* *

MEETING OF THE SUPREME COURT ADVISORY COMMITTEE

October 19, 2007

(FRIDAY SESSION)

* *

Taken before *D'Lois L. Jones*, Certified Shorthand Reporter in Travis County for the State of Texas, reported by machine shorthand method, on the 19th day of October, 2007, between the hours of 9:06 a.m. and 4:06 p.m., at the Texas Law Center, 1414 Colorado, Room 101, 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

07-24 Complex cases materials and contacts

07-25 TRAP 9.8 memo from J. Hughes, 10-12-07

07-26 9-25-07 referral letter from Justice Hecht

07-27 TRCP 301, TRAP 26.1 memo from J. Hughes, 10-5-07

07-28 Pattern jury charge memo from A. Albright, 10-11-07

07-29 PJC plain language draft, 10-11-07

--*-*-*

--*-*-*

CHAIRMAN BABCOCK: Welcome, everybody. For scheduling purposes we're going to recess at 4:00 today. I hope that's okay with everybody, but the Chair has an emergency he's got to take care of. So we'll recess at 4:00, but otherwise we'll try to stick to the normal schedule, and with that, Justice Hecht will try to talk with his mouth full.

HONORABLE NATHAN HECHT: The Court published the JP electronic filing rules for comment, making the *Bar Journal*'s deadline by about 30 minutes, I think. I think we were 30 minutes on the other side of it, but anyway, they're out there, and I just want to tell everyone again what a great job Judge Lawrence's task force did, this committee did, to turn those around as quickly as we did and get them in place, as the Legislature had hoped, by January the 1st. So I think that will be a good step forward, and we're prepared to make any changes we need to at the end of December to be sure those are in place January 1st.

Then we've been asked to revisit the foreclosure rules that we looked at several years ago after the Constitution was amended to allow loans secured by the equity in homesteads, and there's been some changes in the law that require us to look at those again, so

we've appointed a task force. That's done, right?

MR. HUGHES: Uh-huh.

HONORABLE NATHAN HECHT: And they'll be meeting shortly and will have a report to this committee about how to change those rules. If you -- those of you who were here the last go-around, which was five or six years ago, will remember that we had a very good report from this committee, and it has the leading foreclosure lawyers and the consumer lawyers and the people who have the biggest experience with these cases and practices, and so I think we'll get a good report from them and make those changes without too much trouble.

Then the Court is also looking at appointing a task force to look at the ancillary rules that we discovered need work on, this committee discovered needed work on when we were looking at the rules regarding private process servers and ancillary proceedings. So we're going to appoint a task force to go through all of those rules and look at them substantively as well as texturally and again make a report to this committee, but that will probably be in the spring or later before that comes out because that's going to be a lot of work.

If any of you, of course, are interested in serving on either the -- either of these task forces, the one for -- excuse me, the one for foreclosures or the one

for ancillary proceedings, let us know and, of course, we will try to accommodate that. The reason we appoint task forces for problems like those is that the expertise that's needed really runs beyond the common experience of many members of the committee, so we draw on that experience to be sure that the rules will work the way they should when we're finished with them.

Then just for your information, the Court is going to meet with the principal players in the redrafting of the disciplinary rules, the lawyer disciplinary rules, during the next two months; and while I don't think those rules will come through the committee, they'll be -- there's some very significant changes are being proposed in those rules.

Finally, on two personal notes, I understand Judge Levi Benton has gotten married in the last week or two, which --

CHAIRMAN BABCOCK: Somewhat surreptiously.

HONORABLE NATHAN HECHT: Surreptiously, yes. Which gives some hope to the rest of us, and Jody Hughes, the rules attorney for the Supreme Court, is getting married next weekend, so --

(Applause)

CHAIRMAN BABCOCK: Another shock to those of us --

HONORABLE NATHAN HECHT: Another shock. And that's what I have.

CHAIRMAN BABCOCK: Okay, great. The first issue on the agenda is the complex case matter that generated some comment last time. Jeff Boyd could not be here today, and Jane I know was not able to be at the subcommittee meeting. Has anybody been designated to report by Jeff? Jody?

MR. HUGHES: The subcommittee, legislative mandate subcommittee, met by phone yesterday, and we had kind of an update on where things were. It started by -- talked about the first meeting of the State Bar Court Administration Task Force met on October 1st. That task force is co-chaired by Martha Dickey and Judge Ken Wise of Harris County. It's got 42 members I think appointed to it of prominent lawyers, judges, professors, and a couple of public members. There are six members on this committee who are also members of the task force. Professor Albright, who serves as the recorder, Jeff Boyd, Alistair Dawson, Lamont Jefferson, Judge Lawrence, and Tom Riney. I don't think I'm missing anyone else, but let me know if I am, and then several members of the Court, Justice O'Neill. Lisa Hobbs, the former rules attorney, and Carl Reynolds, who is head of OCA are also members of the task force; and at the first meeting they have

basically broken down into three study groups, three working groups, based on the articles of Senate Bill 1204 as sort of a starting point and organized along those lines and the three groups are -- the first one is court administration, Articles 1 through 4 and 7.

The second one, work group, deals with the different types of courts and possible changes to those for the reorganization, and then the third group is the complex case group that is the overlap with Jeff Boyd's committee. So the legislative mandate subcommittee met yesterday. Jeff has put together a large bibliography of articles and material. Judge Yelenosky and some others have contributed to that, and that's available. Angie has posted that on the website. It's got a lot of good links and a large amount of material, so the subcommittee is still digesting that to try to get sort of the big picture on what other states are doing, where Texas fits right now, and just all the broad range of possibilities from what other states do in terms of either complex cases, specialized courts, business courts, different procedures, and things like that.

And so they're still studying that and digesting all that information and also looking at this issue of having the two committees working at the same time, with the legislative mandates subcommittee wanting

to be involved and obviously understanding what the State Bar task force is doing, but also being an independent source of study and discussion and just having a good link between them. So that's kind of where we are.

CHAIRMAN BABCOCK: Okay. So you'll report at our next meeting on the results of that plan?

MR. HUGHES: Well, the task force is meeting next on November 9th. I'm not sure if you're going to be out of town for that, but Jeff I believe will be there.

CHAIRMAN BABCOCK: Okay. I don't know if anybody noticed it, but there's a great title for a law review article on this bibliography, "Business Courts, Efficient Justice or Two-Tiered Elitism," which may frame the debate that some people think exists over this. Okay. Thanks, Jody.

Jody, I understand that you wanted us to try to take up the uniform format manual next; is that right or not?

Oh, okay. All right. Okay. So we'll stay in order on the agenda, and that is Professor Dorsaneo talking to us about what we have spoken about two meetings already.

PROFESSOR DORSANEO: I think it would be better for Jody to do it.

CHAIRMAN BABCOCK: Excuse me?

PROFESSOR DORSANEO: Jody should do it.

CHAIRMAN BABCOCK: Jody should do it. All right. Well, this will be the Jody show today.

MR. HUGHES: Well, this is -- we're on the TRAP 9.8, redacting minors' names. I just went back. I got some good guidance from this committee at the last meeting and went back and reworked the draft based on the votes that the committee took, and I've got kind of a summary of what the discussion was, and basically the issue that -- I think the main issue after the votes about what is limited to parental rights termination cases, one of the main issues which was the issue that I think Judge Yelenosky raised about whether you can be able to -- whether the Court can have the parent's name redacted in order to protect the identity of the minor. There was broad agreement that that's at least -- that's a good idea at least in some cases because it's otherwise futile if you've got the parent's name out there and it's a very particular name or famous name or something, but there was also a concern on the other side about, you know, whether the parent should benefit from the inadvertent privacy that they gain and trying to balance the need for protecting the privacy of the minor versus extending that to the parent as well.

So the draft, which is on the last page of

this, tries to strike a balance, I think as the consensus of the committee went by giving the court discretion to do that, to either redact the name of the parent in their opinion and/or to require the parties to do it in their briefs; and along with that, let's see, there was a -- oh, Justice Gaultney had suggested adding a provision, a parallel provision or reference in the TRAP 38, the briefing rules, that sort of reminds the parties about this, so I've just suggested something there at the bottom of the draft, and that's' kind of where it stands.

CHAIRMAN BABCOCK: Okay. As I mentioned, we've talked about this at least two meetings, I think, before, haven't we, Bill?

PROFESSOR DORSANEO: Yes.

CHAIRMAN BABCOCK: So this is pretty far along. Any comments on the proposal to 9.8? Yeah, Bill.

PROFESSOR DORSANEO: Jody, what -- in the first subdivision of 9.8 you have "or other submission." What's the word "submission" meant to mean? Does that mean another paper or --

MR. HUGHES: Pleadings, basically, I guess, or papers, yeah.

PROFESSOR DORSANEO: I would say "papers" since that's what the rule is about.

MR. HUGHES: Okay.

PROFESSOR DORSANEO: I wondered if you meant, you know, speaking orally.

MR. HUGHES: I hadn't thought about that, but that's another interesting point about oral argument. I guess you could.

CHAIRMAN BABCOCK: There's a lack of permanence about oral argument that is not -- doesn't exist with papers, and the papers get filed and then they have a life of their own.

HONORABLE TOM GRAY: Well, with oral argument now being broadcast and recorded it's more permanent than it's ever been, and it's going to have a tendency, I think, to go --

CHAIRMAN BABCOCK: Is it recorded and available?

HONORABLE SARAH DUNCAN: In some courts.

MS. HOBBS: In the Supreme Court.

MR. HUGHES: In the Supreme Court it is, and it's available over the web.

CHAIRMAN BABCOCK: Maybe you ought to include that then.

MR. HUGHES: That actually reminded me of another point. I think it was Judge Christopher raised a good point last time about how if everything is done and the court orders full disguising of the parents' names as

well, how is the Court going to know whether to recuse or, you know, if they know the parents if their identity is disguised; and I thought one possibility to deal with that problem would be to allow in the docketing statement to require the parties as in any case to identify the counsel, names of all the parties in full; and I wasn't aware of cases where the information in the docketing statement is getting picked up and put on the web; but if that turns out to be the case then I think the rule would have to deal with that.

But it would seem to me that if it were -- in a case where the Court is going to order the parties to do it, the docketing statement, because it's filed first with the notice of appeal, the court presumably will not have entered that order by the time they file the docketing statement. And so there's nothing in the draft that specifically addresses it, but I noted in the memo that I thought that that would be one way to resolve that concern, is just to go ahead and let the parent be fully identified in the docketing statement, and then later down the road if the court wants to -- decides the name is such that the minor needs to be protected by redacting the parent's name, they can order that, but they've already got the information that the Court needs in order to make a decision about recusal or that kind of thing.

CHAIRMAN BABCOCK: Okay. Yeah, Frank.

MR. GILSTRAP: What's a pseudonym? I mean, I know the meaning of the word, but give me some examples. We're talking about an alias name or "Baby Boy Johnson" or what?

MR. HUGHES: Could be just a different name, either another possibility would be -- or it's not in the draft, but I have seen a lot of courts just use the first name, and I don't think that would technically be a pseudonym because that is their name and in some cases it might not be sufficient if somebody has a really unusual first name. It may kind of say more about it than the court wants to say, but I think pseudonym can be a broad --

PROFESSOR DORSANEO: Jane Roe.

MR. GILSTRAP: That's a pseudonym?

PROFESSOR DORSANEO: (Nods head.)

MR. GILSTRAP: Okay.

CHAIRMAN BABCOCK: Bill, on this submissions thing, would it be better to say "oral or written"?

PROFESSOR DORSANEO: I don't think it would be good to put it in papers if we're talking about oral and, you know, I would say "papers submitted."

CHAIRMAN BABCOCK: Okay.

PROFESSOR DORSANEO: Okay. Rule 9 talks

about papers being filed. I think maybe it should say "submitted" in other places, too, because some things that are submitted don't get filed, but here, you know, I would say just stay away from "filed" and say "submitted."

CHAIRMAN BABCOCK: "Papers submitted."

PROFESSOR DORSANEO: "Papers submitted."

CHAIRMAN BABCOCK: Okay.

MR. HUGHES: Well, that's a good point, too, because that would capture amicus briefs, which are not filed but are submitted.

CHAIRMAN BABCOCK: Any other comments?

HONORABLE TOM GRAY: So you've decided to take out oral argument from the context? If you take -- if you add "paper" in front of "submissions" or "submitted," you've taken out the concept of oral argument.

PROFESSOR DORSANEO: If we should take up oral argument, our committee could take it up and see whether we think, you know, something ought to be done with the rules that are pertinent to that. I don't think it's a bad idea --

HONORABLE TOM GRAY: I see what you're saying. This rule, not the rules generally, but this rule is directed at paper.

PROFESSOR DORSANEO: Yeah, I think somebody

would not necessarily --

HONORABLE TOM GRAY: You're right.

PROFESSOR DORSANEO: -- notice it if it's over here.

CHAIRMAN BABCOCK: Okay. Any other comments? Bonnie.

MS. WOLBRUECK: Since the pseudonym issue did come up, just as a comment, I know that we had a criminal case once in our county to where a pseudonym was used for a minor, a female minor, and that name happened to be somebody else's child's name. And that's -- you know, those are issues that certainly could happen.

CHAIRMAN BABCOCK: Yeah, Justice Jennings.

HONORABLE TERRY JENNINGS: Why not just refer to them as "a minor child"? In some opinions I have seen judges just refer to, you know, "a minor child" or "the minor child" or something along those lines.

CHAIRMAN BABCOCK: Yeah, Bill.

PROFESSOR DORSANEO: I think that may be hard to read those opinions.

CHAIRMAN BABCOCK: Sarah.

HONORABLE SARAH DUNCAN: And what do you do when there's more than one minor child?

PROFESSOR DORSANEO: Yeah, "the other minor child."

HONORABLE SARAH DUNCAN: And then there's the other one, too, and the other one and the other one.

HONORABLE TERRY JENNINGS: "Minor child one," "minor child two."

CHAIRMAN BABCOCK: How often has this happened, Bonnie? I mean, I suppose if there are any kids named Jane Doe they are probably --

MS. WOLBRUECK: Well, they had used the name like Sally Jones or Sally Smith, I forget, and, you know, thinking that it was a name that could be used without any difficulty, but that wasn't true.

CHAIRMAN BABCOCK: Jody.

MR. HUGHES: A lot of times -- it's not required under this rule or anything, but a lot of times courts will drop a footnote -- I've noticed this -- and say when the first time they mention the names, either the court says "mother" and "father" or they'll give a name and they'll drop a footnote sometimes that refers to the statutory provision in the Family Code, but sometimes it just says, "In order to protect the privacy of the minor these are made up names" or, you know, so that might alleviate that concern of if the name resembles somebody else's, but if they're reading the opinion they say, "Well, the court made these up," and hopefully would help with that.

CHAIRMAN BABCOCK: Carl.

MR. HAMILTON: Is the adding of the pseudonym option, is that just because maybe sometimes initials would be too identifying or why do we even need the pseudonym at all?

MR. HUGHES: I think Justice Patterson -- in an early draft of this we had some different possibilities. I think we started with initials, and I realized that different courts right now are doing it in different ways, some use initials, some use "mother" and "father," some use the first names, and it would just -- suggested that we give courts broad discretion the way they want to do it as long as it protects the privacy, and that we -- suggested to me that maybe we just have it be one single way. Is that --

HONORABLE JAN PATTERSON: I think that one of the concerns was that, as you can imagine, very often children have the same initials because people like to name their child by names starting with the same letter, so it gave them more flexibility. If there are multiple children it makes it clear, and it's just to give them, I think, greater discretion.

As far as the pseudonyms, I mean, what I've seen in some other court's opinions is that they designate a child as Mary, and so it's sort of giving another

option. I just want to raise one -- make it clear that under (b) I think there's nothing wrong in giving courts discretion not to name a parent, but I'm just not quite sure of the circumstances in which that would occur, and I think it's -- I think we've made it clear for the record that it's to protect the child in some manner, but I just raise the question that I don't know of any circumstance really because if it's a high profile person as we've discussed, you can't not name them for that reason. If it's a vile act -- I just don't know of the circumstances in which we're not going to name the parent, but I think that by giving discretion and by saying it's for the child, really in the best interest of the child I think is the standard, but I just don't know -- you know, we went from broadly designating pseudonyms or initials, and I think that this has been left in, but in a way it's a -- an ambiguous provision, and I'm just -- it's a remnant of our discussions, and I just don't know whether it should make the final cut --

CHAIRMAN BABCOCK: Okay.

HONORABLE JAN PATTERSON: -- but I'm not against it. I just raise the issue whether it's necessary. I don't know what circumstances that I would --

CHAIRMAN BABCOCK: Bill's got his slasher

out. Carl.

MR. HAMILTON: I have another question. At what point does this name first appear? Is that in the trial court and the lawyer has to select this name, or where does it first originate? I know these are appellate rules, but do we start this in the trial court? I assume we do.

CHAIRMAN BABCOCK: Well, the request for a rule was generated by the Supreme Court to deal with appellate proceedings. I don't think that we've been asked to tackle the issue of what happens in the trial court, although logically it's the same.

MR. HAMILTON: So then if it's -- if the name is the real name in the trial court and it goes up on appeal, is it the appellate lawyer that first selects the name for the minor?

CHAIRMAN BABCOCK: I would guess. Jan.

HONORABLE JAN PATTERSON: I suppose we might want to just make clear what our real goal is here, and I think originally our goals had to do with the concern about every opinion being printed on the computer, Lexis, because I don't think we necessarily -- while we're concerned about privacy and confidentiality in the trial court, it's not broadcast in the same way as it is on Lexis, and also I can't imagine really the circumstances

in which you might have a child testifying, and you don't want to call them "AN."

I mean, there's a little bit more candor and disclosure I think that can occur in a trial and in a trial proceeding that doesn't implicate the same interests, so I suppose it might make sense to say what we are accomplishing here, which is a more limited task. I don't think we can solve the problems of the trial court or that concern, and I'm not sure we really sought that by this rule.

CHAIRMAN BABCOCK: Okay. Any other comments? Yeah, Bill. And then Justice Gray.

PROFESSOR DORSANEO: This doesn't mean, of course, that you have to go and redact names from the record.

MR. HUGHES: No. That's addressed -- in subsection (c), there's -- the concern is the last sentence says, "Nothing authorizes alteration of the original record," but we included a provision -- the problem you can get into is with briefs, particularly at the Supreme Court, maybe in other courts as well, there are required components, for example, the judgment, that are required to be attached to the brief and sometimes get published along with the brief on the internet, and then you have a situation where you've gone through all this

trouble to disguise the name and then you turn the next page to Appendix A, and it's the judgment, and there it all is.

And so the idea in (c) was to if you're going to require redaction, either if the Court is doing it on its own motion for opinions or if it's requiring the parties to do it, there's a parallel provision that says anything that you're putting into the appendices, the briefs, et cetera, from the record that contains those names also has to be redacted, but the last sentence is to make clear that you can't go changing the original record.

PROFESSOR DORSANEO: Why don't you put that in a separate letter, make that (d)?

MR. HUGHES: Which part?

PROFESSOR DORSANEO: The last sentence.

MR. HUGHES: Okay.

PROFESSOR DORSANEO: It really is a slightly different thought than redaction of the appendix items.

CHAIRMAN BABCOCK: Yeah. What about this -- I'm sorry. Richard, and Justice Gray had his hand up. Let's --

MR. MUNZINGER: A minute ago Bill mentioned amicus briefs. I don't know if an amicus is a party. I suspect not, but if the word "party" is used in the rule it leaves a loophole for the amicus. That may or may not

be something worthy of your attention, but if an amicus is not a party then the amicus could get around the rule.

CHAIRMAN BABCOCK: Yeah. Justice Gray, sorry. I didn't mean to skip you.

HONORABLE TOM GRAY: No, that's okay. It actually didn't matter because it was sort of related to what Jody was talking about with Professor Dorsaneo on one of my comments, and that is that there are a lot of documents. I mean, we are probably once every six months getting a request from someone that wants all our briefs going back many years, as far back as we can. We got a request a couple of months ago for basically everything we could turn over to them involving the dockets of the Court, and so my position on this is somewhat relaxed because until there is a comprehensive solution to what we are going to make publicly available routinely, it is more of a problem than what we can fix in this little area, and probably just along subsection (a) of the proposed rule may be all -- which is basically what we're doing now, and may be enough, given practical obscurity, to address the problem, but once we get past the practical obscurity -- and so much of this does go on the web -- it's a very easy process to just go back into the record and find who these people are.

To change the subject now on another

comment, Jody, the change from I think you said "involving" versus "seeking," the use of the term "seeking the termination of parental rights" may actually wind up pushing it the other direction, because if the rights have already been terminated, which is more often the case as far as the number of appeals I've seen, it may only be in those cases in which the judgment of the trial court is not for termination that someone could argue that this doesn't apply to a case where the parental rights have already been terminated. In other words, they're no longer seeking it. It's already been done. The judgment of the trial court is to terminate.

MR. HUGHES: Oh, I see what -- you're reading "seeking" to go with "appeal" as opposed to "suit." I see your point.

HONORABLE TOM GRAY: And I don't know -- I know what you're saying, and I know what the intent of the rule is, but I also know the type of arguments that get made to me about what applies and doesn't apply, and I could see that as a very plausible argument that somebody would make in good faith that I didn't think it applied to me because this termination had already been accomplished.

MR. HUGHES: I tried to address that by having it be talking about the suit, but I see the problem is that you're reading "seeking" to go with "appeal"

and --

HONORABLE SARAH DUNCAN: As long as we're talking about that, you don't appeal a suit. You appeal a judgment, so if the -- or orders, so if what is on appeal is a termination order or judgment, would that encapsulate, Tom?

HONORABLE TOM GRAY: Well, and actually we probably need to expand it beyond appeal to proceedings, because original proceedings would then be captured as well.

MR. HUGHES: But you couldn't have an appeal of a termination judgment because then that's not going to capture the cases where the judgment was for no termination.

HONORABLE TOM GRAY: I would say "proceeding involving the termination of parental rights."

CHAIRMAN BABCOCK: "In an appeal from a judgment of a suit involving" --

PROFESSOR DORSANEO: No, just start it with Tom's.

HONORABLE TOM GRAY: "In a proceeding involving the termination of parental rights."

CHAIRMAN BABCOCK: Okay. All righty. Good. Did we ever get to closure on the pseudonym issue? I know we started to talk about it. Bill, what do you think

about the pseudonym?

PROFESSOR DORSANEO: I think it's -- I think courts won't abuse this. I'm not sure parties will be able to handle it, so I think we should take it out. There isn't anything in here about -- this is about what parties are doing, right, Jody?

MR. HUGHES: It's both.

CHAIRMAN BABCOCK: It's both.

PROFESSOR DORSANEO: Okay.

CHAIRMAN BABCOCK: You think pseudonym should be taken out? Bill, do you think pseudonym should be taken out?

PROFESSOR DORSANEO: Yes, but I'd like to leave the courts the ability to use a pseudonym if they would like.

CHAIRMAN BABCOCK: Well, the problem that Bonnie raised really would be applicable to whether it's a party or a court, because they said "Jane Doe" and there just happened to be a child in the community named Jane Doe.

PROFESSOR DORSANEO: Yeah.

CHAIRMAN BABCOCK: Right, Bonnie? That's what you were saying, right?

MS. WOLBRUECK: Yes, and it was a -- you know, the use of Jones and Smith sometimes is used for

pseudonyms, and that's much more prevalent to be a problem.

HONORABLE TERRY JENNINGS: You're using common names for pseudonyms.

CHAIRMAN BABCOCK: Yeah.

HONORABLE TERRY JENNINGS: Well, under this rule in an appellate opinion do you have to refer to the child by their initials? Let's say the appellate court wants to just refer to them -- there's only one minor child, and we want to refer to them as a minor child. Under this rule can the appellate court refer to them as "the child"?

CHAIRMAN BABCOCK: I would think so.

MR. HUGHES: I think so.

HONORABLE TERRY JENNINGS: Or do they have to use the initials?

MR. HUGHES: Well, I think that would fall under pseudonym, or if they wanted to say "mother" or "father," I mean --

HONORABLE TOM LAWRENCE: Is there any reason you couldn't use numbers that would be reset yearly? Maybe specific to an appeals court region?

MR. HUGHES: Well, I started out on the first draft with it had to be first and last initial and then numbers if they were the same, and I think the

consensus was that was too specific and we needed to give courts, you know, more discretion in some cases to continue doing what they're doing, which is working well, but I don't have a -- whatever you-all want to do.

CHAIRMAN BABCOCK: Any other thoughts about this? Yeah.

MR. STORIE: How about just identifying the child in a way to protect the child's true identity and not trying to select all the choices?

CHAIRMAN BABCOCK: Bill.

PROFESSOR DORSANEO: I say take out pseudonym. It's too much trouble figuring out what it even means, and presumably if a party does what (a) says, that would be the same designation that the court would use.

CHAIRMAN BABCOCK: Yeah. Wouldn't it?

MR. GILSTRAP: Well, I mean, we do have the problem of the same initials. I mean, you know, Ronnie and Randy, I mean, you know, Donna and Don. I mean, parents do that all the time.

CHAIRMAN BABCOCK: George Foreman, all his kids are named George Foreman.

MR. GILSTRAP: I mean, the goal is not to use the kid's real name. That's what we're talking about here.

CHAIRMAN BABCOCK: Right.

MR. GILSTRAP: And the only objection that's been raised to pseudonym has been that in some cases when they say "John Smith" there are real people named John Smith. I think that's just the price you pay for being named John Smith.

CHAIRMAN BABCOCK: See, you run the risk of -- Bonnie.

MS. WOLBRUECK: I just wanted to state the Legislature has allowed pseudonyms in criminal actions of like victims of crime. They've actually used in the statute that a victim of crime may select the pseudonym to proceed in the criminal action, so the Legislature has allowed pseudonyms.

CHAIRMAN BABCOCK: So you're taking back what you said before?

MS. WOLBRUECK: No, I'm just telling you that it's already out there.

CHAIRMAN BABCOCK: Okay. Yeah, Justice Jennings.

HONORABLE TERRY JENNINGS: Well, since we're trying to say the child should not be identified by their true name, can't we just say that, that in such an appeal a minor child shall not be identified by his or her true name?

CHAIRMAN BABCOCK: Yeah, that was Gene's point, which --

MR. STORIE: Yeah. Thank you.

CHAIRMAN BABCOCK: -- may be a good way to do it. What do you think about that?

HONORABLE JAN PATTERSON: I think that's fine. You don't want to cap indiscretion in this area.

HONORABLE TERRY JENNINGS: That way the court can use or the parties can use whatever writing style they want to use just as long as they're not identifying the child's name.

HONORABLE JAN PATTERSON: Or numbers.

PROFESSOR DORSANEO: I'm worried about lawyers picking -- some lawyers picking ugly pejorative pseudonyms for -- not so much for minor children, but --

MR. GILSTRAP: "The child from hell."

PROFESSOR DORSANEO: I like the --

MR. HAMILTON: "Terribly abused child."

PROFESSOR DORSANEO: I like the initials, and I don't think it's a big problem for somebody to figure out that if the children have the same initial then they'll differentiate them in some obvious manner. But if you don't think that people will be able to figure that out then I would say go back to Jody's original language.

CHAIRMAN BABCOCK: Okay.

HONORABLE TERRY JENNINGS: How about putting that in a comment, like, you know, you can use a pseudonym, initials, or any other --

CHAIRMAN BABCOCK: Nonpejorative.

HONORABLE TERRY JENNINGS: Nonpejorative.

CHAIRMAN BABCOCK: Okay. What about the suggestion that subpart (b) ought to come out? When I said Bill was making a slashing noise and motion in response to Justice Patterson's comment, he said, "Take it out." What's everybody think about that?

PROFESSOR DORSANEO: I meant the pseudonym.

CHAIRMAN BABCOCK: Oh, just the pseudonym. Okay. All right. Any other comment about subpart (b)? Any other comments about the rule? Yeah, Frank.

MR. GILSTRAP: Is the goal here to make it impossible to find the child's real name ever? And that seems to me to be a problem, because I'm the child and it's years later and I say, "This affected me," and there's no way I can -- no way it can be determined. I mean, it seems to me the child's real name ought to be there somewhere.

MR. HUGHES: Well, it will be in the original appellate record. It will be in the judgment.

MR. GILSTRAP: Well, I mean, will it? I don't know. I mean, in the trial court they start calling

the child "DF," I guess somewhere buried down in the records hopefully there's some way to identify that child, or do we want that?

HONORABLE TOM GRAY: It will be on the sensitive data form.

MR. GILSTRAP: Okay. I mean, that may be the answer, but, I mean, it's a problem.

CHAIRMAN BABCOCK: Yeah.

HONORABLE TOM GRAY: It is a problem.

CHAIRMAN BABCOCK: All right. Any other comments about this? All right. Do you have enough direction?

MR. HUGHES: Well, maybe I should quit digging, but something came up I wanted to address, Richard's point about -- Richard Munzinger's point about the amicus, because I don't think we specifically addressed it. Under Rule 11 for the amicus it does say they have to comply with the briefing rules for parties, and I don't know if that's sufficient to address that concern or whether we should say something specific.

PROFESSOR DORSANEO: Take out the word "parties."

MR. GILSTRAP: Take out "parties," yeah.

CHAIRMAN BABCOCK: Yeah.

MR. HUGHES: Okay.

CHAIRMAN BABCOCK: Yeah. Okay. Anything else? All right. Let's move on to the next agenda item, which, again, Professor Dorsaneo and Sarah Duncan are going to talk about, but this is the one that Jody wanted to talk about, Uniform Format Manual for Texas Court Reporters first. Is that right? Or was I misinformed?

MR. HUGHES: No, I think that was right. My concern was that Skip Watson had some particular issues with this, but I think --

CHAIRMAN BABCOCK: So we want to do it when he's not here?

MR. HUGHES: Well, I think Sarah may not want to go forward with this anyway.

HONORABLE SARAH DUNCAN: We can open it up to discussion if we want. Let's do something that has an end because post-judgment -- post-verdict motion rules don't have an end. This is the third time since I've been on the committee that we've been down this road, so let's do the formatting if that's all right.

CHAIRMAN BABCOCK: Sure. Yeah. Your show. Whatever you guys want to talk about first.

HONORABLE SARAH DUNCAN: It's not my show. I'm not on the uniform formatting, whatever that is.

CHAIRMAN BABCOCK: Okay. Whatever it is. Bill, the proposed additions to 301, 329b, et cetera. Do

we want to talk about that?

MR. HUGHES: That's what we're not ready on.

HONORABLE SARAH DUNCAN: Let's do that -- can we do that one last, because it truly is never-ending?

CHAIRMAN BABCOCK: Yeah, sure.

HONORABLE SARAH DUNCAN: There is not a subcommittee report and the discussion is never-ending.

CHAIRMAN BABCOCK: Okay. Let me just throw it to you guys. What do you want to talk about?

HONORABLE SARAH DUNCAN: Uniform Format Manual for Texas Court Reporters.

PROFESSOR DORSANEO: And that's not us.

HONORABLE SARAH DUNCAN: I'm not sure why it's -- it's all the same letter from Justice Hecht.

CHAIRMAN BABCOCK: Okay. David, is that you?

MR. JACKSON: Not me. I'm just here to answer questions.

MR. HUGHES: I don't know who it got referred to, but this was the issue at a recent State Bar appellate CLE. Stephen Tipps raised this issue, and I know I talked about it just informally with Sarah and with Bill, and I don't think Stephen is here today, but this --

HONORABLE SARAH DUNCAN: Well, I have a personal story to tell.

CHAIRMAN BABCOCK: Oh, good. Let's hear that.

HONORABLE SARAH DUNCAN: So does David. We both have personal stories to tell.

MR. JACKSON: Yeah.

HONORABLE SARAH DUNCAN: I think we should tell our personal stories because I didn't realize -- when this came up with at the advanced civil appellate practice seminar recently I didn't realize exactly what Mr. Tipps was referring to.

CHAIRMAN BABCOCK: Okay.

HONORABLE SARAH DUNCAN: I now have firsthand experience with it, and it is a substantial problem both for lawyers who write briefs and I'm afraid more so for courts. This was a case in which there were a lot of witnesses who testified at trial by video excerpts, and what the court reporter did is not transcribe, not record, those words. He or she simply appended the -- that person's written deposition, the transcript of the deposition, with a list of all of the excerpts that were admitted at trial. So in this case, I now know, there was -- there are two volumes of the record that are depositions, and there are about 15 pages single-spaced of numbers identifying the excerpt that was admitted at trial. For instance, "157:31 to 33." That's an excerpt

from the deposition. There are about 15 pages of those.

So when we got ready -- and I didn't know this because I didn't do it. My assistant tells me now that he did it. So when we got ready to abstract the record he had to go through and identify, mark out, all of the parts of the deposition that weren't admitted at trial so those wouldn't be abstracted. I went to try to read the record and had to go and mark out everything that hadn't been admitted at trial, and it was a good part of, you know, this much written material. That cost our client I can't imagine how much money to go through it. Now, our client pays for it, and that's great, but what happens when it gets to the Supreme Court and Justice Hecht is trying to read the record and can't figure out what's been admitted and what wasn't admitted in trying to write an opinion?

David has the other side of the personal story why apparently sometimes this is done. I think it is a huge problem for the appellate courts and anyone trying to write a brief. I now understand it's a huge problem for some court reporters in some cases because of the quality of the tape, which David will speak to.

MR. JACKSON: Right. I mean, when we are sitting in the courtroom and they say we're going to play a videotape, the anxiety starts to build right there as

to, you know, the quality of the videotape, whether you're going to be able to hear what's being said, how long it's going to be. You don't know any of these answers. You go ahead and start writing it. A lot of times they're okay, you can understand them, but there are so many times where you can't distinguish what they said on that tape, like a "did" or a "didn't" or an "is" or an "isn't," and you get to the point where a lot of times they'll start talking over each other and you can't hear any of it. I've taken one where it was a minor child and you couldn't understand anything they were saying, I mean, or just kind of baby talk, and we're supposed to make a verbatim record of that and swear to it and turn it in, and I don't think in a lot of cases that's going to be helpful on appeal anyway. If I've got it wrong or I heard it wrong or wrote it down wrong, then it's just wrong.

If there is a transcript that exists from the person who was actually at the deposition and had the ability to stop them and ask them what they said, that's going to be a more accurate transcript than me sitting in the courtroom trying to write a variable quality of -- it could be the acoustics of the courtroom, it could be the quality of the tape, it could be the speed that it was given, or just the intelligence of the witnesses or whatever, and it just gets impossible.

CHAIRMAN BABCOCK: David, aren't you going to -- if you undertake to transcribe what was played in the courtroom, you will have access just as -- just as Sarah had access to the transcript, wouldn't you in preparing the appellate transcript go back to that deposition transcript to make sure that what you transcribed from the courtroom was accurate? And the reason why I think Sarah's point -- and I've run into this myself. Why that's important is so that you don't have to go digging through, you know, hundreds -- the appellate lawyer doesn't have to go digging through hundreds of pages of deposition and perhaps not getting it -- not matching what actually was played in the courtroom.

I had another situation, a case that's on appeal right now, that's even -- that's even worse than this. We played -- or we attempted to play a video of a news broadcast, not the one that was at issue in the lawsuit but another news broadcast, and the plaintiff was hopping mad about it and didn't want it played, and so the trial judge said, "Okay, I'm going to -- I'm going to edit this news broadcast, so you can only play, you know, certain parts," and so he took the written transcript and said, "Okay, you can play this, this, and this." We then edited on the fly the video and the audio. It was played in the courtroom, but the court reporter didn't write it

down, and the judge's handwritten editing is long gone, so there's nothing in the record, which is good for me, because -- but there's nothing in the record to say what the jury heard. Yeah, Justice Gray.

HONORABLE TOM GRAY: The third scenario that occurs when this happens -- and it's happened to us twice. I think both of them happened to be criminal cases. A portion of the video was played, like what you just described, on the fly, just kind of excerpted, and then the entire video was marked as an exhibit and went back to the jury room, and the jury for some reason or other didn't stop where the start and stops were played during trial, and so then you've got that problem, and so I agree with Sarah and Chip that it is a big problem for the appellate court to know and, therefore, the appellate lawyers really to present to us what happened at trial.

CHAIRMAN BABCOCK: Bill.

PROFESSOR DORSANEO: If this section 16.16 allows the court reporter to make the record that way, it needs to be changed.

HONORABLE SARAH DUNCAN: And I'll go further and say that with all respect for court reporters, because I think they have an enormously difficult job and line of work, career, they've got to quit deciding what they're going to send up and what they're not going to send up. I

don't know, Tom, if it's been your experience, or Jane, but if it wasn't on an eight and a half by eleven piece of paper, we didn't get it, and sometimes orders to get it were completely unavailing.

CHAIRMAN BABCOCK: Justice -- oh, I'm sorry.

HONORABLE SARAH DUNCAN: And I think, you know, if we need a new rule that just -- that says if it goes on in the courtroom, the court reporter has to take it down, and if it is an exhibit, it has to go up, period. No exceptions. No discretion.

CHAIRMAN BABCOCK: Yeah, Justice Jennings.

HONORABLE TERRY JENNINGS: I'm wondering how practical that is, though. The first thing I learned as a baby prosecutor was it was my job to protect my record. If I wanted something in the record, I had to get it and make sure it got in the record. I had to deal with the court reporter. If I had a situation with a videotape, we would have a -- we would have a transcript made and get defense counsel to agree on it so that the transcript could be in the record. It just occurs to me that if we do something like this we're going to be putting the burden on the court reporters when that's always been the job of the advocate to make sure that they've got a clean record to take up on appeal.

HONORABLE SARAH DUNCAN: I'm talking about

things that are in the record. I'm not talking about things that haven't been made a part of the record in the trial court.

PROFESSOR DORSANEO: I think it would be my responsibility to speak so the court reporter could hear what I was saying, but I don't think I should be responsible for the court reporter performing the court reporter's designated function, and I didn't know this was in the -- what Carl just showed me was in the manual. How did it get in there? I mean, that's not the way we've ever done things. Somebody just made up a new procedure and put it in this manual. It needs to go away.

CHAIRMAN BABCOCK: Justice Bland. Justice Bland.

HONORABLE JANE BLAND: Don't we have a rule that says the court reporter shall take down all proceedings in the courtroom, and the way that we handle it is that the lawyers can waive that by not -- you know, making sure that we have a court reporter; and it seems to me to have it incorporated in a manual something that's inconsistent with our rule that they take everything down is not a good idea; and, you know, to me it's sort of like waiving voir dire, you know, reporting of voir dire and reporting of closing argument. You know, the lawyers should be sure, you know, to say to the reporter, "No, I'm

not going to waive reporting of my voir dire, I'm not going to waive reporting of my closing argument, I'm not willing to waive reporting of my deposition," but I don't think we should be signaling to the court reporters that the standard practice is to do this. I think it should be the opposite, and I just signed an order last week to supplement the record for depositions that never got tendered because they're an afterthought. Then if the court reporter doesn't take them down at the time they're played for the jury or read to the jury, then somebody has to go back and make sure that they get included, and that doesn't always happen, so it slows everything down on the appellate timetable, and that's assuming that you can recreate what was played to the jury. I think it would be a good idea to get rid of this.

CHAIRMAN BABCOCK: And there can be great mischief, too, when you're -- you know, when you're reconstructing something after the fact somebody can maybe slip some stuff in from the deposition that wasn't really played to the jury, not that they do it intentionally, but it can happen. David.

MR. JACKSON: But, Chip, it can go to the other extreme as well. We've on this committee changed the rules where people can tape-record depositions now and not have to have a court reporter at all, and with this

rule amended too much you're going to have lawyers that are going to bring their tape recorders to the courthouse and push the play button and put a requirement on a court reporter sitting in the courtroom to do what they didn't want to pay somebody else to do right the first time, and it's not going to be good quality. It's going to be horrible, and we're going to be swearing to a record that's not going to be accurate.

CHAIRMAN BABCOCK: Carlos.

MR. LOPEZ: I've had this issue come up many, many, many times, and the short answer of how we dealt with it was we got an agreement about how to handle it. We addressed it, and it got handled one way or the other. But philosophical question, I have a problem. The problem I have -- I understand very much the concern, but the problem I have is that in my book -- and I doubt anybody here will disagree -- the record that goes up as the official record in my book has always been -- in the perfect world it ought to be exactly what the jury heard. So, I mean, when a witness gets on the stand and speaks inaudibly, the court reporter either puts "inaudible" or says, "I didn't get that, can you repeat it?" And they repeat it, but the record shows all that.

And so if that tape is crap -- pardon my French -- the quality, and the jury isn't hearing it, I

think the record should reflect that, and if you make the court reporter struggle through it, it will reflect that. If you take the easy way out, it will reflect something that didn't happen, and that is that the jury heard this perfectly, but in reality they did not, and so I know it's a problem and I don't have a solution, but I do think it's not just a theoretical problem. I mean, what we do many times is the lawyer -- much like the justice said, the lawyer who wants to make sure his record is good would bring the deposition transcript and put it right in front of the court reporter so that she could kind of see, have the benefit of this prior transcript to kind of figure out what the issue was and what was going on, but, I mean, it ought to reflect what really happened in the courtroom, and if what really happened in the courtroom is not nice and neat then the record is not going to be nice and neat, and it shouldn't be.

CHAIRMAN BABCOCK: Yeah. There's another problem, too, and that is, David, on my example -- and this wasn't in Texas. This was out of state, but where this video, edited video, got played to the jury, it never occurred to me -- it should have, but it never occurred to me that the court reporter wasn't, you know, taking all this down. They were over there. They seemed attentive, and I'm not watching to see if their fingers are moving

all the time because other stuff is going on, and I think -- and I think that's happening not only with little snippets like that, but with videotaped depositions, too. I don't think they're -- I don't think their rule is that they're taking that down contemporaneously and the lawyers don't even -- trial lawyers don't notice it, or at least I don't.

HONORABLE STEPHEN YELENOSKY: Well, I'll just say what my court reporter and I always do is ask them if they're going to provide page and line number and then it still has the problem that, of course, the page and line number from the deposition may not actually be audible in the courtroom, and it's not a solution to that problem, but it is a solution to the problem that if the court reporter doesn't let them get away and I don't let them leave without giving page and line number then you at least know what was read or displayed. It doesn't go to audibility, but you get that.

MR. JACKSON: If you're talking just page and line numbers like snippets you have to write those. I mean, it just doesn't make any sense to do it otherwise, but if you've got a situation where they play an entire witness and you can put that Dr., you know, Jekyll was played, you know, consistent with Exhibit 114, it makes that part of it a lot simpler than the court reporter

trying to struggle through writing Dr. Jekyll for three and a half hours when you can't hear him and you can't understand him, and you're going to spend eight or ten hours comparing the other -- if you have the other transcript, comparing that to what you thought you heard, and it just becomes impossible.

HONORABLE STEPHEN YELENOSKY: Well, if you can't hear them or understand them then the point is made that the jury can't either, so that is a problem. So I don't agree that it's appropriate because the court reporter can't hear them or understand them, but when it is crystal clear and you have page and line number designated then it just seems redundant to have another transcription, but if it's considered important enough, then fine.

MR. JACKSON: But my point is --

CHAIRMAN BABCOCK: Judge, at what point do you require page and line? Before it's played or --

HONORABLE STEPHEN YELENOSKY: Oh, before they read a deposition or put it on, which we talk about, you know, we need page and line number because we're not going to be making a contemporaneous transcription of what's read or played unless you insist on that, so we have that discussion and, yeah, I'll let them go ahead without providing it at that point, but usually at the

next break they're told "You need to give that to him before you go on break."

CHAIRMAN BABCOCK: What if there's an objection during the playing of the video deposition?

HONORABLE STEPHEN YELENOSKY: Well, there shouldn't be because they should have presented the portion of the deposition for editing in pretrial and I've ruled on all those objections.

CHAIRMAN BABCOCK: Sometimes it does happen, though, that judges don't do that.

HONORABLE STEPHEN YELENOSKY: They don't do a pretrial -- well, I can't speak for those.

CHAIRMAN BABCOCK: They just say, "Play your thing and when you've got an objection, stand up and object."

HONORABLE STEPHEN YELENOSKY: Well, I never do that, so I can't speak for those judges.

CHAIRMAN BABCOCK: That does happen.

HONORABLE HARVEY BROWN: In one of my recent trials the designations everybody thought would match up with what was played in the courtroom, but there was mistakes in the editing process, so there was some questions played that we didn't want played and so there was objections, and there were some parts that weren't played that we wanted played, so we stood up and read

them, and in that case also the judge handled objections pretrial, or you know, as the trial went along before the actual video was played, but some of the judge's rulings were changing a little bit in the trial. So a few times, not often, but a few times, there were objections that were kind of new that were made of the video, despite the good procedure the judge had ahead of time. And so afterwards we all thought, "Well, we've got a problem," and we weren't sure really what to do because we had tried to save the court reporter the time and make it easier for the court as a whole by agreeing to the page and line, but it just ended up being cumbersome.

HONORABLE STEPHEN YELENOSKY: Well, did anybody stop it? I've had lawyers realize they made a mistake in the editing and then that stops and we send the jury out and we deal with it, bring the court reporter in if necessary, but, you know, I don't see how that's a difficult problem to deal with as long as they're paying -- and if they're not paying attention, that's on them.

HONORABLE HARVEY BROWN: It's not if you think about it, but if you're watching the jury and you're thinking about how the jury is reacting to the video and you're reading the transcript yourself to make sure the edit matches the transcript, you just might not think to get the court reporter in there to take down that one more

question that got skipped.

CHAIRMAN BABCOCK: Carlos.

MR. LOPEZ: I'm just -- I'm still back at the -- maybe I want to make sure that I'm not off base here. I mean, do we all agree that the record ought to be as accurate a record of what really happened, or should it be nicer and cleaner than what happened?

HONORABLE STEPHEN YELENOSKY: With this group we better take a vote on it.

MR. LOPEZ: That's not a rhetorical question. I'm being serious, because, you know, I mean, you're -- what Harvey was saying, that happens all the time. You know, I guess I know it's pie in the sky, but philosophically I think the record should be a true record with all the warts and hickeys of how a trial bumps along. I mean, it shouldn't be a cleaned up process unless there's been an agreement, which I always did. We always had an agreed process of how it's going to be handled because it comes up all the time.

CHAIRMAN BABCOCK: David, any insight as to how -- first of all, what is the Uniform Format Manual for Texas Court Reporters? Anybody know that?

MR. JACKSON: I can explain that. We had a trial, a pretty famous trial, that we had a court reporter that made some big mistakes. They had a 6,400-page

record. They turned it over to their daughter to turn out the record. Their daughter went through the record, transcribed the court reporter's notes. She had left -- the daughter had left all these parentheticals in the transcript for her mother to go back and check, and the mother never bothered to check. She turned in the record, and it got a lot of publicity and a lot of press and had a lot of mistakes in it.

A task force of court reporters got together. We came down to the Office of Court Administration. We met with the Office of Court Administration, and they showed us the vast differences in the way every court reporter in the state did their records and the format they were in and the mess that a lot of them were in. The parentheticals that would run three or four pages about this long -- I mean, this wide of marking an exhibit and all the problems that we had. So this task force got together for several weekends over a six- or eight-month period and rewrote -- we wrote the Uniform Format Manual so that every court reporter in the state would do everything the same way, because you had people that were getting their business by changing the way they formatted their depositions. They would announce that they were 20 percent cheaper than anybody in town, but yet their font was 30 percent bigger than anybody else

in town so they got a ten percent raise, and, you know, so people were doing all this sort of things, and we sat down and wrote this manual, and the Court Reporters Certification Board enforces this manual that if you're one digit off you could be brought up before the board on it, and it was for that reason, and we covered some of these other issues that we all have to face so that we all handle things the same way.

CHAIRMAN BABCOCK: Did the Court -- did the Supreme Court or any courts --

MR. JACKSON: Yes. The Court signed off on this.

CHAIRMAN BABCOCK: The Supreme Court signed off on it. Okay.

PROFESSOR DORSANEO: But they didn't read all of it.

CHAIRMAN BABCOCK: Huh? Is Tipps right that 16.16 conflicts with TRAP 13.1? Justice Bland is saying -- nodding her head "yes."

HONORABLE JANE BLAND: Well, I mean, it's one of the -- it's just like waiving voir dire or waiving closing argument, and I think that even there's a Supreme Court case about it. I think you can waive it, and so I guess theoretically the fact that it's not being recorded isn't a rule violation if the lawyers aren't affirmatively

saying, "Please report this deposition," but if we're talking about best practices in a manual, it would seem to me like for a court to be consistent with a rule it should nudge toward reporting and then get, you know, some sort of affirmative waiver if that's not what the attorneys want.

CHAIRMAN BABCOCK: Sarah.

HONORABLE SARAH DUNCAN: I think it's a straight-up conflict. The rule says "unless excused by agreement." If I don't know the court reporter isn't transcribing the video deposition excerpts I can't possibly have agreed to his or her not doing so.

CHAIRMAN BABCOCK: Unless you knew about 16.16, which told you that they're not going to do it.

HONORABLE SARAH DUNCAN: No, that just tells me some of them may not do it. This has not happened in every record I've looked at in the last six months, so I understand that it was intended to produce uniformity, but it -- thank the Lord, it hasn't, because --

CHAIRMAN BABCOCK: Sometimes it is transcribed?

HONORABLE SARAH DUNCAN: Yeah.

CHAIRMAN BABCOCK: Yeah, Carlos.

HONORABLE SARAH DUNCAN: This is --

MR. LOPEZ: What rule is Justice Duncan

talking about, the first rule that she mentioned?

HONORABLE SARAH DUNCAN: 13.1(a).

MR. LOPEZ: Okay. Because there's also local -- I don't remember if it's local Government Code or Government Code provisions that say --

MR. JACKSON: 52.

MR. LOPEZ: -- there will be a court reporter and the proceeding will be recorded, so then it goes back to how do you define proceeding?

HONORABLE NATHAN HECHT: But you'll remember that 13.1(a) has a history, and --

CHAIRMAN BABCOCK: Don't they all.

HONORABLE NATHAN HECHT: Yes, and there was -- there have been huge disagreement, I think on this committee, but certainly on the trial bench, about which way the default should run, whether the court reporter is presumed not to be there unless you ask them to be or presumed to be there unless you ask them not to be. And so there was some -- there has been some consternation getting Rule 13.1(a) to read the way it does.

HONORABLE SARAH DUNCAN: Now that I think about it, I think I have a dissent on that. I'm somebody who reads it that unless there is an affirmative agreement, but I think I may be in the minority on that. I mean, that's to me what it says, but other people read

it differently.

CHAIRMAN BABCOCK: Jody.

MR. HUGHES: Just another issue that I think Stephen Tipps raised or somebody has raised is that with the language of the UFM it talks about exhibits, and demonstrative exhibits are a problem because this sort of equates exhibits with things that are admitted in evidence, and the so-called demonstrative exhibit is -- you know, they might say, "Well, this is our demonstrative exhibit" and the court reporter might read this and stop typing and then it goes up on appeal and it just says, you know, "tape played here" or something like that.

HONORABLE SARAH DUNCAN: Well, and yet worse, the witnesses and the lawyers are all referring to the upper right corner of this demonstrative exhibit where it says something of huge importance to my appeal, but I couldn't begin to tell you what it says because that demonstrative exhibit is not in evidence and it's not in the record.

PROFESSOR DORSANEO: Well, that is the lawyer's fault.

HONORABLE STEPHEN YELENOSKY: That is the lawyer's fault.

HONORABLE SARAH DUNCAN: I understand that.

HONORABLE NATHAN HECHT: On that score when

we're talking about this we need to be careful to distinguish between demonstrative exhibits as I think the rules contemplate them, which are something that does come into evidence, as opposed to what some people have called, for want of any good word, pedagogical or some kind of material. It's where in the old days you put the easel up, and the plaintiff's lawyer is trying to put his damage numbers up where the jury can see them and he says, "Well, how much for this and how much for this" and writes the number, and then there's always a big fuss about is that going to go to the jury or not, and oftentimes it doesn't, but sometimes it does.

And then, of course, that was then, and today we have PowerPoints and much more sophisticated presentations, which are meant to assist the lawyer in the presentation of the evidence, but query, do then those go back to the jury room, and there's always an issue, because obviously if you could summarize the best points of your case, put them in a PowerPoint and send it to the jury that would be great, but some judges think the jury should try to remember the best they can what happened and not be assisted by those things, so that -- but that's as -- that's different from the model handgun or the model mixer or product that is brought in to say, "Well, this is what the thing looks like."

CHAIRMAN BABCOCK: The animated re-creation of the accident.

HONORABLE NATHAN HECHT: Yeah.

CHAIRMAN BABCOCK: Fire or whatever it may be. Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: Well, those are all issues, but they should all have been addressed, in my opinion, at the trial court. If it doesn't have an exhibit sticker on it and I didn't say it was admitted, it doesn't go back to the jury.

CHAIRMAN BABCOCK: Right.

HONORABLE STEPHEN YELENOSKY: It's possible it has an exhibit sticker on it and I said it was admitted solely for the court because it's not something going to the jury, but those are the only two possibilities. If they show a PowerPoint and they don't offer it in a form that we can put a sticker on it, it's pretty clear it's not going back to the jury. They can call it whatever they want. You can call it demonstrative or "I'm just showing this to blah-blah-blah." Until they put a sticker on it and offer it, I know what it is. It's not going back to the jury.

And then we have the argument about what form it goes back. If you have a blowup then you have the argument, okay, it's an exhibit, but does it go back as an

eight and a half by eleven or a blowup. You have those arguments because it puts undue influence, but that all should be done at the trial court level.

HONORABLE NATHAN HECHT: But the additional problem is you're just using this for demonstration, and it could be as simple as a sheet that you're just marking on and tearing off, but as Sarah says, then when you're reading the appellate record you see the lawyer say, "Well, and as you see from this slide, the plaintiff loses" and then the slide is not evidence and you don't know what --

HONORABLE STEPHEN YELENOSKY: Well, it's that lawyer's fault.

HONORABLE SARAH DUNCAN: Well, but it's not exactly. That lawyer is trying to try a case in front of a jury, and it's the rare trial lawyer who is able or willing to simultaneously be concerned with what the appellate judge or attorney is looking at. Whether it was admitted in evidence or not, the jury saw that or heard it, and it's enormously frustrating to be trying to write an opinion and know the jury saw something that I didn't get to see.

HONORABLE STEPHEN YELENOSKY: Well, then that's an argument against allowing the jury to see anything that's not admitted in evidence, not allowing

these pedagogical aids or whatever.

HONORABLE SARAH DUNCAN: I would go exactly the opposite way. I think what the jury sees and what the jury hears goes up. If it's not in evidence, it's not in evidence, but the jury heard it and the jury saw it. I mean, I go back to what Carlos was saying that I think that the appellate court is entitled and responsible for hearing and seeing what the jury heard and saw.

HONORABLE STEPHEN YELENOSKY: Well, then things come in by default. There's no offer. Something is shown, at the end of the trial they say, "That needs to go up to the appellate court." Trial court was never asked to admit it.

HONORABLE SARAH DUNCAN: Well, the jury heard it or the jury saw it. Whether you admitted it or not, the jury has had that experience.

HONORABLE STEPHEN YELENOSKY: Well, does that include something that's whispered by somebody in the audience that somebody claims the jury heard? Don't you have to then get that on the record?

CHAIRMAN BABCOCK: Justice Bland, then Steve, then Carlos.

HONORABLE JANE BLAND: I don't agree with Judge Duncan's idea that everything the jury saw and everything the jury heard has to be verbatim to the court

of appeals because the whole idea is that we're going to defer to jury decisions about lots of things, credibility, demeanor, all those things that we can't possibly see from a record, but -- and I think that's where the lawyer's job comes in to decide to admit things into evidence or not; and, you know, both sides are there, both sides can look at a chart and offer to admit it into evidence, if they think it's more than just a tool for eliciting testimony from a witness; but what we're talking about here is the actual testimony of somebody, not a chart or a demonstrative aid.

And even then, you know, the lawyers presumably could affirmatively waive the right to have it recorded, but to put in a manual for court reporters that they ought to not record it without checking with anybody is not a good idea because I think there would be a fair assumption that if you were in the middle of a trial and everything else is being reported that this stuff would be reported, too, and you know, it seems to me that we ought to nudge in favor of having this stuff reported instead of not having it reported.

CHAIRMAN BABCOCK: Steve.

MR. SUSMAN: Yeah, I mean, not to get in the big debate about whether demonstratives need to go to the court of appeals, because I don't think they do.

HONORABLE STEPHEN YELENOSKY: Little bit louder, please.

MR. SUSMAN: There is a lot that goes on in the courtroom that the jury -- that the jury sees that the court of appeals doesn't see, and so big deal, and I think lawyers ought to be free to use all kinds of demonstrative aids that don't go back to the jury room, whatever they want basically. I think any rule that puts a damper on that, which requires you to identify it in advance or provide it to the other side in advance, is against -- detracts from jury comprehension, which is what we ought to -- we ought to try to make it as easy for the jury to understand the first time; and any rule that distracts from that by hampering the lawyers in using those aids, we should not enact a rule.

But we're talking here about testimony and, I mean, the actual testimony that they hear. I think the whole idea that it's marked as an exhibit, that the audio or videotape gets marked -- is entered as an exhibit is wrong, because if it's entered as an exhibit it means it goes back to the jury room, and certainly the jury ought to be able to listen to or look at what's entered as an exhibit, which means that they could ask for a recorder, a device. I mean, certainly you're not going to send back an exhibit that they can't look at again or read again,

and I think that is contrary to current practice. So, I mean, if you're going to adopt a rule like this, you've got to do something other than enter it as an exhibit.

CHAIRMAN BABCOCK: That's a good point. Carlos.

MR. LOPEZ: I was going to echo that. I mean, this takes me back to when I was a prosecutor and we had DWI tapes, and you would have the people on tape doing the stuff, and the jury would always want to see the tape again. And we have rules about -- you know, about what the jury gets to see again. There are certain rules that they have to -- I don't even remember what they are now, but they have to agree that there's a conflict and there's all kinds of things as a threshold. We don't just willy-nilly let them kind of see whatever they want, although some judges certainly do, I guess.

So I agree there is an issue there, but would this be solvable, I mean, as just a solution, sort of moving towards it, if we changed -- certainly people are agreeing to do this, and I think if they've agreed to it, they've agreed to it. I mean, you know, what's the problem? So if we change the language to make it an opt-in rather than an opt-out, maybe that solves it. In other words, the court reporter is allowed to do it with court permission, but it's up to the court reporters to

get that court permission or make it an issue so that it doesn't just happen by default.

Maybe that's a -- you know, I know that Professor Dorsaneo just wants to get rid of it altogether, and frankly, I kind of do, too, but that's certainly a compromise solution that at least makes it an issue, but I think resolves it in a way that makes there be a discussion about it, and you know, so that it happens conscientiously rather than just somebody forgot to do it.

CHAIRMAN BABCOCK: Judge Benton and then Sarah, then Bill.

HONORABLE LEVI BENTON: I agree with Steve Susman. In fact, I go further. I think that if a jury asks for something that was just demonstrative, if they affirmatively ask for it during the deliberations, we ought to send it back. If a jury affirmatively asks for portions of testimony to be read back without indicating there's a -- that there's a conflict, it ought to be read back, or if it's a depo transcript, we ought to provide them with a transcript. I think some of these rules about what the jury can have back in the jury room disrespect them and are arcane.

CHAIRMAN BABCOCK: Okay. Sarah. Did you --

HONORABLE SARAH DUNCAN: Yes. I would like to speak against letting the lawyers opt into a system

that causes the record on appeal to not encompass the entire record in one place. What that does is it just shifts the costs to the courts of appeals to figure out what is and isn't in a record, and I am completely opposed to letting the lawyers agree to do that, and I will say about Mr. Susman's comment that I'm sorry he's not as concerned about the court of appeals and attorney understanding his case as he is the jury, and that may be because he generally wins in the trial court.

CHAIRMAN BABCOCK: Does that mean he loses on appeal?

MR. SUSMAN: Yes.

HONORABLE SARAH DUNCAN: Well, that's the problem. That's the problem. All I'm speaking for is it is very frustrating as -- was very frustrating as a judge and is now very frustrating as a lawyer to want to understand what it is the jury saw and not be able to do it and not be able to help the court of appeals understand it. It's very frustrating.

CHAIRMAN BABCOCK: Bill and then Frank.

PROFESSOR DORSANEO: The only thing I know about that says what goes to the jury is Rule 281, and that basically says that in addition to the charge and verdict form going back, that we have any written evidence. I'm not seeing very well today. "The jury may

and on request shall take with them in their retirement the charge, any written evidence except the depositions of witnesses, but shall not take with them any special charges which have been refused. Where only part of a paper has been read in evidence, the jury shall not take the same with them unless the part as read to them is detached from that which was excluded." I mean, that's all there is about stuff going to the jury.

I'm reminded every -- nearly everyday that I'm -- that things have passed me by, you know, that I'm an older guy than I would like -- well, I would like to continue to become older, but you get my point. But it just absolutely amazes me that something is going into the record unless it's, you know, reported by the court reporter and, of course, it's what 13.1 of the appellate rules plainly says. My students the other day were saying, "Well, what about depositions?" I said, "Well, the court reporter is going to take that down. That's going to be read." Now I'm finding out that, well, maybe not. Is there some additional videotape that's not a videotaped deposition that somehow gets in, a videotaped witness? Does that happen? That's not a deposition?

MS. HOBBS: Yes, it could. You could do videoconference. You could have a witness, a remote witness, and you bring him into the courtroom with video

technology.

PROFESSOR DORSANEO: And the court reporter doesn't take that down?

MS. HOBBS: Well, no, that court reporter definitely should take that down because no one else is.

HONORABLE TOM GRAY: Where you most often see the video that's not a deposition get introduced into evidence is the dashboard camera of a police officer, and there's a lot of discussion that winds up on the videotape at the stop, at the arrest, the search, and so a lot of these are coming from criminal cases as well.

PROFESSOR DORSANEO: Isn't that marked and admitted somehow?

HONORABLE TOM GRAY: Well, but the problem that -- it is, but the problem becomes if only a portion of that video is actually played for the jury and other parts are determined to be objectionable and not admitted and they play only the part that's admitted, but then the whole videotape goes to the jury room along with the VCR, as Steve said.

PROFESSOR DORSANEO: How does the videotape go to the jury room? That's not in our rules.

MS. HOBBS: That's just error.

HONORABLE TOM GRAY: It's marked as an exhibit.

PROFESSOR DORSANEO: It doesn't matter. It's not written. Do they take guns back there, too?

HONORABLE TOM GRAY: Yes.

MR. GILSTRAP: They take pictures. They take pictures.

PROFESSOR DORSANEO: Well, that's a writing.

MR. LOPEZ: They're unloaded.

CHAIRMAN BABCOCK: Frank.

MR. GILSTRAP: We're getting into some -- I think we're getting a little confused because we're getting into some different questions --

CHAIRMAN BABCOCK: Not us.

MR. GILSTRAP: -- which are related, but they need to be sorted out. The first question is, you know, what happens in the courtroom. The second question is what goes back to the jury room, and that's covered by Rule 281. The third question and where I thought we started was what goes to the court of appeals, and the court of appeals Rule 34.6a says if there's a stenographic recording the reporter's record consists of the court reporter's -- so much of the court reporter's transcription of the proceedings and any exhibits as the parties designate. That's the record on appeal. It can't be anything else according to the rule. So if something else is going up on appeal then it seems to me we need to

address that rule, too. Beyond that, I mean, if I'm the appellant and I request a full transcription of the proceedings and the court reporter can't get it all, then I'm entitled to a reversal, as I understand the rule, because I can't get a record.

CHAIRMAN BABCOCK: Judge Benton.

HONORABLE LEVI BENTON: That rule could be and should be modernized to provide that things like PowerPoints or videos shown to the jury that are not admitted into evidence but are clearly seen and/or heard by the jury should be part of the appellate record.

MR. GILSTRAP: Maybe you're right.

CHAIRMAN BABCOCK: Bill. Justice Jennings, did you have your hand up?

HONORABLE TERRY JENNINGS: Yes.

CHAIRMAN BABCOCK: I'll get Bill and then you. Thanks.

PROFESSOR DORSANEO: Things don't have to be -- I wish Buddy was here because we had this argument before. The cases say that things don't have to be formally admitted in evidence to be in evidence, so if you let in some movie or cartoon or whatever before the jury, then that's -- you know, that's in evidence if the parties treated it as in evidence, but I think it's not good practice at all to be putting things in evidence in some

sort of -- some sort of ad hoc way that's not in accordance with the rules that we've followed forever. Huh?

HONORABLE SARAH DUNCAN: But we haven't. We haven't followed those rules forever.

PROFESSOR DORSANEO: Well, we need to start following them because --

HONORABLE STEPHEN YELENOSKY: Spoken like a --

PROFESSOR DORSANEO: I may be stuck in the Sixties, but we used to follow those rules, and it amazes me that things are going into the record before the jury in some sort of informal way, and that's why they don't get in the appellate record, because somebody should have said, "Hey, if you want it in the record, you know, let's mark it, let's memorialize it in some way." If you're going to show slides to people, you need to have pictures and have them marked and admitted. You can't just go in there and do things in some sort of an informal manner and expect it to look like a legal system.

HONORABLE SARAH DUNCAN: Bill wants to impose what he wants on people. I just want what is to go up.

CHAIRMAN BABCOCK: It's the problem with the kids, Bill. Justice Jennings.

HONORABLE TERRY JENNINGS: Just to make sure our record is clear, we're talking about 16.16, which reads, "Generally audio/video recordings played in court are entered as an exhibit in the proceedings. When the exhibits are played in court, a contemporaneous record of the proceedings will not be made unless the court so orders." It does occur to me that there is some -- that this needs to be fixed somewhat, because it's talking in general terms about these things being played. They might or might not be an exhibit and so forth and so on.

I could see that maybe this 16.16 ought to be revised that something along the lines of "If an audio/video recording is admitted as an exhibit then maybe the court reporter need not go through that extra step of taking down what's already in evidence," because it's already in evidence, and it does seem to me that there's some inconsistency between that and 13.1(a) which says, "The official court reporter or court recorder must, unless excused by the agreement of the parties, attend court sessions and make a full record of the proceedings," so there does seem to be some room for reconciliation between these two rules here, but the bottom line is even if we change 16.16 or recommend to the Court that it change 16.16, I think it ought to be changed to the extent that if the exhibit is in evidence the court reporter need

not go through that extra step of taking it down.

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

MR. SUSMAN: No.

CHAIRMAN BABCOCK: Okay. Carlos and then Judge Benton.

MR. LOPEZ: I was just going to say maybe one solution I guess in terms of a practical matter is to remember what this is and what it isn't. This is the manual for the court reporters. So, I mean, we can have the interesting discussion about what happens then. You know, like Sarah's saying, what do we do with what is in evidence. We can discuss that later, and my guess is the place to do that is in the TRAPs or the Government Code or these other places. This is just a manual for the court reporters. So, I mean, I haven't heard any disagreement today, I don't think, from anybody other than the fact that it's a burden, sometimes a heavy one, on the court reporters to make them transcribe this so that we then can have whatever rules we're going to have about how that record gets on appeal, but this is about the record itself, not what we do with it on appeal, and does anybody disagree that my initial premise, which is that it ought to reflect as faithfully as it can what actually happened in the courtroom, and that the only real way to do that is

to have the court reporter take it down?

After that if the parties want to agree their way around it, I think they agree their way around it. Trials are messy things. They're not as clean as appeals, and you get -- if I'm -- if I'm the defendant and the plaintiff's witness is inaudible and the jury can't understand a damn thing he's saying, I love that. I'm not going to raise my hand and go, "Excuse me, I couldn't hear you. What did you say your damages are?" Let the jury not hear it. That's the other lawyer's problem, and if that creates a messy record on appeal, that's what happened, you know, and so let's just fix this one thing by not allowing the record to be something other than the record.

CHAIRMAN BABCOCK: Judge Benton and then Steve and then David.

HONORABLE LEVI BENTON: I understand Professor Dorsaneo to be a little -- have a different perspective from what I think Carlos said and from what I'm suggesting. Professor, you're examining a witness and you're using an easel and that there are writings on and the witness is testifying about the things on the easel. I think we would agree that under our current rules you wouldn't be permitted to mark a sheet from the easel, admit it as an exhibit, and have it go back to the jury

room.

Where maybe we're not on the connecting is I say we ought to respect the jury and modernize our rules so that if they ask for that writing on the easel it should then be marked and sent back to them. But even if they don't, the writings, the PowerPoints, the other things that aren't marked and admitted should be made part of the record, so that -- and I pause here. I don't know whose side Carlos is on. He --

CHAIRMAN BABCOCK: He's not sure himself.

HONORABLE LEVI BENTON: He said trial court is messy, and it's neat on appeal. That's not true. It's the other way around. What happens at the trial court is very neat. What happens on appeal is very messy.

MR. LOPEZ: He's obviously not seen one of my trials, but --

HONORABLE LEVI BENTON: But the PowerPoints, the easels, ought to be -- they ought to have the benefit of understanding everything that was played out, not -- that the jury saw and heard, not just that we went through these ritualistic rules and marked it and admitted it and sent it back.

CHAIRMAN BABCOCK: Steve.

MR. SUSMAN: Well, I think we're only talking about what you do with audio and video recordings

in the court, and I think the general rule should be -- the default rule should be the court reporter's transcribe everything. Of course, the parties can agree not to have that done, and I've never been in a trial where we haven't agreed not to have it done. I mean, the judge looks at you and says, "Does the court reporter need to transcribe this?" And unless you want to make an enemy of the court reporter, which you don't, you're not going to have him or her sit there during a 20-minute video deposition taking everything down, so you almost always agree, and once you make the agreement, fine, but in the default the rule should be that a court reporter stays and transcribes unless he or her -- he has an agreement from the parties that they can go have a cup of coffee, not that they -- they shouldn't be told in a manual that when it comes to video depositions they can just get up and leave the room. They should have to stay there unless there is an agreement to the contrary. I think that's all we're talking about now.

CHAIRMAN BABCOCK: And typically what happens is they don't leave the room. They're just -- their fingers quit moving.

MR. SUSMAN: Well, they're resting, whatever.

CHAIRMAN BABCOCK: That's the problem,

because you don't know that they --

HONORABLE STEPHEN YELENOSKY: If it's a two-hour deposition mine certainly leaves the room. He doesn't sit there through that.

CHAIRMAN BABCOCK: Bill.

PROFESSOR DORSANEO: There is more to your agreement than that the court reporter doesn't have to take it down, though, right? I mean, don't you agree --

MR. LOPEZ: On the record.

HONORABLE STEPHEN YELENOSKY: Oh, yeah.

PROFESSOR DORSANEO: -- that this can be -- that this can be substituted in some manner?

MR. SUSMAN: Sure.

PROFESSOR DORSANEO: Wouldn't it have to be in some --

HONORABLE STEPHEN YELENOSKY: Page and line.

MR. SUSMAN: Sure. You know, like most cases aren't appealed anyway, so you never need the record.

PROFESSOR DORSANEO: Yeah.

MR. SUSMAN: You get a verdict and it's over, so you save a lot of time and money. Why make the court reporter sit there and transcribe everything? It's only if it has to go up on appeal. Well, if it's kind of messy doing it after the fact, big deal, you know, for the

small percentages of the cases that go up on appeal. Most of them settle or something happens after an adverse verdict. Someone gets reasonable, so why waste all the resources in making a transcript?

CHAIRMAN BABCOCK: It occurs to me that there's an issue here that needs resolution, and it looks like it's -- Bill, it's your subcommittee, as we don't have a subcommittee for the Uniform Format Manual, but I would suggest that for this purpose David Jackson ought to be part of your discussions, and I hear a consensus that maybe there ought to be some change to 16.6 (sic), but -- and if so, if that's -- if that's the consensus, how do we effect that, how do we effect that change? So that will be for next time.

PROFESSOR DORSANEO: Okay. There probably is more of the manual we should look at. You're not just telling us to look at that one thing, right?

CHAIRMAN BABCOCK: David.

MR. JACKSON: Can I make one kind of -- one closing comment? You know, these rules were all written a long time before a lot of this technology existed, like videotaped depositions and some of the things that we're debating today and why they're not part of the record, and PowerPoint and all of these other things that we're using in court now. Court reporters are wired to make verbatim

records. Now, they don't always do it, and we certainly make mistakes, but our wiring is to get down every word that we hear. "Did"/"didn't," "is"/"isn't," and concentrate on every word, and when you put us in an environment where we can't control that anymore, I can't stop you if I wasn't clear that you said "did" or "didn't," we get into a thing where we're just hearing noise from one of the new technologies that's come along that we're using in the courtroom now and say that, okay, it's okay if it's garbled, the jury didn't hear it, you didn't hear it.

Well, people have short-term memory about that, and six months after the trial is over they get this transcript that has all of this "inaudible" in there and all of this junk that the court reporter said, "Okay, well, they said if I couldn't hear it just put 'inaudible,'" and you'll have some reporters that will abuse that. I think you're creating a problem where you're taking the exact science of the definition of a verbatim transcript and saying we're going to put the court reporter in the middle of a football field, and we want you to make a verbatim record of what happens in that stadium. We cannot do that.

CHAIRMAN BABCOCK: So that's the final word for today on this, and, Bill, let's just look at 16.16 for

now, and we'll huddle with the Court and see if they want your subcommittee with David appended to it to look at the whole manual for issues like this.

PROFESSOR DORSANEO: Maybe we'll look at the surrounding ones, instead of just picking out one little piece.

CHAIRMAN BABCOCK: Look at the surrounding ones, okay. Fair enough.

HONORABLE JAN PATTERSON: And if we can in some way accommodate the court reporters, can they not give us six pages to a page on appellate records?

I say this in jest. We're getting six pages to a page on appellate records, which --

CHAIRMAN BABCOCK: We're about to take our morning break, but Frank wants to impede that.

MR. JACKSON: You want four or eight?

HONORABLE JAN PATTERSON: Four.

MR. GILSTRAP: I just want to say --

MR. JACKSON: Front and back?

MR. GILSTRAP: -- I'm not sure you can restrict this for the reporters manual. I mean, I think you've got to look at some of the appellate rules. I mean, there's stuff in here for -- you know, if a significant part of the proceedings are electronically recorded, are inaudible, where it's expressly talked

about, and, you know, they may wind up getting over into that.

CHAIRMAN BABCOCK: That's why the appellate subcommittee has got this issue. So let's take our morning break.

(Recess from 10:43 a.m. to 11:06 a.m.)

CHAIRMAN BABCOCK: Back on the record. We're still on item five of the agenda, and there is an issue regarding TRAP Rules 301 and 329b and others.

PROFESSOR DORSANEO: Civil procedure rules.

CHAIRMAN BABCOCK: Excuse me?

PROFESSOR DORSANEO: Civil procedure rules.

CHAIRMAN BABCOCK: I'm sorry, civil procedure rules, and we're not going to discuss that today, but Sarah Duncan is going to outline the problem for us and then the subcommittee is going to get into that, and we'll talk about it at our next meeting. So, Sarah, the floor is yours.

HONORABLE SARAH DUNCAN: Well, I'm not sure that I can outline a discrete problem. As all of you know, there have been problems with post-verdict, post-judgment motions, when they have to be filed, what preserves error, what extends the time for filing a notice of appeal. My subcommittee grappled with some of those issues in -- you know, close to a decade ago, before I was

married, which tells you how long ago it was -- and issued a report. Most of that -- this is back when we were talking about finality and 306a, if you-all remember, and there were all sorts of problems with 306a and what had to be filed to get a new date of judgment, all that, so we issued this report.

Before that, Bill is now telling me, I thought it was after this report, but Bill is saying it's before this report, the full committee spent an enormous amount of time trying to rewrite the JNOV rule, the motion for new trial rule. This was about the time I think of Justice Hecht's dissent suggesting that the denial or a grant of a motion for new trial should be reviewable, and it's come up again. There's on the back table a memo from Jody to me dated October the 5th that incorporates Bill's recodification language of -- maybe this will ring a bell. I'm not getting any looks like this rings a bell for anybody -- having a motion for judgment as a matter of law. Does that ring any bells, as opposed to a motion for judgment non obstante veredicto? Does that ring any bells? No. Okay. I'm glad you-all's memories are as rich and alive as mine.

October 5th memo incorporates the recodification language. It does away with JNOV motions in favor of the motion for judgment as a matter of law.

It doesn't -- it doesn't change things necessarily a whole lot. I know that Skip Watson on my subcommittee brought up a serious question that I'll let him address on subsection (a)(2) of 301b and 301c, it's the same, and whether that does away with the trial judge's discretion to decide a case as a matter of law before there's been a charge conference or turn every JNOV motion into a charge conference or -- it's all very complicated.

Suffice it to say, this was referred to us this week. The subcommittee has not had an opportunity to meet or discuss this. It's -- it's very complicated, and it does impact a number of other issues, but I don't think we can just change a JNOV to a motion for judgment as a matter of law, the semantics of it, and attempt -- and that be any colorful attempt to fix the problems in the post-verdict and post-judgment rules, but we're happy to take a look at it, and Bill's memory is probably better than mine on this.

CHAIRMAN BABCOCK: Bill.

PROFESSOR DORSANEO: Well, I think how all of this got started and, Jody, correct me if I'm wrong -- is that the Court Rules Committee wanted to have a change in the 300 series rules and in the -- or maybe it was in the appellate rule, just to include --

MR. HUGHES: Both.

PROFESSOR DORSANEO: Okay. To say that a motion for --

MR. HUGHES: JNOV.

PROFESSOR DORSANEO: -- JNOV would, if you made it and got it -- got it ruled on, that it would put you on the longer appellate track rather than the shorter one. It's always been an odd kind of aspect of Texas appellate law that only some motions get you from 30 days to 90 days, and for a pretty good while there was a large debate as to -- a separate debate as to whether under Rule 301 since there's no timing you could make a Rule 301 motion for JNOV or to disregard a particular jury finding motion, you know, after a judgment. Okay.

Now, as I read the Supreme Court's -- and I think everybody who would read it would read it the same way -- Lane Bank opinion, the Court says that you can say in a motion to modify the judgment, which does get you on a longer track, okay, you can say everything that you said in a JNOV motion in a motion to modify. So to say anything that makes a substantive change in the judgment, it's a Lane Bank rule. So I responded to Jody and to the Court Rules Committee person that it's not necessary to change the 300 rules and the appellate rules to say that you get on the 90-day track if you make a JNOV because you get on the 90-day track by making a motion to modify, and

that's the same thing. It just is a question of when you do the motion to modify, clearly after judgment. So we don't need to resolve the dilemma about 301 motions either, about whether they need to be before or after judgment.

So I regard it as a nonproblem, okay, but I do agree that it's always been a troublesome aspect of Texas appellate practice that some of these post-verdict motions get you on the longer appellate track and some of them don't, and that's kind of a trap for people. Right? And that's -- I understand the Court Rules Committee wanted to fix that by just making the simple thing of saying if you make a motion for JNOV, even if you don't make a motion for new trial or a motion to modify the judgment, that gets you on the longer track, too; but to say for the second time, in case you didn't get it, a motion to modify made after judgment lets you do in effect the same thing as putting the motion for JNOV in the 90-day track. It's the same type of vehicle. It's a vehicle that's as serviceable.

Then when Jody and I corresponded by e-mail further, I said, "You know, we worked on this ten years ago, a lot," and my recollection of it and my files, which are probably as complete as the Court's files on what happened ten years ago, that all of that good work

probably should be taken into account if we're going to look at this at all; and we started to do that, but our memories -- you know, some of the cases have changed. Our memories are weak, even as to exactly when this happened. The report that I found from your committee was a mid-Nineties report. Okay

HONORABLE SARAH DUNCAN: Can I interrupt just a minute to read a note that was passed to me? "Sarah, some of us were in high school when you were discussing this before. Maybe that is why we do not remember it." That's a big part of the problem here.

PROFESSOR DORSANEO: Yeah. I would say, too, that in my view this work -- remember working with Clarence Guittard on a lot of this?

HONORABLE SARAH DUNCAN: I do. I do, at the Dallas Bar Center.

PROFESSOR DORSANEO: Yes. And this was kind of -- I think this work deserves a lot of respect, not just because we did it ten years ago, but because, you know, it was one of Justice Guittard's, you know, last significant projects rulewise, and if there is anybody who has done more on the Rules of Civil and Appellate Procedure than the late great Justice Guittard, I don't know who I would identify to be that person.

HONORABLE SARAH DUNCAN: The late great

Justice Alexander.

PROFESSOR DORSANEO: So I think this stuff should be looked at, but we're probably ahead of ourselves.

CHAIRMAN BABCOCK: Okay. Yeah, Sarah.

HONORABLE SARAH DUNCAN: And I would add to that, as Bill was saying, the case law has changed. It's much more forgiving than it used to be, but it's also created some serious problems, like the IKB case where request for findings of fact and conclusions of law will extend the appellate timetable if there was an evidentiary hearing that was proper, and Justice Hecht I believe dissented in that one also and said, well, who's going to decide what's proper? So that needs to be folded into this, and it all needs to be harmonized and fixed and cleaned up.

CHAIRMAN BABCOCK: Frank.

HONORABLE SARAH DUNCAN: And we're the subcommittee to do it, right, Frank?

MR. GILSTRAP: Well, I don't know. I mean, IKB and Lane Bank, they're not ancient history, but they're history, and I mean, I know there is an issue about whether or not the -- you can -- you know, the appellate courts should be able to review a grant of a motion for new trial, but we're not going to decide that.

The Court's going to decide that, and so --

HONORABLE SARAH DUNCAN: Well, but --

MR. GILSTRAP: -- is this a problem now? I mean, are people having problems with the JNOV procedure today? Is it the type of trap that used to come up in the Federal rules all the time when they had issues? My impression is it's not a big problem today.

CHAIRMAN BABCOCK: Sarah.

HONORABLE SARAH DUNCAN: But part of what I think needs to be wrapped up into this, if we're going to do it, is the motion for new trial. We spent a great deal of time in this committee, the full committee, trying to figure out what -- if a trial court granted a motion for new trial, what should the trial court have to do to support that decision, when should it be permissible. You-all are looking at me like you haven't been here the last 15 years, and I know you have been. Don't you remember that, Bill?

PROFESSOR DORSANEO: Oh, yeah.

HONORABLE SARAH DUNCAN: And you've got that file, too?

PROFESSOR DORSANEO: Yeah. It's all in the same report.

HONORABLE SARAH DUNCAN: Oh, oh. Okay.

CHAIRMAN BABCOCK: Skip.

MR. WATSON: Just on that narrow little point, I mean, you know, the Court heard two arguments September the 29th on mandamusing motion for new trial and even folded in the Porter vs. Vick and Fulton v. Finch thing that I gave the report to the committee on, and I think they just might decide that issue before we get to it.

Well, I take that back. I don't want to be harsh.

CHAIRMAN BABCOCK: Are you going to be harsh to us or them?

MR. WATSON: Either way.

PROFESSOR DORSANEO: Are we going to take two years?

HONORABLE SARAH DUNCAN: The Court's going to decide the issues that are before it. It's not necessarily going to craft a rule. We've been told that on numerous occasions.

MR. WATSON: But maybe we want to hear the decision on the issue before it before we craft the rule.

PROFESSOR DORSANEO: Well, my response to the Court Rules Committee would be the response that they don't need that change if they understood what Lane Bank does to give meaning to a motion to modify; but maybe the rules ought to say what Lane Bank says, since there's

nothing in the rules of procedure that says what a motion to modify is used for; and, you know, that was a mistake that was made when 329b was revised a long time ago, in 1982; and that was a Clarence Guittard-drafted rule, you know, with me kind of watching, too, that needs to be reworked; and it's in the same shape it was in in 1982.

So, you know, I'm kind of of two minds about this, to say, no, it's really not a problem if you understand the law, okay, which would be my first thing to say; but the other thing is, well, shouldn't these rules kind of provide guidance as to what it is that you can do and you can't do? And my response to that is, well, yeah, they probably should, and once you start with that, then you say, well, shouldn't we fix these other obvious problems?

HONORABLE SARAH DUNCAN: I believe that's what we did with our last report a decade ago. That was the goal. That was the impetus for that discussion and report, I believe.

PROFESSOR DORSANEO: So what are you going to do? Are you going to have a subcommittee meeting to go over all the old reports again or --

HONORABLE SARAH DUNCAN: I guess so.

CHAIRMAN BABCOCK: Sounds like a blast.

HONORABLE SARAH DUNCAN: I'm sort of

thinking life's too short, but --

CHAIRMAN BABCOCK: Let me know when you're meeting. I want to be there for that one.

HONORABLE SARAH DUNCAN: Well, see, that's the problem, is that the subcommittee did this once before. We brought it to the full committee and discovered, believe it or not, that we were not remotely radical enough for this committee, and that's why we ended up rewriting it on the floor. If that's going to happen again, which I think it very well might, let's just go ahead and take it up in the full committee.

CHAIRMAN BABCOCK: Well, let's get some materials together so that the full committee can understand what the issues are, but I was looking around the room. I think there are only eight people on the current committee who were there 10 years ago.

HONORABLE SARAH DUNCAN: Well, I will guarantee you Chief Justice Gray was not in high school.

CHAIRMAN BABCOCK: He probably wasn't in high school.

HONORABLE SARAH DUNCAN: Not even Ms. Hobbs was in high school. Jody may have been in high school.

CHAIRMAN BABCOCK: All right. TRAP 53, where are you?

That was a subtle play on an old television

show, by the way.

HONORABLE SARAH DUNCAN: "Old" is the operative word, by the way.

CHAIRMAN BABCOCK: Starring Fred Gwynne, the late Fred Gwynne.

MR. GILSTRAP: Rule 53, where are you?

CHAIRMAN BABCOCK: TRAP 53, where are you?

HONORABLE SARAH DUNCAN: Car 54.

CHAIRMAN BABCOCK: "Car 54, where are you?"

PROFESSOR DORSANEO: Okay. Well, this is a -- this is a little issue. It's in the -- Jody pointed out to me it's in the September 25, '07, letter from Justice Hecht to Chip. It's on the third page, and along the way I guess Jody noticed that we don't have a rule like Rule 4.3 for modification of a court of appeals judgment, as to whether that restarts the time for filing a petition for review.

Appellate Rule 4.3, the summary of issues says "provides that if the trial court judgment is modified in any respect while the trial court has plenary power, any period that runs from the signing of the judgment is extended to run from the date the modified judgment is signed." In other words, the modification of anything, okay, restarts the clock, all clocks, for further action in the trial court and for appealing the

trial court's judgment.

We don't have that same idea in any appellate rule, and I guess the logical place where it would go would be in 53 somewhere, and I think Sarah and I both thought in response to the e-mail that that would be a good thing to add into the appellate rules, and I don't know whether anybody else on the appellate subcommittee thinks so. We didn't have a committee meeting on that concept either, but it seems almost to me like a no-brainer that that should be in the appellate rules, but that's just me, so maybe other people would think negatively about that.

CHAIRMAN BABCOCK: Sarah.

HONORABLE SARAH DUNCAN: We actually do have a rule that applies in criminal cases, Rule 50, that provides the court of appeals can modify its opinion within 30 days of a petition for discretionary review being filed, and the party seeking review can then withdraw its PDR and file a new one after the modified opinion comes out. It's not used very frequently, but every once in a while, you know, somebody would file a PDR, and you would realize that, you know, you had really, really, really messed up, and you might as well just fix it before the Court of Criminal Appeals had to do it. Something similar in the appellate rules with the change

in deadlines, as Bill mentioned, might be a good thing.

CHAIRMAN BABCOCK: Yeah, Lonnie.

PROFESSOR HOFFMAN: Your point, though, may go to the fact that on the criminal side you file your PDR with the intermediate appellate court. They have that strange feature --

HONORABLE SARAH DUNCAN: True.

PROFESSOR HOFFMAN: -- that gives them the courtesy of changing their minds, whereas on the civil side we don't do that.

PROFESSOR DORSANEO: And I think that there ought -- probably it's pretty rare when you get kind of a sua sponte modification of a court of appeals opinion on the civil side. I don't know whether that's -- I don't know enough about the whole state to know whether that's so, but --

HONORABLE SARAH DUNCAN: You-all have tightened up the plenary power rules so much I think we need to do something for the poor courts of appeals.

CHAIRMAN BABCOCK: Frank.

MR. GILSTRAP: We're talking about starting the appellate timetable to go to the Supreme Court from any change in the court of appeals opinion or judgment? Opinion?

PROFESSOR DORSANEO: No, judgment.

MR. GILSTRAP: Because the trial rule is the trial court judgment, and the court of appeals often modify their opinions without changing their judgment.

PROFESSOR DORSANEO: Yeah, I think it would be the judgment.

MR. GILSTRAP: So that's almost never going to happen.

HONORABLE TOM GRAY: I think most courts of appeals, though, if they modify the opinion withdraw the judgment at the same time they withdraw the former opinion and issue a new judgment.

PROFESSOR DORSANEO: And I think that would be a change in some respect, because the date would be different.

MR. GILSTRAP: Well, it seems to me, you know, if you're going to say judgment and they just don't change -- they only change the opinion, it's kind of a trap.

PROFESSOR DORSANEO: Well, this may be a nonproblem. You know, my immediate reaction was, well, why wouldn't the same principle apply? It's a good principle.

MR. GILSTRAP: Sure. Sure.

PROFESSOR DORSANEO: But, A, maybe we don't need that rule, because it doesn't -- doesn't come up, and

maybe it's not a good idea in this distinct context anyway.

HONORABLE TOM GRAY: Well, if the court -- if the appellate court withdraws its judgment obviously while it has the plenary power, the appellate timetables are automatically going to start with the issuance of the new judgment, and the trap that can happen is if they were to for some reason withdraw the opinion and reissue an opinion without a judgment and then somebody could get trapped.

PROFESSOR DORSANEO: We have the -- this sentence that's in 4.3 actually first got put in 329b, and that was an early Eighties work, and the reason why it got put in there is that there were cases that involved the judgment, vacation of the judgment, re-entry of the same judgment, okay, and court of appeals and even Supreme Court saying, "You missed your time for appeal, because the first judgment was the judgment, even though it was vacated." Duh, believe that or not, I mean, there are cases. Hammer V. Hammer I think is one of them, and that's what this sentence was put in there to fix, and the debate we had back then was, you know, how significant a change does it need to be, and I think it was Justice Stakely who came up with the language. Well, it just needs to be in any respect, you know, any kind of a change

at all, and, you know, that got over into 4.3 of the appellate rules when we were crafting them, not just in 329b, so it applies, you know, to appellate timetables as well as trial court timetables. And remember, we didn't have a separate set of appellate rules at one time, so there was no need to have it in -- have it in two places early on.

So the question is, is it a good idea to move it into the next level of the appellate process? And maybe it's not necessary, but I don't see why it wouldn't be parallel if there isn't any kind of a problem.

CHAIRMAN BABCOCK: Justice Bland has had her hand up for awhile.

HONORABLE JANE BLAND: Oh, I was just going to note about the difference on the criminal side and allowing the courts of appeals to review the PDR and then withdraw the opinion, the Court of Criminal Appeals has held that you have to -- if you withdraw the opinion, that doesn't restart anything. You basically have that 30 days to issue a new opinion and/or a judgment, but if you don't do it within the 30 days, your withdrawing of the earlier opinion is a nullity and the earlier opinion stands, and that was one comment.

The second is, it seems to me, and I'm not an expert on this, but it seems like on the criminal side

there are far fewer motions for rehearing filed as a -- kind of as a preliminary step to going to the Court of Criminal Appeals. Most people or a number of people just go ahead and file the PDR; whereas, I think there is a highly developed motion for rehearing practice on the civil side. So I'm not sure that we need that rule moved to the civil side because I think that if the court of appeals becomes aware of whatever errors we might have made in our opinion through a pretty sophisticated motion for rehearing practice that is not as well-developed immediately on the criminal side.

CHAIRMAN BABCOCK: Frank and then Sarah.

MR. GILSTRAP: Well, the purpose of Rule 4.3 was to remove any trap, and they had a rule whether -- and I can't remember what the terminology was, but if it was a substantive change --

PROFESSOR DORSANEO: Right.

MR. GILSTRAP: -- it started it, but if it was a trivial change it didn't, and that way with this rule it doesn't make any difference. If they change one comma it starts the timetable running again. Now if you're going to replicate that in the court of appeals, then it also needs to be a trap-proof rule, so it needs to say "any change in the judgment or opinion." That way there's no problem. It always restarts. It's the same

approach. If you say "judgment" and -- because the operative document in the trial court is the judgment. The operative document in the court of appeals in most attorneys' minds is the opinion, so if you're going to say that, make it change the opinion or judgment, then it's foolproof.

PROFESSOR DORSANEO: We need to get this before the subcommittee then.

CHAIRMAN BABCOCK: Justice Hecht.

HONORABLE NATHAN HECHT: Well, I mean, I'm not sure it would work because I don't know how the courts of appeals do it, but we get letters from West routinely four, five, six months after an opinion issues saying, "There should be a comma here" or "You left out something here" or "Did you really mean this footnote to be here," and we just change it.

HONORABLE TOM GRAY: You do?

HONORABLE JAN PATTERSON: We don't get those as often as the Supreme Court.

HONORABLE NATHAN HECHT: I'll assure you that none of the changes are substantive, but it's not unusual that people catch things. I mean, the U.S. Supreme Court does it all the time. When it's -- before opinions go in the U.S. Reports there's a big errata sheet that comes out where they've corrected all kinds of

things.

CHAIRMAN BABCOCK: Sarah.

HONORABLE SARAH DUNCAN: I'm just wondering and I haven't -- we haven't talked about this really and I haven't really thought it through. 53.7 says, "The petition has to to be filed within 45 days after the following: The date the court of appeals rendered judgment if no motion for rehearing is timely filed, the date of the court of appeals last ruling of all timely filed motions for rehearing," and then that was in response to a particular case I remember, and then (b) talks about premature filing.

Do we really need a 4.3-type rule given the way 53.7(a) is phrased? "45 days after the court of appeals renders judgment." At an earlier time I can see how it might have been a problem if the court of appeals issued a new judgment, but I can't imagine with things as they are now if the court of appeals withdrew its judgment and issued a new judgment and filed a new petition within 45 days after that, I -- I can't imagine a court wouldn't accept it as timely.

PROFESSOR DORSANEO: Can't imagine what?

HONORABLE SARAH DUNCAN: That the court wouldn't accept it as timely.

PROFESSOR DORSANEO: Yeah.

HONORABLE SARAH DUNCAN: I mean, maybe we want to prepare for the mean old bad court that's coming in the future, but I'm just not sure this is -- Pam, Mike, Skip, is this a problem?

MR. HATCHELL: I don't think it's a problem except to the extent that what if the court of appeals rewrites the section that makes it more or less important to the jurisprudence of Texas? You ought to at least have the right to amend your petition or the filing date start over again. Otherwise, I don't think it's really any kind of problem.

MR. WATSON: And I can't imagine the court denying a motion to amend. I mean, in fact, I frankly, as I understand the practice is that motions to amend the PFR are not even sent upstairs. I mean, the amended PFR goes upstairs. I just don't think it's a real problem, but that's the only problem I see.

CHAIRMAN BABCOCK: Anybody else? Any views on this, Justice Bland? Is this a problem or not?

HONORABLE JANE BLAND: I'm sorry?

CHAIRMAN BABCOCK: Real or imagined?

HONORABLE JANE BLAND: To me?

CHAIRMAN BABCOCK: Yeah.

HONORABLE JANE BLAND: Not at the appellate court level, I don't think.

CHAIRMAN BABCOCK: Pam, what do you think?

MS. BARON: I don't have a strong feeling one way or the other here.

CHAIRMAN BABCOCK: I'm sorry, I couldn't hear you.

MS. BARON: No comment.

CHAIRMAN BABCOCK: No comment. All right. Anybody else? So, Bill, what do you think, you and Sarah? Do you think we need to study this further, or Justice Hecht, have you got a view about this?

HONORABLE NATHAN HECHT: No.

CHAIRMAN BABCOCK: Okay. So that's the definitive word on that.

HONORABLE SARAH DUNCAN: Have you had a problem, Bill, or is this just something that your academic mind thought could be a problem?

PROFESSOR DORSANEO: I didn't think this up.

MR. GILSTRAP: Who's responsible?

HONORABLE SARAH DUNCAN: Jody thought this up. Have you seen a problem, Jody?

MR. HUGHES: The reason I brought this up is because --

CHAIRMAN BABCOCK: His academic mind.

MR. HUGHES: No. Somebody called me about this and said, "What's the answer," and to me, I think it

usually is almost never a problem because when the court of appeals changes its opinion and usually its judgment it's going to do so in response to a motion for rehearing, in which case you get a new clock. Apparently in this case -- and I didn't know anything more about the case, but it was the rare situation where they changed it and didn't -- it was not pursuant to a motion for rehearing, and I didn't know what the answer is. So --

PROFESSOR DORSANEO: I guess my question, does that happen a lot? It doesn't happen a lot in my experience. Does it happen a lot where the courts of appeals change?

MS. HOBBS: And why wouldn't you just file a motion to extend the time to file your petition for review and give yourself some more time?

MR. HUGHES: That was my advice, but it becomes like the en banc issue about whether that extends it, where the answer for yours was just we'll never know the answer because you always file a motion for extension of time.

MS. HOBBS: Right.

HONORABLE TERRY JENNINGS: There is a rare occasion where the petition is filed and the appellate -- the author of the opinion, the appellate court opinion, reads the petition and says, "Hey, let's fix this or

whatever. They're right about some aspect of it, we'll make a minor change." Sometimes the -- and I think most of the time, as Justice Gray pointed out, when we issue the new opinion we'll go ahead and vacate the previous judgment and issue the new opinion and judgment instead.

There are a few occasions where the court will issue a supplemental opinion, especially if the other previous opinion was a memorandum opinion, so instead of issuing a new full-blown opinion and withdrawing the judgment, we'll issue a supplemental opinion saying, "Well, we considered that. You still lose."

CHAIRMAN BABCOCK: Okay.

HONORABLE TERRY JENNINGS: But that's very rare.

CHAIRMAN BABCOCK: Skip.

MR. WATSON: How long does the court of appeals have the power to change an opinion?

HONORABLE SARAH DUNCAN: What did you say?

MR. HUGHES: Depends on what's filed.

MR. WATSON: How long does the court of appeals have the power to change an opinion?

HONORABLE TOM GRAY: We have plenary power for 60 days after the date of the judgment.

MR. WATSON: So in that 15-day window between the PFR, that's why you always request an

extension of time on the PFR, so the appellate judge can't change the opinion. I knew there was a reason for that.

CHAIRMAN BABCOCK: Okay. Let's move on to the No. 6 item on the agenda, which is Professor Albright's project about plain language for the jury, and let's get started, if it's all right with you, Alex, a little bit before lunch, and then we'll break for lunch, and I think Wayne Scheiss is going to be here right after lunch.

PROFESSOR ALBRIGHT: Right.

CHAIRMAN BABCOCK: So why don't you just get started?

PROFESSOR ALBRIGHT: Okay. What I have sent to y'all, which is over there, is a -- the plain language draft, which is just the same draft that we looked at last meeting, but I took out the current PJC --

MR. GILSTRAP: Can't hear you, sorry.

PROFESSOR ALBRIGHT: -- current orders language, because I thought it might be a little easier for you to look at, and then there's a memo that I wrote, and I have too much stuff sitting here and I can't find my memo. Then there's a memo that I wrote asking for comments and then listing particular issues for discussion.

I've gotten two comments, one from Jane

Bland this second. Someone in her office was supposed to send it to me and it didn't happen. I also got one from Buddy Low where a judge said that an instruction should read, "Do not let your far-out, redneck, narrow-minded stingy attitude play any part in your deliberations." I thought you would like that. So that was -- so where we are is basically where we were last time when we had specific issues to talk about. I know you-all are going to want to talk about the language. We do need to be careful about changing the language; and Wayne Scheiss, who teaches legal research and writing at the University of Texas Law School and who helped us with the plain language draft, is going to be here after lunch, so he can help us if we have substantive changes that then need to be put into plain language.

I guess should we go through the -- my issues for discussion and then if people want to talk about particular issues and particular rules we can do that as well? Does that sound good?

If you will look, the first issue for discussion is the description of bias and prejudice in Rule 226a, part (I). This ends on page two of the draft that's out there, the one that's not in block form. It's under the bracketed description of the current case. "Jurors sometimes ask what it means when I say we want

jurors who do not have any bias or prejudice. The word 'prejudice' comes from 'prejudge' or judging something before you have all the information. We want jurors who will not prejudge the case and who will decide the case based only on the evidence presented in court and the law that I explain."

There was some discussion at the Pattern Jury Charge Oversight Committee about expanding that to have a more complete description of what bias and prejudice is or is not, but nobody was able to write it, so we left it as it is. Bill.

PROFESSOR DORSANEO: Well, when I was teaching the last round of cases about voir dire it seemed pretty clear to me that Justice Medina's opinion -- the Court's opinion that Justice Medina's name is on takes, you know, bias out of bias and prejudice, so I can see why you wouldn't go further in this definition than defining "prejudice," prejudgment, because that's kind of how "bias" was defined in that opinion. I forget its name now. It's not -- it's not Vasquez. You were Vasquez, right?

HONORABLE NATHAN HECHT: No, she's on that.

PROFESSOR DORSANEO: Huh?

HONORABLE NATHAN HECHT: It must be Vasquez.

PROFESSOR DORSANEO: Must be Vasquez. Now,

that really, that -- I may be wrong about that, but I am pretty damn certain that the way that the Court is interpreting bias and prejudice is completely different from the old Swap Shop vs. Fortune or whatever definition of bias and prejudice, that it's okay to have leanings. Okay. If it's okay to have leanings, then under the old definition of bias then bias is okay, unless it amounts to prejudice, unless it amounts to prejudgment, and I think that's where we are.

So I don't know what we do about that. I don't know whether we say that bias and prejudice just means prejudice in clear terms or we take out the word "bias" and just flat out recognize that a bias is just a leaning, and I don't know how else you would define "bias," and maybe it's fixed opinion, okay, more than -- but that's prejudgment, and that's my first observation about that.

So things are a little bit different than what they used to be. Or maybe a lot.

HONORABLE NATHAN HECHT: Well, I don't know if it's different or if we just are thinking about it harder --

PROFESSOR DORSANEO: Yes.

HONORABLE NATHAN HECHT: -- these days.

CHAIRMAN BABCOCK: So you're saying bias and

prejudice are synonymous?

HONORABLE NATHAN HECHT: He's saying everybody has a bias of some kind or another about some thing or another, which they may or may not let affect what they're supposed to do in a particular situation, and so you can't exclude people that have biases because, I mean, they're -- you know, everybody has -- they're for one political party or the other, they're for this kind of legal system or not, but are they -- is that the way they're going to rule on this case that they don't know anything about when they come in the courtroom. If they say "yes," well, you say, "Well, then we can't use you." If they say you can set aside all of that and you can decide this on the basis of what you hear here, then we say, "Okay, you can go ahead."

So the question is not really do you have a bias. The question is, is that bias going to control the way that you are going to decide this case, but then you have to add on this -- if you think about it really hard, you have to add on this caveat at the end, which is, "in a way that we don't permit," and they say, "Well, what way is that?" Well, I mean, obviously when you're picking the jury you're picking people that you hope are biased in your favor some way or another, not in the sense that they're automatically your vote, but in the sense that

they're more conservative or more liberal or more scientific or more sentimental or whatever you think is going to help you kind of nudge things one way or the other.

CHAIRMAN BABCOCK: Are there some biases that are more serious than others?

HONORABLE NATHAN HECHT: Well, I think so, but trying to list those, I mean, it's easy to start the list. I mean, if you say, "I'm biased for racial reasons," well, that's it, you're out. It doesn't make any difference if --

CHAIRMAN BABCOCK: "But I can be fair about this case."

HONORABLE NATHAN HECHT: Yeah. Yeah. If you say, "I'm biased on racial grounds but I can be fair," well, you know, probably you're not going to get in. If the same thing was true of gender, probably you're not going to get in, but that's -- but, you know, I think the mentality is that way because those are long-time identified suspect classes that we don't recognize any validity to those kinds of biases.

CHAIRMAN BABCOCK: Invidious discrimination.

HONORABLE NATHAN HECHT: Yeah, but, you know, there are lots of other things that we would not agree whether they're on the list or not.

HONORABLE STEPHEN YELENOSKY: Bias against lawyers.

HONORABLE NATHAN HECHT: Yes. Right. Well, I mean, you know, there's a case, Windle Turley's case the other day, where -- I don't know anything about the case, and maybe it will come up on appeal, but all I was referring to was the newspaper reports where he's -- where there was some indication in the newspaper reports, well, this is what you get when you put a lawyer in front of a jury, and everybody thinks that there are those kinds of things, but some of them we'll accept, we have to accept among jurors, but then there are other things that we wouldn't, and we won't accept anybody who says, "And therefore on account of that, no matter what they say I'm this way or that way."

CHAIRMAN BABCOCK: Justice Bland.

HONORABLE JANE BLAND: Well, I think that we need to keep "bias" in because bias is in a statute as a basis for disqualification. It's bias or prejudice, and they are two different things, and I read Justice Medina's opinion in Cortez to say we're going to let a trial judge evaluate whether somebody has an unequivocal bias, and in that case in the court's view there was equivocation by the venire member. And, you know, that's always going to be -- and then whether or not the bias goes to something

in the case or whether it's something they held outside the courtroom, those type of things come up, but I think we should keep bias in this 226a. I think we have to. I think that's part of the analysis, and I don't think there's any harm in keeping it in.

CHAIRMAN BABCOCK: Bill, Carl, and Carlos.

PROFESSOR DORSANEO: You know, the words are statutory words, but I -- in other systems, other statutes, like the Federal jury selection statute talks about the problem -- this kind of problem that the jurors cannot act with impartiality, so maybe in formulating a definition of "bias" or a new definition, a better definition perhaps, of "bias and prejudice," we could consider something like that, and what would we -- what would you say about bias? The committee -- Alex's committee couldn't come up with anything extra to say about bias that they would be sure would be right. Is this unequivocal bias? I mean, we don't want to be talking about that. And that's --

MR. HAMILTON: Well, that was the question I was going to have, is what you would say about bias because when I looked them up it seemed like "bias" and "prejudice" were defined much the same way.

CHAIRMAN BABCOCK: Looked them up where, Carl?

MR. HAMILTON: In the Black's Dictionary.

CHAIRMAN BABCOCK: Dictionary.

MR. HAMILTON: "Bias" was "an inclination, a bent, a preconceived opinion, a predisposition to decide a cause a certain way"; and "prejudice" was defined as "a predisposition to decide a cause a certain way." So they were both pretty much the same, and I couldn't see why we would be defining one and not the other or maybe just leave one out.

PROFESSOR ALBRIGHT: I think Swap Shop vs. Fortune actually says one is subsumed in the other.

PROFESSOR DORSANEO: Can't hear.

HONORABLE SARAH DUNCAN: Alex, we can't hear.

PROFESSOR ALBRIGHT: I think Swap Shop vs. Fortune, that old opinion, says that one is subsumed within the other. So another thing that I just recognized here, I was looking at it, and we start this by saying, "Jurors sometimes ask what it means when we want jurors who don't have any bias or prejudice." Well, we never had a statement before that that says "we don't want jurors," and Justice Bland recognized that, and her sentence is "We are here to select jurors who are free from bias and prejudice in this particular case." Then "Jurors sometimes ask what that means."

CHAIRMAN BABCOCK: Carlos.

MR. LOPEZ: I wonder if the issue would be do we really want -- I mean, it says -- the statute says what it says, but prejudice, I think we all -- I think we all agree that prejudice legally and officially, technically to go back to I guess the Latin root or whatever the English professor would tell you means one thing, and prejudice the way a juror thinks -- I mean, it's a communication issue. You need to -- you know, a fourth grade educated juror, when you tell that juror -- when you use the word "prejudice," I hazard that they think it means one thing when you are meaning it the way the rule means it or the Latin correct way or the technically correct way.

So I think we mean it to mean prejudge. You can prejudge a case based on bias, you can prejudge a case based on being hard-headed, you can prejudge a case based on a whole bunch of issues; and if you prejudged it, you're gone. Bias is a completely different concept that can lead to prejudging a case, along with a lot of other things that can lead to prejudging a case. So, I mean, to me they're two very different concepts, but at a minimum the low hanging fruit would be to define "prejudice" or just to say "prejudge," which is what we really mean in a way that the juror who we're talking to will know what the

heck you're asking them when you're asking them to tell you "Are you prejudice?" I mean, they don't know what we mean.

CHAIRMAN BABCOCK: Bobby had his hand up, or you got it down now?

MR. MEADOWS: Well, no, I was just going to say kind of consistent with all of this, the problem I have with the way this is presented is we talk in terms of not wanting jurors who are -- who have any bias or prejudice and then we only define "prejudice," so I think that's a mistake, makes bias seem like it's less important or it's over -- it's somehow not as significant in the deliberation, but the stronger point I would make is what I think we need to say is that the outcome needs to be based upon the evidence and the law that's given by the Court and not bias or prejudice. I mean, that's the test. You know, whether we define both or neither, the instruction that's important is that the jury is to decide this case based on the evidence and the law and not bias or prejudice.

CHAIRMAN BABCOCK: Kent and then Justice Bland and then Harvey.

HONORABLE KENT SULLIVAN: I just wanted to chime in and agree and say this is a communications issue primarily. We do not need two hypertechnical definitions

of the word "bias" and "prejudice." This is a communication piece with jurors. This is not for the lawyers, it's not for the judge. This is a communication with prospective jurors, and I think that's what we've got to keep foremost in our minds, and in some sense it's just a question of what are they thinking is expected of them.

In my view, it was to tell them in some sense this other piece that we've been talking about, that they don't need to come to the courtroom with no opinions at all on any subject that may arise in the context of the case, that that is not the point that's being made; and I think the flip side of this is the point that Bobby Meadows just made, that you're supposed to agree and be able to decide it based on the law provided by the Court and the evidence heard in the courtroom in that case; and if we can communicate it concisely and effectively like that we would advance the ball.

HONORABLE JANE BLAND: And I agree. I don't think we need two separate definitions for these two words, especially when even the legal definitions are sort of altogether. I just think that if we're going to try to explain it, use two words, because you're right, Carlos. I think some people that are not lawyers think of prejudice as racial discrimination and not really -- or maybe, you know, other kinds of discrimination, but

basically, you know, the categories of discrimination that we all know about; and so if you use "bias," that's just another word that some people might understand; and if they think about those two concepts together and don't see differences between them, that's fine; but, you know, we should try to, you know, holistically explain to them what our point is; and when we say "do not have any bias or prejudice" and then just define "prejudice," I'm not sure that we really give enough information to them about what we're trying to get them to do.

And I like Bobby's statement about putting aside opinions they have and deciding it based on the law and the facts.

CHAIRMAN BABCOCK: Uh-huh. Harvey and then Alex and then Judge Yelenosky.

HONORABLE HARVEY BROWN: Well, I do think we do need to have "bias" in there if we're going to define one, but I think Jane's point about a broader definition is a good one and Bobby's point about that. I'm a little concerned about giving definitions, though, because these are words that do have legal meaning, and I wonder if this instruction then, you know, in a sense is going to massage the legal definition for determining whether a challenge for cause was appropriate or not.

In other words, we have a number of cases

that have defined this, going back to Swap and Henry, but now are we going to as a committee change the definition that the Court has used historically, and I think one of the things the Court has said historically is it's not enough if you have bias. It's bias to an extent that you cannot be impartial, and so I think part of the issue here is not whether they feel it, but whether they will allow it to influence their verdict.

And if you look at the instruction we give at the end of the case, we say, "Do not let bias or prejudice play any part in your deliberations," which is kind of an acknowledgement that a person might have some of these feelings, but they're to decide the case based on the evidence, which brings us back to Bobby's and Jane's point about bias or prejudice really should be defined somehow if we're going to give a definition of focusing the jury that you need to decide this on the evidence itself and not some technical or legal definition.

By the way, I think a lot of subsection (4) of 226a, which has this sentence about bias and prejudice is not in here that talks about that, a particular sentence dropped and two other sentences in that somehow got dropped out.

CHAIRMAN BABCOCK: Judge Yelenosky. Oh, Alex, I'm sorry. You were next.

PROFESSOR ALBRIGHT: I just want to -- you know, these are instructions that are read to the panel. This is not anything that they get in writing, so it sounds to me -- what I would like to do is propose that we change this paragraph to make it much simpler, say, "We are here to select jurors who are free from bias and prejudice in this particular case. This means we are looking for jurors who will not prejudge the case and who will decide the case based only on the evidence presented in court and the law that I explain."

HONORABLE STEPHEN YELENOSKY: Then why do you even need to use the words "bias" and "prejudice"? Tell them what you want. Don't tell them what you don't want because most of the time lawyers spend their time explaining what "bias" and "prejudice" doesn't mean because that's what jurors come in with.

PROFESSOR ALBRIGHT: Well, if you have any -- I mean, what I was trying to get away from is defining "bias" and "prejudice." I think we need to use the words "bias" and "prejudice" because they are statutory and everybody uses them throughout the voir dire.

HONORABLE STEPHEN YELENOSKY: Well, I guess that's what I'm questioning, why we need to use those words.

MR. HAMILTON: Statute.

HONORABLE STEPHEN YELENOSKY: Well, if it's a statute, I guess that's the answer.

CHAIRMAN BABCOCK: Justice Jennings.

HONORABLE TERRY JENNINGS: Along those same lines, I do think we need to tell the jury what we mean or what the judge means and what the lawyers mean when they're talking to the jury during voir dire about what bias and prejudice mean; and I don't think you need to get hypertechnical about it; and given Justice Hecht's remarks about, you know, everybody does have a bias, but bias can rise to a level where one side has an unfair advantage; and so what I was thinking, along the lines of what Professor Albright was saying, saying something along the lines of this: "When we use the words 'bias' and 'prejudice' we mean basically prejudging the case before you have all the information and giving one side or the other an unfair advantage in the case."

PROFESSOR ALBRIGHT: Giving what -- say that again.

HONORABLE TERRY JENNINGS: "One side or the other an unfair advantage in the case."

CHAIRMAN BABCOCK: Carlos, Bill, Sarah.

MR. LOPEZ: My language would be less ambitious. If you're leaning towards that I would rather

than saying "giving an unfair advantage" I would say "resulting in an unfair advantage" just so that it's not -- it's a little less -- it's more politically correct. I don't know.

My language is less ambitious. I always used to take the time to tell them it's not that you're biased or prejudiced generally, it's that you may have a bias or prejudice with regard to the issue presented by this case, because you always have these lawyers that say, "You might be a great juror for this other case that doesn't have these issues to which you have a bias or prejudice," and so that's one way to help explain we're not talking about the Webster's dictionary of "bias" or "prejudice."

We're talking about a very specific application of it, and so it's whether they're biased or prejudiced with regard to the things that are going to happen in this case. They may have a bias against GM because of some -- who knows why, but if GM has nothing to do with this case, who cares. They may be a great juror for this case. So we're confusing them unnecessarily, I think, by not telling them what at least we mean, at a minimum, when we're asking them the question or asking them to do this, so why can't we at least say, "bias or prejudice with regard to the issues we anticipate will be

raised in this case." I mean, somebody smarter than me can figure out the language, but that's the nuts of it at a minimum.

CHAIRMAN BABCOCK: Bill.

PROFESSOR DORSANEO: Well, Harvey's idea about saying that bias involves the circumstance where you can't act with impartiality, which is the same concept in the Federal statute, makes sense to me as a way to end some kind of a definition of bias, maybe one that begins with Brian Garner's definition from the dictionary; but then I'm thinking if the jurors don't understand the words they didn't understand, you know, later then they're not going to understand what that means. But on the other hand it's got -- if lawyers use those terms during voir dire, the jurors need to understand it, and the lawyers need to understand, because they're probably abusing at least the term "bias." I would suspect that the old practices are still afoot.

So maybe the impartiality could be defined itself by saying "can't act with impartiality by being fair to both parties or all the parties," you know, get back to the concept of fairness. See, I'm struggling with the idea that these definitions need to be right, but they also need to be understandable.

CHAIRMAN BABCOCK: Sarah and then Steve and

then Frank.

HONORABLE SARAH DUNCAN: With all respect to the subcommittee and the valiant effort to rewrite this in language that could be understood by a fourth grader, people don't talk like this anymore; and this is written the way we talk around this table, which less than one percent of the population, I would be willing to bet, is the way they talk; and if we really want to communicate, if that's the goal here, if we want to have people and communicate to them what we do and we don't want and what we want them to tell us, this isn't, I don't think -- there's no way this is -- I mean, just from the very beginning, "We are about to begin selecting a jury." People don't -- I mean, you go out on any street in any town, even Waco, Texas, people don't talk like that anymore.

CHAIRMAN BABCOCK: Even in Waco they don't?

HONORABLE SARAH DUNCAN: Even in Waco, even in Waco.

HONORABLE STEPHEN YELENOSKY: Well, they certainly have more of an accent.

PROFESSOR DORSANEO: They're fixin' to pick a jury.

MR. FULLER: I beg to differ.

HONORABLE SARAH DUNCAN: I think we're

overengineering this. If what we really want to do is communicate, let's get somebody who specializes in communication, not plain language. Plain language is just -- is lawyer bunk. Let's get someone who specializes in communicating concepts to people.

CHAIRMAN BABCOCK: "Yo, dudes, listen up."

HONORABLE SARAH DUNCAN: That's right.

HONORABLE STEPHEN YELENOSKY: Well, I agree with that, and to the extent the statute doesn't allow us to do that then that's a problem, but I don't know that everything that we're doing here is necessarily statutorily required, and attorneys, if they're following that advice and learn how to communicate are going to be asking questions without using the word "bias" and "prejudice" to tease that stuff out, but I agree we shouldn't focus on the words that we're going to use in appellate review of a challenge for cause and all that, because that may not communicate well to them; moreover, do they need to know all those intricacies.

But I also think this is a topic that's really worthy of a lot of discussion because I'm not sure we all agree or know what we are -- individually think bias and prejudice is. For example, you say, well, bias or prejudice about the issues. Well, very often the question of bias is "We're going to have a witness who's a

police officer. If you've had a bad experience, you're biased against them." "We're going to have a witness who is a minister. Do you believe everything ministers say?" Not the issues in the case, it's the person, and what it comes down to on the challenge for cause is not their -- I think the case law even refer to what they initially come in with, but usually it's, "Okay, I understand you usually think, for example, police officers are bad because you've had a bad experience with them, can you admit that people are different and this particular police officer may not be bad, may be believable, and just judge his or her credibility based on what's presented" or conversely with the minister, but that's just an example.

I mean, this, once we figure out exactly what each of us think it means then we get to the communication part, but I wouldn't start with words that we have to fight to explain away simply because that's what you use in the case law.

CHAIRMAN BABCOCK: Lamont.

MR. JEFFERSON: Well, what the statute says is you're not qualified to serve on a particular jury if you have a bias or prejudice in favor of or against a party in the case, and so the idea is not to eliminate everybody who has biases or prejudices. It's you're not qualified if you have a bias or prejudice in favor or

against a party, but the other thing that I point out is we're talking about instructions. Like Alex said, they're going to be read to the jury in advance of a jury selection. I mean, this is before we pick the jury, and the idea, the whole idea behind jury selection, is to tease out those people who have something in their background that you don't like that's going to be harmful to your case, and lawyers are going to do that.

I mean, so I think it's helpful to have a clear explanation read to the jury, but that's not going to be the whole ballgame by any means. I mean, the way we're going to find -- make our strikes is by getting responses from folks that we don't like, and so all this instruction is doing is loosening up the panel so that they feel free to respond to the questions that we ask.

CHAIRMAN BABCOCK: Frank, then Jim.

MR. GILSTRAP: I want to go back to kind of Sarah's point, and I want to approach it a little bit differently, and she raises the question of what are we doing here and what's our approach. I mean, we're not writing on a clean slate. We're writing on -- lawyers have been using these instructions for a long time, and they know what they mean. The question is, do the jurors know what they mean?

Well, if we've got empirical evidence that

the jurors don't understand bias or prejudice then let's examine that. If we've got empirical evidence that says the jurors don't understand unanimous, great, let's get in there and change that, but what we've got here is a complete rewrite of the rule that -- let me just give you an example. This has been in the rule for years. "Do not accept from nor give any of these persons any favors, however slight, such as rides, foods, or refreshment. Do not discuss anything about this case or even mention it to anyone whomsoever, including your wife or husband."

HONORABLE STEPHEN YELENOSKY: Shakespeare.

MR. GILSTRAP: Well, let me just say this. You know, that may not be how they talk on Hannah Montana, but that is -- people understand that. That's not unclear. Why are we changing it? What you're going to do is we're going to do just like we did on the voir dire. We're going to do a complete rewrite of the rule, it's going to go up to the Court, it's going to be sent out maybe to the Bar. They're all going to be suspicious, "Look, there's some kind of hidden agenda here." You know, and if you're going to change it, change the stuff that you need to change, change it a little bit at a time, and make it work. Don't give us a complete plain language rewrite, we don't know what it is, and say, "Now we're going to talk about what does bias mean." We'll talk

about what bias means forever.

HONORABLE STEPHEN YELENOSKY: I don't think people know what "whomsoever" means.

MR. GILSTRAP: Well, say "whosoever." You know, change that. You know, why do we have to do away with that sentence that's been there for years?

MR. MUNZINGER: Here, here.

CHAIRMAN BABCOCK: Jim.

MR. PERDUE: I guess my question is kind of for Alex, but to follow up on that, I have the column that you gave us last time.

PROFESSOR ALBRIGHT: Right.

MR. PERDUE: And this paragraph that we're talking about as far as prejudice does not have a corollary in the prior rule.

PROFESSOR ALBRIGHT: No, that's why I'm bringing it up. This is new. This is what -- this is new. This is what the Pattern Jury Charge Oversight Committee decided that it made sense to have some mention of bias and prejudice in the early voir dire to give the jurors some clue as to what the judge means by bias and prejudice before the lawyers start talking about it.

MR. PERDUE: Well, I guess my question and for the committee and my observation is, is in context this is the admonitory instructions before a lawyer talks.

So this is what a judge is telling the jury before you start, and how -- how are you inserting even the issue -- we don't do that now. All that they are told is to answer the questions truthfully, you know, do not conceal information, we're trying to select fair and impartial jurors.

Now what the committee is offering is an effort to get the court involved in precommitment, which is always the concern I think from both sides, is you don't have the Court in the role of precommitting or preventing potential jurors from answering honestly or completely because they don't like the terminology used. Judge Yelenosky is talking about whether lawyers even use bias or prejudice. I try to avoid the terminology because I don't think it gets them talking with you. But so I'm confused as to how or what the impetus is for this paragraph to be added in here at this stage of the proceeding other than to get the panel to precommit that they're not -- they're not going to offer themselves up for cause challenges.

PROFESSOR ALBRIGHT: I think the reason this is here is Justice Peeples, as I recall -- this is just based on my recollection. This has been going on so long that I can't remember everything exactly correctly, but I believe Justice Peeples felt that -- and others agreed,

that after Cortez that this has become especially important, that there are some jurors who think that they are not qualified to be on a jury because they have some bias or prejudice as they think of as a bias or prejudice when it may not be to the extent that it would prejudge -- it's something that causes them to prejudge the case.

So this introducing to them the idea that you may -- like we've been talking about, you may have certain biases, but if you can still listen to the evidence and not prejudge the case and decide the case based on that evidence then you're still a qualified juror.

MR. PERDUE: But I guess the question is how can you instruct them on a legal standard for which nobody in here can truly verbalize anyway?

PROFESSOR ALBRIGHT: Well, I think we've all verbalized prejudge.

CHAIRMAN BABCOCK: Lisa.

MS. HOBBS: If I could just add to what you said, Alex, about why I think this was put in here, I think when you're -- you know, just your common average person and people start asking you questions like "How do you feel about police officers, how do you feel about your minister," they get a little bit like "Why are you asking me about a police officer and my minister? Are you trying

to attack me?" I mean, you know, they may not really understand why they are going to be asked all these questions, and the idea is to tell them up-front, "We may be asking you some questions. What we're trying to decide is, you know, do you have any bias or as we think of that word" and so I think that was part of the reason --

PROFESSOR ALBRIGHT: Right.

MS. HOBBS: -- why it was pulled up front, too.

PROFESSOR ALBRIGHT: Yeah, that's right. Because jurors do wonder -- again, it's part of the, you know, transparency of the process, why are we delving into your personal business --

MS. HOBBS: Right.

PROFESSOR ALBRIGHT: -- in this trial.

CHAIRMAN BABCOCK: Harvey and then Justice Jennings.

HONORABLE HARVEY BROWN: Well, I think where this is coming from, again, is paragraph (4). If you have your rule book and you look at (4) it just says, "The parties through their attorneys have the right to direct questions to each of you concerning your qualifications, background, experiences, and attitudes." That is not in here right now. "In questioning you they are not meddling into your own personal affairs but are trying to select

fair and impartial jurors who are free from any bias or prejudice in this case." And those tend to be the words the lawyers use. Some use "bias," some use "prejudice," a lot use "fair," some use "impartial," not too many because it's a difficult word for jurors, but I think that's where this came from.

MS. HOBBS: Uh-huh.

HONORABLE HARVEY BROWN: The step that's further is defining "bias" and "prejudice." That's not in the existing 226a, but all of (4), the first paragraph, I think need to be here to give some context, and I agree it's a good idea to get it up front because the jury is wondering, "Why are they asking me the questions?"

PROFESSOR ALBRIGHT: So do you take more of No. (4) -- this is like I was saying before that we don't necessarily take what we're doing --

HONORABLE HARVEY BROWN: Right.

PROFESSOR ALBRIGHT: So take it from No. (4) and then --

CHAIRMAN BABCOCK: Justice Jennings, I skipped Bill, so I'll let him go next and then you.

PROFESSOR DORSANEO: Well, I think that talking about it might make more sense now in terms of definitions, given the fact that the cases have really changed what can be done on voir dire. People are

following -- actually following those cases. I mean, to a large degree, as I read them, they say that your primary, if not sole reason, for doing voir dire is to uncover some kind of external bias or prejudice, not just for doing -- not for doing anything, not for just getting any information that might to you be useful in deciding whether to challenge somebody with a peremptory challenge.

So if the lawyers are involved in conducting voir dire around that primary notion and are controlled by it, if the cases are followed, then maybe it's necessary to have this information right up front to explain exactly what it is that this process is about. In other words, you have to think about what is going to come next because that is really what it's about, you know, the jury selection phase of the case and what can be done there and what needs to be done and what shouldn't be done.

CHAIRMAN BABCOCK: Justice Jennings.

HONORABLE TERRY JENNINGS: Well, I think the paragraph has a very good purpose, and, you know, we've seen this case litigated to the Supreme Court where the -- on a number of occasions where the problem arises in voir dire when you get down to, well, the lawyers know what they think bias and prejudice means, the judge has his or her conception of what bias or prejudice means, and it needs to be communicated to a juror what that means; and

along with the lines of disqualification, which we heard about earlier, you know, you can't be biased to the extent that, you know, one side is going to have an unfair advantage; and I haven't heard a better way of saying that, but I think that's the language that any grade school -- person with a grade school education would understand.

They would understand I'm not supposed to give one side an unfair advantage over the other side and I'm not supposed to make up my mind about this case until I've heard the evidence, and that's why I like the idea of telling the jurors, "Here's what we mean when we use these words and when we're talking to you," and this is, again, a preliminary instruction try to give the jury an understanding of what's going on here so that you avoid this confusion later when people are trying to rehabilitate a jury and so forth, to give them an understanding of what these words mean, unfair advantage and you made up your mind about the case before you heard the evidence.

CHAIRMAN BABCOCK: Carlos and then Justice Bland. And then Richard Munzinger.

MR. LOPEZ: Mine is just a semantic issue. I would take the word "unfair" out. I mean, an advantage under these circumstances is considered unfair and

improper. If it gives them an advantage, it gives them an advantage. "Unfair" is another word to argue about. I don't think the jury is going to argue about it. I think it's more of a legal issue, but you know --

HONORABLE STEPHEN YELENOSKY: Of course, the nature of prejudice and bias is that you don't think it's an unfair advantage.

MR. LOPEZ: Well, that's my point, so take the subjective part out and just call it an advantage.

HONORABLE STEPHEN YELENOSKY: Well, I don't even think it's an advantage. I think it's the way things are.

HONORABLE TERRY JENNINGS: It's got to rise to a level of disqualification. As we've all acknowledged, people can have certain biases, but the bias to be disqualifying has to rise to a certain level, and again, you're trying to make this plain language to where a person with a grade school education can understand it, and I think everybody understands the concept of being unfair to a point where a party has an advantage over another party, and I think that's kind of along the lines of what the statutes say about disqualification.

CHAIRMAN BABCOCK: Jane.

HONORABLE JANE BLAND: When Harvey reread that paragraph (4), it has "fair," and I wouldn't do

"unfair advantage," because advantage to me -- I would do the opposite of what you would do. I would take out "advantage," and I would take out "un-" and just talk about "fair," because any three-year-old knows how to say, "That's not fair" or "That's fair." I mean, everybody uses the word "fair," so maybe if we --

HONORABLE TERRY JENNINGS: Yeah, but then --

HONORABLE JANE BLAND: Use "fair," can you be fair, which is a one of our words used, too, in sort of describing this concept. We would be communicating to jurors better what we mean.

HONORABLE TERRY JENNINGS: But that's when you get to the point where you have all this problem with rehabilitation about what is fair, and everybody says, "Well, of course I can be fair."

MR. LOPEZ: Especially if the judge orders me to.

HONORABLE TERRY JENNINGS: Yeah.

CHAIRMAN BABCOCK: Richard Munzinger.

MR. MUNZINGER: I would like to ask a question of the professors or others who are here along the lines of Frank's comments. Have there been empirical studies that say Texas juries don't understand what we've been telling them for 25 or 30 years?

CHAIRMAN BABCOCK: Yeah.

HONORABLE LEVI BENTON: Thank you. We disrespect them so much. Thank you. You're exactly right.

MR. MUNZINGER: No, I'm asking the question because --

HONORABLE LEVI BENTON: No, there has not been an empirical study.

MR. MUNZINGER: I'm on a pattern jury charge committee and have been on two or three of them over the years, and I was told this came down from some committee of the pattern jury charge group, which is fine, but I'm like Frank. Here I am getting ready debating about whether I'm going to use the word "bias" because it's been used in Texas jury charges since I held a law license, and I would like to know if there is someone who has really done a study that says Texas jurors don't know what this means when led through a valid voir dire by a good lawyer. I don't understand why we're doing it. If there is -- I would love to hear somebody say there has been an empirical study that our juries are too dadgum dumb to know what we're talking about.

HONORABLE STEPHEN YELENOSKY: Well, we have a study. It was provided to us, right?

PROFESSOR ALBRIGHT: Right.

MR. MUNZINGER: I haven't seen it.

HONORABLE STEPHEN YELENOSKY: Well, It was provided in the materials for today. I can't say I read it cover to cover, but it had pretty alarming statistics that they don't understand "unanimous," a good percentage don't understand "unanimous," a good percentage do not think that preponderance of the evidence is 80 percent. Look at the study. It's there.

MR. MUNZINGER: Then change those words.

MR. SUSMAN: Does it say anything on "bias"?

MR. PERDUE: I guess that's the finer point I was trying -- paragraph (4) of the PJC that we have now is an effort to let them know what the process is. The parties through their attorneys have the right to direct questions and why they're doing it. This now is an effort to define the legal standard. It is a completely different purpose, and it is trying to achieve a different objective as opposed to let them understand why you're there asking them questions, and I don't know --

PROFESSOR ALBRIGHT: I think the purpose, like I said, in some iteration of this something got left out. It was always intended to say the purpose, you know, what we're doing is the lawyer is going to be asking you questions to find out if you're biased or prejudiced, this is what we mean when we're talking about bias or prejudice. Somehow this, the concept of No. (4), got left

out, and I've got to go through multiple drafts to find it, or it may be easier just to rewrite it.

CHAIRMAN BABCOCK: Justice Bland.

HONORABLE JANE BLAND: As a trial judge when I would read these instructions I always liked paragraph (4). I thought of all the stuff that we read that was the only paragraph that actually told them what we were about to do, so -- and a lot of people, you know, just want to have some guidance about what the next step is, and so and I liked it sort of at the end like it was. I think the language is a little bit old-fashioned, but, you know, if we're -- I'd be curious to know why that was just taken out, and it has that -- it has the prejudge and the judge, and then there must have been some thinking about moving it up more to the beginning, which, you know, might be okay, but it just, yeah, it seems like we're reinventing the wheel when maybe we should start with what we have.

HONORABLE TERRY JENNINGS: Paragraph No. (4) from the old rule ought to be under these instructions the first paragraph mentioned. "These are the instructions, one, the parties through their attorneys have the right to" --

PROFESSOR ALBRIGHT: I think that --

CHAIRMAN BABCOCK: Sarah.

PROFESSOR DORSANEO: Listen to the way Jane

said it. I think most everybody would understand what she just said. "Let me tell you what we're getting ready to do. The lawyers are going to ask you some questions to find out if they think you can be fair to their clients if you sit as a juror." People understand that, but that's not -- the problem is that it's screenwriters who write dialogue in a way that people actually talk. We write as though we're writing a brief, and there's a difference between the way people read words and the way they hear words, and I -- you know, I think just let's tell Jane to tell the jury what she wants to tell them and we'll record it and then we'll transcribe it, and I think we would be a lot further down the road.

CHAIRMAN BABCOCK: I think we ought to get the guys from Boston Legal.

PROFESSOR DORSANEO: Denny Crane?

CHAIRMAN BABCOCK: Yeah. Harvey.

HONORABLE HARVEY BROWN: Reading it is part of the problem. Whenever you read something to somebody and you're literally using a script it makes it hard to understand; therefore, I would always paraphrase after I read, but I felt like I had to read it because the rule said you have to read it. So I would like the judge to have a little more freedom, but I don't know if people all agree with that or want that statewide. So you can

paraphrase, at least as an explanation, because I do think you're right, you can say it a lot simpler.

MR. MEADOWS: Well, Harvey, if you did it, don't you have the freedom to do it?

HONORABLE HARVEY BROWN: Well, no one ever challenged me, so I thought I did.

CHAIRMAN BABCOCK: "Your Honor, you're not reading from the script."

MR. PERDUE: I have had a judge not paraphrase something to that effect.

CHAIRMAN BABCOCK: Yeah, Lisa.

MS. HOBBS: I was just going to note that in the study when the jurors were responding to whether -- when we were going through the study or they were going through the study you would ask them to answer a question, and the results of the study determined whether or not they answered the question correctly or not. So the question was "To be free from bias and prejudice means you have not prejudged the case before hearing the evidence."

Well, under the old rule -- under the old pattern jury charge 92 percent got that right, and under the new version 98 percent got it right. So it seems like jurors do understand what "free from bias and prejudice" do, whether it's written the old way or the new way.

HONORABLE SARAH DUNCAN: But, Lisa, that

depends on there being synchronicity in what the questioner means by bias and prejudice --

CHAIRMAN BABCOCK: Can we put that word in?

HONORABLE SARAH DUNCAN: -- and what the answerer means by bias and prejudice, and this is -- it's all -- it's all about communicating. They didn't -- 98 percent said they understood, but you don't know what they believed bias and prejudice to mean. If they meant I've already decided I'm going to vote for the lady with the red hair, if they think that's what that means, so what that 98 percent versus 92 percent said "yes."

PROFESSOR DORSANEO: Good question.

MS. HOBBS: Well, this --

HONORABLE SARAH DUNCAN: That question was designed to get a high response rate, not to communicate and to get a real answer from the prospective jurors, in my view.

CHAIRMAN BABCOCK: All this synchronicity is going to my head.

HONORABLE SARAH DUNCAN: That's a good word. Don't make fun of "synchronicity."

CHAIRMAN BABCOCK: Why don't we eat on that?

PROFESSOR ALBRIGHT: I think it would be helpful to know if -- for me to go back with is --

CHAIRMAN BABCOCK: Hang on, hang on. What

are you saying, Alex?

PROFESSOR ALBRIGHT: Should we try to move forward in taking these thoughts about further definitions of bias or prejudice or should we leave any more talk of bias and prejudice out? I mean, for us that is an issue. We made the decision to add to the current instructions further definition of bias and prejudice, and either we should proceed with trying to do a better job of that or we should take it out.

CHAIRMAN BABCOCK: Yeah, Harvey.

HONORABLE HARVEY BROWN: I think we should leave it as it is and not put those words in. I think the jurors seem to get it from this. I think the lawyers do a pretty good job of explaining it, and I think if we define it now we're going to get into a lot of debate about what the definition is, and those are definitions that may evolve over time as the Court hears more cases on voir dire, which historically there aren't that many cases on voir dire and what these words mean, and the Court's heard two in the last year, and I think they have another one pending, so I think we should --

PROFESSOR ALBRIGHT: The old rule does contain the words "bias" and "prejudice."

HONORABLE HARVEY BROWN: No, I wasn't saying we shouldn't have those words. I was saying I don't think

we should define them. I think we should do something similar to paragraph (4) as it currently exists.

PROFESSOR ALBRIGHT: And that's my question, is whether we should work further to try to further define or just leave it alone.

HONORABLE HARVEY BROWN: And I like the way it is, personally.

CHAIRMAN BABCOCK: Okay. Let's break for lunch.

(Recess from 12:33 p.m. to 1:31 p.m.)

CHAIRMAN BABCOCK: All right. Alex, do you want to introduce Mr. Scheiss or do you want me to, or why don't you?

PROFESSOR ALBRIGHT: I'm sorry. The Honorable Kent Sullivan was talking to me. This is Wayne Scheiss, who helped us with the plain language version, and he's here to be a resource. He also happened to have a memory stick with him that shows that we did have another paragraph that is No. (4) that we were talking about a little bit ago. The plain language version of paragraph (4) says, "The parties have the right to have their lawyers ask you questions about your background, experiences, and attitudes. They are not trying to meddle in your affairs. They are just being thorough and trying to choose fair jurors who do not have any bias or

prejudice about this case."

Then it starts "Jurors sometimes ask what it means when I say we want jurors who do not have any bias or prejudice."

HONORABLE KENT SULLIVAN: Mr. Chairman, let the record show that Professor Albright has had a Rose Mary Woods moment.

CHAIRMAN BABCOCK: I wonder if she would demonstrate that for us. See if you can keep your foot on the pedal. See, Jody is saying, "What are they talking about?"

MR. HUGHES: I learned that last time.

CHAIRMAN BABCOCK: "I wasn't even born when that happened."

MR. WADE: Professor Dorsaneo will explain it.

PROFESSOR ALBRIGHT: It was a modern Rose Mary Woods moment because it was a mouse issue instead of a pedal issue.

CHAIRMAN BABCOCK: Okay. Very good.

PROFESSOR ALBRIGHT: So what I would like to do is maybe in view of all the discussion and the accidental omission of that paragraph is redraft this -- this part of the charge and bring it back and move on to something else.

CHAIRMAN BABCOCK: That would be great.

PROFESSOR ALBRIGHT: So the next issue is -- the next issue is the contempt instruction of 226a that's in Roman I and Roman III. And it is -- here it is. The paragraph that we were talking about is two paragraphs below that, right above the sentence that says, "These are the instructions" and starts listing them one, two, and three.

MR. HAMILTON: Can you give the page number?

CHAIRMAN BABCOCK: What was the page number, Alex?

PROFESSOR ALBRIGHT: It's on page two. You see where there are instructions one and two at the bottom of the page? Look above, the paragraph above, "These are the instructions."

CHAIRMAN BABCOCK: Okay.

PROFESSOR ALBRIGHT: "Every juror must obey the instructions that I am about to give you. If you do not follow these instructions, I may have to order a new trial and start this process over again. That will be a waste of time and money. It is also possible that you may be held in contempt or punished in some other way, so please listen carefully to these instructions."

This is new. Previously we have just instructed jurors that it's a waste of time and money and

we may have to try the case over again. There were judges on the pattern jury charge committee that felt like we needed to tell jurors that their failure to follow instructions could have some impact on them and not just upon the parties in the court, and they can be held in contempt, they can be punished, so they wanted to tell the jurors about that. So for you-all to discuss whether you think it's a good idea or bad idea.

CHAIRMAN BABCOCK: Any comments about this? Yeah, Bill.

PROFESSOR ALBRIGHT: And we do not define "contempt."

PROFESSOR DORSANEO: Other than the obvious reason, why would they want such a thing in here, just, you know --

CHAIRMAN BABCOCK: Other than the obvious reason.

PROFESSOR DORSANEO: Yeah.

CHAIRMAN BABCOCK: What's the hidden agenda on this?

PROFESSOR DORSANEO: Aren't jurors frightened enough? Aren't they frightened enough without telling them this at the beginning that they can be, you know, put in jail if they don't behave themselves? I don't think this is necessary, and I think it sets a bad

tone for this experience.

CHAIRMAN BABCOCK: Okay. Yeah, Lonny.

PROFESSOR HOFFMAN: We could maybe describe in greater detail what the punishments would involve.

PROFESSOR DORSANEO: Yeah. Order boarding.

CHAIRMAN BABCOCK: I've defined "bias" and "prejudice" for you. Now let me define "contempt."

PROFESSOR ALBRIGHT: All of the --

HONORABLE JAN PATTERSON: Not to exceed five years. Sorry.

PROFESSOR ALBRIGHT: All of the trial judges on the previous committee felt that they were not able to get the jurors to do what they were telling them to and they needed an additional stick, so maybe we need to hear from trial judges.

CHAIRMAN BABCOCK: Yeah, Judge Yelenosky, a trial judge, by the way.

HONORABLE STEPHEN YELENOSKY: What's that?

CHAIRMAN BABCOCK: I said you were a trial judge.

HONORABLE STEPHEN YELENOSKY: Yeah, by the way. Well, I'd like the discretion. I wouldn't want to have to do that. I don't -- I think at least in my experience they do try, and perhaps if I thought I had a jury that wasn't trying I might need to do that, but I do

think it sets a particular tone that may not be necessary, and I'd like to have the choice.

CHAIRMAN BABCOCK: Justice Patterson.

HONORABLE JAN PATTERSON: I speak from a position of authority because I've been a juror, and I think that judges speak to the highest and best in jurors and that you don't need something like this, and I agree with Professor Dorsaneo that it sets a bad tone. Jurors really strive and they listen and they try to do the right thing and they try to figure it out, and I think trial judges probably, right, Judge Yelenosky, see that effort? I mean, most everybody who serves on a jury is impressed that the effort that is put out is above and beyond the individual effort and that was --

HONORABLE STEPHEN YELENOSKY: Except, as Chip said, those young kids, you know. Yeah, I mean, there is an occasional juror who is a problem, but that's partly why you have 12 of them.

CHAIRMAN BABCOCK: Yeah.

MR. FULLER: Well, and --

CHAIRMAN BABCOCK: Yeah, Hayes.

MR. FULLER: In those instances when you do get one of those problem jurors when I've been on the panel and witnessed them in the courtroom the judges usually have a pretty good way of communicating them

up-front of the seriousness of the process, and I don't think there is any doubt in their minds that they could get punished if they don't straighten up. I think that's, you know --

CHAIRMAN BABCOCK: Justice Bland.

HONORABLE JANE BLAND: In our old instructions we talked about it will be jury misconduct, and I was wondering what was wrong with jury misconduct, because everybody gets a conduct grade when they're growing up, so everybody knows what conduct is, and -- what, you didn't get a conduct grade, Justice Gray?

CHAIRMAN BABCOCK: Well, isn't that obvious?

HONORABLE STEPHEN YELENOSKY: He went to Montessori or one of those kind of wavy-gravy schools.

HONORABLE JAN PATTERSON: This is always revelatory.

HONORABLE JANE BLAND: I would just say as a mother to young children I know that it is almost universal in the schools that every week you must sign a page that has your child's conduct grade for the week, you know, on up into middle school, so to me I just think that's -- I don't think they know what contempt is, so I'm not really sure they're going to be afraid of it, but I think misconduct kind of says to them, you know, "This is something serious that you need to pay attention to."

HONORABLE TOM GRAY: I thought I was going to get away without you putting my name on the record.

CHAIRMAN BABCOCK: Who else? Anybody else got any comments about this? Yeah, Lonny.

PROFESSOR HOFFMAN: I'm in favor of dropping all of the language. I don't think we ought to have misconduct. I think we ought to just -- if judges have to deal with it, they've got the authority to deal with it, and most of the time they don't have to deal with it, and when they do they'll set an example as they need to, and we ought not to have this stuff in here.

CHAIRMAN BABCOCK: Wayne Scheiss.

MR. SCHEISS: I need to keep my mouth -- I don't have a dog in this hunt, but because I don't care what you do.

CHAIRMAN BABCOCK: Have you ever been a juror?

MR. SCHEISS: Never been a juror.

CHAIRMAN BABCOCK: Did you get a misconduct grade?

MR. SCHEISS: Yes, I did, except we called it citizenship, and I didn't get high grades in citizenship. But the judges said -- maybe this sparks some memories. This is the judges on this other committee that when I was sitting there listening to them, "We've

got people who won't take their cell phones in ther and then they call people and they're not supposed to be calling people. They pull up their Blackberry and they look something up on the internet that they're not supposed to look up, even though I told them they're not supposed to do that," and these judges said -- now, the one I'm thinking of is from El Paso. Maybe that's different from Austin. "I can't get them to do the little things like that or not do the little things like that that they're supposed to do and I wanted a stick."

So I, Wayne Scheiss, said, "I may have to hold you in contempt," and the judges said, "We don't want to say it that directly. I don't want it to be me who is holding you in contempt," so you can see what we did. We switched it to the passive voice. "You may be held in contempt," and so that's the end of my speech. I have no dog in the hunt. If you think it's too heavy-handed, take it out.

CHAIRMAN BABCOCK: Okay. What else? Anybody else? Yeah.

HONORABLE STEPHEN YELENOSKY: Well, I guess the only thing I'd add is in taking it out does that mean that judges may not say that? Because I think I heard Harvey say earlier, well, he read it verbatim because he thought he had to read it verbatim, and I would assume

that meant some judges think they couldn't add something like that, and so do we need to address that?

CHAIRMAN BABCOCK: Harvey was the maverick who paraphrased.

HONORABLE HARVEY BROWN: Both. I did both.

CHAIRMAN BABCOCK: But he was true to spirit.

HONORABLE STEPHEN YELENOSKY: I will admit I've changed "whomsoever" to something else, so I haven't read it verbatim, but do we need to say that somewhere or is that --

CHAIRMAN BABCOCK: Well, if you took it out it seems to me that the trial judge would always retain authority to, you know, be mean to some juror who had their cell phone on.

HONORABLE STEPHEN YELENOSKY: Right. The question is, is it clear that the judge could insert that routinely as this judge apparently would want to do?

PROFESSOR ALBRIGHT: Well, and I need to tell you-all, Tracy Christopher, who is a member of this committee, she was a big proponent of this.

HONORABLE TERRY JENNINGS: It certainly seems to be more harsh than the current rules which reads, you know, "Texas law permits proof of any violation of rules of proper juror conduct. By this I mean that jurors

or others may be called to testify in open court about the acts of jury misconduct." I mean, the current rule basically says, "Look, if you commit misconduct your fellow jurors may tell on you and might have to testify about it." I don't think it's any -- certainly it's not any more harsh than that.

PROFESSOR ALBRIGHT: Terry, where are you reading? Is that in --

HONORABLE TERRY JENNINGS: 226a, Roman numeral I.

HONORABLE HARVEY BROWN: First paragraph.

HONORABLE TERRY JENNINGS: First paragraph after the introductory paragraph.

CHAIRMAN BABCOCK: Justice Bland.

HONORABLE JANE BLAND: Well, you know, Tracy would never have to hold a juror in contempt because all she does is lean forward on the bench and put her glasses down and get her finger and go like this, and it frightens you to death. So I don't think she would ever have that issue. You know, I think there's all kinds of things you have to manage with jurors being late or things like that, and I mean, obviously if it gets to a real serious offense then you have to consider contempt, but, you know, I think it is heavy-handed to put it in the very beginning.

CHAIRMAN BABCOCK: Frank.

MR. GILSTRAP: Well, I mean, one of the purposes is to deter jurors from misconduct, and you know, does this instruction do that? I mean, as long as we're looking at jurors' attitudes it would be interesting to me how seriously some of them take this. I mean, do they all know that it's real important that they not, you know, buy the other side a coke or something? I just don't know. But, you know, I could sure imagine some jurors not knowing that they're really supposed to do this.

CHAIRMAN BABCOCK: Okay. Yeah, Lamont.

MR. JEFFERSON: I guess it's mostly a timing problem for me. I mean, this is a panel that just got there, just got to the courthouse, and to have this be one of their very first instructions is just offensive when they haven't even gotten -- you know, there's not a single question being asked and they're being warned about misconduct already. Where it falls now, where it's either after they're sworn in or just before their deliberations, it's less offensive. By then you've already had all the patriotism and the congratulations for all of their civic duties, but I mean, for it to be the very first thing out of the box seems a little harsh.

MR. GILSTRAP: Maybe you do it there.

PROFESSOR ALBRIGHT: It's also in (3), which is the --

CHAIRMAN BABCOCK: Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: Well, I don't know who the judges are that wanted this in there, but they apparently recited experience where jurors were doing this stuff that they had been told not to do. What did those judges do? If those judges in those instances didn't pull those jurors out and talk to them, they should have; and if it's continued, if those judges didn't actually proceed with something further then they're unwilling to do what they're asking us to threaten up-front. I don't think in general the policy should be to threaten everyone for the chance that a small number may do something when if that -- if one of them does something, they're always going to get a warning before doing anything anyway, and you can determine one on one if you have to warn them of contempt.

CHAIRMAN BABCOCK: Okay. Yeah, Carlos, then Steve.

MR. LOPEZ: Short answer is -- short version is I agree. I mean, if you need this to keep control of your jurors, you're in big trouble. The Tracy Christopher routine I think works pretty well. I mean, it's a question of due notice to them before they really do get in trouble, from a technical aspect, though. You know, you want somebody to know -- you want to be able to prove

they knew it was wrong before you hold them in contempt for it. Maybe that's an issue, a legal issue.

CHAIRMAN BABCOCK: Steve.

MR. SUSMAN: I mean, I think the things we are telling the jurors up above are so counterintuitive to the way normal people operate. Okay. Don't look it up on e-mail -- on the internet. Don't discuss your views with somebody else you're spending time with. The more often you repeat it and the better. I just think you have to repeat it over and over again, the earlier the better, and you should put every possible threat, including execution, in. I don't think it does any harm. I mean, if you deter one juror from looking something up on the internet, you have accomplished something. I mean, no one is going to be --

HONORABLE STEPHEN YELENOSKY: You don't have to run for re-election.

MR. SUSMAN: Yeah, but I mean, hopefully --

HONORABLE STEPHEN YELENOSKY: It's not that so much, but why do you want to threaten people who largely don't need to be threatened, and a lot of what you're saying is jurors inadvertently will do things they shouldn't, and what that calls for is an explanation like, "The most natural thing in the world would be for you to walk out on this break and talk among one another about

what you just heard. That's exactly what you're not supposed to do."

MR. SUSMAN: Well, I mean, threatened? It seems to me one thing you could certainly tell them is we may have to do this all over again, and someone is going to have to spend the time you are, and it's going to cost the state a lot of money. I mean, that's the biggest thing, and that's not a personal threat. What's wrong with that, at least putting that in? Forget about holding them in contempt.

HONORABLE STEPHEN YELENOSKY: Well, that is in. I don't think that's what we're talking about.

CHAIRMAN BABCOCK: Justice Jennings, then Justice Gray.

HONORABLE TERRY JENNINGS: Just two short points. One, Harvey has mentioned earlier about paraphrasing and stuff is in the current rule about the following oral instructions with such modifications as the circumstances of a particular case require shall be given. So if we keep that in, trial judges will always have the ability to modify this and maybe put it in a better language.

Two, I don't really see this as threatening language, and looking at the old rule and how it's phrased it occurs to me that there's a certain amount of

self-policing in here, and we talked about this during the break at lunch that jurors will often go back to the jury room, or at least I've heard, and say, "Well, you know, the judge told us we can't do this" or "The judge told us this," and if you tell the jury, "Look, you can't do that because it's misconduct" or whatever, "We could get in trouble" or "you could get in trouble" and/or it's going to result in a new trial that could cost the taxpayers more money, it gives the jurors the ability to self-police each other and instruct each other. "Remember when the judge told us we couldn't do that? Let's not do it. Let's stop it right now." I think there's a certain amount of that involved in making this clear.

You are trying to communicate to the jury the importance of what they're doing here today, that if there is any deviation from the rule that it could result in the waste of taxpayer money, and there's a certain amount of education involved here telling the juror who might consider doing this, you know what, you might get in serious trouble for doing it. I don't see it as a threat. I see it as kind of educating them as not only what their responsibilities are, but what the consequences are if they don't.

CHAIRMAN BABCOCK: Justice Gray.

HONORABLE TOM GRAY: I agree with Steve,

because you've got their attention. It's one of the first things out of the box that, I mean, these jurors need to be told while they are not tired, they're not bored yet, they're sort of curious about what's about to happen, and you're going to tell them that this is important and bad things can happen if you don't do what I say to do.

Following up on the self-policing concept is something that I think we're missing from the old rule when it says, "By this I mean that jurors and others may be called upon to testify in open court." They're being told right off the bat that if you see one of your fellow jurors doing something wrong you may actually have to become involved as a witness of what that juror did, and in effect, you're empowering them to do the self-policing that he referred to of tell them to quit, and so I think both the warning as well as the possibility of subsequent action by the court is very good policy for the rule.

CHAIRMAN BABCOCK: Justice Bland.

HONORABLE JANE BLAND: Well, I like the old -- I agree with Terry and Tom. I like the old rule better, because it says, "Look, if you do this it will be jury misconduct, and you might have to testify," and I think that would really scare people if we're talking about trying to scare people, and then if you want to have the thing in about being punished I guess that's okay, but

to me without any explanation about, you know, what might happen or why, you know, it doesn't seem like it has any teeth anyway. Also, if -- I don't know why we took out "taxpayer money," because to me that's very effective in telling people, "Look, you don't want to waste taxpayer money." Nobody wants to waste taxpayer money, and so if we're trying to deter people from violating instructions that's probably a pretty effective way.

PROFESSOR ALBRIGHT: I think you may be looking at (2) instead.

CHAIRMAN BABCOCK: Kent.

HONORABLE JANE BLAND: Well, it says waste of -- it says "money," but it doesn't say "taxpayer money."

CHAIRMAN BABCOCK: Kent.

HONORABLE KENT SULLIVAN: I wanted to briefly throw a new angle in on this. I think the one point of consensus is that this is an important thing to emphasize and ensure that all potential jurors understand, because certain of these rules if they violated them, you're starting over with all the attendant inefficiency and waste. If we're serious about communication, I think one thing that objective research would tell us is we would do it visually as well as the -- you know, the listening experience.

As a practical matter, I think it's worth noting or reminding everybody the jurors don't have copies of anything. This is not the court's charge. They don't have anything in front of them. They're simply listening to someone who's probably reading something to them, and we've got a bunch of judges that probably have, you know, varying qualities of their, you know, voices and reading skills. So the comprehension can range all over the map.

It does occur to me as we try to approach the notion of modernizing the communication experience with jurors that you would want something akin to a PowerPoint, and you'd want to flash it up. That would be one thing that might lessen the need to talk about people being punished or whatever in terms of getting their attention, that that's something that I think it's disingenuous for us not to at least some point discuss how outdated our approach is.

HONORABLE TERRY JENNINGS: Would the court reporter have to take that down?

HONORABLE KENT SULLIVAN: What's that?

CHAIRMAN BABCOCK: Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: Judge Chu in El Paso, I believe, uses a PowerPoint for panel members, but -- and that may be a good idea, but the jurors who sit on -- the 12, they do get instructions in writing, and if

you're concerned about what's happening with the jury of 12, they're going to get written instructions anyway.

HONORABLE KENT SULLIVAN: Oh, no.

HONORABLE STEPHEN YELENOSKY: So I just want to make that point.

HONORABLE KENT SULLIVAN: Oh, no, I'm well aware of that.

HONORABLE STEPHEN YELENOSKY: But I don't disagree that -- you know, I mean, obviously Judge Chu --

HONORABLE KENT SULLIVAN: But my point was that it's not clear, is that this is not a modernized experience. The fact that some isolated judges may approach it in a more modern fashion is just that, isolated.

CHAIRMAN BABCOCK: Lamont.

MR. JEFFERSON: Another problem with having this kind of a warning first, to me, is you want to have the broadest possible field to choose from, and you're just -- the effect of having this grave warning up-front or something that a juror might believe is a grave warning discourages them from wanting to serve on the jury, and if there's another way for them to get off, if they need any other reason to get off, the threat of having to be punished for some unintentional misconduct is more reason for that.

CHAIRMAN BABCOCK: Okay. Yeah, Justice Hecht.

HONORABLE NATHAN HECHT: Just for information, has anybody ever heard of a juror being held in contempt for something like this? I mean --

HONORABLE JANE BLAND: Not formally.

CHAIRMAN BABCOCK: A lot of them are from El Paso apparently --

HONORABLE NATHAN HECHT: I think maybe one was held --

HONORABLE JANE BLAND: Didn't it count that if they're late --

HONORABLE NATHAN HECHT: -- in contempt for not showing up.

HONORABLE JANE BLAND: -- thereafter they show up the next morning an hour before all the rest of the jurors come, but there's no hearing or anything, but several judges say, "You've been late. You've been late two days in a row, so for the next -- for the rest of this trial you need to be here an hour and a half early" kind of thing.

CHAIRMAN BABCOCK: Yeah, Lonny.

PROFESSOR HOFFMAN: Yeah, so I mean, just to follow up on that point, right, so it's an empty threat almost always. Right? Even in the very few cases where

it would be relevant it scares the heck out of all those jurors who want to do the right thing but actually are afraid that they may be violating the rule. It probably frustrates the vast majority who -- let's not forget, we have a -- in the beginning of this deal, right, so I mean, on the jury task force that I was on, we looked at -- good close look at how we treat people getting them into the courthouse. Oh, my God. So we've already threatened them with fines and imprisonment for not showing up, and we still have incredibly low response rates, right?

So don't forget we've got a pretty self-selecting group of people who actually show up in our courtrooms. These are people who apparently either were afraid enough of the fact that they were going to be punished -- which we never actually ever do either, by the way -- to show up or just had the good sense or civic duty to show up and did. And so now for this select group of people who are doing their duty, we're going to tell them we're going to throw you in jail or hang you by your thumbs or something, we're not going to tell you what, if you don't follow these rules. We should tell them what to do. We should tell them not what to do. You know, tell them to don't do other things, but we should not punish. We should not even talk about punishing unless we have to, and when we have to, we ought to do it.

CHAIRMAN BABCOCK: Munzinger, you still want to say something?

MR. MUNZINGER: No. You just asked if I knew of a judge who held a juror in contempt, and I did.

HONORABLE STEPHEN YELENOSKY: That's like asking an expert "Do you have an opinion?"

HONORABLE NATHAN HECHT: Do you want to elaborate on that?

MR. MUNZINGER: He just refused to wear a suit, and the judge said, "You've got to wear a suit." This was a long time ago, and he said, "I'm going to wear a suit when they bury me. I wore when I got married, and I'm not going to wear a suit," and he said, "You're going to jail," and he did.

CHAIRMAN BABCOCK: So they gave him his own little suit. Yeah, Skip.

MR. WATSON: I mean, your friend Mary Lou Robinson put one on trial once. The allegations were that she was making eyes with the criminal defendant and was caught making out with him in the parking lot and that was --

MR. SUSMAN: What's wrong with that?

HONORABLE STEPHEN YELENOSKY: That's not one of the listed things.

HONORABLE SARAH DUNCAN: So the lawyer was

asleep and the Court of Criminal Appeals had closed.

MR. WATSON: And, you know, but the defense was that the instructions didn't cover that.

CHAIRMAN BABCOCK: This is obviously a West Texas issue. Harvey.

HONORABLE HARVEY BROWN: Two points, one for this paragraph, I want to go back to Steve's suggestion that the first three sentences it seems like don't really cause much of a, quote, threat to somebody. They're pretty -- they're just explanations, if you do it wrong we may have to try the case again. I don't think anybody would consider that to be a threat, so Steve's suggestion that if we're going to drop anything we drop the last sentence I think has some merit to it.

Secondly, you know, the way it was worded historically for, you know, dozens of years now, I'd never heard any juror say anything to me when I was a judge indicating they felt threatened by an explanation that there's rules of conduct that we expect you to follow. I don't think that's offensive. I think the word "contempt," though, is too strong and the word "punishment" is a little strong, so I'd stay away from there, but I think going back to Jane's idea that everybody understands there's rules, you've got conduct codes you've got to follow, that's not offensive to a

juror.

CHAIRMAN BABCOCK: Okay. Everybody that thinks we ought to leave "contempt" and "punishment" in the plain language instruction raise your hand.

Everybody that thinks that it should not be there raise your hand.

Okay, 7 think it ought to be in, 22 think it should not be in, the Chair not voting, so there you have it. There's an expression of feeling. Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: Well, one thing, this probably goes to the other language. I'm not sure that jurors understand the distinction between jury misconduct and just doing what juries do all the time, which is misunderstand instructions, you know, that kind of thing, and that gets compounded after the trial when jurors -- when attorneys want to ask them, "Well, how did you decide this and what did you think this meant?"

Sometimes they think it's jury misconduct that they got a definition wrong or something like that, so if we are going to put it in stronger language or whether -- or perhaps there is some way of making it clearer to them that we're talking about these specific instructions, and maybe it's clear enough and can't be made any clearer.

PROFESSOR ALBRIGHT: Well, we will work on

it again.

CHAIRMAN BABCOCK: Okay.

PROFESSOR ALBRIGHT: With "contempt" out. Okay. Next part of it is in 22 -- well, I guess what we need to talk about also then is do we want to leave "contempt" in Roman (III), which would be instructions that you give the jury right before they -- you know, when you give them the charge. Because there is an --

MR. HAMILTON: Page seven.

CHAIRMAN BABCOCK: Page six and seven?

MR. HAMILTON: Page seven.

PROFESSOR ALBRIGHT: Page six and seven are the written instructions before the charge, and on page seven at the very end it says, "As I have said before, if you do not follow these instructions I may have to order a new trial and start this process over again. That would be a waste of time and money. It's also possible that you may be held in contempt or punished in another way. If a juror breaks any of these rules, tell that person to stop and report it to me immediately."

So I think I, for example, voted on the oral instructions, and I think it's different here in these written instructions, and I think there were some people that expressed differing opinions about whether to talk about contempt in these instructions as opposed to when

they first walk in in the oral instructions, which we voted on before, so if we could have another vote on these, I'd appreciate it.

CHAIRMAN BABCOCK: I'm sorry, Alex. What do you think we should vote on?

PROFESSOR ALBRIGHT: I need another vote as to whether to leave "contempt" in or take it out on these instructions that are Roman numeral (III), which are part of the charge.

CHAIRMAN BABCOCK: Okay. Which is before answering the questions and reaching a verdict.

PROFESSOR ALBRIGHT: Right. They are written instructions that are included in the charge.

CHAIRMAN BABCOCK: Okay. Anybody want to talk about that?

MR. JEFFERSON: Is it already in -- is that a change?

PROFESSOR ALBRIGHT: It is a change. Yeah. What the pattern jury charge committee did is they wanted it in both places, and there was some differing opinions here as I heard expressed about whether to leave it in the second one.

CHAIRMAN BABCOCK: Okay. Anybody want to talk about that? Okay. Everybody that thinks -- well, where exactly is it, Alex?

PROFESSOR DORSANEO: The end of the admonitory instructions.

PROFESSOR ALBRIGHT: Page seven.

MR. MUNZINGER: Page seven, next to last line.

CHAIRMAN BABCOCK: "As I have said before, if you do not follow these instructions I may have to order a new trial and start this process over again. That would be a waste of time and money. It is also possible that you may be held in contempt or punished in some other way," like sending you to El Paso -- sorry, that last part about El Paso. "If a juror breaks any of these rules, tell the person to stop and report it to me immediately."

So everybody who thinks it's okay to have that in this rule, which is going to be a general instruction to the jury before answering questions and reaching a verdict, raise your hand.

MR. SUSMAN: All the way at the end of the trial, right?

CHAIRMAN BABCOCK: Yeah.

Everybody that thinks it should not be there.

All right. People in favor of that being there had 16 votes and the opposed were 6, the Chair not voting, so that will be in there. Yeah, Richard.

MR. MUNZINGER: May I ask a question? What was wrong with the phrase or the words "jury misconduct"? Why was that considered too complicated for a juror to understand? It has a certain amount of -- it has an arresting quality if you're a juror. I couldn't -- there's something about my conduct that's important. I don't understand why you take the words "jury misconduct" out of a charge that's telling a jury to obey the rules. It doesn't make sense to me.

PROFESSOR ALBRIGHT: Well, I think it's because jury misconduct has a specific meaning that's used in the motion for new trial, and --

MR. MUNZINGER: I know that, but I'm speaking about its effect on a juror. I don't know why you would take that out.

MR. SCHEISS: Well, if you want to know why we took it out you have to ask me because I'm probably the one who took it out, and I can't recall specifically why I took it out. I will disagree with you that it's understandable. I don't think most people know what it means when you say "jury misconduct."

MR. MUNZINGER: Well, you have a sentence that says, "As I've said before, if you don't follow this, it will be jury misconduct."

MR. SCHEISS: Right.

MR. MUNZINGER: "And I may have to order a new trial and start this process over again." Those two words, "jury misconduct," at least in my opinion make people think, "Gee, there's value to what I do and don't do. There's value and effect if I obey or disobey." I don't understand why it was taken out.

Again, sometime I hope we get a chance to vote on the question of whether we're going to rewrite the whole thing or just go after the words that were determined to be too complicated for American juries to understand.

CHAIRMAN BABCOCK: Steve.

MR. SUSMAN: No, but I agree with the idea that it doesn't have much sense, just the word "misconduct" standing alone, because most people think that the things you aren't allowed to do are perfectly normal to do. I mean, you do it if you're in a class, you do it in any learning experience, but here the rules are different. They're turned on their head. So I think it's important to say "if you don't follow these rules."

CHAIRMAN BABCOCK: Carl.

MR. HAMILTON: The way it's worded, that's what jury misconduct is. Failure to follow the instructions is jury misconduct, so why do we need a definition of it?

CHAIRMAN BABCOCK: Okay. Bill.

PROFESSOR DORSANEO: I don't mind having the sentence that we just voted in at the end of the charge, but I do think the jury misconduct issue is -- if you don't know what jury misconduct is, if you've just been told this is jury misconduct, I don't know what anybody can do with you. I mean, I like the way we do it now.

MR. MUNZINGER: I do, too.

MR. HAMILTON: I do, too.

HONORABLE TERRY JENNINGS: Can we have a vote on maybe keeping some of the same language in and incorporating some of this language from the old rule into the new rule?

CHAIRMAN BABCOCK: Sure, we could. Judge Benton.

HONORABLE LEVI BENTON: Just to parrot what Richard said earlier before lunch, where's the empirical study that says we need to change up any of this? That Bar survey in my mind doesn't constitute an empirical study.

CHAIRMAN BABCOCK: And because?

HONORABLE LEVI BENTON: I'm on the record.

CHAIRMAN BABCOCK: Because you're on the record?

HONORABLE LEVI BENTON: And just because

we're on the record, it just doesn't.

CHAIRMAN BABCOCK: There you go. Well, I will say about the study that is part of the materials, there was a relatively, I think -- Jody, correct me if I'm wrong -- I think there was a relatively small universe of people that were surveyed, 24, 36, or was it more than that?

HONORABLE STEPHEN YELENOSKY: I thought it was 50.

MR. HUGHES: Yeah.

CHAIRMAN BABCOCK: 50 people? So I don't know what statisticians would say about whether that's statistically significant or not, but the guy who conducted the survey is a very experienced jury consultant and deals with jurors all the time and I think was trying to inject in addition his own expert experience in it, so I guess you take the study for what it's worth.

MR. GILSTRAP: Yeah. Chip?

CHAIRMAN BABCOCK: Yeah, Frank.

MR. GILSTRAP: I mean, I'm not competent to judge the study and I'm willing to accept it. Did they -- but I think the point is valid. I don't know that the study asked them if they understood jury misconduct. Maybe it did, but if it didn't, then, you know, what's the purpose of taking it out? You see what I'm saying? I

mean, generally that conveys something to a juror that, you know, there is something you do that rises to the level of, if not a crime, an offense or something that's wrong. It sounds bad.

CHAIRMAN BABCOCK: Yeah. Yeah. Carlos.

MR. LOPEZ: Well, and this is going to sound funny, but it's not. All joking aside, I mean, are the people that did that study, if you-all know, are we talking about, you know, jury misconduct in the sense of people chewing gum, people showing up in T-shirts, people not turning off their Blackberry, or are we talking about jury misconduct of people talking about the case, you know, the kinds of things that affect the trial, if you will, the substance of the trial? Because my willingness to do or my willingness to perceive a need to do something I think could be impacted by that. I mean, if it's the former, that, you know, individual trial judges can fix that and, you know, easily enough. If it's the latter, then I think it's a more serious problem.

CHAIRMAN BABCOCK: Alex.

PROFESSOR ALBRIGHT: I don't know that the word "misconduct" was tested. I don't know. I would have to look it up. I can't remember.

MR. SCHEISS: The word "misconduct" was not tested.

PROFESSOR ALBRIGHT: But if you read what we include in the jury charge now, it says about this, "These instructions are given to you because your conduct is subject to review the same as that of the witnesses, parties, attorneys, and the judge. If it should be found that you have disregarded any of these instructions, it will be jury misconduct, and it may require another trial by another jury, and all of our time will have been wasted."

It was our feeling that if we were going to rewrite these rules that that paragraph doesn't tell the jurors a whole lot. It says that their conduct is subject to review the same as witnesses, parties and attorneys and the judge. Well, they don't know how anybody else's conduct is subject to review. Or they're not subject to review the same way that juries -- I mean, witnesses, parties, attorneys, and judges are. "It will be jury misconduct." It never defines "jury misconduct." I guess you could -- you could think that it probably is the -- it is disregarding any of the instructions, but it gives it a label without really describing it, and we just felt like that there was a more understandable way to convey this same information.

That's the way we approached this. We didn't find -- I mean, there are some words that it is

apparent that people who are not part of the legal system don't readily understand, and we were trying to find those words and put them more into plain English. We were also just trying to make all of the instructions easier to understand as a whole.

CHAIRMAN BABCOCK: Bobby.

MR. MEADOWS: I think we're over-lawyering this.

CHAIRMAN BABCOCK: You think?

MR. MEADOWS: If you tell the jury, "These are the rules, this is what you must do, and if you do not do these things it will be misconduct," that's pretty straightforward in my view, and there will be consequences for that conduct. I think people get that.

CHAIRMAN BABCOCK: Okay. Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: Well, I think it's as simple as the difference between saying "jury misconduct" and "misconduct." I think Alex is right. If you say "jury misconduct," one might think, "I need to look for the definition of jury misconduct and the consequences for that." Everybody understands the word "misconduct," but putting "jury" in front of it makes it seem like it is a particular form of misconduct that's defined elsewhere and we can find a list of consequences, so if you just want to say it would be misconduct and then

list the consequences, that seems to me fine.

MR. MEADOWS: I agree with Steve. What we're asking the jurors to do is counterintuitive, to not talk to each other, to have people not do any more than greet them, and they have to kind of understand that, but those are the rules, and so once the rules are put before them, they're there. They're expected to comprehend them, but they certainly can comprehend that if they don't obey the rules it will be misconduct and there will be consequence for it.

And I agree with Jane. I think telling them things like "result in a new trial" or "waste taxpayer money," those are comprehensible outcomes that are not desirable.

HONORABLE STEPHEN YELENOSKY: I don't disagree with that. I'm just saying -- I'm just observing the argument between jury misconduct and misconduct and just making the observation that I think that argument -- I don't really care whether it says "jury misconduct" or "misconduct," but I can understand Alex's point that when you say "jury misconduct" it seems to identify something other than just misconduct and you want to look elsewhere for it.

CHAIRMAN BABCOCK: Okay. Carl.

MR. HAMILTON: Well, I was looking at this

report, and I don't know that I really understand it, but a lot of the questions that were asked of this -- these two groups, their response options don't seem to really help us. The response options are, number one, "I heard the judge read it." Number two, "I didn't hear the judge read it, but it makes sense"; three, "I'm guessing"; and four, "I don't know." I mean, they didn't -- they don't really ask, "Do you understand what this means?"

MR. SCHEISS: They do in a different section of the study.

HONORABLE STEPHEN YELENOSKY: Yeah, there's other sections. They give percentage who understood it initially under option A and then percentage understood it under option B.

PROFESSOR ALBRIGHT: And let's also --

MR. HAMILTON: Yeah, but it's different things under those sections.

HONORABLE STEPHEN YELENOSKY: Well, that's true.

PROFESSOR ALBRIGHT: If I can put this study into context, we had a study, the State Bar had the study done to see if just kind of generally do jurors understand pattern jury charges, and I think Wayne can explain it better than I can, but generally, you know, they understand most of it pretty well, but we can do a better

job, so that's what we are attempting to do. We did not -- we don't have the money or the time to do a full test on every word and every possibility of how we could do this, but Wayne.

MR. SCHEISS: And so instead of spending the money to test every three syllable word in there like "misconduct," we tested words that we knew were problematic, "preponderance," "circumstantial," and so on, and then we just applied other principles that are broadly and widely recognized to enhance the understandability of a piece of writing. That paragraph that Alex read, I don't want to -- I'm not being flippant and I'm not telling you anything you don't know. It's atrocious. "These instructions are given to you because your conduct is subject to review the same as that of the witnesses, parties, attorneys and judge. If it should be found that" -- it's all abstractions, passive voice, nominalizations, big words, and so instead of -- I get wound up about these things, but I teach a really, really dry subject over here, and if you're not excited about it then what good are you.

So what we did when we realized -- and Judge Sullivan and Professor Albright and I, the other members of that task force, we talked about this quite a bit, the very same issues you're talking about. Why do we need to

change the word "misconduct"? Everybody knows what that means. How can we test this, how can we empirically show to the Supreme Court Advisory Committee that we didn't just dream this up. You actually can improve jury instructions. So we hired this jury consultant, and he was fairly expensive and so on. So instead of -- what they did was they hired somebody who supposedly knew what are the principles that will help complex information be translated to nonlawyers fairly understandably, and the person they thought could do it was me, and I thought misconduct was an abstraction that was not understandable to the average person and that we could do better by saying, "Don't do these things and do do these things" in place of the word "misconduct." That's all it amounts to. There is no empirical evidence that jurors don't understand the word "misconduct." That's just my assumption that explaining it in specific terms would be more understandable than the abstraction.

PROFESSOR ALBRIGHT: And it's not that big a deal to throw "misconduct" back in.

MR. SCHEISS: Yeah, and to put it back in. If it's the consensus of the committee that it belongs back in then that's fine.

PROFESSOR ALBRIGHT: We tried to do away with as many of these three syllable words as we could.

CHAIRMAN BABCOCK: Hugh.

MR. KELLY: Could I just point out that one thing that stuck out to me is that the jurors didn't understand the word "unanimous."

MR. SCHEISS: Right.

MR. KELLY: And that what you ought to say is 12-0.

MR. SCHEISS: Right.

MR. KELLY: I mean, everybody in here, this room, has tried jury cases, and it's surprising how few words -- how common words we think are real comprehensible are not. So I second --

MR. SCHEISS: In defense of the jurors, it's one of those questions where only if you're unanimous on this one do you proceed to this one, right, and they answered it 10 out of 12, and so then they want to know, "Well, 10 of us agreed on that one. Now 10 of us agree on this one. Is that unanimous?" And we were shaking our heads thinking unanimous is everybody, come on. But there it was.

PROFESSOR ALBRIGHT: And we do live in the world of using legal terms. I mean, just teaching law students, who have more than a fourth grade or seventh grade education, I'm always amazed how I'll be talking to them and then realize that they're clueless because I'm

assuming they understand some words that I think are very normal words, and it's our lingo. We have a lot of lingo.

CHAIRMAN BABCOCK: Frank.

MR. GILSTRAP: Well, you know, as I understand the process, you know, you find that the jury is misunderstanding certain words; and therefore, this is -- this proves some type of principle of language that we've now got to use to rewrite the entire rules. You know, maybe that's a valid way to approach it, but I think our committee's time could be better used by maybe making slow, incremental changes the way we've done in other areas. If we want to rewrite this whole rule then we've got to sit down and trudge through the whole rule; and, you know, I'm willing to do that; but this -- you know, aside from the evidence that the truck ran over me and broke my back, this is the most important language that the court -- that the jurors hear from the judge. They will value it higher than anything else, and, you know, we're about to rewrite the language that is used in every courtroom in the state of Texas in every trial, and that is a weighted task, and if we want to do it then we've got to sit down and work through it all. I don't think we can take the approach that, well, you know, okay, they misunderstood "unanimous," therefore, let's rewrite the whole thing without rewriting the whole thing in this

committee room.

CHAIRMAN BABCOCK: Yeah, Justice Jennings.

HONORABLE TERRY JENNINGS: Well, I'm going to stick my neck out here a little bit and propose some language back on Roman numeral (I). Everybody was concerned about the sentence that "It is also possible that you may be held in contempt or punished in some other way." I was going to suggest, "Failure to follow these instructions," comma, "or engaging in any other misconduct, may result in an appropriate punishment." That way they know that failure to follow the rules or any other inappropriate behavior could be punished by the Court.

CHAIRMAN BABCOCK: Yeah.

MR. SCHEISS: The gentleman's comment -- I can't see your name.

MR. KELLY: They've taken it away from me.

MR. SCHEISS: Very well taken. Right. We didn't target the most problematic words and only fix those. We did a comprehensive revision to the whole thing, and those are two different things. I perceived and we thought we were asked to do the former, not the latter.

Second, your second point is also very well taken. I am well-acquainted with the justices and a

couple of writing experts from California who undertook to rewrite the entire body of civil jury instructions in California. It took years, and there was a committee that had the debates just like this committee is having. It was a much smaller committee, I'm sure you can imagine, but it took years, and it's not a -- it's a -- and they considered every provision independently. They didn't just say, "Well, the expert says they're all fine and we did a study, let's bless it." He's right. They did it comprehensively, and they got through it, and they're still working on their criminal jury instructions. The civil ones are done. Criminals have taken even longer and are still ongoing.

CHAIRMAN BABCOCK: Well, just so you know, we have studied stuff for not just years, decades. So if you think you're going to outlast us, think again.

Okay. Any more comments? Sarah.

HONORABLE SARAH DUNCAN: I just keep going back to what I said initially. I don't think these will communicate to most people who come in for jury service. I think we should hire someone who can do that, if that's the goal. If the goal is to -- is that they don't understand, jurors, prospective jurors don't understand a few words we use, let's work on those words. If the problem is the entire admonitory instructions, set of

admonitory instructions, I think we find somebody who speaks the language who's not a lawyer. You know, it's like, you know, Terry is starting out with "failure to follow" and we asked, who other than a lawyer would start a sentence with "failure to follow these rules," and we do that, and it sounds perfect to me, and you know, I can't say that most people would understand that at all.

CHAIRMAN BABCOCK: "Failure to follow"?

HONORABLE SARAH DUNCAN: Yeah. And I'm saying I don't know, because I talk like -- I talk like this.

CHAIRMAN BABCOCK: We've noticed.

HONORABLE SARAH DUNCAN: So how do we judge what really is going to communicate to people who don't talk like we talk?

MR. SCHEISS: You read the literature. You study the books and the writing. You read the California jury instructions. You read the Michigan jury instructions. You study the articles that the people who revised them wrote. I mean, there is a huge body of literature on plain English communication and a modest size body of literature on plain English communication in law, and that's what you do, and "failure to follow these" -- how did it begin, "failure to" --

HONORABLE TERRY JENNINGS: "Failure to

follow these instructions."

MR. SCHEISS: "Failure to follow," it's not that they don't understand the word "failure" or they don't understand "follow," but you have a nominalization. You are creating nouns when you don't need to, and verbs are what communicate. So "if you don't follow" is, generally speaking, going to be easier to understand than "failure to follow." If you speak to the person, "If you do this, X will happen" is generally going to be better understood than if -- than "failure to follow."

HONORABLE TERRY JENNINGS: You could say "violation of these instructions."

MR. SCHEISS: Yeah, you could, and you would be better off to say "if you violate these instructions." So I challenge the speaker that a nonlawyer could take this and streamline it even more. I was held back by some of the committee members on, oh, you can't say it that way, you can't use contractions, you can't do this. So, no, there are no easy solutions, but --

PROFESSOR ALBRIGHT: Yeah, a lot -- one thing that we found is there is a lot of our legal jargon that is in here and we want -- we feel like it needs to be here for certain reasons. You know, that's the whole preponderance of the evidence issue.

CHAIRMAN BABCOCK: I want to ask you about

that in a minute. Richard, you had a comment?

MR. MUNZINGER: Only to reply that your sermon would be well-delivered to the courts and the Legislature. The committee writes rules frequently attempting to implement decisions of the Supreme Court or the lower courts or the Legislature, and we're dealing with rights. I sit on a pattern jury charge committee right now. We're working on pattern jury charges for defamation, and so you run into the problem that New York Times vs. Sullivan brought in the United States Constitution to the law of defamation. So when you're telling jurors about the substantive law, can you dumb it down so much that you erase the Constitution? That's the risk.

And there are occasions in these rules, simple as they appear, where when you dumb it down you may take away the law. We're lawyers. We live in a free society, and law is pretty dadgum important, and so it's not -- I don't feel that I'm obstreperous in insisting that the law be honored and to heck with this dumbing down. Let's do the law and get on with it.

MR. SCHEISS: You're right, there's only so far you can go. If you dumb down enough, you change the meaning, you lose subtleties and nuances that are present there, and that's the work -- that's why revising jury

instructions takes a long time, because you've got people saying you can't say it that way because then you've changed it. That's a very good point.

CHAIRMAN BABCOCK: I agree with everything Munzinger said except the obstreperous part.

MR. MUNZINGER: Well, I'm from El Paso.

CHAIRMAN BABCOCK: Yeah, he's always obstreperous. One second, Sarah. One thing that the jury consultant, Jason Bloom, found -- I don't know if it's in the report or not, Jody -- but he said that when technical terms are used with the jury, terms that don't make sense in our normal everyday --

HONORABLE SARAH DUNCAN: To real people.

CHAIRMAN BABCOCK: -- experience, the jurors were more likely to follow it because they said, "Oh, this doesn't make any sense, but it must be a legal thing and the judges told me this legal thing, so we're going to follow it" as opposed to just kind of plain language that they always understand. That's more important in the charge on the elements of a cause of action or a defense, but it was something I never thought about, which is an interesting observation. Sarah.

HONORABLE SARAH DUNCAN: I make my living writing to -- writing, talking to lawyers and talking to judges. My husband makes his living teaching writing, but

we aren't -- I'm sorry, but we are not real people in velveteen rabbit terms. I'm not trying to downgrade lawyers. I'm not trying to downgrade judges or the judicial system. I'm saying I think we need to figure out what our goal is here. If our goal is to communicate to those who would be jurors then we need to figure out, I think, how to do that, and I don't think that reading literature about plain language is going to enable us to talk to the real people. That's my only point.

CHAIRMAN BABCOCK: Okay. There you go. Judge.

HONORABLE STEPHEN YELENOSKY: Well, at lunch we were talking a little bit about the dumbing down. I mean, I think there's three different things going on here. There's archaic language, meaning language that people who speak proper English don't use anymore, and a lot of that has gone away, but there's still some of it there. And then I think there is, as we've said, dumbing down, meaning using words that can be understood at a particular grade level, and then there is just really poor writing, which is in our rules all over the place. I mean, why do you think we have all these writing classes for lawyers? Because they don't write well, and some of our rules were written by lawyers, believe it or not.

CHAIRMAN BABCOCK: All of them.

HONORABLE STEPHEN YELENOSKY: And they are just -- not just the rules, but I mean, the pattern jury charges, some of them are written terribly, and so, you know, to say that we're dumbing it down, let's start by brightening it up a little bit by using good English and then we can start talking about dumbing down.

HONORABLE SARAH DUNCAN: And I don't even think it's a function of dumbing down. That's part of what I resent. I appreciate what you said, Chip, about it sounds legal, so I better follow it. I don't think it's a function of taking out every three syllable word. It's a question of communicating, and sometimes you communicate by using three syllable words and saying, "I'm using this word and here's what it means and you better remember it." But I think we have to decide what we're trying to do with this because I've heard about four different goals.

CHAIRMAN BABCOCK: Carlos, then Lamont. And if you could address what we're doing here for Sarah's edification.

HONORABLE SARAH DUNCAN: Yeah, help me, Lamont.

MR. LOPEZ: I don't know that I could. I thought it was painfully hard to read this stuff to the jury when I was a judge. It's written so bad.

HONORABLE STEPHEN YELENOSKY: Badly.

MR. LOPEZ: That's called a smackdown.

HONORABLE STEPHEN YELENOSKY: Thanks for making my point.

MR. LOPEZ: I did that on purpose.

CHAIRMAN BABCOCK: Yeah.

MR. LOPEZ: Because the point I'm trying to make is that changing it from passive voice to active voice is not dumbing it down. That is following every English teacher's rule that they've been trying to tell us to do now for -- universally, that it's more effective communication without changing the admittedly very critical meaning of the thing that's being communicated. I mean, there are some magic words that are terms of art that have to be in there. Preponderance of the evidence, we're not -- no one is arguing that we need to change that word and take it out, but "failure to follow" as opposed to "if you do not do the following," that's 100 percent English teachers will tell you change that. So I'm not even sure why we're having a debate about that. Now, changing it without changing the meaning is, I think, a challenge.

HONORABLE TERRY JENNINGS: Well, sometimes the use of passive voice can tone it down a little bit, too. If you don't want the trial court to be in the situation of saying, "If you screw up I am going to hold

you in contempt," you can say, you know, "may result in inappropriate conduct."

CHAIRMAN BABCOCK: Lamont. I'm sorry, Judge, were you finished? I'm sorry.

MR. JEFFERSON: I think Carlos said about what I was going to say, which is I think our problem with getting our arms around this is we're familiar with something that has, you know, worked. It's got flaws, it can be improved, but we've worked with this work product for a long time, and it's been functional. There are certainly things we can do like the "failure to follow," you know, that would improve it and increase clarity and make it more simplified and easier to read and follow, but the problem with starting from scratch is that at least I'm uncomfortable with throwing out what I'm familiar with and what seems like it's worked reasonably well in, you know, past decades.

CHAIRMAN BABCOCK: Yeah. I think Judge Benton had his hand up and then Alex and then Hayes.

HONORABLE LEVI BENTON: I want to ask Carlos, you know, at the end of these instructions, the instructions to the panel there's, you know, "If there's anyone who doesn't understand these instructions, please tell me now," or something like that. In eight and a half years I've never had anyone raise their hand and say,

"Judge, I didn't understand this or that," and so while I'm -- while I have the liberty, I don't understand this energy to modify or abolish the trial judge's right to grant a new trial any better than I understand this urgency to change the language. I rest.

HONORABLE STEPHEN YELENOSKY: You think you're getting honest nonanswers when people don't raise their hands?

HONORABLE LEVI BENTON: Steve, because I respect that those folks have common sense and are mature, the answer is yes.

CHAIRMAN BABCOCK: Alex. Alex.

PROFESSOR ALBRIGHT: I guess I was going to respond to starting from -- the comment about starting from scratch. We didn't start from scratch. We made a real effort to take the existing charge and just rewrite it in simpler language and better English.

MR. JEFFERSON: That was overstated. You did start from a point.

PROFESSOR ALBRIGHT: The items that I'm pointing at here are the substantive changes. The adding contempt is a change. That was not in there before, so the things I'm pointing out are a change. Other than that, I am not pointing out, you know, where we rewrote this sentence and we -- all the sentences were rewritten,

so, but we made a concerted effort to take the existing -- existing language and just make it easier to understand, just so you know.

CHAIRMAN BABCOCK: Hayes had his and then Alistair.

MR. FULLER: What we're doing or attempting to do may make these instructions more understandable to the average juror. What we're attempting to do is clearly making us less comfortable with these instructions. I'm not sure either is going to improve the decision the jurors make at the end of the day. They seem to get it. The judges who instruct them seem to communicate it to them, and I just I think -- I mean, you know, if we're trying to make it more understandable to them, that's great; and what we're struggling with, like I say, is our discomfort with something new; but at the end of the day I'm not sure what we currently do or don't do affects the quality of justice being delivered at the end of the day by the jurors sitting on those juries.

CHAIRMAN BABCOCK: Did anybody else have their hand up over there? Hugh and then Sarah.

MR. KELLY: It was an eye-opener for me to see --

CHAIRMAN BABCOCK: Alistair, I'm sorry.

MR. KELLY: -- the responses to the

questions. Like "What do you think preponderance of the evidence?"

"80 percent." I mean, these are all over the map. I could -- really, I didn't really believe -- I would not have anticipated that, but the answers, these guys are not getting it, and it doesn't seem to me that you harm the law by expressing it in a clear and simple way, provided you don't screw it up. That's my view.

CHAIRMAN BABCOCK: Alistair.

MR. DAWSON: It seems to me we have an obligation to do everything that we can to improve a juror's experience when serving as a juror. We already herd them like cats, we never tell them what's going on, whenever there is a dispute we throw them into the jury room and won't let them know, you know, what the lawyers are arguing about, et cetera, et cetera; and it seems to me that these instructions are not for us or anyone in this room. They are for the people who are sitting in the box, and if it -- if we can communicate those instructions more effectively, that's a no-brainer. If they understand more fully whatever is contained in those instructions, then that's -- they're going to have a better experience, and we -- to me, I don't understand why people wouldn't want to communicate more effectively to a jury.

CHAIRMAN BABCOCK: Sarah.

HONORABLE SARAH DUNCAN: I think my answer to that is not from me, but maybe fear of change. And I was just going to say, Hayes, I don't think they're getting it based on what I read. I had one the other day where the presiding juror didn't agree with the verdict and signed along with everybody else as though she agreed with it and then they we went and came out with a quotient verdict. So they're not getting it, and when they think they only get to pick one element of fraud and decide the case on that one element, I don't think they're getting it.

MR. FULLER: Really what I meant by that is I've tried a lot of cases, I've interviewed a lot of jurors after I've tried the cases, I've won and lost cases. I can't say in any of these interviews, number one, rarely, maybe once or twice did I feel like an injustice was done. Generally the result was expected. I just didn't know exactly how it was going to be communicated.

But secondly, never have I had a juror in those interviews come across to me as, you know, the reason why I got it wrong or didn't quite -- is because I misunderstood the instructions given to me at the front of the case. Usually what they've done is they haven't understood the evidence being presented to them in the

course of the case. That's really what I meant by that.

HONORABLE SARAH DUNCAN: Or they had a wrong charge.

MR. FULLER: I agree with you, you know, if we can communicate with them on quotient verdicts and stuff like that that makes no sense to them. A lot of them are going to violate those instructions anyway to get to a decision. They just won't tell us about it.

HONORABLE SARAH DUNCAN: But do we really want to know?

MR. FULLER: Yeah.

CHAIRMAN BABCOCK: Carlos and then Judge Patterson.

MR. LOPEZ: I was going to use two examples, and one was the quotient verdict, and you stole my thunder. What on earth is that? That's a poster child right there for fixing this; and number two, is if they've misunderstood it, that's double problems, that they don't know they misunderstood it; and third, you're -- I'm guessing you're a good lawyer who explains that in a good closing argument, and that makes a big difference.

MR. FULLER: Well, bingo. A lot of what you're talking about, too, is explained by the lawyers.

MR. LOPEZ: And you interview some --

MR. FULLER: We update these instructions in

the course of the trial and put them in plain language and communicate those to jurors. That's what's happening now.

CHAIRMAN BABCOCK: Yeah. Okay. Anybody else on this? Okay. Oh, Judge Patterson, I'm sorry. You had your hand up.

HONORABLE JAN PATTERSON: Well, one of the ways I try to think through these things is who is in the best position to evaluate, and apart from the jurors themselves who gave us some information, it seems to me that the trial judges are in an excellent position to evaluate whether they are effectively communicating and whether it is being received, and I'm sort of hearing from the trial judges if it's difficult to give these instructions, as Carlos mentioned, that to me that's an indicator that what's wrong with empowering, assisting, enabling trial judges to communicate better with jurors, so that to me is an important bit of information.

CHAIRMAN BABCOCK: Okay. Anything else on this? Alex, do you need any votes on that?

PROFESSOR ALBRIGHT: I think we've already had a vote on what we were talking about. Now we're ready to move onto the next one.

CHAIRMAN BABCOCK: Yeah. Okay.

PROFESSOR ALBRIGHT: Number three is the cell phone and the electronic devices.

HONORABLE JAN PATTERSON: Oh, electric chair.

PROFESSOR ALBRIGHT: It's on page four, No. 2, these are instructions for the jury after it has been selected.

PROFESSOR ALBRIGHT: Cell phones are a big problem any time you have a group of people, but we also realize that cell phones record and cell phones photograph and they take videos now, so we never tell jurors not to do that, so this is just -- No. 2 is a new instruction. "Please turn off all cell phones and electronic devices. Do not record or photograph any part of these court proceedings."

CHAIRMAN BABCOCK: Okay. Comments about this? Lisa. No?

MS. HOBBS: I have none, no.

CHAIRMAN BABCOCK: Frank.

MR. GILSTRAP: Well, I mean, this may be not be the appropriate place to do it, but this is certainly one area that at least right now we need probably need better instructions. I mean, we were at lunch and someone was talking about a case where the juror was texting someone outside the jury room during the trial; and apparently, you know, maybe they didn't know to do this; but there is the problem of communication; and I don't

know what you do about cell phones; but jurors are going to get phone calls, you know, in the jury room. What do you tell them? What are judges doing?

And this is certainly one area that we need to address, although, what I'm fearful of is we'll get a set of rules and the technology will change and we'll get something else, but if there's anything that we need to rework it's this.

CHAIRMAN BABCOCK: Yeah. We ought to call them mobile phones rather than cell phones, because that technology is going to be changing.

HONORABLE LEVI BENTON: You know, I had this this week during deliberations. My substitute bailiff came in and said, "Judge, do I take their Blackberries and cell phones away?" I said "no." I don't see why we should. We have instructions about communicating with others about the case, but if you're on a jury, it doesn't offend my sense of justice if a juror -- a lawyer juror happens to get an e-mail about other work during the course of deliberations. I respect that the folks around this table are able to multitask. Why shouldn't I afford some other adult that same level of respect?

HONORABLE TOM GRAY: And you don't mind if he responds to his coworker --

HONORABLE LEVI BENTON: No.

HONORABLE TOM GRAY: -- "I've got no idea when these other three jurors are going to come around to their senses"?

HONORABLE LEVI BENTON: Well, Tom, hold on one second. First, I want to be clear. I wouldn't permit it in the courtroom. If they're in deliberations, they control their schedule. I've instructed them that they shouldn't talk about that case. Now, if he's going to violate that instruction, it matters not that he has an electronic device. It really doesn't matter, and so what you're suggesting really seems to me is, those of us who happen to be fortunate to have a license to practice law or sit on benches are somehow worthy of greater respect than other people. We can all multitask. I can sit here and listen to the debate while I'm trying to find stuff on the website of the Court of Criminal Appeals.

I mean, you have to ask yourself does it offend your sense of justice, and I can see how -- but I suppose I should respect your right to disagree.

HONORABLE TOM GRAY: My suggestion was not that the person couldn't multitask. It's that he didn't understand what information was being communicated, that it did relate to the case, when he says, "I don't know when these other three people are going to come around. I don't know when I'm going to be able to get back to the

office and answer your question." And that might not be a problem except that it's a high profile case, that person works with someone else who does have an interest in the case, and it's just -- you know, in the context of electronic communications today we've got a different problem than we did when we sequestered the jury 30 years ago.

CHAIRMAN BABCOCK: Richard Munzinger, then Alistair.

MR. MUNZINGER: 30 years ago if a juror would have -- if there was a payphone in the jury room and the juror made a call outside during deliberations it would have been a mistrial as a matter of law. I agree with the comments that this doesn't go far enough. The jurors should be instructed that they should not communicate at all during the court proceedings and during their deliberations, and I do respectfully disagree about multitasking for jurors.

The Constitution talks about life's fortune and sacred honor, and that's what trials are about. That's what jury verdicts are, fortunes most of the time, sometimes honor. It's very, very, very significant that a jury finds a fact and it gets embodied into law. The judgment of the Court makes black white and white black. That's a saying in Latin that happens. It's a -- listen,

judgments are judgments. They can be final, and people's lives and fortunes are affected by them seriously, and there shouldn't be any truck with a juror communicating.

Let me give you an example. I'm on a jury. I pick up my e-mail, and I do so-and-so. I change my vote on the issue. I've been voting "no" on that issue all along, but as I've fiddled and phoophooed around I've suddenly changed my vote to "yes." Did I communicate on the outside? That affidavit comes up in a juror. Now you've got alleged jury misconduct and a full blown investigation as to what I said or didn't say. Parties subpoena my e-mail records, they subpoena my blackmail (sic) records to find out what in the dickens did this guy do that changed his vote suddenly.

I don't think that's a farfetched hypothetical example now. I don't think that jurors should be permitted to communicate. If you confiscated their cell phones during the deal, heck, you go to Federal court today you can't walk into the courtroom with a cell phone. You can't take your calendar into the Federal courtroom because it's a communication device. It happens seven days a week all over the United States, so there's -- I don't see a problem with it myself.

CHAIRMAN BABCOCK: Alistair.

MR. DAWSON: I would be inclined to let

jurors take their cell phones into jury rooms just because -- particularly in longer cases. I mean, I worry about, you know, jurors, you know, being concerned if there's a family emergency or something, but I would give them appropriate instructions about, you know, it can only be used in case of an emergency, and I also think we ought to include access to the internet as an instruction.

We had a trial where the jury sent out a note and they asked for a dictionary; and the judge sent back an appropriate instruction, you know, you've got all the evidence, and basically in effect said, "No, you can't have a dictionary," to which one of the jurors got on the internet via the cell phone and got on dictionary.com or whatever, and they looked up all the words; and they didn't think that that was a problem; and they did not get from the instructions that they were given that what they were doing was prohibited by their instructions. So I think in today's day and age we need to be very clear about what you can and can't do in jury deliberations.

CHAIRMAN BABCOCK: Carl, then Carlos.

MR. HAMILTON: The courts in Corpus Christi do not allow any phones or electronic devices to be taken to the courtroom unless you apply to the judge and he makes some special exception for you, if you have some emergency or something.

CHAIRMAN BABCOCK: Carlos.

MR. LOPEZ: Yeah, obviously most -- maybe all Federal courts do it; and a little bit different than what Levi is saying, I think that is the problem, is that people do multitask; and there are certain places where you shouldn't multitask, church and the jury room. I'm just picking -- you know, that's the problem, and I don't think there's anything wrong. I don't think you confiscate it. You give to it them, but I think you give them the instruction that says during the deliberations here's the rules. You know, you want to make a phone call, do it during a break. Why can't we tell them that? My guess is most of them will follow it.

CHAIRMAN BABCOCK: Hugh.

MR. KELLY: It occurred to me if you did, as they said, confiscate the device, you get the bailiff to answer the darn thing. If it says, you know, that the kid just fell down a hole in the backyard, you go in there and talk to them. I mean, there are ways to get around it, I would think.

CHAIRMAN BABCOCK: Justice Jennings and then Sarah.

HONORABLE TERRY JENNINGS: Well, it just occurred to me, first question is why not put this in the previous instruction, because it appears you're telling

the juror, "Do not record or photograph any part of the court proceedings." Well, you're doing this after it's been selected. Is it okay to record or photograph any part of the voir dire? And so it occurs to me that this ought to appear in the front.

One way to maybe answer Judge Benton's question would be maybe to qualify this and say, "During court proceedings and jury deliberations please make sure your cell phones are turned off," something along those lines, as opposed to confiscateing them or turning them off during the entire time, but "During all court proceedings and jury deliberations please turn off all cell phones and electronic devices."

CHAIRMAN BABCOCK: Sarah.

HONORABLE SARAH DUNCAN: I just almost always agree with Carlos, but when he equated church and a trial -- and I realize it was, you know, shooting from the hip, Carlos, but I think probably a lot of people in the room would rank the two in terms of importance pretty durn close to each other, and maybe part of what's going on in Judge Benton's mind is that however important this may be to the lawyers and the parties, it's probably not the most important thing to the jurors in their lives. They have family, they have work, that probably rank higher and -- and there is sort of a bias or prejudice that, you know,

we can sit here with our Blackberries and our laptops and multitask, and yet they come into our church and they can't multitask, they can't communicate with their families. And I'm not saying I feel about it one way or the other, but I do think we're talking about it as though this is -- and I say that, you know, in a Duke basketball sort of way, "You're in my house."

"You're in my house now, and I'm Judge Benton, and you'll follow my rules, and I say you have to give 100 percent undivided attention to this," and I'm not saying, Judge Benton, that do you this; but there is sort of a "my house" about this that's -- you know, why is our house so special? Why is our house on the level with a church? And I'm a big believer in the justice system, but I'm not sure I'd go to the level of church.

CHAIRMAN BABCOCK: And where do you put Cameron Auditorium at Duke?

HONORABLE SARAH DUNCAN: Cameron's pretty high up there. But, you know, it's the our house thing that has me a little uncomfortable in this whole discussion.

CHAIRMAN BABCOCK: Richard.

MR. MUNZINGER: I'm in favor of if you're going to rewrite the rule you ought to tell them "Do not communicate during the proceedings, during your

deliberations with these devices," and it isn't a question of it's my house and it's the church. It's a question of what you're doing. Would you want your anesthesiologist to multitask during your surgery? No, you would not. Well, wait just a moment. You're about to put someone in jail or you're about to take away my home or you're about to take away my reputation. By golly, that is a far sight different than cashing out at the Circle K.

CHAIRMAN BABCOCK: Frank.

MR. GILSTRAP: Well, you know, we're talking about two things. We're talking about, you know, whether the -- what the jurors should be doing when they're in the jury room. That's one thing. The other thing we're talking about, though, is communication, and maybe we need to scrutinize the communication. You know, we've had these famous -- these old words, you know, "Don't talk about it to your husband or wife," that type thing.

In the first part we say do not discuss, now, I don't know, back on page three, paragraph three, we say, "Do not discuss this case with anyone, even your spouse or friend." I guess we're talking to people with only one friend, but anyway, it says -- I'm not sure what discuss means, you know. To me, that's when I'm sitting down talking to somebody. Does that include text messaging my friend about it? I think some jurors may not

understand that. The term "discuss" is kind of problematic throughout all of these instructions, but -- and then we go back here and that's the instructions to the panel.

Then we go back and -- to the -- once the jury is picked we say, "We ask you not to discuss this case with others." Well, is that enough? In other words, do they understand that the old instructions still apply? I'm not sure they do. And all we've got here is saying, "Do not discuss the case with others." I'm not sure that -- a lot of jurors would not think that means sending an e-mail to someone, because that's not a discussion in their mind.

CHAIRMAN BABCOCK: Carlos.

MR. LOPEZ: I'm just -- I'm wondering in terms of the -- I mean, either we're going to allow it or we're not. I don't know that there's a middle ground. You know, if you're against telling them they can't do it, that's the same thing as telling them they can, okay, because they will. In a jury of 12 my guess is in 90 percent of the cases you're going to have 12 cell phones in today's world. Okay. If you don't make them turn those off I don't know how many phone calls you're going to get.

Even under our old-fashioned rules when not

all jurors are present and paying attention they're supposed to stop deliberating. So if juror number one gets a phone call and says it's an emergency and "It's just 30 seconds, guys," I mean, I think it's needlessly disruptive of something that with all due respect ought to be more solemn than that, and I was using church as kind of a funny example, but it's certainly important enough -- it's as important as we make it.

The jurors take their cue from us. You know, if the judge is on the bench clowning around they're going to think it's a circus. We've seen that on TV, right? If the judge takes it seriously and makes it serious, the jurors will take it seriously. They take their cue from us. They are out of their element. You know, they are in our house. You know, we can call it whatever you want, but they are in our house, and they know it, and they take their cue from us, and so if we don't tell them that they can't do this stuff they're going to do it, and why shouldn't they, and why would we blame them? They don't know, and I think it's just going to be a real -- I think it's a real slippery slope. I mean, I don't want to be that Draconian about it, but I think we're really going to make the jury deliberations bog down if we let them kind of just use their PDA's however they want during the deliberations.

CHAIRMAN BABCOCK: Nina.

MS. CORTELL: I agree with many of the comments made. I just want to give an example. We had a case where the juror went on -- I'm not going to use the right name, but Friendster or Myspace, is that what they're called? Went on that night and talked about the trial, and so there's all kinds of ways now in just looking back through these instructions, I agree with those that are saying they could look at this and think that does not cover these other examples. So I think in sort of a wholesale fashion we really have to look at our instructions and be very clear about what we mean in today's technological world.

And in terms of not allowing multitasking, I would agree with that, notwithstanding the fact that I sit here with all of these things, other than emergencies, and whoever mentioned that the bailiff could cover that, I agree with not going there. I've heard from many professors, not those on the committee but in law school, for example, who knows what the university students are doing during any given class. They're not listening. They're doing any number of other things on their computers, and I think it's right that we have to regard the courtroom as a very important place where as much as possible we keep everyone's attention focused on the

matter at hand, so I agree with going in that direction.

CHAIRMAN BABCOCK: Okay. Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: Well, I just wanted to add that we're talking about the deliberative period, and I do support restrictions on what happens then. That's a special time. That's when the jury door closes. That's when the bailiff is really watching things. Most of the trial is not that, and at least in my experience in civil trials they don't deliberate more than a day. Usually they deliberate a few hours, and being deprived of your cell phone, if that's what it takes, for those few hours is not as big a deal.

You know, my feeling is when the jury is not working with us because we've sent them out or whatever, they're on break, they should have their cell phones and everything else because that obviously makes it easier for them to be there, and maybe everybody understood that, but I just want to put in perspective that the deliberation at least in most trials is not all that long that they couldn't be deprived of those things, and I do think that that is different from other multitasking because, frankly, sitting here it's important for me to hear everything, but it's not as important as each of the 12 having an opportunity to hear what's being said in the deliberation.

CHAIRMAN BABCOCK: What did you say?

HONORABLE SARAH DUNCAN: Is that the point, though, is that we -- and I really don't know how I feel about this, so I'm not trying to express an opinion --

CHAIRMAN BABCOCK: Stir the pot.

HONORABLE SARAH DUNCAN: I'm sorry?

CHAIRMAN BABCOCK: Not trying to stir the pot.

HONORABLE SARAH DUNCAN: Well, I'm trying to understand what I do think about this because I very much sympathize with what Judge Benton said and this two-tier code of conduct. Is it that we know it's acceptable on some level for us to multitask in this room, but it --

HONORABLE STEPHEN YELENOSKY: But it would not be acceptable for us to multitask in the courtroom. It's not us versus them. It's the situation that you're in.

HONORABLE SARAH DUNCAN: And I remember a particular trial judge who read the newspaper while I was doing the charge objections, and I really did resent that.

HONORABLE STEPHEN YELENOSKY: Well, that doesn't sound like that was very proper.

HONORABLE SARAH DUNCAN: And that's a type of multitasking where maybe he didn't exercise very good judgment about when and where to multitask, and I'm

working my way around to having an opinion.

HONORABLE STEPHEN YELENOSKY: It's not -- I mean, I know people don't really mean this, but it's not our house. It's the system.

HONORABLE SARAH DUNCAN: It's justice.

HONORABLE STEPHEN YELENOSKY: Everything we try to -- when we try to explain to jurors why they have to be there despite the fact that they're missing work and how important it is, it's not because it's our house as lawyers or judges. It's not my court. It's the 345th District Court of Travis County. I'm just supposed to make sure that everything is handled properly, and one of those things is when you're deliberating you don't have your cell phones, just like when the 12 men are on the football field they don't have their cell phones. It just depends on the situation. It's not us versus them. Or maybe they do have their cell phones. Or 11.

CHAIRMAN BABCOCK: 12 at A&M.

HONORABLE SARAH DUNCAN: Well, maybe --

HONORABLE STEPHEN YELENOSKY: A&M, 12.

HONORABLE SARAH DUNCAN: Maybe that's what we're not communicating -- what I've been saying all along is I want to communicate -- is that the reason we're here is because some people have a dispute. You could be one of these people.

HONORABLE STEPHEN YELENOSKY: Right, exactly.

HONORABLE SARAH DUNCAN: As Lisa was saying, it could be a termination of parental rights case.

HONORABLE STEPHEN YELENOSKY: Exactly.

HONORABLE SARAH DUNCAN: Which for some people is not all that important based on the records I've read, and for some it's extremely important, and it is important whether they choose to make it important or not.

Maybe we do just want to say "our house," because it's the litigants' house and it's the community's house for resolving disputes.

CHAIRMAN BABCOCK: Judge Benton. Any comments about our house? It's a very, very, very, very fine house, by the way.

HONORABLE STEPHEN YELENOSKY: You're dating yourself.

HONORABLE LEVI BENTON: Our thoughts about jury service has evolved over time. Richard Munzinger mentioned -- suggested 30 years ago we would have sequestered juries. We don't do that anymore because we have evolved into a mature way of thinking that adults, if instructed, generally will try to follow instructions, will try to comply with the law, whether it be a fortune or a person's liberty. I've yet to see a juror who's

motivated -- or to meet a juror who's motivated to extend the time for deliberations.

I don't think that if I as a judge have the honor of serving as a juror in another case should be deprived of knowing that my wife has called or e-mailed me. I will respect my colleagues on the juries, as most adults do, by not e-mailing her right back where it might be disrespectful or inconvenient or taking the call. I think we should treat jurors as adults. They have the same degree of common sense that all of us do. They -- as a general they're going to have the same degree of respect for mankind that we all do. They're going to -- they take every case seriously, even the slip and falls, and they can police themselves. So we need not tell them while they're in the jury room that they must turn off their devices.

You expressed the concern, Richard, about the juror getting an e-mail and then changing the vote. That's not any different than voting to give them life at 5:00 o'clock p.m., coming back the next day after I've talked to my wife in person and changing to give them death. If there's suspicion about the motivation for a change of votes, there is a process to flesh that out. It might be subpoenaing -- a subpoena served on the wife or the juror, it might be subpoenaing the home phone records,

or it may well be subpoenaing the electronic device.

I just think we should evolve in our thinking about these things, and, you know, we don't have -- we don't have to instruct them at the micro level.

CHAIRMAN BABCOCK: I think Judge Patterson had her hand up before anybody else, but it was close.

HONORABLE JAN PATTERSON: In the courtroom if I don't instruct people to turn off their cell phones before court begins, there will be a cell phone that will ring, inevitably, and it happens a lot, and so -- and the most effective instruction I can give is "Out of courtesy for your fellow lawyers, please turn off your cell phones or electronic devices."

I think it's two things. It's, one, it's a matter of courtesy, but it's also a matter of joint mission, and I think things can easily deteriorate, and I think this is a good point. I really appreciate this effort in this rule, and we ought to staunch the spread and the deterioration of those kind of communications. I think that there is a respect aspect of -- once you allow someone to answer or to use his discretion in answering a cell phone in a jury room, I mean, that could easily deteriorate and become -- you know, people love to show off with that kind of communication and think how important it is that they get in touch, so I think this is

a very important thing to deal with in some fairly strong manner.

CHAIRMAN BABCOCK: Well, you know what Judge Benton was also sort of saying, I think, is that in a jury trial there's a lot of downtime, and so long as the people aren't communicating about the case I wouldn't think there would be anything wrong with somebody catching up on his e-mails or even taking a call during the interminable delays when the jurors don't have anything to do.

HONORABLE STEPHEN YELENOSKY: Well, aren't we just talking about deliberations?

CHAIRMAN BABCOCK: No, we're talking about confiscating their cell phones.

PROFESSOR ALBRIGHT: This rule is not about deliberations. This is after the jury has been selected when we're talking about getting ready to watch the trial. I'm hearing that some people want a rule at the beginning before voir dire that would be equivalent and perhaps a stronger rule at deliberations, but the one that's on the table right now is right before the trial begins.

CHAIRMAN BABCOCK: Yeah. All right. Carlos.

MR. LOPEZ: I just want to clarify. My comments have been based on the assumption that we were talking about deliberations. They're in -- like Yelenosky

said, they're in the jury room, they're supposed to be deliberating. You know they're going to take a break every -- five minutes every hour anyway. They can go 55 minutes without communicating with the outside world. It's not the end of the world. They can turn it back on after five minutes and find out what's going on.

HONORABLE STEPHEN YELENOSKY: I thought that's what we're concerned about. I don't know why we would take their cell phones away while they're sitting out there and we're dealing with some legal issue when they're not supposed to be deliberating.

MR. LOPEZ: Right, and the other real quick comment, while I -- is it's not -- most of this stuff isn't common sense, though. That's the problem. I agree, that's one of the strong points of our system, is the jurors do have common sense, but for example, we tell them that if only eight are present at lunch and the other four aren't, they're not allowed to start talking about the case or the fact that they're not allowed to start deliberating until the whole case is done, so they can't talk about what they've heard already. That's very counterintuitive. There's nothing commonsense about that, and so using a healthy dose of common sense in a counterintuitive situation creates a problem, and so we have to explain to them these really artificial things, so

that's just --

MR. MUNZINGER: I would draw a distinction. I wouldn't want to limit a rule forbidding communications and the use of communication devices to just that time when the jury deliberates. It ought to be during the entire trial, during the official proceedings of the Court. The deliberations are the product of the jury listening to the evidence, so while I'm e-mailing my wife or friend about what I want for breakfast or lunch tomorrow, I missed the person saying that it was --

HONORABLE STEPHEN YELENOSKY: Oh, you misunderstood me. Not in the courtroom. I thought that was already a done deal.

MR. MUNZINGER: You keep using the word "deliberations," and that's my point.

HONORABLE STEPHEN YELENOSKY: I mean when they're on break.

MR. MUNZINGER: On break is break, but during the official proceedings it's --

HONORABLE STEPHEN YELENOSKY: Oh, no. I guess my assumptions were all askew. I assumed it was out of the question, not in the courtroom, we were just talking about deliberations.

MR. MUNZINGER: I seized on the word "deliberations" as distinct from proceeding.

HONORABLE STEPHEN YELENOSKY: No, my mistake. Sorry.

CHAIRMAN BABCOCK: Frank.

MR. GILSTRAP: Well, I mean, I think we could all agree that the prohibition against communicating about the case should be beefed up to include cell phones and everything else and computers and all that. The question of what the juror does with his cell phone or Blackberry during the trial, you know, assuming he's not communicating with somebody about the case is a different question. Maybe we should leave that up to the judge. I mean, you know, from town to town and case to case, that might be something we allow the judge to do, but -- and I don't think we could pass a one size fits all rule about when you turn in your cell phone. What I'm concerned about with is we've got to tell them not to use the cell phone at all while they're jurors to talk about the trial.

MS. HOBBS: Or to record.

MR. GILSTRAP: Or to record it or take a picture.

CHAIRMAN BABCOCK: Harvey and then Justice Jennings.

HONORABLE HARVEY BROWN: Well, Carlos earlier said it was an all or none, and I'm not sure I agree with that. Levi's point has made me think about if

I was a juror and trying to get in the shoes of a juror, and I have been a fact finder where a case was submitted to me nonjury. I did not turn off my computer, I did not turn off my cell phone, but I respected the lawyers enough that, you know, it would take an emergency for me to look at it. It seems to me we could tell the jury something along those lines. I mean, if I'm serving on a jury and my wife's eight months pregnant, I don't want to have the bailiff screening my personal phone calls. I want to be able to answer the phone call from my wife. I think you could --

HONORABLE TERRY JENNINGS: While you're in the box? While you're in the jury box?

HONORABLE HARVEY BROWN: While I'm in the jury box. I think you could say something along the lines of "You should only take something that's an emergency and when you do you should recognize that everything has to stop."

HONORABLE TERRY JENNINGS: Well, different people are going to have a different idea of what's an emergency.

HONORABLE HARVEY BROWN: I know that, but by telling them that everything has to stop, we're getting back to kind of Jan's idea about courtesy. We tell them it's not courteous to do this any more than is absolutely

necessary, but if it's necessary, I think should be able to --

HONORABLE TERRY JENNINGS: What did people do about emergencies before cell phones?

HONORABLE STEPHEN YELENOSKY: Yeah. I mean, if your wife was pregnant, you called the courthouse, and if there's an emergency the bailiff goes in and stops everything and pulls you out.

MR. LOPEZ: We give them a phone number that says, "If have you an emergency during this trial, tell that person they can reach you at this number."

HONORABLE STEPHEN YELENOSKY: Yeah.

HONORABLE JAN PATTERSON: There weren't emergencies before cell phones.

HONORABLE LEVI BENTON: And then it goes to voicemail.

HONORABLE STEPHEN YELENOSKY: Well, otherwise you have jurors looking at 12 phone calls to find the one that's truly an emergency.

CHAIRMAN BABCOCK: Terry.

HONORABLE TERRY JENNINGS: And they shouldn't be looking at anything other than they should be listening to the witness.

MR. LOPEZ: Well, this is during deliberations, right?

HONORABLE TERRY JENNINGS: Again, I just propose amending the proposed rule by saying "During all court proceedings and jury deliberations please turn off all cell phones and electronic devices." I think that would cover all court proceedings where you're basically in the box and any time you're sitting there with your fellow jurors discussing the case in deliberations.

CHAIRMAN BABCOCK: Is "please" too polite?

MR. HAMILTON: Yes.

MR. MUNZINGER: That's what I was going to say. I wouldn't say "please." I would say "must be turned off."

HONORABLE STEPHEN YELENOSKY: Can we add movie theaters in there?

HONORABLE JAN PATTERSON: Or to use Richard's earlier words, "dadgum it."

HONORABLE TERRY JENNINGS: And if it's not, you're engaging in jury misconduct and you can be held in contempt.

HONORABLE STEPHEN YELENOSKY: Please leave a cell phone where we may reach you.

MR. LOPEZ: The judges are doing this already. They're way ahead of us. The ones that don't want cell phones in the jury room or deliberations are making up their little signs that say that.

CHAIRMAN BABCOCK: Is there any chance we haven't beaten this cell phone thing to death?

HONORABLE LEVI BENTON: I don't know. You'll have to e-mail me about it.

CHAIRMAN BABCOCK: I'm going to call you.

HONORABLE TERRY JENNINGS: Call the question.

CHAIRMAN BABCOCK: All right. So now we know everything we ever wanted to know about cell phones. What's next, Alex? Give us something good, something we can get worried about.

PROFESSOR ALBRIGHT: I don't know if we want to go here. The next one is preponderance of the evidence, but we recommended no change, and let me explain why. When you look at the study there's jurors, you know, all over the map about where preponderance of the evidence is, but preponderance of the evidence is very hard to define other than the way we have defined it, and also lawyers tend to explain preponderance of the evidence in argument, and so we just decided that this was a legal -- this was a substantive legal issue that we just -- that just needed to be left alone. Wayne, you want to add?

MR. SCHEISS: California changed it and dropped the term from its civil jury instructions.

HONORABLE SARAH DUNCAN: What did they use?

MR. SCHEISS: I think they used "more likely than not."

MR. LOPEZ: Which is what it means.

MR. SCHEISS: But they had a different set of original jury instructions. They also had the verb form. I'm not going to quote it exactly, but it was something to the effect of "You shall decide the case in favor of the party for whom the evidence preponderates." They also had preponderance of the evidence in other places, but at one place they had the verb form, and their committee said, "This is ridiculously hard to understand for nonlawyers," and so they took it out.

CHAIRMAN BABCOCK: Levi.

HONORABLE LEVI BENTON: This is something that must be said on the record. I, for one -- I, for one, am a Texan who has no desire to emulate what they do in California.

HONORABLE TOM GRAY: Can we take a vote on that?

HONORABLE SARAH DUNCAN: I think you've made that point before, but I'm proud of you.

CHAIRMAN BABCOCK: Yeah, who had their hand up? Alistair, Richard? Somebody over there. No? Carl.

MR. HAMILTON: Well, I wonder if this committee can tell us what preponderance of the evidence

means. If the jury doesn't understand it, they've given all kinds of answers in here, 51 percent, 80 percent, most, almost.

CHAIRMAN BABCOCK: Well, it's the greater weight and degree of credible evidence.

MR. KELLY: That's easy. Everybody understands that.

HONORABLE SARAH DUNCAN: Of credible competent evidence.

MR. GILSTRAP: Well, the jury does understand it. They understand it. They understand that one side's got to have more evidence than the other.

MR. HAMILTON: How much more?

MR. GILSTRAP: Now, if we start quantifying it, I bet if we sat around the table and said, okay, put down the percentage of evidence that you think the plaintiff has to reach before he gets preponderance of the evidence, we might get some real odd answers. The jury understands generally the idea. It's hard to quantify.

HONORABLE SARAH DUNCAN: Did you look at the survey? A hundred percent?

MR. GILSTRAP: That's more. They understand that the plaintiff has to --

PROFESSOR ALBRIGHT: That was --

MR. GILSTRAP: -- have a hundred percent.

PROFESSOR ALBRIGHT: -- before argument.

MR. GILSTRAP: Okay. You want to tell them less?

HONORABLE SARAH DUNCAN: Was before argument?

PROFESSOR ALBRIGHT: So it's just saying what does preponderance of the evidence mean, just out of the clear blue sky.

HONORABLE SARAH DUNCAN: And the question wasn't asked after argument; is that right?

PROFESSOR ALBRIGHT: I don't remember.

CHAIRMAN BABCOCK: Richard.

MR. MUNZINGER: I've never been in a trial in my life where the plaintiff's lawyer, whether it was me or somebody else, wasn't able to explain to a jury what preponderance meant in a way that they understood. You drop a feather on the scale, I win. That's -- and that's day in, day out. You don't need to -- the word "preponderance" is defined by the lawyers when they're trying the lawsuit.

CHAIRMAN BABCOCK: Justice Hecht.

HONORABLE NATHAN HECHT: And I don't want to comment on this in any way other than just to report on it, but in a pending -- in a pending case two jurors after the verdict was returned gave affidavits saying that they

had understood preponderance of the evidence to mean beyond a reasonable doubt.

CHAIRMAN BABCOCK: Yeah, Wayne.

MR. SCHEISS: Part of the discussions at the task force level between Judge Sullivan and Professor Albright and including me was how do you frame a definition of preponderance that doesn't appear to favor somebody, a plaintiff's or a defendant's bar, and that's another reason we decided not to tackle it. And I wish you would jump in and tell the story you told, but anyway, the drop the feather on the -- Judge Sullivan. Drop the feather on the scale works great for certain sides of cases in certain cases, not always for everybody all the time, and so and "more likely than not," "51 percent," we debated all these things and decided we were not going to be able to express it. Let the lawyers in the argument get you --

CHAIRMAN BABCOCK: Anybody -- anybody have any other views on that, that we should try to change this or just leave it the same? Kent.

HONORABLE KENT SULLIVAN: Just a thought that occurs to me is that I agree that anecdotally and in terms of the vast majority of cases it probably comes out in the wash; i.e., the lawyers are probably doing an adequate job of thrashing it out. I do wonder about the

efficacy of a system that depends always on the quality of the lawyers participating in a particular case in order for things like the appropriate legal standard to be articulated to the jury. It seems to me that's symptomatic of a system that has a defect.

CHAIRMAN BABCOCK: Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: Yeah, I mean, this, of those three categories, I mean, this is archaic language that doesn't mean anything unless you define it; and the only defense of it, I guess, is that that's what all the case law says; but if there's a way to transport us from that language to something that people understand, obviously that would be preferable. It is meaningless without a definition, and the definition given isn't really all that good itself.

HONORABLE TERRY JENNINGS: Several years ago, if my memory serves me correctly, the Court of Criminal Appeals defined "beyond a reasonable doubt" and then the trial courts started using that in their charge and then a few years later they overruled themselves and said, "Well, this is not working." So these are things that -- these are things that are probably better left, just as people have said, letting the lawyers explain it and argue it, and the jury usually comes to the right decision.

HONORABLE STEPHEN YELENOSKY: But only because we're stuck with it. Why do we let -- as whoever just said, why do we leave it to the lawyers, if this is all so important it ought to be read in every court, and then we admit, well, this is important enough that it ought to be read in every court, but whatever it means is whatever the lawyers in that court happen to explain it.

HONORABLE TERRY JENNINGS: Well, it's like explaining the Trinity or whatever. I mean, there are just some things that are just mysteries.

CHAIRMAN BABCOCK: Are we back in the house?

HONORABLE SARAH DUNCAN: We're back in church.

CHAIRMAN BABCOCK: Yeah, Carlos.

MR. LOPEZ: I mean, we can debate this for ten years, but I bet if someone put a gun to our head and said, "You have to make a decision in the next ten seconds and you have to make one," the decision would be "more likely than not" is probably a lot better than "greater weight and degree." That's a no-brainer. I mean, "greater weight and degree," what does that mean? I don't know what that means.

CHAIRMAN BABCOCK: It means a little feather.

MR. LOPEZ: Well, then let's say feather.

HONORABLE STEPHEN YELENOSKY: Which part of it's the weight and which part's the degree?

MR. KELLY: What if it is the weight, but not the degree?

CHAIRMAN BABCOCK: Good point.

MR. LOPEZ: But that's the point. It's not who has much more -- it's not one side has a hundred documents and the other side --

CHAIRMAN BABCOCK: Yeah, that's a great argument. "You know, the plaintiff's lawyer just talked to you about a feather, but if you look at the charge it says 'weight and degree.'"

HONORABLE STEPHEN YELENOSKY: Exactly.

MR. KELLY: What did he tell you about degree?

CHAIRMAN BABCOCK: He didn't say a thing about degree.

HONORABLE STEPHEN YELENOSKY: Those were the judge's instructions.

HONORABLE SARAH DUNCAN: But, you know, that's sort of the reason it needs to be defined, because I've read records where I just can't believe the opposing counsel didn't object to the way somebody was defining "preponderance." I mean, it was preposterous.

MR. HAMILTON: Degree means the temperature.

Time to weigh the feather.

CHAIRMAN BABCOCK: We're in a Celsius -- yeah, Alex, you got anything on this?

PROFESSOR ALBRIGHT: Can we get a vote just for kicks to see who likes it as-is and who likes "more likely than not"?

CHAIRMAN BABCOCK: Everybody that wants to leave the definition as it's found here on page six, which is undisturbed from the prior definition, raise your hand.

HONORABLE LEVI BENTON: What was the question?

HONORABLE SARAH DUNCAN: As opposed to "more likely than not"?

HONORABLE STEPHEN YELENOSKY: Something else.

HONORABLE SARAH DUNCAN: Oh, just something else.

CHAIRMAN BABCOCK: Just something else. Everybody that wants to keep this raise your hand high again.

Alistair, get off the floor.

MR. DAWSON: I was trying do that while you were taking a vote.

HONORABLE STEPHEN YELENOSKY: It probably won't help.

CHAIRMAN BABCOCK: Everybody that wants to change it?

MR. LOPEZ: To something?

CHAIRMAN BABCOCK: To something. Okay. Six want to keep it the same, 15 want to change it, the Chair not voting. So that's some expression of interest. Has anybody got any stomach for doing anything more?

PROFESSOR ALBRIGHT: Why don't we vote on "more likely than not," just for kicks?

CHAIRMAN BABCOCK: Okay. "More likely than not"?

HONORABLE SARAH DUNCAN: Sure.

CHAIRMAN BABCOCK: "The term preponderance of the evidence is a legal phrase that means more likely than not." Everybody in favor of that raise your hand.

MR. KELLY: What about the credibility part?

MR. LOPEZ: Yeah, that only goes to one part of it.

HONORABLE KENT SULLIVAN: It would be looking -- viewing the totality of the evidence it is more likely than not --

CHAIRMAN BABCOCK: How would you phrase it?

MR. KELLY: I don't know how you phrase it, but --

HONORABLE STEPHEN YELENOSKY: You ought to

have a definition that includes more likely --

(Simultaneous multiple speakers.)

THE REPORTER: Wait, wait, wait.

CHAIRMAN BABCOCK: Whoa, whoa, whoa, guys. She can't take this down.

PROFESSOR ALBRIGHT: What if we said, "It means the greater weight and degree of credible evidence presented in this case or more likely than not"?

HONORABLE STEPHEN YELENOSKY: No. No.

MR. MEADOWS: No.

CHAIRMAN BABCOCK: Boo. I'm getting into my baseball mode.

PROFESSOR ALBRIGHT: "And more likely than not."

CHAIRMAN BABCOCK: All right. How do you want to say --

PROFESSOR ALBRIGHT: I just wanted you-all to know why we ended up where we ended up.

CHAIRMAN BABCOCK: Yeah, good point.

PROFESSOR ALBRIGHT: Y'all ready to move on?

CHAIRMAN BABCOCK: How many people think it would be good to work the phrase in "more likely than not," into the definition?

MR. LOPEZ: If we vote "yes" are we automatically on that committee?

CHAIRMAN BABCOCK: How many people don't think it would be helpful to add the phrase "more likely than not"?

So 14 people think it would be helpful to have "more likely than not," and four say "huh-uh." That would be "no." Yeah, Richard.

MR. MUNZINGER: They are different concepts. Greater weight of the evidence describes a measure. More likely than not refers to the result. You'd have to -- somehow or another when you use the phrase "more likely than not" it seems to me you have to work it into the verdict itself. "It means that the plaintiff must establish by evidence convincing you that it is more likely than not that Munzinger said the words attributed to him." I don't think you could say do you find -- maybe you can say, "Do you find it more likely than not that Munzinger said the words attributed to him?"

CHAIRMAN BABCOCK: Alex.

PROFESSOR ALBRIGHT: I am reminded that California has a bit longer explanation than this, and so how about we take this back to the committee and report?

CHAIRMAN BABCOCK: Okay. But don't tell Levi that you're doing that.

PROFESSOR ALBRIGHT: If anybody has any great ideas, memorialize it.

CHAIRMAN BABCOCK: Just say you got it from the cosmos or something. Don't attribute it to California. Although, that may be the same thing.

PROFESSOR ALBRIGHT: Okay. Y'all ready?

CHAIRMAN BABCOCK: Yeah, we're ready. What else do you have?

PROFESSOR ALBRIGHT: Number five. Okay. There was an issue that was raised under Rule 226a(III) that requires that the presiding juror read the charge to all the jurors when they go back and deliberate. In most counties they have a Xerox machine and they make multiple copies of the charge and so every juror has their own copy of the charge, so people were saying that's ridiculous for the presiding juror to have to go and read it outloud again right after the judge has read it outloud, but apparently there are counties that don't use their Xerox machines and only the presiding juror has a copy.

So if you look on page eight, the first presiding juror duty bullet point, the first bullet point, "The committee felt that this instruction was not necessary if each juror receives a copy of the charge." So we wanted to make that optional instead of required.

HONORABLE STEPHEN YELENOSKY: Because some places don't have copy machines?

PROFESSOR ALBRIGHT: Or they choose not to

spend their money on these kind of things.

CHAIRMAN BABCOCK: Well, I'll tell you, again, I don't know if it's in the study or not, in the survey or not, but only having the presiding juror with a copy of the charge gives enormous, and in my view improper, power to the presiding juror because the presiding juror in the course of the arguments can pick out bits and pieces of the charge and say, "No, no. Wait a minute. It says this, and that supports my argument that," et cetera, et cetera; whereas if everybody's got a copy of the charge they can look and say, "Well, it says that, but then it also goes on to say such-and-such," so I don't know if this is the place to do it --

PROFESSOR ALBRIGHT: Yeah.

CHAIRMAN BABCOCK: -- but I would be way in favor of having all jurors --

PROFESSOR ALBRIGHT: I think our committee felt very much in favor that everybody should have a copy of the charge; that is, the pattern jury charge committee felt like --

CHAIRMAN BABCOCK: But that practice is very uneven in the state. Some judges let all the jurors have it, but a lot don't, and some will deny your request to have all the jurors --

PROFESSOR ALBRIGHT: If this is a Supreme

Court order I suppose we could recommend that it say that every juror gets a --

HONORABLE KENT SULLIVAN: It's in the rule. It's already required. It's in the rule. I can read the provision if anybody is --

CHAIRMAN BABCOCK: Yeah, I'd love to hear it.

HONORABLE KENT SULLIVAN: This is Rule 226a, Roman (III), subsection Roman (III), that's entitled "Court's charge. Before closing arguments begin, the court must give to each member of the jury a copy of the charge which must include the following written instruction, with such modifications as the circumstances in the particular case may require," with a colon and then it begins with the standard "precedes the individual instructions and questions for the particular case."

CHAIRMAN BABCOCK: Cool. Maybe I'll win that motion the next time. Frank.

HONORABLE STEPHEN YELENOSKY: Tell your other clients that it just got in the rule.

CHAIRMAN BABCOCK: Yeah. Yeah, we just passed it, because of your case.

MR. GILSTRAP: Obviously every juror should have a copy of the charge, but that doesn't mean that every juror is going to read the charge, and, you know,

we're all saying, well, gosh, they've got the charge, therefore, the presiding juror doesn't have to sit there and read it. I'm not sure that we should do that. I think it is probably very helpful for the whole jury to sit down together and read through the charge aloud so they all hear the same words at least once, and it kind of gets -- I haven't been in a jury room, but it seems to me it kind of gets them all started on the same place, which is the charge. And I would be very concerned about saying, "Oh, well, they've read it, nobody has to read it." I think a lot of them won't ever read it.

HONORABLE STEPHEN YELENOSKY: But the judge still reads it.

HONORABLE KENT SULLIVAN: The judge just did it.

HONORABLE STEPHEN YELENOSKY: The judge just reads it, did closing arguments. The lawyers refer to it. Then they go back and they're supposed to read it, and it may be quite a long charge.

CHAIRMAN BABCOCK: Kent and then Carl and then Carlos.

HONORABLE KENT SULLIVAN: The point I was going to make is that the judge will have just read the charge to them, basically just a matter of minutes before generally.

CHAIRMAN BABCOCK: Carl.

MR. HAMILTON: Well, we have jurors that are supposed to be able to read, but a lot of them don't read very well, and I think it is -- at least it would be helpful if the foreman asks does anybody want to have the charge read again, because some of them might be embarrassed that they can't read it themselves and they would like to have it read again.

CHAIRMAN BABCOCK: Yeah. Good point. Carlos.

MR. LOPEZ: I don't know that this a terribly huge distinction because I do think, I mean, obviously the judge will have just read it. I learned as I was going on to start slowing down and really reading it because maybe they're not going to follow the rule and maybe they're not going to reread it five minutes later.

I would defer to whatever the debate was back when the rule got decided in the first place to have them reread it right after the judge just read it. Maybe there's good reasons for it, maybe there's not. I don't know, but unless there's a good reason for it, it seems kind of like a waste of time because the judge just read it.

MR. GILSTRAP: Or the judge may have read it on Wednesday afternoon and said, "Okay, go home, and come

back tomorrow and start deliberating." That's the only time they hear it.

HONORABLE TOM GRAY: Or we're going to have oral -- or we're going to have arguments, closing arguments, tomorrow morning and he read it, you know, the evening before.

CHAIRMAN BABCOCK: Justice Jennings.

HONORABLE TERRY JENNINGS: Well, And there's also something to be said for the idea that the jury reading the charge itself is framing their issues and setting the decorum, and here's what we're here to decide. You know, with all due respect to the trial court judge, I mean, they may have just blown through it or whatever; and this gets the jury focused on what they're there to decide; and it focuses them yet again like a laser beam, this is the limits of our discussion; and frankly, I think there's something to be said for keeping that tradition.

CHAIRMAN BABCOCK: Okay. Any other comments on this? Alex, do we need some sort of a vote?

PROFESSOR ALBRIGHT: Well, I guess.

MR. GILSTRAP: Sure.

PROFESSOR ALBRIGHT: If you-all want to take it out we maybe need a vote.

CHAIRMAN BABCOCK: Okay. How many people want to leave this first bullet point in as drafted, and

that is the very first thing a presiding juror does is to read the charge aloud. How many are in favor of that, leaving that in?

How many people want to take it out?

HONORABLE SARAH DUNCAN: There's no middle ground?

CHAIRMAN BABCOCK: There's no middle ground between leaving it in and taking it out.

Okay. Eleven people want to leave it in, five want to take it out.

HONORABLE SARAH DUNCAN: Levi, do you want to explain why you think it should be taken out?

HONORABLE LEVI BENTON: Yeah. I just read it. They're adults. They have common sense. They're a cross-section of the community. Some of them got it, some of them didn't. I respect them. I don't like -- I don't like it when lawyers repeat themselves in front of me. Why should I think jurors want to have -- and they repeat themselves in front of the jurors and now you're saying, "You've been here all this time, you're heard ad nauseam why did the chicken cross the road repetitively, and now I've read to you why the chicken crossed the road, and you go back and you've got to read it again," and I just think that disrespects them.

HONORABLE SARAH DUNCAN: And sometimes what

they have to read is that thick.

HONORABLE LEVI BENTON: Yeah, that's true, too.

HONORABLE SARAH DUNCAN: So you want to really cause people not to want to serve on juries?

CHAIRMAN BABCOCK: Kent.

HONORABLE KENT SULLIVAN: There may be a middle ground. Maybe it should be optional. The reality is, is that there are certain cases where a judge could look at the circumstances, both in terms of who's in the jury box and the like and suggest that, you know, maybe that that ought to be an instruction to them. If there are other cases where it is clear that, you know, there's a strong likelihood that the jury can organize itself appropriately -- and it might be specific hardships associated with it.

If you had a jury charge, as you sometimes do, I certainly did, where you have 50 questions, and to reread all of the instructions and questions might not be best use of the jury's time, then you are arguably giving them an instruction that will start the process with more than a little derision from the jurors, and I think, you know, using good judgment is -- and having the option might not be a bad way to handle it.

CHAIRMAN BABCOCK: Harvey.

HONORABLE HARVEY BROWN: When I was a new judge my predecessor -- actually two back, but a predecessor forgot to read a charge in a case, just, you know, got distracted and forgot, and I granted a new trial. I thought it was silly.

CHAIRMAN BABCOCK: Frank.

MR. GILSTRAP: Well, I think if we're going to give them a 50-page charge we ought to make them read it. I really do.

While we're on the subject of presiding jurors, by the way, back on page seven in the third bullet point, we've somehow left in the word "foreperson," which has got to be the worst word ever invented. Maybe you could change that.

HONORABLE STEPHEN YELENOSKY: Chip?

CHAIRMAN BABCOCK: Yeah, Judge.

HONORABLE STEPHEN YELENOSKY: I mean, because you don't require them to after the judge has just read the 50 pages and they've heard closing arguments sit down and read it cover to cover does not mean they're not going to read it again, particularly if it's 50 pages. What they're going to do is they're going to go to question one, and they're all going to sit around and look at question one, and perhaps they're going to read it outloud, but to say that reading the 50-pages so that they

can go back to question one is a good use of their time, it just doesn't make sense to me.

CHAIRMAN BABCOCK: Yeah, Richard.

MR. MUNZINGER: It makes sense to me because one of the exercises we've spent the afternoon on is writing jury charges that people with fourth grade educations can understand. That's the word that's used. I doubt there really are very many fourth grade educated jurors, and I mean no disrespect for any of them, but the point of the matter is law can be quite complex. The jury rereading the charge ought to be impressed with the seriousness of what they're doing and the complexity of what they're doing. Some of these charges are extremely complex, and I agree they're thick, it takes time, but by god, it's justice, and justice may take time. Truth may take time.

CHAIRMAN BABCOCK: Yeah, if you think about the dynamic of what's happening, the judge reads the charge to the jury. It's the first time anybody has told them about what the rules are, and then the lawyers will get up, maybe for an hour or two hours or some, you know, not insubstantial period of time and apply those, the facts of the case, to the charge they've just heard. It's not -- probably not a real bad idea for them to go back and review the law again before they start deliberating,

but I could see arguments on both sides. Judge Benton, I can understand your argument, and I meant no disrespect to a recently married man.

HONORABLE LEVI BENTON: Yeah, well, I don't think they should be deprived of reading it in the jury room if that's their desire, and I believe that if they -- if there's one of them who doesn't understand it, they'll say something in the jury room.

And since you raised it and I wasn't here this morning, I move to amend the record to note that I thank Justice Hecht for mentioning my recent change in marital status. So thank you, Justice Hecht. Several folks have told me off of the record that you noted it on the record, and so my thanks on the record.

MR. GILSTRAP: Congratulations.

HONORABLE LEVI BENTON: Thank you very much.

(Applause)

CHAIRMAN BABCOCK: Justice Hecht.

HONORABLE NATHAN HECHT: One other point just to take into consideration is in the five years I was a trial judge I asked every jury if they understood what I said, and not one single juror ever said "no," but back in the jury room they would say, "When we were reading through the charge and we got to this point that's when somebody said -- Sally Jones said, 'Wait a minute. What

does that say again? Read that again,'" and sometimes that was when a question came up or discussion was prompted because they would ask each other -- they didn't mind saying to one another, "Wait a minute, I don't understand that," something they're never going to say to me.

HONORABLE STEPHEN YELENOSKY: But that doesn't necessarily have to happen in a reading from beginning to end. They could ask those questions when they went over on question three. "Now question three is blah."

HONORABLE NATHAN HECHT: Right. It could, but I think, again, that gives the presiding juror quite a bit of authority in the jury room to say, "Well, we're not on that, we're on question one," and it's just -- and it's a broad dynamic. I just have that one point.

CHAIRMAN BABCOCK: Anything else about that? Okay. Alex, what's next?

PROFESSOR ALBRIGHT: Next is unanimous, number six. It's on page nine in the exemplary damages instructions. Wherever it says, "You must unanimously agree," we have put a parenthetical, "all of you," closed paren. You can see it on the last italicized paragraph on page nine. It's also in the second italicized paragraph.

HONORABLE TOM GRAY: But isn't that going to

run into the same problem that you referred to earlier when you say "all of you," that if ten of them answered it one way before you're talking about the same ten, instead of saying "All 12 of you"?

MR. SCHEISS: I think yes, and my original -- in my original, I didn't -- sorry. New PJC 100.3a I didn't write, but in other places where the word "unanimously" is used I switched it to "all 12." I was then told, not being a trial lawyer, well, not all juries have 12 people, so I did -- the change to "all of you" was sort of imposed on us because "all 12 of you" didn't always work. I don't know.

MS. HOBBS: You could just bracket "12" and --

MR. SCHEISS: You could put whatever the number is and then adjust it appropriately for the trial. Just as an opinion, I think you're right, Judge. All of you, they may think all of us that agreed on the last one.

HONORABLE TOM GRAY: Particularly if it happens to be a question with a conditional submission where only 10 had to answer the prior question "yes." Then you get to a conditional submission, and then all of you. Well, is that the ones that answered the conditional submission question? So --

MR. GILSTRAP: Up above there --

MR. HAMILTON: Or is it all 12?

MR. GILSTRAP: -- they use "all of you." I mean, two or three paragraphs before you say "all of you." In the middle of the page, "answer question two for D1 only if all of you." And then the next paragraph they say "unanimously."

PROFESSOR ALBRIGHT: That must be --

MR. SCHEISS: I know. I remember this now. Sorry. I think the only change that's been made here is, "all of you" in a few places to clarify unanimous. Otherwise this whole instruction baffled us.

PROFESSOR ALBRIGHT: Yeah, I think there was an attempt to rewrite this entire instruction, and it was determined that we should just leave it alone, and then all we did is whenever the word "unanimous" was used we added the parenthetical that said "all of you," and saying "all 12/6 of you," I don't think anybody cared about.

MR. MUNZINGER: Chip?

CHAIRMAN BABCOCK: Yes.

MR. MUNZINGER: Would it make more sense to move that parenthetical, "all of you," to follow the word "unanimously" rather than follow the word "agree"? "Unanimously (all of you) agree"?

MR. SCHEISS: I think it would. Sure.

MR. LOPEZ: Little grammatical, if we use

"each and every one of you," would that solve about the problem about the 10 who had to answer the conditional versus the 12, et cetera? Might that even be a little more specific? Maybe it's -- I mean, it's probably overkill, but, I mean, it might solve that problem.

CHAIRMAN BABCOCK: Angie says we ought to say "Y'all."

HONORABLE STEPHEN YELENOSKY: "All y'all."

HONORABLE SARAH DUNCAN: "All y'all." I think that might work.

CHAIRMAN BABCOCK: That's from the California rules. Is there anything like this in the --

MR. GILSTRAP: Wait a second. On the next page -- Chip?

CHAIRMAN BABCOCK: Yeah.

MR. GILSTRAP: On the next page, 10, we have this instruction before the signature lines. It says, "All jurors do not agree then those 10 who do agree" -- I think it can be 11, so I'm not sure how we do that. I mean, the whole problem of the unanimous jury charge is, you know, an extremely difficult problem, and I'm not sure it's ready for plain language yet.

PROFESSOR ALBRIGHT: That's kind of what we felt, and we just felt like we needed to do something with unanimous since we had this specific finding that they

didn't understand it.

MR. GILSTRAP: I'm just saying on the next page it's got to be 10 or 11. Eleven can agree.

PROFESSOR ALBRIGHT: You can say, "If all 12/6 do not agree, those who do agree" --

MR. GILSTRAP: Yeah, but if there's only eight who agree I don't know that they can sign.

I guess that took care of the next item.

HONORABLE STEPHEN YELENOSKY: Wouldn't that cut out a lot of the verbiage if we could do that?

CHAIRMAN BABCOCK: Yeah, but to change it just to change it.

HONORABLE STEPHEN YELENOSKY: Well, hopefully we're changing it to make it more understandable, but --

CHAIRMAN BABCOCK: Jan.

HONORABLE JAN PATTERSON: I like the use of the one, the little (i), (ii), and (iii), but is that confusing for nonlawyers as opposed to the numbers?

PROFESSOR ALBRIGHT: Where are you talking about?

MR. SCHEISS: You are talking about Romanettes.

HONORABLE JAN PATTERSON: Yes.

MR. SCHEISS: I have no empirical evidence

to suggest that nonlawyers do not understand them, only a personal opinion that this is English, let's use English, so we didn't edit it. We didn't revise this one. I just wouldn't use little Romanettes. I think they're silly.

PROFESSOR ALBRIGHT: Yeah, this is -- we didn't use it.

HONORABLE JAN PATTERSON: I know. I understand.

MR. SCHEISS: I don't have any evidence that nonlawyers don't understand it.

CHAIRMAN BABCOCK: Justice Gray.

HONORABLE TOM GRAY: Alex, in looking at the use of the term "unanimously," did the subcommittee consider the same as the language -- and I understand unanimously is used in the statute, but on the next page, rather than the term "unanimous" we just say "if all jurors do not agree." Could you use the word "all" in place of "unanimous" in the previous? It may require some changes, but, for example, "You must all agree to your answer before you proceed to the next question."

PROFESSOR ALBRIGHT: Yeah, I think what happened here is that the committee tried several times to completely rewrite this part of the order, and in the end just said, "We can't do it, so all we're going to do is" -- it was a punt, we're just going to put this

parenthetical. I think there's any number of things that we could do. You know, "all agree," "all 12 of you agree," "12/6 of you agree to your answer," I think would be perhaps more understandable.

HONORABLE NATHAN HECHT: Just to clarify a point, the Romanettes would not appear in the charge, right?

HONORABLE HARVEY BROWN: Right.

CHAIRMAN BABCOCK: Any other comments about this? Alex, any other questions?

PROFESSOR ALBRIGHT: No. I'll change this according to the --

CHAIRMAN BABCOCK: Okay. Harvey.

HONORABLE HARVEY BROWN: This isn't quite on topic, but it is about this, and Professor Dorsaneo asked me to raise it, and that is for the instruction in the court's charge he has suggested that some of these things we've talked about today that are in subsection (2), that is, the instructions that are given after they're sworn such as do not use dictionaries, don't go to the internet, et cetera, he says that he thinks that should go in the court's charge; and I think that's a good idea because the instructions before the evidence begins might be weeks before the charge and then they've forgotten they can't look something up in a dictionary; and frankly, that's

where I saw the most misconduct, was jurors looking things up. So I think a number of those items that are in what are in existing rule part (2), you should think about putting into part (3), the court's charge.

PROFESSOR ALBRIGHT: Okay.

HONORABLE TOM GRAY: Harvey, was that a repeated in the court's charge or moved to?

HONORABLE HARVEY BROWN: Repeated, because we don't want them to start looking up things in the dictionary the first day of trial, but you certainly don't want them doing it again during deliberations.

CHAIRMAN BABCOCK: Frank.

MR. GILSTRAP: As long as we're kind of, you know, picking out some things that are troublesome, on page six in the second line, it says, "Members of the jury, you're about to go to the jury room and reach a verdict. This means you will apply the law and answer the questions." I showed this -- I showed this proposal to three district judges. They all just jumped straight up about the words "apply the law." The jury doesn't apply the law, and we shouldn't invite them to. I think maybe that needs to be "follow my instructions and answer the questions."

There's also a place where we tell the court -- the juries, the juror, that "I'm about to discuss the

charge with you" when what we mean is reading the charge; and again, I think that's troublesome because it kind of gives them the wrong idea of what a discussion is; and we use the word "discuss" all the way through, but those two things jumped out at me as -- oh, yeah, over on page seven in the second full paragraph it says, "What you're receiving is a set of written instructions, and I'm going to discuss them with you now," and that might be a softer term, but there is no discussion that goes on with the jury, I think. I think you just read the charge.

MR. SCHEISS: I can't find where you're talking about.

MR. GILSTRAP: Page four.

MR. SCHEISS: Oh, page four.

MR. GILSTRAP: I'm sorry. Page four is what I was discussing. Did you find the other one I was talking about?

MR. SCHEISS: I didn't.

MR. GILSTRAP: Okay. Well, on page four in the second full paragraph it says, "What you're receiving is a set of written instructions. I'm going to discuss them." And on page six in the second line it says, "This means you will apply the law."

PROFESSOR ALBRIGHT: Yeah, I have that one.

MR. SCHEISS: Got that one. Thank you.

CHAIRMAN BABCOCK: Great. Good catches. What else?

PROFESSOR ALBRIGHT: Okay. The next thing on the list is the certificates, and if you-all would just look at those. What we've found is we gave these to Wayne to look at and then he had looked at them and then I gave them to a law student to do a side-by-side version. The -- what was interesting to me is the exemplary damage discussion and the certificates, both the law student -- third-year law student and Wayne had trouble trying to figure out what we were talking about. A lot of it was because they had not dealt with jury verdicts before.

MR. SCHEISS: And I'm just not that smart.

PROFESSOR ALBRIGHT: Well, that's not true, but we -- so we just -- on the certificates I just kind of redid them trying to make it make more sense, and I don't know if I succeeded or not, so if you-all would look at those and see if you think those were --

MR. GILSTRAP: What page are you talking about?

PROFESSOR ALBRIGHT: This is page 10, 11, and 12. There is a regular verdict certificate when you don't have any unanimous questions, page 11 you have mixed unanimous and nonunanimous verdict, and then page 12 is when you have a second part of a two-part trial and that

second part is unanimous verdict.

MS. HOBBS: Did you just label them, or did you make changes to the certificate itself?

PROFESSOR ALBRIGHT: I can't remember, and I have an old copy of the rules, so I don't have the --

MS. HOBBS: I feel like you just titled them something.

PROFESSOR ALBRIGHT: Maybe I did. But I just wanted to call that to everybody's attention so they can look at them.

Okay. The next two deserve some discussion, 8 and 9. We are -- the pattern jury charge committee is proposing that these be included in the Supreme Court order. They are not included now. One is on juror note-taking and one is on language interpreters, and these are on page --

MS. CORTELL: 14.

PROFESSOR ALBRIGHT: 14.

MS. CORTELL: 15.

PROFESSOR ALBRIGHT: And 15. The juror note-taking is now a comment in the pattern jury charge, and what this does is say this allows jurors to take notes. It says don't take them if they will distract you, take them for your own personal use, and don't take them out of the courtroom and don't share them and don't rely

on another juror's notes.

Then on interpreters -- well, I guess we should talk about one and then the other.

CHAIRMAN BABCOCK: Richard.

MR. MUNZINGER: Is it appropriate to talk about the interpreter rule at this point, or do you want to delay that?

CHAIRMAN BABCOCK: Certainly.

PROFESSOR ALBRIGHT: Should I explain the interpreter one?

MR. GILSTRAP: Are we going to talk about note-taking or not?

CHAIRMAN BABCOCK: Well, I think after Alex explains the interpreter rule we're going to recess and take this up at our next meeting.

MR. GILSTRAP: Fair enough.

PROFESSOR ALBRIGHT: Okay. And the interpreter rule is -- the issue is whether when you have a juror who is fluent in the language that's being interpreted and the juror does not agree with the interpretation, should the juror talk to the judge about the disagreement. Judge Christopher originally felt like, yes, she wanted to know, and she polled all the judges in Harris County and realized there were lots of different ways that people handled this. Ultimately, I believe

after thinking about it she came to the conclusion that it was better to just say, "This is the official interpretation," and if the lawyers disagree with it then the lawyers need to come and make objections as opposed to jurors making the objections.

So it would be if we're going to make -- allow jurors to object to interpretation then that's just like letting them ask questions about any other kind of evidence. So that's how the committee ultimately came down on it. Kent, do you remember any other -- these two were really Tracy's proposals, and she's the one who knows the most about them.

HONORABLE KENT SULLIVAN: The take away that I had from it was that it's important to make a decision, that this is a reality of, you know, real courtroom practice, and there needs to be a clear decision about how to handle it. In the absence of any clear guiding principle now, it creates more than just uncertainty, the possibility of really some different results and how they turn out.

PROFESSOR ALBRIGHT: Sarah.

HONORABLE SARAH DUNCAN: So if we have someone on the jury who speaks the same dialect as the witness and knows that the interpreter who speaks a different dialect just misinterpreted a word, we're going

to put it on the lawyers who speak -- don't even speak this language, much less this dialect?

PROFESSOR ALBRIGHT: I think, we don't know that the juror is correct.

HONORABLE SARAH DUNCAN: I understand that, but my hypothetical is that the juror speaks the same dialect and knows that the word was misinterpreted, and we just -- we don't want to know that is basically what I'm hearing. Because we can't depend on the lawyers because they don't even speak Vietnamese, let's say, much less this dialect.

CHAIRMAN BABCOCK: Kent.

HONORABLE KENT SULLIVAN: I think one other important variable to inject into this is it would be nice to have a clear standard for the certification of the interpreter. I mean, that to me is something that is left unsaid here, and I think it's increasingly an important question.

CHAIRMAN BABCOCK: Well, what is the rule on certifications of interpreters? Do they have to --

HONORABLE STEPHEN YELENOSKY: Yeah, you have to have a certain level of certification to interpret.

MR. LOPEZ: There is a Texas state -- I don't want to call it an agency, maybe it's a department. There is a way that the State of Texas says, "You're

qualified."

HONORABLE STEPHEN YELENOSKY: Yeah, statutorily required.

MR. LOPEZ: Yeah. But that doesn't answer our question.

HONORABLE KENT SULLIVAN: And I think it really is --

MR. HAMILTON: I guess I would like to know where that is because we had that come up in a case where the judge ordered a certified interpreter, and we couldn't find anybody in the state of Texas that knew how to certify one, but the other comment is that we frequently have misinterpretations by the so-called certified interpreters. Generally the lawyers catch it, but -- and they, you know, bring it up to the judge, and we get it resolved, but there are instances where the lawyers don't speak the language, and they don't catch it. So -- and then the interpretation may be entirely wrong.

CHAIRMAN BABCOCK: Yeah.

MR. HAMILTON: Especially on cross-examinations. It's entirely wrong sometimes.

CHAIRMAN BABCOCK: Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: Well, I think the statute admits that you may have to use uncertified for certain languages in certain places. I think that's

true, but as far as the thing -- the point Sarah made about, well, what if somebody on the jury knows it's wrong, don't we want to know that, the prsoblem is that somebody on the jury is presented with two different interpretations. It isn't that somebody on the jury should be our fail-safe because what that means is in every case where we don't happen to have somebody on the jury who speaks that dialect we're perfectly happy to go along with the interpretation given by the person.

HONORABLE SARAH DUNCAN: We don't have a choice.

HONORABLE STEPHEN YELENOSKY: We don't have a choice. That's right. But the problem we can't avoid is that one juror doesn't know without our instructions what they're supposed to do with that conflict in their own minds.

CHAIRMAN BABCOCK: Alex.

PROFESSOR ALBRIGHT: You know, if you think about it in terms of an expert witness, if you had a medical expert or an engineer on the stand and you have a medical -- you know, doctor or an engineer on the jury, and that doctor or engineer testifies to one thing, and the doctor or engineer on the jury says, "That is just not true." We have said we don't want those jurors to be jumping up and to tell the judge, "I don't agree with that

expert," and I think it's really much the same issue, is what are we going to do when you end up with a juror with specialized knowledge on the jury. They may go in the jury room and say, "Boy, did they get that interpretation wrong, let me tell you what it really means," but that's jury deliberations that we don't get to hear about, and --

CHAIRMAN BABCOCK: Richard, then Carl, then done.

MR. MUNZINGER: My only point is the problem is real and frequent in some places in the state; and given the reality of the, quote, "global village," close quote, it's going to become a lot more frequent; and I think it's going to be the subject of extensive discussion in this committee, because while what Alex just said has some truth to it, they are not totally analogous and they are different problems, because in one instance we are in essence saying to the jury, "This word means X" and it isn't determined adversarially at all unless each party hires their own expert in Mandarin to double check on the translator during the court and then you raise that issue during the trial of the case, which may be what we end up doing. It's a very complex problem is all I'm saying and one that I think we really need to spend a fair amount of time on. I know it happens frequently in my jurisdiction.

CHAIRMAN BABCOCK: Is the global village the

same as the house?

MR. MUNZINGER: No. I just said, quote, "global village," close quote.

CHAIRMAN BABCOCK: Carl. Then if you're name is "done" then you can do it.

MR. HAMILTON: It's not like the doctor or the expert. In that instance the question and the answer is clear. It's just that he has a different opinion about it. In our problem the question doesn't come out right when it's interpreted. It's the wrong question --

CHAIRMAN BABCOCK: Or the wrong answer.

MR. HAMILTON: -- and the witness answers something, and he's answered the wrong question that the lawyer asked, so it makes it very confusing.

CHAIRMAN BABCOCK: Okay. Carlos, do you want the last word?

MR. LOPEZ: I thought "done" meant D-u-n-n, not d-o-n-e. D-o-n-e.

CHAIRMAN BABCOCK: Yes.

HONORABLE KENT SULLIVAN: One quick thought, if you don't mind --

CHAIRMAN BABCOCK: Not at all.

HONORABLE KENT SULLIVAN: -- before we wrap up, and that is I think the problem is exacerbated by the fact that it often comes up realtime for the judge and the

participants; that is, if we had a rule that required some notice of an intent or a need to use an interpreter and that required some resolution, that is, a ruling or some action taken in advance of the trial, then at least it might bring it to a head and you might obtain a more thoughtful resolution.

CHAIRMAN BABCOCK: Yeah. Good point. Well, we'll see you next time, which is November 30.

(Adjourned at 4:03 p.m.)

* *

REPORTER'S CERTIFICATION
MEETING OF THE
SUPREME COURT ADVISORY COMMITTEE

* *

I, D'LOIS L. JONES, Certified Shorthand Reporter, State of Texas, hereby certify that I reported the above meeting of the Supreme Court Advisory Committee on the 19th day of October, 2007, Friday Session, and the same was thereafter reduced to computer transcription by me.

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

Charged to: The Supreme Court of Texas.

Given under my hand and seal of office on this the _____ day of _____, 2007.

_____
D'LOIS L. JONES, CSR
Certification No. 4546
Certificate Expires 12/31/2008
3215 F.M. 1339
Kingsbury, Texas 78638
(512) 751-2618

#DJ-193