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MEETING OF THE SUPREME COURT ADVISORY COMMITTEE

January 23, 2010

(SATURDAY 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 23rd day of January, 2010, between the hours of 9:05 a.m. and 12:03 p.m., at the Texas Association of Broadcasters, 502 East 11th Street, Suite 200, Austin, Texas 78701.

INDEX OF VOTES

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

Documents referenced in this session

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

10-05 Additional page to report Rules 296-305, (page 15a)

10-06 Rule 18a, January 2010 strikeout version

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CHAIRMAN BABCOCK: Nina is on a tight schedule, and if she starts listening maybe we can get started. Hey, Nina. Nina, I was just mentioning that you're on a tight schedule, so let's quit gabbing and let's get going.

MS. CORTELL: Point well-taken, point well-taken.

CHAIRMAN BABCOCK: Ready?

MS. CORTELL: Chip, you just want me to start?

CHAIRMAN BABCOCK: I'm asking for you to start.

MS. CORTELL: Okay. Good morning. Good morning.

HONORABLE DAVID PEEPLES: Morning, morning.

MS. CORTELL: We're going to take things a little bit out of order. I have to leave. Good morning again. Well, what we obviously spent a lot of good time on yesterday was Rule 301 that Bill took us through, so if you could turn back to that, however you have it, that handout of those rules. What we're going to look at real quickly hopefully in the next hour are 302, 303, and 304, and I'm not sure of the history of this, but I've gone ahead and handed you also this morning a supplement that's

got kind of three boxes on it. It says "page 14" at the bottom. Why don't you just mark that page 15a because it will come behind your current page 15 and it's an extension of Rule 303, so that when we look at 303 there will be subsections (a) through (f) and then 304. Is David Peeples here?

HONORABLE DAVID PEEPLES: Yeah.

MS. CORTELL: And then do you want to go with Rule 300 after that and then Elaine will pick up with the findings rules, so why don't we do it in that order?

CHAIRMAN BABCOCK: Okay.

MS. CORTELL: Just to explain generally what these rules are intended to do, Rule 302 is a brand new rule setting out sort of a template, if you will, for what might go into a motion for new trial as the new rule. We do not have anything like it. I think it's based in large part upon a prior codification a long time ago, and Bill Dorsaneo updated that, so that's Rule 302.

Rule 303 is a new rule for the civil rules, but it's really otherwise not a new rule. I'll explain as follows: Subsections (a), (b), and (c) all come out of appellate Rule 33.1, so you wouldn't normally have the kind of debate about these subsections that we normally would, assuming we're comfortable with the appellate rule. The idea was that someone shouldn't have to go to the

appellate rules to see what the rules were, and so it would bring them forward into the civil rules, so that's (a), (b), and (c).

Then on your new page, what I said to call 15a, we have a continuation, and you can tell where these rules come from. (d) comes from current 324(a), (e) comes from 324(b), and subsection (f) comes from appellate Rule 33.1(d). So there is no language in the proposed Rule 303 that is new. It is just repositioned. And we can come back to that, and then Rule 304 would be new, and its intent -- and we talked a lot yesterday about plenary power, but was to have a plenary power rule that explains what plenary power is, how long it would last, and what a court can do after expiration of plenary power.

What's interesting about these rules, we talked a little bit about this yesterday because Sarah made a good point that, you know, we don't want to just change rules for the sake of changing rules. That creates havoc in our system. We've got established understanding and case law based upon the current rules, but what's I think important to note about these proposals is that, for example, 302, it will provide guidance where the current rules provide no guidance, because we don't really explain what would go in a motion for new trial in our rules. 303 brings into the -- into the civil rules things that might

be hard to find because they're located other places, and Rule 304 talks about plenary power again, which is sort of a gap in our current rules because there is nothing that's -- you know, specifically addresses plenary power, what it is, and how it works.

So that gives you the overlay, and then later Judge Peeples will talk about Rule 300, which is about judgments, sort of a finality rule. I don't know whether to just kind of open it up. I don't really have specific discussion items, but Rule 302, again, is the motion for new trial rule. Are there any issues that people want to --

CHAIRMAN BABCOCK: Let's start with 302. Does anybody have any comments on Rule 302? Stephen.

MR. TIPPS: I have a question. Does the current rule -- I'm looking at (a)(2) and (a)(3). Does the current rule use the term "overwhelming preponderance of the evidence" as opposed to "overwhelming weight of the evidence"? I mean, "overwhelming weight" seems to me to be the more accurate concept, but I'm not sure what the current rule says.

MS. CORTELL: You know, I had my rules yesterday, and I forgot to bring them. It probably says "weight." That would be my memory.

HONORABLE TRACY CHRISTOPHER: I have them.

CHAIRMAN BABCOCK: Yeah, there are cases where preponderance is not the evidentiary standard. Clear and convincing is the standard in some cases.

MR. TIPPS: Yeah. But, I mean, I think for these purposes the correct word should be "weight" rather than "preponderance."

MR. MUNZINGER: Chip?

CHAIRMAN BABCOCK: Yeah, Richard.

MR. MUNZINGER: Is subsection (3), a statement of the current substantive law on the issue, so that the only time that a trial court may set aside a damage award is under the circumstances where the evidence is either factually insufficient or overwhelmingly contrary to the verdict, or is there a power in the trial court to set aside a verdict because its amount shocks the conscience, for example, apart from the evidence. I'm just curious if that's a full statement of the substantive law on the issue.

MS. CORTELL: I think that's a good comment.

MR. HATCHELL: Shock to the conscience went out with, what, *Hope vs. Moore* or one of the others, and it was reduced to weight of preponderance.

MR. MUNZINGER: So that is a correct statement --

MR. HATCHELL: Yes.

MR. MUNZINGER: -- of substantive law.

MR. HATCHELL: Yes.

MR. ORSINGER: But that was before we adopted a separate trial standard. There's a different -- the U.S. Supreme Court imposed clear and convincing evidence in mental commitment proceedings as a constitutional matter first and then it got picked up for termination of parent-child relationship. Then the Legislature picked it up for approving separate property in a divorce, and so the case law that developed that Mike is talking about developed before we really had that intermediate standard. Then there was a debate as to whether the intermediate trial standard affected appellate review of the evidence, and for a long time people thought it didn't, and then the Supreme Court said that it did. So I think we need to be sensitive to the fact that we now have an intermediate standard between preponderance and beyond a reasonable doubt that applies not only in the trial court but also for appellate review of the evidence.

CHAIRMAN BABCOCK: That would be true in certain kinds of libel cases, too.

MR. ORSINGER: They certainly did about that, too, in libel cases.

HONORABLE STEPHEN YELENOSKY: I just don't understand why we're trying to state the law in the rule.

I brought this up yesterday, and I never really heard a response.

CHAIRMAN BABCOCK: Sarah has got an answer to that.

HONORABLE SARAH DUNCAN: I completely agree. I think trying to codify the law is a mistake in many instances.

HONORABLE STEPHEN YELENOSKY: I mean, even if we get it perfectly right this time, the law can change. I mean, why would we put it in a rule?

CHAIRMAN BABCOCK: Mike.

MR. HATCHELL: I concur with Sarah.

CHAIRMAN BABCOCK: So at least three votes.

MR. ORSINGER: I can tell you why it happens is because the law professors on the committee are teaching this rule, and they would like to have a road map for their teaching.

CHAIRMAN BABCOCK: Justice Gray.

PROFESSOR ALBRIGHT: I disagree.

CHAIRMAN BABCOCK: Justice Gray and then the professor gets to --

PROFESSOR ALBRIGHT: I'd rather them find it.

HONORABLE TOM GRAY: Maybe I misunderstood a comment that was made yesterday, but I thought since this

proposal was that it could be granted for -- or a judgment set aside for these reasons, this was the litany of what the trial court was expected to pull out of the rule and put into the order of the reason not just for good cause, which I would tweak No. (11) so that it's -- I said good cause, I meant interest of justice, but I would just say on (11) that it can be granted in the interest of justice, which must be specified in the order, or which ground must be elaborated on in the order, whatever, the language that's in the case that now requires that finding or ground to be more fully expressed, but I thought we were basically giving the trial judges a laundry list of things to choose, so --

CHAIRMAN BABCOCK: Okay, Judge Yelenosky, and then --

HONORABLE STEPHEN YELENOSKY: Well, I mean, that's a response, I guess, but I guess the only way I can really feel that this has been addressed is to ask for a vote on whether we need to state the substantive law, and that's my request.

CHAIRMAN BABCOCK: Roger.

MR. HUGHES: Well, ditto, and I think by stating a list some judges are going to conclude that they're on thin ice if they stray from the list and then on No. (11), the interest of justice, you know, that could

be construed to create basically a wild card that whatever the interest of justice or whatever the judge decides; and, you know, what if the trial judge said, "You know, the victorious counsel was late everyday to trial and I'm going to teach that guy a lesson. So good cause is I'm taking the verdict away from this guy to teach him to come to court on time." I mean, I don't think we want that.

MR. GILSTRAP: Well, until recently that's been the law. They can grant new trial for any reason they wanted to.

CHAIRMAN BABCOCK: Justice Bland.

HONORABLE JANE BLAND: Is Rule 302 going to incorporate 324 and get rid of 324? Because 324(b) is where it says "a motion for new trial is required," and it has the things that are similar to what are here in new Rule 302 that a party must raise in a motion for new trial.

MS. CORTELL: That is currently -- that's that separate sheet I just handed out. That would be 303(d), or 303(e) rather.

HONORABLE JANE BLAND: So this is --

MS. CORTELL: That's what it requires. That stays the same.

HONORABLE JANE BLAND: Okay.

MS. CORTELL: And --

HONORABLE JANE BLAND: So this is just --

MS. CORTELL: This is just sort of a how-to guide to motion for new trial. I think it -- I was just telling Judge Evans we worked on this for, what, Sarah, over a year or two?

HONORABLE SARAH DUNCAN: This particular time?

MS. CORTELL: Well, all these rules. The committee has, and some cases have come down, and, frankly, I'm having a hard time remembering even when we did what and why, but Bill drafted this I think again basically from the old code. It does not really reflect the new *In Re: Columbia,* for example, decision seeking grounds. That decision interestingly might be a reason why you would want a rule like this, to give a suggested list to a court on reasons for new trial, although that would not be satisfied, as Roger pointed out, by (11).

Why don't we -- I guess the broader discussion point which we might want to look at is do we want to try to provide a list at all and then if the committee senses we do then we can discuss some of the more specific issues raised by it?

HONORABLE STEPHEN YELENOSKY: That's the same request I have essentially.

MS. CORTELL: Yes.

CHAIRMAN BABCOCK: Richard Orsinger. Richard the First.

MR. ORSINGER: I was the second last time. I would speak --

CHAIRMAN BABCOCK: We don't want clarity.

MR. ORSINGER: I would speak in favor of a rule that articulates the known grounds as long as it's not inaccurate or misleading, because right now you have to know the case law or have had knowledge on the procedure or spent a lot of time in the books, and there are other places in the rules where we have a checklist, maybe it wasn't design, but like the kind of -- affirmative defenses is a rule that starts a list of affirmative defenses, and it's not complete, which I think is dangerous, but once you have a rule that has a partial listing everyone comes to believe that that's an exclusive listing, even though it might be stated "including, but not limited to."

And, what is it, Rule 324 that has the grounds that have to be mentioned in a jury trial. I think a lot of people think that that's the checklist of the grounds for a motion for new trial, and if there is anyone -- the best place to do comprehensive and accurate listing in my view is this committee as opposed to the collective wisdom of the courts of appeals that hand down

individual decisions and the Supreme Court that occasionally comments on those decisions that were handed down, and so even though it's -- one might question whether we can make a list that's complete or make a list that's completely accurate, I think we probably have the best chance of doing it and that it would be very helpful, especially considering that Rule 324 is already there and is already used as a de facto checklist when it's really not.

CHAIRMAN BABCOCK: You're a pro-list guy. Judge Yelenosky and Hatchell and Sarah Duncan are anti-list people. Anybody else have comments on -- Jeff.

MR. BOYD: I'm pro-list as long as you have something like No. (11) that makes it clear that the list is not exclusive.

CHAIRMAN BABCOCK: Okay. Justice Bland.

HONORABLE JANE BLAND: If you're going to have a list, you ought to put it next to or near the part where we talk about what particular grounds must be asserted in a motion for new trial.

MS. CORTELL: I agree.

HONORABLE JANE BLAND: Which is not all of these things, and so --

MS. CORTELL: I agree.

HONORABLE JANE BLAND: -- it's the five

things on the page.

MS. CORTELL: I think that I would agree with that, and that would be currently what's 303(e). Maybe look at 303(d) and (e), kind of pick those up and put them into Rule 302 so that you have all in one rule what's required, what's not required, and here would be a list of some sort.

HONORABLE JANE BLAND: But I'm --

MS. CORTELL: Oh, okay.

HONORABLE JANE BLAND: I think I tend to agree with Judge Yelenosky that if we tried to put a list in the rule there are any number of reasons that a party might seek a new trial and a trial court might grant a new trial, and I'm not sure that making a list, especially a list that doesn't match the list where motions for new trial are required, is helpful.

CHAIRMAN BABCOCK: Nina, what was the subcommittee trying to cure or address, or what deficiency in the current practice was this list intended to cure?

MS. CORTELL: I believe that the idea was to -- again, an overall idea of these rules was to be more intuitive and provide a place for people to go to to understand what these motions are and how they were -- again, and specifically motion for new trial, there's nothing in our rules that indicates what grounds might go

in a motion. We do have the current Rule 324(b) that lists the grounds that must go in a motion, but there is nothing in the current rules that indicates other grounds that may be raised in a motion.

CHAIRMAN BABCOCK: Okay. Justice Christopher, and then Sarah.

HONORABLE TRACY CHRISTOPHER: I think it's a good idea to have the list since the trial judges now are going to be called upon to state specifically why they're granting the motion for new trial; and to the extent that the current rule only has, you know, five grounds in it that you would look at, they may or may not be confused that other grounds might support the granting of the motion for new trial; but this way you would have specific things that you could look at or point to as being sufficient grounds for the granting of the new trial.

CHAIRMAN BABCOCK: Okay. Sarah.

HONORABLE SARAH DUNCAN: My memory is this came from the State Bar Rules Committee.

CHAIRMAN BABCOCK: I'm sorry, what?

HONORABLE SARAH DUNCAN: My memory is that this -- the desire for a list came from the State Bar Rules Committee.

CHAIRMAN BABCOCK: Okay.

HONORABLE SARAH DUNCAN: Of course, before

Columbia and the interest of justice in and of itself not being enough, and there was sentiment that the trial judge should be restricted in the grounds that could support a new trial, and we've done this once before. And with all due respect to Richard the Second, we may have the best shot at coming up with a definitive list, but we couldn't agree on a definitive list the last time we tried this, and I'm not sure the trial judges want to be restricted to a definitive list since they're the ones who are actually seeing and hearing the things that could cause them, and I know that one of the things that's not on here is when you find out that the plaintiff's attorney or the defense attorney is sleeping with the court reporter or the bailiff or the court coordinator or whatever it may be, how can we --

CHAIRMAN BABCOCK: Is there a case on that?

HONORABLE SARAH DUNCAN: Absolutely.

MR. ORSINGER: I didn't know that was a grounds for new trial. Imagine the discovery you can do on that.

CHAIRMAN BABCOCK: Novelize.

HONORABLE SARAH DUNCAN: Even us presuming to put together a definitive list in my view is presumptuous and a mistake.

CHAIRMAN BABCOCK: Well, that's why Jeff

says it ought to be nonexclusive.

MR. GILSTRAP: It is.

MR. MUNZINGER: It is.

HONORABLE SARAH DUNCAN: Actually, Chief Justice Gray reads this as exclusive.

HONORABLE TOM GRAY: No.

HONORABLE SARAH DUNCAN: No?

HONORABLE TOM GRAY: No, I read (11) as being any other grounds. It just needs to be modified so that if the ground that you're granting the new trial on is in the interest of justice, go ahead and give the direction that that interest of justice must be specified in the judgment.

HONORABLE SARAH DUNCAN: Well, then you do read this list as exclusive. It's just that (11) --

HONORABLE TOM GRAY: Is the open-ended that you can add anything.

HONORABLE SARAH DUNCAN: -- is the open-ended.

HONORABLE TOM GRAY: Yeah. If you wanted to view that as exclusive, then, yeah, it's exclusive.

CHAIRMAN BABCOCK: Yeah, Alex.

PROFESSOR ALBRIGHT: I don't like the list because I think even we can't agree on it, and that's what courts' jobs are to do, is to develop reasons. I would

prefer something like "For good cause a new trial or partial new trial may be granted and a judgment may be set aside on the motion of a party or a judge's own initiative. The order granting must state the grounds therefor," because I think that's important now, that the order has to state what the grounds of it; but there are any number of reasons to grant motions for new trial; and I think the way this is worded "in the following instances," it really makes it look like this is an exclusive list and then it says "in the interest of justice" as though you can have an order that says "in the interest of justice" without anything else, which is -- was probably true when this was written, but it's not correct now; and the fact that courts can make changes to this and I don't think we want to be making amendments every time there's a new opinion about motions for new trial, I think it's an effort that we don't need to be --

CHAIRMAN BABCOCK: You wouldn't -- Sarah, you wouldn't do away with the current rule that says, "A motion for new trial is not required," 324(a), and "A motion for new trial is required" in 324(b). You'd still have to have that, wouldn't you?

HONORABLE SARAH DUNCAN: Well, I think that's a matter of opinion. As somebody said yesterday, why do you have to have a motion for new trial on some of

these? I mean, if the motion for new trial is grounded in something that requires the taking of evidence --

CHAIRMAN BABCOCK: That's one of the --

HONORABLE SARAH DUNCAN: -- that's one of them, and to me that one makes sense, but why do you have to have a motion for new trial to preserve a sufficiency complaint?

PROFESSOR ALBRIGHT: Because it's the first time you can make that motion, you can raise that issue.

HONORABLE TOM GRAY: So, in other words, we're going to have --

PROFESSOR ALBRIGHT: Factual sufficiency.

HONORABLE TOM GRAY: So we're going to write a rule that embodies existing law that is the preservation requirement that you have to present the issue to the trial court. In other words, I'm asking it rhetorically because we do write rules that embody existing law for guidance of the bench and the bar, and I thought the list was a good thing because it was giving guidance in an area that, as Richard said, you can go out and you can find all of this as the basis of a motion for new trial and put it in a motion and a trial court can grant it, but it's really nice to have a relatively comprehensive, although with appropriate conditional language everyone should recognize that it is not completely comprehensive, place

to start. I mean, it provides a jumping off place that provides reasonable guidance to most of the circumstances.

HONORABLE SARAH DUNCAN: I don't have any problem with the rules just the way they are as far as preservation goes. I don't think other people do -- I don't think it's a problem with the rules.

CHAIRMAN BABCOCK: But --

HONORABLE SARAH DUNCAN: But if you're really going to question why anything is in there, let's start there.

CHAIRMAN BABCOCK: Yeah. But my point was if you do away with this list that is proposed in 302 you still would have to have the corollary to 324(a) and (b). I mean, you still have to list that.

HONORABLE SARAH DUNCAN: You could list that, if that's the view of the Court, those things are required to be --

CHAIRMAN BABCOCK: Right.

HONORABLE SARAH DUNCAN: -- preserved in a motion for new trial, you could continue that, but you don't have to.

PROFESSOR ALBRIGHT: Can I respond to that?

CHAIRMAN BABCOCK: Yes, you may, Alex.

PROFESSOR ALBRIGHT: Thanks. On (e), I think we could have a broader one there. The reason you

have to have all of these five things in your motion for new trial is because it's the first time that you can preserve the error, is in a motion for new trial because these are objections to the verdict, and so in which you don't get rendition, you get a new trial. So you could have a broader thing where you said you have to include in a motion for new trial any point that's not yet been preserved for which you -- an objection to the verdict or something broader, but these are the ones.

HONORABLE SARAH DUNCAN: See, I think that's scary.

PROFESSOR ALBRIGHT: Yeah. I mean --

HONORABLE SARAH DUNCAN: I think that would be really scary.

PROFESSOR ALBRIGHT: So --

CHAIRMAN BABCOCK: Just curious, if there's incurable jury argument that was not objected to at the time the argument was made, can you still object to it in a motion for new trial and preserve error?

PROFESSOR ALBRIGHT: Yes.

MR. ORSINGER: You don't need to preserve error.

CHAIRMAN BABCOCK: Yeah, you may not win, but you can preserve error. Judge Christopher.

HONORABLE TRACY CHRISTOPHER: Well, again,

I'd kind of like to -- you know, if we're going to redo everything I would like to speak in favor of eliminating certain requirements in the motion for new trial in terms of preserving error on appeal. I just don't understand why we would have 324(b)(1) through (5) and then have this rule, too. I mean, I just don't see the point in requiring certain things to be in the motion for new trial that no one is presenting to the judge anyway or asking the judge to rule on or -- versus -- and that's necessary to preserve error while others are not necessary to preserve error.

I don't understand the distinction for that; and again, in favor of the list, you know, the lawyers in this room know the law. Okay. They know how to research, they know a certain ground is, you know, a good ground for a motion for new trial. The motions for new trial that you see in the trial court, you know, some lawyers are just not as good. All right. They're not appellate specialists. They're -- you know, something went wrong in the trial. They want to bring it to your attention and ask for a new trial. Judges don't have law clerks to do -- a lot of them don't, to do research on whether this is or isn't a valid ground for a new trial, and you often don't get it from the lawyers, so I just think it's useful to have it. Because if you think something went really

wrong in a trial and the lawyer comes in to you and says, "You know, Judge, I want a new trial," and now under the new case law we have to make sure that we, you know, state a sufficient ground in our order on granting the motion for new trial, I just think it's invaluable to a trial judge to be able to say, "Oh, yeah, okay, well, this fits here and, you know, that's the ground I'm putting in."

HONORABLE JAN PATTERSON: Chip.

CHAIRMAN BABCOCK: Judge Patterson.

HONORABLE JAN PATTERSON: It also comes at a time when there's time and money pressure, so resort to a list I think would also be helpful, but I would -- I would prefer that we not call "interest of justice" a wild card.

HONORABLE DAVID MEDINA: Catchall.

CHAIRMAN BABCOCK: Justice Medina suggests catchall.

HONORABLE JAN PATTERSON: Catchall is preferable to wild card.

CHAIRMAN BABCOCK: Free agent? Nina.

MS. CORTELL: In the interest of time, if it's okay, I would call for a vote on a nonexclusive list to see whether the sense of the committee is whether we should have a nonexclusive list in Rule 302(a).

CHAIRMAN BABCOCK: As opposed to -- but there is no proposal on the table --

MS. CORTELL: As opposed to no list, yes. I don't know that there's -- would be anybody, you can tell me if I'm wrong, for an exclusive list.

CHAIRMAN BABCOCK: Yeah, that's not even proposed, right?

MS. CORTELL: That's right.

CHAIRMAN BABCOCK: Okay. We ready to vote on this? Yeah, Judge Evans.

HONORABLE DAVID EVANS: One question. Would it have sufficient clarification in being a nonexclusive list that the phrasing of it doesn't have to be exactly within the rule, because I worry that this is becoming a practice aid as opposed to boundaries.

HONORABLE STEPHEN YELENOSKY: Exactly.

HONORABLE DAVID EVANS: Most judges look at the rules and lawyers look at them as boundaries on what is to be done, and I think there's merits to the argument that it's a good practice aid; but that's what it is, it's a practice aid; and I assume every one of these is based upon a case that granted a motion for new trial or was held that a judge is -- the judge committed error by not granting a new trial or his clock -- I mean was overruled by operation of law -- created an error; but it is a practice aid; and it is going to be looked at by the bench and the bar and those that are disqualified, like Tracy

said, as to be confining. It's just a -- I don't know where else we have a practice aid in the rules.

CHAIRMAN BABCOCK: Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: Well, and to some lawyers I guess it would look like now there are 11 times as many ways of getting a new trial, and we know how often those are granted.

HONORABLE DAVID EVANS: I think there's a lot of books that are being published that have all of these grounds listed that most lawyers own.

CHAIRMAN BABCOCK: Frank.

HONORABLE DAVID EVANS: Just a thought.

MR. GILSTRAP: Nina, the distinction in the old rule was, you know, a motion for new trial was not required except in certain instances where you're taking evidence, and that had to do with preservation of error. Where is -- where is that old list in here?

MS. CORTELL: Look at 303.

MR. GILSTRAP: It's in 303 then.

MR. TIPPS: On the separate sheet of paper.

CHAIRMAN BABCOCK: It's on the separate sheet of paper that was handed out.

MR. GILSTRAP: I'm sorry.

MS. CORTELL: And I apologize. Again, I don't know if this accidentally fell out or --

CHAIRMAN BABCOCK: It's page 15a.

MR. GILSTRAP: So what we've got here is a rule that sets forth the grounds for new trial and then in a second section talks about preservation of error. It kind of seems bastardized. You know, it really does, you know, like you're patching together the old rules, which maybe is what we're doing.

MS. CORTELL: Well, one of the things that I had suggested earlier, and we can look at it separately, is whether you would move these two subsections into 302 so you had everything in one place.

MR. GILSTRAP: I certainly think if we don't have a comprehensive rule, and I don't think I'm for a comprehensive rule, we obviously have to keep the old rule 324, the second portion of 324(b).

CHAIRMAN BABCOCK: Yeah, that was what I said a minute ago.

MR. GILSTRAP: Okay. I'm sorry. I missed that.

MS. CORTELL: I don't think there is any question about that.

CHAIRMAN BABCOCK: Okay. Lonny had a comment, an important one because he's waving his hands like an air traffic controller.

PROFESSOR HOFFMAN: I didn't know if you

were testing me from yesterday --

MR. TIPPS: He wants to know if the United Chamber of Commerce wrote these rules.

(Laughter)

CHAIRMAN BABCOCK: It's all a conspiracy.

PROFESSOR HOFFMAN: It just goes to show you people are not going to actually listen after the first two things you say, so there's a lesson. For those who are against the list, what is the difference between that and so, for instance, like Rule 94 on affirmative defenses where we list a number of defenses and then say "any other matter constituting an avoidance or affirmative defense" or Rule 93 where No. (16) says "any other matter required by statute to be pled under oath"? I'm just trying to understand.

HONORABLE STEPHEN YELENOSKY: There isn't. I don't like that rule either.

CHAIRMAN BABCOCK: Justice Bland has the answer to that.

HONORABLE JANE BLAND: I think that it's very difficult to try to put an exhaustive list together for motions for new trial, and I think there are two things we need to communicate. One is that a trial judge can grant a motion for new trial, and second is that they must state the reasons for granting it, and I think

Professor Albright's suggestion is a better suggestion because it's simple. You can look at it and you can say, "Okay, I can grant a new trial and I have to say the reason," and instead of -- instead of a checklist, and I also with Judge Yelenosky think that the affirmative defense rule is unwieldy, and I'm not even sure that every affirmative defense -- there are other defensive issues which have been characterized as affirmative defenses in the case law that may or may not be listed in rule -- they may not be listed in Rule 93.

HONORABLE STEPHEN YELENOSKY: Yeah, just because the rules committee got it wrong doesn't mean we have to.

CHAIRMAN BABCOCK: Jeff, and then Sarah.

MR. BOYD: Well, my first comment is going to play right into Stephen's comment, but I don't think it's a bad thing, and that is a week ago I had a new case come in. I got my second-year associate. I said, "Prepare the original answer to a general denial and then pull out the rules and look at that list of affirmative defenses and consider what we need, as well as the verified denials that are listed in the rules." It's a place you can go where it's right there for you. So is it a practice guide? Maybe so, but I think it's a good practice guide, and I think having the same kind of thing

for all these various grounds for motion for new trial would be helpful, too.

Secondly is then once we do that and we pick which ground we want and we go to the judge and we say, "We need a new trial and here's why, it's right here in the rule and here's the case, but, look, here are the three grounds we're asserting" when it's right there in the rule it's easier for the judge, it's easier for us to lay out for the judge I think, so overall I'm for it.

CHAIRMAN BABCOCK: Kennon. Oh, Sarah, then Kennon.

HONORABLE SARAH DUNCAN: I have the same problem with 94, and the reason I have a problem with it is I don't think people learn what an affirmative defense is, and so they look at that list, and they don't think. They just say, "Well, what I've got isn't on that list, so it must not be an affirmative defense," because we haven't taught people what does it mean to be an affirmative defense, and if they don't see it on the list they don't do it and then it's waived, and that's to me dangerous, and that is part of the danger here is that Jeff's not going to teach his new associate what is a good ground for a new trial.

MR. BOYD: I figure Alex has already taught them that.

HONORABLE SARAH DUNCAN: The motions for new trial are going to have all of these in them, and they're going to be this thick instead of this thick, and I have the same problem with the affirmative defense rule.

CHAIRMAN BABCOCK: Yeah, there's definite deficiencies in Jeff's associate training. You can't just look at a list, Jeff. You've got to tell them to think about it. Kennon.

MS. PETERSON: I just wanted to throw out as an option the possibility of putting something in the rule about "as permitted by law." In the disciplinary rules you see phrases like that a lot, and then in the comments there are examples, and it's not intended to be the definitive guide, but it's supposed to give some guidance to the practitioner. I don't know if that's something you want to do with the Rules of Civil Procedure as well, but it is something done fairly regularly in the disciplinary rules.

CHAIRMAN BABCOCK: What would you know about the disciplinary rules?

MS. PETERSON: Not a thing.

MR. GILSTRAP: In answer to Lonny's question, the reason that it's in Rules 92 and 93 is because the framers of the Federal rules, certainly with regard to 92, thought it belonged there back in the

Thirties, and when the Texas rules were adopted we just put it in. Now, after many years of kind of flirting around with the problem, the Texas Supreme Court is now addressing the problem of whether or not you can review the ground of a new trial. We're kind of in an area of flux, and maybe this isn't the time to come in with some kind of definitive rules when the Court appears to be rewriting the law here in a judge made fashion, as they should if they're going to rewrite the law.

CHAIRMAN BABCOCK: Judge Peeples, you got a view on this?

HONORABLE DAVID PEEPLES: On balance a list is good. I think it saves attorney's fees. Jeff is probably not going to charge his client as much this way as he would if the guy had to hit the books and researched the cases, a teaching tool, and helps judges, helps lawyers.

CHAIRMAN BABCOCK: Okay.

HONORABLE DAVID PEEPLES: We're the best people to do it in this room, not somebody else.

CHAIRMAN BABCOCK: Okay. Richard the -- would it be the second? Richard the Second.

MR. ORSINGER: We are not actually writing the rule. We're just writing a proposal for the Supreme Court to consider, and if they don't want the rule we

don't have the rule, and if they do want the rule then we've helped them write it, but they don't have to accept our language if they think that it's wrong or they think that something should be excluded, so consider that what we're doing is aiding the Court if we just say, "Well, some people think it's a good idea, but we're not going to actually give you a list to consider." It really makes them draft the rule, and in my view we ought to fight through this rule. Some smart people over a period probably of more than a decade have tried to contribute to this effort, and the Supreme Court may reject it, or they may pick part of it, but we don't actually draft the final rule and we shouldn't. Remember that.

HONORABLE STEPHEN YELENOSKY: But that doesn't obviate giving the Court this body's opinion as to whether it's a good idea.

MR. ORSINGER: No, but if we vote cloture there's no filibuster rule, is there? 41? So I think if we vote cloture --

CHAIRMAN BABCOCK: The junior Senator from Massachusetts is preventing cloture, so --

MR. ORSINGER: Right. Anyway, however the committee votes, if we just drop the debate and don't discuss the merits of any of these provisions then we're left with just a list with no investigation of the

validity of the words.

CHAIRMAN BABCOCK: Yeah. That's a very good point. But because Nina wants validation or not, why don't we take a quick vote on whether there should be a list or no list or nonexclusive list, and then we ought to continue to talk about it if there are any flaws in the list that we have. So everybody that is in favor of a nonexclusive list, raise your hand.

All those opposed? Well, the ayes have it by a vote of 16 to 13. Close vote. Okay. So any more comments about -- we've talked about whether overwhelming preponderance of the evidence is appropriate. Judge Christopher.

HONORABLE TRACY CHRISTOPHER: I know this is a lot of work for me to propose to the subcommittee, but --

CHAIRMAN BABCOCK: Since you're not on it --

HONORABLE TRACY CHRISTOPHER: But I'm not on it so I'm proposing it. Whenever we work on a pattern jury charge and we're going to put like different measures of damages, we have a case that supports, you know, that measure of damages for each one of these elements, and, now, maybe everybody in this room knows that each and every one of these elements come from a case and they know the case and are familiar with it, but I'm not, so it

would be really useful to me if we're going to work on a list to have the case that they are, you know, referring to where all of this came from.

CHAIRMAN BABCOCK: Yeah, I was thinking that same thing. If I were Kennon, you know, I would want not to have to dig into the books if they've already done that work.

HONORABLE SARAH DUNCAN: Why don't we annotate all the rules then?

CHAIRMAN BABCOCK: No, no. I just mean in terms of -- not annotating it for publication, just so that you know you've got something correct, it's properly done. We're talking about the drafters, not the -- not the West publication. Yeah, Jeff.

MR. BOYD: I just had a couple. One is No. (5) where it says "or injury to the movant has probably resulted." That seems like an odd use of the word "injury" instead of "harm." Maybe that comes straight from case law or something, but and then if we were going to -- granted it's not exclusive, but if we were going to try and make sure we covered the key -- it seems like a change in the law "from the time the verdict is rendered before" -- I mean, yeah, "before the judgment is entered" might be included.

CHAIRMAN BABCOCK: Okay. Yeah, Alex.

PROFESSOR ALBRIGHT: I think No. (2) needs to look like (e)(2) and (3), which are the ones that are required. "A complaint of factual insufficiency of the evidence to support a jury finding"; "A complaint the jury finding is against the overwhelming weight of the evidence." To have them different is a little confusing.

I also have a problem with No. (8). I understand why you might want to have it to tell somebody that if they were served by publication it may be a different standard, but in that case do you also want to tell them that they have two years to do it, which means that you're really restating the rule on -- that's already there on citation by publication. So I would prefer to just leave No. (7) because that's -- you're overturning a default judgment on legal or equitable grounds, and if you're served by citation you should go look at the service by citation rule, and then as we've said, we need to work on "in the interest of justice." That may be where the "any other ground" and "stated in the order" -- and it also needs to say "stated in the order."

CHAIRMAN BABCOCK: You finished, Alex?

PROFESSOR ALBRIGHT: Yes.

CHAIRMAN BABCOCK: Okay. Roger. And then Carl.

MR. HUGHES: I agree that we should work on

No. (11) and perhaps consider collapsing No. (5) and No. (11) together. I think it's important that whatever ground you have be some sort of recognized or arguably recognized ground at law or equity that would be an error. To give judges the authority to make up new grounds that have never -- that aren't error at all I think is on dangerous ground and arguably is going to raise the right to trial by jury at all.

The second is that No. (5) talks about error that affected the outcome of the trial. Frankly, I don't know why a trial judge would want to grant a new trial on a trivial error that didn't affect anything and yet somehow that's in the interest of justice. Usually I think if they -- if they think -- if a judge feels like some error has occurred that warrants a new trial it's because a judge believes some sort of harmful error occurred. They're not just seizing on something to set aside a verdict that they don't happen to agree with. So my -- that's my suggestion, to somehow perhaps collapse (5) and (11) together because I just don't think it's advisable to put in the rule that a judge can set aside a verdict for any reason that suits them that morning.

CHAIRMAN BABCOCK: Are you talking about (5) in the proposed rule?

MR. HUGHES: Yes.

CHAIRMAN BABCOCK: About jury misconduct?

MR. HUGHES: Oh, I'm sorry. That was the (4).

CHAIRMAN BABCOCK: You're thinking about (4). Okay. Gotcha. Carl.

MR. HAMILTON: This started off with "for good cause," and then "in the following instances," I guess that's intended to mean that these are all good cause, but maybe we ought to put the good cause over on No. (11) and just say, "A new trial can be granted in the following instances" and then "for other good cause" under (11) so long as it's stated.

CHAIRMAN BABCOCK: Uh-huh. Richard. Yeah, Justice Hecht.

HONORABLE NATHAN HECHT: In connection with the cases that -- like Columbia that have been argued the last couple of years, there were sometimes argument made, and I think maybe at this committee, too, that sometimes trial judges do order a new trial for reasons other than error. It's just they become convinced at the end of the trial it was just not right, and sometimes -- one of the examples that was given was that a lawyer is unfortunately and unavoidably impaired for some reason, shows up sick, and rather than postpone -- it's a short trial and rather than postpone it he goes ahead, but, you

know, probably just did not work out as well as it should have. Maybe that's a good reason, maybe it isn't, but I'm wondering if the trial judges still think that whether (11) does contemplate instances when there is no real identifiable error in the trial.

HONORABLE DAVID EVANS: You certainly grant mistrials based on things that are not harmful or reversible error, and you can have process issues of misconduct. I haven't seen them personally, but I've heard of them, such as use of cell phones and things during jury deliberations that brings into question the integrity of the process to the point that a trial judge -- you couldn't ever prove that it was reversible error or harmful error, but you'd feel like the process had been tainted to such a point that you would be inclined to grant a new trial, not because you're result-driven or you think the wrong side won or anything of that nature or that you found out there had been misconduct that was curable, but it began to plague you after you tried to cure it.

Contact with a juror and you exclude the jury, and you would be worried did that throw the whole case off because I put an alternate up. I'm not sure that you could prove that as being reversible or harmful error, but I would think that a trial judge in his professional

opinion might think that the system did not come out the way it should have, and it should be retried in the interest of justice, and so as we work on those standards, I didn't understand the new cases to limit the trial judge's discretion to only harmful and reversible error, and I guess I was wondering about Roger's comment in that regard.

CHAIRMAN BABCOCK: Richard the Second, and then Frank.

MR. ORSINGER: I'd like to echo that I think we ought to delete "for good cause" at the beginning because it's kind of inherent that this list is a list, and we ought to put -- if we're going to have "good cause" at all it ought to be in (11). Secondly, I was going to comment on the same topic that just came up. I'm not -- I'm not aware that it's our policy that trial judges can only grant a new trial for reversible error. I understand why appellate courts only grant a new trial for reversible error, but the role of the trial judge is more expansive and more involved in a sense of justice and may be more attuned to the locale and the parties, and they're elected, so they're attuned to the local electorate, and I'm not entirely sure that this rule should be written that a new trial is only warranted when there's, quote, reversible error, but it suffuses through here, and it

comes to us out of the case law, so part of it is traditional, but in No. (5) you have a harmful error standard of "injury probably resulted from," which is probably an effort to try to define reversible error, but that's not really the definition of reversible error.

(6) ends "probably caused the rendition of improper judgment," which I think is probably the way the appellate rules now try to define when an error is reversible. You see the same thing in paragraph (10), "probably caused a rendition of an improper judgment." When you go back to paragraph (7), though, which is setting aside defaults, "when the default judgment should be set aside on legal or equitable grounds," "should be" is obviously a pretty vague standard. The case law is fairly good about, you know, with the three-prong test for equitable motion for new trial in *Craddock vs. Sunshine Bus Lines*, all that, but I think all that requires is a prima facie showing that you have a meritorious defense, which is not really at all the same thing as showing that it is likely that an improper judgment was rendered.

So, first of all, if we're going to have reversible error as the standard, I think let's use the same wordage in this rule, inside the rule, and let's make it match to the appellate rules; and, secondly, I think that we probably ought to hear if there's any dissent of

whether a trial judge is free to grant a new trial over a concern that would not qualify as reversible error. And then to go on, in paragraph (10), which has to do with it -- a list of things that occurred in the trial that probably caused a rendition, it says "the improper admission of evidence," but, see, the improper exclusion of evidence can also probably cause a rendition of an improper judgment, so I would rewrite that "when the improper admission or exclusion of evidence," comma, "error in the court's charge," et cetera.

And then since David Evans raised this I'm kind of curious. Sorry to catch you right before you're headed out, but are the standards for mistrial the same as the standards for a new trial, or are they broader and there are just simply no articulation of what the standards for a mistrial are?

HONORABLE DAVID EVANS: When my blood pressure reaches 155 it's a mistrial. 155 over 137, but if it's just cruising about 120 over 90 I'm okay.

(Laughter)

MR. ORSINGER: I've seen mistrials granted when a lawyer pretty regularly and consciously violates a motion in limine --

HONORABLE DAVID EVANS: That's the classic.

MR. ORSINGER: -- and prejudices the jury

maybe with sidebar comments or something, but if that's a ground for a mistrial, is it also a ground for a new trial? Are they really the same standards and we don't know it? Maybe we don't care, but it does occur to me that --

HONORABLE DAVID EVANS: I granted -- a lawyer three times in voir diring the jury and in opening statements said, "If you answer these questions this way, we win." I thought that kind of informed the jury of the effect of their answers. I cautioned him one, two, and on the third one I just pulled the trap door and said, "We're out of here." If I had just instructed the jury to disregard, finally gotten him under control, and the case had come back, and I had been presented with a motion for new trial, I would have had that query, did all of that affect the jury; and, you know, there's just a lot of integrity that's supposed to go with the process; and I think a trial judge should be vested with that to -- for a lot of reasons, not for -- and I don't -- I know that I've practiced long enough to have a suspicion of trial judges and had it from the very first day, but since I've been on the bench I have not met a trial judge who has denied a motion for new trial simply because they thought the right person had won or done anything else like that. Most people try to do these things based on the procedures and

processes, and I think it's a rare exception when they are result-oriented, but I know that that view is not shared sometimes by the practicing bar.

CHAIRMAN BABCOCK: Frank, and then Judge Christopher, Justice Christopher.

MS. CORTELL: I'm sorry. Can I just say one thing because I'm going to have to leave?

CHAIRMAN BABCOCK: Yeah, you may say one thing before you leave.

MS. CORTELL: Sorry. And I apologize, but I have a conflicting meeting, but Judge Peeples has agreed graciously to conclude the discussion on 302. I would suggest tabling 303 and 304 because where we have a lot more to follow with 300 and the findings rules, pick up 303, 304 at our next meeting if that's okay.

CHAIRMAN BABCOCK: Okay.

MS. CORTELL: Ask people to read those, and I completely agree with Justice Christopher's idea that any listing that we provide we should provide case annotations. I agree with that.

CHAIRMAN BABCOCK: Yeah. Okay.

MS. CORTELL: And I thank you.

CHAIRMAN BABCOCK: Hey, get out of here.

MS. CORTELL: Sorry. Thank you so much.

CHAIRMAN BABCOCK: Frank.

MR. GILSTRAP: Well, in answer to what -- the concerns Richard's raised, of course, the trial judge's discretion to grant a new trial --

CHAIRMAN BABCOCK: Richard, listen.

MR. GILSTRAP: -- is broader, is broader than reversible error. He's -- historically the trial judges have had almost unfettered discretion, and if this rule can be read to be changing that, it is really a far-reaching rule, and we need to really think about what we're doing. I mean, for example, you know, a conflict in the jury trials -- in the answer, certain kinds of conflict have always been a grounds for new trial, and you can force that on appeal, I think, but let's suppose you just read the jury charge, and we've see how the jury came in, and they got confused. It's clear they were confused, it's clear how it happened, it's clear they misunderstood, and I'm going to grant a new trial, and it's not an irreconcilable conflict. It's just obvious that they should have a new trial. Well, if we say -- if we appear to say that the ground is material and irreconcilable conflict somebody is going to say, "Well, no, it's not a material and irreconcilable conflict. You don't have the power, Judge, to grant a new trial."

The same with newly discovered evidence. You know, it was available before the trial, so it doesn't

qualify as reversible error. I mean, it was available at the time of trial, but the parties just didn't get it, but I'm going to grant it anyway. I mean, the judges have always had that power to grant new trials, and there's only been a few exceptions and now maybe a new one to that, and if we're going to change that, that's a big deal, folks.

HONORABLE SARAH DUNCAN: Well, and --

CHAIRMAN BABCOCK: Justice Christopher, and then Sarah.

HONORABLE TRACY CHRISTOPHER: Well, I still think that that's an unsettled issue, truthfully, as to whether or not there has to be reversible error before we can grant a new trial in light of the Columbia case, because I think that is still very unsettled because now we're going to have the appellate courts reviewing the reasons that the judge grants the new trial. So perhaps the judge will say, "Well, you know, I'm convinced I made four or five errors in admitting certain evidence." Well, that may or may not rise to the level of reversible error, those five errors that I made, but the question is can I grant a new trial if those five errors did not amount to reversible error.

So, I mean, I know we sit here and say, of course the trial judge has that ability, but it's never

been tested. We don't have parameters in the case law because it hadn't been reviewed, so we don't know whether is it five errors that I made, is it one tiny little error that I made. You know, we don't know where we are on it yet. It's kind of interesting because the -- over on the criminal side, now that I'm learning criminal law in my new job, which is very interesting, the state can appeal from the trial judge's granting of a new trial, and it's not clear on the criminal side whether the only reason the judge could grant a new trial is if there was reversible error. So, you know, I mean, it's -- to me I think it's still up in the air, and, you know, I think it would be very useful that we talk about it, you know, and make it as best we can in this rule, but, you know, at some point there's going to be case law, and if all a trial judge can point to is, you know, one evidentiary ruling that they're convinced that they did wrong, you know, we'll see whether the appellate court thinks that that's enough.

CHAIRMAN BABCOCK: Sarah, Skip, and then Judge Yelenosky.

HONORABLE SARAH DUNCAN: I just want to reiterate what Richard said, because I'm not sure that it's gotten through to everybody around the table. Virtually every single ground in here has a

reversible error standard in it, and do we -- do y'all, because I don't think we should have a list, but do y'all who do want a list want that list restricted to reversible error? Do you want the trial court to have to function as an appellate court and figure out whether, one, the exclusion of one piece of evidence is -- probably caused the rendition of an improper verdict? I just -- I think this both hamstrings the trial judges, at the same time it's going to cause a lot of mischief when like (5) is just -- leaps off the page at me. You know, I can say, yeah, a jury -- a juror gave a misleading answer in voir dire. Now, injury, that might be a little tougher because there's nothing in the record. Just understand the kind of list you guys are promulgating to the Court. It is a reversible error standard for a new trial.

CHAIRMAN BABCOCK: Well, (11) wouldn't be, would it? No. (11)?

HONORABLE SARAH DUNCAN: (11) is no good anymore. (11) can't survive in its current form.

MR. HATCHELL: No, I don't --

HONORABLE STEPHEN YELENOSKY: Well, we don't know.

CHAIRMAN BABCOCK: Yeah, Levi. I'm sorry, Judge. Can Levi talk?

HONORABLE LEVI BENTON: That's all right.

That's all right.

HONORABLE STEPHEN YELENOSKY: Are you asking me?

CHAIRMAN BABCOCK: Yeah.

HONORABLE STEPHEN YELENOSKY: Yeah. Well, I wasn't -- I jumped in out of turn.

HONORABLE LEVI BENTON: For the reasons expressed, I would actually -- if I were the king of the world I would make (11) No. (1) on the list to make clear, to make clear, that we are not talking about a reversible error standard, and I would simply write No. (11) as No. (1) to say "when a new trial is warranted in the interest of justice."

CHAIRMAN BABCOCK: Skip got jumped. I'm sorry.

MR. WATSON: That's okay. I'm just curious based on Judge Evans' comments that I've never thought of this, but I just wonder if the folks in the room here may be operating under different standards, because I've never really thought in terms of whether a -- that there is a difference between the judge's discretion before verdict and after verdict to bring things to a screeching halt and say, "I want a do-over here." And I'm just curious if part of the discussion here is fueled by some of us thinking that the judge should have the absolute power to

control the courtroom, the judge is the one that's seen not only the saying of "If you find this way, we win," but the effect on the juror. I mean, you're the one with the eyeballs on the scene. If that is somehow not as, shall we say, upholdable or not proper after the person's jury verdict has kicked in and one side has won and that something about the verdict itself, the jury having done its job, suddenly elevates the standard to what we're calling a reversible standard unless there is a narrow identifiable list of "in the interest of justice." I mean, this has been in my mind for sometime, and I would just be curious, do we think there's a different standard of whether in effect a mistrial can be declared post-verdict as opposed to pre-verdict?

HONORABLE DAVID EVANS: That's a discussion that a colleague had when they discovered that the jury -- one of the jury members using an iPhone was surfing the net looking for answers with regard to the matter pending before the jury, and only the court became aware of it and only inadvertently and then the judgment wasn't in, and the discussion revolved around duties to counsel to report, do I have the authority to grant a mistrial after verdict so that I can get this back on track, or do I need to wait for judgment and motion for new trial and inform the parties, and the cases, as y'all know, don't give us a

lot of guidance as to what reasons, and many of us expect we're going to start saving reasons for the mistrial, that that would be a logical extension. So, you know, having the discussion and moving this forward would be helpful in our administration. The case settled after -- the case settled after the parties were informed.

CHAIRMAN BABCOCK: Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: Yeah, well, picking up on what Judge Christopher said, we voted to do a list. Now, how do we do a list? If we don't know whether or not a judge can grant a new trial for nonreversible error, how do we write a list? If we decide a judge can grant a new trial for nonreversible error then what we're doing is writing a list of reversible error and saying, "Oh, by the way, you can do any of these things even if it's not reversible error." Seems kind of strange.

CHAIRMAN BABCOCK: Judge Peeples.

HONORABLE DAVID PEEPLES: Three things. I for one as a person who voted for the list am willing to move to reconsider that if we can't -- if we're going to do more damage with a list, you know, than good would be done, and one thing about a list is it sort of gives you the impression that a computer could do this, but I think in reality most of our decisions -- and I'll just

certainly say that my decisions as a trial judge usually, you know, if I were to lay bare my reasoning process it would be I was impressed with this, I was impressed with that, and on the other hand so-and-so, and I weigh them this way.

There is a lot of discretion involved in that if you're being realistic about your reasoning process, and I think we want that, and I would be dead set against taking that away from trial judges. I'm in favor of some kind of discretion in here to consider a lot of factors, because in any kind of trial of any length there are a lot of things that would enter into your decision here, and I think we need for judges to keep that authority, and as Richard Orsinger mentioned, we don't want to take away the threat that life -- lawyers know I can misbehave and the judge is without a handler, that's a bad, bad thing to do, and right now everybody knows the judge has a handler, which is you win, you act up and you win, I can take it away.

CHAIRMAN BABCOCK: Carl, then Justice Patterson, then Gene.

MR. HAMILTON: Well, I've had some motions for new trial granted in the interest of justice with nothing stated, but now if they are subject to review then I'm assuming that under (11), for example, there's got to

be a record, there's got to be something in the record to support what the trial judge bases his decision on, and I think (11) ought to state that, that it can't just be something like maybe a lawyer wasn't feeling well and didn't do his best. That's not going to appear in the record, and I think we ought to have a requirement that whatever the basis is it has to appear in the record.

CHAIRMAN BABCOCK: Justice Patterson.

HONORABLE JAN PATTERSON: Well, I voted in favor of the list, and I think that this discussion really supports why that's even more important, and it looks to me as though what we've done is taken the appellate gloss and moved it backwards to cabin the discretion of the trial judge. I still think it would be helpful to have the criteria and the grounds. It may be that we don't have all the grounds properly stated here, that they ought to be from the perspective of the trial stage and not of the appellate stage.

CHAIRMAN BABCOCK: Gene was next, and then Richard the Second.

MR. STORIE: You know, I'm wondering about a concept, something like this, that, for instance, taking the first part of (a) and then "on the judge's own initiative for one or more reasons as specified in an order including," which to me would do a couple of things.

One, it would take out "in the following instances," which looks more exclusive to me, and also would not use the term "ground" in (11), which I think is also kind of restrictive and looks maybe more like a standard of reversible error rather than just the judge thought something really was wrong here, and you can also say it may be one or more things. You might have five things, different evidence, you might have conduct issues. Any number of stuff, you know, could potentially go in there.

CHAIRMAN BABCOCK: Richard the Second followed by Richard the First.

MR. ORSINGER: There's a slippery slope argument that's surfacing here that --

CHAIRMAN BABCOCK: Oh, my god, I didn't even see that.

MR. ORSINGER: The slippery slope is if you, you know, first start down the road then you slip and you lose control, and the slippery slope argument which is constantly used but over my lifetime doesn't usually end up being as horrible as you thought. The argument is, is that if we articulate the grounds for a new trial too well that we're going to subject it to appellate review and, therefore, appellate courts are going to overturn trial judges' granting of new trials, and that Columbia case has helped us move along that slope, because previously there

was this little black box called "in the interest of justice," and nobody could open it and see what was in there. It was just it. You're the trial judge, you decide what justice is, it's over.

Now that you've got to articulate what the justice is, the other shoe that may fall after that is then the ground you articulate is going to be subject to appellate review, and if the appellate court doesn't agree with your sense of justice then they will set it aside and reinstate the verdict, or the judgment I should say. And that's a very interesting argument, discussion, that we should be having, and perhaps it shouldn't be decided in the rule creation stage, but I will have to say that I don't feel strongly one way or the other. I've never been a trial judge or an appellate judge, but I am a trial lawyer and an appellate lawyer, and my sense of it is, is that Texas has -- being a kind of a populous place and electing its trial judges and refusing to ban elections, wants their trial judges to be close to the people, close to the case, close to the litigants, and doesn't want the appellate system to be making those rules, those kinds of rulings, which is why we have such broad discretion for the trial court in the abuse of discretion standard.

And as David Peeples said, if a listing becomes an acceleration of us down the slippery slope

toward ultimate appellate review of those trial court decisions then I'm really uncomfortable with a rule that doesn't make it clear that the trial judge has greater discretion to grant a new trial than the court of appeals does, which has a greater discretion to grant a new trial than the Supreme Court does.

CHAIRMAN BABCOCK: Richard the First, and then Mike Hatchell.

MR. MUNZINGER: I was going to say roughly what Richard said, but not as thoroughly or clearly, but historically we gave trial judges absolutely unfettered discretion to grant a motion for new trial. That was the way I learned it in law school. He didn't have to give you his reason. He just gave you a new trial. The guy is a contributor to my campaign, I'm not going to tell you that, but that's why you get a new trial. That happens. Still. But any rule that we write, if we pretend that we're giving the trial court discretion but then list the grounds that will support it, we really are taking the discretion away. We're not leaving them with any discretion.

The appellate standard for an abuse of discretion is wide open, just like a temporary injunction, a hearing on a temporary injunction. The court has some discretion, but he can't ignore the law. He can't do

this, he can't do that. To the extent that we write a rule like this, I think that the bar is going to interpret it as being a statement of substantive law that is restricting the discretion of trial judges. I think in essence you're saying to the trial judge, "You don't have that discretion and we're going to take it away from you." Whether it's a slippery slope or otherwise, "You don't have discretion and these are the reasons why you can," and I'm not -- I don't know what the substantive law is. If someone tried to state what the substantive law is on the issue right now I don't know that we would get agreement in the room, and if we wouldn't get agreement in the room what are we doing by adopting a rule of this nature?

CHAIRMAN BABCOCK: Okay. Mike.

MR. HATCHELL: I think we may be getting a little bit ahead of ourselves --

CHAIRMAN BABCOCK: Us?

MR. HATCHELL: -- on Richard's comments and others about the effect of the trilogy of cases. I had the third of those cases, DuPont, and I think it's well to look at what the Supreme Court actually did in those cases. It did not order the trial court in any three of those cases to set aside the motion for new trial. It said, "Give us a reason," and that's the state of the law

today. Trial judges have to give the reason. There is nothing in any of those cases and it was certainly not DuPont's position that once the trial judge gives a reason then it's automatically, quote, "subject to review." The only basis for review in Texas today of a grant of a new trial is mandamus, and to date there are only two grounds. One is the trial judge didn't have plenary power to grant it, and, two, he based it on irreconcilable conflict of issues. That's the law today.

Now, whether or not once we begin to get trial courts telling us, if they actually would, that they did it because, "Well, you're my campaign manager and I can't hold against you," once they start articulating grounds we may see some limited mandamus in regard to those grounds, but that's not the certainty, and I would be very, very surprised if the list expands greatly. So let's not think that this list means that when they're articulated by the court that this is automatic appellate review. It's not.

CHAIRMAN BABCOCK: Yeah, Judge Yelenosky, and then Justice Christopher.

HONORABLE STEPHEN YELENOSKY: I don't think I agree. Earlier somebody said, well, obviously you couldn't grant a new trial because the lawyer was sick unless it's on the record. I had a lawyer come up to me

at the beginning of a trial saying he would need certain breaks. He didn't want everybody to know he was undergoing chemotherapy, blah, blah, blah, nothing on the record. Sure, you can have breaks. I advised them that, you know, he was going to have breaks but not why. At the end of that trial if he had gotten sicker, are you saying that I couldn't say, "I'm granting a new trial because although he thought that he could proceed through this trial and was healthy enough to do it, he wasn't"? I don't think we know the answer to that yet.

CHAIRMAN BABCOCK: Justice Christopher.

HONORABLE TRACY CHRISTOPHER: When we -- when a trial judge says, "I'm granting a new trial because the jury findings are against the overwhelming weight of the evidence," assuming that's the reason I've stated in my motion for new trial, I agree that it's uncertain at this point whether that's going to be reviewed and in what way is it going to be reviewed by the appellate courts, and if it's reviewed by the appellate courts, do the appellate courts have to agree with the judge that the jury finding was against the overwhelming weight of the evidence? Or is there going to be a little more discretion for the judge?

I mean, I had a situation where it was pretty clear to me that the jury cut damages 50 percent

because they found the plaintiff 50 percent at fault. I mean, we see that happen a lot. Now, if I talk to the jurors afterward, I'd be getting into their jury deliberations as to why they cut the damages, and they would tell me that, "Well, we didn't really follow that instruction. You know, the plaintiff was 50 percent at fault so we cut his damages 50 percent." Well, legally I'm not supposed to consider that evidence because, you know, under the case law and the Rules of Evidence that's, you know, off bounds, but, you know, I mean, there's a lot of question in my mind as to where we're going.

CHAIRMAN BABCOCK: Okay. Sarah, did you have your hand halfway up?

HONORABLE SARAH DUNCAN: I've had it up for quite a while, but to reiterate what Mike said, look at the motion for new trial in DuPont, and I'm not saying this about that particular motion, but just assume with me that there's a motion that states two grounds for new trial, neither of which is legally valid, both of which are legally invalid. I think there's a lot of overreading of the Columbia decision, the trilogy, that's factoring into this discussion in a really perilous way.

As much as -- there's not going to be appellate review outside of an extraordinary writ proceeding of grants of new trials unless -- unless this

committee comes up with this list, and all of the sudden it's a reversible error standard. This is kind of nutty, people. I mean, we're going from absolute total discretion to if you can't get it reversed on appeal on this ground it's not a good enough reason for a new trial.

HONORABLE JAN PATTERSON: And was that the intent of the committee?

HONORABLE SARAH DUNCAN: I'm sorry?

HONORABLE JAN PATTERSON: Was that the intent of the committee?

HONORABLE SARAH DUNCAN: That was the intent of the State Bar Rules Committee at the time, but it was a different list. It was not a reversible error standard list, and they did want to restrict the trial judge, and when we talked about this, you know, six years ago we couldn't agree on a list. We didn't like the idea, but we're going from absolute unfettered discretion to reversible error standard, which is tough, really tough.

CHAIRMAN BABCOCK: I don't know if this is within the boundaries of our debate, but maybe it is. The absolute unfettered discretion standard, it seems to me that granting a new trial is a pretty big thing. I mean, you've expended -- the parties and the jurors and the court have expended an enormous amount of time and effort to get to a verdict that now you're just going to

completely wipe out and start all over again, and from a policy standpoint, is it a good thing to have absolute unfettered discretion to make that ruling, or should there be -- should there be review of that decision, just like every other judge has review? Richard the Second.

MR. ORSINGER: In light of all this discussion, these grounds here that are listed that require reversible error are grounds that developed I think out of appeals where someone was able to get reversible -- get a reversal because the error was reversible. Now, when we're talking about the motivation or the parameters of a trial judge granting a new trial, there's apparently maybe a difference of opinion whether reversible error should be required, but assume for my comments that it's not required to have reversible error for a judge to grant a new trial. A judge reading this list might easily think that a new trial should not be granted in these rules that require reversible error unless the error is reversible; and of course, that's out of sync with the appellate rule, as Mike Hatchell has pointed out, because the denial of the motion for new trial would occur -- would be reviewable only on mandamus where the standard review is abuse of discretion, not reversible error, although sometimes you can show an abuse of discretion by showing an error, but that hadn't ever

been equated, and the abuse of discretion standard in my view is broader maybe or we might debate that, but I think abuse of discretion standard is broader than reversible error.

So I wouldn't want this listing to be used by lawyers to convince judges that their discretion is less than only reversible error because so many of these grounds say reversible error. I mean, if you have a ground that has like "injury probably resulted from," if you have two or three or four of these where none of them are conclusively there but collectively it looks like an injustice was done, you shouldn't be able to talk a trial judge out of granting a new trial, because even though there were three grounds, none of which were reversible error collectively, they led to an injustice. The trial judge ought to be free to have that power.

And I guess I -- in light of our discussion here, I think the judge should have discretion to grant a new trial. It should be reviewed on abuse of discretion standards, and the listing implies to the judge that they can only use that ground as a ground for new trial if it constitutes reversible error, and I think we need to be very careful about sending that message, and maybe the only solution is to not have a list, or maybe there's a way to write the rule that says, as someone suggested, you

can grant it on any grounds that you think is right, plus you can grant it on the following grounds.

CHAIRMAN BABCOCK: So Judge Evans grants a new trial, and he says, "I'm granting this new trial because even though the jury accepted -- obviously accepted his testimony, I thought the plaintiff was lying. So we're going to give him a new trial."

MR. ORSINGER: Well, I mean, that's an important policy question you've raised. The issue about whether the trial judge's decision should be reviewable on appeal is different from whether the trial judge ought to override the jury verdict. If you grant a mistrial before the verdict you don't know how the case is going to come out.

CHAIRMAN BABCOCK: No, Judge Evans says, "Look, I'm sitting up here and I can spot a liar, you know, just dead on perfect, and this guy was lying. There's no question about it in my mind, and in the interest of justice we need to have a new trial."

MR. ORSINGER: From a policy perspective I believe that you could reasonably argue that a jury verdict should be more impervious to being overturned after it's granted than before it's granted. In other words, before the trial judge knows the outcome of what the jury is going to do.

CHAIRMAN BABCOCK: Assuming my hypothetical is after the jury has reached its verdict --

MR. ORSINGER: Yeah. All right, so then --

CHAIRMAN BABCOCK: -- and if there's no review of his -- if it's not susceptible to review, he can do that, right? He can say, "I thought the plaintiff was lying, jury didn't, but I thought he was."

PROFESSOR ALBRIGHT: That's called insufficient evidence.

CHAIRMAN BABCOCK: So we're going to do it all over again.

MR. ORSINGER: Well, I mean, the insufficient evidence standard is a standard that applies to --

CHAIRMAN BABCOCK: It wouldn't be insufficient evidence.

HONORABLE SARAH DUNCAN: Sure.

MR. ORSINGER: -- appellate courts and not trial courts. So I think you're -- in my view you're asking a question that's a philosophical question or a jurisprudential question, which is should trial judges be able to overturn a jury verdict because they don't agree with it and that's the only reason they're doing it? It doesn't have anything to do with error, objection, or standard of review. "I don't like the way this case

turned out, I'm giving you another shot with another jury."

CHAIRMAN BABCOCK: Well, I thought the plaintiff was lying, so yeah, I don't like the way it turned out because --

MR. ORSINGER: I'll put a little comment on the record. I don't know how applicable it is now, but when I first started practicing law in Bexar County in 1975 there was a very old judge who had been on the bench since long, long time, and it was well-known that if the plaintiff got a verdict against the defendant that he would grant a new trial. It didn't matter what the amount of money was, didn't matter, you know, who the plaintiffs or who the lawyers were. It was so well-known and since you have random assignment in Bexar County you never knew until the day of trial who the trial judge was going to be.

CHAIRMAN BABCOCK: Not to mention the central docket.

MR. ORSINGER: The plaintiffs lawyers, if the statute of limitations has not run and they were assigned to that judge for the jury trial, they nonsuited and then refiled because there was no point in trying it because if they won, they would try it again; and if they won, they would try it again; and so, you know, there can

be abuses where the trial judge is so -- for whatever reason, it could be campaign contributions or it could be philosophical view of tort law. There can be abuses at the trial level, and in fact, the jury is kind of designed to protect the people from the judges, aren't they?

CHAIRMAN BABCOCK: Yeah.

MR. ORSINGER: So if the jury is designed to protect people from judges and judges can overturn jury verdicts willy nilly without any kind of limitations then the jury verdict is really no protection.

HONORABLE TOM GRAY: But there is a limitation. You can only grant two of those.

MR. ORSINGER: No, you can only grant two on -- I thought it was on the evidence.

PROFESSOR ALBRIGHT: Sufficiency of the evidence.

HONORABLE TOM GRAY: Well, that's what you're talking about.

MR. ORSINGER: I don't know. See, if it's in the interest of justice, is it -- isn't that rule against -- is based on the insufficiency of the evidence?

MR. HUGHES: It is.

MR. ORSINGER: So how many can you grant in the interest of justice?

CHAIRMAN BABCOCK: Roger and then Carl and

then Alex.

MR. HUGHES: Well, I think the real problem underlying this is for the first time we're having to think about something we've never had to think before. Before we've never had a procedural vehicle to challenge the grant of a new trial, couldn't do it by appeal, couldn't do it by mandamus. We've never had to think about it, so we've never had to square the constitutional right to trial by jury against the judge's power. It's never -- we've never had to do it, and what I think our -- one of the problems about writing a rule is ultimately the problem is constitutional. We can't write a rule for the Constitution because the state Constitution has given the power to regulate the purity of the jury to the Legislature, if my recollection is correct. So if we try to solve many of the problems we're talking about of the limits of discretion, does it require reversible error or not, then we run into a constitutional problem about whether the right to trial by jury would require some form of harm standard before the judge could vacate, and that we cannot solve by a rule.

CHAIRMAN BABCOCK: Carl, then Alex.

MR. HAMILTON: Well, we're talking about abuse of discretion, and of course, we've seen a lot of that in our county, granting motions for new trial every

time the plaintiff loses, and it costs hundreds of thousands of dollars to retry these cases, and I think there has to be some brakes put on these judges. I mean, even though it may take some discretion away from the good honest judges that don't do that, that's just the nature of the thing to protect, as Richard says, the integrity of the jury trials. We get verdicts, and then they get set aside, we try them again, and this business about can only grant it twice, that's really not very helpful because once is enough.

CHAIRMAN BABCOCK: You have two two-week jury trials, and a lot of effort goes into that.

MR. HAMILTON: Yeah. So I think we have to have some review of it so that if it's improvidently granted then the court ought to reverse it, uphold the jury verdict.

CHAIRMAN BABCOCK: Alex.

PROFESSOR ALBRIGHT: Well, I think we've gone far afield of what we've started with. I think we started with an attempt to restate current law.

CHAIRMAN BABCOCK: And we started with Dorsaneo's dog yesterday.

PROFESSOR ALBRIGHT: Okay. So --

CHAIRMAN BABCOCK: Smarter than some judge.

PROFESSOR ALBRIGHT: I'm just talking about

today, so and if restating the law is one thing. Now we're talking about making huge changes in how we deal with trial court discretion and motion for new trial, and there is a sense in some of these statements that it is absurd to give trial judges discretion in granting motions for new trial for anything but reversible error, and I just want to take issue with that, because in the Federal system even, as I recall, trial judges are given discretion to grant motions for new trial, and they can be reviewed after that new trial on that, but it's -- courts of appeals can grant motions for -- can reverse and remand for their power is more limited than the trial court's power.

So it is not absurd in our system of justice to let trial judges have discretion to grant new trials, and I think our system has been built on the idea that trial judges know more about what was going on in the trial than a court of appeals or the Supreme Court can know about it. All that the recent Supreme Court opinions did was say Texas was so far in allowing unfettered discretion that we want to make trial judges at least say why they granted motions for new trial, and perhaps there could be some review of that by mandamus, which is an extraordinary remedy which is still not the kind of review that there is in the Federal system where you can get

review after the second judgment. So I'm just not sure -- it seems like we're talking about a lot of huge changes that I'm not sure we have any direction to go there.

CHAIRMAN BABCOCK: Judge Evans, Justice Gaultney, and Sarah.

HONORABLE DAVID EVANS: I don't sense from trial judges that I've spoken to any problem with complying with giving reasons for new trials and that that's not -- and that that's appropriate, and then, you know, we don't know what the standard will be ultimately that the Court comes up with or that the rules come up with. One thing I wanted to bring up is that this says I may grant a new trial and then these are reversible error standards --

HONORABLE STEPHEN YELENOSKY: Must.

HONORABLE DAVID EVANS: -- and so it's kind of odd to me that I may grant it if it's actually reversible. It seems like it ought to be phrased that I must grant it, and I wanted to point out to the appellate lawyers, many of these on appeal would lead to rendition and not remand and new trial. Do you really want me to have the authority to grant a new trial when you stick it in my -- in front of me or put it before my clock for operational law -- I'm sorry, I can't lose an agenda, but and then retry the case instead of getting it rendered?

I'm not too sure there's a lot of unintended consequences.

Now, if you came up with a list where I must grant a new trial, that would be a great aid to a trial judge, that it was just something you had to do and then there were other discretionary areas that were up to you, that would be great clarification from the Court of the direction we're going. But you'd have to think about whether you want -- you're looking for rendition, remand, or affirmation, rendition or remand. So I just think you ought to look at it from that standpoint. There's one here on the charge that I thought would -- an incorrect charge submitted over an objection would probably be a rendition issue and not a remand, and you're giving me the right to just pop it off. Now, I have it right now because I've got unfettered discretion to take care of my friends who contribute money. I'll send out a little list later on.

(Laughter)

CHAIRMAN BABCOCK: Justice Gaultney, then Sarah.

HONORABLE JAN PATTERSON: The record should reflect laughter after that.

CHAIRMAN BABCOCK: Dee Dee always gets laughter.

HONORABLE JAN PATTERSON: Okay.

CHAIRMAN BABCOCK: Justice Gaultney.

HONORABLE DAVID GAULTNEY: I just wanted to make a brief comment, and that is that you don't have to accept the notion that the trial court currently has absolute unfettered discretion and still be opposed to a rule which unduly restricts that discretion. I mean, this -- there is a discretion perhaps granting a new trial, which can -- if you state in the order under Columbia, that is no one in this room would accept as a reason for granting a new trial. It might be an abuse of discretion, but you could have that view, so it's not unfettered, and still have the view that this rule with reversible error standard will restrict, will restrict the ability of a judge to grant a motion for new trial.

CHAIRMAN BABCOCK: Sarah.

HONORABLE SARAH DUNCAN: I just want to respond to something Carl said earlier and what you suggested, Mr. Chair. One, I don't believe it to remotely be the law that whatever the reason is for granting a new trial has to appear on the record. In fact, I think one of the reasons we give the trial judges so much discretion to grant new trials is because things can happen off the record that might very well warrant a new trial, and that's outside the purview of an appellate court.

And, number two, I have not meant this

morning to remotely suggest what the Chair suggested. I read Columbia and the whole trilogy very narrowly. I don't think there are many abuses of the power to grant a new trial, and we're going to really mess things up if we overreact to a few abuses in a few parts of the state in a few cases.

CHAIRMAN BABCOCK: Richard the First, and then Kent, Justice Sullivan.

MR. MUNZINGER: I just want to say everybody needs to think about what Judge Evans just said. If some of these reasons would require rendition but you're telling the trial judge he can give a new trial, that's logically inconsistent.

CHAIRMAN BABCOCK: Yeah.

MR. MUNZINGER: It's standing the law on its head. Is the Supreme Court going to do that? Does the Supreme Court want to start that kind of confusion? Does the Supreme Court want to make itself open to that kind of criticism? That's a very salient point he just made against promulgating a list of this nature.

CHAIRMAN BABCOCK: Justice Sullivan.

HONORABLE KENT SULLIVAN: I was just reacting to a couple of comments made earlier that either explicitly or implicitly talk about reading Columbia broadly or narrowly. It's been a while since I've read

it, but I'm not sure on this specific issue how you read it broadly or narrowly, because I don't think it says anything. I mean, part of this discussion I think is based on the fact that there really aren't prospective guiding principles for lawyers, trial judges, or appellate judges on what the implication is post-Columbia. There are people who have expressed policy preferences and philosophical differences. Some of them are implicit in the drafting of these rules, and it's probably impossible to avoid that, given that we don't know whether Mike Hatchell is right and, in fact, this is -- will mean nothing more than what is sort of currently on the books or whether other people are right, some of the Chair's comments, some of us suggesting that what they would like and that perhaps what this heralds is some new era of -- you know, and much lower bar with respect to reviewing decisions made by the trial court and much more intervention or potential intervention by appellate courts. We don't know, and I think it makes this discussion problematic and a little bit inefficient because we're all guessing.

CHAIRMAN BABCOCK: Yep. Good point. Mike.

MR. HATCHELL: By the way, I agree with that. That's very thoughtful, and I want to echo what Richard Munzinger said earlier. Look at (4). "When the

trial judge has made an error of law that probably caused the rendition of an improper judgment." Well, okay, what if the error of law is submitting the basic liability question. So we're -- it looks to me like we're institutionalizing rendition grounds as a basis for a new trial and then does that coincidentally tell appellate courts that, "Well, I can look at Rule 320. You know, I should render judgment here, but let's just send it back" because that's a judgment the trial court really shouldn't have made.

CHAIRMAN BABCOCK: Yeah. Yeah.

MR. HATCHELL: You've got to be real careful with this list if we're going the list route, and I think this discussion is demonstrating that the list is indeed a slippery slope.

CHAIRMAN BABCOCK: Yeah. Well, with that, Richard, we're going to shift gears after our morning break of only 10 minutes, and then we're going to go on to Rule 18a and 18b because we need to talk about that this morning, and we're obviously coming back on these rules, so we'll defer that for the next session, and we'll be in recess for about 10 minutes.

(Recess from 10:42 a.m. to 10:56 a.m.)

CHAIRMAN BABCOCK: Judge Peeples and Richard Orsinger will take us hopefully for the last time through

18a and 18b.

MR. ORSINGER: Well, that's probably too much to hope for b, but for a certainly.

CHAIRMAN BABCOCK: Okay, for a.

MR. ORSINGER: Judge Peeples is going to lead us through a.

CHAIRMAN BABCOCK: Let's go through a then.

HONORABLE DAVID PEEPLES: What I'd like to do is ask you to have in your hands the one-page front and back version which has a strikeout and redline or italics. What I did, I gave you also a clean copy that has some comments that explains some things, but I think it's most helpful to go through the strikeout version, and I thank Carl Hamilton for sending a rewrite, and I've checked with him, it's got just one substantive change, and several wording suggestions, and I want to talk about the substantive change that he recommends when we get there, and as far as wording changes I just think we ought to leave that to the Supreme Court if they want to do something on this. If they think the wording needs to be made better, that's fine with me because I have not attempted to word edit. I just thought we shouldn't spend our time on that.

So on the one-page front and back version, right in the middle of that first big paragraph, I took

out the business about favor -- deep-seated favoritism and so forth because the consensus that I think was reached the last time was that that language causes more problems than it solves, and so I took it out, and I added the word "alone."

By the way, I reread the Liteky case, that's the U.S. Supreme Court case where that language came from. They were construing a couple of Federal statutes, and there's not anything in that opinion that is constitutional law. It's all statutory construction. It's interesting, but it is not a constitutional holding binding on us, and so my thought is that we ought to say that about rulings alone can't be the basis, but as is stated in a comment, if you plead a case impartiality might reasonably be questioned and you're entitled to a hearing the judge can consider your evidence about rulings. It's just that the rulings alone don't get you the right to a hearing. And the comment, I also make the distinction that rulings are different from statements the judge may make. I mean, if somebody makes unguided -- inadvisable statements that are -- you know, sound prejudicial and so forth, that's different from rulings. All this says is if the only thing you're complaining about is this judge rules against me, that's not enough by itself to entitle you to a full-fledged hearing.

And the next section I changed, you know, you can see, send copy -- we want to deliver a copy to the judge's office and so forth. I think (c), business days and so forth, that's pretty self-explanatory, and then down at the end of section (c) I rewrote that because several people did not like the word -- the phrase "The judge may disregard a motion during trial." I had trouble with the concept of when a trial has begun. I settled with the language "when a case has been called for trial." We may need to talk about that.

Over on the back Carl Hamilton suggests that on line 53 where I say "the judge must hear it as soon as practicable and may hear it immediately," Carl wants to take out the "may hear it immediately" and give everybody a right to three days notice, and I respect -- as I told Carl, I respectfully disagree with that. I think in the vast majority of these cases I want to give the -- either the presiding judge or the assigned judge the authority to have a quick hearing on it because most of the time that's going to be needed, and I just think we need to trust our judges if there's a complicated motion and, you know, opposing statements and so forth and the hearing is needed, just trust the judge to say, "I'll give you some time on that," but to give everybody a right to three days notice, that's a guaranteed three-day continuance, and I

think it would be unwise to do it.

I rewrote sub (4), and on the other copy -- I put a couple of versions, but this is the one I think is probably better. I think we need to say in this rule that a presiding judge who is hearing a recusal motion, not only is there no objection under Chapter 74, but you can't recuse a presiding judge from hearing the recusal motion, and if we want to put the Chief Justice in here and flag that office for pro se litigants and so forth and invite them to file their -- so be it, but I was impressed with Kennon's remark one or two meetings ago that that probably wouldn't be a good thing to do, and then I did some rewriting on sanctions.

The main thing is -- there was substantial opinion expressed last time that if somebody has filed a frivolous motion and the judge who hears the motion, you know, concludes it was frivolous, we ought to give that judge the discretion to say, "You can't file any more recusal motions in this case without my prior written approval." Or if we want to say two frivolous motions I guess we could do that, but I think that would put some pretty sharp teeth in the sanctions part of this proposal. So that's really not very many changes that attempt to implement the discussion from the last time and I --

CHAIRMAN BABCOCK: Okay. Justice Patterson

has got a comment.

HONORABLE JAN PATTERSON: David, since it is hard to define when a trial may begin or what is a trial, I wonder -- and there are some proceedings that are so substantial that you may want to treat them as a trial or with the same seriousness, I wonder if you could in the paragraph at line 36, "notwithstanding the other provisions" part say when a proceeding -- "when a motion is made after a proceeding has begun" so that it's broad as -- because I could imagine a motion for a class certification or summary judgment motions or any attempt to stall an immediate motion might be treated in the same way and somehow maybe consider broadening that to not just be the trial.

HONORABLE DAVID PEEPLES: Jan, the reason I changed that is substantial remarks were made last time that we ought to limit it to trials and not hearings, and that's the reason I took out the words "or hearing." I'm open to suggestion on "call for trial," "trial has begun." I just had trouble putting that into words.

HONORABLE JAN PATTERSON: Well, I remember the discussion, and I think my recollection was that we just didn't want to have this paragraph trump the rule so that the theory was to be able to proceed with whatever it is, but to allow it to be presented, but if we can define

when trial begins, that may do it.

HONORABLE STEPHEN YELENOSKY: Well, I remember it as you did, Judge Peeples, that we wanted hearings to stop but not trials. Isn't that what we said?

HONORABLE DAVID PEEPLES: I thought that was the -- if not consensus, more people said that than opposed it, let's limit this to trials and not mere hearings because there's less harm done when a hearing is frozen --

CHAIRMAN BABCOCK: Right.

HONORABLE DAVID PEEPLES: -- by motions and other stuff, even though some hearings are big. Injunction hearings, for example.

CHAIRMAN BABCOCK: Yeah. Carl.

MR. HAMILTON: David, I did have another substantive change I didn't point out on rule -- on line 13. My suggestion was that "The respondent judge's rulings alone may not be a basis for a recusal motion, but may be evidence of a personal bias or prejudice concerning the subject matter or a party."

HONORABLE DAVID PEEPLES: Yeah. Thanks, Carl, and the reason I didn't put that in, I've got that in a comment. I think we need to remember that pro ses read these, and if they're going to file a motion and to flag for them that they may be able to just talk about

rulings and get a hearing is just not a wise thing to do. I was impressed that something that Harvey Brown showed or said last time, which was, you know, if a lawyer wants to advise a client "We don't want to file this thing," it's nice to have some language in the rule, and if the language -- to point to, and if the language in the rule gives the client something to argue back with, that might not be a good thing. So that's the reason that I took -- that I sort of demoted that concept to a comment rather than put it in the black letter of the proposal here. That was my thinking.

CHAIRMAN BABCOCK: Yeah, Lonny.

PROFESSOR HOFFMAN: On the back page, line 70, I don't remember if we've talked about this before, but I don't like the word "frivolous," and it doesn't show up anywhere in Rule 13, in fact, so the word I think you may have meant was "groundless," which both does show up and is defined in Rule 13.

HONORABLE DAVID PEEPLES: That change is fine with me if everybody else wants to do it.

CHAIRMAN BABCOCK: Anybody?

MR. MUNZINGER: Change "frivolous" to what?

PROFESSOR HOFFMAN: "Groundless."

CHAIRMAN BABCOCK: "Groundless" instead of "frivolous."

CHAIRMAN BABCOCK: Justice Sullivan.

HONORABLE KENT SULLIVAN: I want to take one more run at tilting at a windmill that I tilted at last time; and that is that what I have heard based on my limited personal experience with this sort of thing is that the concern is about disruption, that there is some misplaced incentive here in the rule that people can file motions, when we're talking about frivolous or groundless motions, that the concern is, is that it causes everything to grind to a halt and that that's not a good thing. And so it seems to me in terms of looking at the model, the question is what should be the rule and what should be the exception, and I'm not sure that I understand why we should not simply say that nothing stops when you file a recusal motion. If you have circumstances that you think are truly irreparable, you could file an emergency motion and ask for a presiding judge, for example, to take action, and presumably he or she would.

I don't know why we want the model to be that merely by filing a motion you cause this train wreck, which disproportionately seems to be the problem that we're worried about. Why not simply remove it entirely and put the burden on the movant if -- because most everything else, suppose the hearing, this hypothetical hearing, goes forward and the judge who ultimately should

be removed, recused, makes an erroneous ruling, well, it seems to me 99 times out of a hundred you can simply go back and repair that unless there is truly something that's of an emergency nature or irreparable, in which case you could relatively easily state that to the presiding judge or whoever is going to have that authority, and they could pick up the phone, you know, take appropriate action, and bring the proceedings to a halt in those few cases where it was warranted.

HONORABLE DAVID PEEPLES: He's talking about the language that starts on line 25, and this is a serious suggestion that we probably ought to talk about a little bit. You made it last time, and it's --

HONORABLE KENT SULLIVAN: One other point I would make that concerns me a little bit, you referenced the language on line 37, indicating when, quote, "a case has been called for trial," close quote. That will simply change -- while it's I think something of an improvement certainly, it will simply change the grounds for debate, because that will be the next point of argument, "You did call it for trial." "No, I didn't," and "well, you know" -- and there will be that level of debate. Why not simply end the debate and simply say the rule is nothing stops absent, you know -- obviously the trial judge could on his or her own motion simply say, "This is a serious motion.

I'm concerned about it. I am going to stay these proceedings until we hear from the presiding judge or whatever ruling is made." That would always be available to a fair-minded judge, but otherwise I don't think it's that difficult to put this burden on the movant and simply say, "Tell us why things should immediately be brought to a halt and we should otherwise cause the expense, the delay, the problem that that will perhaps cause."

CHAIRMAN BABCOCK: R. H.

MR. WALLACE: I think the reason that -- or that I would prefer to see things brought to a halt is that in my all years of experience I've only filed one motion to recuse a judge. We learned about some facts about one day prior to a hearing that we were about to get hosed badly. We filed the motion, and it did stop everything, and at least what I have seen in Tarrant County, you get an immediate hearing. As soon as the presiding judge can find a judge to hear your motion or hear whoever's motion it is, you go have it, so there's no significant delay, but if that trial judge had been able to go forward with that hearing, there's no question in my mind what would have happened.

It may have gotten set aside later, but if a judge has done something for which there really is legitimate cause to recuse them or at least arguable cause

to recuse them, I think the trial lawyer would feel much more comfortable knowing that that judge doesn't have any power to do anything else until another judge decides whether or not there's a legitimate grounds for recusal. So I would -- I agree with I think there ought to be a provision that the matter can be heard immediately, you don't have to wait three days, but I also think that it ought to -- at least as to the -- for the judge who is hearing the case, they ought to stop, that they should no longer have any authority to do anything.

CHAIRMAN BABCOCK: Justice Patterson.

HONORABLE JAN PATTERSON: I agree in theory, Judge, with the model, but what this does is it incentivizes immediate action, and there is a -- I hesitate to call it a trend, but there are numbers of instances across the state where judges don't deliver them immediately to the presiding judge, where there is some sitting on those motions, and so this provides an incentive to get it immediately decided, but my question, Judge Peeples, is how often do people try to recuse the presiding judge? Is that a common --

HONORABLE DAVID PEEPLES: It's not very common. But the people who do it are really trying to gum up the works. But statistically it does not happen often.

HONORABLE JAN PATTERSON: Have we had any

instances where a presiding judge has been recused?

HONORABLE DAVID PEEPLES: I can't give you any. I voluntary recused on a matter that I had mediated the case, and I discovered it, and so I just assigned somebody else.

HONORABLE JAN PATTERSON: So that's available, and is that a common practice?

HONORABLE DAVID PEEPLES: No, it -- no.

HONORABLE JAN PATTERSON: Okay.

HONORABLE STEPHEN YELENOSKY: There's a case in the Supreme Court this week.

CHAIRMAN BABCOCK: Justice Gray.

HONORABLE TOM GRAY: Mine was kind of a follow-up on that, and it's because I probably don't know enough about how the presiding judges are selected. Are they all retired judges, and do they not have their own benches, and why -- as I read this and the exception there on the presiding judge, if a -- if it's a case assigned to him or her, how does that recusal motion when filed against the presiding judge in their court get dealt with?

HONORABLE DAVID PEEPLES: Yeah, two questions. The presiding judges are roughly -- it's nine. It's five and four, retired and active, and I can't remember which way it is, roughly half and half. On line 59, "Presiding judge who hears a recusal motion," I mean,

this is meant to immunize a presiding judge from being recused on the motion to recuse. You're saying if he's the --

HONORABLE TOM GRAY: Target, because he or she is the assigned judge to that matter.

HONORABLE DAVID PEEPLES: He certainly shouldn't hear his own recusal motion. I mean when he's the subject of the motion. Whether that's worth drafting for is a different matter, but I think the language of this does not catch that.

CHAIRMAN BABCOCK: Alex. Sorry.

HONORABLE NATHAN HECHT: Explain that again.

HONORABLE DAVID PEEPLES: Well, let's say I'm an active judge and there's a case in my court and somebody files a motion to recuse me from hearing that case. I shouldn't hear the motion to recuse me. This language technically would say I can't be recused from hearing the motion in my own case. That's what you're saying.

HONORABLE TOM GRAY: Yeah. And mechanically how does the presiding judge in that situation who is just sort of fortuitously also the presiding judge for that case, for that recusal, where does that judge send the motion?

HONORABLE DAVID PEEPLES: He faxes and

telephones to the counsel at the Supreme Court and Chief Justice Jefferson would assign somebody to hear it.

HONORABLE JAN PATTERSON: Isn't that cured with just a little "who hears a recusal motion against another judge"? I mean, can't you solve that --

HONORABLE DAVID PEEPLES: If y'all think that's worth drafting for, that's a pretty easy fix. We could do a comment or do black letter language. What do you think? I had not thought about that.

PROFESSOR HOFFMAN: What line are you on?

HONORABLE DAVID PEEPLES: It would be on line 59.

HONORABLE TOM GRAY: I think a comment would do it myself.

CHAIRMAN BABCOCK: Alex has had her hand up for a while. Then Carl.

PROFESSOR ALBRIGHT: Mine's on a different issue that was brought up before if y'all want to finish dealing with this one.

CHAIRMAN BABCOCK: Anybody got something on this?

HONORABLE STEPHEN YELENOSKY: Yes.

CHAIRMAN BABCOCK: Carl.

MR. HAMILTON: One of my suggested changes goes down to (g). In the current rules it says, "The

Chief Justice of the Supreme Court may also appoint and assign judges in conformity with this rule and pursuant to statute," but there's no vehicle for getting anything to him, so I suggested in my draft that if in the opinion of the presiding judge good cause exists for him not to hear the motion, such as if he got a motion for recusal --

CHAIRMAN BABCOCK: Uh-huh.

MR. HAMILTON: -- then he shall refer the matter to the Chief Justice of the Supreme Court, who can hear it or refer the matter to another judge. Because the current rule doesn't have a vehicle for getting something before the Chief Justice.

HONORABLE STEPHEN YELENOSKY: But it should be more than good cause. Line 24 is where essentially you have a situation -- we don't address the situation where the presiding judge is also the respondent judge, and that starts on line 24, and it wouldn't be a good cause. It would be when the respondent judge is the presiding judge what happens. And it would be automatic because it isn't a question of good cause. It's necessarily the case that when the respondent is the presiding judge it has to go to somebody else.

HONORABLE TOM GRAY: And if there was a way, I would actually propose that it go to another presiding judge rather than bothering the Chief Justice with it

because it's just a regular recusal motion at that point that needs to be heard.

HONORABLE JAN PATTERSON: Yes. Yes.

HONORABLE LEVI BENTON: Why not the chief justice of the court of appeals in which that district court sits rather than another --

HONORABLE TOM GRAY: Because we don't have the experience of dealing with these, and we may not be able to be immediately available to assign a district judge closer to the action that needs to decide it.

CHAIRMAN BABCOCK: Okay. Alex, did you have a different point?

PROFESSOR ALBRIGHT: Yeah. Mine was on (f), line 69 or 70 where Lonny said "frivolous" maybe should be "groundless."

CHAIRMAN BABCOCK: Right.

PROFESSOR ALBRIGHT: Rule 13 requires more than it just being groundless, so are you intending to say that a motion to recuse that violates Rule 13 should be dealt with this way, or are you saying if it's just -- a groundless motion could mean that it's a loser, right?

HONORABLE JAN PATTERSON: Without merit.

PROFESSOR ALBRIGHT: Yeah, just without -- and so where Rule 13 also requires that it be filed in bad faith or something. That's not the words. I don't have

the rule in front of me.

HONORABLE DAVID PEEPLES: It ought to be worse than just a loser to get you a sanction.

PROFESSOR ALBRIGHT: So it may be that you just want to refer to Rule 13, if it determines that it violates Rule 13.

HONORABLE STEPHEN YELENOSKY: But then it's followed by an "or" which completely eviscerates that.

PROFESSOR ALBRIGHT: Right. So --

HONORABLE STEPHEN YELENOSKY: Because it says "or was brought for delay and without sufficient cause," so whatever the Rule 13 standard is, that's less.

HONORABLE DAVID PEEPLES: This is easier to meet delay than without sufficient cause. You're right.

PROFESSOR ALBRIGHT: Or take it -- we need to figure out what standard you're wanting to apply here.

HONORABLE STEPHEN YELENOSKY: Well, there's no point in referring to a Rule 13 standard that's higher if you're going to have a disjunctive sentence that then applies a lower standard.

PROFESSOR ALBRIGHT: Right.

HONORABLE DAVID PEEPLES: Well, that raises the question of how bad should it be in order to justify sanctions.

PROFESSOR ALBRIGHT: Does anybody have a

rule book? What does Rule 13 --

MR. HAMILTON: Why not just leave that out, leave it "brought for delay and without sufficient cause"?

PROFESSOR ALBRIGHT: Okay, let's see. It's "not groundless and brought in bad faith or groundless and brought for the purpose of a harassment" is Rule 13. Then there's also Chapter 10 that has a different standard.

HONORABLE STEPHEN YELENOSKY: Well, the evil we want to balance against is solely brought for delay, isn't it? I mean, if it's solely brought for delay, bring everything to a halt, that should be enough to sanction them, shouldn't it?

HONORABLE DAVID PEEPLES: Well, the word "solely" is a limiting modifier.

PROFESSOR ALBRIGHT: So maybe if you mean that it was -- if the -- it seems like Rule 13 gives you the power to sanction if it violates Rule 13 because you have a pleading or other paper that was signed in violation of Rule 13, but I think what you also want to be able to sanction these motions if they were brought for delay and without sufficient cause. So that is -- you have to satisfy both of those requirements, and that would be in addition to -- those would let you sanction some motions that you maybe couldn't sanction under Rule 13, so maybe the reference to Rule 13 needs to be left off.

HONORABLE DAVID PEEPLES: Let me say I think Judge Yelenosky makes a good point that if you've got the "was brought for delay and without sufficient cause," that's an easier standard to meet than Rule 13; therefore, why have the rule reference to Rule 13. I'm persuaded by that.

HONORABLE STEPHEN YELENOSKY: And that's current Rule 18a. That's current Rule 18a, "for the purpose of delay," "solely for the purpose of delay and without sufficient cause."

HONORABLE DAVID PEEPLES: And Alex says if it violates Rule 13 and you've already got that anyway, so why not take out the first half there on line 70 and just say "if the judge determines that it was brought for delay and without sufficient cause."

PROFESSOR ALBRIGHT: Yeah.

HONORABLE DAVID PEEPLES: Is that good enough for everybody?

HONORABLE STEPHEN YELENOSKY: The current rule is "solely for the purpose of delay."

HONORABLE DAVID PEEPLES: Yes.

HONORABLE STEPHEN YELENOSKY: So you would put the "solely" in?

HONORABLE DAVID PEEPLES: I don't think it ought to be --

HONORABLE STEPHEN YELENOSKY: Okay.

HONORABLE DAVID PEEPLES: I think "solely" should not be in there.

HONORABLE STEPHEN YELENOSKY: All right.

CHAIRMAN BABCOCK: What is "without sufficient cause"? What does that mean?

HONORABLE DAVID PEEPLES: A chancellor's foot.

MR. BOYD: It's groundless.

CHAIRMAN BABCOCK: Well, I mean, it sounds like it gives discretion to the court to say, you know, "You lost and, you know, there was some delay involved in here, and so I'm going to sanction you," and is that what we're intending?

PROFESSOR ALBRIGHT: This clearly gives lots of discretion to the judge --

HONORABLE DAVID PEEPLES: Yeah, it does.

PROFESSOR ALBRIGHT: -- to sanction.

HONORABLE DAVID PEEPLES: Well, do you want to say something a little stronger, like "substantially unjustified" or something like that?

PROFESSOR ALBRIGHT: What is the definition of "groundless" in Rule 13?

HONORABLE TOM GRAY: It means, "No basis in law or fact and not warranted by good faith argument for

the extension, modification, or reversal of existing law."

HONORABLE DAVID PEEPLES: That doesn't fit.

CHAIRMAN BABCOCK: Yeah, Jeff.

MR. BOYD: If there were no subsection (f) in this rule and a party or a lawyer filed a motion to recuse that was in violation of Rule 13, you could award sanctions, right?

CHAIRMAN BABCOCK: Sure.

MR. BOYD: Under Rule 13.

CHAIRMAN BABCOCK: Or Chapter 10, too.

MR. BOYD: Or Chapter 10. So I'm wondering do we even need subsection (f) in here, and I think Judge Peeples' answer is "yes" because it's so important in this context.

HONORABLE STEPHEN YELENOSKY: Harvey Brown needs to be able to show his client section (f).

MR. BOYD: Yeah, but then the question is but do we really want to create a different standard for sanctioning parties and lawyers that applies only in the contest of recusal motions, or do we instead just want to make some reference that sanctions may be awarded if a motion is brought in violation of Rule 13 and Chapter 10 and let those standards be what govern?

CHAIRMAN BABCOCK: Roger.

MR. HUGHES: Well, I don't have the rule book in front of me, but I think an important part of subsection (f) is not just to mimic Rule 13, but to add that an injunction against filing further recusal motions, and I'm not sure that's a specific sanction available under Rule 13 or Chapter 10. So I think that's a valuable feature to put in the rule so that that will at least be an arrow in the quiver of a judge who finds we have a serial offender as it were.

MR. BOYD: Yeah, but that's the remedy, not the basis.

HONORABLE STEPHEN YELENOSKY: Right.

MR. BOYD: And I guess what I'm saying is you change line 70 or 69 and 70 to say the basis for finding that sanctions are appropriate would be the same standard we already have under 13 and Chapter 10.

PROFESSOR ALBRIGHT: I have Chapter 10 here if y'all want to know. It says improper -- "A pleading or motion," so this would be a motion, "is not being presented for any improper purpose, including to harass or cause unnecessary delay or needless increase in the cost of litigation."

CHAIRMAN BABCOCK: Alex, can you look up, there is a serial recusal sanction statute.

HONORABLE NATHAN HECHT: Tertiary.

CHAIRMAN BABCOCK: Tertiary.

PROFESSOR ALBRIGHT: Oh, the tertiary.

HONORABLE JAN PATTERSON: I do like the word "unnecessary for delay," by the way.

HONORABLE STEPHEN YELENOSKY: Civil Practice and Remedies Code.

HONORABLE NATHAN HECHT: Well, there's two of them.

HONORABLE STEPHEN YELENOSKY: Yeah. That was before the Supreme Court this week.

HONORABLE NATHAN HECHT: Yeah.

PROFESSOR ALBRIGHT: Okay, tertiary. Okay, "A judge hearing a tertiary recusal motion against another judge who denies the motion shall award reasonable and necessary attorney's fees and costs to the party opposing the motion. The party making the motion and the attorney for the party are jointly and severally liable for the award of fees and costs." And then it says when they have to be paid.

MR. BOYD: But tertiary is a third or subsequent.

PROFESSOR ALBRIGHT: "A third or subsequent motion for recusal or disqualification filed against a district court or statutory county court judge by the same party in a case."

CHAIRMAN BABCOCK: And as we pointed out in prior meetings, there are all sorts of problems with that statute in counties where there's a central docket.

HONORABLE STEPHEN YELENOSKY: Depending on whether "a" or "any" means same judge.

MS. BARON: Yes.

HONORABLE STEPHEN YELENOSKY: Before the court.

CHAIRMAN BABCOCK: Right.

HONORABLE STEPHEN YELENOSKY: Well, on this point, the current rule, Jeff, says "solely for the purpose of delay and without sufficient cause," so do you think now the standard is too low, because that's a lower standard than 13?

MR. BOYD: If you took out the reference to 13 and went -- and left in only "solely for the purpose."

HONORABLE STEPHEN YELENOSKY: Well, that's the current rule, and you're suggesting that basically the current rule creates a different standard than 13, and I'm saying has that been a problem?

MR. BOYD: Not that I'm aware of, although it does seem like that standard is similar to -- is not very different from Chapter 10 standard.

PROFESSOR ALBRIGHT: So it seems like what we're doing is saying if you violate Chapter 13 or Chapter

10, court can impose sanctions, which include reasonable attorney's fees; and the main thing is to add this injunction, but -- and then that tertiary motion, so if they filed a third one there's -- and it's denied, it's "the court shall award attorney's fees."

HONORABLE STEPHEN YELENOSKY: But, but -- yeah. So that doesn't have a standard. I mean, that's automatic.

PROFESSOR ALBRIGHT: Right.

HONORABLE STEPHEN YELENOSKY: And so it's not going to be very helpful if we're trying to put in a standard that's either like the current rule or Rule 13 or Chapter 10.

PROFESSOR ALBRIGHT: But that is an automatic -- if this is a third motion, it's automatic sanctions.

MR. BOYD: It's kind of a groundless standard. I mean, if it's denied a third time.

HONORABLE STEPHEN YELENOSKY: Right. And so why are we looking at the tertiary? It doesn't help us for what we're trying to do.

HONORABLE TOM GRAY: Because Justice Hecht asked us to.

HONORABLE STEPHEN YELENOSKY: Oh. I thought that was Chip.

CHAIRMAN BABCOCK: I merely pointed out there was such a statute. The thing about Rule 13 is that sanctions are tied to Rule 215, and Rule 215 are all sanctions for discovery abuses, which this wouldn't easily fit into, I wouldn't think.

HONORABLE STEPHEN YELENOSKY: Can we just use the groundless definition in 13 and the remedies that we want? If not, either the current rule or the groundless definition in 13 along with the remedy that includes injunction against further recusal without the presiding judge, if that's the remedy we want.

PROFESSOR ALBRIGHT: You could say if it violates Chapter 10 or Rule 13 then the court can impose these sanctions.

HONORABLE DAVID PEEPLES: Would you-all leave in the language about "was brought for delay without sufficient cause"? I think that's pretty important. That's one word different from the existing rule.

PROFESSOR ALBRIGHT: But isn't it your -- isn't that the same as Chapter 10?

HONORABLE DAVID PEEPLES: I'm just looking at existing present Rule 18a, sub (h), if there's a finding that the motion was brought solely for the purpose of delay and without sufficient cause you can bring sanctions.

PROFESSOR ALBRIGHT: But it was written before Chapter 10 was passed. Okay, so it says "presented for any improper purpose, including to harass or to cause unnecessary delay or needless increase in the cost of litigation." That gets what you want, doesn't it?

HONORABLE STEPHEN YELENOSKY: He wants a -- an easier standard than me if he wants the current rule, right?

HONORABLE DAVID PEEPLES: Well, I think there's something to be said for a judge to be able to open up the book and find it all right there on the page and not have to cross-reference.

HONORABLE JAN PATTERSON: Don't you either need the word "solely for delay" or "for unnecessary delay," either, instead of just "for delay"?

HONORABLE DAVID PEEPLES: Maybe drop "solely" and put "unnecessary" before "delay." I can go with that.

PROFESSOR ALBRIGHT: "To cause unnecessary delay" comes from Chapter 10.

HONORABLE STEPHEN YELENOSKY: Well, I mean, if it's a -- if it's a groundless motion, any delay -- or a frivolous motion that violates 10 and 13, any delay is unnecessary. I don't know what that really adds.

PROFESSOR ALBRIGHT: Well, even if it's a --

if it's a --

MR. ORSINGER: Well, can I comment? What if it has a ground but it was calculatedly filed in such a way as to cause a delay? In other words, you knew about it a month before trial, but you waited until the last second so you could get yourself a continuance. Should the judge be able to say, "I think you've gamed the system on this one. I'm going to make you pay for the cost of delay"?

HONORABLE STEPHEN YELENOSKY: Is there a problem with what -- I mean, the sanction language we have now?

HONORABLE DAVID PEEPLES: The word "solely," in my opinion.

CHAIRMAN BABCOCK: R. H.

MR. WALLACE: Yeah, I agree "solely" is a problem because, like I said earlier, if there's a hearing held immediately there's not going to be any delay, and also I don't know what percentage of these are brought by pro se litigants. I would think probably a fair number. I recently had one in Tarrant County who filed motions to recuse against two different judges, and he wasn't filing them for delay. You would never prove that he filed them for delay. He would file them because he disagreed with what the judges ruled. It wasn't like there was a hearing

set. There wasn't a trial setting, so if you -- if you're really going to say, well, you've got to prove that he filed that, that it was -- that there was no basis, it was groundless, and he filed it for purposes of delay, you would never get there, and certainly you wouldn't get there to say that he filed it solely for purposes of delay. So I'm -- I'm kind of like you are. If it's -- if it's frivolous and if it's groundless and if there's no basis for it, why do we care if it was filed for purposes of delay or not?

CHAIRMAN BABCOCK: Yeah, for my own part I sort of like "groundless" as opposed to the language that's in the current rule, "without sufficient cause," because "groundless" is defined and has a pretty hard standard, but "without sufficient cause" is not, as best I can tell, and that might -- that might give discretion to the judge to say, "Well, you lost. I think there's been some delay involved and you lost, so I'm going to fine you and enjoin you."

And I do think, by the way, David, that you've got to -- you've got to have your sanctions within the rule, because our current rule says "impose any sanction authorized by Rule 215," paren (2), paren, paren (b), paren, and there is no such rule, and if we mean -- if we meant 215.2(b) then that's all discovery-related

sanctions.

HONORABLE DAVID PEEPLES: My original proposal changed it to the decimal and then there was a good discussion in which people said, you know, they don't really fit and they're too strong, contempt and so forth.

CHAIRMAN BABCOCK: Yeah.

HONORABLE DAVID PEEPLES: Strike pleadings, and so we carved it down to this.

CHAIRMAN BABCOCK: Yeah, and I think that's right. I think you ought to do that.

PROFESSOR ALBRIGHT: But if I could -- Chapter 10, I'm looking at Chapter 10 again. Chapter 10 includes all this. It says -- 10.004 talks about the sanctions that are available. "A directive to the violator to perform or refrain from performing an act."

HONORABLE NATHAN HECHT: Yep.

PROFESSOR ALBRIGHT: "Or an order to pay a penalty into court, an order to pay to the other party the amount of reasonable expenses incurred by the party because of the filing of the pleading or motion, including reasonable attorney's fees."

CHAIRMAN BABCOCK: Lonny.

PROFESSOR HOFFMAN: I'm in that camp. It seems to me that the broadest discretion will be by saying that you can award sanctions when it's appropriate under

Chapter 10 or Rule 13.

HONORABLE DAVID PEEPLES: And then take out "delay" and "sufficient cause"?

PROFESSOR HOFFMAN: Right.

HONORABLE DAVID PEEPLES: Well, my view is that the other procedural changes in this proposal are tailored and strong and will help cut out a lot of the abuse, even if the sanctions provision is weakened a little bit from what I've got here. I think it's okay.

CHAIRMAN BABCOCK: Lonny.

PROFESSOR HOFFMAN: Can I return, though, to what Judge Sullivan raised, because I must say I don't -- maybe I just need further clarification. It seems like he was raising a pretty essential point that we haven't wholly addressed. So, so, let me try my stab at it and tell me if -- tell me where I'm off. We begin with the assumption that it is rare that a judge should, in fact, recuse himself. Am I -- have I gone off the page yet?

HONORABLE DAVID PEEPLES: Statistically rare.

PROFESSOR HOFFMAN: So in these rare cases sometimes judges are going to recuse themselves voluntarily. They'll do the right thing in these rare instances when they're supposed to. In other cases they're not -- either they didn't do the right thing or

they didn't know it was the right thing, whatever it is, but they don't voluntarily recuse; and it's in that circumstance that we now have this issue, right, of whether we should potentially stop the process so that some other judge can decide the recusal issue or whether we should, as I think Judge Sullivan was suggesting, allow the default rule to be that everything just moves on as forward; and in the rare case that the judge who didn't voluntarily recuse should have done so and it turns out that something perhaps bad happened in that interval in between, we can always fix it later; and although there is -- if I heard you correctly that there is some concern that in some cases that may cost more or lead to bad things happening, aren't we dealing with such an incredibly small universe we ought not to try to write a rule for that rare problem? Again, I really am not staking a claim out here, but it does seem to me that Judge Sullivan, if I understand it right, which I may not, that seems to be the upshot of where he's headed.

HONORABLE KENT SULLIVAN: That's correct.

CHAIRMAN BABCOCK: Yeah, Richard.

MR. MUNZINGER: Yeah, but the problem is if you allow the judge to go forward, the judge makes a ruling. I don't know what the circumstances this could arise in. It might be that he grants a motion or denies a

motion. What if it is that a finding is made or testimony is admitted to a trier of fact? The whole thing has to be thrown away, it would seem to me after that, because every decision of the judge who has been recused is suspect, so everything is tainted. So whatever your hurry to get something done turns out to be wasteful because it was tainted. How can you say, well, this was good and this was bad?

CHAIRMAN BABCOCK: Justice Sullivan.

HONORABLE KENT SULLIVAN: That's a valid point, but I think it goes back to Professor Hoffman's central theme, and it's certainly consistent with what I was trying to say, and that is how often does that happen? And I think the answer is virtually never. If somebody raises something that raises a legitimate point, a competent and ethical trial judge will say, "Wow, close call, I'll rule against it, but, you know, I'll -- I'll send it on to the presiding judge."

As a practical matter if you think you've got one of those what I take is a one in a thousand circumstance where moving forward -- let's face it, let me take one step back. Stopping everything is very costly as well, which I think is central to Richard's point, and that is to say there's costs, there's inefficiency, there's trouble. Well, stopping everything and causing

that train wreck causes cost and inefficiency and trouble, which is going to happen more often under the current system.

The unique set of circumstances that I think we ought to be worried about is when you've got the trial judge who ought to be recused, and he is involved in something where things are in motion and are going to happen relatively fast, and you're concerned that the results are irreparable, in which case I think that's equally fairly easy to deal with. You present it to the trial judge, say, "I'm asking you to stay the proceedings." He or she says "no," and quite frankly it is 2010. We have, you know -- we have e-mail, you know, we have technology, we have telephones, and you could then -- the rule could contemplate that you could immediately ask the presiding judge or whoever is next in line to stop the proceedings, and I just don't think it's that, you know -- that difficult, given how rare I think we believe this is likely to happen.

CHAIRMAN BABCOCK: Munzinger and then R. H.

MR. WALLACE: Well --

CHAIRMAN BABCOCK: Munzinger first.

MR. WALLACE: Oh, okay.

MR. MUNZINGER: My response is I guess to repeat myself. The judge's response presumed the

competent ethical judge. That's the issue, is the judge ethical, not so much his competence or her competence. It's their ethics, and the appearance of justice is oftentimes as important as justice itself, at least to the outsider and possibly to the litigants. I think it may be since it is so statistically rare that it may be pennywise and pound foolish to proceed with the hearing since they are, in fact, rare. I've never filed a motion to recuse a judge. I'm getting ready to file my first one, but I've never done it, and that's a very serious motion. It's a very serious motion. Judges have friends.

HONORABLE KENT SULLIVAN: If I could raise one thing, just to frame the issue, though. The concern I have is how many times would that arise, because I actually agree with much of what Richard has said. How many times would it arise, though, in which you couldn't simply reverse the ruling, this improper ruling, because then the only issue that's left is sort of the inefficiency of it. That's all we're talking about. If the ruling doesn't represent something that's irreparable then the issue that we ought to consider is really just an efficiency issue, it seems to me.

CHAIRMAN BABCOCK: R. H.

MR. WALLACE: Well, and I agree. In the situation we had the judge was neither competent or of

integrity, no longer on the bench. We won our motion. The facts were egregious. I won't take up everybody's time, but the delay was he set a hearing on less than 24 hours notice. We went in, we filed our motion at 9:00 o'clock that morning. At 2:00 o'clock we had a hearing, and by 4:00 o'clock we were done, and we had a new judge to -- so I don't know how it would work in every district. You may not be able to do it that quick, but when you weigh the delay against the problem of going forward, there really -- we didn't have any delay.

HONORABLE STEPHEN YELENOSKY: What would happen if --

HONORABLE KENT SULLIVAN: But we're not --

CHAIRMAN BABCOCK: Whoa, whoa, whoa.

MR. WALLACE: What could happen? We would have gone forward with the temporary injunction hearing, which would have been -- you know, who knows how long we would have gone and what testimony would have been given. It may have been undone, but it would be -- compared to the lack of delay there would have been expense and trouble and who knows what all.

CHAIRMAN BABCOCK: Justice Sullivan wants to respond and then Justice Christopher.

HONORABLE KENT SULLIVAN: Well, I just don't think we're writing the rule for that. I mean, that's the

outlier it seems to me, and the question is -- and I turn to Judge Peeples here because if I'm off base I readily concede, but the question is what provides the quantity of these issues? What are you -- you know, you have to write the rule to some extent for, if you'll accept the phrase, the lowest common denominator. I mean, that's what the rule is meant to deal with. What is the high volume, most routine, most normal set of circumstances that could come down the road time after time after time. I don't think any rule can consider every possible set of circumstances; and anecdotally, we can all relate situations in which we think, oh, gosh, any particular rule might provide problematic because that model rule didn't consider this one anecdotal experience that I had.

I think with respect to brother Wallace's point he did have a situation in which he could get it turned around very quickly. I think that may have been unique. The situation in Tarrant County may not be equivalent to the situation in, say, West Texas or South Texas or whatever; and that's what we've got to write the rule for, not for Tarrant County; and that's my level of concern, is just to create the presumption in the right direction and acknowledge and carve out exceptions that indeed deal with outliers.

CHAIRMAN BABCOCK: Justice Christopher, then

Tom.

HONORABLE TRACY CHRISTOPHER: Well, what if we write the rule in such a way that the judge can proceed unless -- well, the motion should be accompanied by a request for a stay and then the judge can decide on the stay one way or the other and put something in there that the stay should be granted unless, you know, there's some reason -- you know, I don't know exactly how you phrase it, but some reason to have to go forward at that point. It's a Daubert hearing, it's creating expense to the parties, et cetera, and then you still have the fall back of going to the presiding judge for the stay. So, you know, in the normal situation I stop. If -- Stephen and I were talking about a summary judgment hearing. I stop. That's not a big deal. I'll stop it. So I grant the stay. They go to the presiding judge. But something that involves expense, you know, inconvenience, you know, harm, then I move forward with the fall back being that they could still go to the presiding judge.

CHAIRMAN BABCOCK: Tom, then Justice Gray.

MR. RINEY: This is more of an observation without a recommended solution, but I think most likely the timing problem is going to come up with someone seeking or imposing injunctive relief, and it could potentially be a problem in West Texas where we have to

track down our judge, you know, perhaps some distance away, may be gone for the weekend, and an unscrupulous party that thinks they're going to lose a temporary injunction might well welcome that potential delay to do whatever it is that the other side is trying to stop them to do, but it could just as easily work for the person that's trying to seek the relief. So I think the timing is an issue.

Now, if I'm representing someone that's trying to get that injunctive relief, I mean, I suppose I just work that much harder to try to track down the presiding judge wherever he is or look wherever the alternatives are, but I think in cases involving injunctive relief this could be a potential problem either way. That's why I say I don't know what the solution.

CHAIRMAN BABCOCK: Justice Gray.

HONORABLE TOM GRAY: Until we have the Chamber of Commerce conduct some empirical research on how many of these we have I think the rule as drafted by Judge Peeples addresses the concern of the delay when it has in subsection (d) starting on line 26 that after you can take no further action it says "except for good cause stated in writing on the record" those events have to stop. So the judge can go forward if the circumstances necessitate it. That could be excessive costs that will be incurred if we

don't go forward with the hearing because we've got the expert from Finland here on something. You know, we're going to go ahead and make the record.

CHAIRMAN BABCOCK: Those Finnish experts, you know.

HONORABLE TOM GRAY: Yeah.

CHAIRMAN BABCOCK: I love them when they come all the way over here.

HONORABLE TOM GRAY: But, I mean, there is a way in the rule as proposed that seems to address the concern to me.

CHAIRMAN BABCOCK: Okay. Justice Patterson.

HONORABLE JAN PATTERSON: I, too, agree that the rule strikes the right balance. I do think that these are some of the simpler motions that judges hear, right, Judge Peeples? I mean, these are generally not complex motions; is that right?

HONORABLE DAVID PEEPLES: The law is not complicated and usually the facts are not complicated.

HONORABLE JAN PATTERSON: So they're capable of fairly easy resolution, but one thing I can add is that we get probably several dozen complaints about judges sitting on motions to recuse before the Commission on Judicial Conduct. It is a problem among litigants that they're unable to get these heard, and they may not -- and

it may just be pro se or inability to get them before a presiding judge or lack of knowledge, but I do sense that around the state it's not as organized as some of the larger cities, and it is a problem of delay, unless there is some way to address the incentive to get them decided immediately.

CHAIRMAN BABCOCK: Judge Peeples, ever since you've been on this committee you have advocated not changing something unless it's broken, and we've got a generation of lawyers and judges who are accustomed to when a motion is filed no further action is taken until it's resolved, unless it's on the eve of trial, which you've taken care of. I like the fact and it seems to me you ameliorate Justice Sullivan's concerns by having this -- having this "good cause stated in writing on the record" provision to it, and it seems if we were to go the way Justice Sullivan wants us to, with all due respect, you're not saving much because if the judge goes ahead with the Daubert hearing or the injunction or whatever it is and then gets recused, there will inevitably be a motion to reconsider or to vacate that the new judge is going to have to hear if it's gone against the movant. So you're going to have to repeat that hearing, so you're going to double the cost.

HONORABLE KENT SULLIVAN: Let me cycle back

to where I thought we started, and that is I think that what you just suggested, with all due respect to the Chair, is the outlier. I think that -- and I invite Judge Peeples to correct me -- that volumewise what we're talking about is probably the pro se who has filed something that perhaps doesn't really make much sense in any sort of legal analytical framework and that in part we need to not give incentives to people either who are pro se litigants or poor or perhaps unethical lawyers who file motions that are groundless, and I think that's what we're really looking at are in volume groundless motions. If I'm wrong then I would withdraw the whole suggestion, but I -- that was one of the significant reasons that I made my suggestion, because that's what is disrupting a lot of the court proceedings and if that's not correct then I will concede the point.

CHAIRMAN BABCOCK: One thing Judge Peeples is wrong about was he said we're not going to need the whole hour to talk about this rule, which I correctly predicted. Anything more about this part? Yeah, Justice Gaultney.

HONORABLE DAVID GAULTNEY: Well, not on this part but on the discovery.

CHAIRMAN BABCOCK: Okay.

HONORABLE DAVID GAULTNEY: And I was

wondering if the committee -- this is on (e), the subpoena for the judge. I mean, it requires prior written approval of the presiding judge or the judge assigned to hear the motion, but I was wondering if the committee had considered some type of standard like "the information or discovery was unavailable from any other source and was necessary to establish the ground." I mean, the trial court I guess always has control over the discovery, but I'm wondering if there should be a restriction. I mean, the trial judge, whoever is being recused, is not going to have an attorney. They're out there, you know, by themselves, and you've got a request for discovery or subpoena against the trial judge. Should there be a standard in the rule that says, look, this type of discovery is very restricted, and it's restricted to these circumstances?

And then my second question is did the committee consider any other restrictions on discovery because by providing one restriction on discovery, that is you must seek written approval in advance in discovery against the judge, it's just there's no other restrictions on discovery, and I'm wondering if they considered that.

CHAIRMAN BABCOCK: I'll let Judge Peeples give you the definitive answer, but the examples that we talked about last time and which I've seen happen, a lot

of it are subpoenas to the judge for the judge's e-mails, and if you put in there "not available from any other source," I think you strengthen the hand of the subpoenaing party who will say, "Hey, I can't get these e-mails from anybody else. The only person I can get them from is the judge, and here, I comply exactly with that rule." It seems to me better to put the discretion in the hands of the presiding judge to make a case by case determination, but as I say, I defer to Judge Peeples on that.

HONORABLE DAVID PEEPLES: Well, I think the answer is that I just trust the judge that's going to hear the motion, the presiding judge, to make a wise decision and put the burden on the asker to come up with something convincing and to carve it down to what's reasonable if it's going to be granted, but admittedly there are no standards in this rule.

CHAIRMAN BABCOCK: Yeah, Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: Admittedly this is against my interest as a judge, but I don't like the language that says, "Any subpoena or discovery request in violation of this may be disregarded." Maybe a discovery request, but I don't like the suggestion that a subpoena can be disregarded.

HONORABLE DAVID PEEPLES: "In violation of

the rule."

HONORABLE STEPHEN YELENOSKY: "In violation of the rule," but you can't tell from the face of the subpoena whether it's issued in violation of the rule, right?

HONORABLE DAVID PEEPLES: Well, wouldn't it have to have a written order by the presiding judge saying "I order this issued"? If that's not there --

HONORABLE STEPHEN YELENOSKY: Well, if we make that clear. The problem otherwise is it appears to show disregard for what is facially a valid subpoena and only in the context of its issuance against a judge, and I think that looks bad. I'm always telling litigants the order may have been wrong, it may be reversed, but it's an order of the court, you have to obey it. It just sounds wrong to me.

HONORABLE DAVID PEEPLES: Would it improve this to say "any subpoena that does not have a written order attached to it can be disregarded"? I mean, that's in effect what this says.

HONORABLE STEPHEN YELENOSKY: I don't know. I mean, we should think about the wording, and maybe "is not valid," something like that, other than here's an exception to what we tell everybody, which is obey subpoenas.

CHAIRMAN BABCOCK: Yeah, what Judge Yelenosky is worried about I guess is the third party who gets the subpoena and not --

HONORABLE STEPHEN YELENOSKY: I'm just worried about anything that says anybody may ever disregard what is facially a valid subpoena or order, and so we need to do the wording so that it's facially not valid because it doesn't have something. "Any order for discovery against the judge must include an order from the court" and then if it doesn't include it, it's not valid. We don't have to say "disregard."

CHAIRMAN BABCOCK: Yeah.

HONORABLE DAVID PEEPLES: Well, just to review, the reason for that second sentence is it is difficult for a judge who gets subpoenaed to get it quashed. Do you hire a lawyer? Well, there are problems if it's a lawyer friend who does it free. There are problems if you've got to pay a lawyer. You show up yourself. I mean, it's just -- it's not -- you don't want the judge to make a phone call. I mean, we need to think about how the poor judge who has been improperly subpoenaed deals with it.

HONORABLE STEPHEN YELENOSKY: Well, right, but --

HONORABLE DAVID PEEPLES: And this sentence

deals with it.

HONORABLE STEPHEN YELENOSKY: But there are other cases where people get, in their view, improperly subpoenaed, but they don't get to disregard it. So I'm just -- maybe that's not -- what I've suggested is not the right answer, but it appears to me to be something that we don't want to say in this way.

CHAIRMAN BABCOCK: Carl, then Roger.

MR. HAMILTON: Well, two things. Number one, maybe we don't need a subpoena. Maybe the presiding judge could just issue an order that the judge submit the discovery. Number two is on this "good cause stated" on line 26, "except for good cause" -- where the judge can't do anything else except for good cause stated in writing or on the record, the current rule says "in the order," and I think it should be in the order because there's no record. If the judge just receives the motion and acts on it and enters some kind of an order, there's not going to be a record, so the good cause needs to be stated in his order.

CHAIRMAN BABCOCK: Okay. What else? Any other -- oh, Roger, yeah, you were next.

MR. HUGHES: Well, I think there must be some feature here to have the intervention of the presiding judge, because if you have to have the trial

judge respond in any way to discovery, even if only to assert privileges, you now have a situation in which the trial judge has injected himself or herself almost as a witness in the proceedings.

CHAIRMAN BABCOCK: Yeah.

MR. HUGHES: And you risk that in order to prevent the judge from being harassed by discovery you almost create the grounds for recusal that, well, if the judge wasn't interested, now this thing comes up before, the judge sure is now.

CHAIRMAN BABCOCK: Yeah, that's happened. I think there's some judges who have gotten subpoenaed just say, "Oh, the heck with it." Isn't that right, David?

HONORABLE DAVID PEEPLES: Some people just throw in the towel and say, "Life's too short," that's true, but what Roger's saying I think has truth to it that if you show up and fight it then you sort of increased the case against you that you ought to recuse.

CHAIRMAN BABCOCK: Yeah.

HONORABLE DAVID PEEPLES: You've gotten a little bit adversary with the person.

CHAIRMAN BABCOCK: David.

MR. JACKSON: Chip, what if you just retitled (e) to just say "discovery" instead of "subpoena of judge," and that would take the burden off of, you

know, the subpoena issue altogether. You could say "subpoena" in the text, but (e) would just read "discovery," and you wouldn't point to a specific document.

CHAIRMAN BABCOCK: Yeah. Okay, Richard.

MR. ORSINGER: I don't understand why the prior written approval of the presiding judge isn't a good way to solve this problem because can't we assume that the presiding judge is going to automatically be sensitive to the trial judge's sense of privacy without an official objection or motion to quash or something?

HONORABLE DAVID PEEPLES: I think so.

MR. ORSINGER: I mean, is it really necessary for a trial judge to file a motion to quash if the judge who is presiding over the recusal is the only one who can issue the discovery in the first place?

HONORABLE STEPHEN YELENOSKY: We could leave out the second sentence. It's the pronouncement of that that's a problem for me. It may not change anything. Somebody issues a subpoena to me, and I know it doesn't have a written order, you know, county attorney can go move to quash it or I can just count on the presiding judge realizing that that wasn't valid.

MR. ORSINGER: Well, if it goes to a third party, though, somebody's got to do something because the

third party is just going to get this unconditional command.

HONORABLE TRACY CHRISTOPHER: We're not restricting third party subpoenas.

HONORABLE STEPHEN YELENOSKY: This is to the judge.

HONORABLE TRACY CHRISTOPHER: This is only to the judge.

MR. ORSINGER: Even if it's the judge's information that's in the hands of a third party, like a bank or a country club or a --

HONORABLE STEPHEN YELENOSKY: I think he would probably have to quash it.

HONORABLE TRACY CHRISTOPHER: Yeah. I don't think -- I didn't think it was designed to quash third party notices.

MR. ORSINGER: Okay. Then I'd overread that.

CHAIRMAN BABCOCK: Yeah, Justice Gaultney. Sorry.

HONORABLE DAVID GAULTNEY: But maybe it should be. Maybe the presiding judge or the trial court -- I mean, usually we're talking about a very quick, short process. I mean, maybe the presiding judge or the assigned judge should have initial control over any

discovery that's issued in a case.

HONORABLE STEPHEN YELENOSKY: Well, if a third party gets a subpoena, how are they going to know necessarily that it's connected with the recusal such that it needs a prior written approval of the court? I mean, if somebody wants to recuse me and they want to go subpoena my bank records, they're going to issue a subpoena, I guess, for the bank records; and is the bank supposed to know whether it's pertinent to a recusal and therefore needs an order? I probably have to get it quashed. You know, some of these things are messy. I probably have to get the county attorney involved. I don't know that there is a easy way to do this.

CHAIRMAN BABCOCK: Richard Munzinger.

HONORABLE TRACY CHRISTOPHER: You know, certainly there have been subpoenas to campaign treasurers. We know that. That's kind of not routine, but it's one that issues.

MR. MUNZINGER: Well, a subpoena in this rule that is said to be capable of being disregarded is one directed to the judge, not to the bank, to the country club, or to someone else.

CHAIRMAN BABCOCK: Okay. I think we've reached the end of our road here, and, Justice Peeples, thank you so much for your work on this. We'll get to 18b

the next time, along with your work, Elaine, and your work, Justice Christopher. Sorry. I just got word that the building will be closing in 15 minutes, so everybody skidaddle, and we'll see you next time. Thank you very much.

(Meeting adjourned at 12:03 p.m.)

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REPORTER'S CERTIFICATION
MEETING OF THE
SUPREME COURT ADVISORY COMMITTEE

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I further certify that the costs for my services in the matter are $_____.

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