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5 **MEETING OF THE SUPREME COURT ADVISORY COMMITTEE**
6 October 20, 2006
7 (FRIDAY SESSION)
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17 Taken before *D'Lois L. Jones*, Certified
18 Shorthand Reporter in Travis County for the State of
19 Texas, reported by machine shorthand method, on the 20th
20 day of October, 2006, between the hours of 9:04 a.m. and
21 5:08 p.m., at the Texas Law Center, 1414 Colorado, Room
22 101, Austin, Texas 78701.
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INDEX OF VOTES

Votes taken by the Supreme Court Advisory Committee during this session are reflected on the following pages:

Documents referenced in this session

06-5 Letter from Justice Hecht (9-22-06)

06-6 TRCP subcommittee report, Rules 216-229a (10-16-06)

06-7 TRCP 306a report

06-8 TRAP subcommittee report (10-19-06)

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CHAIRMAN BABCOCK: We're on the record. Welcome, everybody. Glad to see everybody again. Sorry we missed the last meeting, but we didn't have anything to talk about, so there's no reason meeting when we don't have anything to talk about, but today we've got plenty to talk about; and as is customary, Justice Hecht will tell us what's going on with the Court.

HONORABLE NATHAN HECHT: I don't have much to report, just that the Court has revised the private process server rules to allow process with the Board of Process Servers complaining about each other, that they either should or shouldn't be on the list of approved process servers, and we put that out in the December Bar issue for comment. It builds on all the discussions that the committee had about that subject. We did contact Senator Wentworth and Representative Hartnett about their views on that subject, and they extended their gratitude to the Court and vicariously to this group for helping them with that sticky problem.

Just as an aside, there was a civil jury trial summit in Houston about two weeks ago that some of you were at that talked about ways to improve the civil jury trials. Then I noticed that SMU has got a similar conference going on within a few days, maybe this weekend

1 or next weekend, anyway, this month, that's being
2 sponsored in part by Vinson Elkins on some of the same
3 topics; and then thirdly, there is a report out from the
4 State Bar Grievance Oversight Committee about how to make
5 improvements in Texas Rule of Civil Procedure 226a to make
6 those instructions more understandable, so there is a lot
7 going on in that area.
8 The Court has its own task force looking at
9 the assembly of the venire and the differences and
10 problems around the state; and as we were talking
11 yesterday, as all of these things march along, we'll be
12 running them past this committee to get your views on them
13 as policy as well as implementation, so that's kind of
14 what's happening at the Court.
15 CHAIRMAN BABCOCK: Great. Jody has prepared
16 a memo that did not make it to the website yet, but it
17 will shortly; and, Jody, do you want to just -- and there
18 are a couple of copies around here today, and there will
19 be some more after lunch, but, Jody, do you want to tell
20 us what this memo attempts to accomplish?
21 MR. HUGHES: Sure. There is really two
22 things. I think at our June meeting Justice Peeples had
23 asked about the pending recommendations of the committee
24 that were still before the Court, and I was asked to go
25 back and check on those and come up with a list of what

1 was still pending, and I have done that and have a list of
2 those, and that's one of the two items, actually.
3 And then the second, which I think is the
4 item that Chip is referring to specifically, is in the
5 process of doing that I went through about five years of
6 transcripts of this group, which really gave me a
7 tremendous appreciation for all the hard work you all do
8 and the difficult problems you wrestle with, if I didn't
9 already have that appreciation; and I made a lot of notes
10 on it in terms of coming up with what was still pending
11 and what had been resolved and made sort of an informal
12 index of votes day-by-day of committee meetings. You can
13 look up on this index if you want to see what was actually
14 discussed and what was voted on, and I tried to make some
15 notes about what the votes were and what the
16 recommendations were.
17 It's a very sort of rough thing, but I think
18 if any of you are doing research or, you know, just are
19 following the history of the rule, it was helpful to me in
20 terms of coming up with a list of recommendations, and I
21 hope it would be helpful to you in the same vein if you
22 care to use it.
23 PROFESSOR DORSANEO: Mr. Chairman?
24 CHAIRMAN BABCOCK: Yes.
25 PROFESSOR DORSANEO: How many years does

1 that go back?
2 MR. HUGHES: It goes back to the beginning
3 of 2001, January of 2001.
4 PROFESSOR DORSANEO: Well, that's not far
5 enough.
6 HONORABLE SARAH DUNCAN: Second.
7 CHAIRMAN BABCOCK: Well, says who?
8 PROFESSOR DORSANEO: Says anybody that's
9 been here that whole time.
10 HONORABLE NATHAN HECHT: We agree with that,
11 but resources are slim.
12 PROFESSOR DORSANEO: Does that mean that the
13 recodification draft is kind of like --
14 HONORABLE NATHAN HECHT: No.
15 PROFESSOR DORSANEO: -- dead, because it's
16 several years before that?
17 HONORABLE NATHAN HECHT: Well --
18 PROFESSOR DORSANEO: The task force, jury
19 charge task force stuff is included in the recodification
20 class. Most of the significant work this committee has
21 done in the last ten years was done before this report
22 you're working on started.
23 CHAIRMAN BABCOCK: Well, not to slight the
24 work of the last five years, but the recodification was
25 well before five years. In fact, it was probably before

eight years ago, I would think, wasn't it? Eight or nine years ago?

PROFESSOR DORSANEO: 1998, 1999. I think 1998.

CHAIRMAN BABCOCK: Yeah. Yeah. Okey-doke. Anything else on that topic?

HONORABLE SARAH DUNCAN: Question.

CHAIRMAN BABCOCK: Yes.

HONORABLE SARAH DUNCAN: So what happens to all the work that precedes Jody's report? Are we going to learn the status of that?

HONORABLE NATHAN HECHT: Nothing happens to it. It's there to be considered, this certainly, but other things. Jody was just going back to try to find what happened in the last five years. This is a part of what we do, and so he was not undertaking to do a 60-year history of the committee. He was just trying to work backwards from where we are.

PROFESSOR DORSANEO: The significant -- Tom Phillips appointed a task force I believe in 1991, and those task forces all did work. You don't have to go back to 1991, but I think if you go back to the point where the task force reports were handed in about 19 -- beginning about 1994, 1995, and a lot of stuff that we've done, you know, a lot of the activity in that period, the appellate

rules work that actually did get completed, so we're largely talking about -- I guess we're really largely talking about the recodification draft, and that all went to the Court from Chairman Soules in more or less one package, although certain parts of it went back and forth, like the jury charge rule.

HONORABLE SARAH DUNCAN: I was going to say, are the charge rules and the post-judgment rules in the recodification?

PROFESSOR DORSANEO: Yes. Everything was folded in.

CHAIRMAN BABCOCK: Yeah. All right. Well, then, we'll get to today's agenda, and the first item is Rule 199, which is Bobby Meadows' subcommittee. So, Bobby, you want to talk to us about it?

MR. MEADOWS: Thank you, Chip. The discovery subcommittee did meet on this proposed rule change to 199.2, which is essentially the insertion of a sentence into the existing rule. The rule as it's stated now essentially allows a deposition to be taken on reasonable notice to the witness and to all parties, and the proposed rule change would provide that an oral deposition cannot be taken until the appearance of all parties was had or by agreement of the parties or by leave of the court, and there was a -- our committee did not

1 have any prior knowledge of the need for this change.
2 There was a statement along with the
3 proposed change from the State Bar Rules Committee
4 indicating that the change was sought because of an
5 observation that there had been times when a party has
6 sought an early deposition prior to the appearance of all
7 parties. So it was in consideration of this rule change
8 that we met and talked about it, and it was -- with a
9 further inquiry it was determined that there was some
10 concern about this rule as it's currently written in some
11 places of the state because apparently prior to the
12 appearance of a party depositions have been had of that
13 party before, as I say, they appeared or had a lawyer; and
14 while nobody thinks that's a good idea, the discussion
15 about post change was that the subcommittee just didn't
16 appreciate the severity of the problem, if you will; and I
17 wanted to hear more about that and, moreover, was more
18 concerned about the language as proposed because it would
19 give certain parties, certain defendants, an opportunity
20 to hold up discovery just simply because they weren't in
21 the case themselves or were unwilling to agree, which
22 would require an appearance before the court and leave of
23 court to pursue discovery in this way.
24 So, you know, for something to seem so
25 straightforward and simple we discussed it for about an

hour, and the decision of our committee was that -- was not in favor of the rule change.

CHAIRMAN BABCOCK: Was that unanimous, Bobby, or was there --

MR. MEADOWS: Well, not everybody was on the call, of course, but Jane was on it and Tracy and Harvey, all distinguished jurists in their time, and Alex couldn't be on it to bring her procedural wisdom to the issue, but she's seated here today. But, yes, it was unanimous. I mean, there was absolutely no interest in even trying to recraft the language.

I had participated in another committee, Elaine's committee on the rules that are going to come before us a little later today, and we just took the opportunity to talk about this proposed change, and Kent was on that call and others. There was also concern in that group about this language. There was some effort in this discussion and a dialogue about how it could be changed to reach the problem that was articulated about a party being deposed before they had appeared and had a lawyer, but since it was not the charge of that committee, we didn't attempt to formulate change, and so when it came before -- and I brought all that forward to the discovery subcommittee, and the thinking was that just the problem is not fully appreciated in our committee, and the

1 proposed change to the rule was so sweeping and would put
2 so much authority or ability in the hands of litigants to
3 prevent discovery that it was just an unwilling -- I mean,
4 a change that we were unwilling to recommend.
5 CHAIRMAN BABCOCK: Okay. Thanks, Bobby.
6 Carl, or Hayes, do you-all have any thoughts about this?
7 I mean, apparently it emanated from the State Bar.
8 MR. FULLER: I was on the committee when
9 they were discussing this. It is a huge problem. It
10 happens all the time in the multiparty toxic tort cases
11 where you'll sue 40 defendants, 20 of them answer, 20 of
12 them don't even have an answer date due, or they've got an
13 answer date but their answer is not due, and the
14 depositions go forward at that point in time. And I think
15 that was the original problem, and then the thought was
16 not to hold up discovery, it was not to do it twice.
17 It was basically to wait for -- everybody
18 has got an answer date and basically start taking
19 depositions after those answer dates, and I see how this
20 rule might be modified in that regard. Appearance, you
21 may have an answer date but they just choose not to
22 appear. Is that holding up discovery? Perhaps. It may
23 also get you a default, but if you've got an answer date,
24 and I think that was the intent of the committee, just to
25 make sure that the discovery didn't start before everybody

had to have their answer on file.

CHAIRMAN BABCOCK: Of course, you can withhold service on one of those 40 defendants.

MR. FULLER: Which happens.

CHAIRMAN BABCOCK: And frustrate discovery for a long period of time.

MR. FULLER: Well, and that's the plaintiff doing that.

CHAIRMAN BABCOCK: Right.

MR. FULLER: Yeah. And so I think it was really more of a let's get -- you know, if you're going to file a lawsuit, you're going to serve all the defendants, get them in the lawsuit and then start discovery rather than having discovery against some of the defendants, then getting the others served, bringing them in, and having to redo the discovery again, at which point it's -- yes.

CHAIRMAN BABCOCK: Justice Bland.

HONORABLE JANE BLAND: When you're talking about these cases, toxic tort cases with 20 or 40 defendants, do you-all usually have a specific discovery control plan that governs those cases?

MR. FULLER: No.

HONORABLE JANE BLAND: Do you try to see if you can get -- because our concern was that there are a number of times where defendants are named but really

never served, never added, and nobody ever pursues them; and at least the rule as written would seem to say until the plaintiff has served every defendant and appeared, and that defendant has appeared, no depositions could be taken, unless by the agreement of the parties; and if you're saying it's by agreement of the parties, is that the parties then present? Because if that's the case, then that basically -- I mean, that was --

MR. FULLER: Probably --

HONORABLE JANE BLAND: -- the objective of the rule.

MR. FULLER: Probably it's the agreement of the parties. I think the intent of the committee was the agreement of the parties who you've chosen to sue. I mean, if somebody wants to have their deposition taken before their appearance date for some reason, I guess they could always be contacted and agree to it, but the parties that are prejudiced by this practice are the parties who haven't answered. They haven't even made an appearance in the lawsuit to go seek relief from the court or obtain a scheduling order or a discovery control plan.

CHAIRMAN BABCOCK: Bill Dorsaneo.

PROFESSOR DORSANEO: I think there are two things that you do with this. Either nothing, as the committee recommends, or send it back to the committee for

1 somebody to work on this to see if we want to impose some
2 sort of limits on depositions, but this isn't ready to be
3 voted on.
4 CHAIRMAN BABCOCK: Yeah, I think it's ready
5 to be discussed, though, a little bit more, see what
6 people think about it. Or maybe not. No, somebody else
7 has a comment. Justice Gray.
8 HONORABLE TOM GRAY: Who always has a
9 comment, it seems. Not appreciating the problem, where it
10 was coming from, I looked at it as -- from I guess a
11 different vantage point. It caused me to question,
12 because of some cases that are also coming through our
13 court, who is a party, and is that going to need to be
14 defined as the party that's already been served, is it the
15 defendant that's just simply been named. I mean, you
16 know, there is a lot of issues there.
17 But it caused me to think back to the
18 conversations we were having about trying to take a
19 deposition prior to filing suit and how are those
20 depositions controlled, and back to Rule 202.5, there is a
21 provision that says, "A Court may restrict or prohibit the
22 use of a deposition," it goes on "to protect the person
23 who was not served with notice of the deposition," but
24 that doesn't address -- because I was thinking it was
25 going to be to protect those people that weren't there,

1 but what you're really saying is it's trying to avoid
2 duplication --
3 MR. FULLER: Exactly.
4 HONORABLE TOM GRAY: -- which I was focused
5 on a different end of the problem as opposed to the
6 duplication issue.
7 MR. FULLER: What tends to happen is that
8 when the practice occurs, when a party who has not entered
9 an appearance prior to the taking of a deposition appears,
10 sometimes what happens is they go in and they retake the
11 deposition. Of course, at that point in time a lot has
12 already happened, positions have been set in stone, people
13 don't want to contradict themselves. You know, there are
14 some things that have taken place. Other times the person
15 who has been deposed has died and they're unable to take
16 that deposition. There are just some -- there are some
17 real problems with it, and I think what this does is
18 establish some discipline and some economy.
19 If you're going to name somebody in a
20 petition you ought to go on and get them served and
21 brought into the lawsuit. You know, if you're -- rather
22 than playing the games about it before discovery
23 commences. I mean, I think that's the way it's supposed
24 to work. If you're not going to do that, don't put them
25 in the lawsuit.

1 CHAIRMAN BABCOCK: Is there any requirement
2 right now that requires a plaintiff who sues somebody to
3 get them served and brought into the lawsuit within a
4 particular period of time? I know in Federal courts there
5 is, but I don't know that --
6 HONORABLE TOM GRAY: Statute of limitations.
7 MR. FULLER: Statute of limitation really is
8 the only thing that applies.
9 CHAIRMAN BABCOCK: Other than that, yeah.
10 Other than that there isn't. Judge Christopher.
11 HONORABLE TRACY CHRISTOPHER: Well, you're
12 always going to have this problem when parties are added
13 to the lawsuit; and, you know, if somebody was really
14 doing this for a strategic reason they could sue five
15 defendants, take some depositions, and then add 20 more.
16 You know, well, I haven't personally seen the problems,
17 and that was one thing that we were worried about in the
18 subcommittee, that none of us had ever really seen the
19 problem; but, I mean, that's just going to happen when you
20 add parties to the lawsuit or people get added later.
21 And sometimes a plaintiff might not want to
22 sue someone until they find out -- or serve someone until
23 they get some discovery to make sure that person deserves
24 to be served and then they might drop them out, and it
25 would just -- everybody that was in the lawsuit, oh, well,

you've named five other people and you haven't served them, so we're not doing discovery, and the case just sits.

CHAIRMAN BABCOCK: Kent.

HONORABLE KENT SULLIVAN: Just a footnote to this. It seems to me one issue you've got is you really do have to take note of the fact that this area is already regulated to some extent by Rule 203.6 of the Rules of Civil Procedure that deals specifically with use of depositions, and it points under section (b), subparts (1) and (2) of that rule, about this issue. One of the points that is made is that "the deposition can be admissible against a party only after the deposition was taken if" and then it goes on to say "that party has had a reasonable opportunity to redepose the witness and has failed to do so."

And my point in noting this is just that we ought to be aware that this is already out there in the Rules of Civil Procedure, and then, of course, you've got Rule 801, subsection (d)(3). I think I'm reading that right. As I get older it's harder for me to read. My arms aren't long enough, but I think that's what it is, dealing with depositions and the admissibility of deposition testimony. So that is already out there, and I think we would have to amend all of this in tandem or in

1 coordination to reach a particular result. I just
2 wouldn't want to start changing the rules completely or
3 think about them completely in isolation.
4 CHAIRMAN BABCOCK: What was the second cite
5 that you had on that? 801?
6 HONORABLE KENT SULLIVAN: 801.
7 MR. HAMILTON: Is that a rule of evidence?
8 HONORABLE KENT SULLIVAN: Yes. I'm talking
9 about Rules of Evidence. Yeah, excuse me.
10 CHAIRMAN BABCOCK: Oh, a rule of evidence.
11 I was looking at civil procedure. Okay, Lonny.
12 PROFESSOR HOFFMAN: To me it seems likely
13 that one of two things would happen, or maybe both at
14 different times. As Judge Christopher says, I think it's
15 likely that what will happen is you will have more
16 strategic gamesmanship in terms of who gets sued when, so
17 you sue one or two and then take whatever depositions you
18 want and then sue the others. To me that's likely.
19 The other point is, getting back to the
20 point you made about Federal practice, in the Federal
21 rules right now, one of the features that a lot of people
22 are unhappy about is the 26(e) provision that says
23 discovery can't begin until the parties have conferred and
24 all of that has happened; and one of the complaints a lot
25 of plaintiffs lawyers in particular have voiced to me over

1 the years is that that tremendously slows down the process
2 by which cases can begin, that is to say the real process
3 of working the case up; and I would worry that this kind
4 of a change would by hook or crook end up bringing us to
5 that same critique that apparently bedevils to some extent
6 Federal practice.
7 CHAIRMAN BABCOCK: Yeah, there's -- that
8 Rule 26 in the Federal practice is a lot of gamesmanship
9 going on with that one. Have you-all talked about that in
10 the Federal rules committee yet, Justice Hecht?
11 HONORABLE NATHAN HECHT: No.
12 CHAIRMAN BABCOCK: Frank.
13 MR. GILSTRAP: I want to go back to what
14 Justice Gray said. I mean, I think that any abuse that
15 exists in this context also can exist in the presuit
16 deposition, and that is the duplication and the fact that
17 you get a party, you take their deposition, you get them
18 set in stone before the major litigant has come into the
19 lawsuit and had a chance to cross-examine or talk to them.
20 So if we're going to address that, see, and I agree with
21 Judge Sullivan, that we need -- if we're going to address
22 it we don't need to do it piecemeal.
23 It looks to me like if you took the last
24 sentence of 202(a), which is "The court may restrict or
25 prohibit the use of deposition under certain

1 circumstances" and 203.6(b)(2) that deals with parties
2 having a reasonable opportunity to depose the witness, if
3 you're going to fix it you need to maybe put that all in
4 one rule and make it applicable to all depositions.
5 I'm not saying that I'm convinced that we're
6 there yet, but it seems to me if you're going to fix it,
7 that's the way to do it.
8 CHAIRMAN BABCOCK: Yeah, Buddy.
9 MR. LOW: Also, too, Tracy raised the
10 problem they may sue five and know they're going to sue
11 ten more. Well, at least 202.3 says they've got to serve
12 all persons petitioner expects to have an adverse
13 interest. The rule as drawn here just says "all parties,"
14 so they need to consider adding something like that, I
15 mean, so that they say, "Well, wait a minute, you knew
16 then you already had on your computer these other ten
17 people," so they ought to serve not just the parties, but
18 persons expected to have an adverse interest as is done in
19 202.3.
20 CHAIRMAN BABCOCK: Hayes.
21 MR. FULLER: One thing that the committee
22 did discuss, and you raise good points, is that what is
23 happening and what prompted this rule was an attempt to
24 circumvent the protections afforded by Rule 202. In other
25 words, okay, we're not going to have a deposition prior to

suit, we're going to file the suit, and then we're going to do what we are -- you know, take these depositions without having parties, and so that's really -- I think it's a good point that all of these things were considered to do.

I know the rules committee at one time had a problem with 202, and I think maybe the real issue is, well, it is an issue as to who refines the wording of the rules, whether that be the State Bar committee or this committee or the subcommittee, I don't think, you know, there is any pride of authorship or ownership down at the State Bar Rules Committee, but --

CHAIRMAN BABCOCK: Right.

MR. FULLER: -- Professor Dorsaneo recommended that we go back and redraft it. I think the first part is recognizing there is a problem --

CHAIRMAN BABCOCK: Right.

MR. FULLER: -- and how we recognize it.

CHAIRMAN BABCOCK: Yeah, I think what we're driving to is a vote on whether or not this committee recommends further study, and if it does, then I think it's probably appropriate for the subcommittee to go look at it again; and if the sense of this committee is that this rule change is a bad idea then that's probably the end of it. Jim.

MR. PURDUE: If I could just give a different perspective, because apparently this is coming from a single perspective of the defense bar and mass torts, and as proposed I would just say from a plaintiff's perspective this encourages total gamesmanship from the other side. If you're trying to deal with gamesmanship on one side, I will say that this absolutely encourages people to hide from service in multi-defendant cases.

I mean, I don't have 40 defendants, but I have four, and this absolutely looks like a way to find one of them to hide out and freeze everything, and that's a real concern when you're trying to move forward. It absolutely empowers a single defendant who is clever in just putting a freeze on things. So we've got enough problems as it is getting the process started to add this kind of barrier to it. I'm really concerned from the opposite perspective of gamesmanship that can occur.

MR. FULLER: Well, I do know that's why the committee put in the leave of court. If you encounter that kind of gamesmanship you can go to the court and say, "Look, here's what's going on. Can we go on with discovery?" and they can say "sure."

MR. PURDUE: Well, I think the leave of court issue was addressed well by Judge Sullivan and Judge Christopher as, you know, that leave of court from whom,

1 according to whom, why would they ever give it to you?
2 CHAIRMAN BABCOCK: Okay. Alex.
3 PROFESSOR ALBRIGHT: I was just wondering is
4 this a problem that some kind of cost-shifting at some
5 point could help solve the problem as opposed to a total
6 prohibition, or does that just create more problems? Just
7 throwing that out.
8 CHAIRMAN BABCOCK: Hayes, did you-all
9 consider that, cost-shifting?
10 MR. FULLER: We really didn't discuss that,
11 and quite frankly, maybe the committee was somewhat naive.
12 I think the general good faith basis behind the committee
13 was discovery just ought not start until everybody showed
14 up at the party, and I think that was the simple thing
15 that they were trying to address, and you know, as far as
16 the gamesmanship of who you serve and who you name and
17 this sort of thing, I really think it was more of a
18 fundamental fairness, you know, that you can't start
19 discovery until everybody that's a party to the lawsuit
20 showed up.
21 CHAIRMAN BABCOCK: Judge Christopher, did
22 you have your hand up or was it --
23 HONORABLE TRACY CHRISTOPHER: Well, I mean,
24 we'll get to trial with parties that are listed and never
25 ever served, and, you know, at that point they get

1 dismissed. I mean, I just -- there is a lot of reasons
2 why people will add parties and not serve them, and I
3 mean, my thought is if it's a problem in certain cases
4 that the people whose depositions are being noticed ought
5 to file a motion to quash and say, "Look, let's wait until
6 everybody's in." Rather than making some rule that's
7 unworkable and unneeded in the vast majority of cases.
8 CHAIRMAN BABCOCK: What about John Doe
9 defendants? You've got to wait until they're in the case?
10 PROFESSOR DORSANEO: We don't have any of
11 those.
12 CHAIRMAN BABCOCK: Kent. Huh?
13 PROFESSOR DORSANEO: We don't have any.
14 HONORABLE KENT SULLIVAN: I wonder if the
15 rules don't already provide a pretty good remedy, and that
16 is I think under the current state of the rules if you
17 file a motion to quash timely -- what is it, within three
18 days -- I think the deposition is automatically quashed.
19 It cannot go forward.
20 PROFESSOR DORSANEO: 199.4.
21 HONORABLE KENT SULLIVAN: I'm sorry?
22 PROFESSOR DORSANEO: 199.4.
23 HONORABLE KENT SULLIVAN: Okay.
24 CHAIRMAN BABCOCK: Our encyclopedia here was
25 reciting that.

1 HONORABLE KENT SULLIVAN: That gives you
2 your opportunity to go before the court. If you think
3 you've got a situation that requires some docket control
4 then you can articulate it at that point, and presumably
5 if it is such a situation the court will give you relief.
6 I wonder if that isn't enough where the remedy really is
7 commensurate with the problem and not subject to the
8 rules.
9 CHAIRMAN BABCOCK: Justice Gaultney.
10 HONORABLE DAVID GAULTNEY: Well, I
11 understood the problem to be someone who didn't know about
12 the lawsuit, so I'm not sure they're going to be able to
13 file a motion to quash before the deposition is taken.
14 If -- I guess the thing that troubles me more was the
15 comment that this is being used as a way to avoid what you
16 would have to do under Rule 202. I mean, if that's the
17 abuse that's occurring, I think we ought to try to figure
18 out some way to address that.
19 CHAIRMAN BABCOCK: Kent.
20 HONORABLE KENT SULLIVAN: And I'm not sure,
21 because we don't normally get anecdotal here, but maybe we
22 need to, because I understood it was a toxic tort
23 multiparty scenario that was causing a lot of trouble.
24 MR. FULLER: It comes up in multiple
25 scenarios. That was simply an example that I personally

1 encountered it.
2 CHAIRMAN BABCOCK: Yeah, Lamont.
3 MR. JEFFERSON: Listening to everybody talk,
4 it sounds to me like the rule change, at least as it's
5 being explained, is something to kind of -- to try to
6 police bad behavior by plaintiffs in a particular kind of
7 case, and it just -- I think that's the -- I don't think
8 that that's a good reason to change the rule, because you
9 have a -- if you look across the spectrum of litigation, I
10 mean, you're going to have plaintiffs in all kinds of
11 cases that I guess could potentially abuse the privilege,
12 but I have a hard time coming up with a rule to try to,
13 you know, police one side of the practice, and I kind of
14 shared Jim's comments that it just sounds like it's trying
15 to level the games playing field, and I don't think -- I
16 mean, I think there are ways that parties can account for
17 that.
18 And I know that the idea -- I guess at least
19 part of the idea is to protect those who have not yet
20 appeared, but the other part of the idea is to stop this
21 unnecessary cost, that is the double taking of the
22 deposition, and any party who's already in the suit can
23 raise that as an issue. They can say, "Look, I don't want
24 to have to take this deposition again, so I don't want it
25 to be taken now," and you can file a motion to quash.

HONORABLE DAVID GAULTNEY: Again, as I understand the problem, it's not the parties that is the problem being articulated.

MR. JEFFERSON: Right.

HONORABLE DAVID GAULTNEY: As I understand the problem being articulated, it's not the parties in the lawsuit that care, I mean, because the -- probably the party that's being deposed, I mean, who is the witness who is being deposed may not even be a party, may be a key fact witness. The party who is being hurt doesn't know about the lawsuit. The parties that were in the lawsuit actually may have an interest in the same testimony that the plaintiff does, identifying the defendant who's absent, so I'm not sure that the parties that are in place would have the same interest in stopping the deposition as someone who's -- I mean, if this is, in fact, what's going on. I don't know that it is, but the way I'm hearing it articulated is, well, this is a substitute for Rule 202. You don't have to give notice to that party who's being adversely affected and you can kind of prepare your discovery and then bring them in, and that's the only -- that's actually the only issue that is bothering me about it, because I think you do have other protections, motions to quash and whatnot, that can protect the parties that are there.

1 MR. FULLER: And that in a nutshell is the
2 issue that was disturbing the State Bar committee, was the
3 fact that there are certain protections provided for in
4 202 that are being obviated by simply filing a lawsuit, in
5 essence taking your presuit depositions without any of the
6 parties really even knowing about it because they haven't
7 been served, and then there seems to be a gap there.
8 CHAIRMAN BABCOCK: Okay. Any other
9 comments? Yeah, Alex.
10 PROFESSOR ALBRIGHT: Well, and that can
11 happen, just like Tracy was saying, is you just don't join
12 them yet, you take their depositions, and then you join
13 them afterwards. This rule is not going to solve that
14 problem, as I see it.
15 CHAIRMAN BABCOCK: Okay. Yeah, Carl.
16 MR. HAMILTON: We mentioned briefly in
17 another subcommittee meeting about the term "parties," and
18 Tom Gray mentioned it a moment ago. Under the current
19 rule it says you have to serve the witness and all
20 parties. If that means just who's been named as a party,
21 that would seem to indicate that you have to serve even
22 those parties who have not yet been served and answered.
23 PROFESSOR DORSANEO: Yes, it does.
24 MR. HAMILTON: I don't know that that's even
25 done in the practice, and it may be like you say, we ought

1 to look at defining what we mean by parties, if somebody
2 is going to look at the rule.
3 CHAIRMAN BABCOCK: Right. Any other
4 comments?
5 Okay. The vote we're going to take is
6 whether or not the full committee here agrees with the
7 subcommittee that there is no change called for, so that
8 would be our recommendation to the Court. The
9 subcommittee, of course, did not have the benefit of this
10 discussion or of Hayes' comments from the State Bar Rules
11 Committee, so that's a factor to consider. So everybody
12 who is in favor of no further study -- in other words, our
13 recommendation to the Supreme Court would be no rule
14 change -- raise your hand.
15 All those opposed to that, in other words,
16 think that further study is called for?
17 Okay. By a vote of 17 to 8 our
18 recommendation to the Court is that no rule change is
19 called for, so if the State Bar Rules Committee wants to
20 press the point, I guess they will press it.
21 Moving onto Elaine Carlson's subcommittee,
22 Rules 245 and 296.
23 PROFESSOR CARLSON: We actually were asked
24 to look at three rules, Chip, in addition to 226a from
25 David Beck's letter.

1 CHAIRMAN BABCOCK: Right.
2 PROFESSOR CARLSON: The first rule we were
3 asked to look at is Rule 245, and the proposal from the
4 State Bar Rules Committee in full appears on page three
5 and four of Justice Hecht's letter. I summarized in my
6 October 16th subcommittee report that there are two
7 proposals to Rule 245. One is to enlarge the time that a
8 party would receive for the first trial setting from 45
9 days to 75 days, and the second proposal was to clarify in
10 Rule 245 that a party joined or who appears after a case
11 has been set for trial is entitled to that same notice
12 with a proposal giving the trial court discretion to
13 shorten that period for good cause.
14 Our subcommittee did not recommend the
15 adoption of this proposal for three different reasons.
16 First -- and this may be our ignorance, Hayes. You can
17 educate us as well. Our subcommittee was not aware that
18 there was any huge problem in the operation of the current
19 rule.
20 Secondly, in many cases a docket control
21 order is used, and that will set the trial setting and the
22 time to add parties, alleviating the unfair surprise; and
23 finally, we -- the subcommittee questioned whether it is a
24 good idea to enlarge the time period in any event from 45
25 days to 75 days, particularly in some types of cases in

1 which you might want an expedited setting, such as on a
2 declaratory judgment or seeking injunctive relief.
3 There were some members of our subcommittee
4 that felt that current Rule 245 isn't clear as to whether
5 a later joined party after a case that's been set for
6 trial is entitled to the same current 45 days notice that
7 the rule affords. I didn't feel that way, but several
8 members of our subcommittee did, and so we looked at the
9 rule to see if maybe tweaking some of the language of the
10 rule would clarify that, and it was thought that Rule 245
11 could be amended by simply changing the current language,
12 "with notice of not less than 45 days to the parties" to
13 "45 days notice to all parties."
14 CHAIRMAN BABCOCK: Okay.
15 PROFESSOR CARLSON: So I guess the first
16 question or really what would be very helpful, Hayes, is
17 if we missed the boat on the current problem, it would be
18 helpful to hear from you if you don't mind.
19 MR. FULLER: I think the reasons of the
20 committee were well-articulated in the comment to the rule
21 that accompanied it. I think the concern was since this
22 rule was adopted there have been many changes in terms of
23 designation of responsible third parties, forum non
24 convenes, venue motions, all of which have time periods in
25 excess of 45 days, and I recognize that courts should, you

1 know, have those motions heard and if they can't do it --
2 if they want to do it within -- have a trial within 45
3 days they should shorten the time.
4 That doesn't always occur. Would it be an
5 abuse of discretion? Who knows? It would certainly
6 require an appeal to find out, and I think the thought
7 behind the committee was they ought to have at least a
8 long enough time period before a first trial setting to
9 where those sorts of motions could all be heard within the
10 time limits that are prescribed by the rules for hearing
11 those motions. If for some reason you needed to hurry it
12 up then there is the provision in there to go for leave of
13 court and get it done shorter, but with the provision that
14 those motions will be heard.
15 PROFESSOR CARLSON: And were there folks on
16 your committee that faced that problem that many cases
17 were being set before they could get a venue hearing?
18 MR. FULLER: Yes, and as Professor Dorsaneo
19 pointed out, in those courts where that occurs it's
20 probably going to occur with this rule, too. But I think
21 there is some comfort that at least you can point at the
22 rules for those folks that -- it never happened to me, but
23 there were folks who reported that it had occurred.
24 CHAIRMAN BABCOCK: Bill.
25 PROFESSOR DORSANEO: Well, in our wonderful

rule book here, copied during consecutive periods probably from 1869 until now, we have a Rule 84 that does say that the trial judge is meant to hear special appearance motions and motions to transfer venue before anything else is scheduled for a hearing. The problem with the responsible third party business, I guess that's a problem with just joining anybody. I mean, you have the opportunity to join people under the joinder rules when you make an appearance, so maybe people need to be aware of the fact they need to file something more than a general denial and kind of get with it.

Maybe 45 days is too short to get with it. I don't know, but I see the problem is that kind of a disconnect between the places in the rule book where you can get the pertinent information and neither the lawyers or the judges are aware of what to read.

MR. FULLER: I think there was a sentence in the rule that talked about that. Maybe it's just a simple rule of adding that sentence making clear that even with this 45 days notice these things will be done. Maybe that would solve the problem. I think it would address the issue that was raised by the committee.

PROFESSOR CARLSON: It may not help you out with the responsible third party statute, but it certainly would help in the other instances.

1 CHAIRMAN BABCOCK: Justice Hecht.
2 HONORABLE NATHAN HECHT: Let me ask a
3 question just for information. When Hayes mentioned --
4 there are a number of statutes that prescribe periods now
5 for things to be done. One of them is the responsible
6 third parties have to be named 60 days before the trial,
7 and the Court can shorten that, I think, but I wonder if
8 there is any experience with courts extending that
9 deadline, saying, "Oh, no, in this particular case by a
10 docket control order you have to do it 90 days out" or
11 some other time than 60, whether there is experience with
12 using docket control orders to change statutory deadlines
13 in ways that the statutes themselves do not seem to
14 contemplate.
15 CHAIRMAN BABCOCK: Judge Christopher.
16 HONORABLE TRACY CHRISTOPHER: I have that in
17 my silica case management order that we're changing the
18 deadline for the responsible third party designation. It
19 was by agreement of the parties. We'll see what happens
20 if, you know, push comes to shove and the 90 days comes
21 and they still want to add people at the 30-day deadline,
22 but at least in that case we're kind of aware of the issue
23 that it's the kind of case where there are often
24 responsible third parties that would be added that, you
25 know, the plaintiff might need to sue, and we have changed

1 the deadline.
2 I'd like to say one thing about the notice
3 to all parties of the trial setting, which seems like a
4 very basic thing that we should do, but I think a lot of
5 courts now use the docket control order that's very
6 similar to the one in Harris County where we have a
7 joinder deadline. Like, I brought one that I have here.
8 My joinder deadline is January 17th of '07 and my trial
9 date is 7-16 of '07, and it says all parties must be added
10 by the joinder date, the party causing the joinder shall
11 provide a copy of this docket control order at the time of
12 service.
13 So we rely on the plaintiff or the
14 defendant, who's ever joined that party to send notice to
15 the new party, which doesn't always happen and causes
16 problems, and they ask for continuance, and we grant them;
17 but from an internal operating procedure, I talked to my
18 clerks, and -- to see if there was some way that we could
19 as a court or the clerk's office keep track of newly added
20 parties and make sure that we send them a docket control
21 order if the rule requires the court to send that notice
22 to the new parties as opposed to the way we do it here,
23 and basically they told me that we don't have the software
24 to track something like that and it would be very
25 difficult for us to do.

1 So I'm not saying it's impossible, I mean,
2 but it would basically require any time an answer came in,
3 checking to see if that was a new party answering the
4 lawsuit and send them a copy of the docket control order.
5 CHAIRMAN BABCOCK: Frank.
6 MR. GILSTRAP: There are county courts at
7 law in the state that do regularly set cases quicker than
8 75 days. I mean, you can go into some of those courts,
9 and you will get a trial setting that's awfully quick, and
10 you know, sometimes they're less than 45 days and people
11 maybe don't say anything, but that could be a problem for
12 those courts, and I don't think we want to slow those
13 courts down.
14 HONORABLE TRACY CHRISTOPHER: And I did
15 check with our county court judges, and they're vehemently
16 opposed to 75 days as terribly unnecessary on the vast
17 majority of the county court cases they have.
18 CHAIRMAN BABCOCK: Okay. Justice Gray.
19 HONORABLE TOM GRAY: Several comments, just
20 so that they're in the record if they go back and look at
21 this. You are creating a yet further dichotomy between
22 civil cases and criminal cases where in criminal cases
23 it's just a due process standard of what is reasonable
24 notice, and 10 days is presumed reasonable. Because this
25 is related to somewhat the complexity of the case, I'd

like to at least throw out the idea that you may want to put -- peg this related to the discovery control plan level, that if it's a complex case you get more notice, if it's not a complex case you get less notice.

And then my real most substantive comment is that in -- and I apologize for being the one that brings this up. Normally I would defer to Richard Orsinger, but since he's not here I'll feel compelled to bring up the family law issue. In termination cases you have a hard dismissal date that the trial judge has to get it done and sign the order by either a year, or if it's extended, 18 months. We had a case where the trial judge knew he was coming up to the dismissal date. He tried to give the 45 days notice. He sent it by mail, so it wasn't 45 days notice. It was called to his attention. He said, okay, I'll put it off. He gave second notice of 31 days, and it was determined by a majority of our court that that was not adequate, they had never gotten the 45 days notice of trial, and a judgment of termination of parental rights was reversed and remanded for --

CHAIRMAN BABCOCK: Was there any dissent?

HONORABLE TOM GRAY: There was a dissent on that, yeah.

CHAIRMAN BABCOCK: Judge Lawrence.

HONORABLE TOM LAWRENCE: Well, this is

1 another one of those rules that there's some confusion
2 among the justice courts as to whether or not it really
3 applies to the JP courts because there is some kind of
4 vague language in the JP court rules that says the judge
5 can try its case in its normal order, whatever that means,
6 and there is the Rule 523 that says you apply the county
7 and district court rules insofar as they can be applied,
8 whatever that may mean.
9 So if this rule would apply to JP courts,
10 then the JP courts would routinely violate that because
11 the practice is that we set things much quicker than that
12 statewide; and if we could exempt the JP courts from 245,
13 that would ease some of the confusion, because there is
14 some confusion throughout the state as to whether this
15 rule really applies to the justice court suits or not.
16 CHAIRMAN BABCOCK: So we get the family law
17 cases out of it and we get the JP cases out of it and go
18 forward on it. Buddy. Just kidding.
19 MR. LOW: The whole problem is both
20 defendants and plaintiffs talk about how long it takes to
21 conclude litigation; and maybe it's like a budget, another
22 hundred million here doesn't hurt and a little few days;
23 but it just tends to extend the time that we can conclude
24 litigation. I have been the plaintiff where six years
25 before we're through. Defendant, same thing, and that's

one of the complaints of our system, and I know we have to make every step procedurally correct and fair, but what we're doing when we extend, we're just extending the time.

CHAIRMAN BABCOCK: Yeah. Senator Wentworth at this conference that we had was on a panel with Judge Peeples and myself, and he told me off the record -- not off the record, but not as part of the conference that he was considering introducing legislation to tighten up the time that we get from filing to trial.

MR. LOW: Right. If something doesn't, the Legislature is going to do something.

CHAIRMAN BABCOCK: Yeah. So point of interest only, I suppose. Any other comments? Judge Patterson.

HONORABLE JAN PATTERSON: My only comment, which really went to the last rule as well as to this one, is that it seems to me we ought to have a place to retain comments so that when there is a wholesale amendment of our rules that perhaps these issues can be raised, because I resist the notion of changing a rule just because we think it might address a certain situation or it might be better. I think petitioners like stability and deserve stability, and so that's just sort of a general comment, not necessarily with respect to this rule, but it does seem to be a little bit small and undefined to make the

change.

CHAIRMAN BABCOCK: That's the Peeples principle, that you don't make a change in anything unless you really, really need to.

HONORABLE JAN PATTERSON: Let us speak out loudly and clearly against change.

CHAIRMAN BABCOCK: Bill Dorsaneo.

PROFESSOR DORSANEO: This gives me another opportunity to mention the recodification draft because, of course, we discussed all of these rules that we're talking about over again in many of the same ways back in the time period when that draft was done. So we're -- my memory isn't as good as it used to be, but I can remember talking about a lot of these things before.

CHAIRMAN BABCOCK: Those were truly the good old days.

All right. Anybody else on this? Elaine, how would you propose proceeding on this? Do you want to have a vote to see whether this committee thinks the rules -- the change is necessary, or do you want to get down to language?

PROFESSOR CARLSON: I would rather go with the two part and see if the whole committee thinks a change is necessary.

CHAIRMAN BABCOCK: Okay. As we did with the

last one.

PROFESSOR CARLSON: That would be great.

CHAIRMAN BABCOCK: Very good. On Rule 245, how many people think that a change is necessary, and then if that carries then we'll get down to what it ought to be. How many people think a change in 245 is -- should occur?

HONORABLE KENT SULLIVAN: Chip?

PROFESSOR DORSANEO: Any change or just a number of days?

CHAIRMAN BABCOCK: Just the proposed change.

PROFESSOR DORSANEO: There are two proposed. Okay. All right.

HONORABLE KENT SULLIVAN: Are we talking about the issue of just the minor clarification, or are you just talking about the 75 days?

CHAIRMAN BABCOCK: I think we're talking mostly about the 75 days.

PROFESSOR DORSANEO: That's not proposed.

CHAIRMAN BABCOCK: Okay. Is that right, Elaine?

PROFESSOR CARLSON: Or we can do that the first one is 45 to 75 days, the other one is do we need to clarify the rights of later-added parties.

HONORABLE KENT SULLIVAN: Right.

CHAIRMAN BABCOCK: Well, so there is no confusion let's break it down. Let's go to the 75, 45 first. How many people think that we should recommend to the Court that there be a change from 45 to 75 days? Everybody that thinks there should be a change raise your hand.

Everybody that thinks there should not be a change, raise your hand.

In a rare display of unanimity, the Chair not voting, 28 to nothing against change in this regard. Okay. The second -- the second issue, of course, taking the 75-day part out of it, is whether the court should have some discretion to shorten the notice, right, Elaine?

PROFESSOR CARLSON: No. The second concern, as I understood it from the State Bar Rules Committee, was whether or not the current rule is sufficiently clear that a party added after a trial setting has been made has the same right to 45 days notice. I think it's clear. I think it has to be, but some members of our subcommittee didn't feel that, so --

CHAIRMAN BABCOCK: Okay.

PROFESSOR CARLSON: It must not be clear to everyone.

CHAIRMAN BABCOCK: How many people think the rule should be clarified?

Yeah, Carl.

MR. HAMILTON: Back to that same thing about parties, I mean, arguably the court could send out a notice based upon the address shown on the citation, even though somebody hadn't yet been served, if you're going to define parties as simply people who are named in the petition. So arguably the court could say, "Well, clerk, send it out to the addresses on the citation, and therefore, they have been notified." So I don't know whether that's intended to be a party or they're not supposed to be a party until they've answered.

PROFESSOR CARLSON: Bill, do you know the answer to that?

PROFESSOR DORSANEO: Actually, I think it's unclear.

PROFESSOR CARLSON: I think it is, too. I was feeling foolish because Sarah and I were talking about this, and I said, "I think you're a party if you're named in the pleadings," and Sarah said, "I think you're a party when you're served." Now, a party subject to what? Subject to judgment --

HONORABLE SARAH DUNCAN: Reasonable minds can disagree.

PROFESSOR CARLSON: A party subject to judgment and being bound by the judgment, yeah, when

you're served; but otherwise, in my mind, your name is on there, you're a party.

CHAIRMAN BABCOCK: Okay. Any other comments? Yeah, Judge Christopher.

HONORABLE TRACY CHRISTOPHER: Just on the idea that every party is entitled to 45 days notice, which seems very reasonable; but sometimes a party will get added that is, you know, instead of Coca Cola, Inc., it's Coca Cola, LP; and Coca Cola, Inc., has been in the case and everybody knows it was really LP that should have been the correct party; and so the plaintiff finally gets their -- the name correct and adds them in. I would just like the ability to give less notice if circumstances warranted.

CHAIRMAN BABCOCK: Bill.

HONORABLE TRACY CHRISTOPHER: Because I don't think LP needs 45 days when everyone knew he's the right person and it should have been LP, not Inc.

CHAIRMAN BABCOCK: Same lawyers representing.

HONORABLE TRACY CHRISTOPHER: Same lawyers.

CHAIRMAN BABCOCK: Right.

HONORABLE TRACY CHRISTOPHER: Yeah. That's my only request on that point.

CHAIRMAN BABCOCK: Yeah, Bill.

PROFESSOR DORSANEO: Well, I was just thinking about the number of days and what the purpose of having any specific number of days actually is, you know, because we started out, not that long ago there was no Rule 245. You had to keep track of your own case by going to the courthouse and just keeping up with things, and then we had a 10-day rule. Then I think we went to a 30-day rule, and now we're at a 45-day rule and talking about a 75-day rule.

The idea seems to me to keep somebody from being subjected to a default judgment, more often than not a post-answer default judgment, and I think 45 days is enough time for that. Maybe less would be enough in the context of the situation that Judge Christopher is talking about if the objective is to keep somebody from suffering primarily a post-answer default judgment.

CHAIRMAN BABCOCK: Okay. Sarah.

HONORABLE SARAH DUNCAN: Tracy, do you do that now under the current rule in the LP and Inc. situation? Would you give less than 45 days notice?

HONORABLE TRACY CHRISTOPHER: Yes, if no one complains. I mean, you know, if somebody amended their pleading and the defense lawyer accepted service on behalf of LP because he's representing LP in addition to Inc., but my reading of the rule is that I would have to give LP

45 days notice if they demanded it.

HONORABLE SARAH DUNCAN: That was my question --

HONORABLE TRACY CHRISTOPHER: Yeah.

HONORABLE SARAH DUNCAN: -- because it seems to me under Elaine's interpretation of the current rule you have the same problem.

HONORABLE TRACY CHRISTOPHER: Right.

HONORABLE SARAH DUNCAN: And I have a hard time seeing in that situation how they would ever show harm on appeal.

HONORABLE TRACY CHRISTOPHER: Right.

HONORABLE SARAH DUNCAN: So I'm not sure we need to put an exception in there. I mean, in a case where a reasonable judge is going to give for good reason less than 45 notice, 45 days notice, the defendant's not going to be able to show harm.

PROFESSOR DORSANEO: Except the cases don't require any particular showing of harm.

HONORABLE TRACY CHRISTOPHER: Right.

HONORABLE SARAH DUNCAN: Oh, they don't?

PROFESSOR CARLSON: It's due process.

PROFESSOR DORSANEO: It is harm.

HONORABLE SARAH DUNCAN: Presumed.

HONORABLE TRACY CHRISTOPHER: Presumed,

uh-huh. They need exception.

CHAIRMAN BABCOCK: Okay. Any other comments on this? Is this language that we have here the proposed language of the State Bar, or is this your subcommittee?

PROFESSOR CARLSON: That's our subcommittee.

CHAIRMAN BABCOCK: Okay. And it is -- just so we know what we're talking about, is it the proposed paragraph (3) that is underlined the proposed new text?

PROFESSOR CARLSON: Yes. Changing "all" to "the." In the second to the last, the last line on the page, changing "reasonable notice of not less than 45 days to the parties of a first trial setting" to "reasonable notice of not less than 45 days to all parties."

CHAIRMAN BABCOCK: Okay. Any more comments? Any more discussion? Alex.

PROFESSOR ALBRIGHT: You know, in the discussion about what does parties mean and do you have to prepare to get notice, I was just looking through rules like 4 and 21 and 21a, and it looks to me like all the rules say you serve parties, and it doesn't talk about it has to be a party who has appeared. I thought there was a rule someplace that said that parties who have appeared get notice, but I can't find it.

HONORABLE JAN PATTERSON: Well, but it also makes reference in special appearance to a party

1 challenging, and that could be to process as well. So --
2 PROFESSOR ALBRIGHT: I guess my point is, is
3 that it seems like throughout the rules it talks about
4 notice to parties.
5 HONORABLE JAN PATTERSON: And named.
6 PROFESSOR ALBRIGHT: And everybody kind of
7 deals with that, and so if you change it in only one rule
8 to something other than "parties" or "all parties" then
9 you're trying to make clear as to if you're supposed to
10 serve people who haven't been -- who haven't appeared or
11 whatever we're trying to do. I'm not clear on what the
12 problem is, but I think we need to realize that throughout
13 the rules there is an assumption that you serve all
14 parties or the parties, whatever that means.
15 CHAIRMAN BABCOCK: Yeah. That's another
16 Peeples principle. Be aware of the law of unintended
17 consequences.
18 PROFESSOR ALBRIGHT: Exactly.
19 CHAIRMAN BABCOCK: Justice Gaultney.
20 HONORABLE DAVID GAULTNEY: I would argue
21 just leaving the rule as it is. As I understand the
22 problem, it's where a party is joined after the first
23 trial setting.
24 PROFESSOR CARLSON: Correct.
25 HONORABLE DAVID GAULTNEY: And the rule

1 requires they be given a reasonable notice, so I think
2 leaving the rule the way it is would take care of a
3 situation like you've got the same party, would take care
4 of everything, and it may, in fact, end up being
5 interpreted as 45 days, but it has that flexibility
6 CHAIRMAN BABCOCK: Bill, then Buddy.
7 PROFESSOR DORSANEO: I would say let it be,
8 too, mainly because this change doesn't seem worth the
9 trouble and there are larger monsters lurking inside this
10 little problem area, which also extends to 246, which
11 should be in the same rule as 245, or at least they should
12 be drafted to be compatible one with the other. Alex is
13 right. The rule book actually seems to contemplate the
14 parties would be named parties, not served parties, but
15 I'm not sure when this rule was drafted that that's what
16 anybody was thinking, so if we started out with a view
17 about who parties are, I don't think it's necessarily --
18 necessarily means the same thing in all the places where
19 the rules have been worked on.
20 CHAIRMAN BABCOCK: Buddy, then Kent.
21 MR. LOW: I don't understand the difference
22 between "the" and "all." If I give notice to the parties
23 who have appeared, who is going to be excluded out of
24 "all"? In other words, there's something I'm missing is
25 what I'm saying.

PROFESSOR CARLSON: I think the subcommittee discussion was you'd serve the parties at the time the trial setting is made that are made out by the pleadings, and then you amend your pleadings, you say, "Oh, here's the notice that we gave the parties previously and now you're a party, but you don't get new notice." That's how I understood the problem to be.

MR. LOW: But you're proposing changing only "the" to "all" and the other part says "who have appeared when notice is given." I mean, that's the only word change?

PROFESSOR CARLSON: Yeah.

MR. LOW: Yeah. That's not the only thing I haven't understood, so let's go on.

CHAIRMAN BABCOCK: Kent.

HONORABLE KENT SULLIVAN: The question, it seems to me, is what is the notice standard following a first trial setting for a subsequently joined party. Is it 45 days or is it only reasonable notice? And the only reason that I had an interest in it is I think our guideline should be clarity. There should be no need to debate which standard it is. We should all know from reading the rule what standard it is, and the mere fact that our subcommittee had a debate on it led me to conclude that we ought to clarify the rule.

I really don't advocate one standard as opposed to the other. I think either one is probably okay, but there shouldn't be a debate about which standard the rule points to. The rule ought to be clear. That was my thought about it, and I think that ought to be a sort of guideline for us in the context of discussing rules in general. If the rule is not clear and you are seriously having a debate about what the rule means, that's what really causes me heartburn.

HONORABLE JAN PATTERSON: That's what our job is everyday, isn't it, on the court of appeals?

HONORABLE KENT SULLIVAN: But interestingly, there was a quick look at the case law that was available under this rule. It was not exhaustive. It was very, very quick and dirty, but no one found a case that was on point here, and maybe there is one and it could be located, but it would be nice for the rule to be clear to the reader just upon -- you know, on its face.

CHAIRMAN BABCOCK: Okay. Yeah, Sarah. Justice Duncan.

HONORABLE SARAH DUNCAN: As sort of an aside, this party question is really interesting to me. I got all the way up to Rule 7, which says, "Any party to a suit may appear to prosecute or defend his rights therein either in person or by an attorney of the court," which

implies that a party is anyone who is named, because if you're a party before you even appear and prosecute or defend it's -- can only be because you're named, but then I got to -- I went on up to 38, the joinder rules. 38, third party practice, 37, additional parties, and I'm convinced I don't know the answer to this question, and I think it's significant that nobody around this table can say definitively who's a party, and we ought to fix that.

CHAIRMAN BABCOCK: Okay. Any other comments? All right. The subcommittee recommends let it be?

PROFESSOR CARLSON: No.

CHAIRMAN BABCOCK: No, the subcommittee recommends let's change the one --

PROFESSOR CARLSON: I'm a minority of the subcommittee. The subcommittee as a whole felt that the rule was not clear, that a later-added party was entitled to the same notice as those parties who were originally named.

PROFESSOR DORSANEO: So we're going to make it unclear in a different way.

PROFESSOR CARLSON: We could just say if we really think it's a problem, "A later added party is entitled" -- "a party added after a case is set for trial is entitled to 45 days notice," "reasonable notice,"

1 whatever the subcommittee thinks if the subcommittee
2 thinks the rule needs clarification.
3 CHAIRMAN BABCOCK: Justice Gray.
4 HONORABLE TOM GRAY: I'd just like to point
5 out that you really have interjected a opportunity to
6 engage in great gamesmanship at that point because if you
7 can find someone that you can add and you want a
8 continuance, you've got it. And that just -- the trial
9 judge to me seems like needs to be in control of that
10 process, and I know there is some joinder rules that may
11 come in there when you can join a party, but I would want
12 the trial judge to have some discretion over a late-added
13 party.
14 CHAIRMAN BABCOCK: Well, are you in the
15 let-it-be camp or in the we-need-to-clarify-it camp?
16 HONORABLE TOM GRAY: I'd let it be.
17 CHAIRMAN BABCOCK: All right. Well, since
18 the subcommittee recommended clarification --
19 PROFESSOR CARLSON: Yes, they did.
20 CHAIRMAN BABCOCK: -- let's vote on that.
21 How many people think that we should clarify Rule 245?
22 Raise your hand.
23 MR. MUNZINGER: In general, as distinct from
24 suggested language?
25 CHAIRMAN BABCOCK: Yeah. In general, not

the suggested language. Everybody?

How many think we ought to let it be? Well, John Lennon would be happy. By a vote of 23 to 3 we vote to let it be. There we go. All right.

MR. FULLER: Chip?

CHAIRMAN BABCOCK: Yes.

MR. FULLER: One last question, and I -- I know that the State Bar committee, the reason why they went to the 75 days was not to make things take longer, but they were genuinely concerned about this issue that may be addressed by 84 of having their motions heard, and at 45 days there is a lot of things that by statute or rule require more time, and I -- is that another issue that should be addressed here or by a comment referring to Rule 84 or -- I mean, I think there was really kind of a third issue other than the later-added parties, the length of time -- the length of time really had to do with making sure you can get everything heard timely.

CHAIRMAN BABCOCK: What do you think about that, Elaine?

PROFESSOR CARLSON: The Court has, as I understand it, generally not been in favor of having comments to rules.

CHAIRMAN BABCOCK: Comments.

HONORABLE TOM GRAY: Chip, I make a motion

1 we take a 15-minute break.
2 HONORABLE SARAH DUNCAN: Second.
3 CHAIRMAN BABCOCK: Okay. Any particular
4 reason?
5 HONORABLE TOM GRAY: Well, yes. What's
6 laying in your lap.
7 CHAIRMAN BABCOCK: Huh? Okay. We'll take a
8 15-minute break.
9 (Recess from 10:12 a.m. to 10:58 a.m.)
10 CHAIRMAN BABCOCK: All right. Back on the
11 record, and we're now moving on to Rule 296, Elaine,
12 right?
13 PROFESSOR CARLSON: Right. The full
14 proposal from the State Bar Rules Committee appears on
15 page five of Justice Hecht's letter, and the State Bar
16 Rules Committee is suggesting that the rule pertaining to
17 findings of facts and conclusions of law include a
18 statement that the findings of fact shall only include the
19 elements of each ground of recovery or defense, and they
20 state that their rationale is "Many courts or
21 practitioners feel compelled to make or propose voluminous
22 and detailed findings of fact out of fear that omitting a
23 single key fact may undermine the validity of subsequent
24 judgment or broaden the basis for appeal. This is said to
25 be time-consuming and a waste of both judicial economy and

1 the litigants' resources."
2 Our subcommittee was concerned at the
3 proposal -- at that proposal because there are appellate
4 court decisions supporting that the trial court may make
5 broad form findings of fact, so it's really not accurate
6 to state that the trial court is required to make
7 elements -- findings on each element of every ground
8 that's raised by the pleadings and proof. Although,
9 nothing in Rule 296 suggests the trial court must make its
10 findings of fact in broad form. Although, that may be a
11 matter for a different day.
12 The committee was also concerned that
13 statutorily there are instances in which the Legislature
14 requires findings that may include evidentiary support,
15 particularly I think in the family law area. So, again,
16 with all due deference to the State Bar Rules Committee,
17 we recommend that the proposal not be adopted.
18 CHAIRMAN BABCOCK: Okay. Comments? Yeah,
19 Frank.
20 MR. GILSTRAP: While I'm not sure there's an
21 answer, I think we need to all, you know, recognize there
22 is a problem, and the problem is this. The losing party
23 requests findings of fact and conclusions of law 20 days
24 out; the judge has I think something like 50 days or so --
25 I don't know exactly what it is -- to make the findings.

HONORABLE TRACY CHRISTOPHER: 20. 20.

MR. GILSTRAP: The prevailing party then sends in a set of findings that in many cases covers every jot and tittle of the lawsuit --

CHAIRMAN BABCOCK: Every what?

MR. GILSTRAP: -- including negating, you know, issues on which the other side had the burden of proof, and then the trial judge just signs them, and then you go up on appeal and the courts of appeal have this -- some of them say, "Well, you didn't object to finding No. 64, and under our approach, you know, that stands, and we are going to decide it on that, and this is how we decide Point 4 against you, and yes, we like to have economical briefs and short briefs, but we're going to pour you out on this."

And it's a terrible abuse. Everybody has had these. This is not the way it's supposed to be, but it -- and the reason that it's not, I think, is because of two things. First of all, our judges don't have clerks, and they have to make the findings maybe two months after the judgment.

HONORABLE TRACY CHRISTOPHER: 20 days.

MR. GILSTRAP: Well, yeah, but then that's in -- but in the real world --

CHAIRMAN BABCOCK: Seems like two months.

MR. GILSTRAP: -- it's reminded. You get reminded, and they get it in under the deadline, and they can make them late, although they seldom do I don't think. So what happens -- and so the case is cold, they don't have the clerk, and they don't have time to get the people in and talk about it, and they just sign them.

Compared with the Federal courts, the Federal judges make the findings all the time. They're required to make them in every case. I'll give you an example. Barefoot Sanders, who unfortunately is about to retire from the Northern District of Texas, you finish your evidence on Thursday, he comes back -- he says "Come back at 2:00 o'clock tomorrow. I'm ruling from the bench." You come in, he sits down, he reads the findings. The findings are on point. He's thought about every issue. He nails every one, and everybody comes out of the court with a pretty sober look on their face. That's how it's supposed to look. We can't do that in state court for those reasons because the judges don't have clerks. I'm not sure how you fix the problem, but it's a terrible problem.

CHAIRMAN BABCOCK: Justice Gray.

HONORABLE TOM GRAY: Well, reading from a brief that was filed in my court, "Traditionally a court responds to a Rule 296 TRCP request by signing a paper

1 with numbered findings of fact and separate conclusions of
2 law." I'll skip the judge's name, but Judge X's "112
3 initial and additional findings" -- "fact findings not
4 included in the exhibits do not reflect" and then they go
5 on to make some comments about the judge.
6 He overruled -- the findings they
7 characterize as too massive, hyperdetailed reword process,
8 copies of plaintiff's briefing, and did I neglect to
9 mention that was 116 pages of findings of fact and
10 conclusions of law? And what Frank has described is
11 exactly what happens. The issue gets addressed because
12 there is absolutely no way that a trial judge -- that,
13 excuse me, that an appellate court can get through an
14 attack on 116 pages of findings of fact. I did a rough
15 count in this one. It may not be entirely accurate, but
16 there were 365 or more findings of fact in this case, and
17 I picked this one just because it was the most egregious.
18 There would be others that I could pick that were not
19 quite as egregious, but certainly have the same problem.
20 I think that the State Bar's observations of
21 a problem are entirely on track. I would have done it a
22 little bit differently. I have worked up two -- or the
23 language of (2), one rule, one comment; and I think that
24 while Elaine said we may come back and revisit whether
25 they must be, I think this is the opportunity; and I would

1 say, "The findings of fact must be limited to the issues
2 as if a charge was submitted in the case to a jury" and
3 then comment if necessary, "The trial court is prohibited
4 from supported" -- "supporting its findings with recitals
5 regarding the evidence, including comments on the weight
6 or credibility of any evidence unless expressly authorized
7 or required by law," because she is absolutely right that
8 in family law context, and in particular Jane Doe cases on
9 parental consent, there is the need for the trial judge to
10 comment on the credibility of the witnesses.
11 CHAIRMAN BABCOCK: Okay. Yeah, Buddy.
12 MR. LOW: But what is the difference? I
13 mean, the elements of a cause of -- I say negligence,
14 okay. I find defendant was negligent. I find it was a
15 proximate cause that caused this damage. That's the
16 elements, or is that a conclusion of the law? I mean, is
17 that all we're going to, is, you know, cut it down to
18 that, or what are findings of fact? What would you call
19 findings of fact as distinguished from the elements of a
20 cause of action?
21 HONORABLE TOM GRAY: What I would
22 characterize, Buddy, since you're looking at me and asking
23 the question --
24 MR. LOW: Yeah, you have an answer.
25 HONORABLE TOM GRAY: -- is exactly as I said

1 in my proposal in the rule is that would which would have
2 been submitted to a jury for determination in a charge
3 and, yes, that authorizes broad form findings by a trial
4 court judge. And then you attack them on appeal the same
5 way you would attacking a jury charge, and we have a very
6 well-developed body of law on how to do that, and it's not
7 this amorphous, well, which ones of these 365 findings do
8 you need to attack to be able to get past this result.
9 MR. LOW: But one question, how many times
10 have you seen it done exactly that way as distinguished
11 from, you know, expanding it a little? Have you ever
12 reviewed one that just did it just like findings? Have
13 you ever seen one?
14 HONORABLE TOM GRAY: No. I haven't seen
15 trial judges do that.
16 MR. LOW: All I'm saying is you're
17 advocating doing something that's not been done in a
18 hundred years.
19 HONORABLE TOM GRAY: I think that's a very
20 fair characterization.
21 CHAIRMAN BABCOCK: Or at least as long as
22 Buddy's been alive.
23 MR. LOW: Wait. You're five years off, man.
24 CHAIRMAN BABCOCK: Judge Christopher.
25 HONORABLE TRACY CHRISTOPHER: Buddy, I have

1 actually done that before. I've said, you know, "The
2 defendant was negligent; that is, the defendant failed to
3 use ordinary care. The defendant's negligence was a
4 proximate cause of damages to the plaintiff, and I find
5 that 5,000 is reasonable medical bills and 350 is
6 reasonable physical impairment," just like pattern jury
7 charge, but -- and I have done it because it was really
8 fast and easy to do, but does that really help the
9 appellate court?
10 I mean, that's my mind, is does that help
11 you with anything? You know, it's not hard to do it that
12 way. It just doesn't seem to be useful. I mean, it seems
13 to me if they've sued on negligence, and my judgment is I
14 find in favor of the plaintiff, and, you know, the amount
15 of damage is X -- I might break them down just to, you
16 know, have that in the record. Why would I need to do any
17 further finding of fact or conclusion of law?
18 CHAIRMAN BABCOCK: Bill Dorsaneo and then
19 Judge Peeples and then Hayes.
20 PROFESSOR DORSANEO: Well, it helps the
21 appellant. You know, I mean, our notion now is the
22 negligence is the ultimate issue in negligence cases
23 submissionwise, not speed, brakes, or lookout. You know,
24 once upon a time the first element in a negligence case
25 would have been the -- would have been the act or acts or

1 omissions that you would be talking about as the threshold
2 determinate before you got to the issue of negligence.
3 They ought to be -- the findings ought to be
4 done like the -- like jury findings are made in jury trial
5 cases. That's very satisfactory from the standpoint of an
6 appellant. I hate to appeal bench tried cases that have
7 an enormous number of findings. Consequently, if I'm
8 drafting the findings, I'm going to give you about 17
9 single-spaced pages. I might give you numbers, I might
10 not. Okay. No separation of conclusions of law from the
11 factual findings.
12 Something that's enormously difficult to
13 deal with, particularly in courts of appeals that say --
14 particularly in courts of appeals that say that you need
15 to be very careful in attacking each thing that can be
16 identified as a separate finding because you miss a stitch
17 here, and we're going to affirm, and not only have -- and
18 some of those courts have to mention every one of those
19 findings by number in a point of error I have to make sure
20 that I'm talking about that number somewhere in the brief
21 on several occasions.
22 That might not be good enough for a number
23 of courts of appeals in terms of satisfying Rule 38. So
24 this -- I've always thought it was odd that we talk about
25 how findings should be made in jury-tried cases and say

nothing whatsoever about the matter in bench-tried cases. I think that's a problem.

CHAIRMAN BABCOCK: Judge Peeples.

HONORABLE DAVID PEEPLES: Bill said pretty much what I was wanting to say, which basically is we've -- the jury rules were changed to go to broad form, but the finding of fact rules for nonjury finding the same thing have not been changed; and I'm just wondering if there's a good reason why we would want the judge to have to be more specific than a jury; and I don't think I have ever seen a lawyer present proposed findings that aren't just -- make Fox vs. Dallas Hotel look moderate.

CHAIRMAN BABCOCK: Hayes and Pete, you want to yield to Buddy, who is twitching?

MR. LOW: Then you change it not to findings of fact and conclusions of law, you change it to conclusions of law, because what you're talking about is a conclusion of the law.

PROFESSOR DORSANEO: No. It's a mixed question of fact and law negligence.

HONORABLE STEPHEN YELENOSKY: It's a jury question.

MR. LOW: That is a conclusion that you can't just ask a witness "Was he negligent?" I mean, that's a conclusion to me.

HONORABLE STEPHEN YELENOSKY: Well, the jury question would be what the pattern jury charge is, and it's not "Was it negligent?"

MR. LOW: I understand, but I'm saying just because we've gotten away from submitting a case on brakes, lookout, and everything, I think it should be helpful to find, all right, a finding of fact that, yes, they were not keeping a lookout and these certain things and, therefore, we're negligent. That's the basis for the conclusion of law.

HONORABLE STEPHEN YELENOSKY: But what --

CHAIRMAN BABCOCK: Hayes.

MR. FULLER: I was just going to say that the committee was approaching it from the perspective that's been raised by Judge Peeples, Tom, and Dorsaneo in the sense that we were looking at let's get it to the -- what charge is the jury going to see? That's the only thing that really needs to be in your findings of fact and conclusions of law and avoid voluminous findings of fact, et cetera. That's all that the committee was trying to get to.

CHAIRMAN BABCOCK: Pete.

MR. SCHENKKAN: I think the problem of solving it this way is that "in any matter where findings are required and permitted" is so broad that there are

1 many situations in which the lawyers do not know what
2 findings are required or permitted. And I'm saying in any
3 case tried, so you're going to have people saying, "I
4 think I need findings. It's my view of the law that I
5 need findings here," and it will not be clear whether they
6 do or not, and then it will not be clear what findings you
7 need in saying that the elements of the grounds of
8 recovery or defense won't cover it.
9 Then the question is how safe can you be in
10 preparing for your appeal, not knowing whether your
11 narrower version of the findings and conclusions is in
12 fact going to be adequate to sustain or attack, whichever
13 it is you're talking about doing; but in our regulatory
14 litigation areas -- Justice Patterson will be happy to
15 support me on -- there was a time years ago in which John
16 Powers was very diligent in arguing that a requirement of
17 the Administrative Procedure Act that requires findings of
18 fact and conclusions of law had to be construed a
19 particular way in terms of what was needed in the way of
20 findings and conclusions; and the Texas Supreme Court was
21 unsympathetic of his view of what was required; but it
22 took about 15 years and I think two different Texas
23 Supreme Court decisions that were clear enough before it
24 was accepted at the Austin court of appeals level what was
25 required in the way of findings of fact and conclusions of

1 law.
2 During that 15 years those of us who were
3 litigating these cases, we really wanted to make sure that
4 there were enough findings of fact and conclusions of law
5 in there so that we would win regardless of how that
6 debate came out. I suspect that's not a unique problem.
7 CHAIRMAN BABCOCK: Frank, then Judge
8 Yelenosky, and then Judge Christopher if you've still got
9 a comment.
10 MR. GILSTRAP: You know, what's being
11 proposed is some type of theoretical solution which says
12 we're going to have broad forms akin to, you know, general
13 negligence findings, general causation findings. At the
14 same time, you know, it seems to me that there might be
15 room for some specific findings.
16 I mean, if you have two litigants in there
17 and they try the lawsuit over whether or not one of them
18 ran the redlight and they don't get a finding from the
19 court that one of them ran the red light, it seems to me
20 that, you know, what are they supposed to think? Well,
21 no, you were negligent. Or maybe they tried -- the real
22 lawsuit was really tried over when the contract was
23 signed, and the judge said, "The contract was signed
24 Thursday." There are also cases in which, you know, the
25 law does require specific findings, as the subcommittee

1 pointed out.
2 I don't know that this kind of generalized
3 akin to broad form jury findings is really the answer
4 here, but there needs to be something to do -- what we're
5 talking about is a large number of findings. I think
6 that's what everybody has talked about, and that's the
7 most obvious form of abuse. I think that's what we
8 need -- maybe we should just have some type of limit, you
9 know, just arbitrary limit and say they're not exclusive.
10 You can get 10 findings, you know, draw them the way you
11 want to, you know, and you're not bound by them, but these
12 are the findings .
13 CHAIRMAN BABCOCK: Then you're going to get
14 great big paragraphs.
15 MR. GILSTRAP: Well, we'll limit the words.
16 CHAIRMAN BABCOCK: Judge Yelenosky.
17 HONORABLE STEPHEN YELENOSKY: Well, putting
18 Judge Christopher's question and Judge Peeples' comment
19 that I took to be somewhat of a response to it and looking
20 across at Justice Patterson, who grades my papers, my
21 question is, other than courtesy, which I always want to
22 be courteous to the court of appeals, why should the court
23 of appeals get more help on a bench trial than they get on
24 a jury trial and what's a jurisprudential reason for that,
25 and if they do get more help on a bench trial than they

1 get on a jury trial doesn't that put in a different
2 strategic question when you're deciding whether or not to
3 waive your jury trial? Why should that be different?
4 CHAIRMAN BABCOCK: Judge Christopher, did
5 you still have your hand up?
6 HONORABLE TRACY CHRISTOPHER: Well, I'm
7 sorry, I also -- if we're going to rewrite this rule,
8 which I don't really have an objection to doing, and I'll
9 do whatever people think, you know, we as a trial judge
10 should do. I do think that there ought to be
11 clarification on when findings are required or permitted
12 because it's a confusing thing. We get requests for
13 findings when they're not required, and, you know, you're
14 like, "Do I have to do it here, don't have to do it here?"
15 And then you kind of like check the law. "Okay. Well, I
16 don't have to do it here," and so you don't do it and all
17 of the sudden the appellate court two years later says to
18 you, "Hey, we would really like you to do findings." Oh,
19 my gosh, okay. It's two years later.
20 So I would like guidance as to which matters
21 I specifically need to do it in and if -- I mean, I
22 understand that the court of appeals can ask us to make
23 findings even when they're not required, but, you know,
24 from my point of view it sure is a lot nicer if we got --
25 you know, we knew that within the short period of time

1 after we actually tried the case, not a couple of years
2 later. So I think that the rule needs rewriting. I don't
3 like the fix that's right here.
4 CHAIRMAN BABCOCK: Okay. Gene Storie, did
5 you have your hand up?
6 MR. STORIE: Yeah, thanks, and I'd like to
7 follow up I guess on those comments because we have some
8 cases that are still tried under the substantial evidence
9 de novo standard, and so when you see a rule talking about
10 cases tried in a court without a jury, well, those would
11 be our cases, but findings would really never be
12 appropriate because it's just a legal issue and the file
13 might indicate that there is some error in the trial court
14 on applying the right standard of law.
15 CHAIRMAN BABCOCK: Okay. Richard Munzinger.
16 MR. MUNZINGER: I agree with Judge
17 Christopher's comment about the need for specificity as to
18 occasions when findings are required or permitted. I also
19 agree with his comments that the findings ought to be
20 limited to the same findings that a jury would have. I
21 would be opposed to the last sentence, the underlined last
22 sentence, because it would not require the appellate court
23 -- or the trial court, rather, to give the findings of
24 fact with the specificity that a particular cause of
25 action may require.

1 For example, in defamation, there may be a
2 lengthy newspaper article in which many of the words are
3 not defamatory. Maybe the article itself is not
4 defamatory. The specificity of the finding may implicate
5 constitutional considerations, if it's a public figure,
6 public official, et cetera. So if you were to adopt this
7 rule, if you would simply -- a trial court could simply
8 say, "I find that the plaintiff was defamed, which led to
9 damages," et cetera. That would be all that would be
10 required if this rule were written, but the Constitution
11 would require the specific language "Declared upon by the
12 plaintiff in the plaintiff's pleading or in answer to
13 discovery was found by the jury to have had the" -- if it
14 were not libelous per say -- "to have had the meaning that
15 the plaintiff ascribed to it in his or her pleadings," and
16 I can see any number of cases where you would have some
17 problems if you just allowed a sentence like this.
18 My personal thought would be that we need to
19 rework the rule so that a trial judge is not inundated
20 with hundreds of findings. I've done it myself. It's
21 never been required specifically in the rule. It's always
22 been the practice all of us in an abundance of caution add
23 these findings after finding after finding after finding
24 that's unnecessary. If the case had been tried in front
25 of a jury the question would be one question, is this

1 special issue sufficient, did the jury find it, is there
2 evidence to support the special issue? Will the special
3 issue support the judgment and would stand, for example,
4 in a defamation case the constitutional challenge of the
5 defendant?
6 The same standard ought to apply to a case
7 in front of a judge, and the only concern I would have
8 would be that we would somehow or another be avoiding the
9 same scrutiny in nonjury trial charges that our jury
10 trials get, and that would be a mistake because judges
11 like lawyers are humans and make mistakes and have
12 predispositions, and we need to be careful about that.
13 CHAIRMAN BABCOCK: Bill Dorsaneo.
14 PROFESSOR DORSANEO: I didn't necessarily
15 understand that this opening part was part of the
16 committee's report, Elaine. Is it? "In any matter where
17 findings are required or permitted."
18 PROFESSOR CARLSON: No. No.
19 PROFESSOR DORSANEO: But aside from that,
20 that looks like it comes from the idea that's in our
21 appellate Rule 26.1 that you get on the longer track if
22 the trial judge makes findings in any case where the
23 findings are required or where that would be helpful.
24 Okay. Where permitted. I think that's analogous.
25 Now, the difficulty is that the required

1 part really harkens back to Rule 296. That's the idea.
2 The idea is that they're required by Rule 296. So to add
3 this "or in any matter where the findings are required" is
4 kind of a general concept, you know, has no meaning to me.
5 Okay. Now, where findings would be useful would be any
6 time there is an evidentiary hearing, which is in effect
7 what the appellate rule is talking about is when findings
8 not being required but where they will be helpful in the
9 context of the appellate process.
10 The ambiguity in Rule 296 is actually in the
11 first part, "in any case tried in the district or county
12 court without a jury" because we don't know what the
13 word -- we don't know what the word "case" means and we
14 don't know what the word "tried" means, okay, whether it's
15 a whole case, part of a case, or whatever. When we did --
16 we discussed all this before years ago, of course, and the
17 idea was --
18 CHAIRMAN BABCOCK: Would that be in the
19 recodification?
20 PROFESSOR DORSANEO: Yes, exactly right.
21 CHAIRMAN BABCOCK: Just checking.
22 PROFESSOR DORSANEO: And the idea was that
23 if any part of the proceedings are tried where there's a
24 factual issue then the judge ought to be required to make
25 findings of fact, maybe not in any kind of detailed way,

1 but to indicate the basis for the decision. We might make
2 exceptions for that in certain classes of cases, maybe the
3 preanswer default judgment cases or -- and obviously there
4 wouldn't be findings in summary judgment cases, but that's
5 kind of the idea of, you know, where something is
6 permitted, where it's a good idea, is if you have
7 something factually that the judge determined, whether
8 it's a whole full scale trial or a separate trial on part
9 of a case or even a preliminary matter, even a plea and
10 abatement that is tried to the court, and I think that's
11 where the clarification needs to come in and this language
12 doesn't really get it.
13 CHAIRMAN BABCOCK: Justice Bland, then
14 Justice Patterson.
15 HONORABLE JANE BLAND: Well, I wonder if the
16 reason that all of these lawyers are submitting long
17 findings of fact is because the judgment of a trial judge
18 after a bench trial has not been afforded the same
19 deference as the jury verdict; and so in other words,
20 bench trials get reversed more often than jury verdicts;
21 and because I have heard appellate courts say basically,
22 you know, that when asked, you know, why would you -- why
23 would appellate judges, not appellate courts -- why would
24 you reverse a bench trial based on what you conclude to be
25 conclusive evidence of what the trial judge didn't find if

1 the trial judge believed that evidence wasn't credible;
2 and the appellate judge response was, "Well, if the trial
3 judge didn't believe the witness was credible, the trial
4 judge should have included that in the findings of fact.
5 Otherwise, we see this evidence as conclusive."
6 And as a trial judge that's frustrating
7 because, of course, a jury can basically believe or not
8 believe the testimony of any witness, and it doesn't have
9 to say so in its verdict form, and so -- and maybe we're
10 requiring more insight into the thinking process of the
11 trial judge in coming to his or her decision, and we
12 probably shouldn't require any more than we do of a jury,
13 but I will note that we're starting to ask more about a
14 jury's thinking than we used to because there's been some
15 retreat from just very, very global findings of fact and
16 some idea that if a party raises the issue, a jury ought
17 to do their specific thinking on particular grounds for
18 recovery. So --
19 CHAIRMAN BABCOCK: Justice Patterson, then
20 Buddy, and then Bill again.
21 HONORABLE JAN PATTERSON: I think it's
22 possible that some clarification might be helpful, but I
23 don't see where this would be helpful. I agree with
24 Professor Dorsaneo that there are a wide range of cases,
25 including evidentiary hearings, where findings of fact are

1 made and are necessary and appropriate. I think we have
2 to keep in mind that the nature of the findings between
3 bench and jury are different. A jury makes them at one
4 point; a trial judge makes them after coming to a
5 conclusion and based on the evidence, so to me they are
6 sort of fundamentally different.
7 It would seem to me that there is nothing
8 that would prevent a trial judge from saying "Do it on the
9 elements" or "trim these down" or "I want them basic." I
10 mean, to me that's a matter of trial management, and I
11 don't think that our Federal judges have any advantage
12 over -- they just have a practice of perhaps being more
13 attentive, but there's nothing that prevents a trial judge
14 from doing a similar thing; and I would worry -- as Pete
15 Schenkkan points out, I worry about any system that shifts
16 the risk to the appellate system. You know, do I or do I
17 not need a finding on this point, and that becomes a
18 guessing game so that that becomes a whole area I can see
19 it spin out in the appellate courts so that it's just sort
20 of shifting what is a fairly helpful system, and sometimes
21 it is cumbersome in the trial courts, but now we're
22 shifting that whole guessing game and gamesmanship to the
23 appellate court.
24 I would also say, and it's been a while
25 since I've done this, but there's nothing that prevents --

I think we've fallen into the habit of the prevailing party submitting not only voluminous findings but submitting the findings that are perhaps rubber-stamped by judges, but there's nothing that requires them to be just the rubber stamp.

CHAIRMAN BABCOCK: Buddy.

MR. LOW: Back to the point that the way it's submitted to the jury they answer one question. Take an assault. Findings of fact, conclusions are, yeah, a, assault, b. The jury is given more than that. They're not just given a single sheet of paper. They're given instructions. They must find certain elements of those things, so if we go to just the system of where you just submit it, just answer the question a jury would have answered, you're shortcutting it because the jury has to find certain elements and certain things, so you can't shortcut it the way you're talking about.

CHAIRMAN BABCOCK: Bill, then Kent, and then Alex.

PROFESSOR DORSANEO: The idea behind the findings is supposed to help the appellant, not the appellate court, and it helps the appellant by eliminating the comprehensive presumption that the judgment loser lost everything, but I think any appellate lawyer who is writing findings of fact and conclusions, if you add them,

1 would want them to be long because it's more difficult to
2 deal with a bunch of long findings or a bunch of sentences
3 strung together than it is to deal with something shorter.
4 On the other hand, you might make it so
5 short that it's completely opaque because of the finding
6 can't be attacked as not being supported by sufficient
7 evidence, and that's been a problem in family law cases
8 with respect to evaluation of property particularly. You
9 know, a finding that the property division was just and
10 right, okay, is a bit hard to attack, okay, because of
11 problems with the characterization and valuation.
12 The appellate courts would be best helped by
13 something that does approximate the kinds of findings,
14 whether they're made one-by-one or subsumed findings in
15 the context of a jury-tried case, which does kind of get
16 -- kind of get close to the idea of elements, if you focus
17 on elements as being legal elements rather than factual
18 elements, and that's really all that we need. You can't
19 write it down in some sort of absolute cookie cutter
20 prevision form, but you can approximate the precision that
21 we have in the jury charge rules, and that would be an
22 improvement.
23 CHAIRMAN BABCOCK: Kent, then Alex, and then
24 Judge Yelenosky.
25 HONORABLE KENT SULLIVAN: I'm on this

1 subcommittee, and I assume the issue that's really before
2 us is does 296 need to be reworked. I agreed with the
3 recommendation of the subcommittee. At the same time --
4 with respect to the specific proposal that's on the table,
5 but if I'm hearing everyone's comments correctly, there
6 seems to be a consensus that we're not sure when findings
7 are required or permitted and we're not really sure what
8 the proper form and scope of the finding should be, and
9 that sure militates in favor of revisiting this rule, it
10 seems to me. It has apparently produced and I have some
11 experience with it producing a lot of trouble.
12 CHAIRMAN BABCOCK: Justice Hecht.
13 HONORABLE NATHAN HECHT: And we should
14 consider it in light of some possibility that there may be
15 legislation to encourage more nonjury trials. There are
16 some people that think that one way to recover some of our
17 business from arbitration is to encourage nonjury trials
18 by letting the parties have a strike or two against the
19 judge so that the parties feel like they have some role in
20 selecting who is going to decide and they're not just
21 stuck with whoever is in the draw.
22 HONORABLE LEVI BENTON: Justice Hecht, could
23 you speak up a little bit, sir?
24 HONORABLE NATHAN HECHT: Yeah. They are not
25 just stuck with whoever is assigned to it, so I don't know

if that will happen or not, but if it does, this may take on even greater significance because if there are more of them do we want to review them more like Federal judge decisions with more meat on the bone, if you will, or not; and all I'm saying is that the problem may get bigger, the issue may get bigger, if that legislation goes forward in the next session.

CHAIRMAN BABCOCK: Yeah. Did everybody hear down there what Justice Hecht said at the beginning when he was whispering about there may be some legislation to try to recover some of our business from arbitration and that would give more emphasis to nonjury trials? I think that's a real possibility.

Judge Yelenosky, then Justice Duncan.

HONORABLE STEPHEN YELENOSKY: Well, I wanted to respond to Buddy that the jury instructions are just conclusions of law; and if they're not in dispute, you know, what is definition of negligence then it's not necessary; but if you have a dispute on instructions in a jury trial like who has the burden on a fiduciary case or something then you argue that out and you get the instruction. In a bench trial you put in a conclusion of law as to what you thought the burden was there. There is no distinction between those.

MR. LOW: Yeah, but, for instance, proximate

1 cause can be -- it might have uninterrupted by any new and
2 independent cause. It might not have that, so if you had
3 the charge that the judge is going by, then -- and you
4 argue about the charge and that's the charge, then there's
5 no problem. Then you just submit, but in an assault case
6 just defined to say, yes, A, assaulted, B. It has all
7 these other things. If you had a charge up there that had
8 those elements in --
9 HONORABLE STEPHEN YELENOSKY: But the other
10 side, if there had been a debate about a question of law
11 that would have been a debate on the charge, then
12 hopefully the judge would put -- would hear from the other
13 side, "We need that conclusion of law because we think
14 it's wrong," and hopefully it would be put in there, but I
15 don't hear anything that convinces me it should be treated
16 differently if we want them to be the same; but as Justice
17 Hecht said, maybe we don't want them to be the same, and
18 maybe we want them more like the Federal system or
19 something else. Fine, but if we want them to be the same
20 I don't understand why we would do it any differently.
21 CHAIRMAN BABCOCK: Justice Duncan.
22 HONORABLE SARAH DUNCAN: At the risk of
23 beating a dead horse, I think we've already written --
24 rewritten the bench trial rules and submitted them to the
25 Supreme Court, and I'm a little uncomfortable trying to

rewrite something that we've already rewritten because of, for instance, the problem of when are findings and conclusions required and how -- what level of detail and things like that. My second comment is despite having rewritten these rules --

PROFESSOR ALBRIGHT: Sarah, excuse me, can you speak up a little bit? We can't hear you.

HONORABLE SARAH DUNCAN: I think --

HONORABLE STEPHEN YELENOSKY: We're all getting older. We need you to speak up.

HONORABLE SARAH DUNCAN: I guess. Some of us can't talk as loud as we used to either.

HONORABLE LEVI BENTON: Maybe you need to stand.

HONORABLE SARAH DUNCAN: My first comment was just that we've already rewritten the bench trial rules some years ago, and I'm a little uncomfortable rewriting something we've already rewritten without looking at our rewrite, which is also going to be a problem on 306a.

My second comment is I think this area of the law is a mess. I have a case right now where a request was not made to separate out -- I don't remember the two elements, but two elements of damages that I think that lawyer probably would have known in a flash to do in

1 a jury charge but just didn't think about it in the bench
2 trial context to object to not separating the two elements
3 of damages out in the jury charge, and I'm sitting here
4 thinking, to, you know, various people talking about there
5 shouldn't be a difference between bench trials and jury
6 trials in terms of, you know, helping the appellant, not
7 helping the appellant, making it harder, making it
8 voluminous, not voluminous, broad form versus not broad
9 form, retreating on broad form, and it occurs to me why
10 don't the parties just have a charge conference and have
11 the trial judge answer a jury charge? We would know then
12 where the judge placed the burden of proof in a fiduciary
13 case. We would know whether they thought the jury should
14 be instructed on intervening or superseding cause. We
15 would know -- or at least we would be able to presume
16 credibility findings that a jury or any trier of fact
17 might have made.
18 My final point is what concerns me about not
19 differentiating between the two is the presumption Bill
20 mentioned, and the reason I don't really understand the
21 opinion Justice Bland was referring to is -- not
22 necessarily an opinion.
23 HONORABLE JANE BLAND: Not my opinion,
24 but --
25 HONORABLE SARAH DUNCAN: No, a viewpoint.

1 My understanding was we presume the trial judge in a bench
2 trial found everything in favor of its judgment, so how
3 can we not presume that credibility was one of those
4 things?
5 HONORABLE TRACY CHRISTOPHER: Well, read
6 some opinions. I'm sorry.
7 HONORABLE SARAH DUNCAN: I read a lot of
8 opinions. I haven't read that particular one.
9 HONORABLE TRACY CHRISTOPHER: You as a trial
10 judge can reject someone's testimony completely because
11 you think it's not credible, you know, it's totally
12 gotten -- and then you see it up there on the appellate,
13 well, you know, "This witness said A, B, C. Trial judge,
14 why didn't you pay attention to that?" Happens.
15 HONORABLE SARAH DUNCAN: So what is wrong --
16 and I'm not saying it's right. I'm just floating the
17 idea. What is wrong with getting the trial judge to
18 answer a jury charge? I think lawyers would be more
19 familiar with it.
20 CHAIRMAN BABCOCK: Frank or Bill. Or Alex.
21 Alex had her hand up before.
22 PROFESSOR ALBRIGHT: Long time ago.
23 CHAIRMAN BABCOCK: Long time ago.
24 PROFESSOR ALBRIGHT: I got skipped. I want
25 everybody to know I got skipped.

1 CHAIRMAN BABCOCK: Speak up.
2 PROFESSOR ALBRIGHT: In favor of all these
3 judges. I just wanted to, you know, I think say basically
4 what Judge Yelenosky was saying, that it seems to me it
5 makes a lot of sense for the charge -- I mean, for the
6 findings to look like the jury charge, because if you take
7 a Castile situation and say -- I was thinking of an
8 example. I don't think really negligence is a good
9 example. If you say, you know, the plaintiff gets to
10 recover if they prove a deceptive act or practice, then
11 the deceptive act or practice is an issue, and you list
12 all of them and then the judge then -- that's a conclusion
13 of law, and then you have a finding that says there was a
14 deceptive act or practice.
15 Well, then if the losing party, the
16 defendant loses and says, well, if half of those are not
17 applicable to this case then they can object to the broad
18 finding and ask that they be separated out, and you
19 could -- it seems to me like you could deal with them a
20 lot like you do the jury charge as to whether it is
21 appropriate to be broad or it's appropriate to be more
22 separate and distinct.
23 HONORABLE STEPHEN YELENOSKY: After hearing
24 that support, please make sure you don't skip her again.
25 CHAIRMAN BABCOCK: No. Carl.

1 MR. HAMILTON: This may be a dumb question,
2 but I assume that there is a lot of cases that are
3 appealed from bench trials where there are no findings of
4 fact and conclusions of law, and if those appellate courts
5 get along okay without them why complicate matters with
6 them?
7 HONORABLE SARAH DUNCAN: Well, the appellant
8 doesn't get along very well, because everything is
9 presumed to support the judgment.
10 CHAIRMAN BABCOCK: Frank.
11 MR. GILSTRAP: What about a simple
12 prohibition in the rule on unnecessary evidentiary
13 findings? Okay. Okay. Yeah, it's -- and then --
14 CHAIRMAN BABCOCK: The eyes of the beholder.
15 MR. GILSTRAP: Sure, but we know that 350
16 does -- is probably an example, and the next time an
17 appellate court gets it and says, "I got 350 or, you know,
18 30 pages, this is absurd," they can bounce it back and
19 maybe some more courts will do it and that may have some
20 type of, you know, salubrious effect on the practice.
21 That might be a simple way of approaching it.
22 HONORABLE TOM GRAY: So we reverse it not
23 because of the merits of the case but because there is
24 simply too many findings of fact? Reverse it and start
25 over?

1 MR. GILSTRAP: No, Judge. Do them again.
2 There are too many, make your findings over.
3 HONORABLE TOM GRAY: So the appellant has
4 incurred the cost of either putting all his apples in the
5 basket of I'm going to go with too -- this is too many or
6 they've had to make their first issue, this is too many,
7 but if it's just right then I'm going to challenge all
8 365. And I did think that there was one solution on this
9 to get all the appellate courts on board, if we get -- if
10 we give the appellant three pages of briefing to complain
11 about each finding of fact then I think all the appellate
12 judges will be on board to change this rule.
13 MR. GILSTRAP: Let met just add --
14 HONORABLE TOM GRAY: Because in mine that
15 would have only been a thousand page brief.
16 MR. GILSTRAP: Let me add one thing. You
17 know, the courts of appeals do have authority to send them
18 back to make findings when they didn't make them. They
19 were requested, they weren't made, send them back, make
20 the findings. Well, how about send them back, but do it
21 over? There are too many excessive evidentiary findings,
22 try it again, Judge. It won't take more than two or
23 three.
24 HONORABLE JAN PATTERSON: Is that the papa
25 bear standard?

1 MR. GILSTRAP: You know, no one knows what
2 the standard is, but everybody reads it, and at some point
3 people are going to start cutting them down.
4 CHAIRMAN BABCOCK: Judge Benton.
5 HONORABLE LEVI BENTON: Frank, I don't know
6 how the reviewing court makes that determination without
7 reviewing the record, and if they're going to go to the
8 trouble of reviewing the record to conclude that there are
9 too many, just let the reviewing court make the findings.
10 MR. GILSTRAP: Well, but they can't. They
11 can't.
12 HONORABLE TOM GRAY: We do that already,
13 Levi.
14 HONORABLE LEVI BENTON: I know.
15 CHAIRMAN BABCOCK: Professor Dorsaneo.
16 PROFESSOR DORSANEO: One of the problems for
17 the appellant with this long kind of list of damning
18 findings, including ones that say that your client was a
19 liar, is that people on the court of appeals read this
20 stuff and they read it first and maybe briefing attorneys
21 read it first and they develop a very bad attitude
22 about -- about your appellant's case, and that doesn't --
23 that doesn't really happen the same way in a jury-tried
24 case.
25 I mean, the reason why you -- the reason why

1 you write findings along those lines is to prejudice the
2 appellant in the prosecution of the case. That's what
3 your job is. Somebody ought to put a stop to it.
4 CHAIRMAN BABCOCK: Judge Benton.
5 HONORABLE LEVI BENTON: Well, Bill, with all
6 due respect, that's not why a court writes such a finding.
7 A court writes those findings -- the trial court writes
8 those findings because of the reason that Justice Bland
9 said, that unless the trial court expresses that it finds
10 a witness' testimony to be credible or uncredible, the
11 reviewing court or the briefing attorney says, "Well, the
12 witness said X, so why didn't the trial judge get that?"
13 So it's -- and we're not trying to prejudice anyone. What
14 we're trying to do is get our judgment affirmed.
15 PROFESSOR DORSANEO: It shouldn't be too
16 hard for the court of appeals to realize if the judge made
17 a finding contrary to the witness' testimony the judge had
18 a problem with the witness or the testimony. That
19 shouldn't be a problem. That's just silly from my
20 standpoint for appellate courts to say that you needed to
21 make a finding about each witness' credibility, that they
22 were credible or not. I don't think that that kind of a
23 finding really even has any kind of place in findings. So
24 that's --
25 HONORABLE LEVI BENTON: Well, why then do we

1 instruct juries that it's their duty to weigh the evidence
2 and determine the credibility of witnesses?
3 PROFESSOR DORSANEO: Well, we don't ask them
4 to make specific findings about whether witnesses were
5 credible.
6 HONORABLE LEVI BENTON: Well, why do we
7 instruct them?
8 PROFESSOR DORSANEO: Because that's part of
9 the --
10 HONORABLE SARAH DUNCAN: Because we've
11 always done it.
12 PROFESSOR DORSANEO: -- what they need to
13 know in order to understand how they can -- how to decide
14 to answer the questions.
15 HONORABLE LEVI BENTON: Well, that's what
16 the trial court needs to do in the findings to remind the
17 reviewing court that we're the fact finder, they're not.
18 HONORABLE STEPHEN YELENOSKY: Should the
19 Supreme Court remind them that?
20 HONORABLE LEVI BENTON: Pardon?
21 HONORABLE STEPHEN YELENOSKY: Shouldn't the
22 Supreme Court remind them of that?
23 PROFESSOR DORSANEO: But the other thing
24 about the finding and being done after judgment, which is,
25 you know, a bit on the odd side -- I mean, it's part of

1 the appeal, it's not part of the trial process -- is that
2 I know almost all the time the trial judge is going to
3 sign the findings that the winning party has prepared, and
4 really only very conscientious trial judges go through
5 them with a particular great care to see if they want to
6 sign off. I mean, whether they call it rubber-stamping
7 may be a bit much, but certainly there is a very strong
8 likelihood that the findings proposed by the one who won
9 are going to be the findings.
10 CHAIRMAN BABCOCK: Okay. Anybody else?
11 Justice --
12 HONORABLE LEVI BENTON: Just one second.
13 May I --
14 CHAIRMAN BABCOCK: Yeah.
15 HONORABLE LEVI BENTON: May I just -- so
16 does Professor Dorsaneo give the same deference to trial
17 judges who become Supreme Court justices? Does he assume
18 that they're just going to rubber-stamp the appellant's
19 brief?
20 CHAIRMAN BABCOCK: That's a direct question,
21 I gather? But maybe not. Justice Gaultney.
22 HONORABLE DAVID GAULTNEY: I just want to
23 weigh in in support of the concept of really when a trial
24 judge is serving as fact finder, he's serving or she's
25 serving the same role as the jury, and I would be in favor

1 of something that said, "When feasible findings of fact
2 should address only those issues that would be submitted
3 were the case tried to a jury." I like Justice Gray's
4 proposal. I think that's what it was. That wasn't yours?
5 HONORABLE TOM GRAY: No, it scares me that
6 I've found someone to agree with me.
7 CHAIRMAN BABCOCK: Judge Yelenosky.
8 HONORABLE STEPHEN YELENOSKY: Well, I
9 suggested in -- I mean, sometimes we make rules because we
10 all agree that we can't really control all the trial
11 judges, but -- and trial judges will do what they're going
12 to do and we have to take that into account, but I
13 don't -- I haven't heard anyone here suggest that a court
14 of appeals that does what Justice Bland apparently said
15 some appellate judges do is a correct statement of the
16 law, and so I wasn't being facetious in saying that the
17 Supreme Court can resolve that, and why should we mess up
18 our whole findings of fact approach because apparently
19 some appellate judges have the law wrong?
20 CHAIRMAN BABCOCK: Buddy.
21 MR. LOW: But what is submitted, Judge, I
22 mean, assault case, you submit one issue, did A assault B.
23 Is that all you're talking about, or are you talking about
24 the elements? It has to be intentional. Well, what is
25 submitted to the jury?

HONORABLE DAVID GAULTNEY: Buddy, I don't think we need to debate how any particular case, whether it's an assault case or whether it's a defamation case or whatever. That particular case, the lawyers are going to know what -- if they were trying it to a jury, what issues they would submit and get findings of fact on. Now, when you're trying it to the judge aren't you just substituting a fact finder, one fact finder for another, and if we had a statement that said, "if feasible," because in jury cases there are feasibility issues, too, on how you submit it. "If feasible" --

MR. LOW: But my question is I don't understand your definition of submitted because I consider submitted the very question the jury answers, was -- did A assault B.

HONORABLE DAVID GAULTNEY: The fact question that the jury determines.

MR. LOW: All right. Then that would be in the definition or the elements of an assault.

HONORABLE DAVID GAULTNEY: Well, I would assume that the judge would not be -- need to be instructed on the law.

PROFESSOR ALBRIGHT: But aren't those the conclusions of law? The conclusion of law would be an assault is A, B, and C.

1 MR. LOW: But the fact-finding I'm saying
2 would be the elements of it.
3 CHAIRMAN BABCOCK: Justice Duncan.
4 HONORABLE SARAH DUNCAN: And I agree with
5 David's proposal up to the point that what we find out
6 with a jury's verdict is not just what the jury thinks
7 about the facts but what the trial judge thinks about the
8 law, and for instance, in a statute of limitations case
9 where there's some dispute between the parties about
10 whether the two or the four-year statute applies, they're
11 going to have a charge conference, they're going to
12 discuss that. The judge is going to rule one way or the
13 other, and either she's going to submit an instruction if
14 there's, you know, some -- one way or the other, the judge
15 is going to submit something to the jury that tells us how
16 the judge ruled on that question, or we're going to see it
17 in the charge conference. The problem with a bench trial
18 is that if all the judge does is find facts, we don't know
19 how the judge has ruled on legal issues that may be
20 dispositive to the appeal.
21 HONORABLE DAVID GAULTNEY: Well, I wouldn't
22 say that that is the distinction between conclusions of
23 law. What I thought this problem was, that it's not the
24 conclusions of law that are the problem. It's the
25 findings of fact that are voluminous and that -- I mean,

1 the proposal, as I read it, says the findings of fact will
2 only include the elements of each ground or defense.
3 HONORABLE SARAH DUNCAN: That's the beauty
4 of the jury charge, is we give both.
5 CHAIRMAN BABCOCK: Two more comments.
6 HONORABLE DAVID GAULTNEY: I don't oppose
7 your jury charge concept.
8 CHAIRMAN BABCOCK: Bill and Alex, last two
9 comments.
10 PROFESSOR DORSANEO: Well, part of the
11 problem is the law of fact distinction doesn't make any
12 more sense in this context than it does in any other. So
13 we just ought to have it done similar to the -- you know,
14 to the way juries do it where they resolve mixed questions
15 of law and fact. Now, along the way they're going to
16 answer some kind of specific questions, because in a
17 premises case negligence is defined differently than in a
18 car wreck case, so the questions that the jury answers,
19 subsumed questions when the jury answers "yes" or "no,"
20 you know, can be identified by looking at the
21 instructions, and the findings could be -- the findings
22 could be a little more than the judge finds, yes, that
23 there was causal negligence, huh?
24 MR. LOW: That's what I'm saying. I've been
25 saying it.

PROFESSOR DORSANEO: Sort of look a little different, but it would fundamentally be the same thing. I mean, a causation finding is going to include but for causation, substantial factor, natural and contingency, and proximate cause is going to be foreseeability. It's going to subsume all of that, and the findings should be along those lines.

MR. LOW: Let the record show I said the same thing.

CHAIRMAN BABCOCK: Anybody else? One last comment. Anybody? Frank.

MR. GILSTRAP: All right. Going back to my earlier proposal, Rule 274 says that "When the complaining party's objection or requested question, definition, or instruction is in the opinion of the appellate court obscure or concealed by voluminous unfounded objections, minute differentiations, or numerous unnecessary requests, such objectionable request shall be untenable." That's what we're talking about here. Why can't we have some type of rule saying that when the findings are that way, they're untenable and it's reversible error and send it back.

CHAIRMAN BABCOCK: I just talked to Justice Hecht a moment ago, and I think the Court's desire is for the subcommittee to look at Rule 296, not only in the way

1 that the State Bar was talking about, but in taking into
2 consideration what we've been saying today. We'll try to
3 find the prior 296 work if you can't -- if you don't have
4 it or can't have it.
5 PROFESSOR CARLSON: Bill's got it.
6 PROFESSOR DORSANEO: It's in the
7 recodification draft.
8 PROFESSOR CARLSON: We've had all these
9 discussions before but many years ago.
10 HONORABLE NATHAN HECHT: But part of the
11 thinking, again, should be do we want nonjury trials to
12 look like jury trials, because I -- I mean, I'm not
13 persuaded either way on that. It seems to me good
14 arguments are made both ways, and, you know, maybe this
15 shouldn't be said, but frankly, I think appellate judges
16 look at who the trial judge was and if it was a pretty
17 good trial judge you're inclined to think they did a
18 pretty good job, and if it's somebody you don't know --
19 PROFESSOR DORSANEO: Or somebody you do
20 know.
21 HONORABLE NATHAN HECHT: Or somebody you do
22 know, if you can look at your docket and see that they're
23 the most mandamused judge in the state then you kind of
24 are going to be wary of what they did.
25 CHAIRMAN BABCOCK: But that's just human

1 nature.
2 HONORABLE NATHAN HECHT: Yeah, but I think
3 we should look not only at the procedure here but whether
4 it's a good idea one way or the other.
5 PROFESSOR CARLSON: Do you want us also to
6 look at the comparative Federal practice?
7 HONORABLE NATHAN HECHT: Yeah. Because they
8 have a clearly erroneous standard and then they have a
9 different -- for trial judges and then they have a
10 different standard for doing similar --
11 PROFESSOR DORSANEO: Well, they shouldn't.
12 CHAIRMAN BABCOCK: Well, you know, those
13 feds. Okay. Let's -- so we'll come back next time and
14 talk about that, if that's all right, Elaine.
15 PROFESSOR CARLSON: That's fine.
16 CHAIRMAN BABCOCK: And do you know where to
17 get the recodification draft?
18 PROFESSOR CARLSON: Bill.
19 PROFESSOR DORSANEO: On my website.
20 CHAIRMAN BABCOCK: It's on his website.
21 MR. GILSTRAP: What's next, Chip?
22 CHAIRMAN BABCOCK: Recod.org.com.
23 PROFESSOR DORSANEO: Along with a memo to
24 Justice Hecht about what it's all about and the history of
25 it.

MR. GILSTRAP: What are we going to do after lunch?

CHAIRMAN BABCOCK: Huh?

MR. GILSTRAP: What are we going to do after lunch? Do you know yet?

HONORABLE SARAH DUNCAN: Take a walk around the Capitol.

CHAIRMAN BABCOCK: You've got an agenda, right?

MR. GILSTRAP: Well, you think we'll go through it pretty much in order?

CHAIRMAN BABCOCK: Yeah. I have not had any requests to go out of order, except from Elaine to go out of order right now and talk about Rule 226a.

PROFESSOR CARLSON: Okay. You should have from the table or pulled down from your e-mail, it's a letter from David Beck in his capacity as president of the American College of Trial Lawyers, who has asked our committee to consider a change to Rule 226a out of concern of the negative perception of trial lawyers and to attempt to clarify in the court's instruction to the jury the role of trial counsel with the language you see in my report, our report of the subcommittee, at the bottom of page two.

Our subcommittee did not find all of the language that David Beck proposed to be desirable, at

1 least in our opinion, and so you'll see the strike-through
2 on the bottom of page two and the top of page three. The
3 subcommittee felt that it would be desirable to include an
4 instruction of this nature, but I think that is the
5 threshold question for this committee. Do we think it is
6 appropriate to include in instructions to the jury Rule
7 226a commentary on the role of trial counsel, and if a
8 majority of the committee doesn't feel that way then we're
9 done.
10 CHAIRMAN BABCOCK: What the language is
11 doesn't matter then.
12 PROFESSOR CARLSON: Right.
13 CHAIRMAN BABCOCK: Okay. Frank.
14 MR. GILSTRAP: You know, it's kind of hard
15 to come in and say maybe we shouldn't do this, but at the
16 same time I've got some real concerns. I think we've got
17 to separate out the statements that are being made and the
18 question of whether or not they're appropriate for Rule
19 226a. I agree enthusiastically with everything in that
20 statement. I also believe in religious tolerance, early
21 cancer detection, and accommodating the needs of the
22 disabled, but those should not be in Rule 226a.
23 The purpose of 226a is to assist the jury,
24 and if we want -- the stated purpose of this request is to
25 improve the image of lawyers. If we want to improve the

image of lawyers we need to do a better job of the administration of justice, and that will take care of itself. I think once we open the door to this, then, you know, it's kind of a slippery slope what other type of somewhat political statements can be put in the rules, and it's always going to displease somebody. For example, there may be some people that object to "founding fathers." Maybe it ought to be "founding persons" and then other people are going to say, "Oh, my god, another example of political correctness," and it's going to have just the opposite effect on the jurors.

Finally, the jurors are an involuntary audience. Once you graduate from high school I can't think of any instance in which a citizen is required to endure overt political education, and that's what we're doing here.

PROFESSOR DORSANEO: Well, you need to come to my class.

CHAIRMAN BABCOCK: Buddy.

MR. LOW: The jury is instructed that what the lawyers say is not evidence. Now, I disagree with the statement that tells that the lawyers are supposed to present their respective cases in the best light possible. That means best light might be lying, stretching the truth, whatever, but I don't disagree with the statement

1 that's in our preamble to the Ethics Code that a lawyer
2 has a duty to zealously assert his client's cause, I mean,
3 because you're already talking about the lawyer, you're
4 saying what they say is not evidence. I think that would
5 fit that part, but I don't agree with just saying you do
6 whatever is possible to make your client look best.
7 CHAIRMAN BABCOCK: Okay. Bill.
8 PROFESSOR DORSANEO: Did this come from
9 anywhere or --
10 PROFESSOR CARLSON: Yes.
11 HONORABLE NATHAN HECHT: American College.
12 CHAIRMAN BABCOCK: American College.
13 PROFESSOR DORSANEO: But did they base it on
14 anything or just sit down and kind of make it up?
15 CHAIRMAN BABCOCK: Hayes.
16 MR. FULLER: I don't know that David has an
17 advocate here for this. He called and had a conference
18 call with both me and -- I'm trying to think. It was Mark
19 Stanley. We were all on the call, and this is strictly
20 coming from his -- in his capacity as president of the
21 American College of Trial Lawyers, and I think you're
22 partially right, although I think he would argue that he
23 is trying to assist jurors by assisting jurors with their
24 perception of the legal profession, and I think David's
25 position was we need to do something, and we need to do it

everywhere we can to improve the public's perception of the legal profession, jury trials, trial lawyers, et cetera.

He thought this was the best place -- one of the places that you could address that issue in the rules. He's not wedded to the language. He said -- he frankly told us, he said, "I just put this together to get the debate started as a proposal" and would certainly probably have no objection to however that language was reworked, but he thinks this is a starting point.

CHAIRMAN BABCOCK: Yeah. Bill.

PROFESSOR DORSANEO: A couple of things for sure, you know, I think if this is going to be for civil cases, it's not accurate to say it's guaranteed by the United States Constitution. The 7th Amendment has nothing to do with civil cases. Maybe it's meant to be used in, you know, criminal charges, too, and I guess this 226a is the admonitory instructions. Does that all work for criminal cases, too?

HONORABLE NATHAN HECHT: Huh-uh.

PROFESSOR DORSANEO: No? I don't have much to do with criminal cases, so I don't know, and this other thing is maybe a quibble to say, "The right to trial by jury and the right to serve on a jury be conferred upon all of our citizens, including you." Well, it's not

exactly conferred on all of our citizens. I mean, people who are felons are citizens, but they're not eligible.

CHAIRMAN BABCOCK: They have fewer rights than some of our other citizens.

PROFESSOR DORSANEO: Yeah. So it needs to be not -- you know, needs to be legally accurate. That's the first thing I would be concerned with. I don't have a problem with kind of getting the jurors in the right frame of mind to go do -- go be good jurors. I don't have a problem with that, but it needs to be legally accurate, and then there's a question about how much of this stuff do we need. When do they stop listening, like Frank's standpoint, and think like "oh, god"?

CHAIRMAN BABCOCK: Bobby.

MR. MEADOWS: I just have somewhat of a foundational question, because I certainly agree that it's unfortunate and perhaps even unfair that lawyers are viewed in a negative light by the public, but do we believe that's because jurors do not understand the adversary system, because isn't that what this is all about, that that view of us results from the fact that jurors don't understand how our adversary system works?

CHAIRMAN BABCOCK: Justice Duncan.

HONORABLE SARAH DUNCAN: I think so. I have been appalled in the past when I was campaigning by how

1 much even highly educated people don't understand an
2 adversary system. They just don't, and trying to talk to
3 them about it is pretty hard to get them to understand. I
4 mean, it's possible, but I have been amazed at the number
5 of doctors, for instance, who are highly educated people,
6 who really don't understand that the person on the other
7 side is not some evil figure, they're simply representing
8 somebody who says, "That doctor hurt me," and so I'm --
9 I'm not prepared to oppose something that would try to
10 help a particular jury understand the roles not just of
11 the lawyers, but of the judge as well, and everybody needs
12 to understand their roles in a courtroom procedure.
13 MR. MEADOWS: Well, then I think that this
14 could be helpful then. If that's true then what is about
15 to happen in front of them should be understood by them.
16 HONORABLE SARAH DUNCAN: I'm only speaking
17 for the people I've talked to. I'm not trying to say it's
18 a universal problem.
19 CHAIRMAN BABCOCK: Well, you know, really
20 it's not just confined to -- I mean, we've all had those
21 conversations, but you look at people who are nominees for
22 the court or for -- or running for political office, and
23 they've acted as lawyers. I mean, the governor of
24 Massachusetts -- or a candidate, democratic candidate for
25 governor of Massachusetts, is getting absolutely shredded

because he was a Legal Aid lawyer and represented some guys in habeas petitions and now all of the sudden he's in favor of lenient sentences for cop killers. Well, that's just because of a basic misunderstanding of our system of justice.

HONORABLE SARAH DUNCAN: I mean, the same could be said for the people who write for the newspaper. It's always very --

CHAIRMAN BABCOCK: Well -- Mary Alice, would you like to comment on that, please?

HONORABLE SARAH DUNCAN: That's not exactly the newspaper.

CHAIRMAN BABCOCK: Who else had -- Judge Lawrence.

HONORABLE TOM LAWRENCE: So if I've got pro ses on both sides do I still have to read this?

CHAIRMAN BABCOCK: The pro ses are zealously advocating their position.

HONORABLE TOM LAWRENCE: But if I had a pro se on one side and a lawyer on the other, what's the jury going to think of this?

CHAIRMAN BABCOCK: Yeah. This may only apply when there are lawyers on both sides. Tom.

MR. RINEY: I just want to say, I think that the comment goes as much to support and explain the jury

1 system as it does to enhance the image of lawyers, and
2 like some of the comments that have been made, all you've
3 got to do is look at these surveys that come out from time
4 to time that show it is appalling how little the average
5 citizen knows about the workings of our government, not
6 just the judicial system but all aspects of government.
7 So if we have an opportunity to explain the purpose of the
8 jury system, I think we should take it.
9 CHAIRMAN BABCOCK: Judge Christopher.
10 HONORABLE TRACY CHRISTOPHER: A lot of
11 judges already give a little pep talk to their jury panel
12 or to their jury, so I don't have a problem with some
13 institutional pep talk, if we think that that's a good
14 idea, but it's been my impression that if someone just
15 shows up for voir dire and they sit there through voir
16 dire and they're not picked and they go home, they still
17 have a fairly negative impression of the judicial system
18 versus the jurors who actually are picked and served, and
19 those people who actually serve as jurors have a much more
20 positive impression of the trial by jury, and it's because
21 the lawyers did act professionally and the system worked
22 and they felt that they were doing an important job.
23 And maybe they didn't like one of the
24 lawyers. Well, you know, that's because the lawyer, you
25 know, had a bad case or misbehaved, one or the other, and

1 they come up not -- end up not liking the lawyer, but I'm
2 not really sure giving these instructions will help us.
3 Actually being on the jury is what helps us.
4 CHAIRMAN BABCOCK: Yeah. Justice Hecht.
5 HONORABLE NATHAN HECHT: My experience when
6 I was a trial judge was that if I didn't give a little pep
7 talk before the voir dire everybody wanted out, and the
8 number of hands that went up was far more than if I said,
9 "Look, the people of this state are depending on you to be
10 here. These parties are depending on you. God help you
11 if you can't be here. Now, who wants to leave?"
12 PROFESSOR CARLSON: Let's give that
13 instruction.
14 CHAIRMAN BABCOCK: Yeah, I see no hands.
15 Judge Yelenosky.
16 HONORABLE STEPHEN YELENOSKY: Well, picking
17 up on that and what Professor Dorsaneo said earlier, other
18 than the legal objection to referring to the right to
19 serve on a jury, what they need to hear is their
20 responsibility, not their right. I mean, sometimes people
21 argue their right to be on a jury. It's come up with
22 people with disabilities, but generally what they need to
23 hear is their responsibility to serve on a jury, and I
24 give that same kind of pep talk -- maybe not quite those
25 words, but that just talks about -- particularly about

1 economic excuses, you know, that says, "All of you are
2 going to lose time, some of you are going to lose business
3 or wages, but that's a sacrifice that generally you can be
4 called upon to make," and I've seen my economic excuses go
5 down since I've started doing that.
6 Another time when the very first row had an
7 empty seat because a gentleman was in Iraq also sort of
8 squelched some of the whiners about serving on a jury for
9 a few days, but I think it needs to focus on
10 responsibility as opposed to right.
11 CHAIRMAN BABCOCK: Judge Patterson.
12 HONORABLE JAN PATTERSON: I think we have
13 two questions, whether this notion, concept, is a good one
14 and then, of course, the language. I have a concern about
15 the language because I distinguish between advocacy and
16 spin, and I think that the language of this gets
17 dangerously into that second category. I don't like the
18 language "best light possible," "best case possible." I
19 wouldn't even say that to a young lawyer. I think it's
20 a -- the characterization is different than that.
21 CHAIRMAN BABCOCK: Okay. Buddy.
22 HONORABLE JAN PATTERSON: And higher, I
23 might add.
24 MR. LOW: I think what David had in mind, I
25 mean, we've gone beyond that. He had in mind something to

1 help with the lawyer's image. I don't think he was
2 concentrating on further instructing the jury, and what he
3 had in mind is correct. It's not going to solve the
4 problem, but it's certainly a step in the right direction.
5 CHAIRMAN BABCOCK: Yeah. Yeah. And when
6 he's talk about buffing up lawyers' images, that's not
7 always politically popular, but explaining the advocacy
8 system is perhaps the more important thing.
9 HONORABLE JAN PATTERSON: Explaining the
10 function of what's --
11 CHAIRMAN BABCOCK: The function of lawyers
12 in an advocacy system.
13 MR. FULLER: Well, and I think David also
14 thought this was appropriate that this would come from the
15 Court, because despite what the public thinks of lawyers
16 from time to time, the perception of the judiciary is
17 still relatively, you know, favorable.
18 HONORABLE NATHAN HECHT: Well, we'll put
19 another paragraph in here about the high quality of
20 judges.
21 HONORABLE LEVI BENTON: High quality of
22 trial court judges.
23 CHAIRMAN BABCOCK: Trial judges.
24 HONORABLE NATHAN HECHT: Particularly the
25 Supreme Court.

1 CHAIRMAN BABCOCK: Richard.
2 MR. MUNZINGER: I agree with Frank. No one
3 can argue with the sympathy -- or rather not sympathize
4 with the intent. We have limited resources. How much of
5 our time do we want to spend arguing over the content of
6 three sentences that are going to be read to a jury in the
7 belief that those three sentences are really going to have
8 an impact and cure the problem? You're not going to cure
9 the problem by these three sentences. You sit there and
10 you -- the judge reads this to the jury, and they take it
11 into the jury room with them. They're not going to be
12 spending a whole heck of a lot of time reading about
13 lawyers.
14 I agree with Frank. This is -- it's an
15 unnecessary waste of our time, although it's a laudable
16 goal, it's an unnecessary waste of our time, and frankly,
17 once you work out the language are you creating something
18 that lets a lawyer go crazy in a jury room and then remind
19 them that "As an advocate I'm ethically obligated to do
20 so-and-so"? What have you done and -- have you unleashed
21 trial lawyers who otherwise might try cases worrying about
22 what the juries think of them and think of their conduct
23 in court and now all of the sudden there's a sentence here
24 that says, hey, it's my job to do what I just did, and I
25 stand up and tell you, "It's the law of the state of

Texas. You took an oath to honor it, and by god, the law says I've got the right and the duty to do what I just did." What have you done? I think Frank is right. Leave it alone.

CHAIRMAN BABCOCK: You think the word "zealous" could be used to mask shenanigans in court that we wouldn't approve?

MR. MUNZINGER: You know, I've done a lot of things in court I wished I hadn't done and --

CHAIRMAN BABCOCK: But you were zealously --

HONORABLE STEPHEN YELENOSKY: But only because you lost.

CHAIRMAN BABCOCK: Okay. Well, I think we've talked this thing out. Two issues. Should we do something, should we have something in the instructions about the role of attorneys in an advocacy system; and then second question, which we'll send back for more study rather than have the whole group try to do it, what's the appropriate language given all the comments that have occurred today; but first the threshold question, how many people -- what's the subcommittee's recommendation? We should, so how many people think we should try to talk about lawyer's roles in an advocacy system?

HONORABLE STEPHEN YELENOSKY: And by that you mean compel judges as opposed to allowing them to

write their own pep talk?

CHAIRMAN BABCOCK: Yeah. 226a would be you've got to say this.

HONORABLE SARAH DUNCAN: Just lawyers?

CHAIRMAN BABCOCK: Huh?

HONORABLE SARAH DUNCAN: Just lawyers?

HONORABLE JAN PATTERSON: Now, that was spin and not advocacy.

CHAIRMAN BABCOCK: Right. Yeah. Well, I think that the sense of this was the role of lawyers in the advocacy system, but it doesn't have to be, but do we want to tackle 226a to add some stuff?

MR. PERDUE: Chip, can I ask, before we vote can you ask the trial judges in the room how many of them do this on an informal basis? I mean --

CHAIRMAN BABCOCK: What's this?

MR. PERDUE: Give some type of pep talk about the system.

HONORABLE LEVI BENTON: Yeah, because 226a does not now prohibit the pep talk --

CHAIRMAN BABCOCK: Right.

HONORABLE LEVI BENTON: -- and this proposal would make it mandatory.

CHAIRMAN BABCOCK: Mandate something, right.

MR. GILSTRAP: Mandatory pep talk.

MR. PERDUE: Is there any trial judge that doesn't do something about the system and the value of the system?

CHAIRMAN BABCOCK: We have both current and former trial judges. Justice Hecht used to give a pep talk back in the dark ages, and --

MR. LOW: But, Chip, that was to persuade the jury not to get excused. Are they explaining the role of the lawyers, the advocates? They don't do that. That's not -- I've not heard, and I have tried four or five cases, and I've not heard that.

CHAIRMAN BABCOCK: Yeah, I've never heard anything about the role of the lawyers, actually.

MR. LOW: Or the advocacy system.

CHAIRMAN BABCOCK: Yeah, Lonny.

PROFESSOR HOFFMAN: I just want to add, maybe if we are going to send this back for further consideration, the place where we actually touch many, many more people is not the folks who get seated on juries but the ones we call down to jury duty. So although there is no rule of procedure that talks about that, I might sort of expand this to say if we're going to do some additional thinking about places that the Court could issue some language, perhaps it would be in some kind of orientation video or something along those lines. There

are a whole lot more people that go to that.

CHAIRMAN BABCOCK: Okay. Judge Benton.

HONORABLE LEVI BENTON: I just want to remind Professor Hoffman that the Government Code does speak to the things that are said to the people in the general assembly room, and I think you have joined me informally in suggesting that the Legislature ought to just yield to the Court to write rules in that area, but there are some things said to the broader group of people.

HONORABLE STEPHEN YELENOSKY: There is a video, too, that's been shown. "High jury" or something.

CHAIRMAN BABCOCK: Judge Patterson.

HONORABLE JAN PATTERSON: Well, a lot of lawyers will say, "Please don't let anything I do" or "Don't hold anything I do against my client."

CHAIRMAN BABCOCK: I've always thought that was an odd way to start your game. "By the way, if I speak out of turn, don't hold it against my client."

HONORABLE JAN PATTERSON: So they already have a license to maybe be a jerk, so I think a lot of it just shifts it to whether it's appropriate that some loftier notion come from the trial court.

CHAIRMAN BABCOCK: Okay. Everybody who is in favor of the subcommittee doing something along these lines raise your hand.

1 Everybody opposed? Well, a close vote, but
2 by a vote of 12 to 10, the Chair not voting, the
3 subcommittee is directed to look into this further.
4 PROFESSOR CARLSON: And could I just ask,
5 Chip, I want to ask you one question. You mentioned that
6 there was a State Bar committee, oversight committee that
7 is --
8 HONORABLE NATHAN HECHT: Grievance oversight
9 committee, yes.
10 PROFESSOR CARLSON: -- working on Rule 226a.
11 Is that anything to do with this or no?
12 HONORABLE NATHAN HECHT: No. It only has to
13 do with writing 226a in plain English.
14 PROFESSOR CARLSON: Okay. And the jury
15 charge tack force, will they be --
16 HONORABLE NATHAN HECHT: No. They are
17 looking at mostly how to empanel the venire.
18 PROFESSOR CARLSON: Okay. Thank you.
19 HONORABLE TOM GRAY: Could I ask Professor
20 Dorsaneo, is this modification in the codification draft?
21 PROFESSOR DORSANEO: Task force last time
22 did a bunch of -- they rewrote the admonitory
23 instructions.
24 CHAIRMAN BABCOCK: So the answer is "yes."
25 PROFESSOR DORSANEO: Huh?

1 CHAIRMAN BABCOCK: The answer is "yes."
2 HONORABLE NATHAN HECHT: The jury trial task
3 force?
4 PROFESSOR DORSANEO: Yeah. And when the
5 Court looked at it and sent it back to this committee, I
6 think it was -- the Court as then constituted made no
7 changes in it, in what was suggested, and when the
8 committee sent it back to the Court with some suggestions
9 for change, the committee made no changes to the
10 suggestions on the admonitory instructions, but the only
11 place that I've actually seen it published is in our --
12 Elaine and I had a case book. We put it in there because
13 we thought it was going to be promulgated maybe 10 years
14 ago.
15 HONORABLE NATHAN HECHT: I misspoke. It's
16 not the grievance oversight committee. That's another
17 group. It's the pattern jury charge oversight committee
18 that has looked at 226a and gotten a grant and done some
19 testing on writing it in plain English.
20 CHAIRMAN BABCOCK: Those are pattern jury
21 instructions that they've tested so far.
22 HONORABLE NATHAN HECHT: Yes. These --
23 CHAIRMAN BABCOCK: And not -- well, yeah,
24 actually --
25 HONORABLE NATHAN HECHT: There's 226a,

not --

PROFESSOR ALBRIGHT: I'm on that committee, and it's the admonitory instructions and some of the pattern jury charge, so but we're definitely doing the admonitory instructions as well.

PROFESSOR DORSANEO: Did you pick up on Ann Cochran's committee's work product, the pattern jury charge task force, or does that just kind of go into oblivion?

PROFESSOR ALBRIGHT: I don't know. I haven't heard anything about it. We haven't met in a while, but --

CHAIRMAN BABCOCK: Alex, isn't Kent working -- Kent Sullivan working on that, too?

PROFESSOR ALBRIGHT: Kent's on that committee, too. Kent's cochair of the committee.

CHAIRMAN BABCOCK: Yeah. So we ought to tell Kent, ask him that question.

PROFESSOR ALBRIGHT: So, yeah, let's talk about whatever that is.

CHAIRMAN BABCOCK: Okay. All right. After lunch, which we're going to take in a minute, we'll go to Justice Duncan, to Sarah, on 306a. Okay. All right. We're in recess.

(Recess from 12:19 p.m. to 1:22 p.m.)

CHAIRMAN BABCOCK: Okay. Well, Ralph, in Sarah's absence, will talk about 306a.

MR. DUGGINS: Sarah polled the subcommittee for thoughts and reactions to the rule in light of the decision that's in Justice Hecht's letter to everybody. I'm drawing a blank on the name of it now, but what I saw back was that --

PROFESSOR DORSANEO: In re: Lynd.

MR. DUGGINS: Pardon?

PROFESSOR DORSANEO: Lynd.

MR. DUGGINS: Lynd, yes, the L-y n-d case, and I think three of us suggested that the rule be changed to make it just like the TRAP Rule 4.2(c), and Sarah drafted what you have, the handout, and she's done that, and as far as I can tell the only change in the proposed -- the proposal that is in front of you and the TRAP rule is that she's added -- in the penultimate line she's added "the" in front of "notice," and then after the word "notice" she's added "required by Texas Rule of Civil Procedure 306a(3)," and she took that out of 4.2(a)(1), and so that's what we have to propose. Now, I'm not aware of any opposition on the subcommittee.

PROFESSOR DORSANEO: This is a total no brainer. It should have been done a long time ago to make the two rules say the same thing.

1 CHAIRMAN BABCOCK: Okay. What about this
2 last sentence, "After the hearing and the motion the trial
3 court must sign an order"?
4 PROFESSOR DORSANEO: That is the no brainer
5 part.
6 CHAIRMAN BABCOCK: Okay.
7 PROFESSOR DORSANEO: The appellate rules
8 have had that sentence in them for a considerable period
9 of time. The only reason why 306a doesn't have that
10 language is that the Court has been disinclined to
11 promulgate any changes in the Rules of Civil Procedure, or
12 very many over the last long period of years.
13 CHAIRMAN BABCOCK: Okay.
14 PROFESSOR DORSANEO: Five or six years.
15 CHAIRMAN BABCOCK: Well, this committee has
16 gone against no brainers before. Anybody have an appetite
17 to do that? Justice Gray? Any more discussion about
18 306a?
19 MR. LOW: Well, you praised it. You won't
20 have much opposition.
21 CHAIRMAN BABCOCK: You wouldn't think.
22 Yeah, Frank. Now, see, here we go.
23 MR. GILSTRAP: See, you finally stirred
24 something up. Why are we better off with an express
25 finding? What does that give us that we don't have now?

I'm sure there's an answer to it. I just don't know what it is.

MR. DUGGINS: Because in the Lynd case, as I remember it, the trial court did not specify the date of the notice, and it led to a finding by the court of appeals that you -- that the rule implicitly required that finding. The Supreme Court disagreed and said that's not -- the rule doesn't implicitly require a finding as to the date of notice, but we think the trial court should do that so as to avoid these kind of disputes, and so it's clear the Court would like to see the rule changed to make it consistent with the TRAP rules so that they don't see a mandamus over an issue of what the date is because the trial court didn't find a date.

MR. GILSTRAP: So it's to nail down the date so that there is no dispute about what the date was?

MR. DUGGINS: That's correct.

MR. GILSTRAP: But there still can be a dispute about what the date was.

PROFESSOR DORSANEO: Not about what the finding is.

MR. GILSTRAP: But not about -- I mean, I'm just trying to see how the finding helps us down the road if they're going to dispute what the date is.

MR. DUGGINS: Chip.

1 CHAIRMAN BABCOCK: Well, I guess the
2 judge -- judge will weigh in on that and decide in the
3 first instance who wins that dispute.
4 MR. GILSTRAP: Now, if they don't make a
5 finding, is that some type of jurisdictional defect that
6 we're going to deal with or what? Suppose they just leave
7 it out.
8 MR. DUGGINS: Well, if the rule is changed,
9 the rule will require the finding, and you're saying then
10 what happens?
11 MR. GILSTRAP: Yeah, what happens then?
12 MR. DUGGINS: Better ask Justice Hecht.
13 CHAIRMAN BABCOCK: Justice Bland.
14 HONORABLE JANE BLAND: What if you don't
15 know the date but you know that it's a date sometime
16 within the period that would allow for you to exercise
17 plenary power?
18 MR. DUGGINS: Great question.
19 HONORABLE JANE BLAND: Because that's what
20 it always comes down to, is it too late to do anything
21 about the judgment, and so I'm not sure why nailing down
22 the date is all that important so long as you know --
23 HONORABLE STEPHEN YELENOSKY: Well, can you
24 say "no later than"?
25 HONORABLE JANE BLAND: Well, that's what I'm

1 wondering. I mean, this says you've got to say the date,
2 and, you know, it could have been Tuesday, it could have
3 been Wednesday, but regardless of whether it was Tuesday
4 or Wednesday --
5 HONORABLE STEPHEN YELENOSKY: Then say "no
6 later than" when --
7 HONORABLE JANE BLAND: You know, you still
8 have plenary power.
9 CHAIRMAN BABCOCK: Could the judge under
10 this rule the way the language is say the date is, you
11 know, on or before such-and-such a date?
12 HONORABLE JANE BLAND: On or after,
13 probably, but -- or that's what I'm saying, I think no. I
14 think it says you have to find the date, and I'm saying
15 that, you know, the trial judge may not want to find the
16 date specifically because he or she heard evidence about
17 generally when the week of such and such date or the this
18 or the that, but not as to the exact date, and the
19 witness's recollection may not be perfect with respect to
20 it either, but it may be good enough for the trial judge
21 to understand that the notice was delayed long enough so
22 that the judge still has plenary power.
23 CHAIRMAN BABCOCK: Okay. Yeah, Judge
24 Peeples.
25 HONORABLE DAVID PEEPLES: TRAP 4.2 already

1 says that when there's a 306a hearing the trial judge is
2 to sign a written order that finds the date, but that
3 language is not in the Rule of Civil Procedure, and a lot
4 of lawyers who do litigation and, frankly, are afraid of
5 the appellate courts don't know this is there, and they
6 look at 306a and just don't know that it's required by a
7 TRAP rule, which is why I think Bill says it's a no
8 brainer to put it in there.
9 CHAIRMAN BABCOCK: Gotcha. Okay. Any other
10 discussion about this? All right. All in favor of the
11 change to 306a raise your hand.
12 Anybody opposed? One opposed. Two opposed.
13 Put the in favors up again, sorry, since it was a no
14 brainer.
15 Okay. By a vote of 22 to 2. Still two
16 opposed? You change your mind, Carl?
17 MR. HAMILTON: I didn't vote opposed. I
18 voted for it.
19 CHAIRMAN BABCOCK: You voted for it. Okay.
20 By a vote of 23 to 1, so almost a no brainer, it passes.
21 That brings us to Professor Dorsaneo, who
22 has a number of TRAP rules to discuss. 13 is the first
23 one?
24 PROFESSOR DORSANEO: I guess we could do
25 them in numerical order.

CHAIRMAN BABCOCK: Yeah, whatever your pleasure is, Bill.

PROFESSOR DORSANEO: Well, let's do them in order, even though this package is a little more problematic than some of the other assignments. In some, not that many, courts instead of having a court reporter who ultimately will make a stenographic transcription of the record, we have court recorders that operate recording machines. The places where that is so include -- according to rules governing the procedure for making a record of court proceedings by electronic recording that's in the West rule book on page 439, beginning on 439, we have Bexar County, Brazos County, Dallas County, Harris County, Kleburg County, Liberty County, Montgomery County, and I think after that we have Hardin County as well; is that right, Jody?

MR. HUGHES: And Jasper County.

PROFESSOR DORSANEO: And Jasper County. So not anywhere near 254. In Dallas County and Harris County, is that widespread or --

MR. HUGHES: I was not able to find any courts in Dallas or Harris County that said that they used a court recorder in place of a reporter.

PROFESSOR DORSANEO: Yeah. That's my thought. So even in all the places where it's authorized

to be done it may not be done.

MR. HUGHES: Correct.

PROFESSOR DORSANEO: Okay. So in a few counties we have these court recorders, and the way the court recorder makes a record is to make -- makes what's called a reporter's record is to make an electronic record, which basically involves making these tapes and logs, which under the specific orders, not the Rules of Civil Procedure, are meant to be filed with the court of appeals within 15 days after the perfection of an appeal or writ of error.

The proposal is to have the court recorders, instead of just making the electronic reporter's record and filing it, if requested by any party to an appeal is to prepare and file a transcription of the proceedings along with the reporter's record, which is defined in 34.6(a)(2), so in lieu of -- if requested, in lieu of just simply filing the tapes and the log, the court recorder under this proposal would prepare a transcription.

Now, in my little draft, Sharon and I made a mistake in not crossing out the word "stenographic." Okay. It just should say, without benefit of any adjective, "prepare and file a transcription of the proceedings along with the reporter's record as provided in Rule 34.6(a)(2)." That's -- that's the basic idea.

1 Should the court recorders if requested have the
2 responsibility to prepare a transcription? They don't
3 have that responsibility now.
4 Now, the way things were meant to happen
5 when the appellate rules were revised to deal with court
6 recorders is that the parties would obtain -- would obtain
7 from the court recorder a certified copy of the original
8 recording of the proceeding and go about making -- go
9 about making a written record themselves, and ultimately
10 that would be included under Rule 38.5 as a part of the
11 appendix to the appellant's brief, with a procedure in
12 38.5 for determining the accuracy of it, supplementing it,
13 and also requiring the court recorder to make a
14 transcription or to see that one is made if someone was
15 appealing as a -- properly as an indigent.
16 So the overall subject, again, is to change
17 the procedure to allow an appellant to ask for a
18 transcription to be prepared. That would be filed along
19 with the tapes, and that requires other little changes
20 along the way, okay, which are at least in 34.6, the
21 request for preparation, at 34.6(b)(1), the responsibility
22 for filing the record in 35.3(b), and 38.5.
23 One other thing before I ask committee
24 people to correct what I've said, supplement or whatever,
25 that's worth noting -- maybe I'm getting ahead of myself

1 -- we have a rule that we haven't recommended a change in,
2 35.1. So far, 35.1, civil cases, says, "When the
3 appellate record must be filed in the appellate court,"
4 and, you know, it provides for 60 days after the judgment,
5 or if 26.1 applies, within -- you know, motion for new
6 trial, motion to modify, within 120 days.
7 Right now that rule, 38 -- 35.1 does not
8 match these orders, these orders which say the time for
9 filing the reporter's record with the court of appeals is
10 within 15 days after the perfection of the appeal. I had
11 thought that these orders were superseded by the appellate
12 rules, but reading one of the more recent ones, it's
13 actually the other way around. It says, "no other filing
14 deadlines as set out in the Texas Rules of Appellate
15 Procedure are changed," and at least some members,
16 including myself, of our committee think that the 15 days
17 after the perfection of the appeal statement in the
18 specific orders -- and it appears to be in all of them,
19 right, Jody?
20 MR. HUGHES: That's correct.
21 PROFESSOR DORSANEO: That that's kind of an
22 odd thing, and we don't know why it's in there and don't
23 know why it isn't good enough to have it done 60 days or
24 120 days or whatever number of days is called for in 35.1.
25 Other members, anything else to add?

1 CHAIRMAN BABCOCK: Justice Gaultney.
2 HONORABLE DAVID GAULTNEY: I think you
3 stated it well. The purpose I think is -- what we're
4 seeing, we've got two counties that have court recorders,
5 and I think we're getting two more in Jasper and Hardin,
6 so that will be four counties within our district that are
7 going to have recorders. What we're seeing from our
8 clerk's standpoint is the reporter's record will get filed
9 and then the briefing deadlines start, and the trial
10 attorney is trying to get their brief timely filed, but
11 needs a transcript and fairly routinely has asked the
12 court recorder to prepare it, but the court recorder has
13 no duty under the rules to prepare it so does it in his or
14 her own time, and the clerk currently -- usually the clerk
15 works with the court reporters or the court recorders to
16 get the transcript timely filed, but has very little
17 ability to work with the court recorder, so the request
18 for extensions of time end up being made by the attorney
19 on the briefing. So that -- one of the values of this is
20 to shift some of the request for extension of time to the
21 court recorder so that the clerk can work with him or her
22 to get it done timely.
23 CHAIRMAN BABCOCK: Any other comments?
24 Yeah, Judge Peeples.
25 HONORABLE DAVID PEEPLES: Bill, did you-all

consider the implications for this in 4(d) child support cases?

PROFESSOR DORSANEO: No.

HONORABLE DAVID PEEPLES: If you didn't, I want to explain those.

PROFESSOR DORSANEO: We did not.

HONORABLE DAVID PEEPLES: Okay. You may or may not know that all across the state there are federally mandated child support enforcement courts, and we've got maybe 25 in Texas, Stephen?

HONORABLE STEPHEN YELENOSKY: I don't know.

HONORABLE DAVID PEEPLES: Something like that, and they are all over the state, and they are there because to get Federal funds of a certain kind you've got to do this, and every one of them or almost every one of them uses a recorder, a court recorder, but it's not an employee who does only this. It's somebody who does everything and in addition runs the tape recorder in the court, and I'm concerned that if we mandate this in these child support cases it will really impact these people, although I don't think they have that many records to -- that many appeals in terms of numbers, but they don't have the equipment to even listen to these things, much less the skills to transcribe them, so they will have to farm it out to someone.

And I think probably what happens now, I'll bet it's different in a lot of places, but probably what happens is when there's going to be an appeal the tape is given to the appellant and arrangements are just made kind of privately to have somebody type it up and then everyone looks at it and the judge signs off, and it happens kind of like that, although I don't have personal knowledge that it happens that way everywhere, but this will change that, and I mean, it will have big changes in the child support enforcement courts, which are probably the busiest trial judges, associate judges, in the state. My experience is they are.

CHAIRMAN BABCOCK: Justice Gaultney.

HONORABLE DAVID GAULTNEY: I'm not sure -- I think that's a different issue, because as I understand the -- there are only certain limited counties that can use court recorders. The ability of a county to use a court recorder in county court, for example, is by Supreme Court order and Court of Criminal Appeals order, and there are only limited counties that can do that. The ability of the associate judges to use the recording machine is under the Family Code. They are -- they use -- if they use a court reporter, which they can, then that, as I understand it, I'm not -- as I understand it, when it's appealed to the referring judge, if it's appealed, that

1 court recorder's transcript can be considered, but I'm not
2 sure under the Family Code they're mandated to do that.
3 I think the -- I think they can use any
4 means -- I think the statute -- I've got it here -- says
5 something to the effect of in the absence of a court
6 reporter they can use any means they feel is appropriate
7 to record it. There are cases where -- there is a case
8 where a court has considered it and said, first of all,
9 this doesn't -- this county that was involved isn't
10 authorized by the Supreme Court to use court recorders,
11 and secondly, they didn't -- in other words, they didn't
12 treat it as a record for purposes of the appeal.
13 Now, they did comment in that case that I'm
14 not sure what they would have done if that county had
15 been -- if that associate judge had been sitting in a
16 county that was authorized to use court recorders. I
17 don't know, but you do have in that context the Family
18 Code, I think, determining what type of record that you've
19 got as opposed to a Supreme Court order or a Court of
20 Criminal Appeals order, so I think there is a little bit
21 of a distinction in those cases.
22 HONORABLE DAVID PEEPLES: So, in other
23 words, this would not trump the Family Code?
24 HONORABLE DAVID GAULTNEY: I think that this
25 is dealing with only those counties -- well, I think

1 that's an interesting issue, but I think this is dealing
2 only with the pilot program that the Supreme Court has set
3 up, and 15 years ago, but I think there is an issue if
4 you've got an associate judge who made a recording and
5 there's another question here of what is a court recorder,
6 but let's say you have an associate judge in Jasper County
7 who is authorized by the Supreme Court to make a recording
8 and they make a recording and that is not timely appealed,
9 so then that becomes the opinion of the referring judge,
10 whether or not that record would fit within this rule.
11 I think that's the context in which the
12 issue would come up. If that occurred, perhaps that judge
13 could get assistance from the referring judge to have the
14 transcription made, because if that's the only record
15 you've got then perhaps the rule should apply to make it
16 transcribed.
17 CHAIRMAN BABCOCK: Okay. Justice Gray.
18 HONORABLE TOM GRAY: Since I wasn't here 15
19 years ago when this pilot project was apparently
20 implemented for the recorders, nor was I here when the
21 codification draft was proposed, I was wondering what the
22 purpose of the court recorder project was. I mean, what
23 is the purpose, and are we furthering it or frustrating it
24 by this proposed modification?
25 HONORABLE NATHAN HECHT: Well, I was there.

1 It was 20 years ago, and the purpose was to experiment
2 with alternative ways of making the reporter's record,
3 number one; number two, seeing if this would aid in
4 counties that have trouble getting reporters, which there
5 are a few; and three, dealing with courts and hearings
6 like David has mentioned that there are rarely appeals
7 from, but there need to be records made and it's just a
8 waste of everybody's time and money to have a court
9 reporter present. Like juvenile -- I think Dallas still
10 does juvenile arraignments on tape, and I don't -- and I
11 guess I knew sort of about the family courts, but there
12 are a lot of proceedings like that where a record is
13 necessary, but it's hardly ever used much.
14 HONORABLE TOM GRAY: So if I understand, the
15 court recorder has no per se qualifications like a court
16 reporter does?
17 HONORABLE NATHAN HECHT: Right. And the
18 reason for a court order was the Court -- I wasn't on the
19 Court then. I was on the trial court, but the Supreme
20 Court and the Court of Criminal Appeals didn't want just
21 anybody walking in doing this. They wanted to make sure
22 that a judge who was going to use this was going to be
23 responsible about it, because they didn't want it to be
24 worse than the current system, and so the approval went
25 county-by-county as we typically do in pilot projects just

so that you could be sure that the judge who was going to do it was really going to be on top of things. I think Judge Brister used it for awhile in Harris County, Judge Kincaid now used it for awhile in Dallas. I think judge --

HONORABLE DAVID PEEPLES: Charlie Gonzales used it for awhile.

HONORABLE NATHAN HECHT: There is a judge out in Bryan, I forget his name, that used it, who's retired now. Judge Underwood, so a bunch of people.

CHAIRMAN BABCOCK: Jody had information.

MR. HUGHES: I just had -- the subcommittee asked me to try to track down some of the recorders that are actually doing this in practice and get their sense of how it works and whether they would have objections to the proposal, and I did that as best I could. I wasn't able to actually find that many people that do it. I did find there were two Title 4 judges in Bexar County. I think their situation, they both said that when they get appeals on it, they do as Justice Gaultney suggested. They make use of the reporter who is assigned to the district court to which the special judge is assigned.

Some of the others I talked to are either current active or former court reporters, and they said they would have no objection to it because they said as a

practical matter they do it anyway, they make money from doing it, and it wouldn't be an imposition. I did talk to the county judge in Hardin County yesterday, Judge Caraway, and they do it for the reason Justice Hecht was talking about, where they don't have a court reporter, and he said it would be more of a problem there because they have to get court reporters or had to get them from Houston when they had them. They've got this very nice system that actually makes CDs. They've got both audio and visual. It makes a nice tape. Now, he said they've never had an appeal done since the time they implemented the system, and he wasn't quite sure how it would work, but he thought that parties could either ask someone to make a transcription on their own and then there's a provision under the pilot project order that allows, you know, the other side to challenge it if it's not accurate, but --

CHAIRMAN BABCOCK: Okay. Bill.

PROFESSOR DORSANEO: I did appeal a case from Scott Brister's court and apparently went through this drill to get the record done. I don't have any real independent recollection of how the record was done or who did it. Maybe David Gunn did it. I don't know, but I feel like I don't have very much experience with any of this, and how many trial judges do?

1 And I think our committee I want to speak
2 for was proposing to get this done, but some were a little
3 skeptical about whether it's a -- whether it's actually
4 the wave of the future or whether it's maybe not something
5 that needs to be done. I got a distinct flavor that in
6 some places the lawyers were waiting for the court
7 recorder to prepare a record because they expected that to
8 be done, even though the rules don't provide -- I mean, a
9 written transcription, even though the rules don't provide
10 for that. I don't know how sympathetic I am with that
11 either.
12 CHAIRMAN BABCOCK: Justice Gaultney.
13 HONORABLE DAVID GAULTNEY: Well, every court
14 is going to have to have the ability to do a transcript
15 because the rule requires that in the event someone cannot
16 pay for it themselves then the court recorder will
17 transcribe it or have to have it transcribed, so the court
18 is going to have to have the ability to provide the
19 transcript.
20 Second thing I would say is, is that we
21 don't really see a problem with challenges to accuracy of
22 the transcriptions on the court recorders. I mean, we
23 have a system set up in the rules for challenging it by
24 objection, but as a practical matter, there is -- we don't
25 see a distinction in an everyday basis between the

1 transcription filed by a reporter and one by a recorder.
2 Once the transcription is prepared and filed, the case
3 rocks along usually without any problem. I can't recall.
4 Maybe once where we had to abate it and have a trial judge
5 determine the accuracy of the record.
6 So if, in fact, they are treated the same
7 then why shouldn't the burden be on the person
8 preparing -- the court recorder, who is in the courtroom,
9 paid to memorialize the event, to prepare a transcription
10 and file it with the accurate -- with the record and then
11 have the attorneys' time lines run from that date.
12 CHAIRMAN BABCOCK: Any reaction to that,
13 Bill?
14 PROFESSOR DORSANEO: I guess my thinking
15 about it, I thought, well, maybe we should change this
16 because this is something that's going to be happening
17 more and more, but is it something that's going to be
18 happening more and more by court order or is it something
19 that's going to be limited to just a few places here and
20 there, because that affects how I think about it
21 generally? If I don't have to worry about it myself in
22 the places where I more normally practice then it's not a
23 big deal, but I'm more concerned with it if it's going to
24 be the way things are permitted to be done across the
25 state. Then it needs to be cleaned up if that's so.

CHAIRMAN BABCOCK: Buddy.

MR. LOW: You know, I doubt that the Court intended these counties and the litigants and the lawyers to be treated any differently than they did in the counties where they have a court reporter. I don't think they would be treating them as second class citizens, so why shouldn't they have the same benefit, the recorder preparing it, or if it's a court reporter the court reporter preparing it. I don't think there was any -- do you get any indication there was a reason to treat them differently, Judge? I mean rights on the appeal.

HONORABLE NATHAN HECHT: Well, there was no reason to treat them as second class or third class citizens, fourth class, but there was -- there is sometimes an argument made by the bar that they can get things done more cheaply than the government is able to provide it for them, and if they want to do that then nothing in this order prevents them from doing that. I think if, on the other hand, the parties want the county to provide the transcription at the county rates, that's fine, too. But if the county is charging X a page to transcribe it and the lawyer thinks he can do it for less than X then that's up to the lawyer.

MR. LOW: But in the counties that have a court reporter, I mean, the lawyers want it cheaper, they

1 could just bring in recording equipment, record it, and
2 get it cheaper, too.
3 HONORABLE NATHAN HECHT: Well, if you could
4 record it, but if you can't -- if you're restrained to
5 using the court reporter then that's the record of the
6 case.
7 CHAIRMAN BABCOCK: Justice Gaultney.
8 HONORABLE DAVID GAULTNEY: And this proposal
9 doesn't modify that option. In other words, it simply
10 says that if you're going to -- if you're going to have --
11 get the certified tapes and do it yourself then you really
12 can't complain about the court recorder not getting their
13 deal done timely because you're the one responsible for
14 transcribing it and attaching it to your brief and
15 following the appendix rule.
16 What this does, though, is say if you do
17 request that the court recorder transcribe it that then
18 the court recorder has a duty to file that transcription
19 at the time they file the record, the actual tapes, and
20 then the appellate -- then the lawyer's time lines start
21 to run.
22 CHAIRMAN BABCOCK: Okay. Justice Gray had
23 his hand up and then Judge Peeples.
24 HONORABLE TOM GRAY: Well, this is somewhat
25 anecdotal. We had one case that I can remember in the

1 eight years that I have been on the bench come up from
2 Brazos County that had one of these, and the appellant's
3 lawyer had it transcribed. It was attached to the
4 appendix like the rules. It worked. I mean, and so for
5 whatever that's worth. It seems to me that if the purpose
6 was to avoid the cost of having that court reporter there
7 in the courtroom everyday for every proceeding and not
8 require that skill set of the court recorder, we seem to
9 be backing up to now in effect require the county to have
10 the equipment and the personnel capable of making that
11 transcription rather than farming it out to whatever third
12 party or secretary of the lawyer or something that does
13 it.
14 CHAIRMAN BABCOCK: Judge Peeples and then
15 Justice Duncan.
16 HONORABLE DAVID PEEPLES: This discussion
17 has removed the concerns that I had a minute ago. I'm
18 fine with it.
19 CHAIRMAN BABCOCK: Okay. Justice Duncan.
20 HONORABLE SARAH DUNCAN: I'm concerned -- my
21 memory of the discussions of this new appellate rule --
22 PROFESSOR DORSANEO: You have to be louder.
23 HONORABLE SARAH DUNCAN: My memory of the
24 discussion of this in the appellate rules subcommittee 10
25 years ago, whenever it was, is that this was going to be a

1 low cost way to appeal because appeals had gotten too
2 expensive and part of the big cost of an appeal is the
3 reporter's fee, and I'm not sure that once you put this
4 subsection (f) in that anybody will do a private
5 transcription of a recording. It's there, take advantage
6 of it.
7 My other concern is my understanding from
8 Jody's e-mail the other day is that there are some
9 counties in which the person who's doing the recording is
10 not going to be the person who does the transcription of
11 the recording; and, you know, with a court reporter,
12 they're the ones taking the notes, they're the ones
13 responsible for transcribing those notes, and they certify
14 that the record is what their notes would indicate it to
15 be. I'm just not at all sure how a transcriber of someone
16 else's recording is going to be held to the same standard,
17 and I'm not saying I know and it's a problem. I'm saying
18 I just don't know how this will work, and I'm afraid it
19 will change the cost parameters here.
20 CHAIRMAN BABCOCK: Bill and then Justice
21 Gaultney.
22 PROFESSOR DORSANEO: You know, the one case
23 that I did have an appeal on this was about a 20
24 million-dollar case. Sufficiency of the evidence on
25 certain things was a part of it. I don't think I would

1 rely or would have relied on the court recorder or
2 somebody acting under the court recorder's direction to do
3 that record, but in other cases it might really be
4 otherwise. I guess in a way we kind of take it partially
5 on faith that what the court reporter has gotten down in
6 the record is faithful to everything that happened in the
7 proceedings, and maybe we have less faith in recording
8 equipment or at least transcribers.
9 Maybe the 15-day thing is to get it out of
10 the hands, okay, of everybody and get it into the court of
11 appeals, and you transcribe the copy that you pay $150
12 for, the copy of the tapes under these orders. Maybe
13 that's the idea. Otherwise I don't understand what the 15
14 days is all about.
15 HONORABLE NATHAN HECHT: No, the 15 days was
16 there because that's what the tests indicated was a
17 reasonable time for the recorder to get the tapes and file
18 them with the Court.
19 PROFESSOR DORSANEO: Without regard to when
20 the court would need to do something with it.
21 HONORABLE NATHAN HECHT: Right.
22 PROFESSOR DORSANEO: So it's reasonable on
23 some kind of odd basis.
24 HONORABLE NATHAN HECHT: Here's your record,
25 and then whatever happens after that is not going to be up

to that person to follow through on. He got that much done. You can set it at the 60 or 120 or left it the way it was, but the point of changing it to 15 was that the -- since the tapes are the record, they're the official record in the case, they could be filed on a much shorter time frame; but as Judge Gaultney points out, since they have to be transcribed that may mean that the lawyers are coming in asking for more time because they've got to get it transcribed.

PROFESSOR DORSANEO: On balance, I'm okay with this as an option, if court recorders are okay with it as something that they could manage to do, and I gather the report is that some of them are and some of them aren't sure.

MR. HUGHES: I think the ones who are already doing it, they're fine with it, and it's the ones that don't have a reporter there, and some of them questioned to me whether they would have the authority to do a transcription. They said, "I'm not a certified shorthand reporter. I wouldn't be able to prepare a transcript," and from looking at Chapter 52 I think the law is --

HONORABLE SARAH DUNCAN: That's my point.

MR. HUGHES: -- not really clear on that.

PROFESSOR DORSANEO: Well, they are not

1 certified. I think the statute is not 52 -- what is it,
2 021?
3 MR. HUGHES: Uh-huh.
4 PROFESSOR DORSANEO: -- that says that court
5 recorders -- or talks about them as if they need to be
6 certified as shorthand court reporters, but then the next
7 sentence after that says that in effect that they don't,
8 that you can make records if you're not a certified
9 shorthand reporter. These people, you're checking these
10 people are not all certified shorthand reporters?
11 MR. HUGHES: Some of them told me that
12 they're not.
13 PROFESSOR DORSANEO: So either they're --
14 and these orders say this is just somebody appointed by
15 the judge, the trial judge, without -- somebody appointed
16 by the trial judges qualified under a Government Code
17 provision, so I'm sure they're not required to be.
18 MR. HUGHES: Well, I think we're talking
19 about maybe two different things. The order clearly
20 contemplates that the recorder has the duty of making the
21 tapes and the logs and so forth. What people I was
22 talking to were uncertain of their ability to do is make a
23 transcription of that recording as the official transcript
24 because they said, "I can take the recording and certify
25 that, but I can't make the transcription because I'm not a

1 certified court reporter."
2 PROFESSOR DORSANEO: Well, the Court can
3 give them the authority but not the ability.
4 HONORABLE NATHAN HECHT: Well --
5 CHAIRMAN BABCOCK: Justice Hecht.
6 HONORABLE NATHAN HECHT: The county is just
7 going to farm it out.
8 PROFESSOR DORSANEO: Yeah.
9 HONORABLE NATHAN HECHT: I mean, if the
10 parties would rather pay the county in what I suspect will
11 be the county's profit margin to provide the transcript
12 then I don't see a problem with that, but if the parties
13 think they can do it more cheaply themselves then they
14 have that option, too.
15 CHAIRMAN BABCOCK: Justice Gaultney and
16 Judge Christopher had their hands up.
17 HONORABLE DAVID GAULTNEY: All I wanted to
18 say was that, yeah, the county is going to have to have
19 the ability to do it under the current rule. If they're
20 going to have a court recording system, the rule requires
21 that if somebody cannot pay then they will -- the county
22 will have it transcribed or transcribe it. The court
23 recorder will do it. The court recorder will do it.
24 That's what it provides.
25 Now, in terms of the reliability of the

1 transcript, the appendix provides the opportunity to
2 object for the party, and what this proposal does is
3 simply fold this transcription into that objection
4 process, so whether -- so the process is the same whether
5 you prepare the transcript, your office, or whether you
6 have a court recorder prepare the transcript. The other
7 side will have an opportunity to object, and I think in
8 terms of cost savings, what I'm told is that it's not so
9 much the cost of the transcriptions and things of that
10 that's driving a county to choose to go to a court
11 recording system. It's, in fact, the difference in cost
12 between a reporter and a recorder.
13 CHAIRMAN BABCOCK: Okay. Judge Christopher.
14 HONORABLE TRACY CHRISTOPHER: Well, that was
15 going to be my point. The court recorders are generally
16 less paid or lower paid than the reporters because they do
17 not have the ability to do a transcript. So, generally, I
18 mean, so to put the onus on them to prepare this
19 transcript seems wrong. Now, you know, maybe we could say
20 "have prepared" or get it prepared by someone qualified to
21 do it, but if you require them to prepare it as opposed to
22 delegating to somebody else then you're going to have to
23 have a more expensive person as the recorder, someone who
24 would have that ability.
25 PROFESSOR DORSANEO: We could certainly say

1 "prepare or have prepared" or "transcribe or have
2 transcribed." We could say that. I don't know how much
3 that differs from "prepare or transcribe" anyway, if you
4 think about it, but, I mean, that certainly could be done.
5 HONORABLE DAVID GAULTNEY: If I could
6 just -- the whole thing that's motivating this is an
7 attempt to comply -- an attempt to conform to what is, in
8 fact, the practice in --
9 CHAIRMAN BABCOCK: Right.
10 HONORABLE DAVID GAULTNEY: -- the courts
11 that we're seeing transcriptions come from, that is that
12 the court recorders are preparing them; and if that's the
13 case then why should -- if that's the case then the clerk
14 perhaps should have the -- our clerk perhaps should have
15 the ability to work with that recorder to get the thing
16 transcribed timely and filed timely so that then the
17 briefing deadlines can start.
18 CHAIRMAN BABCOCK: Judge Yelenosky and then
19 Pam.
20 HONORABLE STEPHEN YELENOSKY: Well, I can
21 understand that, but either we or I have lost track of
22 what we're trying to accomplish here, because I understand
23 when you have a court reporter, that person -- there is no
24 mechanism really to challenge the accuracy. I mean,
25 typically there is no mechanism to challenge the accuracy

1 of that, so the government has an obligation to make sure
2 that that person meets certain qualifications, and it can
3 be only that one person who transcribes it. So you have
4 to put some obligation on that person to transcribe it,
5 otherwise you deprive litigants of their transcription;
6 but with a recording, that's not true, so they're not
7 analogous, and so what are we trying to accomplish?
8 If anybody competent can do it, doesn't have
9 to be somebody who was in the courtroom, then the
10 government doesn't need to make the burden on that person;
11 and if, in fact, they're doing it fine then why do we need
12 the rule? If they're not doing it and maybe they're not
13 doing it in the 4(d) context or something, then we're
14 putting an obligation either on that person to be
15 qualified to do a transcription or on that low paid person
16 to find somebody who's qualified to do it, and why?
17 CHAIRMAN BABCOCK: Pam.
18 HONORABLE DAVID GAULTNEY: I guess --
19 MS. BARON: Go ahead.
20 HONORABLE DAVID GAULTNEY: I've had my fair
21 share. Go ahead.
22 MS. BARON: I guess I want to make sure that
23 we all understand that there's a difference between having
24 the talent to do a transcription and the legal ability
25 under the rules to do a transcription; and when you have

1 it recorded, the way the appendix works is that I could do
2 the transcription as long as it's in the right form. It
3 doesn't require a reporter's certificate, so it does not
4 require somebody who is certified as a court reporter to
5 do the transcription.
6 So anybody can do the transcription, but I
7 think where we're having the problem is some court
8 recorders don't have -- I mean, I can do the
9 transcription. It takes me forever to do it, but I can do
10 it, but some don't have the talent to type quickly from
11 oral notes. They are people who can set up technical
12 equipment, but they are not typists by trade, and so we're
13 talking about two different things, and apparently in your
14 counties you have recorders that have this additional
15 talent, but we do have counties where we have recorders
16 who don't, and the issue is do we need a rule that applies
17 the same to all of these people or do we just need
18 something that's flexible so that appellate courts like
19 yours can still work with them but not necessarily make
20 them have a talent that is expensive that they don't have.
21 HONORABLE STEPHEN YELENOSKY: Right. I
22 mean, the exclusive thing that a court recorders has that
23 the government has a responsibility to make sure they give
24 up is the recording, and if you make sure they give up the
25 recording in a timely fashion I don't see where we have an

1 obligation to further anything by making them do the
2 transcription, and we may harm things where it's going to
3 be complicated to get a governmental employee to do it,
4 and I haven't heard that there's a problem getting people
5 to do the transcriptions.
6 MS. BARON: I don't know.
7 HONORABLE DAVID GAULTNEY: I'm not sure that
8 the skill set necessary to listen and transcribe a tape
9 recording is that difficult for a county to find. I think
10 that it can be done, and we're finding that it is done.
11 Now, the only thing that I'm trying to figure out if we
12 can do is create a situation where if you try a case in
13 Liberty, Montgomery, Hardin, or Jefferson and you're a
14 lawyer and you send in your request to have a
15 transcription by the person who was in the courtroom
16 charged with making sure that was accurately transcribed,
17 that once making that request you could have some
18 assurance that that person then has the responsibility to
19 make sure that you are provided with something that you
20 can use to prepare your brief and that the record will not
21 be filed before that transcription is filed, because once
22 that record is filed your briefing deadlines are running.
23 That's all I'm trying to -- that's all I was hoping to
24 accomplish with the rule.
25 CHAIRMAN BABCOCK: Justice Duncan.

1 HONORABLE SARAH DUNCAN: I think that
2 request to transcribe evidences a lack of understanding of
3 the rules because there is no duty to transcribe. The
4 rule was intentionally drafted that there be no duty to
5 transcribe, and when you say that doesn't take a lot of
6 skill, but one of the things we gain by having court
7 reporters is court reporters and judges work together to
8 ensure that no one talked over another person. I don't
9 know that -- I don't know if we have that with court
10 recorders. I just -- I don't know, but when people start
11 talking over one another, as our court reporter here will
12 testify to, it's exceptionally difficult --
13 HONORABLE STEPHEN YELENOSKY: How would she
14 know that, that never happens.
15 HONORABLE SARAH DUNCAN: -- to record it,
16 and I'm just brought back to the summary of the issue on
17 page eight of Justice Hecht's letter which sets out the
18 reasons Judge Gaultney has suggested this. One is parties
19 to appeals often must request extensions of time because
20 the electronic recordings of the trial have not been
21 transcribed at the time the parties file them with the
22 court of appeals, which is the event that triggers the
23 countdown for filing briefs. Well, if that's true then
24 the appellant hasn't done its job, because the appellant
25 ought to be transcribing that record and attaching it as

1 an appendix to its brief, not waiting around for a court
2 reporter or court recorder to do that.
3 HONORABLE STEPHEN YELENOSKY: Unless they're
4 indigent. That problem has to be dealt with.
5 HONORABLE SARAH DUNCAN: That problem does
6 have to be dealt with. And the second is needless delay
7 results while the parties obtain a transcription. Well,
8 that delay is going to occur regardless of who does the
9 transcription, and I would suggest given what I have seen
10 of court reporters in the last 12 and, you know, to 20
11 years that when you add this to the list of records court
12 reporters have to prepare, the delay is going to be much
13 bigger with a court reporter, most court reporters, than
14 it's going to be with a secretary in a lawyer's office who
15 wants to get this appeal on down the road.
16 CHAIRMAN BABCOCK: Okay. Jody.
17 MR. HUGHES: I just wanted to mention also
18 that the Senate Jurisprudence Committee had an interim
19 charge on this, you know, just finishing up over the
20 summer, and I can't remember the exact wording of the
21 charge, but it dealt with the court recorder issue, and
22 they had some hearings on it a couple months back, and I'm
23 just saying this to follow up on Professor Dorsaneo's
24 question about where is this going sort of in the future.
25 We may see legislation on this, because the subcommittee

1 was very interested about how much power they gave the
2 Supreme Court to allow this, because a lot of this is
3 under statute under Chapter 52 of the Government Code, and
4 I think there were members of the subcommittee who
5 expressed an interest in possibly restricting this pilot
6 project further, or maybe they would want to expand it, I
7 don't know, but we may see legislation on this.
8 HONORABLE STEPHEN YELENOSKY: I heard
9 they're going to get an iPOD for every appellate judge,
10 just listen directly.
11 HONORABLE JANE BLAND: Now they want to get
12 us king-sized monitors so that we can read the appellate
13 record on screen rather than on paper, so you may not be
14 far from the truth.
15 CHAIRMAN BABCOCK: There you go. All right.
16 Have we had any more comments about this proposal? Any
17 last words, Bill, about this before we vote?
18 PROFESSOR DORSANEO: Well, there is a
19 question after about the 15-day thing. Okay. I mean, if
20 people want to do this then I think there's a -- it would
21 be a good idea, although not a necessity, to make the
22 appellate rules either reflect or conform with the time
23 periods in the separate orders.
24 CHAIRMAN BABCOCK: Right.
25 PROFESSOR DORSANEO: Or maybe the appellate

1 rules, you know, be the timetable, suggest to the Court to
2 change those orders.
3 CHAIRMAN BABCOCK: Right.
4 PROFESSOR DORSANEO: But that's more
5 mechanically complicated, and it can wait.
6 CHAIRMAN BABCOCK: Yeah. So right now we're
7 talking about 13.2(f), and we're going to vote on the
8 language, although, deleting the word "stenographic,"
9 right, Bill?
10 PROFESSOR DORSANEO: Yes.
11 CHAIRMAN BABCOCK: Okay. So everybody in
12 favor of this change raise your hand.
13 All opposed? By a vote of 16 to 7 it
14 passes.
15 PROFESSOR DORSANEO: The other -- then the
16 other stuff I think correctly matches that vote, okay, you
17 may want to take an individual vote on those things, too,
18 Mr. Chairman, but I think that matches. But I think there
19 is this other issue. 13.2(f) as just approved would mean
20 taking into account the separate orders and the appellate
21 rules that this transcription of the proceedings is filed
22 within -- within 15 days after the perfection of an
23 appeal, because that's when the electronic recorder's
24 record is to be filed under these separate orders.
25 CHAIRMAN BABCOCK: Right.

PROFESSOR DORSANEO: Nothing in the appellate rule says anything about that. Now, they don't need to, but it would be nice if they did. Otherwise, how is somebody going to know? I mean, we could write -- we could write it into (f), you know, if we want to make these orders in the rule book, just say "within 15 days after the perfection of the appeal." We could do that, but Justice Hecht's response is that's a reasonable time to get it done.

HONORABLE SARAH DUNCAN: But that was just to get the tapes filed.

PROFESSOR DORSANEO: Yeah. That's what I'm talking about. The reporter's record is what the transcription is filed along with, and that reporter's record, the electronic reporter's record, is filed under these orders within -- supposed to be filed under these orders within 15 days after the perfection of an appeal.

HONORABLE SARAH DUNCAN: The tapes.

PROFESSOR DORSANEO: Yes. But this says "and the transcription." Now, that's probably too early.

CHAIRMAN BABCOCK: Frank.

HONORABLE SARAH DUNCAN: What says "and the transcription"?

MR. GILSTRAP: It is too early if we're going to require the filing of the transcript. It makes

sense to move it out. The one problem I have is, as I understand the reason for the requirement of prompt filing of the tapes was a security reason, and I understood that the one time I went to the court of appeals and I asked for the record and they gave me two cassette recordings. I mean, the whole idea is to get them in the hands of the court of appeals so presumably they can be duplicated, they can't be destroyed, that type of thing. So I think it's a security issue. Maybe that's not a problem in the days of CDs. Maybe people automatically get those from the court recorder. I don't know, but I think that's what was prompting the need for promptly getting that in the hands of the court of appeals.

HONORABLE SARAH DUNCAN: Actually, it was -- my memory was that it was so that the parties and lawyers could then go and transcribe the record.

MR. GILSTRAP: Okay.

PROFESSOR DORSANEO: Well, I guess going back and looking at it, the way we just approved is saying it's too early if it's 15 days, so it ought to say some other time. Huh? David, do you see any reason just saying some other time?

HONORABLE DAVID GAULTNEY: Well, the problem I see is that the appellate rules say that the recorder's record, which are the tapes, will be filed within a

1 certain period of time just like the reporter's record, so
2 there is actually an inconsistency --
3 PROFESSOR DORSANEO: Yes.
4 HONORABLE DAVID GAULTNEY: -- between the
5 appellate rules and the 15-day requirement, which says the
6 court recorder shall file a recorder's record with the
7 court of appeals within 15 days, so I would like to take
8 out that 15-day requirement. I've sat in orders of the
9 Supreme Court authorizing these programs, but I think
10 that's the problem, because if that is -- if it is a
11 requirement that it be filed within 15 days then obviously
12 the transcription cannot be prepared within that period of
13 time.
14 CHAIRMAN BABCOCK: Justice Duncan.
15 HONORABLE SARAH DUNCAN: Well, if you're
16 still going to -- if your proposals here are still going
17 to allow the parties and their attorneys to transcribe
18 these, they need to have the official record as soon as
19 possible to start that job.
20 HONORABLE DAVID GAULTNEY: Right.
21 HONORABLE SARAH DUNCAN: And I don't see
22 what's wrong with 15 days.
23 HONORABLE DAVID GAULTNEY: Well, it's the
24 filing -- it's the filing of the record that's the
25 problem. Getting -- if 15 days were the day in which they

1 were required to provide certified copies to the attorney,
2 that's not a problem. But once the record is filed --
3 HONORABLE SARAH DUNCAN: Wait. I think
4 you're confusing the terms "record." The record is the
5 tapes.
6 HONORABLE DAVID GAULTNEY: Right. That's
7 what I'm saying.
8 HONORABLE SARAH DUNCAN: The transcription
9 is something different --
10 HONORABLE DAVID GAULTNEY: I agree.
11 HONORABLE SARAH DUNCAN: -- and under the
12 rules now the transcription doesn't have to be filed until
13 they file their brief.
14 HONORABLE DAVID GAULTNEY: The way the
15 proposed rule is, is that -- you're talking about the way
16 the current rules are or the proposed rule?
17 HONORABLE SARAH DUNCAN: Current.
18 HONORABLE DAVID GAULTNEY: Okay. You're
19 right. The transcription does not have to be filed until
20 the appendix is filed, absolutely. The proposal, which is
21 what I thought we were talking about this 15-day and how
22 it fits with the proposal, the proposal is that the
23 transcription will not be filed until the reporter's
24 record is filed. I mean that the reporter's record will
25 not be filed until the transcription is filed.

1 Now, what that in effect does is you then as
2 an attorney have the transcription just like you would
3 have it with a court reporter situation. When the
4 reporter's record is filed you'll also have the
5 transcription, just like you would in the reporter's
6 record context. So the idea is to have the deadline start
7 to run on your briefing as soon as you have the
8 transcription that you have requested and that has been
9 filed.
10 Now, the problem with that is that the 15
11 days in the orders is a order to file the tapes, which is
12 the official record in the recorder's context. That seems
13 inconsistent with the appellate rules and with the
14 proposal that we just voted on.
15 CHAIRMAN BABCOCK: Justice Gray had his hand
16 up a minute ago, and then Frank and then Bill again.
17 HONORABLE TOM GRAY: Well, mine was to echo
18 or actually to state something that Sarah did, and
19 basically, I think what they've done, Sarah, is they've
20 changed the presumption that no longer will the attorney
21 or his staff or anybody else -- the presumption is now
22 going to be none of that is going to be done, everybody is
23 going to request the transcription, and so there is no
24 private preparation anymore.
25 HONORABLE SARAH DUNCAN: In which case we

have pretty much lost the whole reason for having court recorders anyway, which is my point.

PROFESSOR DORSANEO: Maybe we're not finished. These orders, the little separate orders that go to each county have yet another paragraph in them about duties of court recorders, and that paragraph says that "The court recorder is to prepare or obtain a certified copy of the original recording upon full payment" -- this one -- "of $150 per copy imposed therefore at the request of any party entitled to such recording or at the direction," blah-blah-blah, so the way -- the place under this engineering looked at altogether that you get the thing to work on in your own office is back at the court recorder, not at the court of appeals.

HONORABLE DAVID GAULTNEY: Exactly. The tape at the --

PROFESSOR DORSANEO: So something like this needs to be added in, too, in order to have the full mechanics down, regardless of what we do about the 15 days.

HONORABLE DAVID GAULTNEY: Exactly. I mean, that's the way if you want to do it yourself you still have that option. That's not eliminated. You just request a certified copy of the tapes from the court recorder, and she's or he's required to give them to you.

1 CHAIRMAN BABCOCK: Frank.
2 MR. GILSTRAP: Why don't we just start the
3 appellate timetables running when the transcript is
4 prepared, the transcription is prepared? I mean, that's
5 what you want, isn't it?
6 HONORABLE DAVID GAULTNEY: Right.
7 HONORABLE TOM GRAY: No.
8 PROFESSOR DORSANEO: No.
9 HONORABLE TOM GRAY: And the reason for that
10 is if you start the appellate timetable from that date,
11 everything is delayed until it's filed, and we don't even
12 have a system for monitoring it then because there is no
13 deadline by which to get it filed. If I understand what
14 you're saying, we just sit and wait.
15 HONORABLE DAVID GAULTNEY: Well, there is a
16 a bigger problem in the sense that we have a separate
17 system for the transcription and assuring its accuracy
18 because we have the recorder's system, and that is we put
19 it through an objection process. Okay. So you could
20 either file it as a copy to your appendix or it could be
21 prepared by the court recorder, but in any event it's
22 going to go through an objection process that a court
23 reporter's process would not. It could go through.
24 CHAIRMAN BABCOCK: We didn't make copies of
25 this, Bill. Bill, are you directing us toward changing or

modifying 34.6, 35.3, and 38.5?

PROFESSOR DORSANEO: Yeah. Those changes, I think, are just mechanical changes that are required to implement this other vote.

CHAIRMAN BABCOCK: Okay. I agree with that. Does anybody disagree with that? Okay. So that language we'll recommend to the Court. The problem you're talking about now is these --

PROFESSOR DORSANEO: The problem is that I don't think the subcommittee went far enough in drafting proposed changes to 13.2 primarily. I think we need to add in a paragraph that's in all of these separate orders that says that the court recorder is supposed to sell you the tapes.

CHAIRMAN BABCOCK: And do you think that ought to be in the separate orders or 13.2?

PROFESSOR DORSANEO: Everything else in 13.2, so why not put that in as well? Is there any reason to just kind of leave it over there in the separate rules that, you know, Justice Gaultney told us, "Well, look in your West book, they're at page 439. That's where you can find this information." Maybe we could say something like that. Okay. Or we could just put it in the rule.

CHAIRMAN BABCOCK: "For an additional trap, see page 439."

HONORABLE DAVID GAULTNEY: Yeah, but the Court of Criminal Appeals orders are not in the rule book yet, but I think it ought to be in there.

CHAIRMAN BABCOCK: Frank, did you have something to say? I'm sorry.

MR. GILSTRAP: Let's try this. Let's try having the tapes filed within 15 days and then a requirement that within so many days after that the transcription has to be ready, and that's going to put it on the appellant. If he doesn't meet it, he's got to get an extension, just like the old days.

CHAIRMAN BABCOCK: How does that grab you, Bill?

PROFESSOR DORSANEO: Well, it's an interesting approach, but I think we've done enough drafting on this for hours and hours and hours that I'm reluctant to go back to start over if we're close and if it's, you know, reasonable.

CHAIRMAN BABCOCK: Justice Gaultney.

HONORABLE DAVID GAULTNEY: I just have a hard time understanding the need for the 15 days, because essentially they get filed there, no one ever looks at them or touches them or anything. It's just a now the deadline starts on the briefing deadline. I don't know of any reason why it could not be -- if that 15 days were

1 removed from the authorizing orders then this would flow
2 just like your reporter's record, just like everything
3 else. That's the only problem.
4 PROFESSOR DORSANEO: I think we still have
5 to say something, because this transcription is not really
6 covered by 35.1, because 35.2 says that the reporter's
7 record is -- is the electronic recording.
8 HONORABLE DAVID GAULTNEY: Right. But the
9 transcription, remember, as Justice Duncan pointed out, is
10 not the recorder's record. It is simply by our
11 amendment --
12 PROFESSOR DORSANEO: Okay.
13 HONORABLE DAVID GAULTNEY: -- to the
14 appendix rule, it is placed into the objection process.
15 PROFESSOR DORSANEO: All right. I take that
16 back. I guess it would work if we just had the 15 days
17 taken out of the separate orders. Is that possible?
18 HONORABLE SARAH DUNCAN: Holy -- you-all are
19 just assuming that there is going to be a transcription by
20 a court employee. Think about the situation where a
21 defendant -- the recording is filed on the 15th day, but
22 it's not required to be filed on the 15th day. It's only
23 just a transcription is supposed to be filed with the
24 defendant's brief. Well, the time is never going to start
25 running. What incentive does that defendant have to file

1 a transcription when there's no deadline for filing the
2 transcription? We don't have the authority over the
3 defendant that we have over an official court reporter.
4 HONORABLE DAVID GAULTNEY: No. No. The
5 record that must be filed, the tapes, okay, currently the
6 appellate rules treat -- doesn't have a 15-day
7 requirement, the rules themselves. So if you look just at
8 the rules and did not look at the order, okay, you would
9 think that the time for filing the tapes would be the same
10 as the time for filing a reporter's record.
11 PROFESSOR DORSANEO: Because that's what it
12 says.
13 HONORABLE DAVID GAULTNEY: Because that's
14 what it says. So you would think that your briefing would
15 start at that point, that you would have that much time to
16 file it. The only -- where that 15-day comes in is from
17 the order.
18 Now, if it's a problem in terms of someone
19 preparing the transcript themselves and needing it, and if
20 that's the 15-day requirement that needs to be
21 implemented, then I would suggest the better place to put
22 it is to take this requirement that you prepare and obtain
23 a certified copy of the original recording and provide it,
24 put that as one of the duties, (g), and put a 15-day
25 requirement on that. And now you don't have -- you're

1 taking that 15-day requirement which triggered the
2 briefing deadline before, now you're simply giving the
3 attorney access to the certified copies, but you're not
4 starting their briefing deadline with that time period.
5 CHAIRMAN BABCOCK: Justice Gray.
6 HONORABLE TOM GRAY: Like I said, we've only
7 had one of these, and obviously Justice Gaultney has had
8 more experience with this, but is it my understanding that
9 the parties cannot check out the tapes that are filed with
10 the court of appeals?
11 HONORABLE DAVID GAULTNEY: They do not.
12 They go to the court recorder and get copies if they want
13 to do it, but --
14 HONORABLE TOM GRAY: I know they can, but is
15 there any prohibition to them coming and checking out the
16 copies that are at the court of appeals?
17 HONORABLE DAVID GAULTNEY: I know of none in
18 the rules.
19 HONORABLE TOM GRAY: Because I think that's
20 what was done in the one case we had.
21 PROFESSOR DORSANEO: There should be.
22 Rosemary Woods.
23 HONORABLE DAVID GAULTNEY: I'm not sure our
24 clerk would do it, but --
25 HONORABLE TOM GRAY: My question, if it must

be transcribed, why do we need the tapes at the court of appeals anyway?

HONORABLE DAVID GAULTNEY: That's a good question.

CHAIRMAN BABCOCK: Bill, for the record, would you please explain to Jody who Rosemary Woods is? He's never heard of Rosemary Woods.

HONORABLE STEPHEN YELENOSKY: I told you, we're all getting older.

HONORABLE SARAH DUNCAN: He's too young.

PROFESSOR DORSANEO: 17 minutes.

CHAIRMAN BABCOCK: Eighteen and a half.

PROFESSOR DORSANEO: Eighteen and a half. Nixon's secretary.

HONORABLE DAVID GAULTNEY: That's particularly true since the rules expressly provide that the court of appeals doesn't have to listen to the record, listen to the tape.

CHAIRMAN BABCOCK: Okay. So where are we?

HONORABLE DAVID GAULTNEY: I guess my proposal would be --

HONORABLE JAN PATTERSON: So who is Rosemary Woods?

CHAIRMAN BABCOCK: Justice Gaultney, your proposal would be --

1 HONORABLE DAVID GAULTNEY: My proposal would
2 be that we consider -- there is a paragraph, as Professor
3 pointed out, in the orders that says, "The court recorder
4 has responsibility for preparing or obtaining a certified
5 copy of the original recording of any proceeding upon full
6 payment" -- I don't know if you want to put the amount in
7 it -- "per copy imposed thereon at the request of any
8 person entitled to such recording." My suggestion would
9 be to take that duty and place it in the appellate rules
10 as a duty so that an attorney knows that they have the
11 ability to do that, to get a certified copy to prepare
12 their own transcript, and that a 15-day deadline be put on
13 that.
14 My second proposal would be that the orders
15 be amended to remove the 15-day requirement for filing in
16 the court of appeals and, therefore, same deadline would
17 be for the other reporter records.
18 CHAIRMAN BABCOCK: Okay. And the language,
19 let's take it one at a time. The language you propose,
20 you would put into 13.2(f)?
21 HONORABLE DAVID GAULTNEY: I guess it would
22 be (g). So it's not dependent on you requesting anything.
23 You have an alternative to request the certified copies of
24 the transcript. They're under a responsibility to provide
25 that in both criminal and civil cases. It's just not in

1 the rule.
2 CHAIRMAN BABCOCK: Okay. How do people feel
3 about that? Justice Duncan, did you follow what he was
4 trying to do?
5 HONORABLE SARAH DUNCAN: I'm voting against
6 all of this. I think we're really messing up a system
7 that I --
8 HONORABLE STEPHEN YELENOSKY: We already
9 lost that vote.
10 HONORABLE SARAH DUNCAN: I know, and I
11 appreciate what Justice Gaultney has said, and --
12 CHAIRMAN BABCOCK: Okay. So 13(g) as he
13 proposed it, you're against. Okay. How does everybody
14 else feel about this proposed 13.2(g)? Bill?
15 PROFESSOR DORSANEO: (f), (g), either ask
16 the recorder to do it or do it yourself. Ask the recorder
17 to do it or give me the tape, give me a certified copy of
18 the tapes. Seems like it makes sense to me.
19 CHAIRMAN BABCOCK: Okay. Anybody else?
20 Well, Justice Gaultney, you want to vote on that, your
21 proposed 13.2(g)?
22 Okay. Everybody in favor of that raise your
23 hand.
24 All right. All opposed? 14 to 4 that
25 passes. Okay. Now, your second proposal is to get the

1 Court to take 15 days out of its orders?
2 HONORABLE DAVID GAULTNEY: Yes, sir.
3 Respectfully.
4 CHAIRMAN BABCOCK: Okay. You going to get
5 right about that?
6 HONORABLE NATHAN HECHT: Yeah, I mean,
7 lawyers always want more time, so --
8 CHAIRMAN BABCOCK: Any discussion on that?
9 I'm not sure everybody has got the orders that you're
10 referring to.
11 HONORABLE TOM GRAY: We don't.
12 PROFESSOR DORSANEO: If you have a West rule
13 book it's on page 439.
14 MR. SCHENKKAN: Oh, you meant that.
15 PROFESSOR DORSANEO: Yeah.
16 CHAIRMAN BABCOCK: We thought you were
17 kidding.
18 And if you take out the 15 days do you
19 replace it with any period of time or --
20 PROFESSOR DORSANEO: Nope.
21 CHAIRMAN BABCOCK: -- just have no limit?
22 MR. HAMILTON: Take out that whole
23 paragraph.
24 HONORABLE DAVID GAULTNEY: I think by taking
25 out that time period your appellate rules then govern the

1 time for filing the recorder's record, which would be the
2 tapes.
3 HONORABLE TOM GRAY: Just for grins, what if
4 the court recorder -- and I'll even broaden it to the
5 court reporter -- needed an extension of time in which to
6 file it?
7 HONORABLE DAVID GAULTNEY: We get routine
8 requests for extension of time from reporters, you know,
9 in preparing their transcript.
10 HONORABLE TOM GRAY: Could you show me where
11 in the rules that's authorized, that a court reporter or a
12 court clerk gets to ask for an extension of time?
13 HONORABLE DAVID GAULTNEY: I know they're
14 pretty routine.
15 HONORABLE TOM GRAY: I know they're very
16 routine.
17 HONORABLE SARAH DUNCAN: It's not in there.
18 It's not in there by design.
19 HONORABLE TOM GRAY: Well, I agree, but they
20 don't have to serve those motions, the parties don't know
21 that it's happening. All of the sudden they get an order
22 from the court of appeals that the clerk's record has been
23 extended 30 days.
24 HONORABLE DAVID GAULTNEY: And I know that's
25 a problem, and it depends on particular courts and

whatever. I know your court probably deals with some of the problems, but I don't think we're going to solve that problem here.

HONORABLE TOM GRAY: I just thought this would be a good opportunity to solve it. We're talking about giving them more time to do it, so why not formalize a process or eliminate the process that we currently have of granting extensions?

HONORABLE DAVID GAULTNEY: They will have 15 days to prepare the tapes for the attorneys. What we're --

HONORABLE TOM GRAY: It was a rhetorical question in a way.

HONORABLE DAVID GAULTNEY: I'll address any question you have.

HONORABLE TOM GRAY: It's a very real problem of how court clerks and court reporters get extensions in the courts of appeals because they do not have to ask -- or serve the parties with their request, and it's just routinely done, almost in the dark. The parties have no opportunity to object to it or do anything.

HONORABLE DAVID GAULTNEY: Exactly.

HONORABLE TOM GRAY: And we ought to fix it, and since we're in that area, we ought to fix it as part

1 of this, but it's probably not on our list of things to
2 fix today.
3 CHAIRMAN BABCOCK: Probably not. But so
4 your proposal would be to eliminate paragraph (4) of these
5 rules found at page 439 through 440 of the West rules.
6 HONORABLE DAVID GAULTNEY: Yes.
7 CHAIRMAN BABCOCK: That's the proposal?
8 Okay. Bill? Any thoughts about that?
9 PROFESSOR DORSANEO: I think it's paragraph
10 (4) of all of these orders, but I'm not sure. There are
11 other ones, some later ones.
12 HONORABLE DAVID GAULTNEY: And there would
13 be -- I think I'm correct in saying there are Court of
14 Criminal Appeals orders, companion orders, that go with
15 these for the criminal cases.
16 CHAIRMAN BABCOCK: Is there going to be a
17 different --
18 HONORABLE DAVID GAULTNEY: I think that
19 they're identical.
20 CHAIRMAN BABCOCK: I know, but if we strike
21 a paragraph, is the criminal rules going to be different
22 now?
23 HONORABLE TOM GRAY: Yes.
24 HONORABLE DAVID GAULTNEY: What I'm saying
25 is, is that I don't think that the appellate time line

will change. I mean, the filing of the reporter's record.

CHAIRMAN BABCOCK: Okay. Any other discussion about striking paragraph (4) from these rules? Ready to take a vote on this?

MR. HAMILTON: Let me ask one question. I'm a little bit confused about the --

CHAIRMAN BABCOCK: Carl.

MR. HAMILTON: The original tapes, upon David Gaultney's suggestion on (g), the original tapes go where?

PROFESSOR DORSANEO: Court of appeals.

MR. HAMILTON: No. They don't go to the court of appeals.

HONORABLE DAVID GAULTNEY: Under (g) it's not a filing requirement. It's a preparation requirement. The one that we just talked about?

MR. HAMILTON: Yeah.

HONORABLE DAVID GAULTNEY: It's a preparation requirement that is currently in the Supreme Court orders; that is, it's one of the duties of the court recorders, is to prepare or obtain a certified copy of the original recording for a person requesting it who is entitled to it.

MR. HAMILTON: That's a copy, though.

HONORABLE DAVID GAULTNEY: A certified copy,

yes. The originals stay with the court recorder even under current practice.

MR. HAMILTON: That's my question. The original always stays with the court recorder?

HONORABLE DAVID GAULTNEY: Yes.

MR. HAMILTON: They don't even get filed with the trial district clerk?

HONORABLE DAVID GAULTNEY: A certified copy gets filed with us.

MR. HUGHES: I think it depends on the recorder, because some of them told me that they won't -- they don't want the court of appeals to have the original. Some of them told me that they did give the court of appeals the originals, and I think it depends also now because some of them are doing it on digital, their product is a digital CD, which the recording quality of that doesn't diminish when they make copies as opposed to the old-fashioned tapes that can break and diminish.

HONORABLE DAVID GAULTNEY: Well, Rule 34.6(2) says that it's certified copies to be filed with us, and the orders provide that the court recorder is to provide for storage and safekeeping of it.

CHAIRMAN BABCOCK: Any other questions? Discussion?

All right. Everybody that is in favor of

1 the proposal to remove paragraph (4) from the rules
2 governing the procedure for making a record of court
3 proceedings by electronic recording, found at pages 439
4 and 440 and perhaps elsewhere in the West rules, raise
5 your hand.
6 All those opposed? By a vote of 11 to 5 it
7 passes.
8 HONORABLE SARAH DUNCAN: Are we convincing
9 somebody?
10 CHAIRMAN BABCOCK: We're shrinking here on
11 the vote. We went from 16 to 7 to 14 to 4 to 11 to 5.
12 HONORABLE SARAH DUNCAN: That's right, we're
13 picking people up here. Let's keep going, because this is
14 a bad idea.
15 CHAIRMAN BABCOCK: You want to have an
16 overall vote, Sarah? Maybe we could win this one. Okay.
17 That -- I think that finishes the court reporter issues,
18 does it not, Bill and Justice Gaultney?
19 PROFESSOR DORSANEO: It does, insofar as
20 we're prepared to deal with it today.
21 CHAIRMAN BABCOCK: Right. So that takes us
22 to 20.1, the civil cases?
23 PROFESSOR DORSANEO: Yes.
24 CHAIRMAN BABCOCK: Okay.
25 PROFESSOR DORSANEO: Now, Justice Hecht's

1 letter asked us to deal with a particular problem that
2 involves I guess, fairly stated, an ambiguity in current
3 (c)(1), which is right in the middle of the page as
4 (d)(1). Right now an appellant who is going to claim
5 indigence needs to file an affidavit of indigence in the
6 trial court with or before the notice of appeal. Why it
7 says "with or before" is an interesting question, rather
8 than just say "with," but that's what it says.
9 The ambiguity that's created here is that in
10 many cases the person who becomes the appellant will have
11 filed an affidavit of indigence in the trial court already
12 in accordance with civil procedure Rule 145, so the first
13 point that we decided on was to make it clear to
14 appellants that they need to file another one, a current
15 one in accordance with appellate Rule 20, and that's what
16 this sentence is about. "The prior filing of an affidavit
17 of indigence in the trial court pursuant to civil
18 procedure Rule 145 does not meet the requirements of this
19 rule, which requires a separate affidavit and proof of
20 current indigence," which is not, you know, the only
21 language that could be used, but it at least clears up the
22 requirement for filing something else. Okay? And that
23 sent us to look at Rule 145, which had been amended by the
24 Court in 2000 -- let's see, 2002, 2003.
25 MR. HUGHES: 2005.

1 PROFESSOR DORSANEO: Huh? 2005. All right.
2 That later amendment, later than the draft of what we're
3 amending appellate rule -- appellate Rule 20 made current
4 Rule 145 a more recent version of an affidavit of
5 indigence rule than -- in the trial court rules than we
6 have in the appellate rules, so we thought that it might
7 be a good idea to make companion changes or at least
8 present to the committee that companion changes maybe
9 should be made in appellate Rule 20 like the changes that
10 were made in Rule 145.
11 Now, the biggest change in Rule 145 that is
12 a 2005 rule is to say that if a party is represented by an
13 attorney who is providing free legal services without
14 contingency -- well, it's written -- it's verbatim taken
15 right there in that underlined paragraph (c), that
16 subdivision (c). If there's an IOLTA certificate filed,
17 "a party's affidavit of inability accompanied by an IOLTA
18 certificate may not be contested," kind of that takes care
19 of this issue, and we didn't see any reason -- we didn't
20 have a lot of discussion about it, but we didn't see any
21 reason why the rules shouldn't be the same completely for
22 the trial court and the appellate court, and I think that
23 they are otherwise the same with respect to the contents
24 of the affidavit and the contesting business, with the
25 primary exception being once you get into the court of

1 appeals the primary contestant is going to be a different
2 person, going to be the court reporter rather than a party
3 or a court clerk.
4 So that's our recommendation. Now, there's
5 an additional issue related to (d)(2) and the Higgins
6 case, but I think we can wait on that until -- if that's
7 okay with you.
8 CHAIRMAN BABCOCK: Sure. Absolutely.
9 Stephen.
10 HONORABLE STEPHEN YELENOSKY: I agree that
11 this needs to parallel the trial court, but there's one
12 glitch I think that it may create here. If you have a
13 Legal Aid attorney represented through the trial but then
14 he is not going to represent on appeal, can that attorney
15 certify or does it have to be representation on the
16 appeal? One question.
17 PROFESSOR DORSANEO: This is outside my
18 experience, okay, so you have to tell me what we need to
19 do to make it work.
20 HONORABLE STEPHEN YELENOSKY: Well, the
21 important -- just as with (d)(1), the question is whether
22 they remain indigent, because obviously it could have
23 changed and particularly if something has dragged on for a
24 while, so it would be less important -- I mean, it's not
25 significant as to whether or not the attorney continues to

1 represent them. What's significant is that they were
2 screened for eligibility proximate to whatever they're
3 doing, and if it's the initial representation then the
4 current civil procedure rules sort of deem that they've
5 been screened for eligibility and through to judgment
6 they're indigent.
7 So you're doing another checkpoint at the
8 appellate level. Logically, I don't know, because, I
9 mean, logically it would depend, because if you got there
10 quickly one would say that should be sufficient. On the
11 other hand, maybe not. So if it's been quite awhile there
12 could have been a change in circumstances, so I'm not sure
13 what the answer is. I'm just saying that ambiguity is
14 there.
15 On (d)(1), my only question is why didn't
16 you suggest taking out the "or before," because with the
17 term "current" and leaving "with or before" it sort of
18 raises the question as to what do you mean by current. At
19 the time I filed the appeal, because I can file the
20 affidavit of indigency before I file the appeal? And
21 maybe we ought to be specific as to the time frame to
22 which you are certifying your indigence, because then
23 otherwise maybe we're going to have some argument about
24 that where we don't need to.
25 CHAIRMAN BABCOCK: Buddy.

1 MR. LOW: Wouldn't that be up to -- I mean,
2 somebody comes into some money even during the process,
3 can't the other party question, say, "Wait a minute. He's
4 come into money"? Couldn't you do that? Isn't it best to
5 just do it once, and if somebody questions, if they come
6 into money and no longer indigent, wouldn't they then need
7 to file and say, "Wait a minute, things have changed"?
8 Couldn't they do that?
9 HONORABLE STEPHEN YELENOSKY: Well, up
10 until judgment -- I mean, when they first file --
11 MR. LOW: Yeah.
12 HONORABLE STEPHEN YELENOSKY: -- they're
13 getting by the filing fee.
14 MR. LOW: Right. No, I understand.
15 HONORABLE STEPHEN YELENOSKY: Yeah, that
16 issue. I guess there are other things that -- where
17 indigency could matter, but you could take out -- for the
18 appellate rule you could take out that the certificate may
19 not be contested, I guess, and make it prima facie proof
20 of indigence. If the certificate had been filed in the
21 trial court I guess you could say at the appellate level
22 unless contested that establishes indigency but make it
23 subject to contest on the grounds that, well, yeah, that
24 was five years ago. I don't know. It's an issue, though.
25 CHAIRMAN BABCOCK: Justice Gray.

1 PROFESSOR DORSANEO: What you're saying,
2 you're saying there wouldn't be any screening over again,
3 there wouldn't be any IOLTA screening over again unless --
4 HONORABLE STEPHEN YELENOSKY: Yeah, I mean,
5 a Legal Aid attorney would not screen them over again. I
6 mean, they might sua sponte do that, but there's no
7 obligation to do that. I don't think they would do that,
8 and moreover, you know, they're going to decide whether it
9 ought to be appealed or not, and I've never -- when I was
10 a Legal Aid lawyer I never considered at the time I
11 considered an appeal whether their income status had
12 changed. Nine times out of ten it probably hasn't, but to
13 be fair to foreclose somebody from contesting that after
14 there's been a long passage of time, may be fair.
15 PROFESSOR DORSANEO: So what you're saying
16 is the IOLTA certificate is not actually going to be proof
17 of current indigence unless this case moved very quickly?
18 HONORABLE STEPHEN YELENOSKY: Well, it isn't
19 in the trial court either, because by judgment the person
20 may no longer be indigent, but the civil procedure rules
21 have said we don't care about that. It's irrebuttable and
22 all the way through judgment, so the question is do we
23 want to make it irrebuttable into the court of appeals,
24 because it could take five years from filing the lawsuit
25 to judgment, and our current rules don't allow you to

raise it again, so maybe we want to say it doesn't matter. If you were indigent in the trial court, that's sufficient. We don't look at it during the course of the trial court proceedings and then we're not going to look at it again at the point of appeal. That's a policy decision.

CHAIRMAN BABCOCK: Justice Gray and then Justice Duncan.

HONORABLE TOM GRAY: Well, I have seen very few people's financial status change during the course of litigation.

HONORABLE STEPHEN YELENOSKY: Right.

HONORABLE TOM GRAY: Other than to get worse possibly.

HONORABLE STEPHEN YELENOSKY: Usually there's a connection between the two.

HONORABLE TOM GRAY: Yeah. Until the point of judgment. They may change there, and I can tell you there is a lot of time spent to determine this issue at the appellate court level that I think is essentially wasted time, but because the rule is written like it is, we have felt compelled to deal with it, and I feel like after the Higgins vs. Randall County Sheriff's case there will be more spent, but it will be spent in an after the fact correcting for the indigence determination, and I

1 would strongly suggest that a much more efficient use of
2 our time -- not of this committee's, but of the courts of
3 appeals' time would be to simply presume that indigence
4 once established remains and that unless and until it is
5 challenged after notice and opportunity for a hearing,
6 that that remains the status of the individual, and any
7 subsequent determination or review must include an
8 allegation of a changed circumstance or new evidence which
9 the movant has the burden to prove in addition to proving
10 nonindigence; and that way the court reporter at the end
11 of trial when they become a vested player in the indigence
12 determination, if they can turn up some evidence that this
13 person is not, in fact, indigent or the circumstances have
14 changed, they can challenge the indigence determination if
15 they want to, but basically, once established and
16 accepted, it ought to just stay there. Frankly, you know,
17 our financial interest in it as the state or the court of
18 appeals is 125-dollar filing fee, $10 on motions. It's
19 just not worth our time.
20 HONORABLE STEPHEN YELENOSKY: It's going to
21 be the court reporter.
22 HONORABLE TOM GRAY: Yeah, it's going to be
23 the court reporter.
24 HONORABLE STEPHEN YELENOSKY: So for your
25 purposes you would simply eliminate the need to file an

1 affidavit or a certificate --
2 HONORABLE TOM GRAY: If it was filed at the
3 trial court.
4 HONORABLE STEPHEN YELENOSKY: -- if it was
5 filed at the trial court and then just leave it to a
6 contest.
7 HONORABLE TOM GRAY: Yeah.
8 HONORABLE SARAH DUNCAN: Wow.
9 CHAIRMAN BABCOCK: Okay. Yeah, Bill.
10 PROFESSOR DORSANEO: I'm not sure I
11 completely followed that. Part of the idea about doing
12 the separate one later is that the court reporter is not
13 in play earlier, okay, so it works better if there's
14 something filed, even if it's the same thing, huh, that
15 was filed before in the trial court.
16 I have a couple of questions for Steve.
17 Does this IOLTA certificate language work? And I think
18 both of you are saying that this language is okay in the
19 appellate rule. You know, "is represented" rather than
20 "was represented in the trial court," "is represented." I
21 mean, if somebody is represented by somebody who is not,
22 you know, like this attorney who did the certificate then
23 you would begin to wonder whether, you know, they ought
24 not to proceed without, you know, payment of costs.
25 HONORABLE STEPHEN YELENOSKY: Because of "no

1 longer represented by the" -- well, but the Legal Aid
2 attorney may decide not to appeal it for a lot of reasons,
3 including fear of making bad law, having nothing to do
4 with the indigency.
5 PROFESSOR DORSANEO: Hmm.
6 HONORABLE STEPHEN YELENOSKY: So all I'm
7 saying is that there is a -- I think there's a policy
8 question to be answered first by whoever answers that and
9 then this can work out. I'm just pointing out that
10 there's an issue there. Implicitly I think by the Rules
11 of Civil Procedure the Supreme Court has made the policy
12 decision that IOLTA screening is sufficient and
13 irrebuttable for establishing indigency from time suit is
14 filed to judgment.
15 There's never been a -- there's never been
16 the question posed as to whether it is sufficient from
17 time of filing suit through court of appeals or through to
18 the Supreme Court. It's only being raised now when we
19 look at the discrepancy that the court of appeals rules
20 don't even address the certificate. So there is a policy
21 question there, and then you have separately part of that
22 policy question is the temporal question, which is, well,
23 the answer may depend on how long it's been since that was
24 done.
25 CHAIRMAN BABCOCK: Bonnie.

1 MS. WOLBRUECK: I just want to note that in
2 differing with Justice Gray that if there was an affidavit
3 of indigency filed during the filing of the suit till
4 judgment that I would highly recommend that that affidavit
5 be renewed and filed again during the appellate process
6 for the court reporter and the court clerk regarding the
7 record. Trust me, we have contested many of these, and
8 it's surprising how they come up with the money and they
9 have the money at that time to where they didn't have the
10 filing fee early on. I mean, that's become very, very
11 common, so you can't always trust that the affidavit at
12 the time of the filing of the case is still relevant at
13 the time of the appeal, and there is an awful lot of money
14 involved at the time of the appeal that the counties are
15 out, the court reporter is out, that I think needs to be
16 reconsidered with another affidavit.
17 CHAIRMAN BABCOCK: Justice Benton.
18 HONORABLE LEVI BENTON: Why don't we just
19 make the affidavit that's filed initially good through
20 appeals unless there is a good faith belief of changed
21 circumstances and permit a challenge if there is a good
22 faith belief of changed circumstances, put the burden --
23 CHAIRMAN BABCOCK: Justice Duncan.
24 HONORABLE SARAH DUNCAN: Well, I think
25 that's what Bonnie is suggesting --

HONORABLE LEVI BENTON: Yeah.

HONORABLE SARAH DUNCAN: -- is that circumstances didn't change but incentives did.

MS. WOLBRUECK: But they do so often. They do change during trial.

HONORABLE SARAH DUNCAN: I think the incentive changes. I'm not so sure the financial circumstances change, but the incentives change.

MS. WOLBRUECK: I'm concerned that if -- that you're placing the burden on the court reporter or the court clerk to determine if circumstances have changed. I think it's up to the appellant to decide if their circumstances have changed and then file another affidavit.

HONORABLE SARAH DUNCAN: The reason I -- I think the problem I have with Chief Justice Gray's suggestion and the reason I said "wow" a minute ago is how do I as a court reporter or clerk file a contest to an affidavit that doesn't even represent itself to be a statement of current circumstances?

HONORABLE STEPHEN YELENOSKY: I have a suggestion at least with respect to IOLTA. I said earlier Legal Aid doesn't do that. They don't routinely, and as far as I know, unless the rules have changed, aren't required to do it, but they could. So if you said -- if

1 you said that an IOLTA certificate signed by an attorney
2 who is representing a person, whether or not they're going
3 to take the case to the court of appeals, that the person
4 has been requalified for eligibility at that point is
5 irrebuttable then that would seem to me to be consistent,
6 and there is nothing that would prevent the Legal Aid
7 attorney from saying, well, let's put them through the
8 eligibility determination again. If you want to preserve
9 that kind of thing it would solve the problem that it's
10 been a long time.
11 It doesn't answer your issue. I mean, I
12 guess to be consistent with that, you would also require a
13 second affidavit for those who don't have an IOLTA
14 certificate.
15 CHAIRMAN BABCOCK: Judge Patterson.
16 HONORABLE JAN PATTERSON: I have a question
17 for Bonnie. How often does requiring them to go through
18 the process again and triggering some process result in
19 change without challenge? I mean, the fact that it's in
20 and of itself may be a chilling effect or a realization
21 that they are no longer indigent, and I'm wondering
22 whether the process itself is appropriate, because I think
23 what we want to avoid is something that's not meaningful.
24 MS. WOLBRUECK: The problem is that the time
25 element regarding the change in 2005, we haven't dealt

1 with it too much because of the opportunity in the 2005
2 change in Rule 145 allowed the contest. Prior to that
3 time there was no contest. So the affidavit would be
4 filed during the filing of the case without the ability to
5 contest, for the clerk to contest the affidavit, and then
6 a new affidavit being filed at the time of the appeals,
7 the ability to contest by the court reporter and the clerk
8 was there, and, yes, the money, would be there.
9 Now, granted we haven't dealt with Rule 145
10 long enough to really answer your question truthfully in
11 the way it is written today versus what happens then on
12 the appeal side.
13 CHAIRMAN BABCOCK: Bonnie, did have you a
14 problem with the proposed language of this 20.1?
15 MS. WOLBRUECK: No. I do not have a problem
16 with the way it's proposed, as far as the IOLTA
17 certification is there then you can't contest it,
18 otherwise, then the court reporter and court clerk would
19 have the opportunity to contest it.
20 CHAIRMAN BABCOCK: Right. And then the
21 proposed language in 20.1(d) --
22 MS. WOLBRUECK: Yes.
23 CHAIRMAN BABCOCK: -- does what you're
24 suggesting.
25 MS. WOLBRUECK: Yes, that's exactly right.

1 CHAIRMAN BABCOCK: Which is to basically
2 re-up the affidavit.
3 MS. WOLBRUECK: That's right.
4 CHAIRMAN BABCOCK: Judge Yelenosky.
5 HONORABLE STEPHEN YELENOSKY: I'm just
6 trying to make concrete proposals at this point.
7 CHAIRMAN BABCOCK: As opposed to your prior
8 comments?
9 HONORABLE STEPHEN YELENOSKY: Yeah, right,
10 rather than just saying there is a policy issue and we
11 need to figure it out. Bill, I can suggest language, if
12 you want it, on (c) that would allow for a rescreening.
13 PROFESSOR DORSANEO: How much do we need?
14 Would it be enough to say "if the party is represented on
15 appeal by an attorney"?
16 HONORABLE STEPHEN YELENOSKY: I think you
17 can say "if the party was represented in the trial court
18 by an attorney" and go on past tense and then at the end
19 when you get to the screening say, "and certifies that
20 the" -- whatever person -- "has been rescreened for IOLTA
21 income eligibility at or since the judgment," because that
22 can be done within the appellate time relatively.
23 Then you have the right time frame and, you
24 know, if you want to -- as I was suggesting at the outset,
25 if you want to be specific as to current in (d)(1) I'd

1 suggest the same language, "since the judgment," and then
2 that way everybody knows exactly when the -- the affidavit
3 has to have been signed at or since the judgment and then
4 you've got a current status.
5 HONORABLE JAN PATTERSON: Does the idea of
6 current indigency not contemplate rescreening, if
7 necessary?
8 HONORABLE STEPHEN YELENOSKY: You mean under
9 IOLTA? And, well, again things may have changed since I
10 left in '94, but once somebody qualified for eligibility
11 under the rules back then we were not required to rescreen
12 them for eligibility. Now, I never had a client who won
13 the lottery or anything, so maybe it was a moot point. It
14 was never raised.
15 I guess one could -- there were times when
16 people would challenge whether somebody was ineligible,
17 but typically it was that they just said they didn't
18 believe them, not that anything had changed, and so I
19 think as Justice Gray suggested, there really -- typically
20 there wasn't a change. I've never heard of any
21 rescreening being required. All I'm saying is that if an
22 attorney, IOLTA or Legal Aid attorney, represented in the
23 trial court, whether or not they were going to represent
24 on appeal they could have the recertification done and
25 sign that certificate.

1 HONORABLE JAN PATTERSON: All I'm suggesting
2 is that if you require an affidavit proof of current
3 indigence but not put any additional requirement on an
4 attorney or IOLTA, presumably they would still have to go
5 through some process because they would be -- so they
6 would have to produce some current proof prior screening.
7 HONORABLE STEPHEN YELENOSKY: I'm just
8 saying that they -- all I'm suggesting is that they have
9 subsequent to the judgment, the day of the judgment, the
10 day after the judgment, whatever, either a certificate
11 from the trial attorney who was a Legal Aid attorney or an
12 IOLTA attorney just like in civil procedure, the trial
13 rules, certifying that they had been rescreened and
14 they're still eligible or an affidavit signed at one of
15 those dates saying that they're still indigent. If they
16 have the former, just like in the trial court, it's
17 irrebuttable. If they have the latter, just like in the
18 trial court, it's not.
19 CHAIRMAN BABCOCK: Is there -- just
20 listening to this, is there any opposition to 20.1(d), the
21 proposed language in 20.1(d), "The prior filing of an
22 affidavit of indigence in the trial court pursuant to
23 civil procedure Rule 145 does not meet the requirements of
24 this rule, which requires a separate affidavit and proof
25 of current indigence"?

HONORABLE STEPHEN YELENOSKY: You're talking about the language or the concept, because the current is perhaps a problem?

CHAIRMAN BABCOCK: Okay. Well, how about the concept? Anybody against the concept?

PROFESSOR DORSANEO: Concept of filing something new?

CHAIRMAN BABCOCK: Yeah, right. Right. I don't hear anybody against that. Gray?

HONORABLE TOM GRAY: Yeah, just what I said earlier.

CHAIRMAN BABCOCK: What about the word "current," Stephen?

HONORABLE STEPHEN YELENOSKY: Well, who wants to have an argument about whether the affidavit filed a month ago or, you know, was quote-unquote current, so let's just avoid that problem. Why is there a problem just saying "since the judgment," or if we want to say, you know, within six months, just something that's specific so nobody can argue about it.

PROFESSOR DORSANEO: My sense is we're talking about a lot more money here than we're talking about in the trial court.

CHAIRMAN BABCOCK: Uh-huh.

HONORABLE STEPHEN YELENOSKY: Yeah. The

1 court reporters.
2 PROFESSOR DORSANEO: I mean, court reporters
3 are not having a good day here so far.
4 CHAIRMAN BABCOCK: Well, Stephen, I mean, in
5 terms of the word "current," isn't that tied to the first
6 sentence of this rule where the affidavit of indigency is
7 filed with or before the notice?
8 HONORABLE STEPHEN YELENOSKY: Well, it is in
9 a bad way, like I said before, because it's still
10 ambiguous. "With or before" suggests, just like
11 "current," a long period of time, so, yeah, they are
12 connected.
13 CHAIRMAN BABCOCK: But the current would be
14 tied to the filing, and the filing could be filed at two
15 different time periods. Are you saying it should be
16 tightened up to a point certain like when the notice of
17 appeal is filed, and that's a fairly short period when
18 that has to be filed?
19 HONORABLE STEPHEN YELENOSKY: Well, you
20 don't want to require them to have the same date on the
21 affidavit as the day they file it obviously. I'm just
22 trying to pick a time frame that's reasonable and is
23 certain so it can't be argued about, and it's either an
24 affidavit or it's a recertification. I don't think either
25 one of those things is difficult to do between judgment

1 and filing of the notice of appeal. How long is that? I
2 don't even remember what's the time frame on that. Just
3 30-day notice, right?
4 So I don't think either one of those is. I
5 mean, if you wanted to be generous you would say within
6 three months. You know, I don't know. But, see, nobody
7 is really going to get to the point of worrying about it
8 until they have a judgment anyway, because they might win,
9 so might as well say, "since the judgment."
10 HONORABLE TOM GRAY: But now we're told in
11 East Texas that they file the lawsuit and the notice of
12 appeal on the same day so that they get to pick their
13 appellate court.
14 CHAIRMAN BABCOCK: I thought we fixed that.
15 HONORABLE TOM GRAY: No, we recommended a
16 fix for it.
17 CHAIRMAN BABCOCK: Ahh. We fixed it.
18 HONORABLE JAN PATTERSON: I think I like
19 "current" just because it's a good English word that's a
20 little flexible and it's enough --
21 HONORABLE STEPHEN YELENOSKY: Then go with
22 it, because you'll have to deal with the argument.
23 HONORABLE JAN PATTERSON: Well, I think it's
24 -- I mean, I defer almost to Bonnie on that just because I
25 think you want something that can be challenged, but you

1 want something that's a little flexible, and I think
2 current is a good understandable word, and I don't think
3 you want something that's so precise that you have people
4 arguing over either getting rid of something in three
5 months or getting something in three months.
6 HONORABLE STEPHEN YELENOSKY: The only fear
7 I have is if you're dealing -- as we said, part of the
8 problem is that pro ses may not know that they even have
9 to, you know, re-establish indigence. That's why that one
10 sentence was --
11 CHAIRMAN BABCOCK: Well, they'll find that
12 out soon enough.
13 HONORABLE STEPHEN YELENOSKY: Right. Right,
14 they will. They will. I don't know whether it serves pro
15 ses to be more flexible and then they get burned or just
16 more specific so they know exactly what to do.
17 CHAIRMAN BABCOCK: Yeah, Bill.
18 PROFESSOR DORSANEO: This 145 itself as
19 amended in 2005 is a little bit problematic on its own.
20 In the contents of the affidavit provision you have to
21 give numbers, and then at the very end it says, "If the
22 party is represented by an attorney on a contingent fee
23 basis due to the party's indigency, the attorney may file
24 a statement to that effect to assist the court in
25 understanding the financial condition of the party."

1 HONORABLE STEPHEN YELENOSKY: Is that the
2 latest? That's not --
3 PROFESSOR DORSANEO: It says that, and then
4 it goes on and says the IOLTA certificate, which I gather
5 is different and independent from the contents of the
6 affidavit. So somebody can do this contingency fee
7 affidavit kind of to help -- contingency fee statement to
8 help the affidavit, but the other is the IOLTA
9 certificate, and that trumps all --
10 HONORABLE STEPHEN YELENOSKY: That's the
11 Huber --
12 PROFESSOR DORSANEO: Yeah.
13 HONORABLE STEPHEN YELENOSKY: You wouldn't
14 bother with the first one if you got the second one.
15 PROFESSOR DORSANEO: Yeah. Okay. So my
16 understanding was problematic rather than the rule itself.
17 CHAIRMAN BABCOCK: Bill, do you want to vote
18 on (d), or do you want to vote on the whole thing, (c) and
19 (d)?
20 PROFESSOR DORSANEO: I think we would accept
21 Judge Yelenosky's suggestions about, you know, "was
22 represented in the trial court," assuming this
23 recertification is a plausible.
24 HONORABLE STEPHEN YELENOSKY: You want me to
25 go make a quick phone call to Legal Aid? I can do that.

PROFESSOR DORSANEO: Call them tonight.

HONORABLE STEPHEN YELENOSKY: Huh?

PROFESSOR DORSANEO: Call them tonight.

CHAIRMAN BABCOCK: Okay. Subject to that call with respect to the proposals on 20.1(c) and (d), how many people are in favor?

HONORABLE STEPHEN YELENOSKY: Did we resolve the current versus specific? Or is that next?

PROFESSOR DORSANEO: Current.

CHAIRMAN BABCOCK: How many people opposed? So it is unanimous 26 to nothing, although -- 27 now to nothing.

HONORABLE TOM GRAY: No. That was 26 to 1.

CHAIRMAN BABCOCK: 26 to 1. You know, I thought we scheduled that vote when he was out of the room.

HONORABLE STEPHEN YELENOSKY: Well, Justice Gray is taking the most progressive position.

CHAIRMAN BABCOCK: He snuck back in on us. And Stephen will make a phone call tonight, and if we need a little tweaking in the morning we can do that. Anybody in the mood for a break after two hours straight of TRAP Rules? No? Justice Gray wants more.

HONORABLE TOM GRAY: Actually, I wanted to make one small comment in response to Bonnie's concern --

1 CHAIRMAN BABCOCK: Uh-huh.
2 HONORABLE TOM GRAY: -- that an easy way to
3 fix the lack of incentive of the clerk to contest the
4 affidavit when it is initially filed but when the
5 incentive is much greater at the appellate level to
6 contest the affidavit because of the cost of the clerk's
7 record -- and it would seem to apply to some of the other
8 costs that may be incurred as well -- would be to allow
9 the clerk to file a waiver of contest at the time that the
10 affidavit is initially filed and not have to contest it
11 until the request for the clerk's record is made. That
12 way preserving the right to contest at a later date but
13 acknowledging that the cost of the filing fee and the
14 supplemental payments as they come along, whatever it may
15 be for filing motions or whatever in the trial court,
16 wasn't -- didn't justify the cost of the contest, whereas
17 at the end of trial and you're going to have to prepare
18 this massive record for appeal you could then at that
19 point contest it and challenge the -- but she has a
20 response to that.
21 MS. WOLBRUECK: I do. Only to remind you
22 that the opportunity for the clerk to contest the filing
23 fee just happened in 2005. So the history isn't there,
24 you know, to deal with, you know, the issues that I
25 addressed.

CHAIRMAN BABCOCK: Okay. How about if we take a 15-minute break?

(Recess from 3:18 p.m. to 3:44 p.m.)

CHAIRMAN BABCOCK: Back on the record, and we're up to Rule 24 of the TRAP rules.

PROFESSOR DORSANEO: Well, not quite.

CHAIRMAN BABCOCK: We're not because we're awaiting Elaine Carlson's draft.

PROFESSOR CARLSON: I will serve no rule before its time.

CHAIRMAN BABCOCK: And so there is no rule on that, so we're up to Rule 41. Aren't we?

PROFESSOR DORSANEO: There's a little bit of Higgins issue that David Gaultney wants to talk about. Want to talk about that back on the --

CHAIRMAN BABCOCK: Are we regressing here?

PROFESSOR DORSANEO: Well, we didn't quite get -- regressing is probably --

CHAIRMAN BABCOCK: Oh, the Higgins thing, okay. Judge Gaultney, what do you want to say about Higgins and be brief?

HONORABLE DAVID GAULTNEY: I'm going to be very brief. My only question was whether after Higgins there should be any 15-day requirement for the filing of a motion for an extension of time under 20.1(d)(2).

1 PROFESSOR DORSANEO: And if I might, the
2 idea is that in Higgins there was a notice of appeal but
3 no affidavit of indigence filed, and a lot of -- and there
4 was no motion for extension of time filed either within 15
5 days, and the appeal was dismissed, right, Jody? Huh?
6 MR. HUGHES: Yes, at the court of appeals.
7 PROFESSOR DORSANEO: Yeah. And the Supreme
8 Court said you have to give them a chance to fix this
9 problem, so you need to give them -- you need to give them
10 an opportunity, a notice and opportunity to file an
11 affidavit of indigence, and then it kind of -- and then
12 the opinion I think says that if they don't file a good
13 one, okay, file one or file a good one, they get another
14 shot at correcting it, and I guess ultimately there's a
15 strike three and you're out, but you get two swings. And
16 whether that calls for any change in this 15-day thing
17 because it's the 15 days, and you don't even have to file
18 a motion for extension of time, so --
19 CHAIRMAN BABCOCK: Well, it just says "may."
20 PROFESSOR DORSANEO: Huh?
21 CHAIRMAN BABCOCK: Says "the appellate court
22 may extend the time."
23 PROFESSOR DORSANEO: If you file a motion,
24 but Higgins seems to say they have to extend the time.
25 HONORABLE STEPHEN YELENOSKY: Right.

PROFESSOR DORSANEO: They have to give you an opportunity to file the affidavit of indigence. They can't just throw you out because the time for filing the affidavit, including the time for filing the motion to extend, has expired.

HONORABLE NATHAN HECHT: Because it's not jurisdiction.

PROFESSOR DORSANEO: Yeah.

HONORABLE NATHAN HECHT: So not every failure to follow the rules results in losing.

CHAIRMAN BABCOCK: Right. Okay. It sounds to me like Higgins addresses a situation outside of current (d)(2).

HONORABLE SARAH DUNCAN: It does -- I'm sorry. I'm getting real confused about this what is jurisdictional and what's not.

HONORABLE JAN PATTERSON: What is what, Sarah?

HONORABLE SARAH DUNCAN: What is jurisdictional and what's not. If filing an affidavit of -- never mind.

CHAIRMAN BABCOCK: Okay, Emily.

HONORABLE SARAH DUNCAN: Well, I mean, it's just from the perspective of a poor judge who's just trying to do her job, when it says "must" I assume they

1 must, and now I know that "must" doesn't mean must unless
2 there are consequences for what happens if must isn't
3 fulfilled. Never mind.
4 HONORABLE JAN PATTERSON: It has created a
5 great deal of confusion for the courts of appeals.
6 HONORABLE SARAH DUNCAN: It has for us. We
7 don't know what to --
8 HONORABLE NATHAN HECHT: Well, "must" means
9 must, but you don't get your head chopped off every time
10 you don't do what "must" says, which is like it's similar
11 to -- the idea is similar to a breach of contract. It has
12 to be a material breach and there are consequences, and
13 you don't forfeit everything because you used a 2 by 8
14 instead of a 2 by 4. There are different consequences,
15 and it is confusing, I think, because it's hard -- the
16 rules don't always spell out what is the consequence of a
17 failure to comply.
18 HONORABLE JAN PATTERSON: Yeah, we need
19 level one, a tongue-lashing, level two --
20 HONORABLE NATHAN HECHT: Yeah.
21 PROFESSOR DORSANEO: There's no consequence
22 to not filing the affidavit of indigence, and they tell
23 you to file.
24 HONORABLE NATHAN HECHT: But it can't be
25 capital punishment every time you stub your toe. That

1 can't be.
2 HONORABLE STEPHEN YELENOSKY: Especially
3 when a trial judge doesn't file the findings of fact. We
4 get a reminder.
5 HONORABLE SARAH DUNCAN: I'm not disagreeing
6 with that policy by any stretch of the imagination. All
7 I'm saying is it's -- forget it.
8 CHAIRMAN BABCOCK: Justice Gray.
9 HONORABLE TOM GRAY: I will say that from my
10 reading of Higgins and the way we've been doing it
11 previously, the (d)(2) provision that provides for a
12 15-day extension of time confuses me much more than it
13 helps, because what we will be doing if we do not get a
14 record, we will be notifying the reporter or the clerk
15 that we have not gotten a record. We will then get a
16 letter back from them that the reason you haven't gotten
17 the record is the appellant has not paid or made
18 arrangements to pay for the record, at which time we will
19 send the appellant a letter that says that's our
20 understanding and you have 15 days in which to fix that
21 problem, and that's under another rule, existing rule, and
22 if they fail to respond or fix the problem then we will
23 dismiss their appeal for that failure but not for the
24 failure per se to file the affidavit. But if they file
25 the affidavit then that fixes the problem.

1 CHAIRMAN BABCOCK: Judge Yelenosky.
2 HONORABLE STEPHEN YELENOSKY: Minor point,
3 to the extent we refer to affidavit, we now also need to
4 refer to IOLTA certificate.
5 CHAIRMAN BABCOCK: Say that again.
6 HONORABLE STEPHEN YELENOSKY: Well, we need
7 to refer to IOLTA certificate wherever we refer to
8 affidavit, don't we?
9 PROFESSOR DORSANEO: I think so.
10 CHAIRMAN BABCOCK: Yeah. That's probably
11 right.
12 HONORABLE DAVID GAULTNEY: I guess my point
13 was that the appellate court by permitting the late
14 filing, say four months, ten months after, has in effect
15 granted an extension of time. I think that's okay, but
16 this rule suggests that the motion should have been filed
17 within 15 days, and so if we just remove the 15 days we
18 could at least possibly -- I'm just suggesting -- remove
19 some tension between Higgins and the rule.
20 CHAIRMAN BABCOCK: Is your reading of this
21 rule, (d)(2), and the holdings of the Higgins case that
22 they're irreconcilable?
23 HONORABLE DAVID GAULTNEY: Well, I think
24 implicit in Higgins, as I understand it, the affidavit was
25 filed four to ten months --

1 PROFESSOR DORSANEO: Yeah.
2 HONORABLE DAVID GAULTNEY: Is that right?
3 PROFESSOR DORSANEO: Yes.
4 HONORABLE DAVID GAULTNEY: After. So, you
5 know, this suggests that, yeah, there's a late filing
6 allowed, but you must file a motion for extension of time
7 within 15 days of the deadline. So I'm just suggesting
8 that, yeah, you can file it late like in Higgins, and just
9 by removing that 15 days you're giving the appellate court
10 unlimited time to do that.
11 CHAIRMAN BABCOCK: Yeah, Justice Gray.
12 HONORABLE TOM GRAY: I just don't see the
13 need for the motion. I mean, I don't think there was a
14 motion in Higgins. I mean, they just filed the affidavit
15 at some point in time before they got dismissed, and
16 that's all that's necessary.
17 HONORABLE DAVID GAULTNEY: That's correct.
18 CHAIRMAN BABCOCK: Well, I'm wandering into
19 an area that I don't know anything about, but it does --
20 HONORABLE TOM GRAY: We know all your
21 clients have enough money to pay the filing fee.
22 CHAIRMAN BABCOCK: Right, on behalf of all
23 my many indigent clients. Is that before I represent them
24 or after? I'm not sure, but anyway, wouldn't you want to
25 have a system where they have to comply with this 15-day

1 rule? They may not do it. They even may get off the hook
2 if their lawyer, their unpaid lawyer, finds the Higgins
3 case and argues that, but as a matter of keeping your
4 courts moving, wouldn't you just want to keep this?
5 HONORABLE TOM GRAY: Do I get to collect a
6 10-dollar fee for filing a motion for extension of time?
7 CHAIRMAN BABCOCK: You know, sure.
8 HONORABLE TOM GRAY: See, I mean, there is
9 the problem. The clerk is -- does she take the motion
10 without the filing fee, even though it's a motion for
11 extension of time to file the indigence affidavit? I
12 mean, just we don't need a motion.
13 CHAIRMAN BABCOCK: Justice Duncan.
14 HONORABLE SARAH DUNCAN: I think the problem
15 with (d)(2) -- and I think this is what Judge Gaultney was
16 alluding to, that this implies that that's the only
17 time --
18 HONORABLE STEPHEN YELENOSKY: Right.
19 HONORABLE SARAH DUNCAN: -- that the court
20 can extend the time to file an affidavit of indigency.
21 HONORABLE DAVID GAULTNEY: That's the
22 tension I see.
23 HONORABLE SARAH DUNCAN: If there is a
24 motion within 15 days of when it's due. What Higgins says
25 is -- actually, that's not true. The court can't dismiss

1 without giving the appellant an opportunity to cure the
2 defect of not filing an affidavit or a certificate, so (2)
3 implies something, a limitation on the court of appeals'
4 power to extend the time to file the affidavit of
5 indigency, that's not true under Higgins.
6 CHAIRMAN BABCOCK: Higgins says with a
7 little bit of luck everything will turn out fine.
8 HONORABLE STEPHEN YELENOSKY: Well, Higgins
9 says there's a notice requirement. I don't think you can
10 state a time period without tying it to a notice of
11 opportunity to cure.
12 HONORABLE SARAH DUNCAN: But why are we
13 requiring these people to file a motion? If it's the
14 court's responsibility -- what we do is show cause. We
15 send them an order that says, "You didn't file an
16 affidavit. You're required to file either the cost or an
17 affidavit. Tell us why we shouldn't dismiss your appeal,"
18 and we give them a time to do one or the other.
19 If, in fact, they are indigent, why are we
20 requiring to file a motion? It's just one more motion for
21 us to process. It's unnecessary if what we mean to say is
22 either -- if what we mean to say is the court has an
23 obligation to tell the appellant what rules it has to
24 follow, and if you don't, here are the consequences,
25 because the rules don't tell you this. If that's the

1 point, is to put the obligation onto the court of appeals,
2 then why are we requiring the appellant to do anything
3 other than comply with the order?
4 HONORABLE STEPHEN YELENOSKY: Right. I
5 agree, but we could give some specificity by not talking
6 about a motion but saying -- but specifying the time
7 period for the cure.
8 HONORABLE SARAH DUNCAN: Could.
9 HONORABLE STEPHEN YELENOSKY: By saying, you
10 know, "Upon notice from the court of appeals that it has
11 not been filed, you have 15 days to file" and then all the
12 court of appeals will know 15 days from the notice to cure
13 is the deadline, and the Supreme Court has through rule
14 said that that's sufficient time.
15 HONORABLE SARAH DUNCAN: I would suggest we
16 just change (2) to say, "If an affidavit of inability or
17 IOLTA certificate is not timely filed, the appellate court
18 must notify the appellant of the defect and give the
19 appellant a reasonable opportunity to cure." I mean, if
20 you want to say --
21 HONORABLE STEPHEN YELENOSKY: Could say
22 "reasonable."
23 HONORABLE SARAH DUNCAN: -- 15 days, 14
24 days, whatever. I don't much care about that, but take
25 (2) out and replace it with what the law is.

PROFESSOR DORSANEO: It actually should be (3), but instead of (2) there's another thing in between.

HONORABLE SARAH DUNCAN: Well, is there a typo in your memo? Is this (3)?

PROFESSOR DORSANEO: Yeah. There's another thing in between that I don't think is relevant, but that makes sense to me. Why not codify Higgins?

CHAIRMAN BABCOCK: Just codify Higgins. Justice Gaultney, what's your --

HONORABLE SARAH DUNCAN: And if we do it for affidavits of indigency, why don't we do it for --

CHAIRMAN BABCOCK: What's your thought about that?

HONORABLE DAVID GAULTNEY: I think I'm in favor of consistency, so I would think that's a good thing.

HONORABLE STEPHEN YELENOSKY: Anybody want to vote against that, consistency?

CHAIRMAN BABCOCK: Anybody feel strongly the other way on that? Who wants to do the language?

PROFESSOR DORSANEO: Oh, we'll do it.

HONORABLE STEPHEN YELENOSKY: Put it in the recodification draft.

CHAIRMAN BABCOCK: Yeah, right. Yeah, if you want to bury it, put it there.

1 HONORABLE SARAH DUNCAN: I don't think he's
2 recodified the appellate rules, just rewritten them.
3 CHAIRMAN BABCOCK: Excuse me?
4 HONORABLE SARAH DUNCAN: I don't think he's
5 recodified the appellate rules. We've just rewritten
6 them.
7 CHAIRMAN BABCOCK: Smarter approach. Okay.
8 Have we taken care of Mr. Higgins?
9 MR. GILSTRAP: Yes.
10 CHAIRMAN BABCOCK: Okay. 41.1.
11 PROFESSOR DORSANEO: I thought this would be
12 easy.
13 CHAIRMAN BABCOCK: You underestimate us.
14 PROFESSOR DORSANEO: The idea is -- or was
15 sent to us, was to add active district court judges to the
16 list of persons who -- my secretary is putting an English
17 e "judgement" in there. Active district court judges as
18 persons who can be on the court of appeals panel, court of
19 appeals. (b), "when panel cannot agree on judgment," and
20 (c), "when court cannot agree on judgment," the chief --
21 the idea is the chief justice may -- chief justice of the
22 court of appeals in (b) must designate another justice of
23 the court to sit on the panel to consider the case,
24 request the assignment -- sit on the case, request the
25 assignment of an active district court judge. That's to

be added in to (b). It's not there already. And then there's language that follows in the current rule that says --

MR. HAMILTON: "Retired or former."

PROFESSOR DORSANEO: "A retired or former justice." It doesn't say "a qualified retired or former justice in the current rule." It just says "a retired or former justice." Now, I suppose we -- the subcommittee, we discussed, well, what's the difference between a retired and a former justice, and as I understand it -- and maybe other people understand it better -- a retired justice is somebody who's in the retirement system, okay, not somebody who has just decided to go back to being a lawyer, like Carlos is not --

CHAIRMAN BABCOCK: Right.

PROFESSOR DORSANEO: -- a retired judge. A former justice is -- I'm not completely sure who that is, but it includes people who didn't get -- who didn't get re-elected, all right, former justices.

CHAIRMAN BABCOCK: But are they back in private practice? What are they doing now? Would that be Justice Phillips?

PROFESSOR DORSANEO: Well, I'm asking for help there, but --

HONORABLE TRACY CHRISTOPHER: No, because he

retired.

MS. BARON: He's retired.

PROFESSOR DORSANEO: He must be in the retirement system.

MS. BARON: Yeah, I think the difference is whether you go voluntarily or involuntarily.

PROFESSOR DORSANEO: And the issue is -- and Carl can probably cut to the chase here -- is whether this former justice language is --

MR. HAMILTON: Former justice language is --

PROFESSOR DORSANEO: Is okay or is it bad under the statutes?

MR. HAMILTON: It's no longer in the statute. 24.003(b) says "can assign a qualified retired justice or judge in the Supreme Court, Court of Criminal Appeals, or Court of Civil Appeals."

HONORABLE SARAH DUNCAN: Yeah, I don't think former judges are eligible.

MR. HAMILTON: Former judges are out, so the word "qualified" is a word of quality, not kind. Kinds of judges are retired or active judges, so if we just said "a qualified justice or judge," arguably that could include a former judge. I think we ought to just say "another judge in accordance with existing law" or something.

HONORABLE STEPHEN YELENOSKY: A retired

judge doesn't have to be in the retirement system.

PROFESSOR DORSANEO: But then we've got to chase people around to figure out where the hell to go look. If we could say it here in so many words, why don't we just say it?

HONORABLE SARAH DUNCAN: Because we really can't.

PROFESSOR DORSANEO: Active district court judge is okay. We want to add that in, right?

MR. HAMILTON: Yes.

HONORABLE SARAH DUNCAN: We can't say it in so many words because it depends on whether you've certified the willingness to not appear or plead in court for two years. If you don't do that, you can't be qualified. You're not eligible to sit, and you've got to be retired, not former.

HONORABLE STEPHEN YELENOSKY: And retired doesn't mean --

HONORABLE SARAH DUNCAN: And you've got to be in good standing. You've got to have done whatever continued education is required of you.

PROFESSOR DORSANEO: Doesn't "qualified" capture that?

HONORABLE SARAH DUNCAN: "Qualified" does, but once you go beyond qualified --

MR. HAMILTON: Is it really just retired or active judges now?

HONORABLE STEPHEN YELENOSKY: Retired doesn't have to mean you're in the retirement system.

MR. HAMILTON: Yeah, it does.

HONORABLE STEPHEN YELENOSKY: No, it just means --

HONORABLE SARAH DUNCAN: No, I don't think it does.

HONORABLE STEPHEN YELENOSKY: Doesn't it mean you just --

HONORABLE SARAH DUNCAN: I think come January 1st I will be retired, but I will not be in the retirement system.

HONORABLE STEPHEN YELENOSKY: Right. That's what I'm saying.

MR. HAMILTON: I think the way the statute is worded and the case law says retired judge means one that's in the retirement system.

HONORABLE STEPHEN YELENOSKY: I don't think so.

HONORABLE SARAH DUNCAN: I don't think so.

HONORABLE STEPHEN YELENOSKY: I think it means you left voluntarily, the point being you can't assign judges who were defeated to certain things like

1 visiting judges.
2 PROFESSOR DORSANEO: Well, in other words,
3 we don't know what we're talking about.
4 HONORABLE SARAH DUNCAN: I think that's
5 exactly right.
6 PROFESSOR DORSANEO: So we were -- what we
7 thought we were working on was putting in there the active
8 district court judges, and we would recommend that, but
9 whether -- what the rest of it should say, I don't have
10 any basis for saying myself, because I didn't go read the
11 statutes.
12 HONORABLE SARAH DUNCAN: Well, can I make a
13 suggestion? The people who do appointments do read and
14 know the statutes, so why don't we just say "request the
15 assignment of a qualified judge"? And then if that -- if
16 the person that is requested is qualified under whatever
17 the statute is, whatever year in the future we're talking
18 about, whoever is doing the appointment can look at that
19 and see are they qualified, whatever the qualifications
20 are as of today's date.
21 HONORABLE STEPHEN YELENOSKY: Yeah.
22 CHAIRMAN BABCOCK: That has a brilliant
23 simplicity to it, doesn't it?
24 HONORABLE STEPHEN YELENOSKY: It does.
25 HONORABLE SARAH DUNCAN: Well, these people

are very touchy about who gets appointed, whether it's in the trial court or the appellate court.

CHAIRMAN BABCOCK: Sure.

HONORABLE SARAH DUNCAN: And so these things are going to keep changing, and I don't think we can anticipate what changes are going to be made, so let's just say "qualified."

CHAIRMAN BABCOCK: Richard Munzinger.

MR. MUNZINGER: The simplicity is attractive, but I wonder if you say "a qualified judge" have you solved anything. What is a qualified judge?

HONORABLE STEPHEN YELENOSKY: That's defined elsewhere.

MR. LOW: By statute, I guess.

MR. MUNZINGER: If it's defined by statute then perhaps a reference to the Government Code would not hurt, and it would have the requisite simplicity, but the minute I would read it I would say, "Well, who the heck is a qualified judge?"

HONORABLE STEPHEN YELENOSKY: But it's the -- the chief justice is going to know.

MR. MUNZINGER: Hopefully.

HONORABLE STEPHEN YELENOSKY: Well, he doesn't need the rule to find out. Let's put it that way.

PROFESSOR DORSANEO: You would probably say

1 something like "qualified judge or justices provided by
2 law," if you want to make it general. If it changes
3 somewhere, you're going to have to go find the law.
4 CHAIRMAN BABCOCK: Justice Gray.
5 HONORABLE TOM GRAY: You-all are dealing
6 with the word "qualified." I would like to also deal with
7 the word "justice or judge." What's the prohibition and
8 why accept that limitation? Why not put "qualified
9 person"?
10 CHAIRMAN BABCOCK: Okay.
11 HONORABLE TOM GRAY: And Bill Dorsaneo is
12 looking at me like I've lost my mind.
13 PROFESSOR DORSANEO: No. I'm just funny
14 looking at this --
15 CHAIRMAN BABCOCK: That's his normal look.
16 But, yeah, didn't somebody -- didn't Tom Luce sit on the
17 Supreme Court at one point?
18 HONORABLE NATHAN HECHT: Yeah.
19 CHAIRMAN BABCOCK: He was in private
20 practice?
21 HONORABLE NATHAN HECHT: Appointed by the
22 Governor. That happens, not this way, but the -- but on
23 our Court the government can appoint judges to sit when
24 fewer than nine can sit on a case.
25 HONORABLE TOM GRAY: And it can happen in

1 hours fewer than two, according to some of the memos.
2 HONORABLE NATHAN HECHT: Because the
3 Governor appoints.
4 HONORABLE SARAH DUNCAN: "Person."
5 HONORABLE TOM GRAY: Thank you.
6 HONORABLE STEPHEN YELENOSKY: But we're
7 certain it's "person"?
8 HONORABLE NATHAN HECHT: Well, the chief
9 justice can't appoint him, can he?
10 CHAIRMAN BABCOCK: Well, this says that the
11 chief justice of the court of appeals is the one they
12 designate in here.
13 HONORABLE NATHAN HECHT: "Request the
14 assignment."
15 HONORABLE TOM GRAY: Are you reading in (b)?
16 HONORABLE SARAH DUNCAN: The chief justice
17 asks -- the chief justice of the court of appeals asks the
18 chief justice of the Supreme Court to assign someone.
19 HONORABLE NATHAN HECHT: Or the Governor.
20 HONORABLE SARAH DUNCAN: Or the Governor, to
21 assign someone to sit.
22 CHAIRMAN BABCOCK: Is that the way this
23 reads? I'm looking at (b).
24 MR. MUNZINGER: No. It says "designate."
25 HONORABLE TOM GRAY: (b) is different

because you're appointing other judges on the same court to a panel to decide a case. The reason (b) and(c) are worded differently is there's no one normally left on a three judge court to sit if one of the three judges are not already sitting. That's -- there's a slight -- there is a possibility that you could actually have someone elected while there was a vacancy or whatever, or to fill a vacancy, and there's already someone there and suddenly they become disqualified, so you could actually pick up a fourth person, but it was written for the normal situation where a member of a three judge court is -- needs to be --

CHAIRMAN BABCOCK: Okay.

HONORABLE TOM GRAY: -- assigned a replacement. That's what (c) does.

CHAIRMAN BABCOCK: Okay. Well, Bill, do you prefer Justice Duncan's simple and some would say brilliant approach, or would you rather go back for more study?

PROFESSOR DORSANEO: I'd rather look at it some more. I mean, just even looking at it now, it says, "request the assignment of an active district court judge." I mean, who are we requesting, requesting the chief justice to assign? Huh? I mean, it ought to say that.

HONORABLE SARAH DUNCAN: Chief justice of

1 the court of appeals.
2 PROFESSOR DORSANEO: Instead of just saying
3 "request the assignment to a taxi driver."
4 HONORABLE SARAH DUNCAN: Well, it says the
5 chief justice of the court of appeals in (b).
6 CHAIRMAN BABCOCK: Well, that being the case
7 -- yeah, Carl.
8 MR. HAMILTON: I just have a question about
9 what Judge Gray said. If (b) is to designate another
10 justice in the request of a qualified -- should it be
11 justice? Can it be justice or judge or does it --
12 shouldn't that just be a justice? In other words, we
13 shouldn't have "or judge" in (b) if it's supposed to be
14 another justice.
15 CHAIRMAN BABCOCK: Right. Yeah.
16 PROFESSOR DORSANEO: Court of Criminal
17 Appeals people are judges. They're not justices, so I
18 assume that that's who we're talking about.
19 MR. HAMILTON: Well, this doesn't apply to
20 criminal appeals, does it?
21 HONORABLE NATHAN HECHT: Uh-huh.
22 CHAIRMAN BABCOCK: Oh, yeah. TRAP rules do.
23 MR. HAMILTON: It does? Okay. That's fine.
24 CHAIRMAN BABCOCK: Okay. More study. Let's
25 go to Rule 49.

1 PROFESSOR DORSANEO: Well, this is a hard
2 one here.
3 CHAIRMAN BABCOCK: That's why we saved it
4 for late in the day.
5 PROFESSOR DORSANEO: And I guess maybe --
6 CHAIRMAN BABCOCK: Be sure to speak up so
7 that the people down there can hear.
8 PROFESSOR DORSANEO: What started this off
9 is the fact that we have a rule or a part of a rule in
10 Rule 49 that authorizes en banc reconsideration. It talks
11 about the en banc court -- "a majority of the en banc
12 court, with or without motion, may order en banc
13 reconsideration of a panel's decision." It doesn't say
14 anywhere in Rule 49 or in any other rule in so many words
15 when this motion will be made, aside from saying "while
16 the court has plenary power."
17 Now, that sends us over to the plenary power
18 rule, which is Rule 19. If you don't have your rule book
19 handy, it kind of -- you kind of get the idea of Rule 19
20 by turning the page. "The court of appeals' power over
21 its judgment expires 60 days after judgment if no timely
22 filed motion to extend time or motion for rehearing is
23 then pending," and then the next alternative, "30 days
24 after the court overrules all timely filed motions for
25 rehearing" -- and reading it the way it is now, should be

1 the word "including" in here crossed out. "Including
2 motions for en banc reconsideration of a panel's decision
3 under Rule 49.7 and motions to extend time to file a
4 motion for rehearing."
5 So it's somewhat complicated to figure out
6 when this plenary power expires, so when the court of
7 appeals has power to order en banc reconsideration,
8 including granting a motion for en banc reconsideration.
9 The problem is exacerbated a little more because of the
10 fact that the time for filing a petition for review in the
11 Supreme Court doesn't talk about -- right now doesn't talk
12 about motions for en banc reconsideration in so many words
13 unless motion for rehearing covers that. So we have this
14 kind of, oh, sloppiness in our rules, and the problem came
15 up before the Court in a case called City of --
16 HONORABLE SARAH DUNCAN: Hartman vs. City of
17 San Antonio.
18 PROFESSOR DORSANEO: Hartman vs. City of San
19 Antonio. And in that case the Court held -- or Justice
20 Brister's opinion that a motion for en banc
21 reconsideration is a type of motion for rehearing, is a
22 subspecies of a motion for rehearing, point number one.
23 Then the Court held that unlike other motions for
24 rehearing that under Rule 49 have to be filed within 15
25 days after the judgment or order, although it's a motion

1 for rehearing it's covered by different timetable rules,
2 so it's covered by -- covered by the plenary power rule,
3 sending us back to Rule 19.
4 And then from that you get the idea that you
5 could file a motion for en banc reconsideration without
6 having filed any other kind of a motion for rehearing to
7 begin with, and I don't know if anybody else has any
8 trouble with saying it's a motion for rehearing, but it's
9 dealt with differently than under the motion for rehearing
10 rules, but I have, you know, on my own had a little
11 trouble making those two steps make complete sense.
12 So we were working on this even before City
13 of -- Hartman vs. City of San Antonio, and after Hartman
14 vs. City of San Antonio what we decided for sure to
15 recommend is a change in the petition for review rule,
16 53.7, to make it perfectly plain that you can file a
17 petition for review within 45 days after the date the
18 court of appeals rendered judgment if no motion for
19 rehearing or motion for en banc reconsideration is timely
20 filed. You know, if you consider a motion for en banc
21 reconsideration as a subspecies of a motion for rehearing,
22 you don't technically need to say that, but we think it
23 would be better to say it because it's clearer what we're
24 talking about.
25 So I think we're unanimous in recommending

1 that 53.7 be clarified to embrace the -- I'll call it the
2 holding in City of San Antonio vs. Hartman that a timely
3 filed motion for en banc reconsideration counts in this
4 timetable that's in 53.7, and that -- the first place
5 where I want to stop and say we recommend that change as a
6 good fix for clarification sake.
7 CHAIRMAN BABCOCK: Okay. Discussion on
8 that? Buddy?
9 MR. LOW: I wonder, how do the Federal
10 courts -- have they -- as I understand, they can consider
11 a motion for en banc hearing a motion for rehearing, and
12 they wrap it all together. How do they handle that in
13 their power? What does their rule say?
14 PROFESSOR DORSANEO: Buddy, that's a
15 compliment that you could ask me such a question and
16 expect me to know the answer, but I don't.
17 MR. LOW: I wasn't -- I'm telling you I
18 don't know the answer, and I know you're a lot smarter
19 than I am, so that's why I asked you.
20 CHAIRMAN BABCOCK: He's just a country
21 lawyer, and you're a big time academic.
22 MR. LOW: I mean, theirs seems to work. I
23 don't know how.
24 PROFESSOR DORSANEO: Maybe Jody knows. He's
25 been studying it.

1 MR. HUGHES: Well, under the local rules in
2 the Fifth Circuit there's a provision that says if there
3 hasn't been a panel motion filed, the en banc motion is
4 initially treated as a panel motion.
5 MR. LOW: Right.
6 MR. HUGHES: There's that provision.
7 MR. LOW: And are there any deadlines, or do
8 you remember?
9 MR. HUGHES: I think it's the same as --
10 it's either a 14- or 15-day deadline.
11 MR. GILSTRAP: Same deadline.
12 MR. HUGHES: Yeah.
13 MR. GILSTRAP: Same deadline. You file your
14 motion for rehearing and your suggestion for en banc
15 reconsideration, and they are separate documents, and
16 they've got to be filed both at the same time, and I think
17 they circulate, but the court can create and the court can
18 treat it all as -- unless one of the justices -- judges
19 speaks up, the court can just treat it as a motion for
20 rehearing and ruling. I think if no judge asks that it be
21 heard, considered en banc.
22 PROFESSOR DORSANEO: I think what he was
23 asking is when the cert petition is filed after we do it.
24 MR. STORIE: Yeah, I thought it was
25 different from that.

MR. GILSTRAP: Cert, I don't think --

MR. STORIE: Rehearing extends, but the en banc doesn't I think.

PROFESSOR DORSANEO: I don't know about that.

MR. LOW: I don't know. I was just curious to know. I'm not against what you're suggesting. I just --

CHAIRMAN BABCOCK: Okay. Any other comments about the suggestion, Bill's suggestion? You burned them out.

PROFESSOR DORSANEO: This is the easy one.

MS. BARON: I think it's a lovely suggestion, so --

CHAIRMAN BABCOCK: Okay. Anybody opposed to this rule change? Justice Duncan.

HONORABLE SARAH DUNCAN: I am not opposed to this rule change to 53.7. I would reserve my right to object to the wording of it, depending on what we do to 49.7, because as now written if you look at 19.1 on the plenary power of the courts of appeals, it doesn't use motion for rehearing and motion for en banc reconsideration as alternates. It uses "motions for rehearing, including motions for en banc reconsideration."

CHAIRMAN BABCOCK: 19.1?

1 HONORABLE SARAH DUNCAN: 19.1(b).
2 PROFESSOR DORSANEO: Yes. So that takes us
3 to the next --
4 HONORABLE SARAH DUNCAN: It treats it as a
5 subset, so I would like to reserve my objection to the
6 wording of this, depending on what we do with 49.7.
7 PROFESSOR DORSANEO: Once upon a time when
8 we did 19.1 I thought it would be good to think of a
9 motion for en banc reconsideration as a subspecies of
10 motion for rehearing. I no longer think that because I
11 think it creates more confusion than it provides
12 illumination, so I would ultimately get to 19.1 myself and
13 make it clear that a motion for en banc reconsideration is
14 different for a motion for rehearing and not a subspecies
15 of that, merely for the sake of me being sure what I'm
16 thinking about when I'm talking like that. Okay. Motion
17 for rehearing, is that this one or that one or both of
18 them all -- both of them rolled into one somehow?
19 Justice Brister's opinion, the court's
20 opinion in City of San Antonio, uses the language of 19.1
21 to say, "See there, they're the same kind of thing." The
22 Court has said this in revising 19.1(b), but I think we --
23 I think our advice to the Court, assuming it was based on
24 our advice, was probably a mistake to say it like that.
25 And that takes us to the issue which the

1 committee might think we don't need to address, is it
2 all -- the issue is, is it all right to say that a motion
3 for en banc reconsideration is controlled by plenary -- by
4 the duration of the plenary power of the court of appeals,
5 or should we say that you need to file a motion in order
6 to have the court exercise that plenary power as a matter
7 of right within a certain period of time?
8 And I think the committee members not
9 unanimously thought it would be better to say when you
10 file this motion for en banc reconsideration, if you're
11 going to file a motion in so many words, like we do with a
12 motion for rehearing, and it ought to be -- it ought to be
13 shorter than the duration of plenary power, which can be
14 relatively long. 60 days after judgment if no timely
15 filed motion to extend time or motion for rehearing is
16 then pending. Okay.
17 Now, maybe the 60 days is off the table if
18 the motion for en banc reconsideration is a subspecies of
19 a motion for rehearing. Then, you know, how exactly does
20 that work, okay? "60 days after judgment if no timely
21 filed motion to extend time or motion for rehearing is
22 then pending." 60 days, 60 days, 60 days, then pending.
23 Do you file -- I'm not completely sure how that works,
24 even with the 60 days. Maybe there's not a problem with
25 it. Maybe there is no way to get on the 59th day or

1 whatever a motion for en banc reconsideration filed to do
2 something more. I don't know.
3 CHAIRMAN BABCOCK: Well, why don't we see
4 what people's objections, if any, are to 49.7? I mean,
5 Justice Duncan, do you have an objection with --
6 HONORABLE SARAH DUNCAN: I do.
7 CHAIRMAN BABCOCK: Okay. Why don't we hear
8 what that is?
9 PROFESSOR DORSANEO: You mean the proposed
10 language?
11 CHAIRMAN BABCOCK: Proposed language, right.
12 HONORABLE SARAH DUNCAN: Why doesn't Bill
13 set out what the proposed language is first?
14 CHAIRMAN BABCOCK: Okay.
15 PROFESSOR DORSANEO: All right. We took --
16 the votes we -- what I was told to do was to draft a
17 proposal that would say that you can file -- well, first
18 thing we talked about was are you supposed to file these
19 motions as separate motions, motions for en banc
20 reconsideration separate from a motion for rehearing, or
21 can you combine them in the same motion or instrument?
22 And based upon, I think largely the San Antonio Court's
23 way of handling things we decided that you should -- you
24 must file them as separate things because --
25 CHAIRMAN BABCOCK: Must file them as

1 separate.
2 PROFESSOR DORSANEO: Because they're dealt
3 with separately; is that right? Huh? If you're going to
4 file them you're going to file --
5 HONORABLE SARAH DUNCAN: We do require them
6 to be separate documents, but the reason we require them
7 to be separate documents is because they're supposed to do
8 different things. The motion for rehearing is just
9 supposed to tell the panel, "You got this, this, and this
10 wrong." The motion for reconsideration en banc is
11 supposed to tell the whole court, "Not only did you get
12 this, this, and this wrong, but this case deserves to be
13 heard by the full court for X, Y, and Z reasons."
14 PROFESSOR DORSANEO: But administratively
15 the motion for rehearing doesn't go to the whole court.
16 The motion for en banc reconsideration does.
17 HONORABLE SARAH DUNCAN: The motion for
18 rehearing does go to the whole court, but it goes in back
19 of the motion for reconsideration en banc.
20 PROFESSOR DORSANEO: I didn't understand
21 that. Maybe I didn't even hear it.
22 HONORABLE SARAH DUNCAN: There are two
23 packets, each with a binder clip at the top, rubber-banded
24 together. Once the panel denies the motion for rehearing,
25 the panel motion for rehearing goes to the back of the

1 rubberbanded packet, and the motion for reconsideration en
2 banc comes to the front. And then the rest of it, that
3 circulates to the rest of the court.
4 CHAIRMAN BABCOCK: What about if they just
5 file a motion for rehearing initially but no motion for
6 rehearing en banc?
7 HONORABLE SARAH DUNCAN: The motion for
8 rehearing goes to the panel.
9 CHAIRMAN BABCOCK: But not the full court?
10 HONORABLE SARAH DUNCAN: No.
11 MR. GILSTRAP: Some courts I think it does.
12 MS. BARON: Yes.
13 MR. GILSTRAP: I think some courts do
14 circulate among all the justices.
15 HONORABLE SARAH DUNCAN: Just on a panel
16 motion for rehearing?
17 MR. GILSTRAP: Yeah, motion for rehearing,
18 and I think the idea is that, you know, some judge can say
19 "Wait, I want to hear this en banc."
20 PROFESSOR DORSANEO: Well, it looks like
21 some courts deal with these things --
22 HONORABLE SARAH DUNCAN: Differently.
23 PROFESSOR DORSANEO: -- either at different
24 times or separately, because they are different things
25 that are dealt with by different people or for whatever

1 reason, it makes the clerk's job easier, et cetera. So we
2 decided, okay, going to have to be two separate motions,
3 so when do you file them? When do you file them?
4 So I guess the next question is do you even
5 need to file a motion for rehearing in order to file a
6 motion for en banc reconsideration? And Stephen Tipps
7 recommended that maybe you shouldn't even have to file a
8 motion for rehearing to file a motion for en banc
9 reconsideration because you don't think you're going to
10 get anywhere with the panel.
11 CHAIRMAN BABCOCK: Justice Hecht had a
12 comment and then Justice Bland.
13 HONORABLE NATHAN HECHT: Well, the question
14 about the Federal rules, Rule 35 says that you can
15 petition for -- they call it a petition for rehearing en
16 banc, and there's a 35 -- a 15-page limit. The limit --
17 if you file both a petition for rehearing and a petition
18 for rehearing en banc, the 15-page limit applies to both
19 together, whether you file them in a single document or a
20 separate document, indicating to me you could do either
21 one.
22 A petition for rehearing en banc must be
23 filed within the time prescribed by Rule 40 for filing a
24 petition for rehearing. You just have to file it within
25 the same period of time, which is within 14 days after the

1 entry of judgment, unless the governance apply.
2 CHAIRMAN BABCOCK: Okay.
3 HONORABLE SARAH DUNCAN: So you have to file
4 both within 15 days.
5 HONORABLE NATHAN HECHT: 14 days.
6 HONORABLE SARAH DUNCAN: 14 days.
7 CHAIRMAN BABCOCK: Justice Bland, and then
8 Pete Schenkkan.
9 HONORABLE JANE BLAND: Our court handles it
10 a little bit differently. We treat a motion for rehearing
11 en banc as a motion for rehearing if no motion for
12 rehearing has been filed initially as a motion for
13 rehearing with the panel. So a motion for rehearing en
14 banc goes to the panel first. The panel looks at it to
15 determine whether or not they want to issue a new opinion
16 or correct something in their opinion. If they decide to
17 do nothing, then it's circulated to the full court for a
18 vote on rehearing en banc.
19 If the panel chooses to withdraw its opinion
20 and issue a new opinion then under our court's precedent
21 the motion for rehearing en banc is denied as moot and
22 then the whole process starts again with respect to the
23 new opinion. And so it doesn't matter whether they call
24 it a motion for rehearing en banc and file it alone
25 without a motion for panel rehearing or they file it

1 together with a motion for panel rehearing. The first
2 step is always to ship it to the panel to look at.
3 HONORABLE SARAH DUNCAN: And that's true in
4 our court as well.
5 HONORABLE JANE BLAND: And we don't require
6 a separate filing, so sometimes they file a motion for
7 rehearing and motion for rehearing en banc, and it's one
8 document, one brief.
9 CHAIRMAN BABCOCK: Buddy.
10 MR. LOW: But the Federal rule doesn't have
11 a plenary power, another section. I mean, theirs just
12 seems to be you just do it within this many days, and
13 that's what you do, and it's a much more streamlined to
14 me, but maybe I don't understand all the complications
15 yet.
16 HONORABLE NATHAN HECHT: Well, the -- it is
17 more streamlined, and they don't -- I don't think they
18 have a plenary power rule, but the reason we adopted a
19 provision in our appellate rules was so that there would
20 be a clear dividing line between when the court of appeals
21 could act and when the Supreme Court could act, so there
22 wouldn't be a couple of cases that are Rose -- I've
23 forgotten the names of them, in the late Eighties.
24 MS. BARON: Rose vs. Doctors Hospital.
25 HONORABLE NATHAN HECHT: There you go.

1 Rose.
2 CHAIRMAN BABCOCK: Show-off.
3 HONORABLE NATHAN HECHT: Where after the
4 petition had been filed the court of appeals is still
5 working with the opinion and the judgment, so that was the
6 reason for it. But the Federal rules do just have a --
7 you know, if you want to -- they're both treated very
8 differently. There's requirements of what has to go into
9 a petition of rehearing en banc. You can't just say,
10 "Well, the panel was wrong." You've got to state certain
11 things to even have a petition, but if you want to file
12 either one or both, you've got to do it within 14 days of
13 the judgment.
14 CHAIRMAN BABCOCK: Pete.
15 MR. SCHENKKAN: I want to ask a fact
16 question that's going to be embarrassing for me to ask in
17 this distinguished group, but depending on the answer to
18 it, it's going to affect the comment I want to make. For
19 our courts of appeals --
20 CHAIRMAN BABCOCK: Pete, nobody down there
21 can hear you, Pete.
22 MR. SCHENKKAN: I'm sorry. For our courts
23 of appeals around the state of Texas how many of the ones
24 that have more than three judges have an odd number of
25 judges, or are all the ones that more than three do they

1 have six?
2 CHAIRMAN BABCOCK: Numerically speaking.
3 MR. SCHENKKAN: Numerically speaking.
4 HONORABLE NATHAN HECHT: All but two, or all
5 but three.
6 HONORABLE SARAH DUNCAN: Austin is six.
7 HONORABLE NATHAN HECHT: Doesn't Beaumont
8 have four?
9 HONORABLE DAVID GAULTNEY: Amarillo has
10 four.
11 HONORABLE SARAH DUNCAN: Austin has six,
12 Amarillo has four.
13 HONORABLE NATHAN HECHT: Austin has six and
14 Amarillo has four.
15 HONORABLE SARAH DUNCAN: Corpus has six.
16 MR. SCHENKKAN: Corpus has six, and don't
17 they sit in --
18 HONORABLE SARAH DUNCAN: Yeah, different
19 places.
20 MR. SCHENKKAN: But I want to suggest two
21 things from that. The first is I don't think the Federal
22 model ought to have much to do with it. The Fifth Circuit
23 Court of Appeals has, what, 18 judges, not counting the
24 senior status ones who often --
25 HONORABLE NATHAN HECHT: 17 plus senior.

1 MR. SCHENKKAN: So the odds in the Fifth
2 Circuit that you happen to have a panel that might not
3 represent the full views of the entire Fifth Circuit or a
4 majority of the Fifth Circuit on some important issue are
5 quite different than in a six or four judge court. They
6 also physically live all over the place, and they only get
7 together when they come into New Orleans to sit, or
8 specially sometimes somewhere else to sit in a panel,
9 unlike the courts of appeals in each of our courts of
10 appeals who see each other weekly, I assume.
11 HONORABLE SARAH DUNCAN: Most of the time.
12 MR. SCHENKKAN: If not daily.
13 HONORABLE SARAH DUNCAN: Most of the time.
14 MR. SCHENKKAN: And are far more likely to
15 know, you know, is this en banc worthy or not. Because
16 they have this giant court with all of these judges, they
17 have this problem, well, what are we going to do when the
18 same basic issue comes up or a very similar issue comes up
19 between one panel or another panel, and they have been
20 fighting with each other for many, many years, and the
21 current trend is this vicious version -- I say because I
22 lost on it -- of the prior panel rule. Other people would
23 be very happy with it -- that essentially says as long as
24 the current panel thinks that it's, you know, remotely
25 close to the prior issue, no matter how badly briefed or

1 different the facts, that's the end of the matter, puts a
2 little different state on the motion for rehearing en banc
3 from my hearing.
4 For all that, I want to push the Federal
5 court thing off the side and say let's not think about it.
6 Now, focusing on how we might think about it when there is
7 four or six, I really think the word we need to look at is
8 not one of the underlined words. It's one of the words
9 that's already in there that isn't underlined, and that's
10 "a majority." I have a special interest in this because
11 of my practice, which involves so many government
12 regulation cases, all of which are funneled into Travis
13 County and, therefore, into the Third Court of Appeals.
14 If you want a conflict of the law on this,
15 pretty much you can't get it because the only cases that
16 come up of this type are going to go to the Austin court
17 of appeals, and they're only going to say it once. We
18 need the rule in the Austin court of appeals that it only
19 takes three to call for rehearing en banc, and then if one
20 side or the other can't find a fourth vote, if it is three
21 to three, that ought to tell the Texas Supreme Court
22 "Let's take this case." So, I mean, I'm now off to the
23 side from your issue, but I'm saying that's a more
24 important issue for a six judge court than --
25 PROFESSOR DORSANEO: That makes sense.

1 HONORABLE SARAH DUNCAN: Couldn't that be
2 accomplished with a dissent to denial of rehearing by
3 three judges?
4 MR. SCHENKKAN: Depending on who's on the
5 panel it could be. Two different problems. Could be
6 three to three, but all three who agree are on the panel.
7 It could be three to three and one of those who doesn't
8 agree is on the panel, but then you have the collegiality
9 issues. They are pressed, they are reluctant to dissent,
10 as you understand and appreciate, I'm sure.
11 HONORABLE SARAH DUNCAN: Actually, I don't.
12 CHAIRMAN BABCOCK: Never crossed her mind.
13 MR. SCHENKKAN: Never crossed her mind.
14 Take it back.
15 CHAIRMAN BABCOCK: Frank.
16 MR. GILSTRAP: The Fifth Circuit has --
17 they're very clear that they don't want petitions for
18 rehearing en banc. They've got either comment or internal
19 operating procedure saying it's the most abused
20 prerogative, and they actively discourage it. That's why
21 they have two separate documents. That's why they make
22 you use of up your page limit to split them among the two,
23 and -- but they have a very established practice. They
24 are strict stare decisis. They do go en banc to
25 reconsider -- to overrule a prior panel opinions. How

1 much of a problem is it in the state courts? I mean, the
2 danger it seems to me is if you make it too easy every one
3 is going to be a motion for rehearing and alternatively
4 request for en banc reconsideration. Is that a problem
5 for the court of appeals?
6 CHAIRMAN BABCOCK: Pam.
7 MS. BARON: Actually, Frank, it will be
8 worse than that. What we'll get is a motion for
9 rehearing. Then right before the court's plenary power
10 expires we'll get a motion for rehearing en banc, which
11 will bump all the time lines another 30 plus days, and
12 we'll never get to petition for review, and we've got all
13 sorts of timing issues back to Rose vs. Doctors Hospital,
14 now under City of San Antonio v. Hartman, because
15 presumably if you file your motion for reconsideration en
16 banc at any point during the plenary power period, you can
17 file it on the 59th day if no motions for rehearing have
18 been filed, but your petition for review was actually due
19 on the 45th day, so you can file your petition for review
20 and then seek rehearing en banc, which makes no sense.
21 CHAIRMAN BABCOCK: Buddy.
22 MR. LOW: There's nothing in our rule, as I
23 understand it, that tells how many judges it takes to
24 grant the en banc hearing. I don't think the Fifth
25 Circuit does that. Is there a proposal, Pete, that we put

in our rule that only so many judges to grant it or --

MR. SCHENKKAN: I'm just stating to the order of reconsideration of it is what it says now takes a majority, which means takes four in a six judge court.

MR. LOW: But our rule doesn't say that, does it?

HONORABLE SARAH DUNCAN: Yeah. 49.7 says a majority of the en banc court --

MR. LOW: Court.

HONORABLE SARAH DUNCAN: -- which has its own definition.

MR. LOW: And you're saying if there's four then that presents a problem.

MR. SCHENKKAN: I'm saying three ought to be enough to order reconsideration, and that will get us three-three dissents. Sure there will be splits a few times, but that's taking a different approach.

MR. GILSTRAP: Is a way to proceed -- why don't we decide if we might want to make them separate documents and maybe hear from the judges whether or not they want to discourage en banc reconsideration? Then we've got to go to the timing issue, which, you know, is a separate deal, but it seems to me those are two separate questions. Maybe we could proceed in that way.

CHAIRMAN BABCOCK: Yeah, Bill.

1 PROFESSOR DORSANEO: And to finish up what I
2 was saying, and it's obvious on the page, the timing issue
3 from the committee's standpoint was to kind of shorten
4 things up to say whatever you file first, 15 days. If you
5 file a motion for rehearing, then after that's overruled
6 you can have a motion for en banc reconsideration no later
7 than 15 days after the overruling. It says "the same
8 party's timely filed motion for rehearing." It could be
9 any -- you know, any party's motion for rehearing.
10 MR. GILSTRAP: But we may not want that. We
11 may not want to have in effect a further motion for
12 rehearing, because that's what it is.
13 PROFESSOR DORSANEO: Yeah. But it's --
14 MR. GILSTRAP: We could say you only get
15 one.
16 PROFESSOR DORSANEO: We have it now, and the
17 time is longer under --
18 MR. GILSTRAP: I understand.
19 PROFESSOR DORSANEO: -- City of San Antonio.
20 CHAIRMAN BABCOCK: Frank and Pam raise the
21 issue of dragging out, lengthening appellate proceedings
22 because of the way this proposed change is going to work,
23 right?
24 MS. BARON: It's not the proposed change.
25 It's the way that Hartman works right now.

1 PROFESSOR DORSANEO: This shortens things.
2 HONORABLE NATHAN HECHT: But clearly should
3 they be shortened more like the Federal rule does and say
4 if you want to file them both, file them within 14 days?
5 MR. LOW: Yeah.
6 CHAIRMAN BABCOCK: Okay.
7 HONORABLE NATHAN HECHT: And then you don't
8 have to worry about one being overruled and then the next
9 one.
10 CHAIRMAN BABCOCK: Good point. Buddy.
11 MR. LOW: The parties have hopefully fully
12 briefed, and there's not going to be a lot of new law
13 that's come out since then, so they should be able to file
14 it fairly quickly, I'd think.
15 MS. BARON: Well, I'd assume -- I'm sorry,
16 may I? I would assume that we can move for an extension.
17 I wouldn't want to change it from 15 days to 14 days,
18 because that will really play with people too much because
19 they're used to a 15-day rule.
20 CHAIRMAN BABCOCK: Yeah, but if we all are
21 the only ones that know about it --
22 MS. BARON: Good point. But, you know, we
23 would still assumingly be able to ask for an extension of
24 time from the Court to extend the time for filing a motion
25 for rehearing and/or rehearing en banc, but I'm in favor

1 for shortening the time for filing rehearing en banc
2 because right now it just seems to be a lot of
3 gamesmanship could be built into waiting till the last
4 minute to file that for tactical reasons, either for delay
5 or because of change in personnel of the court, upcoming
6 elections. There are all sorts of possibilities that you
7 can think if you add 60 days to the date of judgment.
8 CHAIRMAN BABCOCK: Frank.
9 MR. GILSTRAP: Let's decide whether or not
10 they ought to be separate documents and whether or not
11 they ought to be filed at the same time.
12 CHAIRMAN BABCOCK: Judge Patterson.
13 HONORABLE JAN PATTERSON: I agree with
14 shortening the deadline, but one of the reasons I think we
15 may want them in separate documents -- and I don't know if
16 this is why San Antonio requires that, but if you don't
17 require them in separate, it seems to me that you're going
18 to get a lot more multiple joint motions, and everything
19 is going to be a motion for rehearing and motion for
20 rehearing en banc, and I'm reminded of this great scene in
21 that movie "Thank You For Smoking" where it's about a
22 tobacco lobbyist, and his young son asks him, "Dad, I have
23 to write an essay for school about what's the greatest
24 thing about our democracy," and so he says, "What's the
25 answer?" And so the father says, "Why, it's our unlimited

1 system of appeals, of course."
2 But I do worry about any system -- I don't
3 think we want to encourage -- we don't want to discourage
4 en bancs, but we don't want to encourage them. It should
5 be in the initial done by the panel, and I think to
6 encourage dual all the time will be very inefficient and
7 unseemly.
8 CHAIRMAN BABCOCK: Are you saying that you
9 want separate documents --
10 HONORABLE JAN PATTERSON: Separate.
11 CHAIRMAN BABCOCK: -- or not?
12 HONORABLE JAN PATTERSON: Separate.
13 CHAIRMAN BABCOCK: You want separate.
14 HONORABLE JAN PATTERSON: But shortened
15 deadlines so that there's -- to reduce the gamesmanship
16 and so that we don't have unlimited systems.
17 CHAIRMAN BABCOCK: Shortened deadlines,
18 separate documents?
19 HONORABLE JAN PATTERSON: Yes.
20 CHAIRMAN BABCOCK: Okay. Bill.
21 PROFESSOR DORSANEO: I just wanted to say
22 that I agree with Pam's interpretation of 19.1, that under
23 City of San Antonio, Hartman versus, the motion for en
24 banc reconsideration was filed 26 days after the judgment,
25 and that's okay, but the time period that it could be

1 filed under 19.1 seems to me to be 59 or 60 days --
2 MS. BARON: Uh-huh.
3 PROFESSOR DORSANEO: -- after the judgment.
4 HONORABLE SARAH DUNCAN: There was no motion
5 for rehearing filed.
6 PROFESSOR DORSANEO: Yeah. Well, that
7 means --
8 HONORABLE SARAH DUNCAN: So --
9 PROFESSOR DORSANEO: That means we're in
10 19.1(a), doesn't it?
11 HONORABLE SARAH DUNCAN: 60 days.
12 PROFESSOR DORSANEO: 60 days, which is a
13 real long time, and I don't even know if the court
14 realized it could get up to -- under the analysis we could
15 get all the way up to past 30.
16 HONORABLE NATHAN HECHT: Well, the Court is
17 not saying this is a good idea. The Court is just saying
18 this is what we're stuck with given what we've got.
19 PROFESSOR DORSANEO: Okay.
20 HONORABLE NATHAN HECHT: I mean, the Court
21 is not opining in any way, shape, or fashion that 60 days
22 is good or it should run during plenary power or any of
23 this.
24 PROFESSOR DORSANEO: Well, I'm sure
25 everybody noticed that it's going to be as many as 60

1 days --
2 HONORABLE NATHAN HECHT: Yeah.
3 PROFESSOR DORSANEO: -- but that wasn't the
4 fact of the cases, so it doesn't immediately leap from the
5 opinion, which doesn't talk about the dates very much.
6 You have to hunt for them.
7 CHAIRMAN BABCOCK: Justice Bland.
8 HONORABLE JANE BLAND: Well, I haven't seen
9 any real gamesmanship with the -- I mean, maybe opinions
10 sent down, I mean, too soon, but usually people file their
11 motions for rehearing en banc timely, but it seems to me
12 like you know everything you need to know when the panel
13 hands down its decision, so there's no reason to allow
14 longer time for somebody to consider the motion for
15 rehearing en banc, so that means that there is no downside
16 to shortening the time.
17 CHAIRMAN BABCOCK: Are you for separate
18 documents?
19 HONORABLE JANE BLAND: That I don't care
20 about. You know, usually if they're going to file a
21 motion for rehearing en banc, they're going to file it
22 whether they put it in a separate document or together all
23 in one and they just attach it to the caption. If he
24 thinks it's more troublesome to file a separate motion and
25 you want to discourage it, well, I don't think it's going

to work. I think the people that want to have a en banc vote are going to ask for it.

CHAIRMAN BABCOCK: So shorter deadlines, although you don't feel strongly and you don't care about separate documents.

HONORABLE JANE BLAND: I like the proposed rule on the deadlines, and, right, I don't care about separate documents.

CHAIRMAN BABCOCK: Okay. Frank, I'm getting -- I'm getting reaction to your idea.

MR. GILSTRAP: Sure. Sure.

CHAIRMAN BABCOCK: You noticed that?

MR. GILSTRAP: Yes, sir.

CHAIRMAN BABCOCK: Good. Justice Duncan.

HONORABLE SARAH DUNCAN: Has anybody actually seen people waiting until the 60th day?

PROFESSOR DORSANEO: Uh-huh.

HONORABLE SARAH DUNCAN: Has anybody actually seen what Pam was referring to, the gamesmanship and waiting until the 59th day and all that or not?

HONORABLE JANE BLAND: No. That was my point.

HONORABLE SARAH DUNCAN: Has anybody actually seen that? We haven't seen that. I'm just wondering.

1 MS. BARON: No, I don't -- it never occurred
2 to me until Hartman came down that you could do that,
3 is -- you know, I've always kind of been leery and thought
4 that if I filed a motion for reconsideration en banc, if I
5 want it to be timely filed that I have to file it within
6 15 days of judgment because there's no other rule that
7 told me when I had to file it. So I've always viewed it
8 as a 15-day time limit until I read Hartman, and now it
9 seems to be much longer.
10 PROFESSOR DORSANEO: And Hartman is
11 schizophrenic because it says it is a type of motion for
12 rehearing, but it's one that you can wait a whole lot
13 longer to file.
14 MS. BARON: Right.
15 PROFESSOR DORSANEO: And we thought before
16 that if it was a motion for rehearing it would likely be a
17 further motion for rehearing, which, you know, you
18 wouldn't have any -- you'd have to file them together.
19 MS. BARON: Yes.
20 CHAIRMAN BABCOCK: Lonny.
21 PROFESSOR HOFFMAN: What would be wrong with
22 saying that the motion for rehearing has to simultaneously
23 ask for en banc treatment and then the court decides? So
24 the panel can then take the case again if it chooses to on
25 rehearing. The whole court has also been alerted that if

1 they don't there's this issue, and they can decide to take
2 it or not. As a way of streamlining these time lines that
3 you were talking about, you do it one time. There is no
4 two different sets of dates and then it goes from there.
5 Obviously if the panel takes the case and
6 issues a new opinion the time lines start again from that
7 new opinion, and one could ask for rehearing again plus
8 the en banc. Presumably they're not going to decide it a
9 third time, so effectively that second motion would be a
10 motion for en banc hearing.
11 CHAIRMAN BABCOCK: Jody, do you want to
12 yield to Justice Duncan real quick?
13 MR. HUGHES: Sure.
14 CHAIRMAN BABCOCK: She's got a reaction to
15 that, I think.
16 HONORABLE SARAH DUNCAN: I'll yield to Jody.
17 CHAIRMAN BABCOCK: Okay. Jody, she's
18 yielding back.
19 MR. HUGHES: Well, I wanted to point
20 something out, and I think Justice Duncan -- I'd never
21 noticed this, and she pointed this out on the conference
22 call. The 60 days versus 30 days depends entirely upon
23 whether a motion for rehearing was filed, and so in terms
24 of the gamesmanship on the 60 days, I don't think it's
25 really any worse because a person can achieve the same

1 effect by first filing a motion for rehearing, which
2 probably is going to take at least 30 days to get denied
3 or may take that long, and then they get an additional 30
4 days under the current rule to file the en banc under
5 subsection (b) versus 60 days plenary power if no motion
6 for rehearing is filed under (a).
7 And the reason for that distinction is
8 because (b) doesn't include motion for rehearing to
9 include en banc motions, which is -- I always assumed that
10 was done for grammatical reasons because it's easier to
11 word it for that, and it never dawned on me that there
12 would be -- you know, the word's defined differently for
13 different parts of the rule, but I think I'm wrong on
14 that.
15 CHAIRMAN BABCOCK: Justice.
16 PROFESSOR DORSANEO: We didn't finish our
17 thinking.
18 CHAIRMAN BABCOCK: Justice Duncan.
19 HONORABLE SARAH DUNCAN: My objection to the
20 proposal would be we don't get -- and maybe we're
21 atypical. We don't get a motion for reconsideration en
22 banc in every single case, and I've only got a couple of
23 months left, so I don't really have a real strong
24 objection here, but I think my fellow judges will have a
25 strong objection to having to read and absorb and analyze

1 a motion for rehearing in every single case decided by our
2 court. That's going to be really onerous.
3 HONORABLE JAN PATTERSON: That would turn it
4 into a motion en banc in every case.
5 HONORABLE SARAH DUNCAN: That would be
6 really burdensome.
7 CHAIRMAN BABCOCK: Lonny.
8 PROFESSOR HOFFMAN: That wasn't what I was
9 suggesting. I was suggesting that if a party wants an en
10 banc consideration they have to do it at the same time.
11 When the court takes -- when it gets filed, presumably the
12 way it would work -- and it sounds like it basically works
13 this way in Houston -- is that it goes to the panel, and
14 they decide whether to have rehearing or not. If they
15 decide to have rehearing, they're the only people that
16 look at it, and it gets reheard. If they decide not to
17 and the party has asked for en banc consideration, which
18 obviously they don't have to do, but if they have, then
19 the other justices decide whether they want everybody to
20 hear it or not, and it happens all at once, and it
21 shortens things, and I don't think it means any more work
22 for anybody else that they wouldn't otherwise have had.
23 CHAIRMAN BABCOCK: Justice Bland.
24 HONORABLE JANE BLAND: Even though we don't
25 require separate documents for the two motions, we don't

1 have a flood of motions for rehearing en banc. I bet we
2 don't have any more than you guys do, but I would say I
3 wouldn't require them to be filed at the same time. I
4 basically would let them have their choice. If they want
5 to file them together, great. If they want to file them
6 separately, they just both need to be filed within 15 days
7 because sometimes people will get their motion for
8 rehearing together first and file it right away, still
9 determining whether or not, you know, they want to file
10 for motion for rehearing en banc. As long as they do that
11 within the 15-day deadline then I don't think there is any
12 harm in -- in looking at both of them.
13 CHAIRMAN BABCOCK: Which of you guys want to
14 go first? Bill, Sarah?
15 HONORABLE SARAH DUNCAN: I don't really
16 care. If one accepts that a motion for rehearing --
17 reconsideration en banc is an entirely different animal
18 than a motion for rehearing, which I understand a lot of
19 lawyers don't -- I do -- it doesn't even make sense to
20 file one until after your motion for rehearing has been
21 denied.
22 PROFESSOR DORSANEO: Assuming you're going
23 to file a motion for rehearing.
24 HONORABLE SARAH DUNCAN: It just doesn't
25 make sense, and we're really pretty darn quick at our

1 court. I don't think even our court is necessarily every
2 single month, every single case, going to get a motion for
3 rehearing denied in enough time within a 15-day period so
4 that a party will know that they've got one day or two
5 days or three days to file a motion for reconsideration en
6 banc.
7 What I want to do is encourage people that
8 when they file a motion for reconsideration en banc they
9 recognize that it is a different animal, it has to have
10 different kinds of arguments in it, it's got to appeal at
11 a different level of judicial understanding, not tell
12 them, you know, file a document, you call it motion for
13 rehearing or alternatively motion for reconsideration en
14 banc, which I think does mean that we're going to see a
15 lot more of them in our court, because we grant a lot of
16 them.
17 I want to tell them, no, it has to be
18 something different. I would be in favor of doing what
19 the Fifth Circuit does and tell them how it has to be
20 different from a motion for rehearing, but to require them
21 to file the motion for reconsideration en banc before they
22 even know what's happened to their motion for rehearing
23 doesn't make any sense to me.
24 HONORABLE NATHAN HECHT: Just to tag onto
25 that, it makes this much sense, which is sometimes you can

1 tell from reading the panel's opinion that there is no way
2 in the world they're going to change their minds, that
3 they have thought this through and think what they think;
4 and so there's no point in going back and saying, "Well,
5 have you thought about the Smith case" or "Have you
6 realized that what you said on page 12 doesn't make any
7 sense?" You know, it's over, and if you want to win, the
8 only shot you've got is by asking the rest of the court to
9 look at it.
10 So, I mean, I don't know how much -- I don't
11 know how often that happens, but that would be the reason
12 why you would ask for rehearing en banc when you
13 wouldn't -- you just figure the other is a water haul.
14 HONORABLE SARAH DUNCAN: And I'm not
15 disagreeing with that. I'm just saying that I don't
16 understand requiring that somebody -- if they're going to
17 file a motion for rehearing because they do think the
18 panel could change its mind, why are we going to try to
19 make them file their motion for reconsideration en banc
20 before they even know what the panel has done with their
21 motion for rehearing?
22 MR. GILSTRAP: Because it makes sense
23 administratively because not that many motions for
24 rehearing are granted, and you do know where the panel is
25 likely to go, and that's why the Fifth Circuit requires

1 them at the same time. If you don't do that you get into
2 this two-tier process, and, you know, if we want that, if
3 we want basically a second motion for rehearing in the
4 form of a petition for en banc reconsideration, let's do
5 it, but, you know, I don't think we need that.
6 I think we ought to say you've got 15 days
7 to file a motion for rehearing and motion for en banc --
8 and/or a motion for en banc reconsideration. You get 15
9 pages, split it up however you want, and then when the
10 last one of those is denied your time for motion for
11 petition for review starts. That way you don't have two
12 bites of the apple, and the parties kind of have a choice
13 as to whether or not how they want to split it up.
14 If you have two separate documents, they
15 each get say 15 pages, then people are going to sandbag
16 their motion for rehearing by putting stuff in the motion
17 for en banc reconsideration. That's why the Fifth Circuit
18 requires you to split it among the two.
19 CHAIRMAN BABCOCK: Justice Bland.
20 HONORABLE JANE BLAND: Well, I think that if
21 the motion for -- I agree that motions for rehearing en
22 banc should have different arguments and are different,
23 but I think if somebody files a motion for rehearing en
24 banc together with their motion for rehearing, and they
25 don't include those arguments, they are not going to win.

1 They are not going to get en banc review, and I would
2 rather have the opportunity to sit down with the motion
3 for rehearing and motion for rehearing en banc together
4 and go through the panel opinion and the briefs and, you
5 know, the record again, all at one time than having to do
6 it once and then, you know, later have a motion for
7 rehearing en banc filed, have to go and -- and generally
8 when that happens we do some sort of short memo to say,
9 you know, what the panel's recommendation on the motion
10 for rehearing en banc, so that work, you know, has to be
11 done again. I'd rather do it all at once and --
12 HONORABLE SARAH DUNCAN: But isn't that what
13 generally happens?
14 HONORABLE JANE BLAND: What's that?
15 HONORABLE SARAH DUNCAN: That they come in
16 at once?
17 HONORABLE JANE BLAND: Well, in our court
18 pretty often they come in at once or, you know, within a
19 couple days of each other. They might file the motion for
20 rehearing, you know, within ten days and then a couple
21 days later there will be a motion for rehearing en banc.
22 HONORABLE SARAH DUNCAN: That's why I asked
23 the question about whether anybody has seen the types of
24 abuses that Pam alluded to. We haven't seen it. Most of
25 the time motion for rehearing and motion for

1 reconsideration en banc come in together, they come in
2 within 15 days after the court of appeals opinion or as
3 extended, and this is usually not an issue at all, but
4 there is that rare case, Isagerie was one of them. I
5 mean, that's really where all this comes from, and it just
6 feels pretty strange to have a motion for reconsideration
7 en banc in front of you and know that you're still within
8 your plenary power. So we can do it on our own
9 initiative, grant en banc, but we can't -- but a motion is
10 untimely? That just seems bizarre to me.
11 CHAIRMAN BABCOCK: Sorry. I missed track
12 who got their hand up first. Justice Bland maybe and
13 then --
14 HONORABLE JANE BLAND: Well, now I'm
15 confused because I thought you were saying -- what are you
16 proposing, Sarah? Because I got confused. I thought you
17 were saying there should be this process where we have a
18 review of panel rehearing and then people should follow
19 their motion for rehearing en banc, but now what I'm
20 hearing you saying is that really, no, we probably should
21 do them altogether. So I'm just wondering which -- where
22 are you going --
23 HONORABLE SARAH DUNCAN: I'm in favor -- I'm
24 in favor of things just the way they are. I think it's
25 just fine.

HONORABLE JANE BLAND: Don't change anything.

HONORABLE SARAH DUNCAN: I don't see abuses. I don't see motions for reconsideration en banc filed on the very last day of plenary power. I don't see motions for reconsideration en banc filed after the 15 days after judgment hardly ever, but I don't -- and so I don't see a need to change that.

CHAIRMAN BABCOCK: Judge Patterson.

HONORABLE JAN PATTERSON: Let me just comment on two things so that we don't work from a premise that I think is incorrect. One is that I'm surprised to hear that people think nothing happens on rehearing, because it's my impression that lots of things happen on rehearing, and that it may be that panels don't flip a result, but that has happened when somebody has just flat out made a mistake or the reasoning changes or, you know, there are lots of things that can happen and I think that do happen so that really the -- and there's your greatest opportunity I would think, is with that panel that knows the case and that's not just reacting to a motion for reconsideration en banc.

So I think -- and that's why I think the Houston court probably sends it to the panel, because they're the ones that know it the best, but I don't think

1 that most courts are going to do that, because if you get
2 a motion for rehearing en banc I think this probably is a
3 pragmatic approach that you'd let the panel have the first
4 crack at it, so to speak, but I think most courts and most
5 judges are going to treat it as though I've received a
6 motion en banc, I need to deal with it. I don't think
7 they're going to necessarily turn it over to the panel
8 like that court does.
9 It may be that if you get -- there are not
10 that many that come in at the same time, and it may be as
11 a practical matter if the panel signals the rest of the
12 court that they're going to be changing the result or that
13 they're going to be changing the opinion, that might close
14 down the en banc consideration, but that's a very
15 complicated thing. I don't think judges are going to
16 relinquish an en banc motion to the panel. I think that's
17 a kind of turning it over, not doing their job. I think
18 this is a pragmatic thing, so but I think a lot happens on
19 a motion for rehearing --
20 HONORABLE JANE BLAND: Well, wait. We don't
21 relinquish that to the en banc panel.
22 HONORABLE JAN PATTERSON: No, I'm not
23 suggesting -- I'm just suggesting a pragmatic --
24 HONORABLE JANE BLAND: Pragmatically or
25 otherwise. It's just, you know, our routing.

1 HONORABLE JAN PATTERSON: Right. And I'm
2 not suggesting that it's wrong, and I think it's a
3 pragmatic approach to -- and I don't think a lot of courts
4 are going to react that same way.
5 CHAIRMAN BABCOCK: Okay. Bill. And include
6 in your comments, Bill, what you want us to vote on.
7 PROFESSOR DORSANEO: Okay. Well, my first
8 comment is that --
9 CHAIRMAN BABCOCK: Because we're getting
10 ready to do that.
11 PROFESSOR DORSANEO: That en banc
12 reconsideration is different from motion for rehearing
13 consideration. 41.2(c), which is the place it talks about
14 en banc reconsideration or en banc consideration says that
15 "en banc consideration of a case is not favored and should
16 not be ordered unless necessary to secure or maintain
17 uniformity of the court's decisions or unless
18 extraordinary circumstances require en banc
19 consideration," and I read that to mean it's not just that
20 there's something wrong with the court of appeals'
21 judgment, okay, that this is kind of a species of
22 discretionary en banc consideration, that kind of review.
23 The motions really are different in terms of
24 the kinds of things that they're permitted legitimately to
25 say in order to get relief or to request relief. I don't

1 mind putting them together myself because you could say
2 those things in sequence. The main reason why I have done
3 them together mostly is that I thought maybe you had to.
4 The San Antonio court said "no" to that, I think, but, you
5 know, in terms of the plenary power idea, but I read Rule
6 49 before thinking that -- just like we drafted 19.1, that
7 a motion for en banc reconsideration is a kind of motion
8 for rehearing, and it's a kind of motion for rehearing
9 that's governed by the 15-day rule. So I put them
10 together because I thought I'd just kind of waive the en
11 banc reconsideration if I didn't include it.
12 After reading Hartman/City of San Antonio I
13 know that they're the same, but they can be filed on
14 different occasions, and really that the motion for en
15 banc reconsideration could be filed way late in the
16 ballgame here, whether at 19.1(a) or 19.1(b), and that
17 doesn't seem right to me.
18 Now, I think the second point I wanted to
19 make here is I think why people file motions for en banc
20 reconsideration would be for two reasons. One is they
21 think they can get en banc reconsideration, so if a court
22 of appeals is going to grant en banc reconsideration,
23 expect more motions. Okay. If you have the reputation
24 for not granting them, you won't get all that many, but if
25 you have the reputation for granting them without regard

1 to whether it's a uniformity issue or some sort of
2 emergency thing, you'll get them.
3 Lawyers might file them, too, at this stage
4 of the game to get more time to do something else later,
5 although I have less experience with seeing that because I
6 didn't know there was such an opportunity to do that; but
7 under Hartman vs. City of San Antonio there seems to be an
8 enormous opportunity to stretch this process out for a
9 really long time; and what I think really needs to be
10 voted on, the important issue, is the time, is the timing.
11 You know, what -- should it be plenary power as long as
12 the court has plenary power or should there be some
13 clearly designated time in the rule that's shorter than
14 that, whether it's 15 and then 15 or 15 altogether? I
15 think that needs to be said.
16 The committee draft says if you're going to
17 file a motion, whether it's for rehearing or for en banc
18 consideration, you have 15 days to file that from the date
19 of judgment. Alternatively, if you filed a motion -- if
20 you filed a timely motion for rehearing you have 15 days
21 after that's overruled to file your motion for en banc
22 reconsideration. That shortens things up a lot. It's
23 clear, and it's one way to go, and that's what our
24 committee recommended as a fix.
25 CHAIRMAN BABCOCK: Justice Hecht.

1 HONORABLE NATHAN HECHT: And just to say
2 again, Hartman did not say that longer is better. It just
3 says longer is.
4 PROFESSOR DORSANEO: It didn't need to say
5 that.
6 HONORABLE NATHAN HECHT: Well, I hear you,
7 Professor, but --
8 CHAIRMAN BABCOCK: But the Judge --
9 HONORABLE NATHAN HECHT: But I imagine that
10 nine judges think that shorter would be better, but it
11 needs to be in the rules so that people don't come in and
12 say, "Well, nobody told me that."
13 CHAIRMAN BABCOCK: Justice Bland.
14 HONORABLE JANE BLAND: I'm going to vote for
15 the subcommittee's proposal because I think it adds the
16 clarity that we need after the Supreme Court's decision.
17 It still allows for people to file their motion for
18 rehearing en banc and allows even for one after the panel
19 has denied the initial panel for rehearing, so people
20 still have the flexibility that they had under the old
21 rule.
22 CHAIRMAN BABCOCK: Okay. Last comment from
23 the vice-chair, Buddy.
24 MR. LOW: Yeah, I was just going to ask, I
25 don't know of any of our rules in the trial court that are

tied to how long the trial court has plenary power. I mean, do any of them specifically?

HONORABLE SARAH DUNCAN: 329(b).

MR. LOW: Pardon?

HONORABLE SARAH DUNCAN: 329(b).

PROFESSOR CARLSON: But not the filing of the motion.

MR. LOW: Tied to the court may have plenary power on its own within a certain date, so I don't know why we have to worry about that here. I agree with what Bill is recommending.

CHAIRMAN BABCOCK: Everybody who is in favor of the subcommittee proposal on Rule 49.7, raise your hand.

HONORABLE SARAH DUNCAN: I just can't do it.

CHAIRMAN BABCOCK: Everybody who is opposed, raise your hand. Is there anybody's hand that's raised that I can't see?

All right. By a vote of 24 to nothing, the Chair not voting, that passes, and we are in recess till tomorrow at 9:00 a.m.

(Recessed at 5:08 p.m. until the following day, as reflected in the next volume.)

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2 **REPORTER CERTIFICATION**
MEETING OF
3 **THE SUPREME COURT ADVISORY COMMITTEE**

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8 I, D'LOIS L. JONES, Certified Shorthand
9 Reporter, State of Texas, hereby certify that I reported
10 the above meeting of the Supreme Court Advisory Committee
11 on the 20th day of October, 2006, Friday Session, and the
12 same was thereafter reduced to computer transcription by
13 me.
14 I further certify that the costs for my
15 services in the matter are $_____.
16 Charged to: Jackson Walker, L.L.P.
17 Given under my hand and seal of office on
18 this the _____ day of _____, 2006.
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20 _____
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