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MEETING OF THE SUPREME COURT ADVISORY COMMITTEE

January 22, 2010

(FRIDAY SESSION)

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Taken before *D'Lois L. Jones*, Certified Shorthand Reporter in Travis County for the State of Texas, reported by machine shorthand method, on the 22nd day of January, 2010, between the hours of 9:01 a.m. and 4:57 p.m., at the Texas Association of Broadcasters, 502 East 11th Street, Suite 200, Austin, Texas 78701.

Documents referenced in this session

10-01 Roadmap for Reform - Pilot Project Rules

10-02 Roadmap for Reform - CaseFlow Management Guidelines

10-03 Rules 296-305 (1-18-10 report)

10-04 Proposed Rule 301, memo from B. Dorsaneo (6-3-09)

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CHAIRMAN BABCOCK: All right. We're on the record. Welcome to everybody. You'll notice the handsome gentleman to my right, Justice Medina, who is taking over Justice Brister's spot as the deputy liaison to our committee, so we welcome him for his first meeting, and he's got a full cup of coffee, so he'll be able to stay awake for at least a couple of hours, and with that, I will turn it over to Justice Hecht to make his typical status report.

HONORABLE NATHAN HECHT: Just a couple of things. The Governor has appointed Judge Christopher to the Fourteenth Court of Appeals.

(Applause)

HONORABLE NATHAN HECHT: Question now that she's on the Fourteenth Court and Justice Bland is on the First Court is whether the conflicts in the two Houston courts will diminish or increase. We anxiously await that verdict.

The Court put out final changes to Rules 2.16 and 6.08 of the Rules of Disciplinary Procedure, and these are changes having to do with the confidentiality of attorney discipline proceedings, and the changes were favorably commented on in the press around Christmastime, if you saw it.

The Court also issued proposed Rule 737 as directed by Senate Bill 1448, providing for certain proceedings in the justice courts regarding landlords' duties to repair premises, and we're grateful to the committee for its work the last sessions and especially, again, to Justice Lawrence for his invaluable continued assistance to the committee and to the Court on that. We just could not have gotten those done in the short time frame that we were required to do them in without that help. So ordinarily the Court asks for comments before the rules become effective, but Senate Bill 1448 requires that these rules become effective January the 1st, 2010. So they are in effect, even though the Court is also actively soliciting comments on those rules and may make changes in the spring in response to them. We kind of have to invert the procedure when we have a short time frame imposed by the Legislature as we did in that case.

And then, finally, the Court is working very hard on the new substantive rules of ethics for the bar, rules that have been under consideration by the lawyer groups for about a decade since the ABA's revision of the model code in 2000. So those have been published for comment in December, and we've gotten about 300 comments, and we're busily going through those and hope to have our own responses to those comments completed in the next

couple of weeks, and they will be submitted to the bar eventually in a referendum to be voted on, and so it's important that the bar be fully aware of these changes. Some of them are cleanup, some of them are additions, some of them are significant changes, and a few of them have received lots of comments. Some of them not very much, so those will all go out to the bar in a referendum in the spring maybe.

MS. PETERSON: Tentatively scheduled to begin in June, the date of the State Bar's annual meeting, which is June 10th.

HONORABLE NATHAN HECHT: So we simply call those to your attention, and I think that's it.

CHAIRMAN BABCOCK: Okay. As y'all may recall, a couple of years ago the Court asked us to look for ways to reverse the trend which is known as the vanishing jury trial and to see if there were ways that we could improve the way we delivered legal services to the public in the face of a threat by arbitrations, alternative dispute resolution competitors of our judicial system, and Jeff Boyd's subcommittee studied a number of different proposals, which we immediately shot down, so they've gone in the dust bin, but there is an independent effort that has been undertaken by the American College of Trial Lawyers and the Institute for the Advancement of the

American Legal System, and as you know, we were going to try to discuss these at our last meeting but ran out of time, so they are first on the agenda for today, and Justice Hecht and I thought it would be helpful if the -- two of the architects of these rules were here to talk to us and present them to us, so we're honored to have Justice Rebecca Kourlis of the Supreme Court of Colorado, who is now the executive director of the institute. Justice Kourlis spent I think 8 years on the district court and 11 years on the Supreme Court in Colorado, was educated at Stanford, both undergraduate and law school, so she's slightly undereducated, but we'll overlook that for the moment.

And to her left is Bill Norwood, who is a prominent lawyer all over the country, but based in Columbus, Georgia, with the Pope McGlamry firm. He practices primarily plaintiff's law. He's on the plaintiff's side of the docket, and he was on the American College task force that worked on these -- worked on these proposals along with the legendary lawyer from Philadelphia, Bill Hangley, who I just wanted to sneak into the record so I could show it to him later. Don Davis is also here. He is the Texas Chair of the American College and reminds me that these rules will be a subject of a panel discussion at the next meeting of the college

in Palm Springs and that although the board has approved them, predictably they do not meet with unanimous consent by the college, and I suspect we'll have comments to make to them ourselves after we hear from Justice Kourlis and Bill.

The purpose of our effort today is twofold. One, I think we need to -- we need to think about whether there's all or any of these rules that could be effectively used in Texas, so we ought to look at them from a Texas perspective, but Justice Kourlis and Bill Norwood are also looking for feedback from us about what we think about these proposals from a more national perspective, because those of you who have read these will realize that the proposal is to have pilot courts around the country implement these rules and then do empirical data to determine what effect, if any, they have on the delivery of legal services to the public.

In that regard, the Court has -- is thinking about having two district courts in Texas be the pilot for these rules, the 48th District Court and the 345th, so we can feel like we can test those.

HONORABLE DAVID EVANS: I haven't even spoken yet.

CHAIRMAN BABCOCK: The record should reflect that that was a prearranged joke to make sure that you

were listening.

HONORABLE STEPHEN YELENOSKY: I don't think they know our numbers.

HONORABLE DAVID EVANS: I didn't think attendance drew an assignment.

HONORABLE STEPHEN YELENOSKY: That will get me off the central docket, I guess.

CHAIRMAN BABCOCK: That will get you off the central docket. Because Judge Yelenosky, of course, is in the 345th in Tarrant County and Judge Evans is in Tarrant County, which does not have a central docket, but that was just a joke to see if you were listening. So without further adieu, I think, Justice Kourlis, it's your table, so --

HONORABLE REBECCA KOURLIS: Got it. Well, thank you very much for inviting us to speak with you. We are honored to have the time on your agenda. We want to use the time in the most productive way for you and the most instructive way for us, so what we would propose, we'll sort of tag team you as we go through these materials, but we would like this to be very interactive, so it's not our expectation that we will make a presentation to you and then we'll have feedback and questions, but rather that the two will be interspersed.

So as we start through these materials --

and I'm going to be over there and I guess you're going to be over here, but as we start through these materials, please interrupt us at any point in time to make comments or ask questions or interpose objections. My perspective on all of this comes from, as Chip says, a number of years on both the trial court and appellate bench and most recently my immersion in the work that we do at the institute, which is largely collecting empirical data in an effort to try to figure out solutions to the problems that plague the civil justice system to then develop proposals and to go on the road in an effort to advocate for those proposals and then to measure so that it is a complete circle.

I've been involved in the business of proposing reforms in the court system for 20 years, and the piece that we have not done very well is measuring. Once we institute a change we don't try to figure out whether that change accomplished what we wanted it to accomplish, and the institute is very committed to closing that loop as well. So let me move on over there, do you want to move here, Bill, or do you want -- where would you prefer to be?

MR. NORWOOD: I'll hide in plain sight.

HONORABLE REBECCA KOURLIS: Okay. Let me begin by telling you just very briefly how this project

got underway. The institute is a part of the University of Denver. We opened our doors in 2006. We are nonpartisan-based in research and empirical data collection. One of our core initiatives has been to explore whether the operating premises for the current Rules of Civil Procedure are, in fact, facilitating the goals of Rule 1 or impeding and escalating costs. So the hypothetical at the outset was that Americans had been priced out of their own system of justice. We were lucky enough to team up with the American College of Trial Lawyers, and, Bill, do you want to address for just a moment the makeup of the college?

MR. NORWOOD: Well, I will. The college is by invitation only, and, Don, if you can speak to this more if you want to about how it plays out in Texas, but it cuts across all facets of the bar. There are plaintiffs lawyers, there are defense lawyers, there are criminal prosecutors, there are defense lawyers, and there are judicial fellows, so it has a broad range. It's by invitation only, and the rules are that you must have been in practice at least 15 years and been a trial lawyer as a lead counsel on at least -- the number has been diminishing through the years. I think now we're down to seven trials, which says something about the vanishing jury trial as well, but in any event, you have to be

proposed by the state committee, by the people who know you best. Then it goes up to a board of regents and the college regents either accept or reject, and then when you're inducted you're told that you're the smartest, brightest lawyer that's ever come through, and we all believed that was intended only for us, and so we get together once a year and tell each other how wonderful we are.

HONORABLE REBECCA KOURLIS: You actually get together twice a year, don't you? Okay. So in the spring of 2007 then-college president David Beck created the College Task Force on Discovery, with the initial mandate of exploring the problems associated with discovery; and as Bill suggests, this was all premised on the notion that the sine qua non of the American College of Trial Lawyers, namely the jury trial, was disappearing and we had to try to figure out why that was happening and what we could do about it. The mandate of the task force was to work with the institute to determine whether a fair and less expensive approach to discovery in litigation would assist in the process of getting more cases to trial and indeed increasing access at the front end. Both organizations shared concerns that the increasing expense and burdens of discovery were having adverse effects on the system. All of us had anecdotes to support that hypothesis was, but as

Lee Rosenthal so eloquently says, "The plural of anecdote is not data," and therefore, we sort of sat around the table early in this process and recognized that we could all come up with examples of cases in which we thought that had been the case, but we had no idea whether that was a broadly shared perception, so we undertook a survey. I see we're not getting a full slide.

We undertook a survey in April of 2008 of the entire membership of the college. A version of that survey was later administered just a few months ago to the ABA litigation section. The institute is in the process of administering a similar survey to in-house counsel. We don't have the results on that yet, but we do clearly have the results from the ACTL fellows survey and the American Bar Association litigation section survey, so the question is whether the notions with which we began our work were confirmed by those surveys. We're having a little placement issue, aren't we?

Okay. We distributed the survey to 3,800 fellows nationwide. 42 percent responded, which all by itself is pretty remarkable. The respondents came from all 50 states and represented both the plaintiff and defense bar. With few exceptions those representing primarily plaintiffs and those representing primarily defendants were largely in agreement. The place where

those numbers diverged was around questions relating to summary judgment. On average the respondents had 38 years of experience. We tout that as a plus. Both Bill and I have been in settings where that is pointed to as an indication that we're all a bunch of dinosaurs and that we haven't quite moved into the next era, but in point of fact we think that that's a pretty impressive body of data or body of individuals from whom to draw data.

The survey says "Litigation is too expensive." 81 percent of the respondents agree. The 68 percent agree that potential costs inhibit case filings. 69 percent agree that the system takes too long. The broad picture that you will see emerge from this is that at least this group of trial lawyers perceived the civil justice system to be in serious need of repair. With respect to discovery specifically, 87 percent, e-discovery increases litigation costs; 71 percent, discovery is used to force settlement. Almost half agree that discovery is abused in almost every case.

The bottom line impact, the fellows survey results suggest that cost and delay are impacting access. 81 percent indicate that their law firms turn away cases that are not cost-effective, and the median threshold is a hundred thousand dollars.

MR. TIPPS: What does cost-effective mean in

that context?

HONORABLE REBECCA KOURLIS: Well, the way that the question was framed was an effort to get at whether they could bring the case for the attorney's fees and the expert costs and if they prevailed it would all make sense. So the question really focused on the actual costs that a plaintiff would need to incur, either on a contingency basis or an hourly fee basis plus whatever out-of-pocket costs were necessary in comparison to the amount in controversy, and the data suggested that law firms around the country are turning away cases where the amount in controversy is less than a hundred thousand dollars because they can't afford to bring them. Bill, do you want to comment on that?

MR. NORWOOD: Actually the ABA survey was even more specific in that regard.

HONORABLE REBECCA KOURLIS: Yeah.

MR. NORWOOD: The ABA section of litigation survey indicated that the mean was $250,000. The median was a hundred thousand, but the mean was 250, with some numbers ranging up to a million dollars. If the case didn't have at least a million dollars potential value it was being turned away, and the tragedy of that is, of course, that some of us who are old enough made a pretty damn good living out of cases that were a hundred thousand

to 250,000 for years, and now these people can't even get into the courthouse because of the costs are prohibitive.

That's one point. The other point I think you're going to make is that -- you just made with the numbers is that from the defense side most people who do get in the courthouse door, defendants are paying what amounts to blackmail to end the case because the costs are out of control; and they're settling cases that they believe meritoriously should not have to be settled, but the cost and the delay are driving them to settle; and so it's affecting both sides of the equation, on the front end with the plaintiffs and on the back end with the defendants; but it's still the same issue, and that's it costs too much and it takes too long.

HONORABLE REBECCA KOURLIS: As Bill suggested, the ABA survey on this point was comparable, if not more concerning. The ABA survey was administered through the Federal Judicial Center. It is almost identical to the survey that was administered to the fellows of the college. It went to 31,000 plus members of the litigation section, approximately 3,300 of whom responded. As with the fellows survey, respondents represented both the plaintiff and defense bar. Approximately half indicated that they represented primarily defendants, a quarter represented primarily

plaintiffs, and the remaining quarter represented both about equally. The average experience among those respondents was 23 years.

The findings of the ABA survey were very similar to the findings of the ACTL survey. 81 percent, litigation too expensive; 89 percent, costs are not proportional to the value of a small case; 82 percent, discovery is too expensive; and as Bill indicated, the most common threshold value for turning away a case was a hundred thousand dollars, but the median was at 250. So once we collected this survey data, the college and the institute then turned its attention to trying to figure out what that meant and to what some possible solutions might be, and parenthetically let me also note that in the course of these meetings the institute also presented -- collated and presented information on civil justice reforms around the world, the Wolf reforms, what's going on in Canada and Australia, and we compiled information about existing cost reports, cost reports and discovery reports, most of which actually were more than 10 years old, but Rand and the FJC have done that kind of analysis.

We pulled that together to present it to the group as well so that we would all have the benefit of as much information as was out there. In March of 2009 the institute and the college released a report, which

espoused various principles, with the proposal that those principles would underlie suggestions for change. The principles express the idea that one size fits all in civil procedure is not necessarily appropriate for certain case types and that rule-makers should build in the flexibility to tailor procedures to certain types of cases where doing so would lead to more effective resolution of the dispute.

The proposal that notice pleadings should be replaced with fact-based pleading for both the complaint and answer alike; pleading material facts at the outset was thought that it would help narrow the issues in dispute, focus discovery, and help the parties and the judge move the case more quickly and in a most cost-effective way; that discovery should be governed by proportionality, expert discovery in particular should be limited to one expert per party, per issue. The principles call for early and active judicial management and suggest that a single judicial officer should remain with a case until its conclusions.

In addition, the principles support in a number of ongoing empirical research and data collection efforts. The idea is that, as you will see, that there would be pilot projects that would implement these principles, which could then be measured in an effort to

determine whether they are moving in the right direction. Also, just sort of FYI, the institute did a study of nearly 8,000 closed Federal civil cases through PACER in eight Federal districts, and the outcome of that study suggests that early trial settings are one of the most strongly correlated variables with shorter time to disposition. So in these 8,000 cases, when we looked exclusively at time to disposition the factor most closely correlated was an early firm trial setting. In addition to the suggestion, therefore, in the ACTL survey that that's a good thing the PACER data would support that as well. The one additional piece of data --

MR. NORWOOD: You have a question.

HONORABLE REBECCA KOURLIS: Yeah, excuse me.

HONORABLE STEPHEN YELENOSKY: Did you study central dockets?

HONORABLE REBECCA KOURLIS: What we studied was the eight Federal judicial districts, two of which did have central dockets, the other six of which had dockets where there was early assignment of a case to a judge.

MR. MUNZINGER: Where were the Federal districts?

HONORABLE REBECCA KOURLIS: Let's see. You're going to test me. Colorado, Wisconsin, Oregon, Idaho.

MR. NORWOOD: Arizona.

HONORABLE REBECCA KOURLIS: What's the rocket docket? Arizona.

MR. NORWOOD: Eastern District of Virginia.

HONORABLE REBECCA KOURLIS: Eastern District. Wisconsin. I'll get the answer to that.

HONORABLE STEPHEN YELENOSKY: And these are central dockets with how many judges?

HONORABLE REBECCA KOURLIS: Pardon me? They ranged from 6 to 11.

HONORABLE STEPHEN YELENOSKY: Thank you.

HONORABLE REBECCA KOURLIS: It's a very dense report. I would be delighted to distribute it to you. You might prefer to start with the executive summary before you decided if you want to get into the whole thing. It's also on our website if you want to take a look at it. We spent months with law students collecting the data, and it's a very rich source of information for this purpose as well as for a lot of other purposes, but really the end conclusion is that when judges manage cases closely or when somebody does it moves along to disposition and that the problems are associated with delays between events, that you can see that continuances and delays after the filing of a motion ultimately exponentially impact the time to disposition, so it's very

focused on how to get control of a case from an administrative standpoint.

HONORABLE STEPHEN YELENOSKY: Well, and the anecdotal feedback I'll give you in Travis County is that the lawyers like things and don't like things about central docket, but one thing they like --

HONORABLE REBECCA KOURLIS: Sure.

HONORABLE STEPHEN YELENOSKY: -- is they get heard more quickly and their cases get tried more quickly.

MR. NORWOOD: And let me just point to one of these five principles we just talked about for just a second, and that is the single judicial officer, the single judge, from cradle to grave. Has anybody in here ever tried a case in North Carolina or South Carolina?

CHAIRMAN BABCOCK: That would be a no.

MR. NORWOOD: Well, let me just tell you the horror story there. To do away with home cooking, both the Carolinas adopted a rule that they rotated all of their judges in the state around the state on a monthly basis. I had a case in Aiken, South Carolina, a medical malpractice case. I saw seven different judges during the time that case started and another judge tried the case after it had been pretried by another judge who had ruled on motions in limine, and they have what they call the rule of the case, the law of the case rule. If any judge

rules, another judge can't undo what that judge has done, so you end up with this mishmash, and it is like -- I mean, most lawyers here have had the experience of going in on a motion to compel or a sanctions motion and trying to get the court to understand what's gone on for the last six months while they've tried to work this thing out. It is multiplied times -- you know, to the hundredth power when you have to do this seven different times with seven different judges before you finally get around to a trial, and at the end of the trial the judge gave a charge that neither party had requested. They just absolutely blew the thing out of the water, so we had to go up on appeal on the thing.

Ultimately we finally gave up and took some money and went home, but the concept of one judge being involved from the outset, understanding the case, having early intervention with the parties, agreeing with the parties as to the proportionality -- that is, what can and can't be done in this case -- narrowing the issues early on and staying with it changes the culture of the lawyers practicing in front of that court when they know what to expect. Yes, Judge.

HONORABLE STEPHEN YELENOSKY: Well --

CHAIRMAN BABCOCK: Judge Yelenosky, and then Judge Evans.

HONORABLE STEPHEN YELENOSKY: The anecdotal experience you had about going before seven judges is the norm in Travis County, and the result is not what you described, and the assumption that everybody thinks that that's a bad thing is going to meet with a lot of pushback from some of us.

MR. NORWOOD: Well, and you may have a different culture here, but understand that what we were trying to address is when a new judge comes in and doesn't have the benefit, and what you've got is judges all in the same county, right?

HONORABLE STEPHEN YELENOSKY: Right.

MR. NORWOOD: I have a judge from Aiken who hears one matter and a judge from Waxhaw who hears the next one and then a judge from over in Myrtle Beach who hears the next one. These people don't even know each other, much less the case, so a central docket makes some sense in some circumstances and may work well, and you've got a culture where it works. The judges in North Carolina and South Carolina told us it really doesn't work, but, you know, that everybody favors it because nobody gets home cooking.

CHAIRMAN BABCOCK: Judge Evans.

HONORABLE DAVID EVANS: Of course, Tarrant County does not have a centralized docket, and I would

just register that I disagree with my learned colleague from Travis County about speed of cases being tried and that it's difficult in centralized docket to have differentiated case management because differentiated case management is a product of a one-judge, one-case environment. Although I will agree with him that the speed with which motions are heard in a centralized docket and can be set is an advantage often cited on moderate discovery matters. As far as speed of trial of cases I think you have a lot more leeway as a one-judge, one-case person to move a case along exponentially quicker and faster and cut down on discovery abuse when you grab ahold of it.

HONORABLE STEPHEN YELENOSKY: I don't disagree with all of that.

CHAIRMAN BABCOCK: Alex.

HONORABLE DAVID EVANS: Oh, my god, we agreed on one.

PROFESSOR ALBRIGHT: I was just going to say, as you see, you've stepped in it as far as Texas is concerned. This is a big issue in Texas, and we did some research. Last year we had a bill with the State bar going about --

MR. TIPPS: Alex, can you speak up?

PROFESSOR ALBRIGHT: We had a bill with the

State bar, a task force about Texas courts, and this was one of the issues, and I did some research on it. What we found is that in New York the central dockets in the state courts was a disaster. You're saying it's a disaster in -- I mean in North Carolina and South Carolina. I think most places, there have been counties here where it's been a disaster, but Bexar County and Travis County love it, and they're not going to give it up and --

CHAIRMAN BABCOCK: Without a fight.

PROFESSOR ALBRIGHT: Yeah. And the culture, culture seems to work for those two counties, so -- but I think it has been an absolute disaster in many other places.

HONORABLE SARAH DUNCAN: Isn't --

CHAIRMAN BABCOCK: Sarah.

HONORABLE SARAH DUNCAN: I would guess the Supreme Court is not going to mandate whether a given county have a central docket or not, and it's a little tough when the funding mechanism is not the Court's to dole out, so I'm wondering if this is even productive for us to discuss because -- and correct me if I'm wrong, Justice Hecht and Justice Medina, but if Bexar County wants a central docket system, I imagine they're going to get a central docket system.

HONORABLE NATHAN HECHT: Well, I mean, I

think it's helpful to know whether it's productive or not. The Harris County judges had a central docket for a long time back in the Seventies and Eighties and finally switched because I think they were convinced from reports like this and reports elsewhere in the state that having 4,000 cases per judge on your docket was not going to be acceptable -- an acceptable way to operate the judiciary, and when every other -- when no other docket in the state was more than a thousand, but I do think Alex is exactly right, that the team approach has worked in Travis County and Bexar County when it has not worked -- Tarrant County had a centralized docket for a while back a couple of decades for --

HONORABLE DAVID EVANS: I came there in '79, and we were already separated into family, criminal, and civil-only courts, and we've never had the centralized docket, and, of course, our bar is very favorable to it, and whenever we travel to Travis and Bexar County we get a local guide dog to make sure that we're properly -- we're not blind in the courthouse and because we never know who we're going to draw, and, you know, I do think that the way that Travis County and Bexar County judges support each other on their rulings cuts down on the problem of motions to reconsider, but I will say that taking over a complex case from another judge -- and I've done that on

recusals or transfers -- you just don't have any history, any memory of what all the discovery issues were about and what the -- and discrete rulings were on the motions for partial summary judgment, so and y'all have a system to opt out, as I recall.

HONORABLE SARAH DUNCAN: The only point is that we tried to convince the Bexar County trial judges, because we had a serious crisis with a child custody case where it was passed around when it was supposed to stay with one judge, and so we really tried, and they really think it is the cat's meow.

CHAIRMAN BABCOCK: Yeah, it's too bad Judge Peeples is not here.

HONORABLE SARAH DUNCAN: I was thinking the same thing.

CHAIRMAN BABCOCK: He would be in the debate. Justice Christopher.

HONORABLE TRACY CHRISTOPHER: Well, certainly in Harris County we had 4,000 cases per judge and then we went to a centralized docket, and within three or four years -- I mean to an individual docket, and within three or four years it was down to about 1,500 per judge because there was active management of the cases. The proposed rule -- I mean, I know we're not talking about the proposed rules, but there are certainly

instances where it's unnecessary. I mean, even though we have individual dockets -- we had individual dockets, I had an individual docket, if I got stuck in a long trial and there were cases on my docket that wanted to go to trial, I'd just ask around, anybody else have availability to try this case, and you know, we shipped it over to that judge to try. So having a rule that, you know, it's yours and you've got to try it is a mistake.

MR. NORWOOD: Well, let me say this, and we tried to come up with principles that ought to be considered by rule-makers. We never thought that we were dictating to Texas how to run anything, just that the Texas rules-makers ought to look at this and determine whether or not it worked. There's no -- the answer is to all of this is how you get through the system in a less costly and more efficient manner, and if you have a culture that works, and if it ain't broke, you don't need to fix it, and if it works in one place and doesn't work somewhere else then you need to look at various options. This is just one of them.

CHAIRMAN BABCOCK: Lonny.

PROFESSOR HOFFMAN: I guess just a point of sort of order first. Are the folks from Colorado done, and is it our time to now talk? I don't want to cut them off if they had more to present. It felt like we kind of

took a detour, so I just want to make sure.

CHAIRMAN BABCOCK: We have, and there is more to say, but as Justice Kourlis said, this should be interactive, so this is a healthy discussion I think.

PROFESSOR HOFFMAN: All right. Well --

CHAIRMAN BABCOCK: You got anything to say?

PROFESSOR HOFFMAN: I do. Funny you should ask.

CHAIRMAN BABCOCK: Justice Christopher.

PROFESSOR HOFFMAN: No, I do.

CHAIRMAN BABCOCK: Oh, sorry. You do.

PROFESSOR HOFFMAN: It's hard to know where to begin. Maybe the best place to start would be to start with what is surely the most dripping of ironies that a group that is purportedly beginning this project because they're concerned about vanishing jury trials would suggest reforms, many of which would seem to me to exacerbate the very problem that they say they're going to start, but I'll come back to that. It's not at all clear to me either that this group that I know has a number of very reasonable, very nonpartisan folks on it is entirely nonpartisan, and so we're going to have to talk about that issue some more. And among other things, Tom Donohue, the executive director of U.S. Chamber of Commerce, plays -- not only is on your board, but the notion to describe

yourself as nonpartisan when Tom Donohue and the U.S. Chamber of Commerce plays a critical role in your group is something that doesn't sit easily with me.

And then now let me turn to at least one -- first substantive point, which is this business of some of the methodological data that you've gathered, the methodological work you've done, and some of the data you purport to report. It is hard to know -- and certainly this isn't the space to kind of roll up sleeves and dive into the methodology, but it is nothing short of astonishing to me that these numbers could be offered up as though they were proof positive of problems that everyone sees. Those who know, know that there has been systematic empirical research for decades showing that discovery is not a ubiquitous problem but rather only exists in a small slice of litigation, typically high stakes complex cases. Indeed, the most recent Federal Judicial Center study that Tom Willging and Emery Lee have done and that is on FJC's website confirm those very same numbers. Those are, by the way, the same numbers or very similar to numbers that they found back in 1998 when they were studying the 1993 Federal reforms and that Beth Thornburg talks further about in her *SMU Law Review* article in 1999.

It looks like half the lawyers consistently

-- at least half the lawyers consistently report that discovery is not a problem, and as a separate parenthetical to that, to the extent that it is, it's not at all clear that the conversation is a one-way street, which is to say defense lawyers may share their equal part, if not a greater part in that equation as opposed to plaintiffs lawyers filing reportedly frivolous lawsuits that presumably form some basis on which some of these reforms are suggested.

But then building on that point, the data that they gather from effectively fairly old lawyers doing, you know, fairly corporate work presumably, at least heavily, but they don't break out that it's utterly inconsistent with data that has been gathered and is scientifically rigorous. I mean, no one would doubt the FJC is nonpartisan, by the way, so there's a strong conflict. In addition to that, there is so much that I just saw in some of those slides that -- again, I'll return to my point. I don't know where to begin, Chip, because some of the reforms are entirely separate, and we've been having a conversation about central docket as though that were even the central idea here. You know, one of the ideas that's being discussed, of course, is one of the most hotly contested procedures in Federal procedure right now, which is the issue of what impact do

the decisions in *Bell Atlantic vs. Twombly* and *Ashcroft vs. Iqbal* have on pleading standards, and this notion of a fact -- returning to a fact-based pleading, something that existed, you know, before 1938 in most states and in the Federal system, as well as the limited discovery proposals that then tag along with that, seem to me to be a more central issue and one to address.

And so on that substantive point a great deal more could be said, one of which, one of those points -- and maybe I'll stop here not because I am done, but because I don't want to abuse my time -- would be to say that if the problem really is discovery costs, that is to say even if their data is right, right, the American College of Trial Lawyers have gotten it right and that all the other studies are wrong and that this problem of discovery abuse is rampant throughout the entire system from big to small cases, from east to the west coast, then the problem is a discovery problem, not a pleading problem; and one wonders why are we tinkering with the pleading rules to fix what presumably we might be able to address through limited discovery -- in discovery.

Ultimately there are some -- in my view, and again, I'll stop, not because I'm done, but because I want to not overstay my welcome, is to say that there are some really, really troubling issues here, and while I'm all in

favor of doing more work and think that rule-makers and Legislatures far too often decide things without adequate data, it is extremely and deeply troubling that a group that looks like it already knows the right answer is now going out to gather data to try to support that position.

CHAIRMAN BABCOCK: I just told Justice Hecht I hate it when people prepare, so thanks for that. We'll go to Justice Christopher and then Skip and then back to Justice Kourlis who can continue her rudely interrupted presentation.

HONORABLE TRACY CHRISTOPHER: Well, I haven't done near the research that I guess has been touted here, but, I mean, the fact of the matter is if you look at an average state court docket, most cases are under $100,000. So the idea that somehow cases under $100,000 have been priced out of the market doesn't make sense to me, so I'm having trouble with that number just right off the bat.

CHAIRMAN BABCOCK: Skip.

MR. WATSON: Just to return to the -- you know, what I understood to be the theme that started this discussion of early and continuous involvement of a single judicial officer to presumably reduce the costs and delay of civil litigation, some of us have practiced long enough to remember the 1990 Civil Justice Reform Act when

Congress came in in response to the Article 3 judges' request for additional judges to solve the backlog of civil litigation, and as part of the deal that was put together to get the additional Federal district judges and circuit judges, Congress specifically required in the Civil Justice Reform Act that each Federal district perform a study of the reasons for cost and delay in civil litigation and to implement a plan for reducing costs and delay in civil litigation, which sounds like deja vu all over again from what we're hearing here, and it interests me that we studied eight Federal districts in this plan that have 20 years of experience trying to follow a legislatively mandated plan to reduce cost and delay in civil litigation.

Now, that act, the Civil Justice Reform Act of 1990, had two cornerstones that had to be in every plan. One of those cornerstones was early and continuous involvement of a judicial officer, a someone assigned to the case from the get-go to evaluate what it was really about, to narrow the issues, and to tailor discovery and to report, of course, to the Article 3 judge on whether it was -- should be subject to alternative dispute resolution, et cetera.

The other cornerstone was alternative dispute resolution, mediation. That's where mediation lit

the afterburner in the United States and came to the fore, was 1990 to present. Now, unfortunately I was on the committee that did some of the work in the Northern District where Nina and Chip and others are from, and in viewing those plans and trying to put together our plan one of the things that was patently obvious to me was that some of the districts took seriously the first cornerstone and took steps to get a judicial officer up front involved at the initial filing stage to figure out, to get the parties together and define what the issues were and to tailor discovery.

Most, in my opinion, from the plans I reviewed, opted to emphasize the other. They gave -- I'm not going to say lip service, but very little really happened on the early involvement. There would be a meeting or a report filed, but that was it. A required conference. But on the second end, it all went to mediation to thin them out, and I was always very curious if a study would ever be done that went through and figured out which worked, because the plans tended in my opinion to break one of those two ways. They tended to go early involvement to truly manage the case, or they really didn't want to fool with that and the emphasis in real world went to the side of force them to mediation, but usually the mediation came after discovery, you see, so,

you know, there was a built in time differential, and I could never figure out if anybody studied which one worked the best.

Chip, you may recall that -- that may still be this way, but before I moved down here one of the ironies was that the Northern District adopted its plan for cost -- you know, reducing costs and delay in civil litigation, but on the pleadings point, you know, one of the things was, you know, we need to really know what's being pleaded here, and they left in the local rule for the Northern District -- and, Nina, that still may be there -- that before you come in and file a motion for a more definite statement of what are you really telling me here, you're supposed to -- you can't file that unless that can be ferreted out by discovery. I mean, in other words, do the discovery first instead of taking up the judge's time with the motion for a more definite statement.

That to me is so typical of the way those plans broke of, no, we really don't want a judicial officer involved in narrowing the issues or even defining the issues for purposes of saying what discovery is, so my question is, did -- which way did your eight districts break on that? Were they more pro-mediation, or did they actually practice early active judicial involvement in

defining issues and tailoring discovery?

HONORABLE REBECCA KOURLIS: More of the latter. I think based on the divergence that you are suggesting -- and you raise a point that I intend to go back and suggest that we analyze further, and that is how each district lines up in terms of the Civil Justice Reform Act steps that they took in the Nineties, because we didn't do that analysis, but crudely in terms of how the eight judicial districts line up, my memory is that two of them were very focused on mediation and were measuring themselves on the basis of early settlements, and the other six were measuring broader time to disposition and time between events and were more focused on the judicial management of the case, but you raise a very good point, and our data I think can be spun to address that question.

MR. WATSON: I would suggest that it needs to incorporate that, because that can skew your data tremendously one way or the other.

HONORABLE REBECCA KOURLIS: Okay.

MR. WATSON: I'm not being critical.

HONORABLE REBECCA KOURLIS: No, asking the question, sure.

MR. NORWOOD: As to that point, however, Article 3 judges are restricted only by their own

imagination, so --

CHAIRMAN BABCOCK: Get that, Dee Dee?

MR. NORWOOD: Well, I had a Federal district judge tell me one time, "We really can't do as much as we used to do. About all we can do now is as we damn well please," but my point is that having a plan and actually having the judges in that district actually follow that plan are two entirely different things, as we all know, so --

CHAIRMAN BABCOCK: Yeah, I was going to make that point, that over time, you know, I was on the committee with Skip in the Northern District and over -- even though the plan was, as Skip describes it, very much weighted to early judicial involvement in the case and managing the case, I dare say that most people -- Nina, maybe you could comment -- that practice in Dallas found that the judges by and large have drifted away from that and have delegated it either to a magistrate judge or don't want to have the kind of hearings that are contemplated, but, Justice Kourlis, Tracy Christopher, Judge Christopher, who was a district judge in Houston, I think makes a good point that a lot of the docket in Houston does have -- a great majority of the docket has cases where the amount in dispute is a hundred thousand or less, and that may be anecdotal, but I bet we could get

some data to support Judge Christopher on that.

So is that aberrational in terms of your study, because Houston is big and has a very large population of lawyers, some of whom would be perhaps more willing to take smaller cases, or how does her experience or her comment square with what you-all found?

HONORABLE REBECCA KOURLIS: Well, the observation that I would offer all of you or the query I guess that I would pose to all of you is as we have all as a profession been thinking about these issues for the last 15 years, I think the question that we have tried to ask ourselves is to some extent the one that Professor Hoffman poses, and that is are we just looking at problems in complex big cases, or are we looking at problems that are system-wide, or are we just looking at problems in small cases? You may remember that the Federal Rules Advisory Committee, Justice Hecht, was looking at simplified Rules of Procedure for small cases for a period of time. Texas may have done the same. Colorado did. We tried to devise a system for cases of a hundred thousand dollars or less, thinking that that's where the problem was.

I would suggest to you that there is at least part of this data, the FJC survey being among that to which I would point, that may suggest that there are certain kinds of small cases that are making their way

quite nicely, thank you. The FJC survey study suggests that the respondents to that study averaged $27,000 in attorney's fees per case. That's I think pretty telling that those were relatively small cases, and if those attorneys were reporting that their cases were moving along fairly well, the American College of Trial Lawyers and the ABA litigation section are reporting that they don't think their cases are moving along well, then, query, where should we be focusing? Should we be looking at trying to devise simplified procedures for small end cases, or should we be looking at trying to triage and allocate more judicial time and resources to the larger cases? So if, in fact, cases of a hundred thousand dollars or less are moving through the system quite well in Houston then maybe that's not where the problem is, at least for that particular population. Maybe the problem is elsewhere.

I guess I would close that particular portion of my remarks by suggesting that as I travel around the country, there sure are a lot of people who say to me that the middle class is priced out of the courts, that if you do have a case where you want to sue your roofer for $75,000, it's very difficult to find an attorney who will take that case. That may not be representative, but it certainly is a voice that I have

heard and that I think others have heard.

So I think we've had a variety of issues raised in this part of discussion, and I don't want to lose them. Certainly the question of one judge per case versus centralized dockets is an issue. Another issue that has been raised that I want to come back to at some point in time is Professor Hoffman's concerns about impartiality. A third issue that we're talking about is this question of, I guess, is this really a problem, and if so, where's the population that is suffering from it. Bill, do you want to address any of those three? I want to go to Oregon and Arizona briefly and then I want to return to the impartiality question.

MR. NORWOOD: I just want to respond briefly to Professor Hoffman's critiques. Tom Donohue didn't participate in anything, Professor. I don't know where you got that information, but I've never seen Tom Donohue at anything.

HONORABLE REBECCA KOURLIS: Bill is on our board, Professor Hoffman.

MR. NORWOOD: And as a result principally of the efforts by me and some of the other plaintiffs lawyers we made it a point to select a group to design the survey and administer the survey who had never worked for the chamber of commerce. The three on the request for bids,

two of them had actually done work for the chamber of commerce on tort reform surveys, and we felt that their results would clearly be questioned because of that as to their political bias, so we selected the one, Mathematic, Inc., who had had no involvement in that.

Second point is the notice pleading issue, and I just want everybody to understand, we looked at states that still have fact-based pleading. It's not Twombly, and it's not Iqbal. Twombly and Iqbal did not exist at the time we first started looking at this. They came out later, and I am sorry that they did because I think they're bad decisions, but I'm also sorry that they did because they skew what we were really trying to suggest, and that is that the plaintiff ought to -- and I'm a plaintiffs lawyer -- ought to have an idea about the who, what, when, where, and how of what happened and put that in the pleadings so that the scope of discovery can be narrowed to issues relevant to that. When you have a notice pleading that says, "Your goat escaped, and I'm hurt, and I want a hundred thousand dollars," that opens discovery up as broad as the plan of salvation. If you say, "Your goat escaped on such-and-such a date and did this damage in this manner and this sort of thing then you're more able to focus on it."

That's all we wanted to do by fact-based

pleadings. We do not want to return to common law pleadings with all the horror stories about whether or not you can plead ultimate facts or evidentiary facts or whatever it is. We don't want to go back to special demurrers and general demurrers. I started with them. Thank God we don't have them. But what we wanted to do was to look at how you narrow the scope of discovery to try and put some restraints on what could be discovered so that the parties could narrowly focus that discovery with the help of a single judicial officer early on in the case.

And we wanted it to cut both ways. We wanted the defendant to have to come in and not be allowed to just generally deny. We wanted the defendant to have to come in and say why, what facts they base their denials upon; and if they had any defenses, I did not want to see a responsive pleading with 38 boilerplate defenses, everything from laches to statute of limitations, with no basis for any of them except that, "Well, I'm covering my butt so I'm going to put all of these in here." If you don't have any basis for that, it ought not be allowed. So the plaintiff doesn't have to go out and say, "What facts do you have to support this defense? What facts do you have to support this defense? What facts do you have to support this defense?" They give you the names of

people with information, and you go and take their deposition, and it turns out they've got nothing.

So at the end of the day what you do is you spend 45 percent of your discovery time throwing out unnecessary defenses. That's a cost and a burden to the plaintiff that I didn't want to see happen, so the concept of fact-based pleadings was to try and narrow and make people actually plead something. I suspect everybody in this room has gotten a pleading in at some time that had the wrong name in there because it's simply somewhere on somebody's Word, and they plug it in and say, "Oh, use all the same defenses we used in the Smith case." So you end up with the plaintiff being named Jones, and you end up with defenses related to Mr. Smith.

Those are the sort of discovery abuses that we were trying to curb, and whether or not the experience of lawyers who believe that these -- this is discovery abuse and understand that the ultimate purpose in all of these was to try and get the case to a trial, not to ADR, not to settlement, but to a trial, the Federal Rules of Civil Procedure, the pretrial portion of it as it exists now came from the old equity rules, which never had a trial. So what you have is a conjoined group in the 38 rules of equity pretrial procedures, which never were intended to lead to a trial, joined with the law

procedures which involved a trial and appeal, and that's sort of a nonstarter when you join a pretrial proceeding to a proceeding and you can't get to a trial. So all of this was an attempt, we thought, by trial lawyers to get to a trial. I'm sorry you disagree with that, Professor, but that was our intent, and I think I ought to say that now.

CHAIRMAN BABCOCK: Justice Sullivan, did you have your hand up a minute ago?

HONORABLE KENT SULLIVAN: Well, I did.

CHAIRMAN BABCOCK: I thought so.

HONORABLE KENT SULLIVAN: Two quick points, because I don't want to divert things further. One is I agree with Judge Christopher's point just about the number of cases under a hundred thousand dollars that are pending on Harris County dockets, but I at least wanted to suggest a twist to that, because I don't know that that number is a terribly relevant number. In my view the question really is how many cases could have or should have been filed, and that's a much harder number to know. I would suggest that the number of cases that are filed are the result of a cost-benefit analysis done by a lawyer saying these cases are simple enough and arguably small enough to get the trial on an economical basis, and I'll suggest one data point of types of cases that have disappeared, and

that is I think that if you have a medical malpractice case in Texas that is worth, say, less than -- you can argue about the number, of course, but say it's worth less than about a quarter of a million dollars, maybe a half million dollars, I think for the most part those cases are probably not getting filed, and it has to do with the perception of the cost that is associated with those cases.

One other thing I was going to suggest just by way of at least implying there may be another way to look at this problem is the issue of -- that is unique to state courts as opposed to Federal courts and Texas state courts in particular. In Federal courts, if I recall diversity jurisdiction, you've at least got an amount in controversy of $75,000, so you have that threshold as to size of the case, if you will, the value of a case in some sense anyway. In a Texas state court you can get into the highest level court, a plenary jurisdiction court in Texas, arguably, hypothetically with a controversy of a few hundred dollars, and it creates a very significant dilemma for a state trial judge, I think.

A trial judge in a metropolitan area certainly and some rural areas as well faces the prospect of a docket that may have a case worth a very small amount, maybe a significant number of cases worth a

relatively small amount on the very same docket with cases worth perhaps tens of millions of dollars; and I suggest that the infrastructure associated with those two dockets, because they're two totally different dockets in my view, the infrastructure necessary to support those two dockets is totally different in terms of the clerical staff, in terms of the availability of a law clerk or a legal research support, and quite frankly, the managerial approach taken by the judge, including the time and flexibility that the judge has to respond to these two totally different dockets.

I think that creates a real problem, because in effect what you end up with is a structure that cannot support either docket, and so we end up with the worst of all possible worlds in Texas. Part of it is, is that we have meaningfully revisited a notion of what is a small case. The notion that you can have a case worth only a few hundred dollars filed in district court seems to me a historical anomaly. Anyway, there are other points I could make, but I'll leave it there for now.

CHAIRMAN BABCOCK: Well, we'll keep going. Justice Kourlis, do you want to get back to slide number nine?

HONORABLE REBECCA KOURLIS: Please.

CHAIRMAN BABCOCK: Nine of fourteen. And,

by the way, while you're looking at that, I will note that Skip Watson has been practicing for 38 years.

(Laughter)

HONORABLE REBECCA KOURLIS: Okay. This slide relates to a survey that we did of the bench and bar in Arizona. Arizona has different Rules of Civil Procedure than the Federal rules. They have presumptive limits on almost every discovery tools. The rules are referred to colloquially as the Zlackett rules after Chief Justice Tom Zlackett, who was on the Court at the time they were adopted. The Arizona bar seems to agree that these limits reduce the volume of discovery, that they focus discovery, and then you'll note over on the question of whether they reduce costs, there is a pretty close total between those who agree that they reduce costs and those who disagree, so query how they impact actual costs, which is odd, because there seems to be a significant number of the Arizona lawyers who believe that they reduce the volume of discovery. It's an odd juxtaposition, but in general the survey of the Arizona bar seems to suggest that they like the Zlackett rules, they like the early disclosures and the presumptive limits.

Now, we also surveyed the Oregon bench and bar on all of these topics. The one most relevant for the moment is Oregon does have fact-based pleading. We wanted

to see whether the bar that practices both in state court and in Federal court in Oregon so that we could sort of normalize for legal culture issues liked fact-based pleading and how they felt about litigating in state versus Federal court. You see that 68 percent of the Oregon lawyers do like fact-based pleading -- let me bring this down a little bit -- that it reveals the facts early and narrows the issues early. There also is a significant indication that those lawyers prefer practicing in state court over Federal court. We had a section where we asked them to break out why that's the case, and a significant portion suggested it was the rules.

So this is fact-based pleading again in Oregon with respect to time and cost. I apologize for having to slide this up and down continuously. Okay, decreases cost to litigants: 47 percent say no effect; 28 percent says it does decrease costs -- or time to resolution; 32 percent it does decrease costs to litigants; 35 percent, no effect. So there's some pretty significant numbers that at least in Oregon fact-based pleading is not disadvantaging plaintiffs, and by the way, as a footnote, the Oregon survey, the respondents were almost equally divided between those who represented plaintiffs and those who represented defendants and on the defense side those who represented plaintiffs and

defendants equally.

So despite any implication to the contrary previously, we do not come at this thinking that we know what the answers are. We do come at this thinking that there is a problem, and nothing that we have uncovered would suggest to the contrary. The question is identifying where the problem is and what the solutions are. To that end the college and the institute decided that what we needed to do was put out some proposed rules and case flow management guidelines, see if we could find some jurisdictions that would pilot those approaches with a commitment from the institute and the National Center for State Courts with whom we're partnering on the measurement side of the equation to measuring impact of those changes in jurisdictions where they're implemented.

So the two roadmap publications were released in November of 2009, which seek to accomplish just that. Pilot projects are under consideration or in place in those four jurisdictions, although the pilot project in Illinois is in the Federal court. Again, as I say, the intent is to measure those, and, in fact, we have a measurement publication which we are about to release. The organizations, both the college and the institute, are focused on gathering information about what works and what does not work, primarily from the perspective of

litigants. We want to know what the litigants perceive is working. We also want to know actual time to disposition, numbers of jury trials. We want to know whether there are increased filings of small cases or decreased filings; and we want to know, to the extent that we can uncover it, the cost information associated with those pilot projects.

Now, our final report and these pilot project rules and case flow management guidelines, as is clear from the discussion today, have ignited a national dialogue. The media has been interested in it. There's been a fair amount of coverage there, but much more importantly, what it has done is to encourage a number of other data collection efforts and conferences that are focusing on these issues. As Professor Hoffman suggests, the FJC undertook a survey. There are other surveys that are underway around the country and data collection efforts. In May of this year there will be a Federal Civil Rules Advisory Committee conference on civil litigation designed to look at the operation of the Federal rule, primarily the pretrial portion of the rules, to determine whether they are indeed serving the goals of Rule 1, and if not, what the next step might be. The 2010 conference has become a very pivotal focus with a lot of this data being designed to address questions posed by the conference, and there also are a great number of papers

that are being prepared by experts around the country on these various issues. Those papers will be published in a Duke Law Review symposium, which I think is supposed to come out in June.

Now, although we have clearly been dabbling in the substance of the proposals all the way through this conversation, what Bill and I would like to do next for maybe the next 45 minutes -- although, Chip, if you would like to break, we might do that. What we wanted --

HONORABLE TRACY CHRISTOPHER: Chip never lets us break.

CHAIRMAN BABCOCK: Yeah, I'm pretty tough on breaks. But, having said that, we do have a morning break, so if this is a natural breaking point then we can do that now.

HONORABLE REBECCA KOURLIS: Our plan had been to turn to the rules specifically, and Bill was going to walk through them by the each, so it is sort of a change in tone, and if you'd like to break, it would be the time.

CHAIRMAN BABCOCK: Okay. Let's take our morning break, and let's keep it to 10 minutes.

(Recess from 10:21 a.m. to 10:39 a.m.)

CHAIRMAN BABCOCK: Okay. By the way, I warned our honored guests ahead of time about this group,

so don't anybody be worried about pulling punches, which I know you're not. Okay. Judge, you ready to roll again?

HONORABLE REBECCA KOURLIS: You bet. And, by the way, on the point that Chip just made, I welcome -- I think both of us welcome debate on these issues. Our mission -- and for me it is truly a mission, and I think now for Bill as well, our mission is to get the profession to focus on these issues and difference of opinion and questioning one another and coming at it from different perspectives is all wonderfully healthy. It's the fact that we're talking about the issues that is our primary goal and that we are looking at ways to develop solutions, whatever those solutions may be.

So with that introduction, Bill is going to go through the rules on a one by one basis, and the good news is that you're going to be rid of us at 11:30, so yes, sir.

HONORABLE TOM GRAY: I understand that we're going to be rid of you, but that is not what is driving this question, but having just a little bit over two weeks ago received a letter from the Lieutenant Governor, the Speaker of the House and the Lieutenant Governor -- well, Speaker of the House, Lieutenant Governor, and the Governor about reducing the cost in the judicial system, you made a statement while ago that piqued my interest

that you were going to try to measure the cost of the pilot project. Is that the -- can you explain what you're talking about there? Because my concern in reading through this and you're talking about a lot more hands-on management of each of the cases, I'm looking at that in the context of, you know, exponentially increasing the cost of the judicial system itself, and to let more people in, which is going to cause more cost and expense of the judicial system. I mean, we're talking if this works building bigger buildings. So is that what you're trying to address?

HONORABLE REBECCA KOURLIS: Two very short responses from my point of view and then Bill has a lot to say about that point. My response is we want to measure costs at both levels, both the cost to the litigants and also the cost to the system, because clearly one of the objectives here is to make the process more efficient for the courts. There is a pilot project that is on the boards and about to be implemented in Atlanta, one of the purposes of which is to figure out ways to use judicial time and staff time more efficiently with respect to the civil docket. So we're looking at it certainly at both levels; and not to do that, in my view, would be disingenuous in these times because state court budgets in particular are being slashed; and we have to try to figure

out how to use judicial resources more effectively; but we also want to know whether these proposals reduce costs to the litigants. Okay, Bill, the floor is yours, and start with Atlanta if you wish.

MR. NORWOOD: Did that answer that?

HONORABLE TOM GRAY: Somewhat, yes.

MR. NORWOOD: Okay. Let me just tell you, I live in Atlanta, and I have an office in Columbus, like Chip said, but the Fulton County superior court agreed to do a pilot project only on the case management portion of all of this, not piloting the rules. We can't do it in Georgia for a lot of reasons, not the least of which is the Legislature had to approve it, which is like watching a glacier move. They were very excited about doing it. The Supreme Court adopted a resolution, the Atlanta Bar Association adopted a resolution urging that these be put into place, the lawyers. The judges who were opposed to doing this kind of on hands case management always said the lawyers don't want it, so we got the Atlanta Bar Association to actually adopt a resolution saying, "We need a playground monitor. We need some help in this to move the cases along."

The Court got excited about it. The Court wanted to do it. We had it all in place to do, and they got notice from the state and from the county that their

budget was being slashed by 50 percent and they were to furlough staff personnel and judges were going to have to take unpaid furlough days throughout the year in order to meet the budget crisis. So I'm working with that court, and we're trying to get something done. Ultimately we're going to do it. We eventually got a significant portion of that restored, so that our budget has only been slashed by about 12 percent rather than 50 percent, which makes it somewhat easier, but we're going to do it with a smaller group of judges, and we're still going to pilot it, and we're going to do it and see how it works.

HONORABLE TOM GRAY: In measuring that, I mean, have y'all attempted to also measure what I would call the placebo effect of --

MR. NORWOOD: Yes.

HONORABLE TOM GRAY: -- just the fact that they're going to be the pilot versus there is going to be some people who are not the pilot but maybe should be watched and then some people that don't know they're being watched?

MR. NORWOOD: Yeah.

HONORABLE TOM GRAY: Okay.

MR. NORWOOD: All of that. We're taking a core group of eight judges out of a bench of 23, and they will do the pilot. We will have a control group of

another eight. The rest of them don't know it, but they're also being measured. Now, if you call and tell them this it's going to screw the whole thing up, but that's the way it's designed, so to that point.

Let me tell you what I wanted to do very briefly, and that is that when we started this almost three years ago we started with anecdotes and war stories and whether or not we needed to do anything. Ultimately what we have now published is some pilot project rules. You've got a copy of them there. What we tried to do was to come up with some areas that we wanted to put in place and see if they could be measured, see if we could design metrics in such a way that we could measure whether or not these were effective in reducing delay and reducing costs, which means that we're going to have to do measurements as we go through the thing.

We did not attempt to rewrite the entire Rules of Civil Procedure. The default in this case is if it's not mentioned in here then the jurisdiction will use its own rules. To the extent they conflict, you're going to have to do something about them, but that's left up to each jurisdiction to do. We can't pilot these things on a Federal bench level because the Rules Enabling Act does not really allow for that. Jim Holderman up in Chicago in the Seventh Circuit is actually doing a pilot project,

only because he's an Article 3 judge and he feels like he can, but it has some limited usefulness, I think, because of where it is. The idea really is to go back to the states.

What happened after 1938 is that state courts got influenced or state systems got influenced by the Federal rules and started adopting the Federal rules in whole or in part. There are about 10 jurisdictions that still have some form of fact-based pleading. There are about four or five jurisdictions, three jurisdictions, that don't allow discovery depositions of experts. There are a number of jurisdictions that have one of the things that we talked about in these rules, which is presuit discovery, allowing the plaintiff to engage in discovery from a defendant who has all the information necessary for the plaintiff to state a claim and prove a claim. The states that have those we talked to, we had academics from those communities, we had lawyers from those communities, and, as Becky told you, we actually measured some of that in Oregon and some other states about fact-based pleading versus notice-based pleading.

So the preamble to these pilot project rules say we're not attempting to rewrite the rules. What we're attempting to do is put some discrete rules out there, proposed rules, that we would like tested in the real

world to see whether or not they work. My suspicion is that some of them aren't going to work. My suspicion is that some of them will work. My suspicion is that the lawyers where they don't have these sort of things are going to resist them because that isn't the way we've always done things, so I don't know what the ultimate outcome is going to be, but let me just walk you through them kind of quickly, and if anybody has got any questions about them, I'll try and deal with them now.

Rule 1 covers the scope, and it covers all actions that are part of the pilot project, and the court and parties -- this is 1.2, the initial overriding, overarching theme of all of this is proportionality, and the burden is placed on the court and the parties to determine what is proportional in that case. Specialized bars are actually encouraged to come up with procedures that would speed up the process. The Northern District of Georgia decided that they had a problem with patent cases. They got the patent bar together. Fortunately, the patent bar for the most part are not split along plaintiff/defendant lines. They tend to do both, which probably helped in this situation, but they determined a protocol for patent cases in the Northern District of Georgia.

The result of that was that patent cases

move through the Northern District of Georgia quicker than they do anywhere else except perhaps in Delaware, and because they did such a good job of coming up with these specialized protocols, their filings of patent cases doubled because these things can pretty much be brought anywhere that you have a nexus, but anyhow, that's one of the aspirational goals, is the proportionality will result in some sort of communication so that the one-size-fits-all approach doesn't take over.

Rule 2 is pleadings, and this is the shift, the paradigm shift, from the blandest notice-based pleading to fact-based pleading. I explained some of that earlier. I will say this, is we've actually done a nine-page paper on what we mean by fact-based pleading. I'll leave a copy of this with Chip, and you can circulate it later if you would like to. Yes, Justice.

HONORABLE TRACY CHRISTOPHER: So if some judges in Harris County wanted to be in the pilot project, a case gets filed in Harris County, it's randomly assigned to a judge. Then would everyone have to replead to make the notice pleading requirement, or do people opt in to that particular judge because they're doing this new thing?

MR. NORWOOD: Well, we don't want opt-ins because that -- or opt-outs because that gives you a

skewed measurement tool. I think it would be up to the jurisdiction if you wanted to do this. I think you would have to make that determination yourself. We don't make any recommendation in that regard.

HONORABLE TRACY CHRISTOPHER: Well, I mean, is Atlanta --

MR. NORWOOD: I understand you file a complaint and it's randomly assigned. Should the court ask them to replead it rather than entertaining a motion for more definite statement or whatever it may be, we don't get into that deep the minutia on the thing.

HONORABLE TRACY CHRISTOPHER: Well, what's Georgia -- you said you've got this program set for --

MR. NORWOOD: They're doing the case flow management. They're not doing the pilot project rules because the pilot project rules would require the Legislature to approve the institution of the pilot project. That's what I was saying earlier. They can do the case flow management piece, which incorporates a lot of the same themes. The proportionality and the single judicial officer and a lot of that is in the case flow management piece.

HONORABLE TRACY CHRISTOPHER: But, I mean, if Texas law says we're a notice pleading state and suddenly I'm in the pilot project and my court -- well, if

I was still on the trial court bench and I wanted to do the pilot project and I want to do the --

MR. NORWOOD: Fact-based pleading.

HONORABLE TRACY CHRISTOPHER: -- fact-based pleading, wouldn't I have to get agreement of the parties?

MR. NORWOOD: Yes. I would think so.

HONORABLE TRACY CHRISTOPHER: And doesn't that skew your whole system of measurement?

HONORABLE REBECCA KOURLIS: Let me interpose an observation. I'm sure Texas has a history of doing pilot projects. Certainly I know in Colorado we have done pilot projects on the basis of chief justice directives approved by the Court, and what that entails is that particular judges or courtrooms or districts are identified as the venue for the pilot project, and the standing order, the chief justice directive, applies to all cases filed after March 1st of 2010 in that court. Now, what that does do is create a possibility of judge shopping or jurisdiction shopping. What it doesn't do is allow for a once filed opt-in, opt-out. Our experience in Colorado, we did a simplified civil procedure pilot project that was opt-in, and nobody opted in. I mean, everybody thought of all kinds of reasons why they didn't think it was in the best interest of their clients or whatever, and so we got no data.

HONORABLE TRACY CHRISTOPHER: Right. I mean, because lawyers would be afraid to opt into something if discovery was limited.

HONORABLE REBECCA KOURLIS: Because of the malpractice implications.

MR. NORWOOD: No question about it.

HONORABLE REBECCA KOURLIS: Which is why there has to be a court imprimatur on this, and the attorneys have to be able to say, "I'm going to file in judge so-and-so's court or in such-and-such a district. What you need to know is that we're going to be subject to this pilot project, and I won't be able to do all of the discovery that I might otherwise be able to do."

MR. NORWOOD: May not.

HONORABLE REBECCA KOURLIS: "I think it's going to be cheaper for you. I think I'm going to be able to get a resolution in less time and for less money, but you've got to understand that there are some risks associated with this." And we know that conversation is going to go on, but it's the only way that we can begin to collect data about what works and what doesn't work. So given the option between none of these cases at all, none of these pilot projects, or the notion that, in fact, this is sort of opt-in because the lawyers are going to know at the front end that the pilot project applies in a

particular jurisdiction, that's the best option.

CHAIRMAN BABCOCK: Yeah, Judge Christopher's point would be that if the pilot is going to have Rule 2 then every civil judge in Harris County would have to be part of that because otherwise you'd have to have a repleading or there would have to be some other mechanism because they're randomly assigned.

HONORABLE REBECCA KOURLIS: Or prospective.

MR. NORWOOD: That's right. Or you could simply adopt the Rule 2 for every judge and then pilot the rest of it with a smaller group.

HONORABLE TRACY CHRISTOPHER: But, I mean, you know, we have case law that questions whether we by local rule can change our Rules of Civil Procedure, so --

MR. NORWOOD: Well, everybody has those issues, and that's why I say in Georgia we couldn't do it actually.

HONORABLE TRACY CHRISTOPHER: I don't see how we could, but maybe I'm wrong.

CHAIRMAN BABCOCK: Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: How does anybody have a choice if they have to file in -- if Harris County were the pilot and that's the only place the lawsuit could be filed, I mean, and they're not given a choice.

MR. NORWOOD: That's right.

HONORABLE STEPHEN YELENOSKY: Okay. Well, I mean, we've had pilot projects, I imagine, over a number of things including, I don't know, electronic filing, that kind of thing, but in my many years -- not as many as Skip apparently -- but in my many years I've never seen a pilot project of this kind of substantive change where I would think that it raises all kinds of due process and constitutional issues to force some people into a system like this.

The second question -- that was a comment I guess. My second question is Rule 2, obviously it's combined with Rule 3. You put those two together, aren't you just saying what we do now will suddenly be called precomplaint, because it seems like just about every case we have a good argument under precomplaint to be allowed to do discovery before they're required to make their factual pleading, so they come in on what looks like a notice pleading, we have to have an extra hearing to allow them to do their discovery so they can do their fact pleading. What does that accomplish?

MR. NORWOOD: Well, that certainly was not the intent, and I disagree with you. Rule 3 is designed and actually is based upon a Pennsylvania statute and an Ohio statute and the books and records provision of the

Delaware chancery court, and it's limited by who can do this and what you have to do. There are clearly cases in which the defendant has all the knowledge and the plaintiff has a suspicion.

The one that I heard most often -- and I don't do any employment work and maybe some of you do and you'll understand this, but a 60-year-old person gets laid off, is replaced by a 20-something person, and knows of two other co-employees who also are in their sixties who have been laid off and replaced by -- they want to file a pattern or practice discrimination claim, but they've got absolutely no evidence at all except the two people they know about, which is not going to meet the burden of proving pattern or practice, I'm told. At that point, though, the defendant has all that knowledge. They know the number of persons in their sixties who have been laid off, so it's an age discrimination claimant. They know the number of people who have been replaced, and they can provide that data.

Well, clearly in that case we would look for that person to meet those strict requirements and to ask for the presuit discovery. At that point they get the data from the -- from the employer. If the data supports a pattern and practice claim then they can file a sufficient complaint. If it doesn't, the idea is that the

case goes away, and it's cheaper for everybody in the long run to find it out that way. This is not just available in three jurisdictions in America. The U.K. has what they call presuit protocols. Canada has what they call presuit protocols.

HONORABLE TRACY CHRISTOPHER: Well, we have it, too. We have presuit discovery.

CHAIRMAN BABCOCK: Yeah, we have it, too.

MR. NORWOOD: Okay. Well, then we ought to put Texas in here, too. But it wouldn't change anything except that it would allow the plaintiff to get the information at the beginning of the case rather than file the case, go through an extensive discovery process, and then have to --

HONORABLE STEPHEN YELENOSKY: Well, but how does it -- how do you say it won't be an extensive discovery process, to the extent it is, simply because you call it presuit? I mean, if they meet requirements under 3.1, I don't know what the bounds of discovery are, but it seems like it's a lot less bounded than our current presuit discovery.

MR. NORWOOD: Well, then no one sues.

HONORABLE STEPHEN YELENOSKY: Maybe a pretrial deposition or presuit deposition.

MR. NORWOOD: (d) says "The proposed

discovery is narrowly tailored to minimize expense and inconvenience." That's part of the rule.

HONORABLE STEPHEN YELENOSKY: Well --

MR. NORWOOD: If you're going to apply that, are you going to allow somebody unlimited discovery if they come into your court?

HONORABLE STEPHEN YELENOSKY: Well, we don't allow them unlimited discovery now. I mean --

MR. NORWOOD: Well, then why would you think that if all of the sudden they came into your court and said, "The defendant has this piece of information because they've got the personnel files on these people," that that's all the sudden going to open up Pandora's box of even more discovery presuit? I mean, the whole idea --

HONORABLE STEPHEN YELENOSKY: I don't think we allow Pandora's box of discovery now, so what it seems to me is you have a hearing to decide whether they can do the normal discovery that we do now.

HONORABLE REBECCA KOURLIS: Remember that the whole focus of this is to try to narrow the issues early, to try to figure out what the real disputes are, and if the parties don't have enough information to capture those in the pleadings, then it's sort of phased discovery. It's discovery directed toward trying to allow them to complete the pleadings sufficiently because the

pleadings then will shape the balance of the discovery, which is supposed to be focused, targeted, sort of -- I think that the term that has captured it for me is it's supposed to be like those headlamps rather than a search lamp. It's supposed to be discovery that really elucidates the issues in the case, and to do that you have to have a framework.

CHAIRMAN BABCOCK: Lonny, and then Justice Gaultney.

PROFESSOR HOFFMAN: It seems as though the answer to Judge Yelenosky's question in part is, as Ms. Kourlis was just saying is -- is that the designed intent here is to make discovery more restrictive at the front end in most cases one must set a higher burden to even get to the discovery. You have to have a pleading of facts with particularity, the purpose of which is then to lead the judge to a headlight as opposed to search light approach, as you have described it; and presumably the upshot of that or the downshot, depending on which side you're standing on, is that if you are unable at the front end of the case to make out adequately those facts that you allege with particularity such that we should point the headlight in your direction and allow you to look some more, we're going to cut your case off at the knees.

In other words, just to be clear, though

there are many places one could jump into this debate, this is on the substantive point as good as any, which is to say that one of the reforms, even though there are two different issues here, they are tethered together, is it's basically on whom do you want to place the burden of getting it wrong? All right. I mean, there's always a tension between how much access and how much efficiency, either to the opposed party or to the system, and sometimes we open the doors, as I tell my students, right, sometimes we open the doors of justice too widely and we let in a lot of riffraff that we wish had not come in and then we've got to figure out how to deal with it later.

But, of course, there's all kinds of tools that we have to do that we seem to have alighted over, as though our system, you know, has been malfunctioning, but the other side of the equation is that we're too restrictive, and that in being too restrictive we keep out too many cases that should have been allowed to proceed forward. In other words, we deny meritorious suits from going forward, and so what we're discussing is a -- that is, of course, at the core of this issue. The early -- although I was hoping to hear and we haven't yet talked about ways in which the fact-based pleading that you were describing would differ from the Twombly and Iqbal reform that happened by way of common law. That is precisely

what the early empirical studies seem to indicate that the impact of Twombly and Iqbal have been, which is to say that they have caused cases that would otherwise have moved forward to have been dismissed.

Now, as we all know, there's no way to know whether or not that's from a normative standpoint a good or a bad thing. Does that mean we caught those frivolous cases, to use a pejorative term, from moving forward, or does it mean that we cut off at the knees meritorious suits that should have gone forward? Certainly there have been a host of procedural reforms over the years where the burden has been placed most heavily on plaintiffs over defendants and particular plaintiffs.

You -- usually those end up being the same usual suspects, civil rights plaintiffs, plaintiffs who assert discrimination and other claims that are not strictly civil rights claims. In effect a broader way to think about that is plaintiffs who suffer informational asymmetry, to use a fancy word, which is another way of saying people who don't -- they know they've been wronged, but they lack access to the information to demonstrate that they do. And so one of the concerns that I'm just highlighting to kind of follow on this point is that presumably -- I'm not suggesting that the motivation behind the drafters was behind this, but presumably in the

course of adopting reforms such as these, the inclination is to make stricter at the front end that the hole, the door by which we allow suits to pass through, and the only question is whether or not the pleading stage is the right place to do that.

We have never thought that before, right? We have normally assumed that to the extent judges have discretion we feel more comfortable with them exercising it, even when they exercise it badly at the summary judgment stage, because at least there there is an evidentiary record on which the judge could be forced to either defend or confirm his or her opinion against the background of records. That's precisely what we don't have at the very outset of the case. So, again, although there is much more that I could say, I'm sure I already have overstayed my welcome this time.

MR. NORWOOD: Well, let me just speak to that point real quickly, and I said this to Miss -- earlier. If you accept the premise that the cost is rising out of proportion to the good to society and the driver of that cost for the most part is discovery and for the most part deposition discovery and document production, I don't think anybody thinks request for -- to admit are really out of whack, but --

CHAIRMAN BABCOCK: Oh, it can be.

MR. NORWOOD: They can be, but, I mean, most people focus on the request for production of documents and on discover -- and on depositions. If you accept that premise then it seems to me that what you don't want to do from a plaintiff's point of view, Professor, is to at the very outset say we're going to put some limit on your discovery, your right to discover, because everybody knows that you don't know until you start taking a 30(b)(6) deposition what you're going to find out.

But there is a way to focus discovery on the issues that are really in play, and that is to require -- and this was our thinking, to require some sort of narrowing both by the defendant and the plaintiff. The plaintiff ought to know what his or her case is about and ought to know what remedy they are seeking when they file the lawsuit. The defendant ought to know whether or not they've got any meritorious defenses or if they're just going to file the 38 boilerplate defenses, and if they've got them, they ought to be required to file them with particularity and state the facts upon which they base that.

The next step in the process and maybe I'm -- I just don't want to leave this unsaid -- is the initial disclosure, which is Rule 5; and Rule 5 changes the initial disclosures from a statement of what you have

and will produce to actually producing the documents at the earliest stage of the pleading. The plaintiff has to come forward shortly after the complaint; and X days is what we put in these things about when this has to happen to be left up to any jurisdiction that pilots the thing, and actually show all documents and things they have to support their claim; and the defendant, shortly after it files its answer, a somewhat longer time, has to come forward with all documents and things which would support their denials and defenses. So you can't have the question of, "Oh, this? I'm sorry, we didn't remember that the Pinto exploded every time it got rear-ended in the crash test document, which we had in our file."

The sanction to Rule 5 is 5.5 that says if you don't timely produce it when you had it in your possession and knew or should have known about it then you can't use that document to support your position. Mandatory. The idea is to quit the game playing and to force people to early on to come forward and put their cards on the table, and that we think will speed up the discovery process and, again, move to narrow the issues. Maybe if we test it, it turns out it doesn't work that way. I was at a meeting last night, and somebody said, "What do you do with the defendant who is going to hide the smoking gun," and I said, "What do you do now?"

I mean, if they're prepared to disregard the rules of ethics and the laws of the profession then the smoking gun doesn't come out. It doesn't matter how many times I ask for it and have appropriate questions on the table. If they're going to hide it, they're going to hide it. So I don't know how you answer that question, but the idea is that if anybody has got something that's going to support their side of the case and they don't produce it then they're barred from using that particular document.

PROFESSOR HOFFMAN: Mr. Norwood, your most recent comments in some ways they sort of underscore for me a sort of essential theme, right, that I keep coming back to in my own head, which is you can cover a lot of grounds and it feels as though to me you're conflating a number of different issues all into the -- as though they necessarily are the same or even that they touch upon one another; and it reminds me in a sense I think more broadly of this concern, which is, you know, body of the whole like this, Chip, where, you know, our function is to, you know, try to offer reasoned advice to the Court, to raise as many issues as these folks do, any one of which is independently a significant issue; and of course, many of these aren't independently over the rash, it just seems to me that this doesn't amount to reasoned discussion. It's good that we're talking about it in that sense, but that

this isn't the place to -- and that we ought to be very careful and have a great deal of humility in thinking that --

CHAIRMAN BABCOCK: That's not our long suit.

PROFESSOR HOFFMAN: Yeah, I know. So we may have to do better, because the idea of -- I mean, at every stage the notion of doing things just -- it raises its own 10 questions in return, and I feel like we often are sort of glossing over not just the nuances, but even sometimes the obvious points, and so that causes me concern.

HONORABLE REBECCA KOURLIS: Professor Hoffman, let me ask you something. Your -- I just looked it up. Your Rule 1 requires your system to be just, fair, equitable, and impartial, and it requires the system to take place with as great expedition and dispatch and least expense to the parties in the state as practicable. Do you believe that your rules meet those objectives?

PROFESSOR HOFFMAN: Well, I mean, I must say it feels like a little bit like the comment I just made before, a question that would take a considerable amount of time and answer to give full, fully. That's an objective. It's an objective of Rule 1 of the Federal rules. It's an objective that all systems presumably have, right? We want to balance access to justice with efficiency.

I would say maybe somewhat more directly in response to what I think you're asking me is when Mr. Norwood says if you accept the premise that the costs have spiraled out of control and that the primary problem is discovery, I don't, which is the point I alluded to earlier, and that virtually all, if not all, of the reliable studies have shown, and so to the extent that you are describing a problem, it appears to be a problem that is primarily limited to specific cases. In addition, and sort of following on from that, the suggestions for reform look to using pleading reform as one vehicle for achieving reform of the discovery rules, which as I said in my initial remarks, seems to me to be a strange place to do it. Not that the rules are unrelated. I understand you have a concept, which is if you restrict pleading then you make people only do discovery based on that which they can kind of allege with particularity.

So, I mean, obviously that's a way to go. It just strikes me as it's entirely the wrong place to go. Again, when we make mistakes, one would presumably like to have made that mistake after we've given the parties an opportunity to do a bit of work and the judge an opportunity to defend his decision as to whether he's going to throw out the case on a more full evidentiary record as opposed to the empty allegations, which

inherently pleadings are filled with. That's all they are meant to do, is frame the issues.

And then a third and related point to that is it also seems as though we're having this conversation without regard to the myriad of ways both formally and informally that we can control the flow and do control the flow of litigation to achieve the goal that you just read out of our rules and that exist in other systems. I mean, we have special exceptions, as though we have forgotten, right? And let's not conflate the problem of the ambiguous lawsuit, the defendant wronged me kind of problem, like that it doesn't give enough notice. We have rules that handle that with the lawsuit that fails to state a claim on which relief can be granted, which we also have rules to deal with.

Our rules, by the way, aren't as refined as the Federal rules, so we don't have a 12(b)(6) equivalent here in Texas, though the upshot of special exceptions along with a streamlined summary judgment usually gets us to the same place. We have certification requirements, both under -- for us it's Rule 13 and Chapter 10 of the Civil Practice and Remedies Code that serve effectively the same function that Rule 11 does in the Federal rules, which is to say when a party thinks that an allegation lacks evidentiary support or a reasonable basis for

evidentiary support, they can be put to their proof and there can be a targeted focus on that with consequences, everything from sanctions to, you know, case consequences that flow out of that.

We can order parties to reply. Defendants can file answers and force -- and the judge has discretion to force the party today to narrow the issues precisely as you describe. We obviously have limits on discovery that we can employ; and as Judge Yelenosky alluded to earlier, it is a rare case indeed, one of any size at all, in which discovery is an issue that the judge just says, "Ah, do what you want"; and while it may be true that judges are not particularly fond of engaging in discovery battles, that is, in fact, presumably one reason why Federal magistrates exist. Nevertheless, I assume that most conscientious judges would not let it go that way.

Now, I can go on. Summary judgment, of course, is a critical part of it. We made a major reform here some years ago in which we adopted a no evidence or a more streamlined version of summary judgment that forces the plaintiff to their proof -- usually, by the way, the plaintiff. The rule, though meant to be applied both sides, rarely is, which by the way is likely to be an effect of these rules as well. So we -- so, so, my answer to your question --

CHAIRMAN BABCOCK: Sounds like it's a qualified "yes," Judge.

HONORABLE REBECCA KOURLIS: Yeah, it does.

CHAIRMAN BABCOCK: A lengthy, but qualified "yes." Justice Gaultney.

HONORABLE DAVID GAULTNEY: I just had two questions. There does seem to be some tension between the pleading requirement for "with particularity" and Rule 3, which is the pretrial. I mean, in Texas I think it's fair to say that currently pretrial discovery is not routine, but it strikes me that if Rule 2 is going to be strictly construed and that you're going to have to plead with particularity all material effects --

HONORABLE REBECCA KOURLIS: Hold on a sec. We're losing -- Bill didn't hear --

MR. NORWOOD: Did you say pretrial discovery is limited?

PROFESSOR HOFFMAN: He meant presuit.

MR. JACKSON: Presuit.

HONORABLE DAVID GAULTNEY: I'm sorry, forgive me. Not pretrial, presuit.

MR. NORWOOD: Yes.

HONORABLE DAVID GAULTNEY: Prepetition, forgive me.

MR. NORWOOD: I think it's limited

everywhere that it is in place, for that matter. I think it's an exception, not --

HONORABLE DAVID GAULTNEY: Well, it strikes me, though, if you're going to require pleadings with particularity of all material facts, I think there is some risk that you're going to have precomplaint discovery, prepetition discovery become more routine, and --

MR. NORWOOD: That's one of the things we need to find out, and if that's true then it doesn't work. I spoke to the National Conference of State Courts, the round table, up in Washington in November. The greatest concern expressed by the judges who were there was that what we're going to do is end up with satellite litigation over the sufficiency of the pleading.

HONORABLE STEPHEN YELENOSKY: Exactly.

MR. NORWOOD: Interestingly enough, we actually have some empirical data to look at on that, and that's Oregon. Oregon requires fact-based pleadings in the state court and use notice pleadings in the Federal court. The motions to dismiss for failure to state a claim or motions for a more particular statement in the Federal court are four times as great where you have notice pleading as they are in the state court where you have fact-based pleading. So, again, I want to caution, what we mean by fact-based pleading is not a strict common

law fact-based pleading. It's not Twombly. It's not Iqbal. It's simply a plain statement with the facts to support the conclusions that you draw.

CHAIRMAN BABCOCK: Richard Munzinger, you had a comment. And then Stephen Tipps and then Judge Yelenosky and then Sarah.

HONORABLE DAVID GAULTNEY: Could I finish my --

CHAIRMAN BABCOCK: Yeah, sure. Yeah, I'm sorry.

HONORABLE DAVID GAULTNEY: The second point -- I apologize. The second point I wanted to ask is on Rule 5. The disclosure requirement is just anything that supports your claim or defense, and was there thought given to -- I've seen other rules that I don't think work that well that address disclosure of relevant material.

MR. NORWOOD: Yeah.

HONORABLE DAVID GAULTNEY: And then in that connection, 5.5, the sanction for failure to disclose is simply that you can't use it.

MR. NORWOOD: Right.

HONORABLE DAVID GAULTNEY: Well, I mean, if it's contrary to your claim or defense --

MR. NORWOOD: No, it's not.

HONORABLE DAVID GAULTNEY: -- you may not

want to use it.

MR. NORWOOD: No, no, no. Rule 5 requires you to come forward with anything that would support your claim or any claim upon which you have the burden to prove. Affirmative defenses, that sort of thing.

HONORABLE DAVID GAULTNEY: Well, by "support" what do you mean? You mean relevant to, or do you mean anything that advances and is not contrary to?

MR. NORWOOD: Advances it. Then discovery at that point proceeds as to anything that you may have that would help my case or anything I may have that would help your side of the case. The disclosures are those things that I would want -- in a medical malpractice case, if I had a document that said this doctor violated the standard of care and I did not produce it up-front then I could not use that affidavit to oppose a summary judgment that may be brought by the physician. That's what it means.

HONORABLE REBECCA KOURLIS: I want to interpose just one quick point, and I know --

CHAIRMAN BABCOCK: Sure.

HONORABLE REBECCA KOURLIS: As probably many of you in this room, I sat on both a civil and a criminal docket, and I've always had the view that criminal discovery works a whole lot better than civil discovery,

and one of the reasons is because there's an affirmative responsibility of the prosecution to come forward with everything they have, and if they don't do it, their case gets thrown out and maybe worse. Creating an analog in the civil side would, in my view of the world, be the best of all possible options, that you have to come forward with everything that you have, whether it supports your case or supports the other guy's case. Maybe we will get there. I think the reason that it works in the criminal context is because Brady -- is because Brady and Aguilar in Colorado, the fact that you can enforce it. That, in fact, if the prosecution screws up and doesn't produce what they're supposed to produce, they're out.

Developing a similar set of enforceable and practicable sanctions in a civil context that would be applied to a defendant or a plaintiff that failed to produce something that was clearly relevant and supportive to the other side's case is something that we have talked about and that I have personally wrestled with for years, because in the search for the truth and in an efficient system that's the way it would work. Somebody would sue somebody. Everybody would put their cards on the table. You would determine what else you needed to do in order to develop that evidence, and you'd go to trial. But in terms of a legal culture, there's no way that the legal

culture in the United States would accept that premise in a civil context at present. Moving incrementally toward that is something which these rules attempt to do.

We also know, by the way, Arizona does have a system that purports to require disclosure of that which both supports and contradicts your case, and the bar is split on whether that actually happens, whether the judges actually enforce it when it doesn't happen, and whether the legal culture has acclimated itself to that expectation. But I agree with you with what I understand to be sort of the underlying notion with which you are struggling, and that is if you have mandatory disclosures, shouldn't they be -- shouldn't they sweep more broadly than just that which supports your case. That's the reason that this proposal is limited as it is limited, but ultimately in a perfect world my view would be that there would just be an affirmative obligation to disclose that which both supports and contradicts your case once the case is at issue. In any event, okay, now, around the --

CHAIRMAN BABCOCK: Around the horn. Richard Munzinger.

MR. MUNZINGER: In response to your statement about voluntary disclosure and in full respect to you, tell Ted Stevens of Alaska that the voluntary disclosure system of a Federal prosecutor works. It

doesn't. Tell the fellow in Pennsylvania that they just reversed his conviction for the same problem that it works. It doesn't. Our legal culture is adversary in nature because of its history in England. In all due respect to you and to your work, Texas has Rules of Civil Procedure today that meet a number of your criticisms, or your goals rather, not your criticisms, but your goals. Our discovery rules require counsel to state when they file their petition which level of discovery they will have, level one, level two, level three. Level one is the 25,000-dollar lawsuit. Level two is the hundred thousand-dollar lawsuit. Level three is the antitrust case or whatever it might be.

I tend to agree with the professor. I don't think that we have that much discovery abuse in Texas. I practice law, and I'm acutely sensitive to the limits that the rules place on the hours of depositions I take. I think we have a six-hour rule for depositions. You want to take a six-hour deposition of a tough witness in a complex case where you're searching and trying to get admissions and they work hard to avoid you, that six hours is not a lot of time. You better be efficient when you're doing it. 25 interrogatories in a notice pleading state where I can file a notice pleading and now I've got contention interrogatories and I can ask some

interrogatories, but 25 questions. I rarely use 25 questions, but that's a limit, and in those cases -- most of my cases are level three cases, and when we sit down with adversarial counsel -- and generally they are multiparty cases -- people have different views. Well, let's raise the number of interrogatories to 50. Let's not. Let's let the judge handle that at a pretrial hearing. It's very rare that I'm in front of a judge in a discovery dispute. Very rare in my practice.

I don't want a judge sanctioning me. I've practiced law 43 years I've never been sanctioned one time, don't intend to be sanctioned. I don't want a judge sanctioning me, and every judge that I go in front of in Texas state court doesn't like to hear a discovery dispute. If you take it to him or her you dang sure better have a reason for going there. That's my experience, and I suspect most trial lawyers in the room would tell you the same thing all over our state. I think we have rules that really don't need to be changed.

My personal belief is, is that all transactions at bottom are moral in nature. The success of a system works because of the morality and the intelligence of the participants, so that if a judge refuses to grant a motion for summary judgment when the motion is good for a political reason, he's going to run

for election, or she is, that's a moral problem. A judge who will tell you, "You're going to trial in 90 days and I don't care what your case involve," we had a Federal judge in the Western District of Texas who would not allow you to call an expert witness. It didn't make any difference what your case involved.

Securities fraud, I had a securities fraud case in front of this judge. He told me -- I said to him, "Judge, it will take me a morning to cross-examine their expert on the securities fraud issue in this case." He laughed out loud at me and said, "You know, Munzinger, you get 10 minutes to state what your cross-examination would reveal." He wouldn't allow the parties to call expert witnesses. He got away with it, a United States district judge. The Fifth Circuit never reversed him for it. But he -- you stood up, you read, "My expert is Joe Schmoe. He will say A, B, C," and I would stand up and say, "Joe Schmoe would admit to D, E, F."

That was the way trials were conducted in his court because in part -- you'll forgive my soliloquy, but because in part studies like yours focus on speed to resolution. Justice is not something that can be quantified nor can truth be quantified, and that's what we ultimately deal in. If we were the board of General Motors, we would be saying "Well, we need to do something

with the Chevrolet. We're selling Chevrolets." Courts deal in justice. Justice is a philosophic concept, maybe even a religious concept. It probably is at bottom line. Is or isn't there a natural law? Justice is a concept. Truth is something that takes time to get to with people who fight over it.

A last moment and then I'll quit. I once had a case with a company in France. Actually it was an American -- it was a French company, a suit filed over something that took place in Africa, and the French general counsel and I went to Paris, and we met, and he was aghast at the amount of money that you Americans spend, he said, on the competence of the court, meaning jurisdiction. They use the word "competence" in English, so he said, "I'm aghast at the way you Americans spend money determining the competence of the court." Then he said, "but, of course, you get to the truth." Wow. That's what courts are for, and my clients, corporate or individual, their lives and property are affected by the end result of the case, and so all of this data to get to the speed of resolution is going to -- we need to keep in mind the first word in Rule 1, "for a just determination of the resolution between the parties." And I don't think you can do that with rules that take away the rights of the parties to ask each other questions and force

responses under oath and have judges who will sanction and punish those who don't obey the rules.

HONORABLE REBECCA KOURLIS: Chip?

CHAIRMAN BABCOCK: All right.

HONORABLE REBECCA KOURLIS: Hold on, Chip. Bill needs to leave. I'm going to stay because I can't leave this sort of in this status, so but you do need to leave.

MR. NORWOOD: Yeah. And what I wanted to say was "amen." There's nothing in there I disagree with. We did not come here trying to sell you anything. We came here because we were asked to come here and present these proposals. If Texas deals with every issue that we've identified in a way that satisfies everybody, that's fine. I mean, I'm not trying to sell snake oil, and I don't think that's the reason why we came here. What we tried to do was give you an idea of what our thoughts were and how we present them, and I'm sorry I have to rush, but if I don't leave now the plane is going to leave without me.

CHAIRMAN BABCOCK: Thank you very much, Bill, for coming. We appreciate it.

Okay. Stephen Tipps. See if you can top Munzinger.

MR. TIPPS: I'm not even going to try. I obviously don't know whether these rules would improve the

way lawsuits get tried or not, which is why you're interested in doing a pilot project, which strikes me as commendable, but in just looking at them I want to just speak briefly on behalf of Rule 2, which requires fact-based pleading. Lonny's obviously right that we have special exceptions and we have motions for summary judgment and we have all sorts of procedural rules that are available to cut down on the issues in the case and over the years my law firm has made a lot of money making those motions on behalf of clients, but it does seem to me at least conceptually that a rule that required a plaintiff and a defendant in the pleading to state the facts that support each claim or state the facts that support each defense could have very salutary results.

I mean, I rarely see a commercial lawsuit that doesn't state eight causes of action when really only three or four are viable, and defendants all the time plead 15 affirmative defenses when only three really have any business being pled, and I'm intrigued by the idea that we would have a rule that would require a lawyer before drafting and filing a petition or drafting and filing an answer to go through the thought process of saying to himself or herself "What are the facts that I have that will support this cause of action" or "What are the facts that I have that will support this affirmative

defense," and it seems to me that it's fairly likely that if you had to go through that exercise that you would end up pleading fewer causes of action and you would end up pleading fewer affirmative defenses and as a result the issues in the case would be narrowed from the beginning, rather than narrowing the issues a month before trial when you have a summary judgment hearing.

So, again, we're talking at a conceptual level, but conceptually I find Rule 2 to be pretty interesting.

CHAIRMAN BABCOCK: I think Judge Yelenosky had his hand up a minute ago.

HONORABLE STEPHEN YELENOSKY: Yeah, well, I was just going to -- there was a question about do we have the rules now. I guess I would ask in these theoretical cases where there -- actual cases where there is an abuse of discovery, if you looked at that actual case would it have made a difference if we had these rules, or was it instead if, in fact, there was abuse of discovery nobody moved for protection or they moved for protection and the judge didn't do what he or she should have done, which is I think the point that Richard Munzinger made and others have made, that it depends perhaps on the judge. But ultimately whether it's this rule or another rule, the question is, is it calculated to leave to admissible

evidence, and they have a good reason why they need to know something under this rule, it will be a precomplaint issue. Under our rules now somebody would move for protection, I guess, and it would be decided at that point, but I don't know what these mythical discovery abuse cases are, and I guess if we had a specific example then we could find out whether it got out of control, despite the fact that they moved for protection and got before a judge, then it would be the question was it a deficiency in the rules or a deficiency in the judge.

HONORABLE REBECCA KOURLIS: Well, let me --

CHAIRMAN BABCOCK: Sure.

HONORABLE REBECCA KOURLIS: Can I separate out a narrow point that might be partially responsive to that concern? For example, there is a proposal here that there be no expert depositions, that experts be required to produce reports and that absent a ruling of a judge to the contrary, that there be no expert depositions. We have a database of information that we're in the process of pulling together that attempts to collect cost data from companies, companies that use matter management systems and also task-based billing so that we are able to segregate out the total costs of a particular case, and what we asked these companies to do was give us the data for all the cases that they closed in 2008.

So we are able to segregate out of that data information about what these particular litigants, normally defendants, although some of the cases represent cases in which the companies were plaintiffs, but the proportion of the costs that they expended for the total, and by that costs and fees, that relate to expert depositions. Grant me a leap of faith for a moment, because the data isn't complete, that that represents 25 percent of the costs, the whole costs associated with taking that case from start to finish. In my view it is a legitimate question to ask about whether rules should say no expert depositions or only X number of expert depositions per side unless you can demonstrate to the court a need to the contrary; and in terms, Professor Hoffman, of whether that would advantage a plaintiff or advantage a defendant, I think that's a very arguable point as to who whipsaws whom the most with requests for expert depositions.

So those are the sort of targeted inquiries that I think we as a profession should be engaged in, and I wanted to remind you, by the way, that Chip introduced us this morning by saying that part of what we're looking for here is feedback and is suggestions for other data collection efforts. Maybe what we need to do is study Texas. Maybe you guys have big chunks of this right.

CHAIRMAN BABCOCK: No, we're not in favor of that.

HONORABLE REBECCA KOURLIS: So I guess I wanted to remind you that this is an inquiry about how we can improve our system. This is not a process whereby we are proposing just out of the tops of our hats to offer solutions that somehow we think should be uniformly adopted. It is a much more incremental process which is heavily laced with data collection. Okay. So I interfered in --

CHAIRMAN BABCOCK: No, no, not at all. Sarah, I think you were --

HONORABLE SARAH DUNCAN: I would just like to suggest that the proposal has too small of a view of potential cases, and I'm thinking particularly of a case -- I'm thinking of a particular case, but a case where the plaintiff doesn't know. The plaintiff doesn't have any knowledge. The plaintiff doesn't really have any documents, and without -- and the statute of limitations is running with --

CHAIRMAN BABCOCK: Day by day speed.

HONORABLE SARAH DUNCAN: Let's take decade by decade. And so I can't produce documents that support my claim beyond those few documents I have that caused me to start questioning, and all of the institutional

knowledge is with various defendants. So there are going to be cases that don't fit the parameter of your proposal, that aren't just a regular old med mal case or a regular old breach of contract case or letter of credit case or whatever. There is going to be trust litigation. There's going to be familial litigation that can't fit within this rule, and I do think our rules for the most part achieve the objectives of Rule 1.

CHAIRMAN BABCOCK: Justice Gray.

HONORABLE TOM GRAY: My comments are a follow-up on Stephen Tipps' comments about some of the theoretical aspects of particularly the evidence-based pleadings. From my viewpoint as an appellate lawyer or appellate judge what would be most beneficial to me is more claim-based pleadings, and by that I mean set out the claim that you're pursuing and the elements of that claim, then blended with the evidence-based pleading because now that we're getting into seeing a fair number of appeals of no evidence summary judgment motions, it is very disconcerting to me on appeal to see either the defendant in asserting an affirmative defense to a claim or a plaintiff trying to reshape pleadings to argue a claim or defense that was not addressed in a summary judgment motion, because supposedly under the rule they've got to attack an element of a claim as having no evidence so that

the plaintiff, or for the affirmative defense the defendant, can come forward with evidence on that targeted claim.

It's very hard to do that rifle shot on appeal if you've just got this amorphous body of pleadings, and it would really streamline the process if we could know -- I mean, you're not even going to take that rifle shot at the pleadings if it's in the pleadings, and it just really lends itself to ease of review at the appellate level if there's even broken down, like I say, by elements of the claims and the evidence to support each of those elements.

CHAIRMAN BABCOCK: Alex.

PROFESSOR ALBRIGHT: I don't know how much you-all know about our rules, but our discovery rules, we substantially rewrote them in 1999, and I was the kind of de facto reporter of the committee that wrote those rules, and we did a lot -- talked to a lot of courts. I remember talking to Arizona, Colorado, Michigan, or someplace up there.

HONORABLE REBECCA KOURLIS: Someplace cold, right?

PROFESSOR ALBRIGHT: Yeah. And it was -- one thing that I thought was really interesting is all of those courts had limits on discovery where they said you

are entitled to -- nobody gets more than two depositions or some just ridiculously limited number, unless the court allows you to have more, or, you know, everything was very limited without court permission, and what every judge I talked to said is what that does is nobody can live with the rules -- with the limits as written, so you have to agree with the other side about what is appropriate for this particular case, and only in very unusual cases are you going to have situations where they can't make some kind of agreements on those.

What I wonder about our limitations, we did do several -- we have three different tiers of discovery, and I think our middle tier I've always wondered is are our limits so high that they don't make any difference in the great majority of cases. And I don't think anybody has done any studies on that, and I think it would be pretty interesting to see how that works, but this group felt very strongly that they didn't want to have -- to go the direction of ridiculous limits that you have to agree on, the fear of people not agreeing and the fear of judges favoring one side or the other when there couldn't be agreement, I think made it so we came up with the limitations that we did, but I think we have -- our system is very different from the Federal system and probably any other state and --

HONORABLE REBECCA KOURLIS: I think you are different from any other state that we've looked at.

PROFESSOR ALBRIGHT: Yeah.

HONORABLE REBECCA KOURLIS: And clearly the Federal system.

PROFESSOR ALBRIGHT: And most states I've seen, I've looked at, tend to be more like the Federal rules with the mandatory disclosure, and we specifically rejected mandatory disclosure because we said there are so many cases that are very efficient because they have very little or no discovery, so why impose discovery costs on those cases, and that's why you have to have a request, but we have some specific generic requests where you can get some information.

HONORABLE REBECCA KOURLIS: Did you do any retrospective look at changes in the legal culture or case filings or anything of that nature after your '99 amendments?

PROFESSOR ALBRIGHT: I don't think we have.

HONORABLE NATHAN HECHT: I mean there's anecdotal.

PROFESSOR ALBRIGHT: Yeah. On case filings we do know that case filings in civil cases have gone down a lot, but I'm not sure that's because of discovery.

HONORABLE REBECCA KOURLIS: Yeah, that's

hard to correlate.

HONORABLE SARAH DUNCAN: Aren't there also statistics on, for instance, discovery disputes, like mandamuses? Because I know just my time at the court, the before and after picture after the changes to the discovery rules was night and day.

HONORABLE STEPHEN YELENOSKY: Sarah, could you speak up?

HONORABLE TRACY CHRISTOPHER: Can't hear you down here.

HONORABLE SARAH DUNCAN: The difference between mandamuses, extraordinary proceedings for mandamus in discovery disputes before and after the discovery rule amendments was night and day.

PROFESSOR ALBRIGHT: Yeah. I agree with that.

HONORABLE SARAH DUNCAN: We just never had them after the amendments.

PROFESSOR ALBRIGHT: And you see very few opinions compared to before 1999.

CHAIRMAN BABCOCK: Gene had his hand up and then Judge Christopher and then Roger.

MR. STORIE: Yeah, I think this is just more of a feedback comment, but would Rule 2 require or imply anything about duties to supplement or opportunities to

amend?

HONORABLE REBECCA KOURLIS: We are assuming that opportunities to amend would be liberal, and we are also assuming that on a state by state basis that the question of whether there was an ongoing duty to supplement would be addressed by individual jurisdictions. The discussion with the college and the institute anticipated that the pleadings would be kept relevant, as the information developed that the pleadings would reflect that at least insofar as material facts with respect to the elements, but we recognize that the question of amendment, whether jurisdictions permit liberal amendment back or permit amendment by operation of the case, not necessarily specific written amendment of the pleadings, is a matter of internal case law. But clearly the anticipation was not that the pleadings would remain static.

CHAIRMAN BABCOCK: Justice Christopher.

HONORABLE TRACY CHRISTOPHER: If the goal is to increase small case filings -- and I assume that's your goal because you say Americans are priced out of cases under a hundred thousand dollars --

HONORABLE REBECCA KOURLIS: Wait.

HONORABLE TRACY CHRISTOPHER: -- I don't see how this does it.

HONORABLE REBECCA KOURLIS: Okay. And you're wrong about the goal.

HONORABLE TRACY CHRISTOPHER: Well, what is the goal then? I'm a little confused.

HONORABLE REBECCA KOURLIS: Okay. There are three goals. The goal is more jury trials. The goal is more cases that move all the way through the system and result in jury trials. The goal is in allowing -- in creating or enhancing a system that encourages people to resolve their disputes within the context of the court system, not necessarily mediation or arbitration, a system that is cost effective and that works, and I've never heard it said quite as clearly as to say that arbitration and mediation are the competitors of the courts, but I think that they realistically are the competitors of the courts, and I don't think that the courts have done a very good job of competing, if you will, in terms of providing a system that allows people to resolve disputes in a fair and efficient way that competes with possible alternatives.

So more jury trials, a more cost effective system, and a system that enhances access, and not necessarily just for hundred thousand-dollar or lower cases. The whole concept of proportionality is that if you have a hundred thousand-dollar case, it probably ought

not to cost more than $50,000 or something less than that to get it to trial. If you have a hundred million-dollar case then the proportionality issues play out differently and the judge needs to be attuned to that. So a system that is not one size fits all, but rather is proportional.

HONORABLE TRACY CHRISTOPHER: Okay, but I don't see how these rules achieve more jury trials. I see how they limit experts in all cases, regardless of whether that's a good idea or not, to just a report. I see increased expense in connection with fact-based pleadings, and perhaps, you know, more motions related to, oh, they're not specific enough here on this fact-based pleading. I see that as an added expense to the system.

HONORABLE REBECCA KOURLIS: Well, keep in mind that the Oregon data would suggest otherwise, but, I, you know, recognize --

HONORABLE TRACY CHRISTOPHER: Well, I thought that Oregon data, which it was hard to see, was very inconclusive as to whether they thought that was useful or not. I thought it was less than 50 percent who thought it was a good system.

HONORABLE REBECCA KOURLIS: No.

HONORABLE TRACY CHRISTOPHER: Maybe I just misread your chart.

HONORABLE REBECCA KOURLIS: Yeah, or I was

moving it around too much and it was hard to see, but, no, the Oregon data would suggest that in terms of decreasing costs to litigants of fact-based pleading, we had 47 percent who said that it was no effect and 28 percent who said that it would decrease costs, similar numbers with respect to decreasing time to resolution, so, in fact -- and a fairly significant number, 68 percent, who say that it reveals facts early, and 64 percent who say that it narrows issues early. If you add the ones who have no opinion, those numbers go up above 70 percent, so whatever, but --

HONORABLE TRACY CHRISTOPHER: Yeah, but costs, 47 percent said no effect. Only a small percentage said useful. Right? 23 percent said useful and then the other one in terms of faster, it was also a small percentage that said it was useful.

HONORABLE REBECCA KOURLIS: Now, wait.

HONORABLE TRACY CHRISTOPHER: I thought that's what you just read.

HONORABLE REBECCA KOURLIS: We're focusing here on cost to litigants. Is that what we're looking at?

HONORABLE TRACY CHRISTOPHER: Right.

HONORABLE REBECCA KOURLIS: Okay. The numbers are 32 percent say it decreases, 35 percent say no effect, and 23 percent say it increases, so we have about

a fourth of the bench and bar who thinks it increases costs to litigants. The rest say it has no effect or it decreases costs.

HONORABLE STEPHEN YELENOSKY: So 58 percent think it has no effect or it increases.

HONORABLE REBECCA KOURLIS: Uh-huh.

CHAIRMAN BABCOCK: Roger.

HONORABLE REBECCA KOURLIS: Well, but that's a different point from saying that fact-based pleading axiomatically increases costs to litigants. They're not saying that.

HONORABLE STEPHEN YELENOSKY: Well, they're certainly not saying it decreases.

HONORABLE REBECCA KOURLIS: Well, but if the principal objection to fact-based pleading is that it increases cost to litigants, at least the Oregon data wouldn't support that, and similarly the Oregon data wouldn't support an increase in motions to dismiss when we look at the Federal vis-a-vis the state. I think the more legitimate concern about fact-based pleading is whether it keeps legitimate plaintiffs out of court, not the impact -- the front end impact on costs.

CHAIRMAN BABCOCK: Roger, you've been waiting patiently. Or not. Impatiently, shooting your hand up every two seconds.

MR. HUGHES: You asked about retrospective. What would complicate that in my opinion in Texas is that as the Court was reforming its rules of discovery the Legislature was busy with tort reform, capping damages, eliminating claims. All of the sudden you had a fall off in cases because they -- and so while maybe discovery was getting a little cheaper, the back end, in other words, the -- you know, what was -- you were looking at in terms of damages was getting much smaller, and so even if you could save money on discovery, it wasn't going to be justified by what you could get on the back end, and so then there was fall off.

What I saw, and perhaps this is unique to my territory, is those sort of cases fell off rapidly and were replaced by family law and probate, and so one of the questions I had was, are we -- is this a one size fits all program, or are we going to have to target it for, you know, family law and probate stuff moves -- it's a different animal, and the judge has to have a special skill set to deal with that docket.

And then my own personal opinion, a lot of this individualized attention is going to be very difficult in a state in which our judiciary staff is funded the way it is. And everyone knows what I'm talking here, just my experience is when you go into court to

argue a motion, number one -- in the state court, number one, the judge doesn't know why you're there. You have to tell them what's in it. They haven't got time to read it, and secondly, your opponent didn't file their opposition until five minutes before the hearing, so you're finding out at the hearing why your opponent opposes the motion, and then the poor judge does have to take it all under advisement.

I think probably the most valuable reform would be to institute an -- a mandatory initial pretrial conference and not leave it up to the parties and not leave it up to some date that's a moving target like when all the parties get into the case. I think it would be very useful to have something to force it at a fixed time after suit is filed to get everybody in front of the judge and say this is how we want to handle the case.

HONORABLE SARAH DUNCAN: We tried that.

MR. HUGHES: Well, we can, but it's --

HONORABLE SARAH DUNCAN: It was -- the trial judges around the table were very quick to point out that they are elected and that that the proposed amendment to pretrial -- the initial conference -- was that 160 -- was just -- that was not going to politically fly.

CHAIRMAN BABCOCK: Harvey.

HONORABLE SARAH DUNCAN: I completely agree

with you, Roger.

CHAIRMAN BABCOCK: Harvey.

HONORABLE HARVEY BROWN: Well, I think, you know, everybody has some questions and concerns about various issues. I think it is good that somebody is studying it. I would suggest that at least the questions that you post that didn't inquire about two things you're trying to achieve, and that is, one, do these various methods bring about what Richard would call a more just result. I think it would be helpful to ask a question that kind of is designed to not only measure efficiency and time but --

HONORABLE REBECCA KOURLIS: Sure.

HONORABLE HARVEY BROWN: -- tries to get to the idea of are we getting to the truth.

HONORABLE REBECCA KOURLIS: But, wait a second. Do you think that question should be addressed to the litigants, because I do, but do you think it also should be that the procedural fairness question and the search for the truth question should be addressed to the lawyers and the judges as well?

HONORABLE HARVEY BROWN: I do, because I think the clients tend to be less objective than the lawyers, so I think you should ask both. I don't think it would hurt to have more data on that rather than less.

HONORABLE REBECCA KOURLIS: Right.

HONORABLE HARVEY BROWN: So I think it would be good to have that data from both, and secondly, you think some of these ideas will make it easier to get to trial. I question some of that, but I didn't see any data on whether people think this makes it easier, in fact, to get to trial. It seems to me some of this might actually make it harder to get to trial. I don't know what the experts on the other side are going to say, how effectively I can cross them, et cetera. I may be more inclined, for example, to think of settlement because of the unknowns. More unknowns I think make it less predictable, which make it harder to get to trial. So I think you should at least ask some questions designed to inquire in that direction.

CHAIRMAN BABCOCK: Richard Munzinger, and then Nina, unless Lonny still has his hand up. No? Then Nina and Sarah.

MR. MUNZINGER: The comment is that -- I'm paraphrasing it my way -- the courts compete with arbitration, and we want courts and juries to resolve disputes. All the lawyers in the room ask themselves if I have the opportunity to choose arbitration, do I choose it; if so, why. That would be a good survey for you to run. My personal experience is in those cases where I

have chosen arbitration it's almost always because of concerns of the fairness of the forum or the concern that the jury will -- I'm representing General Motors or whoever it might be, they're going to put a bunch of money on somebody regardless of what the facts and the law are. But one of the principal problems is the fairness of the forum. Are you going to have a judge who will grant you a motion for summary judgment if you're entitled to it?

Far too often I have to say to my client, "no, sir," "no, ma'am," and I practice all over the state and out of state and make these decisions the same. I don't think it's -- if you arbitrate a case the expense is not that much less, if it is less, than it is in court. Why are people leaving the courts? They're leaving the courts because those who have the choice to make don't think they're going to get a fair shake from the courts in accordance with the law as written. That's a problem. You ought to ask lawyers why they choose arbitration. I'll bet you'll be surprised. It isn't the rules.

CHAIRMAN BABCOCK: Nina.

MS. CORTELL: I've really enjoyed the discussion, and I appreciate having the opportunity to vet a lot of the competing policies. The one thing that has bothered me, though, is that the end result, what is it we're looking for, is not necessarily a system that

provides more trials. That in and of itself to me isn't where -- I mean, we're all trial lawyers and would like to have more trials, but at the end don't we want a system that provides for dispute resolution in a cost-effective and just manner? I mean, that to me is a more sympathetic end point than just going into something so that I have more trials per se, and in Texas, it's hard to separate that from the mediation system that has been embraced by our courts, and I think appropriately so.

Now, in the old days the judges -- you would get down there on Monday, right, for trial, and the judge was sort of your mediator. We now have had that earlier in the process with appointed mediators, and I think for the most part that works. It has its problems as well, but I don't separate the court system from certain other alternative forms of resolution. I think, at least in my experience, that can be one in the same. I think arbitration is separate. That's clearly outside the system.

I feel, for one, also that our rules do provide for many of the mechanisms you're talking about if we get away from the issue of fact-based versus notice pleading. Our pretrial conference rule that Sarah was referring to, Rule 166, provides our trial judges with the opportunity to do much of what we've talked about. So to

me at the end of the day I think we have a lot of the provisions we need to get to the end point we seek. It really is a question of are our -- is our system applying those rules in the best way possible, and that's where it gets so very difficult.

I was part of one of the -- or I think I chaired even one year the Reform Justice Act committee, whatever it was in Federal court, and many of the proposals you have here are echoed in what we suggested, but we couldn't even get all 10 or 15, whatever judges it is, in the Northern District to all sign off. So at the end it was sort of we recommend that you consider or these are the best practices, a lot of what you have here, but we couldn't even get that number of judges all to commit to it. So I don't know what the answer ultimately is to this, but it does seem to me critical is good judges who will control their dockets, and when they do, I think our system works pretty well.

CHAIRMAN BABCOCK: Sarah, did you have something?

HONORABLE SARAH DUNCAN: Yeah. I wonder if any studies -- do the primary arbitration/mediation groups disclose the composition of their docket? Because I know that most of the Texas trial docket is family law litigation. The problems there aren't rule-based.

HONORABLE REBECCA KOURLIS: No, I know.

HONORABLE SARAH DUNCAN: The family law system needs to get out of the litigation docket.

HONORABLE REBECCA KOURLIS: I've been on that kind of a docket, too, and I agree with you.

HONORABLE SARAH DUNCAN: And I'm concerned without knowing what the composition of the alternative dispute resolution dockets are that these rules are directed at the wrong groups. I mean, my experience has been that the people who are leaving the judicial system are employer/employee-based disputes and then large -- large disputes, large intercorporate disputes, because of the reasons that Richard was saying, because they don't think they're going to get a knowledgeable jury or a fair jury or a fair judicial officer. So I think without knowing who's leaving the system it's hard to know how to get them back.

CHAIRMAN BABCOCK: Judge Evans, did you have your hand up a minute ago?

HONORABLE DAVID EVANS: I did, and I think everything I was going to say has been said, except until Steve somewhat changed my mind, my problem since the mag cart went out of existence has not been --

CHAIRMAN BABCOCK: 38 years ago.

HONORABLE DAVID EVANS: -- notice pleadings.

It's been evidentiary pleadings that go on for -- even as a lawyer, which I was one and am still before the exalted status, is 15 pages of facts, evidentiary facts, and then incorporating the hundred counts above, conspiracy, you know. It is -- it's just -- the word processor has been the worst thing that's ever happened when it came down, a brief statement of the facts relied upon and the relief sought. I have a sense that most everything you have in here except for this cultural difference between central dockets and decentralized dockets, for lack of a better term, is incorporated in our own rules right now; and so much of it is education-based and convincing judges that there are different ways to look at and do differentiated case management, which has some pull in the urban areas, but it's very difficult in a -- for a rural judge who handles a docket that is comprehensive.

CHAIRMAN BABCOCK: Skip, then Justice Bland, and then who? Pete.

MR. WATSON: I personally am not offended by the idea that these tensions that we've been talking about this morning exist or that there's a need to try to find a better balancing point on each of these issues. I think if you're talking about notice of pleadings versus evidentiary pleadings, the things that we have been talking about today, for example, are going to be talked

about probably generationally. I mean, they're just not going to go away because there is no perfect way to do it, and we're not trying to reinvent anything. We're trying to find the right spot in a relatively narrow continuum here of how to get it right, and if I understand what's being proposed -- and I may have missed the point -- that the emphasis here is to try to get away from anecdotal changes, changes based on anecdotal evidence of lawyers getting in a room and telling their horror stories, which we are all very capable of doing, but rather to get it down to some sort of empirical data, and to me that empirical data means pilot studies.

Somebody has gone to a lot of trouble of trying to put together a pilot study on specific points that have been thought through, researched to the extent they could, vetted by both sides of the bar, so that if there are pilot studies they could be compared on an apples to apples basis. My question is, is this an informational presentation only, or are we being asked to advise the Court that sometimes seeks our advice that such a study on a limited basis to gather empirical data on these specific points should be attempted? I mean, am I just getting information, or am I being asked to make a decision and do something?

CHAIRMAN BABCOCK: In due time you will be

asked to make a decision on something.

MR. WATSON: I suspected that was coming. Thank you, Chip.

CHAIRMAN BABCOCK: Justice Bland.

HONORABLE JANE BLAND: And when Skip mentioned empirical data, I'm wondering if when we were talking about measuring, we -- I agree that the studies that you brought us today are better evidence of what everybody is thinking out there about or at least what certain groups are thinking about civil justice reform, but they're still just the collective perceptions of the groups surveyed. And when you talk about cost, cost is not an unquantifiable thing like some of these other things; and I wonder if there's been any thought given to measuring, you know, at the conclusion of a case, you know, what did your client pay you, what did your client pay for expenses, to try to determine what really -- what the marketplace is out there and what the costs really are associated with litigation and then to try to determine whether those costs are increasing at a pace that outpaces inflation or is out of control or anything -- or something along those lines. But it seems like cost is, you know, dollars are -- if you talk about data, that's not perception. That's reality. What did your client pay, what did you charge, what did they pay. Same thing with

expenses associated with litigation, what did you pay for expenses, and until we really measure those costs all we really have is the collective perceptions of various sections of the bar about what they think might be reasons for, you know -- or might prompt the need for some sort of civil justice reform.

HONORABLE REBECCA KOURLIS: Rand is doing a study that they're going to release in conjunction with the May 2010 conference that studies the costs of e-discovery. They have gone to companies and done -- Lonny, is it called longitudinal where they do case -- a longitudinal study case-by-case with companies that are willing to disclose information about what they spent for e-discovery specifically? The Seventh Circuit pilot project is -- has as part of its ultimate data gathering efforts inquiries to the attorneys at the end of each case about what they billed their clients. That's -- that's information that's very sensitive, and so I think there are some concerns about whether that data will ultimately be gathered. It's going to depend on assurances that there is a significant confidentiality shield in place, and then as I've told you, we have a database of costs that hopefully will shed some light on this, and certainly I agree with your point that surveys can only go so far.

CHAIRMAN BABCOCK: Pete, and then Justice

Christopher.

MR. SCHENKKAN: Well, it turns out Skip and Justice Bland and I were all three thinking of the same basic points and the need to have some real data, and I don't think surveys of lawyers about what their impressions are of the system really count at data. They are useful only in reflecting the culture of the community that those lawyers come out of. That is a useful thing to know, if the lawyers themselves think the system is broken, and if so, do they agree on how, but it is not data. It is at best the plural of those lawyers' anecdotes and often not even that.

I'm wondering for your purposes, you seem to have some funding to do some actual studies, and I'm wondering if it is possible, obviously beneficial to Texas if it turned out to be possible, that you would find that you could most cost-effectively spend some of your limited research money taking advantage of the somewhat control group status of our having two major metropolitan areas in Texas that do have central dockets and others that don't and spend some of it collecting some actual data, time to disposition, number of cases decided on motions for summary judgment or after special exceptions and opportunity to replead, or whatever the tests you wanted to use of the rest of the way we operate our judicial

system here in Texas, but just taking advantage of the fact that in Austin and San Antonio it's a central docket and elsewhere it's not, and we could -- you know, we might find that data very useful for our purposes as well. That's a -- this is in the spirit of suggesting your larger pilot project work rather than trying to fix the Texas system when we don't even have consensus here whether it's broken at all, and if so in which direction and so --

HONORABLE SARAH DUNCAN: Tracy, can I take your place and follow that with one quick comment?

HONORABLE TRACY CHRISTOPHER: Sure.

HONORABLE SARAH DUNCAN: Bexar County has already -- they have a presentation they're very proud of on how the central docket has increased their dispositions per judge since it was adopted.

CHAIRMAN BABCOCK: Bexar County does?

HONORABLE SARAH DUNCAN: Uh-huh.

CHAIRMAN BABCOCK: Justice Christopher.

HONORABLE TRACY CHRISTOPHER: Well, if we're to consider whether we would want to do a pilot project, it would seem to me that we should identify the type of cases that would benefit from a pilot project, because you would not need this kind of a system in the vast majority of cases on a typical Travis County docket or Harris

County docket. You know, 25 percent of my cases were car wreck cases that for the most part rock along fine, maybe one deposition, maybe not. The plaintiff's on a contingent fee. They come down, they try the case in a day and a half. It's also probably -- or a day or a half day. It's also probably the greatest number of jury trials that we get percentage-wise in terms of a type of case, so we don't need a pretrial conference. The lawyers wouldn't want to show up, waste of time for them. They know how to handle a small car wreck case efficiently.

So what kind of a case, if we were just sort of thinking outside the box, would benefit from this type of a case -- case management system. What are the other types of cases on my docket? A million note cases on my docket. Okay. Those don't need pretrial management. A note case is a note case, and it's probably going to be a default, a summary judgment, or a 20-minute bench trial. You know, there's not going to be discovery for the most part in that case. There's not going to be any big demand for a jury trial. You know, so the idea that these rules would get imposed on every case on a typical state district court docket would just not be workable.

So I would ask then to you what sort of a case do you think would benefit from these kind of rules, because there is a huge number of cases -- we've already

decided family cases probably wouldn't benefit from this. We never get jury trials in family cases. We're not going to up the number -- very rarely get jury trials in family cases. We're not going to up the number of jury trials through some sort of case management system in a family law. So is it small commercial cases where there's a real defense that we're looking at, that we want -- do we want to make that case cheaper versus arbitration so that when you go to Perry Homes and you want to buy your home and they insist on an arbitration provision in your contract before you can buy a Perry Home home, that somehow Perry Homes when they see, wow, you know, things are a lot better down here in the court system, I'm going to take that out of my standard contract for people. Where would this system be most useful? What type of case?

HONORABLE REBECCA KOURLIS: I can tell you what Colorado is doing. Colorado is looking at pilot projects in two cases, med mal and business to business.

HONORABLE SARAH DUNCAN: We don't have any med mal anymore.

HONORABLE REBECCA KOURLIS: Right. Well, we do.

CHAIRMAN BABCOCK: We can still study it.

HONORABLE SARAH DUNCAN: There's nothing to study.

HONORABLE REBECCA KOURLIS: And business versus business, and what their current debate is, is whether they're going to include individual versus business, not promissory note cases, not foreclosure, but whether they're going to limit it exclusively to a corporation versus a corporation or whether an individual can be on one side of the V.

CHAIRMAN BABCOCK: Jeff.

MR. BOYD: I suspected that would be the answer, and so I can't resist saying I think you ought to form a committee to study whether we ought to create business complex litigation courts.

HONORABLE SARAH DUNCAN: Everybody laughed at me when I suggested that, Jeff. Now why can you suggest it?

MR. BOYD: Although, I'm having some deja vu and do not volunteer to serve as the chair of that committee. I've been saving up my comments, and they're not near as intellectual as any that you've heard today, I guess more anecdotal. Number one, I want to say -- and I think in spite of the comments you've been getting, I think overall we appreciate you guys looking at this. It does cost too much to get justice in our country; and I've said all along, even when my rate was a first year rate, I could never afford myself as a lawyer and I can't and I

would never want to have to, but it does vary from case to case.

In my anecdotal experience we don't go to jury trials often not because the client is afraid of the cost of defense, but because they're afraid of the cost of the judgment if they lose, and I don't know how you, you know, study that and adopt rules to change that. I don't think you can. In some ways I think we're getting the results -- we're getting what we asked for 20 years ago when I started law school and was encouraged that I ought to go through this dispute resolution certification program because that was the wave of the future because everybody wants -- you know, we need to get these cases into an alternative dispute resolution and our Civ. Prac. and Rem. Code statutorily promotes that. I mean, we promote by law alternative dispute resolution.

Having said all of that, I want to just raise a question about one underlying presumption, and that is the presumption -- I'm going to weigh in with Judge Yelenosky, I think. The presumption that having judges take, what is it, early and consistent control over the case or rules that impose that kind of early and consistent control, that that necessarily reduces costs, and I guess the empirical data or at least the surveys show that most people think it does, but in my experience

it's not the case, which is why generally speaking my clients and I would rather be in state court than in Federal court because in Federal court you have to do your pretrial conference and your pretrial -- what's the rule? I can't think of it now, where you meet with the other side and discuss it and then 14 days later have to submit a joint pretrial order and do all of these -- I've got a products case, basically a products case, right now, and we removed it to Federal court at the client's wish.

Plaintiff's lawyer has agreed they're going to send me all the medical records, X-rays, expert reviews of the device, and all of this, but in the meantime we still have to spend at least a few to several hours each jumping through all the hoops that the Federal rules require us to jump through within 14 days after we have our required conference next week. Without -- and it would cost money to get the court to allow us an exemption or postponement of those, so either way those rules are imposing additional costs on my client that because this other lawyer and I have been able to reach an agreement to work cooperatively to just get to the bottom of this and see if it's something we then need to do extensive discovery on, the client would not be incurring that cost.

So that's my concern whenever I see these kind of rules that say -- whether it's fact-based pleading

or the judge jumping in right at -- the reason I like the central docket, I've got a case now, just came to me this week. Today is in fact -- it's an interpleader action and based on an interlocutory judgment entered 60 days ago. Today the money was supposed to be disbursed, and so my client calls me Monday and says, "I want you to substitute in as counsel and get this thing -- and stop this from happening." Long story short, the other lawyers were cooperative, they would agree to extend it 30 days. I went down to the clerk's office, talked to the lady who handles all disbursements, she agreed. I went to uncontested -- I didn't have to jump through hoops because the lawyers and the court worked together to get it resolved.

And somehow I hope that whatever system gets developed here will allow for the lawyers to work together to get it done and then impose these kind of requirements only if they can't, because if you impose these kind of requirements on all cases whether or not the parties agree, you're imposing additional costs that they otherwise wouldn't incur.

CHAIRMAN BABCOCK: Roger.

HONORABLE REBECCA KOURLIS: I take your point.

MR. HUGHES: Well --

CHAIRMAN BABCOCK: Then David.

MR. HUGHES: -- if we're suggesting appropriate projects, I think these kind of rules could be beneficial, and what I've seen is the increasing litigation, at least in my area, labor law and commercial construction contracts, once you get away from the mold litigation. In the employment termination/discrimination labor law, the people usually know what they're up to; and if you can get to court, they can usually be tried in a couple of days; and the commercial construction cases, once again, you're dealing with sophisticated people. Well, all they need to do is get their hands on each other's project diaries and their construction records, and so far what I can see is, is that at least when it comes to most of the engineering projects and construction defects we don't suffer quite so much from voodoo science or junk science. The engineers all know each other, and they -- it's almost the point where you might be able to get away with little or no depositions.

CHAIRMAN BABCOCK: Okay. David Jackson.

MR. JACKSON: Well, the part that I haven't heard this morning in this philosophy of everything we do we want to try to get to a jury trial, we have -- I see litigation everyday, I take depositions in cases where the lawsuit was filed just to get someone to act. Everybody

knows they're responsible, but they're not going to live up to that responsibility unless you file a lawsuit against them, and you may take a deposition or two to show that they're responsible and then they pay up, and it's over, and if you develop a system that requires that process to go all the way to a jury every time then I think you really have added to the expense.

CHAIRMAN BABCOCK: Okay. Yeah, Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: I just wanted to follow up on something Jeff said. He noted that he couldn't afford himself. I couldn't afford you either. I don't think I could afford any lawyer. Nobody has really mentioned whether people are priced out of litigation because they can't afford lawyers at all. I mean, if we look at the family law context, people have to go to court to get divorced. They have to go to court to get an order regarding children. What do they do? They come without a lawyer now in increasing numbers, and that's not due to the expense of the litigation. Maybe it is to some extent, but we're really talking about small family cases. They can't afford the hourly rate of a lawyer.

Now, I know in a contingency context or an attorney's fees context the cost of the litigation is going to figure in into whether they can get a lawyer or

not, but when you're talking about hourly rates of attorneys, who can afford 200, 300, $400 an hour, and you can -- obviously you can reduce things. You need to discount things to the year, but if you compared hourly rates for lawyers now in constant dollars to when people hired lawyers for things like that, is it disproportionate?

HONORABLE SARAH DUNCAN: Second.

CHAIRMAN BABCOCK: Good point.

HONORABLE REBECCA KOURLIS: Chip, I'm, unfortunately, this time really going to have to leave --

CHAIRMAN BABCOCK: That's good.

HONORABLE REBECCA KOURLIS: -- for which -- yeah, that's good -- for which I apologize.

CHAIRMAN BABCOCK: Yeah, we'll talk behind your back.

HONORABLE REBECCA KOURLIS: I have about another five minutes, and so I guess I want to from my personal perspective wrap by thanking you very sincerely for the nature of your comments, your thoughtfulness, being willing to take the time of this entire body to talk about this, and for your candor and your concerns. All of those are important to us and to me personally.

What I want to leave you with is that our reason for being is to try to figure out ways to better

serve the citizenry who need access to the courts, and I would hope that some portion of what we have discussed this morning has reminded all of us that the system that we design can't be for us. It can't be for the judges and for the lawyers. It has to be for the people who come to us, be they family litigants or civil litigants or criminal defendants. So I depart with the -- with a renewed commitment to be thoughtful and careful and to be sure that what we are suggesting takes into account the various issues that you have suggested across a host of criteria, and I hope that what I leave behind is some of my passion for trying to make sure that we do the very best job that we can to design and redesign and reevaluate our system so that it serves our society and the people in that society to the very best of our ability.

I will double back with you, Chip, to find out anything -- any other questions or comments or to get the scuttlebutt on what was said behind my back. I'm leaving copies of this shorter fact-based pleading article to which Bill referred, and, again, my gratitude to all of you for your time. It's a very valuable resource of a group of this nature and level of experience, and I thank you.

CHAIRMAN BABCOCK: Well, thank you, and one final comment, don't leave before I get to say this.

HONORABLE REBECCA KOURLIS: Okay.

CHAIRMAN BABCOCK: As Bill noted, we did invite you here to take all this abuse, and we did so, both myself and the Court, because you raise tremendously important and interesting issues, and we all obviously have different views on how we should accomplish the same goal of having a better system of justice for our citizens, but I want to thank you on behalf of the Court and our committee for taking the time at your own expense and Bill's time at his own expense to come here and talk to us, and the only thing I can say is that I warned you that there would be no holds barred by our merry band of warriors here, but a round of applause for Justice Kourlis.

(Applause)

CHAIRMAN BABCOCK: And we'll break for lunch with that.

(Recess from 12:30 p.m. to 1:32 p.m.)

CHAIRMAN BABCOCK: Well, what did everybody think about what we just did? Munzinger, you were your usual eloquent self.

MR. MUNZINGER: I believe our rules are in pretty good shape.

CHAIRMAN BABCOCK: Yeah. It's interesting that a lot of the reforms that they propose really have

already happened here. The only thing that I could see that was different was the fact-based pleading and the fact-based answer that could be different, and we can maybe take that up as a separate issue, but other than that pretty much everything that they propose we're doing. So we've got a couple of options in terms of what we talk to the Court about, but Justice Hecht and I, and Justice Hecht and Justice Medina talked, and we thought that some people -- there were a couple of people that suggested both from the reformers' side and from -- that if they want to spend some money to study what we're doing without us changing our rules, of course, that might be productive for them, but also for us. And, of course, neither Justice Hecht nor Justice Medina can speak for the whole Court, but is there anything I'm missing or we're missing about getting them to use their own money to study what we're doing to see what they think? Lonny.

PROFESSOR HOFFMAN: Yes.

CHAIRMAN BABCOCK: Okay.

PROFESSOR HOFFMAN: Like me to elaborate?

CHAIRMAN BABCOCK: Thank you. Anybody else? No, why do you think that would be a bad thing?

PROFESSOR HOFFMAN: So, so one reason is that one Judge Christopher also -- Justice Christopher also raised earlier, which is -- so and, again, honing in

on your point about it seems like what we may be talking about a lot is this pleading with particularity fact pleading. So one is that how are we going to do this in a way that is fair to litigants who everyone else -- where everyone else operates under a system in which it's a notice pleading, you know, the standard is different.

CHAIRMAN BABCOCK: No, I don't propose changing that.

HONORABLE SARAH DUNCAN: There's a disconnect.

CHAIRMAN BABCOCK: Yeah, there's a disconnect there. I'm not saying that we should change our pleading requirements. I mean, that's for another day if the Court wants to -- if the Court wants us to study whether we should change our pleading requirements then we'll study that. What I'm talking about was the suggestion was made by both Justice Kourlis and I think Bill Norwood and then some other people from our group that they spend their money to study what we're doing and compare that against their pilot projects to see if we've got a better answer or there's some things we could learn from it.

PROFESSOR HOFFMAN: So, again, maybe I'm not clear. What is it that they would be looking at? They would actually see, for example, the incidence of

discovery in civil cases, for instance?

HONORABLE SARAH DUNCAN: Time to disposition. Number of dispositions per judge.

CHAIRMAN BABCOCK: Central dockets.

HONORABLE SARAH DUNCAN: Central dockets versus decentralized.

PROFESSOR ALBRIGHT: Discovery rules I think is what we --

CHAIRMAN BABCOCK: Yeah, you were the one that brought that up.

HONORABLE TOM GRAY: If y'all want Dee Dee to get this, y'all are going to have to talk one at a time.

CHAIRMAN BABCOCK: Good point. Alex was the one that brought up studying how our discovery rules have worked since -- other than what Sarah said about how the incidence of mandamus was night and day before and after the discovery rules, there's really little empirical data about how our discovery rules are working, so that would be something, but, of course, if it's going to be their study I guess they would study what they want. We would just make the data accessible to them.

HONORABLE DAVID MEDINA: Probably have some input.

CHAIRMAN BABCOCK: Yeah. Well, we would

want to have some input, sure. So, yeah, Stephen.

MR. TIPPS: I would just point something out. Would it make sense to suggest to them that they consider conducting the same sort of survey or review of Texas lawyers working under Texas rules that they conducted in Oregon and Arizona?

CHAIRMAN BABCOCK: Sure. That's a good idea.

MR. TIPPS: Since they have that data point.

CHAIRMAN BABCOCK: That's a great idea. I never know when you're raising your hand or you're just warming up to come in on relief.

HONORABLE DAVID MEDINA: Oh, no.

CHAIRMAN BABCOCK: Yeah, Lonny.

PROFESSOR HOFFMAN: Look, I mean, this may be a -- it certainly was awkward when Mr. Norwood and Ms. Kourlis were here, so maybe it would only be moderately less awkward now. This doesn't seem to me to be the right group to do this, even if many of its members may be perfectly reasonable or don't have another agenda here, and I think we need to be -- I would be concerned if I were a member of the Court, and as a member of this committee I'm concerned, that we're sending some sort of a message that we have deputized this group to go do stuff, some of which may -- their finding of which may bear

relevance to our -- some policies that we are -- of course, the Court might ultimately prescribe, but again, I want to underline I don't have it. I'm not suggesting that they are bad people. It may be they just simply don't know what they're doing, okay, but it is nothing --

CHAIRMAN BABCOCK: Dee Dee, did you get that?

PROFESSOR HOFFMAN: It is no small matter to offer surveys that purport to describe what lawyers across the board think is happening with discovery and fail to describe the method -- to underline the methodological work that led those -- to those outcomes. So you're looking at gray-haired lawyers who by definition have lots of experience, otherwise they can't be in the American College, in trials, who -- although, I don't know this, and so they haven't told me -- one suspects are more heavily dominated by big white-shoe law firms doing a certain kind of work that is not itself representative.

CHAIRMAN BABCOCK: Lonny, that's just not true about the college. That's just not true.

PROFESSOR HOFFMAN: Okay. But my point is that we don't know. Moreover --

CHAIRMAN BABCOCK: Well, I'm in the college. I do know.

PROFESSOR HOFFMAN: But you don't know who

responded to the survey.

CHAIRMAN BABCOCK: No, that's true.

PROFESSOR HOFFMAN: And then more centrally, to raise this data without referencing the body of studies that have been done and have not been questioned to my knowledge over the years that have demonstrated that lawyers in other surveys do not believe that discovery is out of control, raises a concern for me that they either don't have the right staff or the right resources to do this in the right way and that -- those are concerns that I have.

I am -- I'm going to again return to the point. I have no idea whether Tom Donohue was involved in the surveys. I will, of course, take them at their word that the U.S. Chamber of Commerce didn't fund it and didn't have anything to do with it, but there ought to be no doubt in this room what the agenda of the U.S. Chamber of Commerce is and has been, and the idea that he's on the board and that there's a lot of information that I don't know, and before I feel comfortable deputizing this group to go out and do stuff on whose -- the result of which might then bear relevance to a policy that we might be asked to make makes me very uncomfortable, and so I would say we have an Office of Court Administration that does exactly this sort of thing, and I would be delighted if we

found -- if they wanted to fund the OCA to have a special project.

CHAIRMAN BABCOCK: Okay. What other comments about that? What Lonny says I think is we need to make sure this group, these groups are -- don't have an agenda, but are nonpartisan as they claim to be.

HONORABLE SARAH DUNCAN: Well, I think actually Lonny was saying that it's like a Daubert motion, that the level of data that was collected and the way it was portrayed in that report is not -- was not very scientific, and it did look like there was an agenda to me, but I'm not saying there is. I don't know, and I don't much care, except that if we're going to have statistical studies done of our system we want them to survive a Daubert motion. We don't -- we don't want to subject the litigants, the judges, and the lawyers to a data collection system that's unscientific and without an underlying methodology.

CHAIRMAN BABCOCK: Well, of course, they could study us if they wanted to.

HONORABLE SARAH DUNCAN: Of course.

CHAIRMAN BABCOCK: I mean, the data is public, so whether we want them to or not, I suppose if they are just all curious about the state of Texas they could do it if they wanted to, but, Frank, you look like

you're about to say something.

MR. GILSTRAP: No.

CHAIRMAN BABCOCK: No?

MR. GILSTRAP: No.

CHAIRMAN BABCOCK: You had your mouth open.

MR. GILSTRAP: My nose is stopped up.

CHAIRMAN BABCOCK: That's what I thought. Okay. Yeah, Judge --

HONORABLE STEPHEN YELENOSKY: I think that's right. They can study us if they want, and that was going to be my point, so -- but to invite them then raises the questions that Lonny raised. So if they want to study us, that's fine, but if we're debating whether to invite them then there are questions that we have to face.

CHAIRMAN BABCOCK: Well, and, of course, if the -- if there is an invitation and there's an effort to work collaboratively with them, there's good and bad with that. As Lonny points out, if we don't like who they are then we shouldn't be working with them, but if we do like who they are and think that they can provide some valuable information to us then we could direct the study in some fashion, I suppose, but, yeah, Judge Christopher.

HONORABLE TRACY CHRISTOPHER: Well, the presentation is a little inflammatory because the first Power Point, you know, that you could actually read as

opposed to the charts that you couldn't read, you know, it's "Americans are priced out of our own justice system" and then the whole program is entitled "Roadmap to Reform." Well, they haven't proven either of those things. They haven't -- you know, they haven't shown that these roadmaps to reform will -- that it is a roadmap to reform, and they really haven't shown how it's going to fix the problem of Americans being priced out of our own justice system. So, I mean, there's something going on here. I'm not sure what it is, but then they kind of back away from it during the presentation, and, oh, well, we just want to study this and get some data on it.

CHAIRMAN BABCOCK: Yeah, okay. Yeah, Hayes.

MR. FULLER: One question I have that I wish I had asked when they were here is any study that you're going to do, they can study us and they can see disposition rates and things like that as to how quickly we can resolve things, but the basic premise is that we've been priced out of our system of justice. That's a subject of statement which is capable of -- I mean, how many litigants are going to actually provide objective data as to how much we spent to resolve this matter? You know, that's going to be -- that's a difficult thing because most of the folks I represent aren't going to share that information.

CHAIRMAN BABCOCK: Yeah, I was thinking that when she mentioned that the Seventh Circuit project they were going to ask lawyers how much they charged their client, I thought the better question was not what they charged but what they paid, what the clients paid, but even so, you would have to get the client's permission --

MR. FULLER: Right.

CHAIRMAN BABCOCK: -- to disclose that kind of data, and, you know, confidentiality can be promised but maybe not delivered, so you'd have to be very wary about sharing that kind of data, and if you don't have that kind of data then --

MR. FULLER: You're subject to that criticism.

CHAIRMAN BABCOCK: Yeah, so good point. Sarah.

HONORABLE SARAH DUNCAN: Some of us were talking about during the break this idea that the jury trial is where we need to get. Well, that's not where we need to get. Where we need to get is resolving people's disputes in a fair and efficient manner.

CHAIRMAN BABCOCK: Oh, you've got to give us trials so we can --

HONORABLE SARAH DUNCAN: Well, I know, and you trial jocks want more trials, and that's fine. You

get them wherever you can get them.

CHAIRMAN BABCOCK: I'm going back to car wreck cases myself.

HONORABLE SARAH DUNCAN: Yeah, right, and you charge $800 for those and let's see how many you get.

CHAIRMAN BABCOCK: There's the point, priced out of the system.

HONORABLE SARAH DUNCAN: And that's a lot of what bothered me about the presentation is when I asked have you looked at the composition like of the Triple A's docket, what cases are going to arbitration that are fleeing the system, no, we haven't done that. When Judge Yelenosky brought up part of what's pricing people out of the system are attorney's fees, they haven't looked at that either.

HONORABLE STEPHEN YELENOSKY: Yeah, that seems to be off the table.

HONORABLE SARAH DUNCAN: So what is this going to tell us that we don't know and they do?

CHAIRMAN BABCOCK: Yeah. The Triple A thing is interesting because I think the way it works in most arbitrations under Triple A is that you pay a filing fee that's based on how much money you're trying to get, and it goes up the more money you're looking for, and if you have a counterclaim, same thing, so --

HONORABLE SARAH DUNCAN: That's fair.

CHAIRMAN BABCOCK: And then you have either one or three arbitrators selected and then the parties pay the arbitrators by the hour, which, you know, there's a different incentive from what the public court system has. The public court system wants disputes resolved as quickly as possible, get them off the docket, but if you're getting paid by the hour by the parties maybe your incentive is not the same.

HONORABLE SARAH DUNCAN: Maybe that's called the billable rate.

CHAIRMAN BABCOCK: Yeah, for the arbitrators, though, which --

HONORABLE SARAH DUNCAN: Same for the lawyers.

CHAIRMAN BABCOCK: Huh?

HONORABLE SARAH DUNCAN: Same for the lawyers, and nobody is suggesting --

CHAIRMAN BABCOCK: Oh, yeah. There's always that inherent conflict that the lawyers have, the hourly rate. Yeah, for sure. But in the arbitration you're paying for your justice system.

HONORABLE SARAH DUNCAN: I really would be interested in a study of what cases, what kinds of cases, are going to arbitration and how many of them.

CHAIRMAN BABCOCK: Well, you know the securities cases that have arbitration clauses in all of these form contracts. You know there's a lot of contract cases that are going there. You know there's a lot of employment disputes that are going there. And beyond that I don't know.

HONORABLE SARAH DUNCAN: But aren't you curious?

CHAIRMAN BABCOCK: I am curious.

HONORABLE SARAH DUNCAN: And I'm curious about how many.

CHAIRMAN BABCOCK: Well, let's get these guys to study that.

HONORABLE SARAH DUNCAN: She didn't sound interested.

CHAIRMAN BABCOCK: Well, you never know. Yeah, Justice Bland.

HONORABLE JANE BLAND: If you look at the pilot project rules, I think everybody has said we have state counter -- Texas state court rules that are counterparts to these pilot project rules with the exception of the single judge versus the central docket, and we've exhaustively looked at that over the last couple of years. Pete Schenkkan did a lot of work on that on our subcommittee, and we ultimately concluded that different

counties are handling it differently, but there aren't any even anecdotal complaints about the way that they're being handled differently in different counties.

So that's the one difference, and then the other difference is this issue of the notice pleading versus a more fact-specific pleading, and the only data that I think that the college was looking at in connection with that principle was this Oregon study, and I think as Judge Christopher pointed out, that was very inconclusive about whether it was -- it was -- it was inconclusive about whether it saved any money or got a case resolved any quicker. On the other hand, here, I don't think we're hearing a lot of complaints even anecdotally about our pleading requirements, so I'm wondering where our committee is supposed to go from here. Because it seems like we've employed these principles and suggestions in places in our rules already except for those two things, and, you know, I don't think either one is drawing a huge -- the ire of the bar, the bench, or the public in our state.

CHAIRMAN BABCOCK: Yeah, no, I agree, and that's what I thought I tried to start out by saying. I don't -- in fact, I don't think, I know the Court is not asking us to study and make a recommendation as of today on the pleading thing, and as you say, we've already

studied the central docket issue, and so we're not being asked to do that. There are only two issues for us to advise the Court on coming out of this morning, and that is does Texas want to participate in a pilot project with this organization or -- and/or do we want -- if they want to study us do we want to cooperate with them, and I hear pretty much some strongly held views by two or three members that we don't want to cooperate with them, but, yeah, Justice Sullivan.

HONORABLE KENT SULLIVAN: I was just going to say I think that the level of interest anyone has in seeing a study done by this group or probably by any other group is probably inversely related to your level of satisfaction with the status quo. So if you're very happy with the status quo, I suspect most people are going to say there's really no need to study much of anything, and I think you have to kind of take that into consideration.

CHAIRMAN BABCOCK: Yeah. That's great. That's a great point. So everybody happy with the status quo?

HONORABLE SARAH DUNCAN: I actually think there's a third prong to that.

CHAIRMAN BABCOCK: What's that?

HONORABLE SARAH DUNCAN: There's a third prong to that. One can be unhappy with the status quo or

not completely happy and yet not think that our being studied by this group or our being part of a pilot project with this group would work to relieve that unhappiness at all.

CHAIRMAN BABCOCK: Justice Bland.

HONORABLE JANE BLAND: Well, I'm not against anybody studying us for anything to improve anything, so and to the extent anybody wants to study any part of the judiciary or government, I think that's great, and we should cooperate with anybody who wants to gather information about with an eye toward improving the judiciary. I'm just trying to figure out what they're going to study about us, because we can only identify two things that we don't do that are in their recommendations. So I don't see that a pilot project would look really much different than, you know, what our court would do -- what a trial court would do in the ordinary course of business unless we did something with these other two issues, which I think people do have strong opinions about.

CHAIRMAN BABCOCK: Justice Christopher. By the way, Justice Christopher, nice cross-examination on the chart. You've still got it.

HONORABLE TRACY CHRISTOPHER: Yelenosky was helping me.

HONORABLE STEPHEN YELENOSKY: I just did the

math in my head. I'm just the math guy.

CHAIRMAN BABCOCK: You were writing notes. I could see it.

HONORABLE TRACY CHRISTOPHER: I agree with Jane that, you know, if they want to come study us, fine. I actually am not particularly opposed to a pilot study with these rules, but I don't think that it's particularly useful in most of our cases, as I was trying to get her to identify which case -- what type of cases would be useful to have, you know, this set of rules in. It might be useful in a more complicated business setting to have fact-based pleadings than the notice pleadings that we have. But you couldn't just say, okay, the 295th is going to be the pilot program, and I just think from our jurisprudence point of view we would definitely have to have people opt-in to the program and agree to be bound by the rules because otherwise we have all sorts of appellate issues.

CHAIRMAN BABCOCK: Right.

HONORABLE TRACY CHRISTOPHER: And, you know, once you have an opt-in system I think it tends to skew the data.

CHAIRMAN BABCOCK: Yeah, Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: Well, I mean, and cooperate, I mean, giving the imprimatur of this group

is one thing, but also cooperating involves any resources is the question of is this important enough for us to devote or the Court to devote any resources? I mean, there may be somebody out there who wants to study whether it's better for judges to wear blue robes instead of black robes. If they want to study, that's fine, but would this group say, yeah, we want to cooperate with that? I mean, why?

CHAIRMAN BABCOCK: White robes. Red, white, and blue robes.

HONORABLE DAVID MEDINA: With wigs.

CHAIRMAN BABCOCK: With wigs. We're definitely into wigs. Judge Yelenosky, on the issue of satisfaction with our civil justice system in Texas, you know, you were at one time very much involved with Legal Aid --

HONORABLE STEPHEN YELENOSKY: Right.

CHAIRMAN BABCOCK: -- and I know you're still closed to them. Are they okay with how we do it?

HONORABLE STEPHEN YELENOSKY: Well, I don't think Legal Aid has the cost of litigation issue at the forefront of their mind. It's a different kind of practice. I don't think this has really a lot of relevance. I can't really speak for them, but I don't think it has a lot of relevance to them. I mean, their

mission, of course, is representing people who really can't not only couldn't afford a lawyer, probably can't -- can barely afford their next meal, but therein is the gap between everyone else and those who can afford all these lawyers.

CHAIRMAN BABCOCK: Yeah. Okay. We pretty much talked this out? Okay. Well, that's really helpful input, and the Court will have the benefit of this record, and I thought it was a really excellent discussion this morning, and frankly, if we came -- if we came to no other conclusion than we're great, I mean, that's worth a couple of hours, but I do think that a whole bunch of interesting issues were raised, and I think we probably raised some things for them to think about, too --

MS. BARON: Yeah, never coming back here.

CHAIRMAN BABCOCK: -- going forward, and I predict -- yeah. But --

HONORABLE NATHAN HECHT: Let me add one thing.

CHAIRMAN BABCOCK: Yeah, Justice Hecht.

HONORABLE NATHAN HECHT: I think one thing that my colleagues and I hear when we're out running for reelection is a huge amount of popular dissatisfaction with the civil justice system that does not resonate in this room, and a lot of it is intemperate and misinformed

and really the situation is not as bad as it's easy to portray it sometimes or caricature it, but it is there, and they have other avenues of expression. We're not the only branch of government, and they go there and air their grievance as well, and I just think the Court is very sensitive to wanting to be sure that the people whose natural interest in the justice system is entrenchment, which, meaning no offense, is everybody in this room and that we've not overlooked a very loud voice that's out there, and sometimes -- I'm not suggesting that that happened today.

I just think that the reason that these issues keep coming up and keep being aired is for what Jeff Boyd went through and Alex and others, I mean, we want to be sure that we're not tone deaf to these comments that are being made all around us and all of the time, so we -- it was a good discussion this morning, and I think the Court will benefit from our having spent the time on it.

CHAIRMAN BABCOCK: Great. Justice Medina, anything?

HONORABLE DAVID MEDINA: No, I agree with what Justice Hecht said. Just like in conference.

HONORABLE TRACY CHRISTOPHER: Could I ask you to be more specific on what the complaints are that

you get?

HONORABLE NATHAN HECHT: Too expensive and takes too long. It's very simple. The popular conception of the civil justice system is "I can't get there" and every lawyer -- any time I have a complaint, if I go to a lawyer they say, "Well, we can't take it or if we do take it, it will cost you more than you've got" and the -- there is a large perception in the ordinary people that you just meet in the course of being out there who feel that way, and I'm not talking about -- I think the repeat litigators sort of get used to it, so there may be some sentiment to that effect among business people who are constantly at the courthouse or even people -- others who are routinely there. Well, that's just how much it costs, and you just kind of get used to it, and that's what it's like, but it's the same kind of cost and the same kind of complaints that you -- you know, you kind of sense are bubbling up about medical care, that it's not meeting our expectations.

When you try to do something about it, we've seen the result of that the last couple of weeks, but I do think that it's our responsibility to try to be sure that we are listening to that and rechecking -- recalibrating to be sure that there isn't some way we can respond in a way that's productive, and for example, I don't know if

it's because it's new or if it's more intrusive or what, but the electronic discovery is drawing a lot of complaints from a lot of different people who are saying, "Wow, this is -- it is a new burden that we are not used to." But that might not be right. I mean, the criticism may be off the mark, but I think we have to look at it pretty carefully. Yeah. Judge.

HONORABLE TRACY CHRISTOPHER: Well, I agree with you that e-discovery is something that really ought to be studied on the cost stuff because I can see how it can easily get out of hand, but if we're talking about a situation -- like I was chatting with my contractor who was doing some work at my house, and he had a subcontractor that filed a lien on a property that he was, you know, the general contractor on; and, you know, it took -- the lien was $350. Okay, well, he says, "I didn't owe the subcontractor the $350." He goes to a lawyer, and the lawyer says, "It's going to cost you a couple of thousand dollars for me to get into court, get the lien removed. You're better off just paying the subcontractor the $350 and, you know, I can give you the lien work to get it done." Those are the kind of complaints I hear in terms of access to the justice system for small issues. But what's here won't make that any different.

HONORABLE NATHAN HECHT: No, no. I'm not

suggesting that the proposals are solutions, but I do think some sort of response to -- that the criticism out there is very real, and it has a reality to it, that the citizenry is increasingly discontent, and we've got to be responsive to that. We just can't let it build up and turn into an earthquake.

CHAIRMAN BABCOCK: Yeah, Sarah.

HONORABLE SARAH DUNCAN: I completely agree. My question is how much of the cost of litigation is cost of litigation as opposed to cost of the lawyer? Having paid attorney's fees now for the first time in my life, it's stunning. It's a traumatic day when that bill comes, and I don't know what we do about that. I mean, I'm horrified at my hourly rate. I'm horrified.

CHAIRMAN BABCOCK: Strike that from the record.

HONORABLE SARAH DUNCAN: No, don't strike it.

(Laughter)

HONORABLE SARAH DUNCAN: I mean, I can see my grandmother, I can hear her now. When I passed the bar and had a job, and I told her what my starting salary was going to be, she said, "Sarah, that's great as long as you never believe you're worth it," and we've begun to believe we're worth it, and I don't think we are. I think we're

causing as much problem as we're solving, but what are we going to do, you know, cap lawyers' hourly rates? That's not going to happen. But I do think lawyers are the biggest cost in the system.

CHAIRMAN BABCOCK: Richard Munzinger.

MR. MUNZINGER: Well, having said that, what do you do about Congress and the Legislatures that pass the laws that make everything so complex that you have to have a lawyer? The people in this room don't write the laws, the Supreme Court shouldn't write the law, and ours doesn't, recently.

(Laughter)

CHAIRMAN BABCOCK: What time frame are you talking about?

HONORABLE NATHAN HECHT: The last 20 years.

MR. MUNZINGER: In the last 20 years or so the Court isn't making law like it used to, in my opinion, but for god's sakes, I go to law school, I'm supposed to understand these concepts, I work my tail off, I read the advance sheets, I stay abreast of the law, and some guy wants me to work for $10 an hour to administer a law that takes hours and hours and hours to read and understand, and I'm going to feed my family and you're blaming me? Blame Congress, blame the Legislatures. Simplify it. You can't, life is too complex.

Electronic discovery, good lord, 15 years ago you would pick up the phone and say "no" or "yes" or have a conversation. Today it's an e-mail. Well, now there's a record to look for, and if I don't look for it, I'm guilty of malpractice. If I don't find it, I'm guilty of malpractice. If I don't look for it and find it, I haven't done my job for my client. The Courts are responding to the complexity of society. I don't think lawyers are the root cause. We contribute to it. Sure, we're greedy. Of course, we all -- well, we are. We all want to get paid a fair salary, but is the grocer less greedy than I? No. How about the plumber? No. You ever paid a plumbing bill the last year or two? My god, I'm scandalized at plumbing bills. It's life. I don't think that the profession is responsible for the problem. We may contribute to it because we're humans, but by golly, look at the legislators and the congressmen first.

CHAIRMAN BABCOCK: Sarah's plumber is on retainer, so she doesn't have the kind of bills that you do. Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: Well, you know, we could debate whether lawyer salaries are fair or whether they need to be fair or whether it's market-driven or not. I think the point is that at least this group has taken it off the table, so if that's a problem, they're

not going to get to a solution.

As far as Justice Hecht, I agree that there's that dissatisfaction. I speak to UT law students every year on pro bono issues, and I talk to two -- I divide them up -- not physically, but as I speak to them -- those who think they're going to do pro bono, or those who are going to go into some type of public interest, and those are -- who don't really have any interest in pro bono, morally or otherwise; and the second group I talk about, you know, there is a lot of dissatisfaction out there, and people are priced out of the system, can't afford lawyers, and the cultural support for our legal system is eroded if ordinary people can't get into the courtroom with competent assistance, because I don't agree with Richard that it's complexity of the law. To have a good cross-examination you need somebody who knows how to do it, no matter how simple the law is. So I agree that there's dissatisfaction out there. I speak to law students about it. I don't know the solution, but I don't think that changes in the rules, even if they are a solution at all, can get to an ultimate solution if, in fact, one of the issues is just that people can't afford lawyers.

CHAIRMAN BABCOCK: Yeah. Gene.

MR. STORIE: Well, I hope I'm not throwing

too big of a bomb here, but --

CHAIRMAN BABCOCK: We like big bombs.

MR. STORIE: Well, I know. I figure I'll get a little break here, especially as an old retired guy who doesn't rely on anyone's business for anything right now, and if I may say for the record, whose final salary as a division chief was less than the starting salary in all of your firms so far as I know. So that's it for the money, but my comment is, my bomb is, can some of this be addressed through ethics? Like we have a responsibility, number one, to the system of justice; number two, to our individual clients. Or that we have an obligation to charge a fee that considers the client's ability to pay. Or that we have a duty of candor such that the issue Stephen mentioned about throwing in a bunch of junk in your pleadings or a bunch of junk in your answer is not something you should do. To me that's a whole new field of possibilities for working on the system, but do what you will with it. That's the bomb.

CHAIRMAN BABCOCK: Very good. Anybody else? Well, yeah, Justice Gray.

HONORABLE TOM GRAY: I'll throw in just a quick comment that primarily affects the appeals, and that's, you know, we are state-funded by the -- for our staffing and our own salaries, but, you know, when the

Legislature is trying to cut expenditures, that impacts the speed with which we dispose of things. I mean, it's a natural consequence of when they tighten the belt so that staff has to go that, you know, we just can't process stuff as quickly, and, you know, the public -- you know, our job is to communicate that back to the public when they start complaining about speed, is that part of that is a funding issue. So --

CHAIRMAN BABCOCK: Well -- yeah, Nina.

MS. CORTELL: I'm mindful that we need to go on to our next topic, so I'll be very short. The one thing I did hear that it could make a difference is -- and let me back up and say I think we have the tools we need in our rules. I don't think I heard anything that requires any kind of fundamental overhaul in that regard, but what we also heard was that in complex cases if there were some way to foster an environment where certain of our case management procedures were tightened or encouraged that -- you know, the judicial involvement, the use of Rule 166 pretrial conferences or whatever, that that could make a difference in that category of cases. The problem, of course, is we can't have a set of rules or a case management system that fits all the different cases we've talked about. If Richard Orsinger were here we would have heard a lot about family law cases, and we

didn't hear much today about that, so --

HONORABLE STEPHEN YELENOSKY: And it would be 5:00 o'clock.

MS. CORTELL: I just thought that there is some food for thought there on complex cases, that we do sometimes see a lot of delay, and there are rooms for greater efficiencies there, but, that said, I do think -- I'm sorry, I know I can't be Chip, but I just have to make a plug that we need to move on at some point to our next agenda item or we're going to lose various members of our committee.

CHAIRMAN BABCOCK: Justice Christopher.

HONORABLE TRACY CHRISTOPHER: I was just going to say if we haven't finalized the cover sheet, you could put on there, you know, "Would you like a pretrial conference early in the case to limit discovery?" And, you know, if both sides say "yes," come in, you know, we're going to have just two depositions in this case or whatever, there's not going to be any discovery because we only have $25,000 in controversy. It would be a way to sort of bring the idea up to the lawyers and the judge that this would be a good case for it.

CHAIRMAN BABCOCK: Yeah. Great. I hope nobody feels like their time was wasted today because the Court, as you know, some time ago, as I started out

saying, asked us to look at ways -- you know, think of ideas on how to improve the civil justice system in Texas, and it seems to me that whatever Lonny and others might think of these two groups, that they have gone to a lot of work and they have some ideas that are worthy of discussion, and we'll leave it at that, and the Court will decide where it wants to go from here, if anywhere, with respect to these proposals and -- you warming up again or raising your hand?

HONORABLE DAVID MEDINA: Oh, just --

CHAIRMAN BABCOCK: Okay. So that will close that item unless anybody else has anything to say, and we'll move on to the proposed amendments to Rules 296 through 329b, and I see that there's been a handout by Professor Dorsaneo, and, Bill, are you the lead dog on this?

PROFESSOR DORSANEO: Well, Ralph Duggins is not here, and David Peeples is not here. I think I've been appointed to present this or begin the presentation of it by default. And being someone who is not afraid of hearing his own voice, I'm ready to roll here.

CHAIRMAN BABCOCK: Good. We just got an e-mail from Ralph Duggins, funny you should mention him, who says Elaine will take the lead on 296 through 299, but she's not here. Peeples on 300, but he's not here.

PROFESSOR DORSANEO: You don't need to read that.

MR. HATCHELL: He's right outside.

CHAIRMAN BABCOCK: He is?

MR. HATCHELL: Yeah.

CHAIRMAN BABCOCK: Eavesdropping on us, huh? Bill, you're on 301 and 303, and Nina on 302 and 304. So have at it.

PROFESSOR DORSANEO: All right. Well, first of all, we have a new package of draft rules, changes noted to April 15th version, January 18th, 2010. Everybody have one of these? I have some extra ones here. That's the first step. The second step would be to see if my little memo, which I have now misplaced, here it is, dated June 3rd, 2009, which deals with proposed civil procedure Rule 301, has been made available to all of you.

All right. Looking at the packet, as Chip indicated, we have various assignments among ourselves, and the first set of rules are from -- yeah, I'm going to skip him anyway -- are from 11(g), the rules -- part two of the Rules of Civil Procedure are the rules for district and county courts, and the part of the rule book that we're in is 11(g) entitled, "Findings of the court." Now -- or "Findings by court." And those rules, 296 through 299a are on the first four, first five, first six

pages, pardon me, keep going, seven, seven pages of this packet. And Elaine is going to present them.

One of the things that you will note -- and I hope you'll mark on the packet that this comes from 11(g), "Findings by court" -- is that Elaine's draft Rules 296 through 299a completely replace the rules in subsection (g) of section 11, and, in fact, the packet indicates the current rule and the proposed new rule. Now, when we get to Rule 300 we're in the next section of the rule book, (h), which is entitled "Judgments." Now, we only have one rule to talk about dealing with that part of the current rule book and, actually, the rule that's listed is Rule 300, beginning on page eight, is not a substitute as I see it for any of the -- any of the rules in (h), "Judgments," because it is really dealing with the codification of the *Lehmann vs. Har-Con Corp.* case identified in the comment on page eight; and with David Peeples' permission, since we didn't know he was actually going to arrive until just now, I'd like to skip over that and let him take that up after we move forward to the next part of the rule book.

Now, in (h), "Judgment," we have a current Rule 301. So I'm still in (h), "Judgments." If I misspoke, I'm still in (h), "Judgments," and the Rule 301 in this draft beginning on page nine and ending on page 10

is meant to replace, among other things, Rule 301 in its entirety. It deals with a lot of other -- Rule 301 deals with a lot of other subjects and other rules. For example, the -- in 301(a), motion for judgment on the verdict, well, there really isn't any rule dealing with motions for judgment on the verdict right now. The closest we have is Rule 300 and Rule 301 which basically say that the judge should render judgment on the verdict, unless there's a judgment NOV or a new trial granted. There is no reference to a motion for judgment on the verdict in the rule book. There is a motion for judgment notwithstanding the verdict talked about in Rule 301 as well as in that same rule, a motion to disregard particular jury findings.

Now, moving down 301, just to give you the structure of it, you then have a third motion relating to judgments in this draft called a motion to modify judgment. For most of time we did not have a motion to modify judgment in the Texas rule book. Well, maybe that's not accurate anymore. The older I get, since I'm fixed in time at a certain point, maybe most of time we've had a motion for judgment, but we're talking about a creature of the -- in 329b(g) a creature of the Seventies created principally under the influence of Chief Justice Clarence Guittard of the Dallas court of appeals to deal

with a situation if somebody didn't want a new trial but they wanted the judgment changed, what would you do, what would you ask for. So we had in 329b, which is mostly a timing rule, stuck into it in subpart (g) or subdivision (g) for the first time a motion to modify the judgment. Okay. But no -- no independent rule and I think you can see that you're talking, okay, we're in Rule 301 and now we're going to jump to 329b(g) to talk about something else that maybe is part of the same subject, motions relating to judgment.

The motion to modify judgment rule as previously enacted and as currently constituted does not say what the motion to modify is for or what the standard is or anything about it other than it extends the trial court's plenary power and the time for perfecting appeal. Okay. So we had wondered for quite sometime what a motion to modify could be used for and how it relates to these other motions, and the Supreme Court answered that following certain courts of appeals in the Lane Bank case, and more about that in a little while.

Now, we have in the same rule an ordinary motion for new trial, which is not talked about very much in Rule 301 because it's covered extensively in Rule 302 for the first time. Then a motion for trial -- for new trial on judgment following citation by publication.

MS. CORTELL: 324.

PROFESSOR DORSANEO: Well, yeah, it's talked about in 324 but that's -- in proposed Rule 302, which comes up next. Okay. But in my judgment the motion for new trial rules have their own problems in terms of not providing very much guidance as to the circumstances under which you would get a new trial and particularly that. Motion for new trial on judgment following citation by publication comes from current Rule 329; motion for judgment nunc pro tunc from current Rule 316, I think; the motion practice provision as far as 329b, as is the periods affected by my modified judgment, 329b. So this Rule 301 does a lot more than 301 as currently in effect does by design in order to put information about motions relating to judgments in one rule, saying something about each one of them in sequence of importance probably, but at least if not importance, alone in terms of the timing.

So if I could start with motion for judgment on the verdict, what I would ask you to do is take a look at the little memo, June 3rd, 2009, to explain to you what the first issue is that relates to not only motions for judgment on the verdict but motions for judgment notwithstanding the verdict or to disregard jury findings. All right. Under current law, unlike motions for new trial and motions to modify the trial court's judgment,

motions for judgment NOV and to disregard particular jury findings as well as motions for judgment are not overruled by operation of law. Let's see. Actually, that second sentence of my memo should have mentioned, you know, motions for judgment on the verdict, not just motions for judgment notwithstanding the verdict or to disregard jury findings, but since I'm talking about Rule 301 in this draft it's understandable at least to me now why I didn't mention it.

But the committee on court rules sometime back when we started getting into this said motions for judgment on the verdict, not currently even talked about, and motions for judgment notwithstanding the verdict or to disregard jury findings should be overruled by operation of law at some point. Rather than needing an order expressly overruling them, that should just happen as a matter of law at some point like it happens for motions for new trial and motions to modify judgments.

Now, I wasn't around when those two types of motions or when the motion for new trial first became overruled by operation of law, or if I was around I was in elementary school or something like that, so I don't know who thought of that, but I think it's a very good idea to have these motions overruled by operation of law because normally if the person who makes the motion doesn't want

to present it, it just makes perfect sense for it to be overruled by operation of law so the complaints in the motions are preserved, with a very high likelihood that those complaints would be overruled if there was a hearing under most circumstances anyway. So I think I'm a fan and the committee is a fan of this concept of post-judgment motions relating to judgments or motions relating to judgments being overruled by operation of law; and I believe that was one of the Court Rules Committee's recommendations that that should happen; and that's the first issue for this committee, should that happen, should they be overruled by operation of law, or should it be necessary to get a signed written order before the complaints in those motions are preserved for appellate review; and that's really the first issue.

CHAIRMAN BABCOCK: Okay. Hatchell.

MR. HATCHELL: (Shakes head.)

CHAIRMAN BABCOCK: Just trying to keep you in the game, that's all.

MR. HATCHELL: No, I'm still in the game. We're actually one paragraph ahead.

CHAIRMAN BABCOCK: Roger.

MR. HUGHES: Well, I was the person on the rule committee that proposed the rule that motions for judgment and JNOVs be overruled by operation of law, and

that was because so often you would go to a hearing, and you would present your motion, and it was clear that you had presented it, and the judge would nod sagely and go, "Well, I'll take that matter under advisement, counsel," and then two weeks later you get -- the other side gets their judgment signed, and you don't have any ruling, and then you have to keep going back and getting them to say something or sign something. And this way -- and, quite frankly, if the judge signs a judgment handed in by the other party, I think it's clear your JNOV just got overruled, but why go the extra step at that point, so I think that's why it was proposed.

CHAIRMAN BABCOCK: Yeah, Frank.

MR. GILSTRAP: This is a good proposal. I mean, the current system where the motion to modify and the motion for new trial are overruled by operation of law works fine. The system where -- the exception where the motion for JNOV or the motion to disregard are not overruled by operation of law is just a trap, so let's make them all work together, and everybody understands it, and there won't be a problem anymore.

CHAIRMAN BABCOCK: Judge Christopher, and then Judge Yelenosky.

HONORABLE TRACY CHRISTOPHER: I'm not opposed to the idea that it would be overruled by

operation of law, but I think it should be presented to the trial judge in some way, shape, or manner, because occasionally there will be a case where I might grant the new trial but for whatever tactical reason the lawyer doesn't want me to grant the new trial, but they filed the motion for new trial anyway, and they never present it to me, and I don't even know it's filed. So that's just my only thought on it.

PROFESSOR DORSANEO: So you want all of these motions presented?

HONORABLE TRACY CHRISTOPHER: Presented, you know, put on the submission docket.

PROFESSOR DORSANEO: The committee's proposal is that none of these have to be presented. Presented means go to the judge and have a hearing scheduled and present it in open court or in some equivalent manner, and that hasn't been so for motions for new trial and motions to modify for a long time.

HONORABLE TRACY CHRISTOPHER: It hasn't. I'm just saying that --

PROFESSOR DORSANEO: It's definitely true for motions for judgment notwithstanding the verdict or to disregard the jury finding, and if you don't have it under current law, notice, hearing, and ruling, those -- those legal insufficiency complaints are not preserved for

appellate review. I learned that on my first case that I ever had in 1969.

CHAIRMAN BABCOCK: 38-plus-year-old lawyer.

HONORABLE TOM GRAY: We deal with the problem of presentment of motion for new trial in criminal cases. It's not something that I had to deal with in the civil arena until I got to the court of appeals, and it presents a problem. You wind up if it's -- if you don't present it in the criminal context, you wind up with an abatement. It's in my view a very substantial problem of what does it mean to present, what efforts do you have to go to -- through. I respect the need to do that, but I think that should be addressed on the trial court's basis and the clerk and the court coordinator to get those motions once filed to the judge if the judge wants to see them. Otherwise, I don't go -- I think we do not need a presentment requirement.

CHAIRMAN BABCOCK: Pete Schenkkan.

MR. SCHENKKAN: I don't know a lot about this, but I am familiar with the problem in some courts in some portions of our state where it's very difficult to get a motion set if you were from out of town. So unless it's truly important that we do this and if it's working well without that requirement in these other related post-trial motions, I would hope we could avoid creating a

new opportunity for that to be abused.

CHAIRMAN BABCOCK: Okay. Judge Yelenosky, then Judge Evans.

HONORABLE TERRY JENNINGS: I just have a question. Bill, did you say the current rule doesn't even speak to a motion for judgment on the verdict?

PROFESSOR DORSANEO: Right. There's no rule about motions for judgment on the verdict, the idea that it's a ministerial duty of the trial judge to render judgment on the verdict unless somebody moves for judgment notwithstanding the verdict.

HONORABLE TERRY JENNINGS: And that leads to my next question, which is I imagine sometimes you get a verdict and for whatever reason the judge won't sign a judgment. Does it do any good to have that overruled by operation of law, or don't you need a mandamus?

PROFESSOR DORSANEO: It may not do any good.

HONORABLE STEPHEN YELENOSKY: I mean, it seems to me you need a mandamus, you need a judgment.

CHAIRMAN BABCOCK: Judge Evans, and then Sarah.

HONORABLE DAVID EVANS: Well, you know, it's been a while since I've been in the TRAP rules. I don't read them very often anymore, but I always thought that one of those basis in civil appellate work was that there

was timely presentment and opportunity for the trial judge to rule of any objection and the reason that the request for findings of facts and conclusions of law gets such attention as to the titling of it and the clerk's duty is to set the judge on notice that he's got something to do. We had the old delivery requirement with separate delivery when we all started practicing, but it may have been different when Skip started, but I'm with Judge Chris -- Justice Christopher.

I think a trial judge -- and I agree with you about the problem of getting a hearing, but there ought to be some showing that there was an attempt to get a hearing and give the judge an opportunity to rule. I'm not sure how you would prevail on appeal on a modification issue if the judge was never told and never asked to rule on the problem with the judgment, that it didn't conform with the verdict or didn't conform with the pleadings or whatever. When did he get an opportunity -- she get an opportunity to rule?

CHAIRMAN BABCOCK: Sarah.

HONORABLE DAVID EVANS: And then you've got the added expense when the judge would be presumed to do the right thing. We are presumed to do that.

HONORABLE SARAH DUNCAN: The ordinary citizen is presumed to know the contents of the --

HONORABLE DAVID EVANS: I'm sorry, what, Sarah?

HONORABLE SARAH DUNCAN: The ordinary citizen is presumed to know the contents of the public records then I would hope a judge is also presumed to know that --

HONORABLE DAVID EVANS: With due respect, with a thousand cases coming in and the people that the district clerk has to hire, I never get to touch those files, and I don't see those pleadings, and somebody that's working on minimum wage is scanning them and putting them in a file. They never come through me.

HONORABLE TRACY CHRISTOPHER: It's not my file.

HONORABLE SARAH DUNCAN: Well, if I can respond to what Steve was asking, I think, Steve, this is actually designed to go to a different problem than just not getting a judgment.

HONORABLE STEPHEN YELENOSKY: Yeah, I understand.

HONORABLE SARAH DUNCAN: What if I ask for a hundred thousand dollars in prejudgment interest and the judge only gives me 75,000 in my judgment? By making this overruled by operation of law I will have preserved that complaint because I didn't get it.

HONORABLE STEPHEN YELENOSKY: No, I understand, and it may be a minor point. I was just saying it seems to me that was an instance in which overruling by operation of law wouldn't help, but it's probably another issue. But on presentment couldn't it be short of a hearing that you require that it be delivered to the judge or something? I mean, those things come to our attention.

CHAIRMAN BABCOCK: Mike Hatchell.

MR. HATCHELL: I'm very concerned that we get into the presentment thing again. Presentment was a big trap -- I'm going to demonstrate my age -- when I started practicing in the 1960s because there were interpretations of the motion for new trial rules that said you had to present it to the trial judge even though there was no explicit statement. If you didn't do that, you hadn't preserved anything. The Supreme Court came along and reinterpreted the rule to say that presentment is you getting it in a form proper to be filed and filed within the system, and it's the system's responsibility to call it to the judge's attention, and I think that's the way the system ought to work. Now, the presentment thing is a huge trap. We're getting right back into what we're trying to get out of if we bring it back.

CHAIRMAN BABCOCK: Frank, and then Justice

Sullivan.

MR. GILSTRAP: I don't have anything.

CHAIRMAN BABCOCK: Frank passes. Justice Sullivan.

HONORABLE KENT SULLIVAN: I wonder if underlying some of this discussion is not the lack of uniformity in practices of our individual state district courts. I think what Justice Christopher was talking about is in Harris County you can always set on a submission docket a motion. You don't have to get an oral hearing. You can try, but you're automatically entitled to set on a submission docket a matter, and that would, you know, presumably accomplish the presentment that is necessary under the rule and also ensure the judge at least has some reasonable chance of getting notice that, in fact, someone has filed it.

I'm sensitive to Judge Evans' point, and that is in major metropolitan areas you have a thousand case docket, and, you know, it's certainly a legitimate point that the system ought to work in a particular way, but I think reality is different, and I think we just have to acknowledge that. The reality of the system is that many clerks' offices are not automated. They are not up to that sort of requirement. But I do wonder if we don't have to take a harder look at the question of uniformity

of the way the district courts operate, and one other brief thought is that underlying this discussion is also the suggestion that there are trial judges who refuse to allow hearings --

HONORABLE DAVID EVANS: That's true.

HONORABLE KENT SULLIVAN: -- and trial judges who intentionally refuse to rule, and that's also troublesome, and I wonder to what extent combining these two thoughts, that is, some sort of automatic process by which your goal is accomplished such as a submission docket, and then allowing all such motions, I think as is the proposal, to be overruled by operation of law doesn't perhaps cure the problem.

CHAIRMAN BABCOCK: Okay. Yeah, Justice Christopher.

HONORABLE TRACY CHRISTOPHER: Well, I just want to give a funny example because this one always makes people laugh. I got reversed on the fact that I granted a no evidence motion for summary judgment when there was no response to the motion for summary judgment. Okay. How could I have done that? Okay. Well, I did that because the no evidence motion for summary judgment only addressed one of the two causes of action in the plaintiff's petition. Well, you know, if the defendant had bothered or the plaintiff had bothered to tell me that, I would

have only had a partial summary judgment. They wouldn't have had to go up to the appellate court and, you know, reverse on this point and take, you know, years, year and a half, for it to wind its way up there before it finally comes back down. I just think we ought to get a chance to correct our mistakes.

CHAIRMAN BABCOCK: Yeah, Frank.

MR. GILSTRAP: In a perfect world the trial judge would get a chance to correct his -- all of his or her mistakes, but we don't live in a perfect world. We've got a situation where you've got a finite amount of time to get your motion heard, and it may be the judge doesn't want to hear it, but likely it's just a logistical impossibility to get it heard, and in almost all the cases it's going to be overruled. Everybody knows what the judge is going to do. There may be a few cases where it does do some good. In that case it's your job to get it heard, but, you know, why -- why put this presentment requirement in all cases when it's only going to -- it's only going to make a real difference in one or two.

CHAIRMAN BABCOCK: Okay. Yeah.

HONORABLE DAVID EVANS: What I would be more concerned about is not -- and I have had to go to trial judges when I started and personally have them sign for request for findings of fact and conclusions of law, and

it was a terrible pain, and you run some real risks with it, but I would think that -- and maybe it's not appropriate to draft in the rule, but with the -- with the filing of a motion a request for a hearing should be made -- I would hate to see it that you could just file this motion, whatever it is, post-trial motion, after you spent all that time and effort on it and never ask for a consideration by the trial court before you take it up. And that would be a -- that would seem to me to be a -- it may be the wrong way to do it, but maybe it's the best way to do it. Then you go on and appeal, and you go up and look at it, and you never even have a request to --

CHAIRMAN BABCOCK: Judge, this rule would not preclude somebody from asking that the trial judge look at it.

HONORABLE DAVID EVANS: No, that's right, and I recognize that completely. I understand that the problem we're talking about is a very small percentage of them where they wouldn't request a hearing and opportunity to cure, and that probably takes care of the whole concern that I have, but it does seem that that would be one area where appeal could be predicated and is predicated on not even a request to trial judge to correct its error.

CHAIRMAN BABCOCK: Yeah, Tom.

MR. RINEY: The example Judge Christopher

gave I think is probably a pretty rare example, and in my judgment shows some pretty poor lawyering, and I don't know why someone would --

THE REPORTER: Speak up, please. I can't hear you.

MR. RINEY: Okay. I don't know why under most circumstances a lawyer in that situation would not file a motion for new trial and ask for a hearing. I think much more often what occurs is that the trial judge has had probably not only an opportunity, but multiple opportunities to rule on the same issue, either during the trial at submission, objecting to entry of the judgment, and the hearing on a motion for new trial is simply a waste of everybody's time. So I think that we've just got to take a look at probably what's common, and the more common issue is that it's really not giving -- that would be a rare exception, the example that you give.

CHAIRMAN BABCOCK: Harvey, and then Skip.

HONORABLE HARVEY BROWN: Could we use the language from request for findings of fact and conclusions of law that says the clerk must notify the judge of the pleading to solve Judge Christopher's issue? In other words, make it mandatory for the clerk to tell you if one of these motions is filed.

HONORABLE STEPHEN YELENOSKY: That's what we

do in finding of fact.

HONORABLE HARVEY BROWN: Right. We do it for finding of fact. Why couldn't we do it for a motion?

PROFESSOR DORSANEO: Does it happen?

HONORABLE DAVID EVANS: Yes.

HONORABLE STEPHEN YELENOSKY: Yeah. Well, I mean, with mistakes, but mistakes are made.

HONORABLE JANE BLAND: Maybe not right away.

CHAIRMAN BABCOCK: Skip, and then Sarah. Then Gene.

MR. WATSON: I was just going to echo what Tom said. Anybody who really thinks that a trial judge is going to change his or her mind and grant a motion is -- should be perfectly capable of sending or taking a courtesy copy of that motion to the judge's chambers, sitting down with the court coordinator, and saying, "When can I get this set?" I mean, that's what you do when you're serious.

Second, what Harvey just said, to me this is an issue that can be solved internally. This is an administrative issue. Those judges who actually want to see this stuff can get it up to them. You know, there is a way to do that. The truth of the matter is that I think the judges in this room may be the cream of the crop, and not every judge wants to see the post-trial motions.

CHAIRMAN BABCOCK: Sarah. Then Gene, then Nina.

HONORABLE SARAH DUNCAN: In Harvey's proposal what happens if the clerk doesn't bring it to the trial judge's attention? Are my JNOV and new trial points preserved or --

HONORABLE DAVID EVANS: What happens on findings right now is, is that we're just late, you know, but we do get -- we do have orders out to our clerks that whenever -- and, too, and again, whenever we get a request for findings of fact because of the content of the rules we're to be notified, a timetable is to be drawn up so that we know when the reminders will be coming in, and then we start -- most of us start cataloging it. We have clerks that make mistakes and don't have it, but it doesn't mean we don't have the duty. It just gives us an opportunity to do our job.

CHAIRMAN BABCOCK: Gene.

MR. STORIE: Thanks. I just was going to say I certainly filed new trial motions after summary judgment, for example, not because I really wanted the court to reconsider but because I wanted to buy some time to consider whether we wanted to appeal, and so asking for a hearing under those circumstances or being required to would be just a disservice to everyone I think.

CHAIRMAN BABCOCK: Nina.

MS. CORTELL: Well, to that point, just to make clear, currently you don't have to have a hearing on a motion for new trial. So that is a our current procedure. What Bill is suggesting is extending that procedure to other motions and making the system parallel.

PROFESSOR DORSANEO: What we are suggesting.

MS. CORTELL: I'm sorry. The committee, the royal we.

CHAIRMAN BABCOCK: Justice Christopher.

HONORABLE TRACY CHRISTOPHER: Well, I agree there probably shouldn't be a difference, but since we're making the changes, and we're doing some wholesale change to this area I'm bringing it up. What is the point in requiring a motion for new trial if all of you here in this room say, "The judge isn't going to grant it anyway it's a waste of our time"? Why do we have that as a requirement for anything? Why is it necessary to present it to preserve error?

HONORABLE STEPHEN YELENOSKY: Yeah.

HONORABLE TRACY CHRISTOPHER: If everyone in here says, "Judge doesn't want to hear it, judge not going to look at it," what's the point? Why should we even tell her, you know, it's filed? Why? What's the point?

MS. CORTELL: Well, sometimes we get relief.

I mean --

HONORABLE STEPHEN YELENOSKY: Or you can still file one, but --

HONORABLE JANE BLAND: So that you have a reason that you can take out of the motion and make your order, so you have a reason for granting it.

HONORABLE HARVEY BROWN: That's right.

HONORABLE JANE BLAND: In the interest of justice.

CHAIRMAN BABCOCK: This is getting way too metaphysical for me. Frank.

MR. GILSTRAP: The answer to Judge Christopher's question is, is that, you know, no one is prepared to take appellate Rule 33.1(d) involving sufficiency of evidence complaints and nonjury trials, which says you don't have to make them in the trial court and apply that to jury trials. We're just not prepared to go there. You know, and this is the current system, and we're just trying to tinker with it. We're not trying to have revolution.

HONORABLE TRACY CHRISTOPHER: Viva la revolution.

CHAIRMAN BABCOCK: Bill. You had a comment. You had your hand up.

PROFESSOR DORSANEO: No. I just -- some

motions for new trial do have to be presented, like an equitable motion for new trial, Craddock motion --

HONORABLE JANE BLAND: What?

PROFESSOR DORSANEO: -- you know, has to be presented. Now, there's a split in the case law. I'm just taking the better view, but presentment requirement -- and Tracy's right. Why we require somebody to have a no evidence complaint with respect to a jury verdict in order to make that argument on appeal when we don't present that to the trial judge, except you can, it doesn't make a lot of sense, so --

CHAIRMAN BABCOCK: Sarah.

HONORABLE SARAH DUNCAN: Except that it's available. And if -- if the trial judge reads the motion for new trial, whether -- or JNOV motion, whatever, whether it's quote-unquote presented or not and decides it has merit, the judge can grant it, and I wouldn't want to dispense with that, that ability to have a second look.

CHAIRMAN BABCOCK: Justice Bland.

HONORABLE JANE BLAND: How does the timetable and everything work under this new --

PROFESSOR DORSANEO: Stay tuned.

HONORABLE JANE BLAND: So if -- because if the JNOV is not presented and gets overruled by operation of law, a lot of people file the JNOV at the same time the

other party moves for entry of judgment, and they contemplate the motion for new trial coming along much, much later, maybe after entry of judgment or -- and I have a little bit of a concern that somebody is going to be thinking that they can be following up with a motion for new trial and, having filed for JNOV, they've started some timetable that precludes them from doing that. Is that not a worry?

PROFESSOR DORSANEO: Not a worry.

HONORABLE JANE BLAND: Okay. Okay.

MS. CORTELL: You can elaborate.

PROFESSOR DORSANEO: You can worry about anything, but it's not a real serious one.

CHAIRMAN BABCOCK: Justice Gaultney.

HONORABLE JANE BLAND: Could it happen?

HONORABLE DAVID GAULTNEY: As I understand the history, the problem is that --

PROFESSOR DORSANEO: No.

CHAIRMAN BABCOCK: Whoa, whoa. Hold it, guys. One at a time.

HONORABLE DAVID GAULTNEY: -- presentment presented a trap, yet the assumption is, as you said, once you get it into the system the assumption I think is that it would eventually make its way to the court. So I would second Harvey's suggestion; that is, simply put it in as a

requirement that the clerk immediately present them to the trial judge. There you have now -- the rule now implements what is the assumption, that is that it will -- the system will actually present it.

CHAIRMAN BABCOCK: Roger.

MR. HUGHES: Well, earlier I think it was noted that it was lost in the midst of antiquities why we overruled it in the operation of law. Well, once -- my memory from my study is once upon a time the judgment -- you didn't appeal till the motion for new trial was overruled in writing, and -- or it got overruled in some way, and that led to problems and you not finding out when it was overruled or you had multiple parties filing multiple motions and one got overruled and the other hadn't been ruled on, and there was much confusion about when to file your notice of appeal, and so this was a rather practical solution of what happened when the judge just hadn't gotten around to ruling.

Now, you're right, it does create a rather lazy situation where you just file it and then wait for the -- your notice period to -- your appeal bond -- now it's the notice to come around. So if we're going to talk about a revolution where we're going to require presentment, I suggest then we, number one, require the judge be required to rule in writing and then that the

notice of appeal period doesn't start running until the last motion is overruled in writing.

HONORABLE SARAH DUNCAN: Yes.

MR. HUGHES: Which I'm not sure anyone wants to go to, but I'm saying if we're going to have a revolution --

HONORABLE NATHAN HECHT: Get it on.

MR. HUGHES: -- and require presentment, then, by god, we ought to stop the clock until the court rules in writing.

MR. GILSTRAP: Like the feds. No problems there.

MR. HUGHES: Oh, yeah, no problems.

PROFESSOR DORSANEO: Back to 1970.

CHAIRMAN BABCOCK: Judge Evans.

HONORABLE DAVID EVANS: There is -- following Judge Gaultney, the way we work with district clerks, we don't employ the people who file the papers. We only employ the court coordinator and the court reporter. We don't employ the bailiff, we don't employ the clerks. If the district clerk of Tarrant County wants to take my two clerks that handle my two files and move them to a criminal district court, they're gone the next morning. If the Supreme Court orders by rule that the clerk, a different political functionary, deliver the

paperwork to the judge and bring it to his attention then the district clerk goes to the commissioners and gets funding for the necessary personnel to take care of the job. If I order the two clerks who are working for me today to do this, they will do it. They won't tell the district clerk that I've put on extra work. I see justice -- you may know my district clerk.

CHAIRMAN BABCOCK: We all know your district clerk.

HONORABLE DAVID EVANS: But when they move it will be a problem, so there wouldn't be any consistent application on it, and so I would request that you just consider that request because we don't control those people, and we don't even control when our files come. We can't tell them where to store them. We can't tell them what kind of folders to put them in. We can't tell them to mark them with tabs. It's like going in your neighbor's garage to find something. It's not quite that bad, but it's close.

CHAIRMAN BABCOCK: Bill.

PROFESSOR DORSANEO: I'm only speaking for myself here, but if all that's necessary to get onto the next thing is to say, "The clerk must immediately call such motion to the attention of the judge who tried the case" then that's not very hard to do. And I myself would

be perfectly willing to put it in there. I don't understand the politics of judges and clerks and who works for whom other than I understand you don't have much control over your staff or much of one.

HONORABLE DAVID EVANS: We don't have a staff.

PROFESSOR DORSANEO: Yeah. But if that will -- if that will work, I have it right here in front of me, then fine.

CHAIRMAN BABCOCK: Justice Gray. Sounds like a great --

HONORABLE TOM GRAY: As long as it's then followed by the sentence that says, "The failure of the clerk to present it to the trial court is not reversible error and does not require an abatement of the proceedings for that to be done," so that the trial court is reinvested with jurisdiction to grant the motion or some words to that effect, I've got no problem with it, but --

CHAIRMAN BABCOCK: Sarah.

HONORABLE TOM GRAY: -- I don't want to reinvest the trial court with jurisdiction if the clerk just inadvertently fails to do that.

CHAIRMAN BABCOCK: Sarah's got her game face on.

HONORABLE SARAH DUNCAN: Well, then we need one more sentence that says, "If the clerk fails to call it to the judge's attention the motion is nonetheless overruled by operation of law and all error in the motion is preserved."

HONORABLE DAVID EVANS: No problem.

CHAIRMAN BABCOCK: Judge Evans likes that.

HONORABLE DAVID EVANS: That's fine. We'll get them and we'll turn them over to the coordinator and call and find out if the people want a hearing on it, if they want a ruling, or if they just want to overrule it by operation of law that's fine.

PROFESSOR DORSANEO: That can be done.

CHAIRMAN BABCOCK: Okay. Moving right along.

PROFESSOR DORSANEO: All right. If it's overruled by operation of law, the next question is when, and unlike motions to modify judgments and motions for new trial, we don't have a judgment yet when it's a motion for judgment on the verdict or motion for judgment notwithstanding the verdict, okay, at least under normal circumstances. So this draft suggests two alternatives. Okay. "A motion for judgment on the verdict" -- and the same is true for JNOV motion -- "is overruled by operation of law, (1) as to any requested relief not granted by a

final judgment under Rule 300"; or second one, alternative, "On the date when the court's plenary power expires under Rule 304." At the last committee meeting I think our preferences is really the first alternative, as to "any requested relief not granted by a final judgment under Rule 300." Because that's sensible, understandable, and the alternative probably takes it too long to be overruled by operation of law when we don't need to wait that long. So that's -- a subissue on the first issue, committee recommends "overruled by operation of law as to any requested relief not granted by a final judgment under Rule 300."

CHAIRMAN BABCOCK: Sarah.

HONORABLE SARAH DUNCAN: I guess a member of the committee dissents. It seems to me that if I were a trial judge I would want them all overruled by operation of law on the same day. I'd want to know here's the 75th day. If I'm going to make any changes to this judgment, one way or the other on any of these motions, that's the day I need to do it, and if we have a different date for different types of motions, I at least would be calendaring when each one of them was going to --

CHAIRMAN BABCOCK: Okay. Richard.

MR. MUNZINGER: I agree with Sarah. The litigants need to have some certainty as to when the

judgment is final for purposes of appeal, if I understand what we're talking about, and so it seems to me we would want to have it an almost as near uniform date as we can when these judgments are overruled by operation of law. Frankly, in reading this draft of Rule 301(a) I wasn't sure when the judgment would be entered as to requested relief not granted by a final judgment. On the date of the judgment?

PROFESSOR DORSANEO: Yes.

MR. MUNZINGER: Okay. Well, then I file a motion for new trial. What happens at that point in time? Then it's overruled by operation of law if the motion for new trial is not presented and not ruled on, it's --

PROFESSOR DORSANEO: It's overruled on the 75th day after the judgment is signed. The reason why the date is different is that (a) and (b) involve prejudgment motions, whereas motions to modify and motions for new trial are post-judgment. Now, we could say, you know, that the motion for judgment on the verdict is overruled, you know, 75 days after the judgment, but that seems --

CHAIRMAN BABCOCK: Sarah, and then Justice Bland.

HONORABLE SARAH DUNCAN: What if the judge makes -- the motion for judgment asks for prejudgment interest of a hundred thousand and the judge thinks, "No,

I'm not going to do that, I want to do 50,000," wakes up one morning and thinks, "You know, I don't think I have discretion to change the amount of prejudgment interest." Why shouldn't the judge be able to grant in part the motion for judgment, change the judgment, and move on? Why should the plaintiff -- because then the plaintiff's going to have to -- the plaintiff's not going to have -- they're going to have to file a motion to modify to get prejudgment interest back up to a hundred thousand, when actually the judge was going to do that that morning that she woke up and realized "I don't have discretion to do that."

CHAIRMAN BABCOCK: Justice Bland.

HONORABLE JANE BLAND: I think since you're going for consistency here, which is a great idea, we ought to have these all overruled by operation of law on the same day; and I like the 75th day because that's the day that everybody already knows in 329b, and then you get that extra 30 days of plenary power to fix anything that might be a hiccup, you know, that the trial judge has; and motions for judgment notwithstanding the verdict in particular, which would be -- which would be (b), can be filed prejudgment before entry of judgment and after entry of judgment.

PROFESSOR DORSANEO: We're going to change

that.

HONORABLE JANE BLAND: But why? Why wouldn't you let people file those --

PROFESSOR DORSANEO: Because we called it a motion to modify after judgment.

HONORABLE JANE BLAND: But people call them -- I mean, yes, people sometimes call a motion for JNOV a motion to modify and vice versa, and you're not going to be able by rule fiat to get everybody to change the title.

PROFESSOR DORSANEO: They don't have to change the title.

HONORABLE JANE BLAND: That's what I think. And so let's just instead of making any kind of distinction between motions that are filed before entry of judgment and after entry of judgment, just if they don't get presented for a ruling, they're not taken care of by the trial court's entry of the judgment, in other words, the trial court gave favorable relief by entering the judgment, then let them all be overruled by operation of law on the same day, because if you have multiple days that is going to create confusion. It's also going to create confusion in terms of 329b subsection (e), which says then the trial judge has another 30 days to do something should they want to on their own motion.

MS. CORTELL: I think that's in here. I'm sorry.

CHAIRMAN BABCOCK: Go ahead, Nina.

MS. CORTELL: I don't disagree really, but there is a conceptual -- and it could be a little clearer, to tell you the truth. I mean, it could be organized to say that (a) and (b) are prejudgment motions and that (c) and whatever, you know, below are post-judgment motions, and so the motions filed before judgment then are -- if they're not granted relief by the judgment, they are overruled then. Even if we don't want to say that, that is in effect what has happened, because you haven't gotten the relief you wanted even though you moved for it. You then have this point in time where the judgment is entered, and then everything after that is basically considered a motion to modify, even if it's a renewed JNOV or whatever it is, and then all of those are overruled by operation of law, so that is -- I'm not saying this couldn't be written in a way that is more -- clarifies that.

HONORABLE JANE BLAND: Well, right now you have the motion talking about JNOVs under 301(b), proposed Rule 301(b). You have the motion may be made after receipt of the jury's verdict, but I don't see anything about that that would preclude somebody from making their

motion for JNOV after entry of judgment, and I think that's typically what happens --

MS. CORTELL: Well, what I'm saying is --

HONORABLE JANE BLAND: -- is the plaintiff moves for entry of judgment. The trial judge enters the judgment and then other people who have complaints about the judgment then bring their motions to modify, motion for JNOV, and I don't think there is anything wrong with that practice. I don't think there's anything wrong with filing it prior to entry of judgment either, and I think we should allow the flexibility for the lawyers to file them however -- whenever they want within that time period, and then if you have them overruled by operation of law all on the same day, everybody is on the same page in terms of their appellate timetable, when the trial court's plenary power expires, that stuff.

CHAIRMAN BABCOCK: Bill, then Nina.

PROFESSOR DORSANEO: Well, we could say on the 75th day after the judgment it's -- and I'm thinking I'm going to teach this to somebody. We're going to say, okay, your motion for judgment on the verdict was not granted because there was a judgment for the other side, but it's not -- your motion really isn't overruled yet. It's still pending for 75 more days, and that would have the salutary effect of letting the judge change her mind

and grant it without anybody filing anything else, but how hard is it for somebody who didn't get the judgment that he or she liked to file a motion to change it? Okay? Wouldn't that make better sense to the judge than to come back later and say, "Judge, remember that motion for judgment on the verdict that I had that you didn't grant? Well, it's still hanging around, and I want you to grant it now, and you need to rule on it even though I'm not really -- I don't have any vehicle to ask you to do that, any separate motion after judgment." I mean, which way is the easier way? I don't really care. The concept about being overruled by operation of law is the most important thing.

CHAIRMAN BABCOCK: Yeah, Justice Bland.

HONORABLE JANE BLAND: And then what about -- we have the plenary power expires under Rule 304, which is the period is to run from signing of judgment.

PROFESSOR DORSANEO: Uh-huh.

HONORABLE JANE BLAND: But what about 329b subsection (e)?

PROFESSOR DORSANEO: We don't have 329b anymore. In this draft.

HONORABLE JANE BLAND: Oh, you're just getting rid of 329b?

PROFESSOR DORSANEO: (Nods head.)

HONORABLE JANE BLAND: Oh. But that's --

CHAIRMAN BABCOCK: All right. Pam.

MS. BARON: This is just a grammatical request. If we do go with the final judgment being the operative date, the way this is phrased right now it's hard to get that out of the phrase because you can't tell whether "by a final judgment" is modifying "relief not granted" or it's saying the date on which the action is overruled by operation of law. So I'd say you either need to set off "as to any requested relief not granted" in commas or say "the motion is overruled by operation of law by a final judgment under Rule 300 as to any relief not -- or not granted in the judgment."

HONORABLE DAVID PEEPLES: Where were you reading from, Pam?

PROFESSOR DORSANEO: You're saying you don't like the way it's crafted, and I'm willing to accept the modification reordering the language in whatever way it would make it better and clearer.

MS. BARON: Yeah. It's just not clear right now.

CHAIRMAN BABCOCK: Richard.

MR. MUNZINGER: To the point of overruling by the operation of law, your point, Bill, about trying to teach it, I think it's a good one, if I understand the

discussion. It's logically inconsistent. The students have to say to themselves, "My god, why? This is stupid." What would prevent us from saying that a motion for judgment on the verdict and a motion for judgment NOV or to disregard jury finding must be filed prior to the entry of a judgment or on prejudgment motions and if a judgment is entered to the contrary or overruled by that action? Your point then is then I come in if I want to get you to modify it, I could get you to modify it, and the fall back position to all of this is Rule 329b lets you have 75 days to file a motion for new trial that tells the trial court "You blew it again." Do I make myself clear?

PROFESSOR DORSANEO: Yeah, reasonably clear.

MR. MUNZINGER: It doesn't make sense to say -- Bill's point is right to me. It doesn't make sense to say you asked me to enter a judgment, I entered a judgment, but your motion to enter the judgment that I didn't enter is still alive and boiling along here for appellate purposes or other purposes. That doesn't make sense. It's logically inconsistent and confusing.

CHAIRMAN BABCOCK: Yeah, Nina.

MS. CORTELL: I agree with that. I know -- I would hope that we could not be bound too much by the wording. We can work with that, but conceptually that the prejudgment motions, if the relief is not granted at the

time of judgment then they are effectively overruled. If someone still has a problem with the judgment then they can renew a motion and bring that to the court's attention, and then it is overruled on the 75th day by operation of law.

CHAIRMAN BABCOCK: Harvey.

HONORABLE HARVEY BROWN: I wonder if it might be a little clearer to have a Rule 301 and 301a then. 301 being motions before judgment and 301(b) being motions after the judgment.

PROFESSOR DORSANEO: Well, I thought about that. I thought about adding additional subtitles.

HONORABLE HARVEY BROWN: Right.

PROFESSOR DORSANEO: Subdivisions, and I would be perfectly happy to do that. I didn't do that because I just didn't do it. All right. Because at some point you work on something, and you say this is good enough for the committee, and we've passed that point.

CHAIRMAN BABCOCK: Justice Bland.

HONORABLE JANE BLAND: Well, I guess my confusion is with the language, because if we're going to have a different rule for motions that are presented before signing of judgment under 301(b) and we called that motion for judgment notwithstanding the verdict, but then within the -- within the language of 301(c), motion to

modify, we contemplate within it that a party might bring a motion for judgment notwithstanding the verdict, so we're calling the motion the same thing whether it's filed before the judgment is signed or after the judgment is signed, but the effect of the implication of the judge not ruling on the motion is different, and I just think that's confusing to practitioners. I don't know if there's a trap in there, but if there is one someone would discover it, and I would hate for that to be.

PROFESSOR DORSANEO: I doubt that there is a trap, and the idea is pretty simply this, that under our current practice if it's before -- if you're making a complaint about something that happened during the trial before judgment that's called a motion for mistrial, not a motion for new trial.

HONORABLE JANE BLAND: No, no. I'm talking about post-trial.

PROFESSOR DORSANEO: I know what you're talking about, but if it's after judgment that's called a motion for new trial, and that's not a hard concept for people to have mastered. You know, mistrial before judgment, new trial after judgment.

HONORABLE JANE BLAND: Okay.

PROFESSOR DORSANEO: I don't think it's any harder to say motion for judgment NOV before you have a

judgment, okay, prejudgment --

HONORABLE JANE BLAND: Right.

PROFESSOR DORSANEO: -- motion and motion to modify, same ground. One is not a prerequisite to the other, you know, after judgment. I think those two things -- I think I could teach my dog that.

HONORABLE JANE BLAND: Except -- okay, I'm not your dog. I'm not as smart as your dog.

PROFESSOR DORSANEO: I'm not suggesting that you are.

HONORABLE JANE BLAND: But, Bill --

MS. CORTELL: I think it's a wording issue.

HONORABLE JANE BLAND: What I'm trying to say is you've got 301(b), motion for judgment notwithstanding the verdict, okay, and you're telling me that's a prejudgment motion that should be brought pre -- prejudgment and then you're saying, well, (c) is what you should do after the judgment is signed, and that's a motion to modify. That's not a motion for JNOV, but when you read (c) you have in there that they may move to modify the judgment at any respect including, dot, dot, dot, a motion for judgment not withstanding the verdict, and I think that to me -- and I'm not as smart as your dog, but to me that's calling the same --

PROFESSOR DORSANEO: I apologize if I gave

any implication to you or anybody else by that comment.

HONORABLE JANE BLAND: That's okay. It is the same language in (b) and in (c), but you're telling me they have different -- there's a different import to that.

PROFESSOR DORSANEO: No, I'm just saying that it's just timing. That's all a motion for mistrial is and a motion for new trial. The same grounds are applicable.

CHAIRMAN BABCOCK: Here's somebody that --

PROFESSOR DORSANEO: It's a question of timing.

CHAIRMAN BABCOCK: Here's somebody that can teach us some new tricks. Skip.

MR. HUGHES: Here, here.

MR. WATSON: Bill, you know, we followed where you're going, and the logic is undeniable. To the practitioner reading this who has been practicing any time the law, I would just respectfully suggest that we need a signal going in that you elected not to put there because you're close to it and you understand it, but we're not, that says, you know, we're talking in these two subdivisions about motions filed before judgment is entered, and we're talking now about judgments filed after judgment is --

PROFESSOR DORSANEO: I'm already going to do

that.

MR. WATSON: Okay. And one of the things that we need to be very careful of, and I would like to see it go in after that subheading, is that all of us have been in trials, whether it's a defense verdict or a plaintiff's verdict, I mean, it's usually the smaller trial but where somebody has the judgment there when the jury comes in. The verdict's announced, and they walk up, slap the judgment on the bench, and it's signed. Now, we need something to reduce the pucker factor when that happens so that we see when we get down to the second subdivision that any motion that could be made before judgment was signed can be made after. You know, I would be more comfortable to see that. To you it's obvious. To me I had to go through it several times reading line by line before I got it.

PROFESSOR DORSANEO: Well, that language in (c), in any respect, which has its own meaning, is again modified by the noninclusive -- okay, "including by a motion for judgment" et cetera. That's in there to tell people that if they didn't do it before, they can do it after in the motion to modify. And if they don't call it a motion to modify and they do it after, that's fine, too, under other provisions. So this is really drafted for somebody not to get trapped even if they don't exactly

understand what they're doing.

MR. WATSON: I understand, Bill. I really do understand it. I just think a sentence to that effect that says you're not hosed if you don't get yours in first, don't worry about it, would sure help.

PROFESSOR DORSANEO: It says a prejudgment motion for judgment on the verdict, for judgment notwithstanding jury verdict, or to disregard jury finding is not a prerequisite to a post-judgment motion to modify a judgment. I don't know how to say it any clearer than that.

MR. WATSON: You could say you're not hosed if you're not --

(Laughter)

CHAIRMAN BABCOCK: Frank, you had your hand up, and then Sarah.

MR. GILSTRAP: Well, I think I tend to side with Justice Bland on this. I mean, we've got four motions, a motion to modify, a motion for new trial, motion for JNOV, and motion to disregard. In the practitioner's mind these are post-verdict motions.

HONORABLE STEPHEN YELENOSKY: Exactly.

MR. GILSTRAP: They're not post -- they don't distinguish between --

HONORABLE STEPHEN YELENOSKY: Judges --

MR. GILSTRAP: -- post-judgment and post-verdict. The verdict is what happens. After that it's just a question of getting the judgment signed and getting it reconsidered. So whatever those things are, they need to be overruled by operation of law all on the same day, and in my mind why not the day the court loses plenary power? That's the simplest way to do it.

PROFESSOR DORSANEO: Oh, that's far from simple, calculation of plenary power.

MR. GILSTRAP: Well, make it the 90th day. How about that?

CHAIRMAN BABCOCK: Sarah.

HONORABLE SARAH DUNCAN: I don't understand why we need to change the names of these things. I really don't. I have all the regard in the world for Bill and the Federal rules and the Federal rules committee, all of them, but I think our names are just fine, but I do think we need to get the overruled by operation of law in there, but I will say again that when we try to revise these rules without redlines things drop out, and when we try to codify, inevitably something doesn't get in. I don't see where in here that I can file a motion to disregard a jury finding that's immaterial, which has been in the case law as long as I've been practicing law, which isn't 38 years, but getting closer everyday.

PROFESSOR DORSANEO: Well, it's not -- the answer to that is it probably should be in there, but it's not mentioned in current Rule 301, which just says "no support in the evidence." The other answer is you don't need a motion to disregard for the appellate court to disregard something that's immaterial.

CHAIRMAN BABCOCK: Justice Bland, then Judge Yelenosky.

HONORABLE JANE BLAND: Okay. I like the idea that we would have them -- if we're going to have some sort of multiple motions being overruled by operation of law, I'd like the operative day of the operation of law to be the same for all of them. I don't know whether we should do the date the court's plenary power expires or do something like we have under the current rule, which is the 75th day, and then that buys this little window of time for everybody to take a breath; and if there's some problem the trial judge still has that tiny window of plenary power to go in and fix something; and if we end up making it the court's plenary power expiring, the operation of law day being the day the court's plenary power expires, we don't have that little window of opportunity to fix a mistake. So I'm not sure that it has to be that day, but I think that whatever day it is, it should be the same day for anything where it's not getting

presented to the trial judge and it's being overruled by operation of law. There should be just one thing that gets one day where all that stuff gets overruled.

CHAIRMAN BABCOCK: Judge Yelenosky.

PROFESSOR DORSANEO: The same day thing does have appeal to me.

CHAIRMAN BABCOCK: Or Bill.

PROFESSOR DORSANEO: And it could be drafted that way, even though, as Richard says, it doesn't seem procedurally logical. I mean, I don't mind drafting it like that. I think you'd obscure the complexity by saying "on the date that the plenary power expires" because it doesn't -- since nobody knows when that is until they go read the other rule it doesn't sound illogical.

HONORABLE JANE BLAND: But 75th day is what everybody is used to, 75 days after the signing of the judgment, so you could just leave it at 75.

PROFESSOR DORSANEO: Well, why don't the committee -- if there's enough sentiment for that, why doesn't the committee draft it that way at least as an alternative since we're going to likely come back to this anyway. I would be happy to do that or I would be willing to do it.

CHAIRMAN BABCOCK: Friendly amendment. Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: Yeah, I just want to speak to the prejudgment/post-judgment. Frank's exactly right. It's post-verdict stuff, and the post-verdict stuff, what I can do on -- before I sign the judgment and what I can do 29 days after I sign the judgment are exactly the same, and there's no different standard for deciding those. So why unnecessarily complicate it by referring to things differently because they're arbitrarily filed before or after the judgment if they're going to be decided on the same standard and I have exactly the same authority? All you need to know about whether post or pre- is just how long there is for the court to act.

CHAIRMAN BABCOCK: Sarah.

HONORABLE SARAH DUNCAN: Particularly since the rules -- some rules expressly say we are not going to determine what something is merely by its title and look to its substance, so if I can call it my pet cat and it's still a motion for JNOV, why are we going to change -- why are we going to complicate my research now by calling it something else than it's been called for the last at least 27 -- 8 years.

PROFESSOR DORSANEO: If you don't have some sort of a structure then everything is just confusion. Okay. And --

HONORABLE SARAH DUNCAN: But we have a structure.

PROFESSOR DORSANEO: The 75th day thing, I'm happy to write that in even though it doesn't -- or the plenary power, all overruled the same day, that kind of makes sense. Okay.

CHAIRMAN BABCOCK: Okay. Nina.

PROFESSOR DORSANEO: Is that enough? Can we go onto the next thing?

CHAIRMAN BABCOCK: I'm ready, but Nina.

HONORABLE DAVID EVANS: If prejudgment motions go to 75 days it assumes that there's a post-judgment motion that opens up the plenary power --

PROFESSOR DORSANEO: Yes.

HONORABLE DAVID EVANS: -- and so consequently prejudgment motions are overruled by operation of law when the judgment is signed unless there's a motion for new trial. I mean, you've got to -- the lawyer has got to be able to present a motion for judgment NOV before the judgment is signed and then if they don't want to file a post-trial motion -- a post-judgment motion, I'll do it better than that, a post-judgment motion, they should know that the error is pre -- whatever. You got the idea. At least Bill's dog knows what I was talking about.

PROFESSOR DORSANEO: Golden retrievers are not very smart.

HONORABLE DAVID EVANS: Well, neither am I, but I think you're going to have to do it that the prejudgment motions are overruled at the time the judgment is signed. That's fair to the judge, fair to the litigants, and then the post-trial motions -- post-judgment motions go 75 days after it's signed, and that 30-day window is important to a lot of judges. You'll pass that 75th day and you'll think "I still have some authority over this," and you'll sometimes fret right up until the last minute and then enter something to change it because you're just not comfortable with where it is.

CHAIRMAN BABCOCK: Nina.

MS. CORTELL: I think Judge Evans raises a very good point, and I would just say in addition that it's sort of like denying reality if I move for certain relief and a judgment gets entered that doesn't provide for that relief, and then I'm acting like it's not overruled when there's a clear ruling against me. It just -- it's just odd. It doesn't make sense to me.

CHAIRMAN BABCOCK: Bill.

PROFESSOR DORSANEO: Well, I think the day of the judgment is the best rule, but it could be when

plenary power expires, and that would be 30 days, you know -- no, it -- it would be 30 days, yeah.

MR. GILSTRAP: 30 days for pretrial.

MS. CORTELL: If no post motion is filed.

HONORABLE DAVID EVANS: Well, now, unless if you word it that way and a post-trial motion is filed then it goes to 105, and that's going to throw off the thinking about it as to when the operation of law takes effect. I think it's if there's no post-trial motion it's one circumstance and then if there's a post-judgment motion, excuse me --

CHAIRMAN BABCOCK: Justice Christopher, then Justice Bland.

HONORABLE TRACY CHRISTOPHER: I agree that makes logical sense, but a lot of times you'll get the motion for entry of judgment; and as they walk up to you they hand you the JNOV; and so you may or may not read it, you know, at the time; and you've got the motion to enter judgment; and when that happens I kind of consider it a post-judgment motion; and it's technically not because they, you know, filed it before I had actually signed the judgment; and so then it gets a little tricky to me.

HONORABLE DAVID EVANS: But you're holding it, and if you're really worried about it you can walk back and take care of it in the 30-day period.

HONORABLE TRACY CHRISTOPHER: Well, I could, but the question is, is the lawyer going to think that's a pre- or post-judgment one that extends the time frame.

HONORABLE DAVID EVANS: And even more confusing than that, you are right about the day of judgment motion because it will get a file mark on it, but the judgment does not get a time stamp on it, and it is a -- that is probably something you want to think about.

CHAIRMAN BABCOCK: Justice Bland.

HONORABLE JANE BLAND: So for those motions for JNOV that are filed before signing and the judge rules, you know, enters judgment on the verdict notwithstanding the verdict, you have a ruling, so there's no need for an overruling by operation of law at all. It's only for whatever matters might be raised that aren't ruled upon in the judgment. So I guess what I'm trying to figure -- why do we even have this operation of law language if the ruling is clear that it's denying it, it's not going to implicate any ruling by operation of law because overruling by operation of law means the judge hasn't ruled or hasn't made a clear ruling on something. Like something that didn't get presented. So I don't see that there's a problem.

MS. CORTELL: Well, I do think to Judge Evans' point that if we don't say it's overruled by the

judgment then you can't have an easy rule on -- I mean, you're going to have to tie it to plenary, right, if there is no motion that preserves -- that extends plenary. You're always going to have to know whether you've extended plenary or not, so I don't know what to say about the filing on the day of, because if you don't have a motion that clearly extends plenary then it's overruled 30 days later. If you do then it's overruled 75 days or 105 or however we want to write that, but that still doesn't really resolve the problem that Justice Christopher is talking about because you don't know whether you've extended plenary or not.

CHAIRMAN BABCOCK: Well, it's a conundrum. Jeff, what do you think?

MR. BOYD: I'm out of this one.

CHAIRMAN BABCOCK: Just trying to see if anybody on that side of the room was with us. There we go. Justice Gaultney has got something.

HONORABLE DAVID GAULTNEY: No, I like Bill's rule. You know, it really makes explicit what is implicit; that is, if you file a judgment -- a motion prejudgment that the judgment doesn't grant, it's denied, and so -- and it seems to capture if you file anything after post-judgment that you could have filed prejudgment, it's treated as a motion to modify, so it attempts to

capture the universe, as I understand it.

PROFESSOR DORSANEO: And to simplify things really.

HONORABLE DAVID GAULTNEY: And simplify and preserve error. Now, the only thing that I would suggest perhaps is that in describing your motions you say in (c) "after the motion notwithstanding the verdict and the motion to request to disregard," just to add the language, a phrase, "if filed after judgment." So now you're making clear I think that this is something which normally is filed before, but if it's filed after, it's treated as a motion to modify.

HONORABLE STEPHEN YELENOSKY: Why can't we just say, "All motions filed before judgment are overruled if not granted in the judgment, and all motions filed after judgment are overruled" -- blah. Because we've already said it doesn't matter what they're called.

CHAIRMAN BABCOCK: Justice Bland.

HONORABLE JANE BLAND: Okay, Nina, are we contemplating that all of these motions, whether they're filed before the judgment is signed or after, will extend plenary power?

MS. CORTELL: No.

HONORABLE JANE BLAND: Or only ones --

HONORABLE STEPHEN YELENOSKY: Only ones

after.

HONORABLE JANE BLAND: Okay. That's where I think the lawyers are going to get tripped up. They file a motion for judgment notwithstanding the verdict before the judgment's signed or a motion for new trial before the judgment is signed.

HONORABLE STEPHEN YELENOSKY: Which they do.

HONORABLE TRACY CHRISTOPHER: Which they do.

HONORABLE JANE BLAND: Which they do. And then --

MS. CORTELL: Well, then it's considered overruled on the day of judgment, and it does only extend it to 30 days, if it's filed before, right? Isn't that --

CHAIRMAN BABCOCK: Nina, speak up.

MS. CORTELL: I think that problem already exists. If these motions are filed before judgment then they're considered overruled by the judgment. No? Is that not right?

PROFESSOR DORSANEO: It's 306(c), yeah. It's in the rule. It's Rule 306(c).

(Sidebar conversation)

THE REPORTER: I can't hear them.

CHAIRMAN BABCOCK: Guys.

(Sidebar conversation continues)

CHAIRMAN BABCOCK: Guys, guys. You can't be

chatting among yourselves and hope to get it on the record.

MS. CORTELL: Sorry.

HONORABLE JANE BLAND: Sorry.

HONORABLE STEPHEN YELENOSKY: Dee Dee, come down here.

PROFESSOR DORSANEO: I understand what you're saying, so 306(c) would need to be expanded to cover JNOV motions then or something like that to make them fix this trap, which I think is a trap.

CHAIRMAN BABCOCK: Justice Bland.

HONORABLE JANE BLAND: So if we're going to treat all trial motions that have to do with the judgment, whether they're a motion to modify, a motion to disregard, a motion for judgment notwithstanding the verdict, or a motion for new trial, we need you to treat them the same for extending the timetable, all the timetables for extending the trial court's plenary power; and because I think we determined at our little off-the-record discussion over here that a prematurely filed motion for new trial is considered to be filed at the time the judgment is signed and will extend the timetable. That needs to work for anything filed in connection with the entry of judgment.

CHAIRMAN BABCOCK: Bill.

PROFESSOR DORSANEO: Well, I hesitate to say this because I've been criticizing it for 40 years, but under the Federal rules your motion for judgment NOV is after judgment, which is quite odd it seems to me, but the motion for new trial and the JNOV are alternative motions in terms of preservation under the Federal system. It makes no procedural logic except it might, you know, simplify things. We could do that. It's a big change. Big change. But you're telling me that out there in the work-a-day world people are clueless anyway.

CHAIRMAN BABCOCK: I think that's a bit of an overstatement.

PROFESSOR DORSANEO: I'm prone to overstatement, though.

HONORABLE SARAH DUNCAN: I like the phrase that Jane just used, "post-trial motions."

HONORABLE STEPHEN YELENOSKY: Right.

HONORABLE SARAH DUNCAN: Call them what you want, it's a post-trial motion.

HONORABLE STEPHEN YELENOSKY: Post-verdict.

HONORABLE SARAH DUNCAN: Post-verdict. I'm sorry, post-verdict. It asks for whatever it asks for, and why the distinction between filing before or after a judgment is signed?

HONORABLE STEPHEN YELENOSKY: Yeah.

HONORABLE SARAH DUNCAN: I mean, if we're going to be revolutionary and complicate Westlaw searches by having to type 20 words now instead of three then let's be revolutionary.

CHAIRMAN BABCOCK: Frank.

MR. GILSTRAP: I think I've got some problems, though, with allowing prejudgment motions to extend the appellate timetable even though that might be logically consistent. I mean, we all tend to think of these in terms, well, it's going up on appeal anyway, but it may not. In other words, and in most cases and in a lot of cases it's going to be important when that judgment becomes final because you might want to execute on it. I think the parties should have to do something after the judgment is signed and we can make it clear in the records to extend the appellate timetable and extend the date of the plenary power.

HONORABLE STEPHEN YELENOSKY: Even for motions for new trial?

MR. GILSTRAP: Yeah. Sure.

HONORABLE STEPHEN YELENOSKY: That changes 306(c).

MR. GILSTRAP: I don't -- I even like the rule that a motion for new trial filed before trial extends it. I think you ought to do something -- excuse

me, before judgment. I think you ought to have to do something after judgment to lengthen the appellate timetable.

PROFESSOR DORSANEO: Mr. Chairman?

CHAIRMAN BABCOCK: Yes, sir.

PROFESSOR DORSANEO: This isn't exactly responsive. It's not responsive to what Frank said, but it just occurred to me that if you had a motion for judgment notwithstanding the verdict or to disregard jury findings and it was overruled, the complaints in -- that, you know, before judgment, the complaints made the assignments of error in that motion are preserved for appeal and you don't need a motion to modify judgment except to extend plenary power and the time for perfecting appeal. So how could somebody get screwed up? If they filed the motion beforehand and it was overruled by operation of law, their complaints are preserved. If they didn't file it beforehand, they can file it after, and their complaints are preserved, and they didn't have to do anything before. That seems pretty simple to me. Maybe I'm --

CHAIRMAN BABCOCK: Sarah.

HONORABLE SARAH DUNCAN: But you read the rules.

PROFESSOR DORSANEO: I couldn't hear what

you said.

HONORABLE SARAH DUNCAN: You read the rules.

CHAIRMAN BABCOCK: She's accusing you of reading the rules.

HONORABLE SARAH DUNCAN: There are -- I mean, everybody around the table has such a rarified -- that's a lawyer -- has such a rarified practice. There are any number of lawyers in the state who don't sit and read the rule books. They don't go to the seminars where they're told that there have been rules changes, and when they do find out about them they're really upset, because they've gotten used to those rules being right where they are, having the numbers they have, and you're changing their whole world.

PROFESSOR DORSANEO: There's another thing to say about that. The motion to modify judgment provisions, except for the language "in any respect," which the Supreme Court rejected as a basis for a motion to modify over Justice Hecht's dissent, very reasonable dissent --

HONORABLE NATHAN HECHT: Spirited.

CHAIRMAN BABCOCK: Spirited and reasonable.

PROFESSOR DORSANEO: -- is exactly what a motion to modify can be used for. I mean, this motion for judgment on all or part of the verdict, a motion for

judgment notwithstanding the verdict. The case law has said anything that makes a change, a substantive change in the judgment, is what a motion to modify is for. So that's not something the committee made up. That came from the case law, filling a gap in the rules that didn't tell us anything about what the motion was to be used for.

CHAIRMAN BABCOCK: Nina.

MS. CORTELL: I want to second that. I'm very sympathetic to changing rules, and I don't think the committee ever does that lightly or recommends it lightly, and that should apply here, but there is confusion, and there are gaps in the rules. There is a lot of confusion about JNOV motions and motions for judgment. I mean, it's unbelievable. We don't have a rule that explains if you've won how do you proceed. Now, everybody -- we've heard you, so a lot of people just run down with a form of judgment. Some people file a motion that explains how they got there, but we don't have a rule for that, and similarly, there's been a lot -- over the course of my career, a lot of concern about JNOV motions and when do you file them and do they extend jurisdiction and do you -- I remember in Dallas for a while there was a feeling they had to be filed I think prejudgment or within 30 days or you had waived it, and other people thought you could file it 30 days after judgment. I mean, so I do

think the there's a need for clarification, although sympathetic --

HONORABLE SARAH DUNCAN: And I don't disagree with that, but I would do it within the framework we have right now is my point.

MS. CORTELL: Well, one of the beauties -- I think let me speak to compliment what Bill has done. There is something very nice about having one rule you can go to that explains what the motions are, what they do, what the timetable is about them. I mean, but I am -- I am, I mean, Sarah, absolutely sympathetic with what you're saying, but there is a beauty to a clear rule where you can go and see what the motions are, when you need to file them, and so forth.

PROFESSOR DORSANEO: Maybe people aren't reading the rules because when you read them you don't get very much guidance.

CHAIRMAN BABCOCK: Could be it. Why don't we take our afternoon break?

(Recess from 3:35 p.m. to 4:04 p.m.)

CHAIRMAN BABCOCK: Okay. Sarah wants to make a comment.

HONORABLE SARAH DUNCAN: I completely agree with what Nina said. I think what Bill has done is elegant and practical, and maybe a better way to address

my concern of lawyers who don't spend as much time with the rules as some of us do is that this rule be released similar to 166a at its introduction where it was sort of all by itself and a lot of focus was put on it and a lot of big seminars and little seminars and a lot of talk was had about it so that people knew basically that a no evidence motion for summary judgment was coming, although I have to say we had quite a few problems with that even with that big introduction. I'm just concerned that these are big changes and a lot of people aren't going to know that they're happening.

CHAIRMAN BABCOCK: Okay. Bill.

PROFESSOR DORSANEO: All right. During the break I was talking with various people, including Justice Hecht, about dealing with this problem of somebody filing something after verdict and before judgment and not refiling it or adding it in after judgment, and I think that is a -- and everybody thought that is a real trap, so it's been suggested that the provisions be redrafted to say that if you filed let's say a motion for judgment notwithstanding the verdict after verdict or filed a comparable motion within 30 days after judgment, the complaints will be preserved for appellate review to eliminate that problem that the trial judges talked about. And I think that can be drafted, although I'm not

completely sure about the overruled by operation of law aspect of that.

Second, we talked about plenary power and why we have in our system that some -- under some circumstances plenary power lasts for 30 days. Under other circumstances it lasts for 75 days plus another 30, and I think everybody during the break thought there's no reason for it to ever be 30 days, that it should be -- should and could be longer without doing any harm to any particular interests, and maybe that's right, maybe that's wrong, but that's one thing that I was going to do is to draft that as at least an alternative that plenary power lasts for 75 days all the time and then for an additional 30.

CHAIRMAN BABCOCK: Sarah's got a comment about that, Bill.

HONORABLE SARAH DUNCAN: I can't speak as eloquently as Richard Orsinger, but I will speak his interest. We've talked about this before.

CHAIRMAN BABCOCK: I disagree with that, by the way.

HONORABLE SARAH DUNCAN: And -- flatterer. And there are a lot of cases in which a judgment needs to be final 30 days after the judgment is signed, and y'all aren't involved in those cases, but they still need to be

final 30 days after the judgment is signed. Termination cases, divorce cases.

MR. GILSTRAP: Custody.

HONORABLE SARAH DUNCAN: Custody.

CHAIRMAN BABCOCK: Justice Bland.

HONORABLE JANE BLAND: I agree. I don't think that we want to delay finality for cases that are final, but what we need to do is clarify these rules when -- when a particular motion is filed whether it extends plenary power. Right now a motion for new trial extends plenary power, and it sounds like the subcommittee was thinking motions filed after signing of judgment will extend plenary power, motions filed before will not. If that is the case then we should say something like, you know, "post-verdict motions do not extend the trial court's plenary power," or something like that expressly.

If we're going to have two different -- if we're going to have two different times for when a judgment becomes final, which we traditionally have had, and if we're going to continue that -- but we should make it clear because now we're adding other kinds of motions to the pile in both categories, and I would think maybe for, you know, Rule 301(a) and (b) you could just instead of incorporating the idea of operation of law, you could just say, "A motion for judgment on the verdict is denied

as to any requested relief not granted by final judgment," period.

PROFESSOR DORSANEO: Uh-huh.

HONORABLE JANE BLAND: "Such motions do not extend the trial court's plenary power." And that would be in the -- you know, that would be the motions that are rolled into the concept of motions filed before the signing of the judgment. And I agree with Sarah that this is -- I think this is great, because I would like it if you could look to one rule to find all of this. Because right now you've got to look at Rule 306, you've got to look at 329b, you've got to look at the old 301, I guess, I don't know. So those would be my suggestions, but if you're going to have two different timetables, you've got to tell people which ones trigger which timetable.

PROFESSOR DORSANEO: I think the plenary power rule does that. This rule doesn't do that, but this denied business, I will draft it alternative ways to the extent that I can manage to recall when I get home all of the things that people have said and by reference to the transcript, too. But I'm not perfect, which you know.

HONORABLE STEPHEN YELENOSKY: But you have that dog.

CHAIRMAN BABCOCK: I think we'll need a vote on that, Bill.

PROFESSOR DORSANEO: No. That's a --

CHAIRMAN BABCOCK: Nina.

MS. CORTELL: I have one question on how -- get a sense of the committee on how to address Justice Christopher's concern about the filing that comes in contemporaneous with the judgment, so would we say that "all motions filed on the day of or after"? I mean, in other words, I want to be sensitive to that problem.

PROFESSOR DORSANEO: What I suggested would handle that, wouldn't it, Judge Christopher, if it's timely and preserves things if it's after verdict or within 30 days, within 30 days after judgment? I mean, there's not --

HONORABLE STEPHEN YELENOSKY: It's not an issue unless your -- as he suggested, it wouldn't change the extension whether it was filed before or after.

PROFESSOR DORSANEO: Right.

HONORABLE STEPHEN YELENOSKY: But if we go to this before doesn't extend and after does, then it is an issue.

HONORABLE JANE BLAND: Right. My issue is not so much -- I think any of these things preserves for appellate review the issue. The question is the timetable and if we're going to have one timetable for everything, whether it's filed before signing of judgment or after

signing of judgment, or if we're going to have two timetables, one for -- one relating to --

MS. CORTELL: Pre-.

HONORABLE JANE BLAND: Pre- and post. One is just, you know, from the signing of judgment, our traditional 306, everything runs from the signing of judgment, and which of these things pre- or post are going to extend that plenary power, and we -- the post has to, because you have to give the trial judge an opportunity to rule on those things, and I think Frank was saying that it's not a good idea to have the ones filed prejudgment do that because it delays finality in a lot of cases where finality is important.

CHAIRMAN BABCOCK: Judge Yelenosky, then Judge Gaultney.

HONORABLE STEPHEN YELENOSKY: I guess I don't want to lose Bill's suggestion and other people's suggestion, or actually, it was someone else's initial suggestion perhaps, that we have one deadline regardless of what you file; and if the problem is family law, a carve out for family law would not be a novel thing. We do that in all kinds -- we do that in many ways. So is there any reason other than family law not to have one 90-day deadline for appeals regardless of what you do post-judgment?

HONORABLE SARAH DUNCAN: I don't think it's just family law cases that need to be final. As Jane said, if something's final, let it be final as quickly as possible for reasons that I don't think any of us know, but why delay finality --

MR. GILSTRAP: In all cases.

HONORABLE SARAH DUNCAN: -- in all cases when it's final and the parties know it's final and they want -- one of them wants their final judgment to be final.

CHAIRMAN BABCOCK: Justice Gaultney.

HONORABLE DAVID GAULTNEY: Well, I think the reason is because you create a trap inevitably in these situations of whether it was a prejudgment or a post-judgment. I mean, all of what we're struggling with right now in this rule is trying to create a system that preserves error, you know, allows you to appeal whether it's you missed by one day or you got one day before or one day after judgment that doesn't create different -- you know, do I now have my extended time or is it the trial court's plenary power different. I mean, you're talking about a difference of 30 days, two months, the time period, when the appeal --

HONORABLE STEPHEN YELENOSKY: Is going to take years.

HONORABLE DAVID GAULTNEY: -- is going to take years. Maybe. Maybe it's shorter than that, but it's an extended period of time, so why don't we give the trial judge additional time to deal with the case whether or not there is a motion filed within 30 days? Have a deadline for filing the motion, certainly you need a deadline for filing post-judgment motions 30 days after, but why do we restrict the trial judge's ability to correct a mistake or to rule on something to 30 days after? That's all I had to say.

HONORABLE STEPHEN YELENOSKY: If I could just follow up, because I think the comparison is for the cases that aren't going to be appealed, you're saying why, why shouldn't it be final when it's final. The comparison is not how long the appeal would be because those aren't appealed. The comparison would be how long has this been in litigation, and is the time to finalize, be it 30 more days or 60 more days, really significant given what we lose in terms of certainty.

CHAIRMAN BABCOCK: Stephen Tipps had his hand up.

MR. TIPPS: Well, I may be addressing something that we've already reached consensus on, but I will anyway just in case because I'm --

CHAIRMAN BABCOCK: Are you in favor of the

consensus or --

MR. TIPPS: -- kind of lost on what we have consensus on, but it seems to me that the starting point is what the rule is with regard to the normal case, and I would suspect that the normal case is one in which there is a verdict and there is a judgment entered and nothing else is filed. I mean, that's -- that's the average case, and in that case I can't see a reason that there should be more than 30 days after the judgment within which the court would have plenary power. And so 30 days -- in the normal case 30 days after the judgment is signed the court loses power and the case is over as far as the district court is concerned, and then the exception to that is what is the rule if somebody files a separate motion, either before judgment is signed or after judgment is signed, and that's when you need to have additional time, but I don't think we ought to mess with the normal average case, and that's the case in which a judgment ought to become final in 30 days.

CHAIRMAN BABCOCK: Frank, and then Judge Evans.

MR. GILSTRAP: Stephen said exactly what I was going to say. I agree with that.

CHAIRMAN BABCOCK: So you agree with Stephen?

MR. GILSTRAP: Yes.

CHAIRMAN BABCOCK: Judge Evans.

HONORABLE DAVID EVANS: Well, I think I do, too. I would like to know the impact of extending plenary power on execution because I would be worried about a prejudgment motion that somehow extended plenary power, kept the parties from executing on the judgment, and I would like to look at some other rules and just see how the interplay would work out.

PROFESSOR DORSANEO: We can do that. I think I know, but I won't say because I'm not sure.

CHAIRMAN BABCOCK: Pam.

HONORABLE DAVID EVANS: I think you can't execute until the plenary power has run.

HONORABLE SARAH DUNCAN: No. No. That's not correct.

HONORABLE DAVID EVANS: And thus if you had a prejudgment motion that extended the plenary power, you'd delay collection until 105 days.

CHAIRMAN BABCOCK: Pam.

MS. BARON: We have had this conversation before at length. I know that at some point Professor Dorsaneo and I both recommended that we go to a single appeal date of 90 days instead of having the two tracks so that everybody knows what the date is and we wouldn't have

this trap that catches people who don't know when their deadline is for filing their appeal, and Richard was adamantly opposed on a number of grounds, and I think he did address the execution issue as well as family law issues, and I feel like we do need him here to give us his perspective. I still liked the idea, but we voted it down was my recollection.

CHAIRMAN BABCOCK: Richard will be here tomorrow, right?

MS. BARON: Yes.

PROFESSOR DORSANEO: Then let's wait until another time.

CHAIRMAN BABCOCK: Okay. Frank.

MR. GILSTRAP: Well, there was good reason for voting -- there was good reason for voting it down. I mean, you know, we're trying to make the tail wag the dog, you know.

CHAIRMAN BABCOCK: Whoa, whoa, let's leave the dogs out of it.

PROFESSOR DORSANEO: It's a smart dog.

MR. TIPPS: The tail can't wag Dorsaneo's dog.

MR. GILSTRAP: It's a smart dog, but, you know, I mean, I mean, the vast majority of cases are not appealed, and in order to eliminate a potential trap in

the few cases that are appealed we're delaying finality in cases in which, you know, agents are holding money to be distributed, grandma's estate needs to be distributed, custody of the children is involved. There are all sorts of things, situations in which people are going to say, "Wait a minute, this judgment is not final, I'm not going to act on it," and you can't imagine all the type of cases in which that's going to occur. It's just -- the vast majority of cases are not going to be appealed, they need to be final, and we don't need to change the rule to accommodate all the cases to this -- to solve this problem. They exist only in a few.

PROFESSOR DORSANEO: Well, let me go on to the next one.

CHAIRMAN BABCOCK: Justice Gray.

HONORABLE TOM GRAY: This actually is the -- and I don't know if y'all talked about this while I had to step out, but the finding of fact/conclusions of law, my concern in that area and the timing of the notice of appeal is that it doesn't meet Justice Bland's concern of when it's filed you know how long it's going to be because the -- you know, whether it's 30 days or 105 days, because it depends upon another issue as to whether or not it's required or could be used in the appeal process, and I know we haven't talked about 261 of the TRAPs and taking

away that trap for the appellant, but I didn't see that the findings of fact/conclusions of law clarified that issue of whether or not that's going to be something that extends in all cases where it's requested to the longer time period, and I think that needs to be done as part of the Rules of Civil Procedure.

PROFESSOR DORSANEO: Okay. Let me go on to -- in the time that we have left to the three things of significance in terms of changing current law, the committee's recommendation to change current law in the motion to modify judgment provision. If you look at my little memo, if you have it and even if you don't, first significant change from current law is the use of the words "in any respect" in the second line of proposed (c). "After a judgment has been signed, a party may move to modify the judgment in any respect." The procedural rules, as I indicated earlier, are silent on what a motion to modify is for, but the majority in the Lane Bank case said that a motion to modify must seek a substantive change in the judgment without exactly explaining what that is.

In Lane Bank it was seeking the imposition of discovery sanctions, I believe, which was a substantive change because it granted more relief than the judgment that was sought to be modified granted; and I've always

thought that the substantive change probably means that somebody is getting more relief than they got in the judgment, less relief they got in the judgment, or different relief than they got in the judgment; and in Lane Bank Justice Hecht said, "Why are you imposing that substantive change in an existing judgment requirement when, one, it's not very clear what that means, and two, it's just an unnecessary complication with respect to whether your motion for judgment really qualifies as a proper motion?"

So the committee recommends eliminating the requirement of substantive change in an existing judgment and -- which many of these motions would be about and just say "in any respect," as the basic standard for motions to modify a judgment. That technically takes the standard that's in 329b(h) and moves it into 329b(g) where the rule is silent. So that's a large change that's meant to simplify things, and it aids preservation because a complaint that the judgment should be changed in any respect would be preserved by a motion to modify filed within 30 days after the judgment. The language that follows, including "by a motion for judgment on all or part of the verdict, a motion for judgment notwithstanding the verdict if a directed verdict would have been proper, or a motion to disregard one or more jury findings that

have no support in" -- at least in the evidence, leave that "in the law" for now, but "in the law" there is probably fine. It's just providing more guidance to the practitioner that we really mean in any respect, not just in any respect that -- that's not previously covered by some other motion, including prejudgment motions.

So that's -- I'm going to go through all three of them because I think you'll be able to follow. That's a significant recommendation. If the committee doesn't want to do that, we can use the Lane Bank language substantive change in the judgment, which the -- all the "includings" would be the same if you culled the substantive change. I personally think in any respect it eliminates problems, and I don't see how it creates problems.

Now, there are two other things that are represented in two other Texas Supreme Court opinions. One of them is represented by *In Re: Brookshire Company*, which was decided in 2008, and in *In Re: Brookshire* the Court read the current rule literally. I think myself it literally says in 329b and means what *In Re: Brookshire* said, that if you filed a motion to modify or a motion for new trial and it's overruled, okay, let's say the other side presents it for you as a favor and gets it overruled, that you can't file an amended one adding a new complaint

or a new basis for modifying the judgment or granting a new trial because it's too late if it's already been ruled upon.

Now, I think that's -- in my reading I think that's what 329b says. "One or more amended motions for new trial may be filed without leave of court before any preceding motion in this case for new trial is overruled," so if somebody files a motion before the party needed to, leaves something out, it gets overruled, you amend it within the 30 days, too bad. You didn't preserve your complaint. Now, in the draft rule in the second unnumbered paragraph, instead of the language of 329b(b), it says, "One or more amended or additional motions may be filed without leave of court within 30 days after the final judgment is signed, regardless of whether a prior motion to modify has been overruled," and there's similar language for motion for new trial, "regardless of whether a prior motion for new trial has been overruled."

Okay. I don't know exactly what the history of the current language is in terms of the motivation, but I know we had a -- this may not be something I should even mention. It may not be pertinent to anything, but we had a case -- a custody case involving same sex contestants in which a motion was amended after a motion was overruled, and that was on people's minds at the time. The committee

thinks "regardless of whether a prior motion to modify has been overruled" is the right way to go, that it's enough of a limit if we're talking about within 30 days after the judgment is signed, and of course, we could use the language of the current rule, which was interpreted literally in *In Re: Brookshire* instead, and although I and the committee think it would be better to say "regardless of whether a prior motion has been overruled," you know, that's a matter for the Court and for the committee to recommend.

The third thing is *Moritz vs. Preiss*, which is identified in the paragraph beginning "Third," which deals with this notion of a tardy motion to modify or a tardy motion for new trial. *Moritz vs. Preiss* is a tardy motion for new trial case, I believe, but the same logic should apply to both, and in Moritz the Court held that "a tardy motion is a nullity for purposes of preserving issues for appellate review," so that if you're late, if you try to file the motion after the 30 days expires, okay, even though there's plenary power and, you know, that -- you know, that can happen, it doesn't preserve any complaints even if the trial judge is willing to consider it and overrule it to allow you to preserve your complaint. Now, that's -- *Moritz vs. Preiss* is contrary to an earlier opinion of the Supreme Court, *Jackson vs.*

Van Winkle, and I know Mike and I have been practicing appellate law for a long time. It was kind of standard operating procedure for us to try to clean things up by filing a motion during plenary power that if the judge would rule on it, we would preserve the complaints in that motion for appellate review. Judge is at liberty not to rule on it. Judge is at liberty to ignore it because it's tardy, but it ought to be the trial judge's call as to let you preserve it or not. I think.

And the last paragraph, not even indented, of the motion to modify and the last paragraph of the ordinary motion for new trial rule says, "As long as the trial court retains plenary power the trial court has discretion to consider and rule on an amended motion" -- it should say "to modify" here, but "that was not timely filed within 30 days after the signing of the trial court's final judgment. The trial court's ruling on such a late-filed motion is subject to review on appeal." And that would overrule *Moritz vs. Preiss,* and in each of those respects, I think, or at least in two out of three we eliminate traps, and the first one we avoid a potential problem that may not be as big a problem.

CHAIRMAN BABCOCK: Was there any spirited dissent in Moritz?

PROFESSOR DORSANEO: Let's see. Justice

Hecht did something there. I think. Maybe not.

HONORABLE NATHAN HECHT: No, that one --

PROFESSOR DORSANEO: Maybe I'm attributing all good things to Justice Hecht.

CHAIRMAN BABCOCK: I was thinking he could go three for three if there was.

PROFESSOR DORSANEO: But in Moritz there is an explanation as to why this is necessary to treat a tardy motion as a nullity that I have quoted. The majority, if it is the majority, maybe the court as a whole, concluded that, quote, "to give full effect to our procedural rules and limit the filing of new trial motions today we hold that an untimely amended motion for new trial does not preserve issues for appellate review, even if the trial court considers and denies the untimely motion within its plenary power period." So the justification for this is to give full effect to the procedural rules that limit the time for doing things. So don't cut anybody any slack if they miss the train, even though it's the trial judge's desire to do so.

CHAIRMAN BABCOCK: Don't let the tricky appellate lawyers come in late and clean everything up.

PROFESSOR DORSANEO: We're not tricky.

CHAIRMAN BABCOCK: Just kidding. Let the record reflect that I don't think Dorsaneo is tricky. But

what would be the policy reason for having that appellate rule that would preclude review of a late-filed motion?

PROFESSOR DORSANEO: Stated in the opinion it's "It's late."

CHAIRMAN BABCOCK: But there must be some reason why the rule reads -- I mean, there must have been some thought behind why the rule reads as it does.

PROFESSOR DORSANEO: Delay haunts the administration of justice, giving people more time. I mean, maybe you could take Judge Calvert's approach on occasion, is that if they're knuckleheads they deserve to suffer.

CHAIRMAN BABCOCK: Or if they have knuckleheads for lawyers.

HONORABLE NATHAN HECHT: Well, and you give the trial court potentially case-ending power to either allow the point to go up on appeal or not, which I don't disagree that the trial court should have that power, but I think that an argument can be made that should -- he can ignore it and the movant is essentially lost on appeal, or he can deny it and suffer reversal, potentially.

CHAIRMAN BABCOCK: But if it's a -- if it's a reversible error why wouldn't the policy be to allow --

HONORABLE NATHAN HECHT: I don't know.

CHAIRMAN BABCOCK: -- that area to be

preserved?

HONORABLE NATHAN HECHT: I'm not disagreeing that it should be. I'm just saying the argument is it puts a -- you know, it puts that power in the trial court's hands.

PROFESSOR DORSANEO: *Moritz vs. Preiss* is not necessarily new law, but it takes a side of the argument that was, you know, pretty controversial; and there was Supreme Court authority to the contrary, although not necessarily the clearest of authority.

CHAIRMAN BABCOCK: Justice Bland.

HONORABLE JANE BLAND: Well, I'm just wondering why we would have this late-filed motion require that it have a ruling to preserve what's in it when we're not requiring presentment or a ruling on anything else.

PROFESSOR DORSANEO: I guess because it's late.

CHAIRMAN BABCOCK: Yeah, Roger.

MS. CORTELL: Then you might as well not have a timetable.

MR. HUGHES: I think there's a certain element of justice because every -- every now and then the Supreme Court will hand down opinion changing years of precedent, and all of the sudden an error that didn't exist suddenly does, and it would be nice to have some

safety valve to go to the judge waving some opinion that just came down yesterday to say, "You still have power to do justice, and even if you think if -- if you buy opposing counsel's argument that it's distinguishable, god bless it, give me the power to go to the appellate courts to make my case."

CHAIRMAN BABCOCK: That's sort of a good cause argument, that if you have good cause for being late then the judge should rule on it.

PROFESSOR DORSANEO: Well, it's an argument that cases should be decided on the merits and not on the basis of some procedural technicality that has little or nothing to do with the merits, in defense of the system.

HONORABLE TRACY CHRISTOPHER: Well, then we might as well throw out all the time limits with respect to discovery that says if you don't produce something you can't get that photo in. I mean, you know, that's affecting the merits of the trial.

CHAIRMAN BABCOCK: But plenary power is a period of time when the trial judge can act, and at the end of that time he can't act or she can't act, and the case moves forward into another stage. I mean, that's different than discovery deadlines that try and get stuff done during the time leading up to trial or disposition.

PROFESSOR DORSANEO: See, all the judge can

do now is to grant -- the judge can grant the tardy motion but can't overrule it and have the complaint be preserved by it. So I've argued to judges, "Judge, you have to grant this because otherwise we're done." There's no relief. It's bad practice. I don't like to use the word malpractice, but it's bad practice. It should have been raised earlier. "Help." You won't maybe get that help.

CHAIRMAN BABCOCK: Good reason to do it, Mike?

MR. HATCHELL: Yes. An anachronism that we give the judges plenary power with the purpose of allowing them to correct errors in the judgment, and when you call an error to their attention by late-filed motion for new trial that they should grant they say "too bad." If he doesn't grant it and commits error again, you can't get it reviewed, so --

CHAIRMAN BABCOCK: That's a clever way of saying it. Justice Christopher.

HONORABLE TRACY CHRISTOPHER: Well, I agree with Jane. I mean, if we're -- it should be preserved for review without you-all having to run around finding those trial judges that don't want to hear your motions and aren't going to grant it anyway.

CHAIRMAN BABCOCK: Okay. Well, what about the first two points? Is there anybody that dares to

disagree with Justice Hecht's view on those two points at this late hour? Bill, your subcommittee recommends going with Justice Hecht's view of it, right?

PROFESSOR DORSANEO: I think, yeah. I'm not speaking for Justice Hecht, but that's as I understand what's on the written page.

CHAIRMAN BABCOCK: Yeah. Any comments about that? Yeah, Stephen.

MR. TIPPS: I just have a question with regard to the decision or the recommendation to exclude the language about clerical changes. We had a rule -- we currently have a rule that excludes clerical changes from this provision, and what's the rationale for including even a clerical change as sufficient to extend the deadlines? Is that just to eliminate any argument?

PROFESSOR DORSANEO: Yeah. We, of course, in -- you know, in the nunc pro tunc area, we have tremendous difficulty deciding what's a clerical change and what's a judicial error, you know, spend a lot of energy on that, and what's the point in this context? In that context it probably does make sense because you're extending the time, so you're fighting with finality a lot, but in this context why go to the trouble?

CHAIRMAN BABCOCK: Okay. Any other comments about it? Yeah, Jeff.

MR. BOYD: Well, my question has to do with the second of the three points, and if I understand it right then so the judgment is signed and entered, and any time between that date and 30 days later I can file as many motions for new trial as I want. It's not going to extend the 75 more days no matter how many I file or when I file them. So long as I file them within the 30 days it's still 105 days, but then once those first 30 days have expired I can still come back and during those 75 days file as many more as I want to try and get the judgment revised during that -- or modified during those 75 days and if the judge refuses to do so can appeal on the basis of whatever point I raise after -- during the 75 days, after the first 30 days have expired. Is that the recommendation?

PROFESSOR DORSANEO: Well, as long as -- I'm not sure I followed all of that, but Nina is shaking her head, but --

CHAIRMAN BABCOCK: Up and down or sideways?

PROFESSOR DORSANEO: -- as long as the judge overrules it.

MR. BOYD: Right. So within the 30 days let's say I just file one motion for new trial.

PROFESSOR DORSANEO: Which would be the most normal thing to happen.

MR. BOYD: Right. Motion to modify the judgment, so the 30 days have expired. Now there's 75 more days. I can -- on the 35th day I can file another motion to modify that raises a new point as to why it ought to be modified, and if the judge doesn't grant that then that point is a valid basis for appeal, is an appealable issue.

PROFESSOR DORSANEO: Uh-huh.

MR. BOYD: And I can do that as many times as I want during those 75 days, even though the first 30 have expired.

PROFESSOR DORSANEO: Well, if the first motion extended plenary power --

MR. BOYD: Right, to 75 days.

PROFESSOR DORSANEO: And new grounds could be raised as long as plenary power exists. You have to get it ruled on before plenary power expired.

MS. CORTELL: And then the judge declined to address those grounds.

PROFESSOR DORSANEO: Yeah, the judge can decline to address those grounds, can just say, "Take a hike, you're late."

MR. BOYD: But can I appeal on the basis of those grounds even though the judge declined to address them?

PROFESSOR DORSANEO: No, not in this draft.
MR. BOYD: Okay.
PROFESSOR DORSANEO: That's been suggested.
MS. CORTELL: That could be more clear. I agree. I made a note on that. That could be clear.
MR. BOYD: Yeah. I thought this was saying that for 105 days I can -- so long as I file at least one during the 30 days I've got 105 days to file as many as I want --
MS. CORTELL: No.
MR. BOYD: -- and if the judge refuses to address them, every argument I make is an appealable point.
MS. CORTELL: I think -- we'll work on the wording, but I think what he means is the trial court's substantive ruling on a late-filed, not the decision not to hear it. That would not be appealable.
MR. BOYD: Now, if I file it within the 30 days, the judge kind of has to hear it, but if the judge -- whatever I argue within those first 30 days is an appealable point, whatever the judge does.
MS. CORTELL: Right.
PROFESSOR DORSANEO: Well, unless you have a prior motion overruled. I'm talking about under the draft, yes.

MR. BOYD: Okay. Okay. I mean, I understand -- of course, I understand and fully agree with Justice Hecht's concern.

PROFESSOR DORSANEO: We knew you would.

MR. BOYD: Yeah. But it seems to me that the opposite concern is a party could for a variety of motivations make life pretty miserable for the winning party over those 105 days by filing more and more and more motions to modify.

MR. HATCHELL: But you can do that today.

MR. BOYD: I guess you can.

MR. HATCHELL: If you compare the motion to modify to the JNOV motion.

MR. BOYD: Yeah. Okay. That's it.

CHAIRMAN BABCOCK: Okay. Any other comments? Well, do we have consensus then that the subcommittee's recommendation on all three of these should be accepted? Anybody disagree?

Record will reflect no disagreement. So, Bill, what's next?

HONORABLE DAVID PEEPLES: Chip, I think the subcommittee needs to discuss this, don't you-all? I mean, Jeff has raised something I hadn't thought about for example. Had you-all?

PROFESSOR DORSANEO: Well, I -- not exactly,

but I don't --

HONORABLE DAVID PEEPLES: I don't recall talking about that.

PROFESSOR DORSANEO: I don't think it really is going to happen somebody to be filing things everyday.

HONORABLE STEPHEN YELENOSKY: But they can do it now.

PROFESSOR DORSANEO: Yeah, they could.

HONORABLE STEPHEN YELENOSKY: I mean, as long as the court's got plenary power they can file whatever they want, and the court can grant it.

HONORABLE DAVID PEEPLES: Up to 105 days?

CHAIRMAN BABCOCK: Alex.

MR. BOYD: But the court doesn't have to act on it.

PROFESSOR ALBRIGHT: So are you saying that if the court doesn't rule on these later-filed grounds then it is or is not grounds for appeal?

PROFESSOR DORSANEO: Is not.

HONORABLE TRACY CHRISTOPHER: Is not.

PROFESSOR ALBRIGHT: Okay. So the court has to expressly rule on them to be --

HONORABLE STEPHEN YELENOSKY: Preserve the error.

PROFESSOR ALBRIGHT: Preserve the error.

See, that almost sounds more complicated than what we've got.

MR. BOYD: That's a tricky procedural rule, if you ask me.

PROFESSOR DORSANEO: Well, the way it works, though, in practice in my experience is you went down to the judge and said, you know, "This is late, but we need to have a ruling on these complaints, which are really good complaints, and they should have been raised by the trial lawyer, you know, before we were hired," but --

MR. BOYD: Now I get it.

PROFESSOR DORSANEO: But the parties to the case deserve to have these things handled on the merits, and the judge can say, "Well" --

PROFESSOR ALBRIGHT: Too bad.

PROFESSOR DORSANEO: -- "too late" or "I'm not going to grant it, but I'll give you the opportunity to preserve the complaint," which many trial judges say. Many trial judges are in that business. Huh?

PROFESSOR ALBRIGHT: Well, then I think if we're going to do that I think the language needs to be a little clearer and so --

PROFESSOR DORSANEO: Well, Nina's willing to help.

MS. CORTELL: Yeah, we understand that, but

we've made that note.

CHAIRMAN BABCOCK: Okay. Bill, what's the next issue in the rule?

PROFESSOR DORSANEO: Well, in this rule, let me go back to (b), and the same language is in (c), but you see in the third line of the first sentence, "A party may move for judgment notwithstanding the verdict if a directed verdict would have been proper or may move to disregard one or more jury findings that have no support." Now, the current rule says "have no support in the evidence." Now, in trying to deal with an issue that we've had trouble dealing with over -- you know, over a number of years as to what happened if there's a controlling legal principle that -- that says that judgment should be, you know, for the verdict loser under the law. Okay? You know, how do we put that in the JNOV disregard jury finding rule?

At one point I thought it would be adequate to add the words "in the law," okay, to say "if there's no support in the law or the evidence"; and I was proud of myself for saying, boy, that's an easy way to make that plain; but then I got to looking at it and I thought, actually, to say that the jury finding has no support in the law doesn't actually make any sense. So I'm scrapping the "in the law" part of this draft which came by me, came

from the committee via me, and plan to try to do better; and right now I have something like this: "May move to disregard one or more jury findings that will not support a judgment under the law or that have no support in the evidence." And that gets the controlling legal principle in there, and this is language that we've been trying to write for at least the last 15 years, so I'm not confident that that's even right, but it advances the ball, I think.

HONORABLE STEPHEN YELENOSKY: Why do we have to state the controlling principle? I mean, it's a procedural rule. You can file your motion for judgment notwithstanding the verdict. The case law tells you whether it ought to be granted or not. Why do we have to describe it?

PROFESSOR DORSANEO: Maybe we don't. We haven't described it for all these years. There's a -- there's a rule, Rule 307, that has not been mentioned by anyone since I was in law school that has a wonderful title. What is it?

MS. CORTELL: Exceptions.

PROFESSOR DORSANEO: Exceptions, et cetera.

HONORABLE STEPHEN YELENOSKY: And it isn't -- well, while you're looking for that, it isn't actually correct to say you may move if this is true. You move, but it shouldn't be granted unless that's true.

PROFESSOR DORSANEO: Well, but that's a quibble.

HONORABLE STEPHEN YELENOSKY: Yeah. Well, it is a quibble, but why are we trying to state the legal standard, and it gets back to why are we even trying to identify the different types of motions that you can file post-verdict when the name doesn't matter?

PROFESSOR DORSANEO: Well, it's just the kind of, you know, being socratic. We have to have categories we can put things in, otherwise we can't talk to each other.

MR. TIPPS: Bill, if the winner of the jury verdict is not entitled to a judgment because of some controlling principle of law, isn't it almost certain that he would have been entitled to a directed verdict or directed verdict would have been proper?

PROFESSOR DORSANEO: Yes.

MR. TIPPS: So doesn't that language capture that problem?

PROFESSOR DORSANEO: Maybe that's good enough, Stephen. But you see in the case law, current case law, cases that make a special point of saying controlling legal principle is a basis for a judgment NOV. They don't say "because a directed verdict would have been proper." They just treat it as a separate thing, and I

know years ago when we drafted the -- you know, the earlier versions of these proposals we went to a lot of trouble to talk about controlling legal principles, and that seemed to make everybody happier in terms of their comprehension. And I don't think it's necessary. I know it's in there, but if it can be stated clearly it ought to be clearly stated.

CHAIRMAN BABCOCK: Skip Watson.

MR. WATSON: Stephen, there's a little wrinkle there that I really like that Bill is getting at that's not necessarily controlled by a motion for instructed verdict. The cases like *Torta vs. Stutsman* and more recently National Plan Administrators where the Court is starting to say that an issue has been submitted, for example, on let's say breach of fiduciary duty, but it allows the jury to find what constitutes a fiduciary duty and the breech of fiduciary duty, just sort of, you know, what I call free range grazing juries, they're allowed to decide what the law is. The Court is starting to come in and say, "I'm sorry, you're submitting a question of law. You may not have intended to, but you have. You've put the robe on the jury and are allowing them to do that." There may have been an issue in this thing at the directed verdict stage about fiduciary duty, but it didn't get submitted, and this -- the key thing here is they're

calling it an immaterial issue now, that that issue is immaterial, and it doesn't have to be objected to.

Well, that's the key point, is that there is this sliver that we're getting into of where cases you don't have to say "I'm sorry" at the charge conference, but you think you're submitting fiduciary duty, but you're not. You're letting the jury decide a question of law of what constitutes fiduciary duty. That's an immaterial issue. It's a controlling legal principle of law. I can come in at the JNOV stage and say, "You had your shot, you blew it. You know, this has got to be a take-nothing judgment," because the verdict that was rendered will not support entry of judgment under the law, if that makes any sense.

MR. TIPPS: Yeah.

HONORABLE STEPHEN YELENOSKY: Do we need to say that in the rule?

CHAIRMAN BABCOCK: Mike Hatchell.

MR. HATCHELL: Also, Stephen, is the unfortunate resurrection of *Allen vs. American National Insurance Company*, which says that at the trial stage by failing to make a proper objection you can actually change the legal standard so that the standard applicable to a motion of directed verdict may well not be the proper motion in relation to the verdict that the jury would

return.

PROFESSOR DORSANEO: Well, that was the last thing I had to say about 301.

MR. WATSON: I like the way you said it there. I mean, I know you've been working on it a long time, but that resonated with me, for whatever it's worth, with this language you have now.

CHAIRMAN BABCOCK: Okay. So are we -- are we done with 301, Bill?

PROFESSOR DORSANEO: Well, aside from me drafting the things that people want to see.

CHAIRMAN BABCOCK: Right. Right. But other than that. You were also going to take up 303, were you not?

PROFESSOR DORSANEO: Well, 303 is kind of -- is that the place where we should go? Does that make sense to go there next or go somewhere else next?

CHAIRMAN BABCOCK: Well, the e-mail I got from Duggins said that you were going to take up 301 and 303, and I know you're not going to be here tomorrow.

MS. CORTELL: I think the e-mail is wrong. I think Bill was 302, but we can explain these pretty quickly.

CHAIRMAN BABCOCK: Can you pinch hit for him tomorrow?

MS. CORTELL: I can cover 303 and 304. 303 really is -- and I think some stuff got dropped off, I was just noticing, but basically these are rules that we already have, just repositioned into our civil rules taken out of the appellate rules.

CHAIRMAN BABCOCK: Right.

MS. CORTELL: So the wording shouldn't be controversial unless we want to change what we currently have. The provisions that aren't in here, though, that I want to -- and I'm just not sure why they dropped out, but we picked up other provisions out of Rule 324 to show that -- kind of carry forward the notion that a motion for new trial is only required in very limited circumstances, and so that should inform everybody's reading of Rule 302, which is the motion for new trial rule, so that you understand we're not saying that for preservation purposes you have to assert all these grounds. This was more by way of helping educate people what they can put in their motion and then Rule 303 should carry forward the limitations from prior law that you for most circumstances don't have to file a motion for new trial.

CHAIRMAN BABCOCK: All right. So tomorrow we will take up with -- would it make sense to start with Elaine on 296?

MS. CORTELL: Well, we can, except that I

have to leave at 10:00 a.m.

CHAIRMAN BABCOCK: Okay. So we should start with you and then we'll get through your part, then Elaine, and then we'll go to Orsinger and Judge Peeples on recusal and disqualification, and, Judge Christopher, I'm not sure we're going to get to yours again. Sorry. Wipe those tears. All right.

MR. HUGHES: What time tomorrow?

CHAIRMAN BABCOCK: 9:00 o'clock in the morning. Thank you, everybody, for a full hard day's work, and I hope everybody will be back tomorrow morning, but for those of you who are not, we will reassemble on April 9th.

(Meeting recessed at 4:57 p.m.)

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MEETING OF THE
SUPREME COURT ADVISORY COMMITTEE

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