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**MEETING OF THE SUPREME COURT ADVISORY COMMITTEE**

November 22, 2008

(SATURDAY SESSION)

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Taken before *D'Lois L. Jones*, Certified  
Shorthand Reporter in Travis County for the State of  
Texas, reported by machine shorthand method, on the 22nd  
day of November, 2008, between the hours of 9:00 a.m. and  
11:01 a.m., at the Texas Association of Broadcasters, 502  
E. 11th Street, Suite 200, Austin, Texas 78701.

**INDEX OF VOTES**

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

<u>Vote on</u>	<u>Page</u>
Rule 226a	17688

**Documents referenced in this session**

08-17	PJC Amendments to Rule 226a, memo and report (Agenda Item 4)
08-18	Civil cover sheets, e-mail from Ms. Peterson and sample cover sheets (Agenda Item 8)

1                                   \*-\*-\*-\*

2                   CHAIRMAN BABCOCK: All right. Judge  
3 Christopher says we still need to go back to 226a, so  
4 maybe let's go back there.

5                   HONORABLE TRACY CHRISTOPHER: I made some  
6 changes from the last time we were here. I don't think  
7 that they were particularly substantive, but -- except for  
8 one area, and so I wanted you-all to look at that and then  
9 I think we're done.

10                  HONORABLE TOM GRAY: Could you give us some  
11 heads-up of where in the agenda you are?

12                  HONORABLE TRACY CHRISTOPHER: Item No. 4,  
13 4(a) and (b).

14                  HONORABLE TOM GRAY: Thank you.

15                  HONORABLE TRACY CHRISTOPHER: So 4(a) was  
16 the little memo about bias and prejudice that we talked  
17 about, and 4(b) is the latest version of the draft of  
18 226a, and the changes that we have made from the previous  
19 version are noted in the comment section under "November  
20 '08 change." So on page two you'll see that we added back  
21 in "open court," which had been requested the last time.  
22 We reworded the reasoning in Items 1, 2, and 3 because  
23 people didn't like having the reasoning at the end, so I  
24 put them back up into 1 and 3, and that way it made it  
25 more mandatory, I think, so everyone is happy with that.

1 You want to just go one by one, any problems, discussions,  
2 questions or you just want to move on?

3 MR. GILSTRAP: Judge Christopher, exactly  
4 where are you?

5 HONORABLE TRACY CHRISTOPHER: Yes, I'm on  
6 page two, instruction No. 1.

7 MR. GILSTRAP: "Do not mingle."

8 HONORABLE TRACY CHRISTOPHER: Yes. If  
9 you'll remember the last draft, we had kind of put the  
10 reasoning at the end and now I've put it back up, so it's  
11 in the second sentence there, "to avoid looking like  
12 you're friendly with one side of the case."

13 CHAIRMAN BABCOCK: Okay. Any problems with  
14 instruction No. 1?

15 HONORABLE TRACY CHRISTOPHER: All right.  
16 And then No. 3 we put the rationale at the end of  
17 instruction 3, "We do not want you to be influenced by  
18 something other than the evidence admitted in court."

19 CHAIRMAN BABCOCK: Any comments on that?  
20 Okay. Next?

21 HONORABLE TRACY CHRISTOPHER: All right.  
22 Page three, we already talked about the bias and prejudice  
23 language. That was the only thing new on that. Page  
24 four, again we made the same changes that had been  
25 previously made in 1 and 3.

1 CHAIRMAN BABCOCK: Okay.

2 HONORABLE TRACY CHRISTOPHER: The rationale  
3 for not mingling and discussing.

4 CHAIRMAN BABCOCK: Okay.

5 HONORABLE TRACY CHRISTOPHER: Nos. 5 and 6  
6 -- excuse me, Nos. 4 and 5 had slight changes based on  
7 grammatical comments, I believe.

8 CHAIRMAN BABCOCK: Okay.

9 MS. PETERSON: I have one question on 4.

10 HONORABLE TRACY CHRISTOPHER: Yes.

11 MS. PETERSON: In the second sentence it  
12 says, "Do not allow anyone to discuss the case with you or  
13 in front of you."

14 HONORABLE TRACY CHRISTOPHER: Yes.

15 MS. PETERSON: And I think on another page,  
16 and I can't find the exact spot, it says, "in your  
17 hearing," so it was just a variation of language within.

18 HONORABLE TRACY CHRISTOPHER: Oh, well, I  
19 wanted it to be "in your hearing."

20 HONORABLE STEPHEN YELENOSKY: Because if  
21 they discuss it behind you, that's not good enough.

22 CHAIRMAN BABCOCK: Turn around.

23 MS. PETERSON: It's okay, it's behind me.

24 HONORABLE STEPHEN YELENOSKY: But, why, it  
25 wasn't in front of me?

1 HONORABLE TRACY CHRISTOPHER: Yeah, I wanted  
2 to make that change and I just missed it. Page five,  
3 here's what we did on page five on the note-taking, and  
4 that's item No. 10. We added in the "Do not show or read  
5 your notes to anyone, including other jurors," and I took  
6 out the part about the deliberations at this point and put  
7 it further on in the charge when they would actually start  
8 to deliberate. So this is before the trial starts, "Do  
9 not show or read your notes to anyone, including other  
10 jurors," and then further instructions are added later in  
11 the charge.

12 CHAIRMAN BABCOCK: Okay.

13 HONORABLE DAVID PEEPLES: Question, on No.  
14 9, Tracy, why did you change "whether either party is  
15 protected" to "who might be covered"? This seems to me to  
16 suggest more that someone might be, whereas "any party" or  
17 "either party" seems more neutral. Not a big issue.

18 HONORABLE TRACY CHRISTOPHER: We can put  
19 that back in. That was a Wayne change that he thought was  
20 clearer, but I can put it back in. I like to say "either  
21 party" because then I go "either side" and kind of  
22 emphasize please don't talk about insurance.

23 Nothing on page six. Page seven is where we  
24 added back in the note-taking cautions, and that is in the  
25 third paragraph at the top. So "You may take them back

1 into the jury room, consult it, but do not show or read  
2 your notes to your fellow jurors during your  
3 deliberations. Your notes are not evidence. Each of you  
4 should rely upon your independent recollection of the  
5 evidence and not be influenced by the fact that another  
6 juror has taken notes." So those were the cautionary  
7 instructions that we talked about adding back in.

8 CHAIRMAN BABCOCK: Any comments on that?

9 HONORABLE TERRY JENNINGS: It may not be  
10 needed, but what about like a sentence saying, again, the  
11 court reporter, you know -- although that's going to be  
12 contained elsewhere, I guess. The court reporter is the  
13 official, if there are any conflicts or disputes about  
14 what the evidence shows.

15 HONORABLE TRACY CHRISTOPHER: We don't like  
16 to tell them to ask the court reporter.

17 CHAIRMAN BABCOCK: No, we talked about that  
18 one or two meetings ago.

19 HONORABLE TERRY JENNINGS: Okay.

20 CHAIRMAN BABCOCK: That would just be a  
21 magnet to have them say, "Well, we'll have the court  
22 reporter tell us."

23 MR. FULLER: This may be overkill, but it  
24 addresses a concern that we've talked about in terms of  
25 note-taking in general. Would it -- where it says "Your

1 notes are not evidence," should we consider putting in a  
2 phrase that says "and may not accurately reflect the  
3 evidence"? I mean, you know, people can be mistaken in  
4 what they write down. That's kind of why, you know, it's  
5 for you and not for everybody else. Or may not be --  
6 something along those lines as a reason why they're not to  
7 share those notes with other people.

8 HONORABLE TRACY CHRISTOPHER: I wouldn't be  
9 in favor of that change personally, but I'm willing to  
10 discuss that.

11 CHAIRMAN BABCOCK: Justice Sullivan.

12 HONORABLE KENT SULLIVAN: I'm more used to  
13 "Hey, you." One concern that I recall having about notes  
14 is that we say in a number of places your notes are not  
15 for this use, your notes are not this, not that. I don't  
16 know that we have in any particular place one very clear  
17 statement of what your notes are to be used for.

18 HONORABLE STEPHEN YELENOSKY: Well, it does  
19 say, doesn't it, to remind you or solely to remind you?

20 HONORABLE KENT SULLIVAN: Do we have a  
21 simple declarative statement of saying -- I mean, my  
22 understanding, of course, is it's used to refresh your  
23 recollection about the evidence.

24 HONORABLE TRACY CHRISTOPHER: Page five,  
25 number 10.



1 HONORABLE KENT SULLIVAN: Do we have it?

2 HONORABLE TRACY CHRISTOPHER: It says,  
3 "During the trial if taking notes will help focus your  
4 attention on the evidence, you may take notes. If taking  
5 notes will distract your attention from the evidence you  
6 should not take notes."

7 HONORABLE KENT SULLIVAN: But for what it's  
8 worth that really isn't what I meant. I thought we might  
9 want to have something that says, "This is how you use  
10 your notes properly," period. That just says whether you  
11 should do it or not in terms of distracting or not  
12 distracting. It seems to me that the statement that we  
13 may have missed here is that your notes can be used to  
14 refresh your recollection about the evidence, or -- and  
15 that's essentially it. That's the reason why we tell you,  
16 "Don't read your notes to other jurors" or that your notes  
17 are not evidence. The use is limited to this. I'm just  
18 not sure that we encapsulate it as well as we could.

19 CHAIRMAN BABCOCK: Okay. Any other  
20 comments? Okay. What else?

21 HONORABLE TRACY CHRISTOPHER: Page eight,  
22 item No. 11. What I've done is to bracket "unless  
23 otherwise instructed" so that in the vast majority of  
24 cases where we do not have a punitive damages question,  
25 the jurors won't have that extra verbiage in there. Right

1 now it's in there no matter what the case. So I bracketed  
2 that.

3           Then we stuck with just a simple instruction  
4 about 10 of 12, and then you'll see on page nine that I've  
5 added four instructions on signing the jury verdict. So I  
6 simplified No. 11, compared to what it used to be and  
7 added four more paragraphs on the next page, separately to  
8 show the jury how to fill out the jury verdict.

9           Oh, and the other change that we made that I  
10 forgot to mention was on the quotient verdict. For some  
11 reason I didn't highlight this one. No. 9 I added back in  
12 the "do not agree in advance to decide on a dollar amount  
13 by adding up each jurors' figure and figuring the  
14 average," since that was the -- from the last discussion  
15 what was wrong with the previous discussion. So I don't  
16 think there's anything controversial. We've just changed  
17 it a little bit there on page eight.

18           MR. GILSTRAP: Wait, in paragraph 3 in the  
19 third line shouldn't that say "10 or 11" also?

20           PROFESSOR CARLSON: Yeah.

21           CHAIRMAN BABCOCK: That's right.

22           HONORABLE TRACY CHRISTOPHER: Well, I  
23 decided to leave it with 10 and then explain it more fully  
24 on the next page, because when you start adding in 10 or  
25 11 each time you say 10, it just gets more and more

1 confusing. So that's why I kept it just 10 on that  
2 paragraph.

3 MR. GILSTRAP: In the third line, but the  
4 previous line it's 10 or 11, right?

5 HONORABLE TRACY CHRISTOPHER: Right. I  
6 mean, I consciously decided to drop that out because it  
7 tended to confuse people.

8 CHAIRMAN BABCOCK: Okay. Then page nine is  
9 basically all new, simplified the statement that we gave  
10 to the presiding juror, because we started to like try to  
11 tell them how to get the signatures, and I just said, "Get  
12 the signatures for the verdict certificate" and then added  
13 all of these instructions on the verdict certificate in  
14 the hopes that they would actually get this one. So 1, 2,  
15 3, and 4 are all new, and includes the idea that you can't  
16 have one group of 10 jurors agree on one answer and a  
17 different group of 10 jurors agree on a different answer.

18 No. 3 is also new, because this sometimes  
19 comes up as a question during jury deliberations. I put  
20 in there, "All jurors should deliberate on every  
21 question," because sometimes we'll get a question from the  
22 jury that says, "We're 10-2 on No. 1, so what do the two  
23 people that didn't agree do?"

24 CHAIRMAN BABCOCK: Right.

25 HONORABLE TRACY CHRISTOPHER: So I

1 specifically added a sentence that all jurors should  
2 deliberate on every question, and then kind of said "Some  
3 of you might be" -- it might be 12-0 on some, might be 10  
4 on some, 10-2 on some, might be 11-1 on some, but the 10  
5 who agree on every answer sign.

6           And then, again, with No. 4, that would only  
7 be added in in a punitive damages situation. "There are  
8 special instructions before questions," blank, "as to how  
9 to answer the questions. Please follow those  
10 instructions. If all 12 of you unanimously answer those  
11 questions, you'll need to complete a second verdict  
12 certificate for those questions."

13           CHAIRMAN BABCOCK: Okay.

14           HONORABLE TRACY CHRISTOPHER: So, again, in  
15 the bracketed one in question No. 1, taking out that extra  
16 verbiage.

17           CHAIRMAN BABCOCK: Ralph's got a comment.

18           HONORABLE TRACY CHRISTOPHER: I'm sorry.

19           MR. DUGGINS: On the 2(b) where we say, "The  
20 presiding juror will take the lead in discussions," that's  
21 new isn't it?

22           HONORABLE TRACY CHRISTOPHER: Well --

23           MR. DUGGINS: That gives me a little --

24           HONORABLE TRACY CHRISTOPHER: It had said  
25 "to preside during your deliberations," which is taking

1 the lead.

2 MR. DUGGINS: I think that some people could  
3 read that to mean that that person's got some extra  
4 authority or decision-making. I'm a little uncomfortable  
5 with that.

6 HONORABLE TRACY CHRISTOPHER: How about  
7 "start the discussions"?

8 HONORABLE DAVID PEEPLES: What was wrong  
9 with "preside over" or "preside during"?

10 HONORABLE TRACY CHRISTOPHER: Well, we have  
11 that, but I was trying to explain what it meant.

12 MR. ORSINGER: It would also include the  
13 ones responsible to make the notes to hand to the bailiff  
14 and things.

15 CHAIRMAN BABCOCK: That's in here.

16 MR. ORSINGER: That's separately in here,  
17 but that's part of presiding.

18 HONORABLE HARVEY BROWN: How about "oversee  
19 the discussions" because a lot of times the foreperson  
20 says nothing but "Okay, now we're going to question two.  
21 Let's go around and get comments." I've never been a real  
22 juror, but in mock trials that's what they do.

23 HONORABLE TRACY CHRISTOPHER: "Oversee,"  
24 "start"?

25 CHAIRMAN BABCOCK: "Manage."

1 HONORABLE TRACY CHRISTOPHER: "Start" is --  
2 "manage."

3 MR. DUGGINS: "Manage" is a good word.

4 HONORABLE TRACY CHRISTOPHER: "Manage"?

5 CHAIRMAN BABCOCK: Yeah, Justice Pemberton.

6 HONORABLE BOB PEMBERTON: In the  
7 instructions on page nine, for signing the verdict  
8 certificate, could there be any room for confusion with  
9 what we mean by the word "answer"? I mean, you've got  
10 broad form submission. There are lots of things that  
11 might be answered within one -- within one question, maybe  
12 a modifier like answer to a question, and the question is  
13 what's on the issue submitted. A possible concern.

14 HONORABLE TRACY CHRISTOPHER: Well, I mean  
15 if a question has three subparts, (a), (b) and (c), it's  
16 the answer that has to be all the same people on. 3(a),  
17 3(b), 3(c), each one of those answers.

18 HONORABLE BOB PEMBERTON: Well, I'm thinking  
19 about multiple --

20 THE REPORTER: Can you speak up, please?

21 HONORABLE BOB PEMBERTON: I mean with  
22 multiple -- in broad form submission we have multiple --  
23 what could be seen as multiple answers and different  
24 things submitted with different questions.

25 HONORABLE STEPHEN YELENOSKY: Are you

1 suggesting what might they do or not do is --

2 HONORABLE BOB PEMBERTON: Well, I mean you  
3 could have within a broad form submission, I mean, a  
4 simple example, broad form negligence, and you've got  
5 multiple negligence, potential negligent acts. Ten might  
6 find following too close in the car, ten might find  
7 driving too fast. That's what I'm thinking. You could  
8 answer that different ways, but it would be within the  
9 same question. I mean, it might suggest the answer might  
10 need to be modified or clarified. That's a potential  
11 concern. Maybe that's something that would be fixed by,  
12 you know, if the jury had a question and send it back to  
13 the judge. That's a possible problem.

14 MR. PERDUE: But isn't that the law? I  
15 mean, they can --

16 HONORABLE TRACY CHRISTOPHER: Right. They  
17 can do that.

18 MR. PERDUE: They can disagree on the  
19 answer.

20 HONORABLE BOB PEMBERTON: What I'm saying is  
21 they might suggest they have to have 10 jurors didn't  
22 agree on that one of the alternative, meaning the ultimate  
23 finding -- you don't want the instructions indicating that  
24 10 of them have to find the car is following too close, 10  
25 of them think the guy is driving too fast, and arguably

1 you're answering each -- these are different. A jury  
2 could read this and potentially think these are different  
3 answers.

4 HONORABLE TRACY CHRISTOPHER: Well, the  
5 charge itself says "answer yes or no" or "answer in  
6 dollars or cents, if any."

7 HONORABLE BOB PEMBERTON: Well, maybe it's a  
8 concern, maybe it's not, but --

9 HONORABLE TRACY CHRISTOPHER: I mean, I  
10 think you're overthinking it.

11 CHAIRMAN BABCOCK: Justice Bland.

12 HONORABLE JANE BLAND: Could we say "write  
13 down your answers to the questions"? Is that (d) is the  
14 one you had the problem with? "Write down your answers to  
15 the questions."

16 HONORABLE BOB PEMBERTON: No, I'm just  
17 saying use of the word "answers" without those  
18 instructions. May not be a concern, may not. I just  
19 raised it for what it's worth.

20 HONORABLE JANE BLAND: Okay. Subsection  
21 (b), it says "and see that you follow the instructions."  
22 Could we say "my instructions" or "these instructions,"  
23 and then do we need to ask twice about whether they answer  
24 the instructions, because I have this feeling that --

25 MR. FULLER: "Understood," you mean?



1 HONORABLE JANE BLAND: "Do you understand  
2 the duties of the presiding juror" and then we ask again  
3 "Do you understand these instructions?" We could just ask  
4 it one time at the very end.

5 And then on instructions for signing the  
6 verdict certificate, No. 1, should we say, "You must  
7 answer the questions on a vote of 10 or more jurors," and  
8 it should be "or more." "The same 10 or more must agree  
9 to every answer in the charge." And then on No. 2, "If 10  
10 jurors agree on every answer, those 10 jurors who agree  
11 sign the verdict." Same thing with 11 jurors.

12 CHAIRMAN BABCOCK: Judge Yelenosky.

13 HONORABLE STEPHEN YELENOSKY: I'm not sure  
14 what happened with this. I was whispering to Judge  
15 Christopher on it. I circulated an e-mail, and I think  
16 there was some support for it to eliminate having the  
17 presiding juror sign when it's unanimous. No. 1, because  
18 it's not necessary. No. 2, because it makes the  
19 instructions more complicated. If they always sign  
20 whether it's 10, 11, or 12, you just say, "Everybody that  
21 supports the verdict sign it"; and No. 3, it has some  
22 small but added advantage of making sure that it was truly  
23 unanimous.

24 So I think the first one or the second one  
25 is probably the best. It shortens the instructions. "The

1 10 or 11 or 12 of you who agree with the verdict, sign  
2 it," and Judge Christopher said we didn't take a vote on  
3 that, but I know there was at least discussion on e-mail,  
4 and I don't remember if we had an oral discussion of it.

5 HONORABLE TRACY CHRISTOPHER: Well, if  
6 you'll look at page 10, there was -- the only discussion  
7 we had was sort of it's tradition.

8 HONORABLE STEPHEN YELENOSKY: Traditional?

9 HONORABLE TRACY CHRISTOPHER: So what I did  
10 is the previous was not as clear as this one, I think, so  
11 we put the signature of the presiding juror up there at  
12 the top to see that right underneath "Our verdict is  
13 unanimous," and then we changed it to say if you're  
14 checking these other two then the signature is there. So  
15 I left it in as tradition, and I think it makes it even  
16 clearer this time.

17 HONORABLE STEPHEN YELENOSKY: Well, I think  
18 tradition is great when we celebrate it, but I don't think  
19 jurors celebrate the fact that the presiding juror is  
20 signing for all of them, and it's not great when there's  
21 good reason to change it.

22 CHAIRMAN BABCOCK: Harvey.

23 HONORABLE HARVEY BROWN: I think that would  
24 be a good change, too, although I like the verdict  
25 certificate and I still would like to have the three

1 checks, one where it's unanimous, one where it's 11, and  
2 one where it's 10. I mean, I think -- I think this is  
3 really, really good work. It's really going to simplify  
4 issues before the jury and save a lot of questions.

5           One technical little thing I would tweak on  
6 instructions for signing the verdict, No. 4, you have  
7 "Questions," blank, "as to how to answer the questions."  
8 I'd say "those questions," because that's clearer exactly  
9 which questions you're talking about.

10           HONORABLE TRACY CHRISTOPHER: Okay.

11           HONORABLE DAVID PEEPLES: You know, Chip, I  
12 bet this unanimous signed by just one person, I bet that  
13 goes back to when we had nothing but unanimous verdicts.

14           MR. GILSTRAP: Sure.

15           HONORABLE DAVID PEEPLES: And just kind of  
16 got kept in 1973. I don't see any reason to keep it. I  
17 agree with Judge Yelenosky.

18           HONORABLE STEPHEN YELENOSKY: Well, if I can  
19 make it as a motion, I make it as a motion.

20           CHAIRMAN BABCOCK: How does everybody feel  
21 about that? Do we need a vote on that, anybody disagree  
22 with that? Judge Christopher, you disagree with that?

23           HONORABLE TRACY CHRISTOPHER: I like  
24 tradition. Can you believe it?

25           HONORABLE HARVEY BROWN: So now you're in

1 charge of changing the tradition in the rule.

2 HONORABLE TOM GRAY: One at a time.

3 HONORABLE STEPHEN YELENOSKY: She has framed  
4 my position, which is the anti-tradition.

5 HONORABLE TRACY CHRISTOPHER: I've been for  
6 change, change, change, and today I want tradition on --

7 MR. GILSTRAP: But see --

8 HONORABLE TRACY CHRISTOPHER: -- the  
9 presiding juror signing for everyone.

10 MR. GILSTRAP: But, see, that's the lessen  
11 of evolution. It gobbles up its children.

12 CHAIRMAN BABCOCK: Justice Bland.

13 HONORABLE JANE BLAND: The reason to keep it  
14 -- and I'm not an advocate of keeping it one way or  
15 another, but there are a fair number of jury verdicts that  
16 are unanimous, and it speeds up the deliberations, and the  
17 jury is in such a rush to get out of there.

18 HONORABLE STEPHEN YELENOSKY: How does it  
19 speed up the deliberations?

20 HONORABLE JANE BLAND: Because they don't  
21 have to get all their signatures.

22 HONORABLE STEPHEN YELENOSKY: Well, that's  
23 not the deliberations. That's the signing part.

24 HONORABLE JANE BLAND: Okay, I mean it  
25 speeds up the signing part so that they can return to the

1 jury room to have the judge read their verdict, and then  
2 the judge looks and the signatures are messed up and so  
3 everybody has to go back to the jury room and --

4 HONORABLE STEPHEN YELENOSKY: Well, that can  
5 happen with 11 signatures, I guess, and the price of that  
6 to get clarity --

7 HONORABLE JANE BLAND: Well, that's what I'm  
8 saying. I mean, you know, you have to evaluate that. It  
9 does take more of the jurors' time, but on the other hand,  
10 you probably have more information that all 12 are in  
11 agreement.

12 CHAIRMAN BABCOCK: Justice Gray.

13 HONORABLE TOM GRAY: And I apologize, but  
14 Dee Dee looked like she was coming under stress over here  
15 when everybody was talking, but Kent, I've never known him  
16 to be shy, but for some reason he didn't want to say this  
17 out loud. He doesn't see the need to read the entire  
18 charge again, and I tend to agree with that, given that  
19 the trial judge --

20 HONORABLE STEPHEN YELENOSKY: I got voted  
21 down on that.

22 HONORABLE TOM GRAY: -- has just read it.

23 HONORABLE STEPHEN YELENOSKY: That's been  
24 discussed and I lost.

25 MR. ORSINGER: But things change on Saturday

1 morning because half the group is gone.

2 CHAIRMAN BABCOCK: Judge Benton.

3 HONORABLE TRACY CHRISTOPHER: That got voted  
4 down about two or three sessions ago.

5 HONORABLE STEPHEN YELENOSKY: It did.

6 HONORABLE TRACY CHRISTOPHER: We had taken  
7 it out. We on the PJC oversight had taken it out, and  
8 this group wanted it back in.

9 CHAIRMAN BABCOCK: Judge Benton.

10 HONORABLE LEVI BENTON: Since April of 1999  
11 nearly every single trial I have presided over I have  
12 taken out that statement that you've got to read the  
13 charge over again. I just take it out of the charge.

14 HONORABLE STEPHEN YELENOSKY: Well, I take  
15 it out, but only by agreement.

16 HONORABLE LEVI BENTON: I don't even ask. I  
17 just take it out. It's harmless error.

18 CHAIRMAN BABCOCK: Justice Bland.

19 HONORABLE JANE BLAND: Well, why are we  
20 telling them they have to read the entire charge again  
21 when now everybody gets a copy of the charge? Is it still  
22 the case in places that they're not providing --

23 HONORABLE STEPHEN YELENOSKY: This is the  
24 same argument I lost.

25 MR. ORSINGER: Steve, Steve, if you just

1 give it up it might pass.

2 HONORABLE STEPHEN YELENOSKY: I mean, I hate  
3 to argue against myself, but I guess if the logic of my  
4 position is so apparent let's revisit it.

5 CHAIRMAN BABCOCK: Yeah, we're not going to  
6 revisit stuff that we've already talked on a lot of times.

7 MR. ORSINGER: Oh, we always do, Chip.  
8 What's the deal?

9 CHAIRMAN BABCOCK: Carl.

10 MR. HAMILTON: Is this charge -- in the  
11 present rule it talks about the rules for if exemplary  
12 damages are sought the jury must unanimously find  
13 liability and so forth. I don't find that anywhere.

14 HONORABLE TRACY CHRISTOPHER: I'm not taking  
15 out those instructions.

16 MR. HAMILTON: Oh, okay.

17 HONORABLE TRACY CHRISTOPHER: Those are  
18 instructions to the judge, in italics there in the rule.  
19 They're not the ones that go to the jury. Those  
20 instructions will still be in there.

21 CHAIRMAN BABCOCK: Justice Sullivan.

22 HONORABLE KENT SULLIVAN: At the risk of  
23 revisiting this and incurring the Chair's wrath, I do want  
24 to add one other thing to 2(a) in favor of Judge  
25 Yelenosky's position that I don't think has been said

1 before. It does concern me that if you have a long charge  
2 the jury will go back, begin the deliberations, and agree  
3 to ignore the instruction in 2(a), because they will see  
4 that they will spend a lot of time reading what the judge  
5 just read to them and that they all have a copy of, and I  
6 think that is a very dangerous precedent for the jury to  
7 begin their deliberations by way of an agreement that we  
8 will ignore the court's instructions.

9 I think that when you're way off base with  
10 respect to practicality and modernizing your instructions  
11 and you have that potential for a reaction, then the  
12 question is have you set a dangerous precedent, and they  
13 go down and decide that maybe there are other instructions  
14 that they ought to ignore as well. It really does give me  
15 concern.

16 CHAIRMAN BABCOCK: All right. Judge Benton,  
17 then Justice Gray.

18 HONORABLE LEVI BENTON: What about just  
19 modify 2(a) to say, "Read the complete charge, unless the  
20 judge has provided copies to each of you"?

21 HONORABLE TRACY CHRISTOPHER: Well, the  
22 judge is supposed to do that, so that's encouraging the  
23 judge not to do their job.

24 HONORABLE LEVI BENTON: Not to provide  
25 copies?



1 HONORABLE TRACY CHRISTOPHER: Yeah. I mean,  
2 that kind of is excusing the practice of not doing it.

3 CHAIRMAN BABCOCK: Justice Gray.

4 HONORABLE TOM GRAY: Yeah, before the floor  
5 got taken away from me when I started this conversation  
6 inadvertently, I was going to add that my real concern in  
7 it, beyond the time it takes, is who then is elected  
8 presiding judge -- or presiding juror, excuse me.

9 CHAIRMAN BABCOCK: Presiding juror.

10 HONORABLE TOM GRAY: Because I didn't think  
11 we had the requirement anymore or that every juror had to  
12 be able to read English, but suddenly the presiding juror  
13 does, and I could see a lot of situations that someone may  
14 be the best presiding juror and not want to sit there and  
15 read the charge. The other thing that concerns me about  
16 the way it's expressed is why does it have to be the  
17 presiding juror that reads it? Why can't they delegate it  
18 to someone if they are going to read it, but I don't see  
19 the need to read it at all, but I'm concerned about if  
20 that's going to put some chilling effect on who might be  
21 the presiding juror otherwise.

22 HONORABLE JANE BLAND: Chip, under the old  
23 rule it said to "have the complete charge read aloud." It  
24 did not charge the presiding juror to be the reader, so  
25 that if we had somebody who was not as good of a -- and

1 it's not whether they can read and write. It's whether  
2 they want to read out loud. A lot of people do not like  
3 to read out loud in front of an audience.

4           And then the second thing is if they're  
5 going to keep this in, could we say "have the complete  
6 charge read aloud, if it will be helpful to your  
7 deliberations"? Because what I used to tell my jurors is  
8 "Each of you are provided a copy of the charge. I ask you  
9 to read the charge aloud, but you can do that in the way  
10 that is most helpful to your deliberations, like, for  
11 example, when you're considering question one, read out  
12 question one."

13           CHAIRMAN BABCOCK: Bill.

14           MR. WADE: I hate to speak for rural  
15 America, but not all rural judges give every juror a copy.  
16 I've seen them go all the way from there's one copy to  
17 they're sharing two, so just something to remember.

18           HONORABLE STEPHEN YELENOSKY: Well, they  
19 should.

20           MR. WADE: They should, but they don't.  
21 Some of those commissioners are a little tight on their  
22 copy costs.

23           CHAIRMAN BABCOCK: Harvey.

24           HONORABLE HARVEY BROWN: I just want to  
25 second Jane's idea that maybe the best solution is not

1 reading it all at one time, but telling them "Read it as  
2 you get to that question." That way we're still keeping  
3 the tradition if you will of reading it, but it's focused  
4 when you get to that question, particularly if you've got  
5 30, 40, 50 questions, which some cases do, it's a waste of  
6 time to read all of that at one time. You can't possibly  
7 get it -- it can't possibly really help them in the  
8 deliberations. The only way it would be helpful is when  
9 they get to that question itself.

10 CHAIRMAN BABCOCK: Judge Yelenosky.

11 HONORABLE STEPHEN YELENOSKY: Well, and the  
12 example I used last time was a trade secrets case in which  
13 it took me 45 minutes to read the charge and in which  
14 every question I had to read "10 to the negative 12  
15 power," more than once, and I did that, and I don't have  
16 any problem with taking 45 minutes to read the charge to  
17 them, but idea that they would be required to read "10 to  
18 the negative 12," 13 times, even broken up, is silly to  
19 me. And since we are revisiting it, I'll just revisit  
20 what I said, which is that.

21 CHAIRMAN BABCOCK: Justice Bland.

22 HONORABLE JANE BLAND: So a good compromise  
23 for everybody that wants something like that in there is  
24 to say "if it will be helpful to your deliberations."  
25 That way you give the jury some control about how they

1 want to manage their deliberations, and instead of saying  
2 "Read the complete charge aloud," you say "have the charge  
3 read aloud."

4 CHAIRMAN BABCOCK: Okay. Judge Christopher,  
5 how do you feel about that?

6 HONORABLE TRACY CHRISTOPHER: Well, I don't  
7 actually like the idea that we tell them to do it question  
8 by question, because that ignores all of the instructions  
9 that we give them, and sometimes definitions are at the  
10 beginning --

11 CHAIRMAN BABCOCK: Right.

12 HONORABLE TRACY CHRISTOPHER: -- rather than  
13 in the question.

14 CHAIRMAN BABCOCK: But Jane's proposal.

15 HONORABLE TRACY CHRISTOPHER: That's fine.  
16 I was in favor of deleting the sentence, so --

17 MR. ORSINGER: Me, too. Can we just do an  
18 informational revote on that, in case the Supreme Court  
19 cares? Because nobody is speaking in favor of really  
20 keeping it in.

21 MR. GILSTRAP: Are we --

22 HONORABLE TRACY CHRISTOPHER: Skip was a big  
23 proponent of it.

24 MR. GILSTRAP: Are we suggesting that the  
25 jury might be able to go through the whole verdict and no

1 one reads one question aloud? Is that what we're saying?

2 MR. ORSINGER: We're just taking out the  
3 instruction that the presiding juror has to read the  
4 charge aloud when the judge just got through reading the  
5 charge aloud.

6 MR. GILSTRAP: Are we then eliminating the  
7 requirement that the charge be read aloud in the jury room  
8 piecemeal or whatever?

9 HONORABLE STEPHEN YELENOSKY: Yes.

10 MR. GILSTRAP: That strikes me as a bad  
11 idea. It seems to me that -- I've been in groups that are  
12 trying to decide things, and it always seems to me that if  
13 you can start by someone, you know, reading what you've  
14 got to decide so everybody hears it at that time it seems  
15 like it's extremely helpful.

16 CHAIRMAN BABCOCK: Justice Bland.

17 HONORABLE JANE BLAND: But we just had the  
18 judge read the entire thing.

19 MR. GILSTRAP: Two days ago.

20 HONORABLE JANE BLAND: No. No. Right  
21 before they retire for the deliberations. The judge reads  
22 the charge, there's a closing argument, and the jury is  
23 retired. Now, if it really was two days ago, then it  
24 probably would be helpful to their deliberations to reread  
25 it, but that isn't really how it happens.

1 HONORABLE STEPHEN YELENOSKY: And all  
2 research shows --

3 MR. GILSTRAP: You never had a jury out for  
4 two days?

5 HONORABLE JANE BLAND: I mean, you should  
6 see the eyes that roll and the sighs that come from the  
7 jury box when you read, "The first thing you should do is  
8 have this complete charge read aloud." They are not --  
9 they look at and -- "What did we just do?"

10 MR. GILSTRAP: You were suggesting that you  
11 thought it might be a good idea to read each question as  
12 they get to it. You don't like that now?

13 HONORABLE JANE BLAND: No, I think we should  
14 leave it up to them, whatever would be helpful.

15 MR. GILSTRAP: I'm just trying to figure  
16 out, the position is we don't have to read it aloud.

17 HONORABLE JANE BLAND: Again.

18 CHAIRMAN BABCOCK: Judge Yelenosky.

19 HONORABLE STEPHEN YELENOSKY: Well, the  
20 distinction is reading it when it's in front of you and  
21 reading it aloud. I mean, all research shows that people  
22 are going to retain and understand better if they read  
23 English when they are reading it than when they're hearing  
24 it, so if you're saying, you know, it's two days later and  
25 the presiding juror is going to say, "Let's redirect our

1 attention to question No. 3" -- which three times says "10  
2 to the negative 12 power" -- "and let's all read it  
3 silently," the idea of reading it aloud seems crazy to me.

4 MR. GILSTRAP: You mean you don't think  
5 people do better if they're in a group and they're all  
6 reading along and they're hearing it read?

7 HONORABLE JANE BLAND: Yeah, I think they  
8 do. I do.

9 HONORABLE STEPHEN YELENOSKY: And maybe so,  
10 but requiring it, no.

11 CHAIRMAN BABCOCK: Hayes.

12 MR. FULLER: I would go back to the  
13 compromise, because I think that does at least address a  
14 legitimate concern from Frank. I have had trials where  
15 I'm pretty convinced while the judge is reading that long  
16 charge in that tone that the 12 people in that box, I'm  
17 not sure all of them are listening, and then when they get  
18 back there in that jury room, although I've never been  
19 there, I get the impression it's like "Okay, now, what is  
20 it we're supposed to do," and I think -- so I think it's  
21 important that you remind them when they get back there  
22 that they might want to do what they just did, you know,  
23 only this time listen.

24 MR. GILSTRAP: Or what they just didn't do,  
25 which is hear the charge read.

1 MR. FULLER: Or didn't do, right. I think  
2 the compromise kind of covers all of our concerns that  
3 we're expressing.

4 HONORABLE STEPHEN YELENOSKY: Well, I mean,  
5 that's contradictory to everything else we say, which is  
6 if the judge says it they pay more attention.

7 CHAIRMAN BABCOCK: Justice Jennings.

8 HONORABLE TERRY JENNINGS: I don't remember  
9 what the vote was, whether it was a close vote, or does  
10 anybody remember whether it was a close vote last time?

11 CHAIRMAN BABCOCK: My recollection is it was  
12 not a close vote, but do we have that?

13 HONORABLE TERRY JENNINGS: I think if I  
14 recall correctly Skip kind of spoke more in favor of this,  
15 but just to be the contrarian again this morning, you are  
16 talking about a group activity. You are talking about  
17 setting a decorum for the jury. This is an important case  
18 for litigants obviously, and it gives the jurors one last  
19 chance to sit down and act as a group together, to go  
20 through the charge together, and this is the framework for  
21 their discussion, and I don't want to go over all the  
22 details. I would refer the Court to what we talked about  
23 previously at the other meetings.

24 CHAIRMAN BABCOCK: The vote was 21 to 8.

25 HONORABLE TRACY CHRISTOPHER: No, it was 11



1 to 5.

2 MR. ORSINGER: Recount. I want a recount.

3 HONORABLE STEPHEN YELENOSKY: Dee Dee, could  
4 you read back that transcript?

5 HONORABLE TRACY CHRISTOPHER: "Gilstrap,  
6 still useful to read it out loud. Hamilton, some jurors  
7 may not read well and it's good to read it out again.  
8 Jennings, good for jury to read it again. Eleven people  
9 say don't delete it, five say it's okay." Those are my  
10 notes from the last -- my notes could be wrong.

11 HONORABLE JANE BLAND: I don't think so.

12 MR. SCHENKKAN: You didn't destroy them.

13 CHAIRMAN BABCOCK: Yeah, I thought you were  
14 supposed to destroy them.

15 MR. WADE: They're not admissible, but  
16 they're discoverable.

17 CHAIRMAN BABCOCK: Kent's got with a  
18 different vote, but anyway, a two to one margin, three to  
19 one margin it failed. Harvey.

20 HONORABLE HARVEY BROWN: I just want to try  
21 one more time for what I thought was a modification of  
22 Jane's, and that is I do think reading the questions again  
23 can be helpful, particularly if only one or two of the  
24 jurors has a copy of the charge. So I, again, think  
25 reading it before the question would be the best way.

1 You'll retain it, and you'll use it for the deliberations.

2 Tracy's point -- excuse me, Judge

3 Christopher's point about reading the general instructions  
4 is true, so I would probably say, "When you get in the  
5 room, read the general instructions, then read question  
6 one and when you finish question one, read question two."

7 CHAIRMAN BABCOCK: Okay. I think the  
8 Court's got a lot of -- the benefit of a lot of people's  
9 thoughts about this, so let's move on to the next issue.

10 HONORABLE TRACY CHRISTOPHER: The other  
11 changes we discussed is on the verdict certificate we  
12 didn't actually end up taking a vote on the unanimous, did  
13 we?

14 HONORABLE STEPHEN YELENOSKY: No.

15 HONORABLE TRACY CHRISTOPHER: So as you see  
16 on page 10, the way we've done it is "Check one. Our  
17 verdict is unanimous. All 12 of us have agreed to each  
18 and every answer. The presiding juror has signed the  
19 certificate for all 12 of us." And then "Our verdict is  
20 not unanimous, 11. Our verdict is not unanimous, 10." So  
21 we've -- we moved where the signatures were versus the  
22 last page to make it simpler, but we can rephrase it if  
23 you want to get rid of it.

24 CHAIRMAN BABCOCK: Yeah, Frank.

25 MR. GILSTRAP: I think Judge Yelenosky's

1 proposal that maybe all the jurors sign the verdict is  
2 worth considering. I mean, you know, I mean, I mean,  
3 since we're requiring 10 of them to sign or 11 of them to  
4 sign, why not have 12 of them sign? I mean, the only  
5 reason we have the presiding juror -- I mean, it's worth a  
6 vote at least.

7 CHAIRMAN BABCOCK: Okay. Yeah, Jeff.

8 MR. BOYD: I agree with that as well, but  
9 I'm bothered by one sentence in the instruction for  
10 signing the verdict, which comes before the verdict form  
11 on page 9, where it says, "You may answer the questions on  
12 a vote of 10 jurors," and I went back and looked. The  
13 only other place the word "vote" shows up is where it  
14 says, "Don't agree to be bound by the vote of less than  
15 10, even if it's a majority," which makes me think they're  
16 not really voting. They're all agreeing. If enough of  
17 them agree on an answer then that's the jury's answer, and  
18 so I wonder if that -- I mean, that's one concern with  
19 that sentence on verdict, signing the verdict instruction  
20 No. 1.

21 And the other, I think as Justice Bland  
22 pointed out, is it's 10 or more, so I wonder if you could  
23 combine those first two sentences to say something like  
24 "At least 10 of the jurors must agree to all of the  
25 answers, and the same 10 or more jurors must agree to each

1 of the answers," rather than tell them that they will be  
2 bound by a vote.

3 HONORABLE TRACY CHRISTOPHER: Well, on page  
4 8, instruction 11, we keep the idea of the vote because we  
5 don't want to have a vote that says, "We're going to agree  
6 to be bound by a majority." I mean, people are voting in  
7 there on yes or no. I don't see what the problem with  
8 "vote" is.

9 MR. BOYD: Well, it actually says, "Do not  
10 agree to be bound by a vote of anything less than 10."

11 HONORABLE TRACY CHRISTOPHER: Right, "a vote  
12 of anything less than 10." I mean, that word has been in  
13 there for a long time.

14 MR. BOYD: For example, if -- as written,  
15 "You may answer the questions on a vote of 10 jurors,"  
16 well, does that mean all 10 have to vote the same way or  
17 you just take a vote, to me it doesn't -- they're not  
18 really voting anyway, but if what you're --

19 HONORABLE TRACY CHRISTOPHER: Well, but  
20 that's why No. 2, "If 10 jurors agree on every answer  
21 those 10 jurors sign the verdict." I mean, we can take  
22 "vote" out, but "vote" has been in there forever, and I  
23 think that's what the jurors do.

24 CHAIRMAN BABCOCK: Judge Yelenosky.

25 HONORABLE STEPHEN YELENOSKY: I just move

1 for a vote on eliminating signature by presiding juror for  
2 unanimity and conforming the certificate and instructions.

3 MR. HAMILTON: Can't hear you.

4 HONORABLE STEPHEN YELENOSKY: I just wanted  
5 to get a vote on my proposal that we eliminate the  
6 tradition of having the presiding juror sign for a  
7 unanimous vote and instead have all 12 sign and then  
8 simplify the instructions accordingly.

9 CHAIRMAN BABCOCK: Hayes.

10 MR. FULLER: Can I comment or is that the  
11 motion, second?

12 CHAIRMAN BABCOCK: That's a motion.  
13 Anybody want to second?

14 MR. HAMILTON: Second it.

15 CHAIRMAN BABCOCK: Okay. Carl seconds it.  
16 Hayes, you want to just say something?

17 MR. FULLER: Well, what about the situation  
18 where you've got a couple of folks on there that might not  
19 know how to write?

20 HONORABLE STEPHEN YELENOSKY: Well, they  
21 have to be able to sign. What if they're one of the 10 or  
22 11? They've got to sign.

23 MR. FULLER: That's true. I just --

24 HONORABLE STEPHEN YELENOSKY: There's no  
25 difference. They've got to be able to do it for 10 or 11.

1 There's no difference with the 12.

2 CHAIRMAN BABCOCK: Any more discussion on  
3 this issue? Okay. Let's vote. Everybody who believes  
4 that we should eliminate the practice, the tradition, of  
5 having the presiding juror sign, but rather require all  
6 jurors to sign, even if it's a unanimous verdict, raise  
7 your hand.

8 MR. GILSTRAP: Down with tradition.

9 CHAIRMAN BABCOCK: All those who are opposed  
10 to that, raise your hand. That passes by 16 to 12, so  
11 that will be our recommendation to the Court.

12 HONORABLE TRACY CHRISTOPHER: I think I'm  
13 going to get the trial court judges to lobby the Supreme  
14 Court like the appellate judges did on that appellate  
15 argument rule.

16 HONORABLE NATHAN HECHT: There's more of  
17 you, too.

18 CHAIRMAN BABCOCK: Alex.

19 PROFESSOR ALBRIGHT: Does this mean if the  
20 Supreme Court adopted this, shouldn't that mean that there  
21 would be no need to poll the jury?

22 HONORABLE DAVID PEEPLES: I don't think so.  
23 To affirm your verdict in the courtroom is a different  
24 thing from signing in the jury room.

25 HONORABLE STEPHEN YELENOSKY: I agree.

1 HONORABLE DAVID PEEPLES: I think people ask  
2 for a poll, this doesn't nullify the right to that.

3 HONORABLE TERRY JENNINGS: It's a failsafe.

4 HONORABLE DAVID PEEPLES: Or the need for  
5 it.

6 CHAIRMAN BABCOCK: Okay. Judge Christopher,  
7 anything else?

8 HONORABLE TRACY CHRISTOPHER: Page 11, the  
9 additional certificate, we have changed that slightly. We  
10 think it's an improvement. First, we specifically told  
11 them when they need to sign this, "If you have answered  
12 question No.," blank, which would be the exemplary damages  
13 amount, "then you must sign this certificate." And the  
14 judge is to actually list the questions that require a  
15 unanimous answer, including the predicate liability  
16 question, and we think that that would make it easier,  
17 because sometimes the jury is unclear about which  
18 questions are supposed to be unanimous or not, so this way  
19 you would put down negligence, whatever question that was,  
20 gross negligence, whatever question that was, and the  
21 damages amount, so that they would see that those were the  
22 three, just to reinforce the instructions that those were  
23 the three that had to be unanimous.

24 CHAIRMAN BABCOCK: Judge Yelenosky.

25 HONORABLE STEPHEN YELENOSKY: I just have

1 one last thing on 226a if she's done, but if she's not I  
2 don't want to interrupt.

3 CHAIRMAN BABCOCK: Okay. Let's stick to  
4 discussion of this issue first. Any other comments on  
5 that? Bill.

6 MR. WADE: Are you going to make all 12 sign  
7 that?

8 HONORABLE TRACY CHRISTOPHER: Well, I assume  
9 so.

10 HONORABLE STEPHEN YELENOSKY: Yeah. Yeah.

11 MR. GILSTRAP: Especially if the trial is  
12 bifurcated. They need to sign again, yeah.

13 CHAIRMAN BABCOCK: Okay.

14 MR. FULLER: We're going to turn this into a  
15 real estate closing.

16 HONORABLE STEPHEN YELENOSKY: Well, don't  
17 forget you're having 10 and 11 sign it in a lot of cases,  
18 so it's one more.

19 CHAIRMAN BABCOCK: Any other comments about  
20 this? Okay. Judge Yelenosky on something else.

21 HONORABLE STEPHEN YELENOSKY: Yeah, I just  
22 wanted to say something based on our discussion yesterday  
23 that returns to an issue, but I am not asking for a vote.  
24 It would be inappropriate to vote on it on Saturday  
25 morning, so I'm really just directing this to the record.



1 CHAIRMAN BABCOCK: Did you have some Red  
2 Bull this morning?

3 HONORABLE STEPHEN YELENOSKY: What was that?  
4 I didn't hear.

5 CHAIRMAN BABCOCK: I said did you have some  
6 Red Bull before you got here this morning?

7 HONORABLE STEPHEN YELENOSKY: I don't want  
8 to revote this. It's Saturday morning and this is a  
9 bigger issue, but yesterday we considered providing a  
10 definition to the jury on bias and prejudice, and there  
11 was a very good argument that apparently won that we  
12 didn't need to provide that definition, and we were trying  
13 to provide it even though there's a very complex  
14 definition in the case law, and in the spring we  
15 considered the definition "preponderance of the evidence,"  
16 that we provide to the jury, and there's no question that  
17 the jury needs that definition and it's central to what  
18 they do, but we voted that we would not give them the very  
19 simple definition that our highest court --

20 HONORABLE TRACY CHRISTOPHER: No, it was out  
21 of the Fourth.

22 HONORABLE STEPHEN YELENOSKY: -- has  
23 acknowledged. No, more likely than not.

24 HONORABLE TRACY CHRISTOPHER: We voted for  
25 it, and it's in the new version of the PJC book.

1 HONORABLE STEPHEN YELENOSKY: That's not  
2 what I was told. You mean, in our 226a we say "more  
3 likely than not"?

4 HONORABLE TRACY CHRISTOPHER: We voted for  
5 it, and it's in the new version in the new PJC books.

6 HONORABLE STEPHEN YELENOSKY: Well, Bill  
7 Dorsaneo told me yesterday we voted for "greater weight of  
8 the credible evidence."

9 HONORABLE TRACY CHRISTOPHER: Both.

10 HONORABLE STEPHEN YELENOSKY: Do we say  
11 "more likely than not"?

12 HONORABLE TRACY CHRISTOPHER: Yeah, we kept  
13 them both. We kept them both.

14 HONORABLE STEPHEN YELENOSKY: That's news to  
15 me. Did we vote that way?

16 HONORABLE TRACY CHRISTOPHER: It was almost  
17 unanimous. It was an astonishing vote from this committee  
18 after very little discussion.

19 HONORABLE STEPHEN YELENOSKY: Well, I must  
20 have missed that meeting because I thought we had not  
21 included it.

22 HONORABLE TRACY CHRISTOPHER: We kept the  
23 greater weight, but then we added the language about "more  
24 likely than not."

25 HONORABLE STEPHEN YELENOSKY: I stand

1 corrected.

2 CHAIRMAN BABCOCK: Okay. Anything else?  
3 Justice Hecht.

4 HONORABLE NATHAN HECHT: Tracy, would you  
5 mind just briefly summarizing how we got to here or how  
6 the project started, the plain language, just for the  
7 record, the plain language input and --

8 HONORABLE TRACY CHRISTOPHER: Sure.

9 HONORABLE NATHAN HECHT: -- why we are, so  
10 it will be in one place --

11 HONORABLE TRACY CHRISTOPHER: Okay.

12 HONORABLE NATHAN HECHT: -- that the Court  
13 can read.

14 CHAIRMAN BABCOCK: Reader's Digest version.

15 HONORABLE NATHAN HECHT: Yeah, executive  
16 summary.

17 MR. ORSINGER: Is the Chief Justice going to  
18 read that for the Court?

19 MS. PETERSON: Aloud, yes.

20 HONORABLE TRACY CHRISTOPHER: Approximately  
21 three years ago the Pattern Jury Charge Committee did a  
22 small scale study on juror comprehension of jury charges.  
23 This was in connection with sort of a national push to put  
24 jury charges and instructions to the jury in plain  
25 language or simpler language for the jury. It's been done

1 in a number of states across the country, and its purpose  
2 is to increase juror comprehension and satisfaction with  
3 the process.

4           The results of the study showed that the  
5 jurors did not understand a lot of our instructions, so  
6 the Pattern Jury Charge Oversight Committee started with  
7 226a. Since that was something that this group approves  
8 and the Supreme Court approves, we knew if we changed that  
9 we would have the blessing of the Supreme Court with  
10 respect to it.

11           In the meantime the Pattern Jury Charge  
12 Committee is attempting to try to simplify other jury  
13 charges as the Court's new opinions come out. So, for  
14 example, the *Ford Motor Company vs. Ledesma* opinion that  
15 talked about producing cause, and the opinion indicated  
16 some unhappiness with old and archaic language, and so it  
17 appeared to us that the Supreme Court was on board with  
18 the idea that we would simplify our jury instructions if  
19 we could. So, for example, that specifically we have  
20 changed to make it a simpler definition. So we've been  
21 working on this, the revisions to 226a, since the first  
22 discussion we brought it to the Supreme Court Advisory  
23 Committee in October of 2007.

24           HONORABLE NATHAN HECHT: Okay.

25           CHAIRMAN BABCOCK: Good enough.

1 HONORABLE TRACY CHRISTOPHER: But there is  
2 one -- sorry, one more point on page 12. After our  
3 discussion of yesterday about juror note-taking, do you  
4 want us to add a sentence in here that says, "You may take  
5 your notes home if you want to. If you do not, the court  
6 will destroy them. The lawyers may ask to see your  
7 notes"? Or do you want to just leave it alone?

8 CHAIRMAN BABCOCK: How does everybody feel  
9 about that? Harvey.

10 HONORABLE HARVEY BROWN: I thought about  
11 this last night actually, and I thought if we put  
12 something like "The lawyers may ask for your notes," it's  
13 more likely that lawyers will start asking for notes.  
14 Frankly, I have never thought about that idea in the  
15 trials I've had since I left the bench until hearing it in  
16 this room. I'd rather that idea not be one that we  
17 further by putting comment.

18 MR. SCHENKKAN: So you'll have a competitive  
19 advantage.

20 HONORABLE HARVEY BROWN: That's right.

21 CHAIRMAN BABCOCK: Any other comments about  
22 that or thoughts about it?

23 HONORABLE TRACY CHRISTOPHER: Okay. I won't  
24 change it then.

25 CHAIRMAN BABCOCK: All right. Good. All

1 right. Judge Christopher, anything else?

2 HONORABLE TRACY CHRISTOPHER: I think that's  
3 it.

4 CHAIRMAN BABCOCK: Thank you so much.

5 HONORABLE TRACY CHRISTOPHER: Oh, and my  
6 plan is this won't come back. We're at the point where it  
7 doesn't have to come back, right?

8 CHAIRMAN BABCOCK: It is going to the Court.

9 HONORABLE TRACY CHRISTOPHER: Okay, good.

10 CHAIRMAN BABCOCK: Thank you. And thanks  
11 for all your hard work on that.

12 I think we have a couple of guests who are  
13 interested in our next topic, which is civil cover sheets,  
14 and Mary Cowherd and Angela Garcia in the back of the  
15 room, thanks, and if anybody wants to use them as a  
16 resource on this, please do so, but Kennon Peterson is  
17 going to talk about this issue, item No. 8 on the agenda.

18 MS. PETERSON: Yes. There's an e-mail that  
19 I sent to Chip and Angie explaining the process by which  
20 these cover sheets were developed and the reason why they  
21 were developed, and to summarize briefly, right now  
22 district courts and county courts at law are required to  
23 report to the Office of Court Administration on the types  
24 of cases that are filed, and is it disposition as well?

25 MS. COWHERD: Filings and dispositions and

1 other information.

2 MS. PETERSON: So they're required to report  
3 all of this information, but the parties are not required  
4 across the board to file cover sheets, and so what happens  
5 is that in many instances clerks are guessing as to the  
6 type of case that's filed, and as a result the data that's  
7 reported to the Office of Court Administration is not as  
8 accurate as it would be, some believe, if the parties or  
9 the attorneys filing the cases were to explicitly state  
10 what type of case they're filing and provide other  
11 information as well, and the information is what you see  
12 on the model cover sheets in the materials.

13 There's one for county level courts, there's  
14 one for district courts, and there's one for family cases,  
15 and so the idea is that as a result of requiring these  
16 cover sheets the data will be more accurate, and as a  
17 result the Bar will know what types of cases are being  
18 filed and how they're disposed of, and there's additional  
19 information about how these cover sheets were developed in  
20 the e-mail, but in a nutshell, I guess it's important to  
21 know that's been an ongoing process since approximately  
22 2002, and it's been through review. Texas Judicial  
23 Council, the presiding judges, various clerks around the  
24 states, and some court personnel have reviewed these cover  
25 sheets and commented on the content.

1                   Now it's before the committee in large part  
2 because there should probably be a rule, a civil procedure  
3 to require parties to file these cover sheets, and we need  
4 to decide what should be in the cover sheets. These are  
5 models that are in the book or stapled in your materials  
6 if you don't have a binder, and the only thing I guess  
7 that would vary county by county or court by court is the  
8 type of case, and that is because although people tried  
9 really hard to come up with a list of cases that would be  
10 the standard across the board, it just came to be that  
11 there wasn't a way to do that. There's too much  
12 diversity, and as of now various courts have the way that  
13 they track cases; and it would require them to change  
14 their system; and it would just wreak havoc.

15                   And so the compromise, as I understand it,  
16 is that the different courts, there may be variation as to  
17 how they label the cases, but in the end when it's  
18 reported to OCA, OCA has kind of a master list of types of  
19 cases and all these various labels fall within that master  
20 list. So there will be a conversion so that there will be  
21 uniformity in the end. So that's the process by which  
22 these were developed, and they can tell you more, Angela  
23 and/or Mary about that, if you have questions.

24                   CHAIRMAN BABCOCK: Okay. And so the --  
25 Kennon, the idea is that our committee would draft a rule



1 which would probably be around Rule 22 --

2 MS. PETERSON: 22.

3 CHAIRMAN BABCOCK: -- I would think.

4 MS. PETERSON: Yes, that's what I was  
5 thinking as well.

6 CHAIRMAN BABCOCK: And that would be  
7 Orsinger's subcommittee, and do they need to comment on  
8 this cover sheet as well, to look at this and see -- I  
9 mean, the one thing I noticed that I think is missing is  
10 you don't have a box as to whether a jury is demanded or  
11 not, jury demand, and maybe that's not important  
12 information, but I know on the Federal civil cover sheet  
13 that's something you're supposed to check.

14 MR. ORSINGER: Do you have to request it  
15 with your initial pleading in Federal court or can you  
16 request it later on?

17 CHAIRMAN BABCOCK: Oh, yeah.

18 MR. ORSINGER: In state court, of course,  
19 you don't have to request it with your initial pleading,  
20 so it might be misleading to even keep that statistic.

21 CHAIRMAN BABCOCK: Yeah, that's a good  
22 point, too, and of course, in Federal court a defendant  
23 can always demand it.

24 MR. ORSINGER: Uh-huh.

25 CHAIRMAN BABCOCK: And that wouldn't reflect

1 on the civil cover sheet if the plaintiff is not. Yeah,  
2 Frank.

3 MR. GILSTRAP: Of course, we've had these in  
4 the appellate courts for a while, and, you know, you file  
5 your notice of appeal, they get the case, and then they  
6 send it to you and say, "Fill out the cover sheet," and  
7 we're not envisioning that you would have to turn this  
8 cover sheet in as a prerequisite for filing your initial  
9 petition. I've got a picture of some court clerk saying,  
10 "I'm not going to let you file this until you fill out the  
11 cover sheet." I'm not sure that we want to do that. I  
12 mean, I think you've got a right to file that petition if  
13 you pay the filing fee at the time. I just don't want to  
14 see it as some kind of prerequisite.

15 CHAIRMAN BABCOCK: Hayes.

16 MR. FULLER: That kind of fits into the  
17 other questions on your e-mail. I know in Federal court  
18 that's exactly what happens. You show up with your  
19 pleading, you don't have your cover sheet, it doesn't get  
20 filed, which is a real incentive to signing it and  
21 presenting it when it's supposed to be presented.

22 MR. GILSTRAP: And if we want to do that  
23 then we should do it, but what I don't want to see is some  
24 clerks taking on that, making that a requirement.

25 CHAIRMAN BABCOCK: Well, that's why you need

1 a rule that would say one way or the other whether it's a  
2 prerequisite. Yeah, Gene.

3 MR. STORIE: Chip, do you want comments on  
4 the model form now or should we wait until we have a draft  
5 rule?

6 CHAIRMAN BABCOCK: Well, I don't know.

7 MS. PETERSON: I think that would be  
8 helpful, because there's already been a lot of feedback on  
9 these cover sheets, and so they could take your concerns  
10 and then perhaps modify the cover sheets as the rule is  
11 being developed.

12 CHAIRMAN BABCOCK: Okay.

13 MR. STORIE: I have two then. I think it  
14 may be helpful to have a category for "combination"  
15 because it seems to me you can have more than one type of  
16 claim in the suit, and I didn't notice a check box for  
17 that if you're going to only check one.

18 MS. GARCIA: Can I respond to that? Under  
19 the OCA system you're only allowed to pick one suit, so  
20 it's up to the parties to determine what is being the most  
21 important issue in that suit.

22 CHAIRMAN BABCOCK: Okay. Yeah, Gene again.

23 MR. STORIE: One more minor one. On the  
24 other civil actions, it says "tortuous interference" and I  
25 think it's "tortious," even though it might be both.

1 HONORABLE STEPHEN YELENOSKY: It might be  
2 both.

3 CHAIRMAN BABCOCK: Yeah, very good. Alex.

4 PROFESSOR ALBRIGHT: About the statistics  
5 keeping, Kennon said that there's going to be one -- some  
6 courts are going to have their own set of cases and OCA  
7 has another set of cases and it was a compromise to let  
8 both go on to not wreak havoc, and sometimes havoc must be  
9 wrought and is it -- I mean, would it be better to wreak  
10 havoc and just say, you know, at some point in time  
11 everybody's got -- if the purpose of this is statistics  
12 then we've just got to -- you know, at some point somebody  
13 has got to call uncle and do it one way, and is this the  
14 time to do it? Because I know when you're negotiating  
15 over these things and you don't have authority to make  
16 that call, would it be nice if somebody made that call?

17 MS. GARCIA: That would be wonderful, but I  
18 don't see it happening, and the reality of the state is  
19 that there are 800 different ways to do things because  
20 there are 254 counties and different levels of courts, but  
21 really the nature of the suits and what we're talking  
22 about are all the same, it's just that everybody calls it  
23 something else.

24 PROFESSOR ALBRIGHT: Well, why is it  
25 important to allow people to call it something else?

1 MS. GARCIA: They demand it. "We've always  
2 done it this way."

3 PROFESSOR ALBRIGHT: Because, you know, part  
4 of the State Bar task force, the proposals to the  
5 Legislature going in is that we've got to have some kind  
6 of coherence in our system, and so I'm just wondering if  
7 there's some way to make this more coherent. It seems so  
8 minor as far as the way people really do business, and  
9 it's just if you're going to keep statistics everybody  
10 should keep the same statistics, but I'm not involved in  
11 it, so that's just my --

12 CHAIRMAN BABCOCK: Pete had his hand up and  
13 then --

14 MR. SCHENKKAN: A couple of comments on No.  
15 6. One, I don't think these are subtopics. I think what  
16 these are is procedures and remedies. The second is I  
17 assume that what is meant by "if relevant" is as  
18 applicable, and if that's so, I think you should say that,  
19 and then I think you should clarify whether for 6, unlike  
20 5, you are permitted to check more than one. I hope you  
21 are. But if OCA's systems are going to be disrupted, then  
22 I'm with Alex, it's time to wreak a little havoc, but  
23 maybe not.

24 CHAIRMAN BABCOCK: Okay.

25 MR. SCHENKKAN: At any event, at least

1 people need to know can they check -- on the procedures  
2 and remedies can they check more than one or are they  
3 limited to one.

4 MS. GARCIA: Thank you.

5 MR. ORSINGER: Do you know the answer to  
6 that question?

7 MS. GARCIA: The way the statistics are  
8 counted they could select more than one because we do  
9 capture bills of review. That would be considered another  
10 case, a garnishment would be considered another case,  
11 post-judgment remedy would be considered another case, so,  
12 yes, they could select more than one.

13 MR. SCHENKKAN: And I think that's good  
14 because I do think we need to get better information in  
15 two areas that I'm familiar with, about class actions and  
16 about declaratory judgments, and there certainly are class  
17 actions that are declaratory actions judgments as well as  
18 class actions that are not.

19 MS. GARCIA: Okay.

20 CHAIRMAN BABCOCK: Ralph, and then Jeff.

21 MR. DUGGINS: I second Alex's suggestion  
22 that we need to have one set of classifications.

23 CHAIRMAN BABCOCK: Jeff.

24 MR. BOYD: I just wanted clarification. The  
25 model form, is that based on the OCA standards, the OCA

1 data categories?

2 MS. GARCIA: The case categories on this  
3 form are based on what will be the new reporting forms in  
4 2010. We have greatly expanded the reports, so these  
5 reflect the changes coming in 2010. We're telling  
6 everybody to start using these case categories now.

7 MR. BOYD: If somebody uses this form and  
8 then the data gets reported to OCA, there won't have to be  
9 the transformation that you're having to do now.

10 MS. GARCIA: Right.

11 CHAIRMAN BABCOCK: Okay. Judge Peeples.

12 HONORABLE DAVID PEEPLES: On the family law  
13 cover sheet, Item 6, subtopic, topic, there are three very  
14 common matters there, protective order, enforcement, and  
15 modification, and there are so many of those I'm thinking  
16 maybe they ought to be put up in category 5 rather than 6  
17 as a subtopic. They just don't seem like subtopics to me.  
18 They seem like almost original suits, although there is  
19 a --

20 HONORABLE TRACY CHRISTOPHER: Well, they do  
21 have it under "all other family law" as a separate topic,  
22 protective order.

23 HONORABLE DAVID PEEPLES: Yeah, they do  
24 that. I don't know. Enforcements and modifications are  
25 just very, very common, and it seems to me that minimizes

1 them and puts them almost in a footnote rather than where  
2 they ought to be more prominent.

3           On the county court sheet, real property,  
4 they get, you know, a good number of appeals in  
5 landlord-tenant cases, and so I would add a category for  
6 lease or landlord-tenant in the real property category in  
7 county court.

8           CHAIRMAN BABCOCK: Can there be appeals from  
9 small claims courts?

10           MR. JACKSON: That's over in contract.

11           HONORABLE TRACY CHRISTOPHER:  
12 Landlord-tenant is under contract.

13           HONORABLE DAVID PEEPLES: Okay.

14           HONORABLE TRACY CHRISTOPHER: You know, a  
15 lot of these things overlap, so it's difficult to make one  
16 particular category for them.

17           CHAIRMAN BABCOCK: Yeah, Jeff.

18           HONORABLE DAVID PEEPLES: Okay.

19           MS. GARCIA: We did follow the standards set  
20 forth by the National Center for State Courts to determine  
21 under what bucket it should be put.

22           CHAIRMAN BABCOCK: Jeff.

23           MR. BOYD: A logistical question, at the top  
24 of the sheet, and I'm looking at the civil case sheet now,  
25 is the clerk expected to fill in the blanks under



1 "district court" and "cause number"? Because when you  
2 file your case you don't know what number court or what  
3 cause number it's going to be --

4 MS. GARCIA: Yes.

5 MR. BOYD: -- when you file the petition.  
6 Okay.

7 MR. FULLER: In Federal court we show up and  
8 stamp it, and I guess they're going to have to do that  
9 here.

10 MR. BOYD: Right.

11 CHAIRMAN BABCOCK: Jim.

12 MR. PERDUE: Is this data that is collected  
13 by you-all or does the local district clerk collect the  
14 cover sheets, put the data in some format, and then send  
15 it to you-all?

16 MS. GARCIA: Yes, the clerks are responsible  
17 for collecting it, compiling it, and they give it to us in  
18 summary form. So they are either entering it online into  
19 our system or submitting a paper report to us.

20 CHAIRMAN BABCOCK: Justice Bland, then  
21 Frank.

22 HONORABLE JANE BLAND: It looks like  
23 landlord-tenant, unless I'm missing it, is missing from  
24 the district court case sheet, which probably gets back to  
25 Alex's comment about having different ones for county and

1 district court.

2 CHAIRMAN BABCOCK: Frank.

3 MR. GILSTRAP: Since this county and  
4 district forms are so similar, have you thought about just  
5 using the same form for both?

6 MS. GARCIA: We could do a constitutional  
7 county court form separately, but, yes, the -- also the  
8 reporting forms for the district and statutory county  
9 courts are identical, so we could use the same form for  
10 both.

11 MR. GILSTRAP: Maybe you could just check  
12 what court it is. I don't know. It might be simpler.  
13 You know, you're designing the forms and you're using  
14 them, but I mean, it seems to me that might be something  
15 we want to look at.

16 MS. GARCIA: Sure.

17 CHAIRMAN BABCOCK: Pete.

18 MR. SCHENKKAN: Two more on the district  
19 court form and obviously the counterpart questions as to  
20 the county court one. We seem to have the topics under 5,  
21 the big headings, in alphabetical order until we get to  
22 "other civil" is out of order and "other civil" seems to  
23 be --

24 HONORABLE STEPHEN YELENOSKY: A lot.

25 MR. SCHENKKAN: -- a lot and important.

1 Maybe we're biased by those of us who are here in Austin  
2 have a disproportionate view of that, but I'm wondering if  
3 we just put it at the top of that third column and then  
4 have "real property" at the bottom. It will still fit,  
5 your size, the one large and one small for the third  
6 column would still work, third and fourth columns.

7                   And then I'm also -- see one question about  
8 this that I'm not sure I would understand the answer to if  
9 I were filling this out. What if the lawsuit were an  
10 enforcement action by the Attorney General on behalf of a  
11 state agency, civil enforcement or civil penalty action?  
12 Where would that go?

13                   HONORABLE STEPHEN YELENOSKY: And where  
14 would a Public Information Act case go?

15                   HONORABLE TRACY CHRISTOPHER: "Other civil."

16                   MS. GARCIA: "Other civil."

17                   HONORABLE STEPHEN YELENOSKY: But which box,  
18 "other"?

19                   MS. GARCIA: "Other."

20                   MR. SCHENKKAN: And maybe this gets back to  
21 OCA, but, you know, rather than having those generically  
22 under "other" I would like to have that data captured.  
23 Those are relevant to some budget issues, state budget  
24 issues.

25                   MR. ORSINGER: Is it possible for you-all to

1 change your categories on your computer? I mean, are we  
2 past that point?

3 MS. GARCIA: We're past that point.

4 MS. COWHERD: Yeah. All of this has been  
5 vetted for the last four years through a number of  
6 committees comprised of judges and clerks, and then we --  
7 after the recommendations were developed they went through  
8 a group of judges who served on these various work groups,  
9 representatives from the Supreme Court, the Court of  
10 Criminal Appeals, and the Legislature. They made some  
11 additional changes to the recommendations.

12 Then it got forwarded to the Judicial  
13 Council's Committee on Judicial Data Management. They  
14 made some further changes. It was presented to the full  
15 Judicial Council. They approved it, and all of this has  
16 been published in the *Texas Register* for comment, so at  
17 this point in time it -- I mean, this is what -- the  
18 categories that were agreed upon.

19 MR. ORSINGER: So the only thing we're  
20 discussing is the placement on the page?

21 MS. GARCIA: Yes.

22 MS. COWHERD: Yes.

23 MR. ORSINGER: Okay, that's good to know.

24 CHAIRMAN BABCOCK: Yep. Okay. Anything  
25 else?

1 HONORABLE NATHAN HECHT: I have one  
2 question.

3 CHAIRMAN BABCOCK: Yeah, Justice Hecht.

4 MR. PERDUE: Doesn't sound like there's much  
5 to talk about.

6 MR. GILSTRAP: And the rule. And the rule.

7 HONORABLE NATHAN HECHT: If things did  
8 change in the future, do you -- with respect to the  
9 information reported, would you expect that change to come  
10 from the Judicial Council or who would --

11 MS. COWHERD: Judicial Council. It's the  
12 Judicial Council's report by statute. They're the ones  
13 that determine what statistics will be reported.

14 CHAIRMAN BABCOCK: Okay. Great. Okay.  
15 Yeah, Justice Gray.

16 HONORABLE TOM GRAY: Just a quick  
17 observation. On the county court level, I don't see an  
18 "other civil," "other" selection like there is in the  
19 district court level.

20 CHAIRMAN BABCOCK: Richard.

21 MR. ORSINGER: Now then, this has been  
22 referred to the subcommittee to like finalize the  
23 placement on the page?

24 CHAIRMAN BABCOCK: No, write a rule.

25 PROFESSOR CARLSON: No, write a rule.

1 MR. ORSINGER: Write a rule to implement  
2 this as a condition to filing a claim or a counterclaim.

3 CHAIRMAN BABCOCK: What about counterclaims?  
4 Does it apply to counterclaims?

5 MS. COWHERD: Just the initial.

6 MR. GILSTRAP: Just the initial filing.

7 CHAIRMAN BABCOCK: Just the initial filing,  
8 Richard.

9 MR. ORSINGER: Really? But there's a box up  
10 here that has you -- let's see. On the family law case  
11 cover sheet you're supposed to check whether you're a  
12 petitioner, a counterpetitioner, or an intervener, so they  
13 are picking up two litigants that are not the initial  
14 filers.

15 MR. SCHENKKAN: And why couldn't we just  
16 deem if you are a counterclaim plaintiff, to that extent  
17 you're a plaintiff, and we want to capture your  
18 information. I mean, if somebody files a lawsuit that is  
19 initially described as a, you know, breach of contract  
20 action and the counterclaim raises an antitrust issue, I  
21 sort of would like to have the antitrust information in  
22 our system.

23 MR. GILSTRAP: Yeah, so you would require a  
24 new cover sheet when they file a counterclaim?

25 MR. SCHENKKAN: Yeah.

1 MR. ORSINGER: I mean, let's ask you guys.  
2 In family law you're capturing counterpetitioners and  
3 interveners, but you're not doing that in civil  
4 litigation. Is that intentional or is that just a  
5 coincidence?

6 MS. GARCIA: That was something the Harris  
7 County judges were wanting -- had asked me to put on, and  
8 I can't remember the reason for that.

9 CHAIRMAN BABCOCK: Those pestilent Harris  
10 County judges.

11 HONORABLE NATHAN HECHT: Wouldn't it be if  
12 it were a later proceeding, or not?

13 MR. ORSINGER: You know, technically under  
14 the Family Code now a motion to modify is styled as a  
15 petition.

16 HONORABLE NATHAN HECHT: Right.

17 MR. ORSINGER: But the counterpetitioner,  
18 which I would say routinely I would say in 99 out of a  
19 hundred divorces if one side files, the other side  
20 counter-files, if no other reason to avoid a nonsuit.  
21 Because the old -- if you don't file a counterpetition and  
22 the trial is going badly for the petitioner, they'll  
23 nonsuit and then you've got to start all over again. So  
24 everybody has learned to file a counterpetition now.

25 MR. GILSTRAP: As a practical matter, the

1 only time you're going to be able to mandate it, pick it  
2 up, is when they file the initial petition, because the  
3 clerk is not going to be looking at it and say, "Oh,  
4 golly, here's a counterclaim. You better file a cover  
5 sheet."

6 MR. ORSINGER: No, they know that because  
7 there's a filing fee. There's no filing fee for an  
8 answer. There is a filing fee for a counterpetition, and  
9 they're well-trained in the revenue, so they can pick it  
10 up. I mean, I think it's doable, and it makes sense to  
11 me, I guess, to know what your counterpetitioners are  
12 filing, because, you know, somebody might file a narrow  
13 initial suit and then the counterpetition might broaden it  
14 up into a bunch of different things, and maybe we should  
15 capture that information, but should we capture it on the  
16 civil side, too, as well as the family law side, or do you  
17 want to just have the plaintiffs in civil suits filling  
18 these out?

19 MS. GARCIA: Whatever makes sense to the  
20 group. You guys know more about the subject matter, and  
21 if you think it's very representative of the court  
22 workload to capture the counterclaim, we should do it.

23 MR. GILSTRAP: Well, how would you handle  
24 that? I mean, you're going to have -- basically be  
25 generating two sets of facts, or two forms for some



1 lawsuits, or maybe three forms for some lawsuits. Is that  
2 going to mess up your statistics?

3 MS. GARCIA: What do you think, Bonnie?

4 MR. ORSINGER: If the counterpetition is  
5 basically just a mirror image of the petition you're going  
6 to carry double the statistics from what the real  
7 statistic is.

8 MS. WOLBRUECK: We actually are just  
9 capturing it at the filing of the lawsuit. And then --

10 MR. ORSINGER: But just --

11 MS. WOLBRUECK: -- like in --

12 MR. ORSINGER: -- imagine in --

13 THE REPORTER: Wait. One at a time.

14 CHAIRMAN BABCOCK: Hold it, guys. Don't  
15 talk over each other.

16 MS. WOLBRUECK: In a family law case, after  
17 the case is disposed of and you come in with other actions  
18 like a modification or something, then you capture that  
19 also, that has to be captured on the OCA report, but in a  
20 family law case like, Richard, you're talking about, we're  
21 going to capture the data at the beginning of the filing  
22 of the petition and for the reporting process. And even  
23 if there are -- I'm trying to remember if the  
24 modifications are counted and the cross actions during the  
25 pendency. Are they counted?

1 MS. GARCIA: I believe so, yes.

2 CHAIRMAN BABCOCK: Bonnie, we can't hear you  
3 if you're turning around.

4 MS. WOLBRUECK: You have to understand that  
5 this -- the report hasn't been changed in about 20 years,  
6 and like Mary and Angela said, this is a major undertaking  
7 for the reporting system and for the clerks in Texas, and  
8 so there are a lot of changes that have been made to this,  
9 and that's one of the reasons for the necessity of the  
10 cover sheet, as you can see here just by looking at it,  
11 that any clerk staff would have a very difficult time  
12 reviewing a petition and trying to figure out what case  
13 category a case should go into, thus the reason for the  
14 petition.

15 You know, my suggestion on the rule would  
16 just basically be that it should say that it should  
17 capture -- I think it's in Kennon's e-mail here, the style  
18 of the case, the name of the parties, the contact  
19 information, the State Bar, and the case type as required  
20 by the Texas Judicial Council reporting system, because  
21 that report can change, but it will probably be more  
22 difficult to change the rule, and as long as we're  
23 capturing at least the minimal data that's required by the  
24 report --

25 MS. COWHERD: That's what we suggest.

1 MS. WOLBRUECK: -- that's what we're trying  
2 to do. Now, each local jurisdiction may want to, you  
3 know, capture a little bit of additional data, and I think  
4 that's an issue that needs to be discussed here, that if  
5 the cover sheet will change from county to county and how  
6 the attorneys want to deal with that.

7 CHAIRMAN BABCOCK: Nina.

8 MS. CORTELL: I was just going to say if  
9 we're going to talk about additional filings, a third  
10 party claim would be more important to capture than a  
11 counterclaim.

12 CHAIRMAN BABCOCK: Okay. Justice Hecht.

13 HONORABLE NATHAN HECHT: Well, just so I  
14 understand, you envision a rule that would just describe  
15 the information generically or --

16 MS. WOLBRUECK: Generically.

17 HONORABLE NATHAN HECHT: Why would we want  
18 different cover sheets in different counties?

19 MS. WOLBRUECK: Well, and that is the  
20 question, because like Angela was saying, that Harris  
21 County wanted to add some additional information, and, you  
22 know, Loving County may not want all of that information  
23 on their cover sheet to have to deal with.

24 But I don't know as attorneys if you would  
25 prefer that there just be one basic one and then the

1 counties that have information on there that they really  
2 don't care about -- because all that the clerk is  
3 concerned about capturing is the data that's necessary for  
4 the report.

5 HONORABLE NATHAN HECHT: Right.

6 MS. WOLBRUECK: Whatever is on the report is  
7 the data that we need to capture, and in some courts and  
8 some counties may want to capture more data for their own  
9 reporting, internal reporting, internal tracking.

10 HONORABLE NATHAN HECHT: Which I suppose is  
11 all right, but as for a mandatory cover sheet, it seems  
12 the worst thing of all worlds would be getting ready to  
13 file a lawsuit in Loving County and not be able to find  
14 the cover sheet.

15 MS. WOLBRUECK: Yes. And I think that that  
16 will be an issue, because you would hate to think that you  
17 could have 254 different cover sheets --

18 HONORABLE NATHAN HECHT: Right.

19 MS. WOLBRUECK: -- and possibly two in each  
20 county, one for county court and one for district court.

21 CHAIRMAN BABCOCK: Over 500 different civil  
22 cover sheets.

23 MS. WOLBRUECK: That's right.

24 CHAIRMAN BABCOCK: Now we're talking.

25 MS. WOLBRUECK: Yeah. So, I mean, I can see

1 so -- so, you know, you will have a concern about what's  
2 on it and how much additional information, knowing that in  
3 some of the instance -- in some of the counties they may  
4 not be capturing that data in their system. They're only  
5 capturing what's required for the report.

6 HONORABLE NATHAN HECHT: Well, but is there  
7 a reason that has developed through the practice that you  
8 go -- process that you've gone through so far why there  
9 shouldn't be with this rule a one cover sheet that's  
10 prescribed? Whatever else that counties want to do, you  
11 know, I guess there is some leeway in doing that, but this  
12 is the only one you have to file. Is there a reason not  
13 to do that?

14 MS. WOLBRUECK: Can you think of a reason  
15 not to do it?

16 MS. COWHERD: Just persistence from counties  
17 and clerks in those counties saying, "We're different here  
18 and we want different information than they want," and  
19 "Why do we have to have a sheet that has all of this stuff  
20 we're not interested in?"

21 CHAIRMAN BABCOCK: Well, if we're going to  
22 write a rule that is going to require litigants to file  
23 this wherever they're filing their lawsuit then I would  
24 think the Court could say there's going to be one cover  
25 sheet and here's what it is. It could do that. It may

1 not want to do that, but I would think it could. Justice  
2 Patterson.

3 HONORABLE JAN PATTERSON: Well, one of the  
4 reasons I would think you would want one single sheet that  
5 doesn't vary, that doesn't allow for other unique  
6 categories to that county, is that it skews the  
7 statistics, and what happens, I think -- and I think Pete  
8 and I may have at one time looked at these statistics, and  
9 what happens is that people characterize them in their own  
10 peculiar ways, and so they will pull a certain category  
11 out and lump it over here when it should be under that  
12 category that everybody else is using for that category,  
13 and so to the extent that we're trying to come up with  
14 meaningful statistics, it has to be the same, and it can't  
15 vary.

16 CHAIRMAN BABCOCK: Judge Benton.

17 HONORABLE LEVI BENTON: This may have been  
18 addressed while I was out, but what about pro ses and  
19 prisoner lawsuits? Will they be required to fill this  
20 out?

21 MS. COWHERD: Yes.

22 CHAIRMAN BABCOCK: Ralph.

23 MR. DUGGINS: I think it would be a disaster  
24 to have multiple sheets. I think for practitioners  
25 particularly, not knowing which sheet you're going to need

1 is just crazy; and also, if you're going to use one for  
2 counterclaims, the question is does it go in a rule for  
3 filings of the plaintiff, or does it go by Rule 97.  
4 Somebody that is filing a counterclaim may not look at  
5 Rule 22 because it doesn't apply.

6 CHAIRMAN BABCOCK: Yeah, good point. Frank.

7 MR. GILSTRAP: As Elaine points out to me,  
8 that, you know, rule -- appellate Rule 32.1 has a  
9 comprehensive statement of what goes in the docketing  
10 sheet, and I guess we could do the same thing for the  
11 civil rules, but I'm not sure that we want to get in a  
12 position of saying what's on the cover sheet. Maybe we  
13 need to say that, you know, there is a cover sheet, but  
14 the Office of Court Administration says what's on it,  
15 something like that.

16 MS. WOLBRUECK: Chip?

17 CHAIRMAN BABCOCK: Yeah, Bonnie.

18 MS. WOLBRUECK: I know that the committee  
19 had first envisioned the cover sheets just to capture the  
20 actual data that was required on the OCA reporting, and I  
21 think that this is -- is that not correct?

22 MS. GARCIA: Uh-huh.

23 MS. WOLBRUECK: And then there are a few  
24 additional items on here that have been required by other  
25 like Harris County or something that the judges there

1 wanted to capture additional data.

2 CHAIRMAN BABCOCK: Okay.

3 MS. WOLBRUECK: And so that's what's  
4 happened to this cover sheet, is that, you know, the main  
5 issue here is that the clerks have the data required of  
6 them in reporting to the OCA in their report.

7 CHAIRMAN BABCOCK: Okay. Pete, and then  
8 Kennon.

9 MR. SCHENKKAN: Back briefly to the  
10 counterclaim issue, it seems to me that category 7 already  
11 provides a way to deal with that. It's a case that's  
12 related to a case previously filed. It has the same  
13 docket number, but it has a new plaintiff and may have a  
14 new cause of action and a new procedure or remedy.

15 CHAIRMAN BABCOCK: Good point. Kennon, then  
16 Richard.

17 MS. PETERSON: I'm just trying to think  
18 about how it may play out if we were to have one cover  
19 sheet that would have only the categories that are in  
20 OCA's system now, because I assume that some courts may  
21 then have a different sheet that they'll give to parties  
22 that's more consistent with their system. I don't know  
23 how strongly the various courts and clerks feel about  
24 this, if they would -- if they had just one cover sheet  
25 with the OCA categories, then have another cover sheet for



1 parties to fill out, or if they would just transition into  
2 OCA's categorization. Do you have a sense for that? No?

3 MS. WOLBRUECK: No.

4 CHAIRMAN BABCOCK: Let the record reflect  
5 they're shaking their heads "no."

6 MS. GARCIA: I think two is going to be a  
7 disaster.

8 MS. PETERSON: You think having two --

9 MS. GARCIA: If we have two different cover  
10 sheets even locally.

11 MS. PETERSON: Yeah, and I asked that  
12 question only because I think that could be the effect in  
13 some courts who have this system in place and these  
14 categorizations that have long been there and they don't  
15 want to modify their systems or don't have the money to do  
16 it, and in case it's not clear -- and I'm not arguing in  
17 favor of having local modification, but I want to make it  
18 crystal clear that there won't be two different stats in  
19 the end because what's going to happen is that the local  
20 level categorization will be converted into the OCA  
21 categorization.

22 MS. GARCIA: Correct.

23 MS. PETERSON: What OCA has now is a list of  
24 categories, and then by each category the different types  
25 of cases that fall within that, and that encompasses every

1 type of categorization in the courts across the state.

2 MS. GARCIA: Yes.

3 MS. PETERSON: And so I just wanted to make  
4 that crystal clear.

5 CHAIRMAN BABCOCK: Okay. Justice Bland.

6 HONORABLE JANE BLAND: Well, if these sheets  
7 are for recordkeeping purposes mainly, and we're going to  
8 have different ones for county courts and district courts,  
9 why do we need a rule of civil procedure for it? I mean,  
10 obviously it's a good thing for lawyers to fill them out  
11 when they come, and I think that's what they're doing, I  
12 guess in all the counties right now, but if we're going to  
13 have a rule of civil procedure that requires it, and  
14 apparently we're going to discuss whether there should be  
15 some penalty or consequence for not filing it, then it has  
16 to be uniform across the state because now we've made it,  
17 you know, not just something that's a matter of  
18 recordkeeping for the clerk's office or for the court  
19 administration, but, you know, something that's like  
20 required to file your lawsuit.

21 And it seems to me like maybe we don't even  
22 need a rule about this in the Rules of Civil Procedure, if  
23 we're going to have different ones in different courts,  
24 you know, let the clerks -- if the clerks have already got  
25 a handle on it and they already are happy with the forms

1 that they provided to us and they, you know, really don't  
2 need any input on the forms from our committee, why should  
3 we even get involved with it? Let's let them handle it.

4 MS. PETERSON: Mary has her hand up. She's  
5 had it up --

6 CHAIRMAN BABCOCK: Yeah, Mary.

7 MS. COWHERD: Currently only a handful of  
8 counties in the state use cover sheets. As part of this  
9 whole judicial data project we're trying to --

10 THE REPORTER: I'm sorry. Can you speak up  
11 a little bit please? I can't hear you.

12 CHAIRMAN BABCOCK: The court reporter can't  
13 hear you, Mary.

14 MS. COWHERD: Very few of the counties in  
15 the state currently use cover sheets, and the reason to  
16 come to this committee to get a Supreme Court rule, the  
17 idea is by having a rule it might encourage attorneys who  
18 would otherwise not file a cover sheet. It may be a  
19 little bit of a stick to get them to do so.

20 CHAIRMAN BABCOCK: Okay.

21 MR. PERDUE: Can OCA say how many product  
22 liability cases were filed in Texas, in the State of  
23 Texas, in 2007?

24 MS. COWHERD: No. Right now we can't under  
25 our case categories, current case categories.

1 MR. PERDUE: But we can find that out from  
2 the Harris County district clerk?

3 MS. GARCIA: Yes.

4 MR. PERDUE: Or Dallas County.

5 CHAIRMAN BABCOCK: Frank.

6 MR. GILSTRAP: If we don't require it to be  
7 filed when they come in the door, what mechanism is there  
8 for making people file it? In the court of appeals if you  
9 don't -- you know, the clerk sends you a notice, you know,  
10 "Fill out your docketing statement or we're going to  
11 dismiss your appeal." I can't see the clerk in the  
12 district clerk doing that. We probably don't want him to  
13 do it, so how do we mandate it?

14 CHAIRMAN BABCOCK: Yeah, Mary.

15 MS. COWHERD: There's an AG opinion from '87  
16 that says that a clerk cannot refuse to file a pleading if  
17 it hasn't been signed by an attorney, and if he's -- you  
18 know, I would assume this would fall in that same  
19 category. If an attorney filed a suit and didn't fill out  
20 a cover sheet, the clerk would still be required to go  
21 ahead and file everything. Dallas and Lubbock County  
22 currently require cover sheets, and Lubbock, they adopted  
23 a local rule that says if an attorney comes in or a party  
24 and doesn't have a cover sheet with them they have 10 days  
25 to complete it. I don't know that there's any sort of

1 punishment if they don't, and in Dallas, same thing, you  
2 know, if they -- about half of the attorneys file cover  
3 sheets in Dallas currently.

4 CHAIRMAN BABCOCK: The Court could by rule,  
5 however, require the cover sheet as part of a filing,  
6 don't you think?

7 MR. GILSTRAP: You could, but that's kind of  
8 a weighty thing. I mean, you've got some kind of right to  
9 come in and file my lawsuit, and now some bureaucrat is  
10 standing up here, "No, you have to fill out a two-page  
11 form."

12 CHAIRMAN BABCOCK: Well, I wouldn't call  
13 Justice Hecht and his colleagues bureaucrats, but --

14 MR. GILSTRAP: But some people would take  
15 that position. I mean, "I have a right to file this  
16 lawsuit."

17 HONORABLE TRACY CHRISTOPHER: They might  
18 call the OCA a bureaucrat, though.

19 CHAIRMAN BABCOCK: Richard, this is going to  
20 be referred to your committee to study these weighty  
21 issues, assuming you get reappointed to the Supreme Court  
22 Advisory Committee.

23 MR. ORSINGER: There you go. There's always  
24 hope, huh?

25 CHAIRMAN BABCOCK: So, Mary and Angela,

1 thank you for coming this morning. Saturday mornings are  
2 not the easiest times to do these.

3           A couple of housekeeping things before we  
4 get to Justice Gaultney's and Professor Albright's  
5 reports, and that is that the proposed amendments -- Judge  
6 Peeples, you'll be interested to hear this -- the proposed  
7 amendments to Rules 296 through 329b are of interest to  
8 the Court, and Justice Hecht would like the -- the  
9 specially appointed group to consider it. In light of the  
10 work that's been done, we think that the special committee  
11 should consist of Ralph Duggins as chair and Elaine as  
12 vice-chair, Elaine Carlson as vice-chair, with you, Judge  
13 Peeples, and Mike Hatchell and Nina Cortell, Bill  
14 Dorsaneo, and Sarah Duncan as the members. Anybody else  
15 that wants to be on this special little group, dive right  
16 in and just let Ralph now, and we'll look for a report  
17 from them at our next meeting.

18           So with that, Justice Gaultney, could you  
19 give us an update on the classification of appellate civil  
20 or criminal? I don't think this is for discussion. It's  
21 just for an update.

22           HONORABLE DAVID GAULTNEY: Okay. Just as  
23 background, at the last meeting the committee adopted a  
24 recommendation to an amendment to appellate Rule 12.284,  
25 and this deals with how appellate clerk designates a case

1 when it comes in for filing, either CR or CV. CR for  
2 criminal, CV for civil. The committee asked that I report  
3 to the Chief Justices of the appellate courts and get  
4 their response. I did that in September. They approved  
5 the recommendations. I then asked our clerk to e-mail the  
6 other appellate clerks and get their responses, and so we  
7 received no objections from any of the appellate clerks to  
8 the proposed amendment. We received 10 responses, so  
9 that's our report.

10 CHAIRMAN BABCOCK: Okay. Thank you very  
11 much. Alex Albright is the reporter for the State Bar  
12 Court Administration Task Force, and she has an update for  
13 us on that project. Again, this is just informational,  
14 not for discussion.

15 PROFESSOR ALBRIGHT: On the table there are  
16 these green books that the State Bar had printed up, and  
17 the State Bar asked me -- said they would love for you-all  
18 to have one and take it home, but if you're going to take  
19 it home and throw it in the trash, please give it back to  
20 me, because they said these are expensive.

21 HONORABLE NATHAN HECHT: And it's also  
22 available online.

23 PROFESSOR ALBRIGHT: It's online, right. If  
24 you go to the State Bar website there's a link on the  
25 State Bar website. So this is -- I think we talked about

1 it, Jeff and I talked about it, two meetings ago. In  
2 response to the legislation last session sponsored --  
3 well, it was put forward by Texans for Lawsuit Reform, and  
4 they had a book that they -- with proposals about  
5 revamping the court system. The most controversial part  
6 of that legislation was the complex courts. They had a  
7 provision where there would be some judges who would be  
8 appointed as complex judges who could then be sent to try  
9 complex cases elsewhere in the state. Very controversial.  
10 The bill was changed and became a resources bill where it  
11 was providing additional resources for complex cases.  
12 Kind of what got lost, it was a much bigger bill, and  
13 there was lots of provisions for streamlining, changing  
14 the structure of the Texas courts as well.

15           The bill didn't get through, so the State  
16 Bar appointed a task force that worked for about a year, a  
17 little more than a year, to talk about the provisions of  
18 those -- of the bill in the last session because Senator  
19 Wentworth said that he -- or, no, it was Senator Duncan  
20 that said that he was going to propose something like it  
21 again in this next session, and the State Bar wanted to be  
22 prepared with how the Bar was going to respond and what  
23 the -- what the Bar would like to support or not. So  
24 there was legislative members, there were judges, there  
25 were lawyers, lots of people on this committee. The list



1 is in a footnote in the report. Martha Dickie and Ken  
2 Wise were co-chairs. Dickey Hile was chair of the  
3 subcommittee on trial courts; Tom Cunningham, chair of the  
4 subcommittee on appellate courts; and Carl Reynolds was  
5 the chair of the subcommittee on specialized courts.

6           The final report moves -- I think the  
7 biggest part of this report really relates to the trial  
8 courts, which it was interesting to see how the discussion  
9 evolved because originally everybody thought the complex  
10 courts was going to be the big deal, and everybody kind of  
11 agreed on how to handle that pretty quickly, so it's kind  
12 of a smaller piece of it. The big part of it is the trial  
13 courts. The idea is to generally move over time to a  
14 three-tier court system that would be district court,  
15 statutory county court, and JP court for civil courts to  
16 eventually take away from the constitutional county courts  
17 their litigation function, and so each county should have  
18 available a county court at law to have -- to handle  
19 county court cases. There is a provision already in the  
20 statutes where counties can share a county court at law.  
21 There are no such animals in the state right now, but it's  
22 possible. Recognition is that this is a long way to be  
23 there. Each tier would have pretty separate  
24 non-overlapping jurisdiction, so that's where we're going  
25 for the long term in this report.

1           Immediate recommendations are to change the  
2 district court jurisdiction so its minimum jurisdiction  
3 would be \$10,000, so significantly raises the district  
4 court's minimum jurisdiction, so more of the smaller cases  
5 go into the county courts, go into the justice courts.  
6 All district courts would have identical civil, family,  
7 criminal, and juvenile jurisdiction. Right now we have  
8 some district courts that only have family court or only  
9 have criminal court jurisdiction, and so when demographics  
10 change in a county they can't change the jurisdiction of  
11 the district, a specialized district court. We would --  
12 the proposal still encourages specialization, but on the  
13 county level, so the counties, if they have multiple  
14 district courts, then they can designate certain courts to  
15 specialize in particular kinds of cases, but their  
16 jurisdiction is not limited so that can be changed. There  
17 are a lot of counties that do that already.

18           County courts at law would have maximum  
19 jurisdiction of \$200,000 for all county courts at law.  
20 Right now there are many county courts at law that have  
21 more jurisdiction than that. Many -- several county  
22 courts at law that have the same jurisdiction as a  
23 district court, and that's a funding issue. It was when  
24 the county needed an additional district court, but the  
25 state didn't have the money, the county said, "We'll pay

1 for it," so the county got a county court at law with the  
2 jurisdiction of a district court. All county courts at  
3 law would become -- have \$200,000 maximum amount in  
4 controversy, uniform definitions of subject matter  
5 jurisdiction. There are many -- it's detailed in the  
6 report -- many types of subject matter jurisdiction as  
7 distinct from amount in controversy jurisdiction. At  
8 least the proposal does not designate that they all have  
9 the same subject matter jurisdiction, but if you're a  
10 family law -- if you're a county court at law with  
11 juvenile jurisdiction then at least the juvenile  
12 jurisdiction is the same for every county court at law  
13 that has juvenile jurisdiction. Now they're all over the  
14 place, so that's the step towards uniformity in that for  
15 that.

16           Okay. So what do you do with all these  
17 county courts at law with more than \$200,000 amount in  
18 controversy? By January 1, 1911, the counties have to  
19 elect whether those are going to become district courts or  
20 they would stay a county court at law limited to \$200,000  
21 amount in controversy, so there's a recognition that if  
22 you convert all of these to district courts then the  
23 county may need to ask the Legislature to create some new  
24 county courts at law, and also that they may need some  
25 money to convert county courts at law which have six

1 person jury facilities to -- if they become a district  
2 court they have to have 12-person juries, so there is some  
3 physical issues that requires money. So they have to make  
4 a decision.

5 Under the original legislation there were  
6 some county courts at law that would maintain their excess  
7 jurisdiction, and we decided that if we're going to make  
8 this change, you just had to decide whether you were going  
9 to be a district court or a county court and try to  
10 maintain some uniformity from then on.

11 JP courts, I had to leave early yesterday.  
12 I don't know if you-all talked about the small claims  
13 issues that were raised.

14 CHAIRMAN BABCOCK: We did.

15 PROFESSOR ALBRIGHT: It's very clear that  
16 there are some real issues with small claims courts and  
17 JP -- in JP courts, and the JP courts want some small  
18 claims court rules with simplified procedures instead of  
19 have it by statute, so this asks that the small claims  
20 court statute be repealed and that the Supreme Court  
21 appoint a committee to adopt rules for small claims  
22 procedures that would be simplified procedures. In the  
23 interim it asks that the statute be appealed -- I mean,  
24 that the statute be amended to allow for appeal of small  
25 claims court cases to the court of appeals, because right

1 now it's been interpreted that if you start in small  
2 claims court everything ends at the county court. That's  
3 your final appeal, and you can't get up to the court of  
4 appeals, which appeared to be kind of the issue in that  
5 thing yesterday.

6 MS. PETERSON: That was part of it.

7 PROFESSOR ALBRIGHT: Let's see. There's a  
8 proposal for uniform provisions for subordinate judicial  
9 officers. Each county has magistrates or special masters,  
10 or there's all different names and ability -- you know,  
11 jurisdiction for subordinate judicial officers, and so  
12 this makes it more -- makes it uniform throughout the  
13 state.

14 And for court of appeals, basically there  
15 was not much proposal for change there. It didn't seem to  
16 be politically that anything is going to happen, so the  
17 only proposal is really to move towards stopping  
18 overlapping districts, whatever that means, so for the  
19 user. For complex cases, it was overwhelming that nobody  
20 wanted complex courts or complex judges, that --

21 HONORABLE STEPHEN YELENOSKY: Well, you're  
22 stuck with us.

23 CHAIRMAN BABCOCK: You've got to leave.

24 PROFESSOR ALBRIGHT: We like simple judges.

25 CHAIRMAN BABCOCK: Simple judges.

1 HONORABLE STEPHEN YELENOSKY: Joe the judge.

2 PROFESSOR ALBRIGHT: That's right. Joe the  
3 judge. And so everybody thought there needed to be  
4 resources for complex cases that we -- it was really  
5 interesting. We had all these discussions about, you  
6 know, that complex cases could arise anywhere, it's not  
7 just a big city issue, and it's not just a big civil case  
8 between companies issue or big tort issue. It could  
9 happen -- for instance, it could happen in family law and  
10 then guess what happened one day, the next day after we  
11 had a meeting and talked about that, was the FLDS cases in  
12 -- I can't remember.

13 HONORABLE NATHAN HECHT: San Angelo.

14 PROFESSOR ALBRIGHT: In San Angelo. Well,  
15 no, it was actually in Eldorado, in Eldorado, that Judge  
16 Walther was dealing with. So it became the poster child  
17 of what everybody was talking about, that this can happen  
18 anywhere and it can happen in any kind of case, and that  
19 was -- talk about a complex case, it was a complex case  
20 that had to be dealt with very quickly, and it became  
21 apparent that if there had been some provisions to funnel  
22 some additional resources to her immediately that it would  
23 have been terrific to have that, that mechanism in place.

24 My favorite story about the FLDS cases was  
25 Judge Walther said that she told the clerk in Schleicher

1 County, said, "Okay, we're going to move to the courthouse  
2 in San Angelo, and they're going to help us, but we need  
3 you to get all your stuff together and, you know, so we  
4 can move to it San Angelo and get, you know, whatever kind  
5 of equipment you have." So the clerk arrives in San  
6 Angelo and has brought the Selectric typewriter, so it's  
7 very clear that there are very different --

8 HONORABLE JAN PATTERSON: And seven goats  
9 for a shredder, right?

10 PROFESSOR ALBRIGHT: That's right. So what  
11 this proposal does is adds judicial resources for specific  
12 cases requiring special judicial attention. We also  
13 realized the word "complex cases" had become loaded, so  
14 there are cases requiring special judicial attention,  
15 could be any kind of case. There is a JCAR, a Judicial  
16 Committee on Additional Resources, which are presiding  
17 judges and the chief justice that make these allocations  
18 upon application from the trial judge. There's also a  
19 proposal to provide funding for a pool of lawyers that  
20 will be at OCA that can be sent out to different counties  
21 to help trial judges.

22 Apparently the urban counties already have  
23 lawyers to help trial judges, and they were not as  
24 desperate for it, but there were some -- like Judge  
25 Walther was desperate for lawyer help to help in those

1 cases. Also, to fully fund the visiting judge program to  
2 help in these cases.

3           There are some provisions on transfer  
4 between courts. There is a provision about presiding  
5 judges, that they should be selected by the Supreme Court  
6 from a list provided by judges in the region. This is  
7 fairly controversial, and it was a close vote. It was the  
8 general feeling that the Governor should not appoint the  
9 presiding judge, but it should be either by -- appointed  
10 by the chief justice, but the final vote was the Supreme  
11 Court, with a list provided by the judges in the region.  
12 So I'm happy to answer any questions if I can.

13           CHAIRMAN BABCOCK: Thanks, Alex. Any  
14 questions?

15           MR. GILSTRAP: And where is the complex  
16 court material in here? It's kind of hard to find your  
17 way around here because they have these warm and fuzzy  
18 section titles.

19           PROFESSOR ALBRIGHT: Yeah, that was our --  
20 we all talked about that. That was so we could talk about  
21 it in the elevator what our common goals were. It's under  
22 flexible resources, so on page 40.

23           MR. GILSTRAP: All right. Thank you.

24           CHAIRMAN BABCOCK: Yeah. Justice Gray.

25           HONORABLE TOM GRAY: Chip, I have kind of a



1 supplemental civil versus criminal update --

2 CHAIRMAN BABCOCK: Yeah.

3 HONORABLE TOM GRAY: -- when it's  
4 appropriate.

5 CHAIRMAN BABCOCK: It's always appropriate.  
6 Go ahead.

7 HONORABLE TOM GRAY: Okay. The case that  
8 was before the Court of Criminal Appeals was *In Re:*  
9 *Johnson*. That was the inmate who was challenging the  
10 taking of court costs from his inmate account, and the  
11 issue or one of the issues in that case was whether it was  
12 civil or criminal.

13 CHAIRMAN BABCOCK: Right.

14 HONORABLE TOM GRAY: The Court of Criminal  
15 Appeals about three weeks ago now, I believe it was,  
16 dismissed that case, having determined that that was a --  
17 was not a CR case, it was not a criminal case, and that  
18 they had no jurisdiction; and the reason I wanted to bring  
19 that up is that goes back to the reason this originally  
20 came up in the chiefs meeting and was originally referred  
21 to the Court for action, is that now the actual person in  
22 that suit, who is the inmate Goad, what does he do?  
23 Because he's now exhausted his relief, so to speak, at the  
24 Court of Criminal Appeals, and what was suggested in the  
25 chiefs was a mechanism when it gets to that level and is

1 decided that allows whichever court decides it is not  
2 theirs to send it to the other one, but that's just an  
3 update on --

4 CHAIRMAN BABCOCK: Oh, that's good.

5 HONORABLE TOM GRAY: -- where this all got  
6 started and now where that particular case is.

7 CHAIRMAN BABCOCK: Yeah, really interesting.  
8 Yeah, great. Okay. Yeah, Judge Christopher.

9 HONORABLE TRACY CHRISTOPHER: Can I ask  
10 whether we in this committee will vet any of the ideas in  
11 this task force report or are we just going to wait and  
12 see what happens or --

13 CHAIRMAN BABCOCK: Well, I don't know the  
14 answer to that, but --

15 HONORABLE NATHAN HECHT: I think we'll wait  
16 and see what happens and then go from there. I think  
17 we'll see what happens this session, because I know the  
18 Bar wants to present the report and some interest in the  
19 Legislature in some of these ideas, so I think we see what  
20 happens the next few months just from a resources point of  
21 view, and then decide whether -- whether and what to  
22 pursue.

23 HONORABLE TRACY CHRISTOPHER: I would just  
24 hate for the Legislature to do some of these things  
25 without input of this group.

1 HONORABLE NATHAN HECHT: Yeah. Well, the  
2 more complex things that really need some attention, I  
3 don't know if they'll get them, like the structure of the  
4 judiciary. It really just is intolerable that the Texas  
5 judiciary is structured the way it is. I mean OCA's  
6 annual report on the jurisdiction of the trial courts in  
7 Texas is like 10, 15 single-spaced pages. It's just all  
8 over the map. And people lose -- you know, they lose  
9 their cases every once in a while because they got it in  
10 the wrong court, and so some work should be done on that.

11 You know, on small claims, it would be  
12 helpful, but it's a less -- I mean, I think if the  
13 Legislature moved it to try to consolidate the small  
14 claims and the JP courts they'd look to the Supreme Court  
15 to set up some rules for that, so I don't know how much  
16 input we would have between now and the session.

17 MS. PETERSON: When are we meeting, or when  
18 do we define the meeting dates for the next year?

19 CHAIRMAN BABCOCK: Well, the first step is  
20 the Court is going to have to appoint a committee, and  
21 then if I'm chair then Angie and I will get with you and  
22 Justice Hecht and pick the dates.

23 MS. PETERSON: Okay.

24 CHAIRMAN BABCOCK: In consultation with  
25 hotels and the University of Texas.

1 MR. ORSINGER: Football schedule, the  
2 University of Texas football schedule.

3 MS. SENNEFF: And hotel schedules.

4 CHAIRMAN BABCOCK: Pete.

5 MR. SCHENKKAN: Could -- Alex, maybe I  
6 missed this, but could you talk a little bit about what  
7 the State Bar's plans are based on this report going into  
8 this, because in particular I'm interested in the  
9 arbitration one, which for me came out of left field. I  
10 didn't understand that was part of the charge of this deal  
11 and seems to be a highly, highly charged issue, which is  
12 likely if it gets any traction at all to completely  
13 prevent attention to these, you know, more -- less  
14 exciting, but things we will really actually need to do  
15 and maybe have legal authority to do in the State of  
16 Texas, not affected by the Federal arbitration.

17 PROFESSOR ALBRIGHT: I forgot to flip my  
18 page over. There's also juror comprehension, which we  
19 talked about earlier, and arbitration issues. The  
20 arbitration issues, I think when we were writing the  
21 report it was like that just kind of came out of left  
22 field. It was there was a subcommittee that finished its  
23 work, and there was a group on that committee that wanted  
24 to deal with the issues. Obviously it only involves the  
25 Texas Arbitration Act. There are minority reports on the

1 arbitration issues.

2           But the state -- I think the State Bar,  
3 they're going to take this to the Legislature. It's not  
4 that there is a set of proposals. We don't have bills,  
5 but it's more talking points, I think, and I think the  
6 State Bar is probably going to focus on the jurisdiction  
7 issue more than anything.

8           MR. SCHENKKAN: I mean, the Legislature is  
9 not going to be told that the State Bar of Texas favors  
10 these arbitration measures, are they, for instance?

11           PROFESSOR ALBRIGHT: This is presented -- it  
12 didn't come from the Bar's Legislative Policy Committee.  
13 It is intended for educational and information purposes  
14 only, that the State Bar convened a group of interested  
15 people, and this is what they could -- this was the  
16 consensus of that group.

17           MS. PETERSON: And at the House Judiciary  
18 Committee last week there were representatives from the  
19 group who again reiterated what's stated in the pamphlet,  
20 "We're not recommending anything. This is just intended  
21 to be a resource."

22           MR. SCHENKKAN: I mean, maybe this is a  
23 partial response to both. Would it be out of order for  
24 this committee to take a vote on the proposition that we  
25 are in favor of attention to these judicial administration

1 parts of this package and we don't consider it to be part  
2 of our charge? We're not taking a stand for or against  
3 the other provisions, but that we really would like to see  
4 some attention to these judicial structure ones.

5 PROFESSOR ALBRIGHT: Yeah, I think it's all  
6 if the Legislature feels like there's substantial support.  
7 I think what happened in the last session was that there  
8 was a thought that there were some fairly uncontroversial  
9 issues and then it just got --

10 MR. SCHENKKAN: They got carried into  
11 controversial ones, and I'm worried about that happening  
12 again.

13 CHAIRMAN BABCOCK: Judge Yelenosky.

14 HONORABLE STEPHEN YELENOSKY: Alex, you  
15 mentioned that with regard to specialization you were --  
16 or I don't know, encouraging or recommending or whatever,  
17 discussing that all district courts would be of general  
18 jurisdiction, but that that would not affect  
19 specialization at the county level.

20 PROFESSOR ALBRIGHT: Right.

21 HONORABLE STEPHEN YELENOSKY: Did you  
22 explore or make any suggestions about how the decisions  
23 get made, by agreement of the district judges to  
24 specialize, or did you touch that issue at all?

25 PROFESSOR ALBRIGHT: I think we didn't --

1 you know, we talked about how different counties did it,  
2 and I think we did not focus on that. It was more that we  
3 were focusing on the statewide statutory issue of what we  
4 wanted to maintain was flexibility county by county so --

5 HONORABLE STEPHEN YELENOSKY: And when you  
6 say counties, my understanding anyway, like in Travis  
7 County it's just because the district judges agree, okay,  
8 at least for this period of time these courts are only  
9 going to take family law.

10 PROFESSOR ALBRIGHT: Right.

11 HONORABLE STEPHEN YELENOSKY: So county  
12 level means all the district judges at that county level?

13 PROFESSOR ALBRIGHT: Or if the county judges  
14 have said that they have a presiding judge who gets to  
15 make those decisions then that's the way they make it, but  
16 the county gets to -- the county judges get to decide how  
17 those decisions are made for that county.

18 HONORABLE NATHAN HECHT: In further response  
19 to Judge Christopher's question, the jury comprehension  
20 and other issues that we've been talking about here, this  
21 meeting, we do expect to have rules and a proposal ready  
22 to adopt by the beginning of the session, the Supreme  
23 Court does, so that it will be what we're going to do,  
24 unless the Legislature has other ideas. So that -- so  
25 that's an exception to this.

1 CHAIRMAN BABCOCK: Okay. Yeah, Judge  
2 Christopher.

3 HONORABLE TRACY CHRISTOPHER: Well, there  
4 was just one point in here that was troubling to me as a  
5 judge that goes to both the First and the Fourteenth Court  
6 of Appeals, that somehow the committee -- the report  
7 recommended that each judicial district would be assigned  
8 to a specific court of appeals.

9 PROFESSOR ALBRIGHT: I think it was that  
10 that would be looked at.

11 HONORABLE TRACY CHRISTOPHER: I thought it  
12 was a little stronger than that.

13 PROFESSOR ALBRIGHT: Was it a little bit  
14 stronger than that? But I think there was a recognition  
15 that it's -- the whole Houston issue is very problematic,  
16 and there was very --

17 HONORABLE TRACY CHRISTOPHER: But I wonder  
18 what the problem is that people were trying to address  
19 there, because -- which is why, you know, I think that's  
20 an issue that this group ought to talk about before  
21 somehow that gets put in some bill somewhere, frankly.

22 PROFESSOR ALBRIGHT: The issue was whether  
23 it makes sense for one district court to have its papers  
24 graded by two courts of appeals.

25 HONORABLE TRACY CHRISTOPHER: But with the



1 way we freely transfer cases between district courts and  
2 how we preside for each other in cases, the idea that the  
3 11th District Court is going to go to the First and the  
4 55th District Court is going to go to the Fourteenth and  
5 somehow there's going to be some sort of, you know, when  
6 I -- I'm the judge of the 11th, but I'm sitting in the  
7 55th for a day or signing their papers or hearing some  
8 hearings for them because they're busy, and so suddenly  
9 I've got a different court of appeals versus when I'm the  
10 11th. And then I recuse out of a case and my case is  
11 suddenly transferred to a district court that goes to --  
12 you know, I was in the Fourteenth and now I've  
13 transferred. I've recused out of the case and it's gone  
14 to the First. Just it makes no sense to me that we would  
15 consider assigning the district courts in Harris County to  
16 a specific court of appeals because of those issues.

17 CHAIRMAN BABCOCK: Last comment, Frank.

18 MR. GILSTRAP: I notice I couldn't find the  
19 perennial proposal to give the courts of appeals  
20 jurisdiction over appeals of -- under the Federal  
21 Arbitration Act, which has been tried a lot, and it never  
22 has passed. I just wondered if you-all had thought about  
23 that.

24 PROFESSOR ALBRIGHT: No, that wasn't  
25 included in the report.

1                   CHAIRMAN BABCOCK: All right, guys, thanks.  
2 It's been a fast three years that we've all been together,  
3 and I trust that we will see each other in the new year as  
4 a group. So, anyway, thanks again, and we're in recess.

5                   HONORABLE JAN PATTERSON: Thank you, Chip  
6 and Angie.

7                   (Applause)

8                   (Meeting adjourned at 11:01 a.m.)  
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2 **REPORTER'S CERTIFICATION**

3 **MEETING OF THE**

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7

8 I, D'LOIS L. JONES, Certified Shorthand

9 Reporter, State of Texas, hereby certify that I reported

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