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**MEETING OF THE SUPREME COURT ADVISORY COMMITTEE**

December 8, 2006

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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 8th day of December, 2006, between the hours of 9:08 a.m. and 3:51 p.m., at the Texas Law Center, 1414 Colorado, Room 101, Austin, Texas 78701.

# INDEX OF VOTES

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



## Documents referenced in this session

06-10 Rocket Docket, initial e-mail from J. Boyd

06-11 Rocket Docket, initial subcommittee report

06-12 Subcommittee report TRCP 216-299a (12-6-06)

06-9 TRE subcommittee report 9-29-06
(referenced and attached in October meeting)

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CHAIRMAN BABCOCK: Good morning, welcome everybody. Anybody know how cold it is outside? It seems very cold.

HONORABLE HARVEY BROWN: It's cold.

CHAIRMAN BABCOCK: 31 degrees, according to Ms. Senneff, but we're on the record, and the first order of business is to hear from Justice Hecht, as is our custom.

HONORABLE NATHAN HECHT: Well, the five members of our Court who were on the ballot this year were all re-elected, so that's cause for great celebration in our ranks; and the opposite happened in Dallas County; and I am advised by a number of people that that may give rise to more conversation in the Legislature this session about how we select judges in Texas, so losing 41 incumbent judges is a small price to pay, I guess, but it would be nice to talk about it just to see.

On the rules front, we have some parental notification rules out for comment that are not controversial and you may have seen them in -- they're in this month's *Bar Journal,* and they are just kind of some cleanup rules, and effective on December 1st were some changes in the Federal Rules of Civil Procedure regarding what's come to be called electronic discovery, or more

generically, the discovery in civil litigation of electronically stored information, information that is not fairly characterized as a, quote, "document," end quote, and I don't know why those rules have gotten such national press, but they have.

Lawyers have been doing this for sometime, but I think there has been a good bit of lag in the litigation bar in this kind of discovery, and no doubt it will pick up some with this -- with the attention being called to it; and I suppose that raises the question, which I'd like for you all to think about -- we don't have to decide it today -- of whether we should consider corresponding changes in our civil rules regarding electronically stored information in discovery.

The Texas rule, which we adopted as kind of an afterthought, I think, Alex, I think we were in Steve Susman's house getting ready to leave and we thought about electronic discovery, and so we threw something together, and it turned out to be the model for the country, but it actually does dispose of -- it does treat the issues, while briefly, pretty evenhandedly, but I guess as time passes we'll need to revisit that and see whether we should make some of the changes that are in the Federal rules.

The Federal rules picked up our snap back or

claw back provision, which says basically that if you produce something by some sort of mistake, whether it's negligent or not and you now claim it's privilege and you wish you hadn't done it, there's a procedure to get it back; and while you can't unring the bell, you could at least minimize some of the damage, and it can't be used in the merits procedure.

So there's that, but more importantly, the Federal rules have two provisions. One is that a party responding to a discovery request need not go look for information in places that the party identifies as being not reasonably accessible, so this really is the first time in history that you don't even have to go look for it, and this is very important because of the way electronically stored information is kept. Almost certainly if you have backup tapes that there's something on those backup tapes that's relevant because they were copying everything during the relevant time period, but you're not going to go look because you're going to give them the active information first. You can dispute about that, and there are ways of resolving whether you eventually have to go look and who is going to go pay for it, but this is really the first time where the responding party can just say, "No, I've looked here and here and here, and I haven't looked over here, and I'm not going to

until somebody makes me," and it's kind of a nod to the realities of the production of this kind of information.

The second thing is that there is a prohibition on sanctions against a party for losing information in the good faith routine operation of a system. As you probably know, just turning your computer on and off loses some information. If you use word processing, which I assume all of you do, every time -- unless you configure your software specially, every time you save a new draft it erases the last one, or if not the last one the one before that, and so drafts are not except. They are automatically erased. Some of that information is retained by the program, but you can't always tell how much, and so information can be lost just because the system is doing what it's supposed to be doing, and so sanctions are prohibited in that situation, which I think will be a fairly limited number of situations, but nevertheless it's a recognition that that could happen.

So there are those specific provisions in the new changes that perhaps we should look at at some point, and then even though our discovery rules are relatively new and seem to be working fairly well, at least from the reports that filter up, they do -- they are built on the premise that we're going to be exchanging

paper. I mean, that's just kind of the unspoken assumption, and maybe we need to go through and see if they should be changed to acknowledge the reality, which I think in five more years will be almost -- a huge part of discovery will be electronic information and not paper.

But anyway, I don't know if we want to do that right away, and perhaps we want to just kind of look and see how things develop in the Federal system and how our own discovery problems are going, but that's -- if we did undertake that it would be a fairly significant undertaking, and I think that's it, unless people have questions.

CHAIRMAN BABCOCK: Any questions? I'll have one for you in a minute.

HONORABLE NATHAN HECHT: All right.

CHAIRMAN BABCOCK: All right. Well, in terms of what we're doing today -- and I trust everybody got the word that we're not going to meet on Saturday. I didn't think our docket was going to be difficult to get through in one day. We're going to go to this new item of the rocket docket in a minute. At about 10:30 we're going to skip over to Buddy Low's Rule 904 because there is a guest here, Bruce Williams, from Cotton Bledsoe, a fine firm in Midland, who wants to address us on that topic. So if we're done with rocket docket by 10:30 then we'll go

right into Buddy's rule and hear from Mr. Williams. If we're not done with rocket docket, discussing it, then we'll break and hear from Mr. Williams because he has a plane he'd like to catch back home.

There are a number of efforts going on around the state that are coming from the Texas Supreme Court that deal generally with the problem, perceived to be a problem, that there is a lot of litigation business that has been diverted out of the civil justice system to arbitration, to mediation; and the result is that there is a diminishing number of trials, that the jury trial is almost disappearing from the landscape.

This is not something that's unique to Texas. It's been observed on the Federal level as well. Judge Higginbotham of the Fifth Circuit started speaking about this probably four or five years ago. As a result, Chief Justice Jefferson has appointed a task force to look into this issue. There is a project that Kent Sullivan I know is involved in and perhaps other people of this committee, and the Legislature is looking at thinking about how to change or reform the system to make it more friendly to the users of the system, that is, the people who are claimants and file lawsuits and the people who defend them. Justice Hecht, do you want to say anything more than that about the task forces or whatever?

HONORABLE NATHAN HECHT: Well, as you know, I've written on this, and a whole lot of other people have, too, and I was at a conference this week where there were state judges from around the country, and so the reports are generally the same, which confirm that jury trials by absolute number and as percentage of cases disposed of are way down, like by half or more from 15, 20 years ago. And so query is, is this something we should be concerned about, and if so, what are the causes and what should we do about it, and there's very little forensic evidence about the causes and very little way to get any. You can look at some things, like in Texas, for example, when the workers comp law changed, that whacked 400 jury trials out of our state docket, just bingo, but other states have not had those kinds of changes and they still had a sharp decline in the number of jury trials.

So while you can identify things here and there, they don't seem to be explaining the larger picture, and they certainly don't explain what's going on in the Federal system; and while this is happening on the civil side in most states, and certainly in Texas, the criminal side is essentially unchanged. It has about -- it's down about 10 percent, but it has about the same number of trials that it has always had, but I don't have much to do with criminal law, but the people who do say

that there just haven't been any changes in the criminal law in the last 20 years, and it basically functions the same way it's always functioned.

So one of the reasons to talk about the rocket docket is would that get some of our business back. I think there are two basic views about what could be wrong, or maybe three, three basic views about what could be wrong. One is a kind of an institutional bias against jury trials, which tort reform represents, maybe other legislative initiatives represent, just kind of a movement away in an institutional sense, and some people feel quite strongly that that's the answer, but there's 50 states and in most of the states there have not been those initiatives and still jury trials are down, so it's hard to say if that really explains it.

Second reason is that our product, if you look at it that way, is just not very attractive. It's too expensive and it takes too long and people don't like it and the results are too unpredictable and if you can stay out of it you do. And so if you can put arbitration agreements into contracts then you put them in there, and even the lawyers who complain most vigorously about arbitration put arbitration agreements in their fee contracts, so maybe that's part of it, although, again, it's just hard to know, but if it is then are there things

that we can do to make the civil justice system more attractive to repeat users as a way to resolve disputes or not?

And then finally, there is a very strong view that the reason trials are down is because there's a public perception that's bad about the jury system and about trial lawyers, and we should get a real good advertising campaign going and try to correct that misimpression. And then there are people who believe just as strongly that while that's fine to do that, it's not going to fix what's really wrong, because people who are not using the system are not using it because they've been fooled into not using it, but they're not using it because they've thought about it and they don't like it.

So anyway, there it sits; and query, what, if anything, should be the reaction. And so one possibility is the stuff we talked about this morning, and we're looking for -- the Supreme Court is trying to encourage people to look at other possible solutions. I suspect there is not one or maybe not even three or four. It may be a sort of a play of things that will help matters, or it's possible that this is just a variation with the times, and it's down now, but like the economy, it will be up some day and we should worry about other stuff, but it seems to me we have to at least think about

it.

And so there are these other groups that will be woking on it, but nobody really has -- that's involved in these groups has a fixed agenda about we need to do this, this, this, and this, and then everything will be fine, so I think the more -- the more we are able to reflect on it and draw on the experience of groups like this, the better off we'll be.

CHAIRMAN BABCOCK: Great. And I have been told whether it comes to pass or not, but it's a great compliment to this committee, that whatever is proposed will -- before it gets to the Court will flow through this committee for its advice and inspection and review, including Senator Wentworth told me that if there is legislation, he anticipates that, as with past legislation, that to the extent that there are rules needed to implement the legislation then it will be directed to us to look at.

This rocket docket idea is not being looked at or discussed by any other group that has any sort of formal charter that I'm aware of, and it occurred to me, frankly, when I read an article in the *New York Times* which was somewhat critical of the Eastern District of Texas, because, as you know, that has been a hotbed of patent litigation and litigation involving intellectual

property, and the suggestion in the *Times* was that there was something evil going on here that perhaps the jurors in the Eastern District in Marshall and in Texarkana were somehow pro-plaintiff in a patent case, which seemed to me to be on an odd idea to the extent that anybody in the Eastern District of Texas has given a lot of thought about what patent law is all about, and I'm talking about at the jury level.

And in reading the article and having practiced in the Eastern District of Texas, it just screamed out to me that the reason why that venue is attractive to people, plaintiffs and defendants alike, frankly, is because the judges of that district have gotten together and have decided that they are going to move their cases very, very swiftly to trial so that -- and I from personal experience know that I filed a case myself against Microsoft because I was concerned that this small company that I was representing could not withstand a lengthy expensive battle with Microsoft and that Microsoft was fully capable of litigating for five years and my guy wasn't, and it came to pass that we filed the case in Texarkana, and it came to resolution within 18 months, and everybody seemed to be happy with the process.

The other jurisdiction that we have to look at is the Eastern District of Virginia, which has probably

the most notorious rocket docket in the country and has a long history of experience with it, and it just occurred to me that a lot of cases are filed there solely because the litigants know that they will get a trial -- and Jeff will tell us in a minute, but I think the literature that he -- research shows that the average time from filing to trial in a civil case in the Eastern District of Virginia is five months. Sometimes it's seven months, some years it goes a little longer, but basically five months, which if you think about it is remarkable, and I'm not saying that that is something that we should do, but it certainly seemed to me and to Justice Hecht and the Court that that's something that we should look at.

So that's why it's on our radar right now. The subcommittee, Jeff Boyd's subcommittee, has not had time to look at it exhaustively, but they have had enough time to make a preliminary report to us. There's an outline that Jeff prepared that has been distributed, and with that said, I'll turn it over to Jeff.

MR. BOYD: Thanks, Chip. This is a new issue to our subcommittee as of a couple of weeks ago, and we gathered up some information and visited earlier this week about it, so there's not a whole lot substantively that I can report to you, but what I would like to do this morning is kind of describe the issue of the

subcommittee's charge as we currently have formulated it based on what Justice Hecht and Chip have advised us, describe to you a little bit about what we have done so far, and where we see ourselves going as a subcommittee on the issue and then open it up for your input and advice, informational and directional, for the subcommittee to consider and take to heart as we start digging into this issue.

At our subcommittee meeting, I think Justice Bland made a comment about how we want to make sure that as we devote a lot of time to this over the next year we do it in a way that's worth it, and I thought to myself, "Are we going to be living with this for a whole year?" and, you know, we probably will be. I mean, I think this is a pretty big issue and one that is going to take some digging.

What you need this morning, if you like to have materials in front of you, is the one and a half page preliminary report of the subcommittee, and then there's also an e-mail that I think copies were available and that's somewhat duplicative or kind of an earlier version of the committee report, but attached to that e-mail was a list of articles that we started off with as a subcommittee, and that might be useful to you as well.

The issue as we've currently formulated it,

the charge of the committee is stated in the subcommittee -- subcommittee's initial report that's been provided, and that is to explore, evaluate, and advise this committee on whether and how the implementation of a rocket docket within the Texas state court system may reduce cost and delay, and thereby promote the role and use of jury trials in the resolution of legal disputes.

Justice Hecht and Chip have given a good description of the background that brought up this issue and that was described to us as a subcommittee as we started considering it. I think we start off with the recognition that it's a controversial issue in many ways, and I know my first reaction when we were asked to consider the issue was, well, is there really a problem with vanishing jury trials or is it cyclical and is cost and delay really a reason for that if there is a problem, and if both of those are true, then would a rocket docket really be an appropriate solution to that? And Texas courts are -- and I practice a lot more in state court than I do in Federal court, and part of the reason is because state courts tend to let lawyers run the show rather than judges, and I like that, and most of the time the lawyers on the other side of the case and I are able to work well together to either resolve it very quickly if necessary or let it sit there a long time if necessary to

allow the things to happen.

And so there is -- as a practicing lawyer I have kind of an initial reaction of resistance of the idea of being forced into any kind of rocket docket approach. Our subcommittee is made up primarily of judges and former judges, and Pete Schenkkan and I are the only two on that are not, and so we have a lot of input and insight from judges as well, who probably inherently have some resistance to it as well, because at least according to all the literature we've looked at so far, the fundamental requirement for a successful rocket docket is a judge who's willing to work a lot harder and take control of the case from the beginning and not allow the lawyers to do so. So there may be some initial resistance and some controversy.

Chip mentioned the idea of a rocket docket, at least from our preliminary research, goes back at least as long ago as I've been alive in the Eastern District of Virginia. It's not a brand new idea. They adopted what has been referred to as the early versions of their rocket docket back in the early Sixties. I remember 10 or 12 or so years ago when I did a lot of asbestos litigation Orange County had a form of rocket docket for asbestos cases, and that's the first I remember hearing the phrase.

As it turns out, there are lots of courts

around the country, a lot of Federal district courts, but also a lot of state courts in various jurisdictions who have adopted some form of fast track or rocket docket resolution either as a mandatory or an optional approach, and even some at the appellate level. There are appellate courts who have adopted rocket dockets for appeals, what they call rocket dockets, and yet in the meantime -- and I was not here at the last meeting, I was not able to be here, but I did read the materials and then reviewed some of the transcript and recall the issue that came up from the State Bar's committee recommending that we expand the notice period prior to trial from 45 days to 75 days because 45 days seemed too short, and as I recall the subcommittee recommended against that recommendation and, in fact, this committee, too. So there is resistance, there are good arguments and push and pull both ways on the issue.

As a subcommittee we do plan to look at some of those more philosophical strategic questions but not get too bogged down in them and instead focus more on what is a rocket docket, how does it work and does it work and what does it do, what effect does it have. Assuming that there is a phenomenon of a vanishing jury trial that is not just cyclical but, in fact, if something is not done it will undermind our historical -- the basis that makes

us unique as a system of jurisprudence, assuming that's the case and assuming that's a bad thing and assuming that cost and delay is the factor, then is the implementation of a rocket docket a way to address it; and if so, how would you go about doing that? And so that's kind of how we plan to approach this as a committee.

We gathered a number of articles that -- some as recent, in fact, if you've read this month's *Texas Bar Journal* there's an article in there about the Eastern District of Texas in Marshall and their rocket docket, so very recent literature and there seems to be a lot more, but just at our very quick initial search to gather some law review articles and similar journal articles, there are articles beginning back in '81 that we found just from our very first search, and I'm sure they go back further that talk about this concept, and so we began by gathering those articles.

Members of the subcommittee have reviewed and at least skimmed through a number of those articles, and then we sat down and tried to just create a preliminary list of issues that as a subcommittee we see that it's necessary for us to begin to address. We're so early in the process now that I think both the issue as we have formulated it and the specific issues that we think we need to address are -- will likely be changed as we dig

deeper into this process and hopefully perhaps even from your comments today.

The charge that I've provided -- I mean, the initial report of the subcommittee that's been provided lists those preliminary list of issues that we think we need to address, and perhaps it's helpful to skim through that for a second and then give you-all a chance to provide some input to us as we get into this. First is gathering up some background data such as what is the average time of disposition by jury trial from filing to disposition in Texas and how has that changed over time, have the new rules changed that. I didn't practice back before the discovery rules, but I've heard about practicing before the discovery rules, and my guess is before the old new rules were implemented things were different then, and I always hear stories about how you would grab your file and run to the courthouse, and so the discovery rules, probably not just the new ones, but the old new ones probably have an effect, and we want to try and gather some data if we can on that.

What is a rocket docket? Just a preliminary review indicates there are a lot of different forms of that, but what are the basic principles. Sort of the overarching issue, No. 3, does a rocket docket in fact offer a method to address the perceived problem of the

vanishing jury trial. No. 4, what courts have previously implemented some form of a rocket docket. No. 5, what rules and procedures do rocket dockets typically use, what is it that makes a rocket docket a rocket docket, and I have provided in this report just a preliminary list of things, a very early setting of a fixed and immutable trial date. You know early on your trial is coming up, it's coming up soon, and it's not going to be moved, what we used to call in Orange County I guess the try, settle, or dismiss docket. Once you get put on that with that date you either try it, you settle it, or you dismiss it on that date. It doesn't get continued.

A short discovery period, short period for amendments and dispositive motions, no continuances, central docket rather than individual dockets. Some of the courts have said that's a key factor to make it work because you need judges who are available when your primary judge may not be. What other factors are inherent, Issue No. 6. Judges committed to a speedy resolution, I mentioned that earlier. There is one article that's a pretty interesting article. I think it was about the Nevada courts. I can't remember. I'll have to go back and look. No, Maricopa County, Arizona, I think it was, where one of the older judges described not what is a rocket docket but how did we get one and talks

about how it really took leaders from both the bench and the bar early on to step up and say this is important, we want to do it, and so there's some good sort of soft information in some of the articles we've seen about what it would take to transition to a -- successfully to a rocket docket.

Of course, Issue No. 8, we want to identify what would be the benefits and downsides to a rocket docket, and there are articles that sort of -- they happen to criticize for tending to be more favorable to the plaintiff side than the defense side, although that seems to be only if you are, in fact, a very well-prepared plaintiff because once you file that suit it's time to move. As you probably know, particularly out in Virginia, and more and more so now in the Eastern District of Texas, there are lawyers who make a very fine living because they know the rocket docket and nobody else does, and so the local counsel practice is very important to a rocket docket, which could be both a benefit and/or a downside.

And then, of course, Issue No. 9, under what circumstances could or should rocket dockets be made available in the state courts in Texas. I mean, is it on the one extreme we just change all the rules and from now on if you file a suit in Texas you're on a rocket docket, to the other extreme, which is it's only available if

somebody goes in and convinces a court that this particular case needs to be put on a rocket docket, a request by one side or for good cause shown, or request by one side based on objective criteria, or would it be available only by agreement of all parties. I mean, there are a lot of variety of ways that that could be approached, and as a committee we plan to explore those.

The last item on the list, Issue 10, I don't know that we'll spend a whole lot of time on except perhaps the third little point there, civil -- I mean, there are criminal -- Eastern District of Virginia all have had some high profile cases, criminal cases, recently that took a lot longer than their average, but for the most part all of their criminal cases are rocket docket cases. We don't plan to really look at that, but we need to consider whether and how any kind of approach like this would affect family cases or juvenile cases or others, particularly those with statutory deadlines already in place; and we plan to focus at the trial court level, not the appellate, not at this point consider appellate court level, although like I say, just reviewing the literature you automatically learn about that as you go because there are some appellate courts that have adopted rocket dockets.

And so that's kind of where we are as a

committee. These are the issues we plan to look at. Our approach is, to begin with, to continue to gather more literature and information to help us really kind of understand the lay of the land and what the issue is and begin to address some of these specific issues. There are people who are very familiar with rocket dockets either because they're judges in the Eastern District of Virginia or the Eastern District of Texas or wherever else or they're practitioners, and somewhere along the way we think we'll probably do some talking with some of them, and that's pretty much how we plan to approach it.

So with that, I think the -- what we could benefit from from this committee today is initial responses, thoughts, specific recommendations on where we might turn to begin to gather all this information and data.

CHAIRMAN BABCOCK: Yeah, let's just brainstorm this a little bit. Buddy.

MR. LOW: All right, Chip. Well, one of the things the committee may start looking at, the rocket docket in the Eastern District started with Thad Heartfield who had the Hyundai case that John Ward, who is now a judge up there moving those cases, was one of the primary lawyers involved; and when they met they told Judge Heartfield, said, "It's going to take us three years

to try this case." He said, "Gentlemen, this case will be tried in nine months," and he explained to them how. You may talk to Thad. He set it up. Certain discovery, he did his own. So that is a source.

Another source would be the criminal docket. It's not down. In a criminal case you get your Brady, you get your Jinx, you get them a statement after the witness takes the stand and testifies. I mean, and you get a trial a certain date unless it's waived, so that is a rocket docket that has operated in this state for a long, long time, but those are sources that the committee may consider.

CHAIRMAN BABCOCK: Great. Yeah, Carl.

MR. HAMILTON: Do either of these courts like the Eastern District or Virginia, are they mandatory for all cases or just discretionary or what?

CHAIRMAN BABCOCK: Virginia is mandatory, and I think Texas is, too.

MR. HAMILTON: For all cases?

CHAIRMAN BABCOCK: For all cases. Yeah, I filed a case in the Eastern District of Virginia as a plaintiff right about this time of year, and the responsive pleading was due January 5th, and the lawyer on the other side called me up and said, "Would you agree to a one-week extension so I don't have to work over the

Christmas holidays?" And I said, you know, "sure." So he filed an unopposed motion, which was denied within 24 hours, so that -- that's a -- that gave me a sense of how fast we were going to be moving. Anybody else? Yeah, Frank.

MR. GILSTRAP: You know, we could go through a long kind of philosophical discussion about why this is happening and whether we need it or everything. I think it might be more profitable to think about, well, is it possible even in Texas, and you know, it would be interesting to go back and look at some of these jurisdictions and see exactly what made it happen. So far what I've heard is judges getting together. So I guess maybe all the judges in Johnson County could get together and say, "We're going to have a rocket docket." I don't know, but it doesn't look to me like -- or have they been able to do it through a rule amendment?

Because we tried that with Rule 190, and I don't know what the answer to that is. You know, I mean, what really is -- if -- maybe we need to look and say, okay, if this is a tentative goal how will we get there, and, you know, it may be impossible, or it may be that we don't want to pay the price. Are we talking about a cultural change among lawyers? That's going to be real difficult.

CHAIRMAN BABCOCK: Richard.

MR. MUNZINGER: Well, what prompted me to raise my hand was the cultural change among lawyers. I was in the Eastern District of Virginia a year or so ago. Discovery was served. The discovery was objectionable. I researched the question, came up with seven Federal cases supporting my position, was told by my adversary that I would lose. I went to the Court and lost, and when I lost my adversary cited not a single case. I said to the magistrate who was handling the matter, "Judge, I cited seven cases in support of my position. I don't understand this."

"Yes, Mr. Munzinger, it's hard to find cases in this area of the law."

"Yes, ma'am, but I found seven in my favor."

"I understand. I won't sanction you. Produce the material." Now --

CHAIRMAN BABCOCK: You beat the sanctions, anyway.

MR. MUNZINGER: That's the Eastern District of Virginia. Your trial date, if that's the way it's managed, will affect your discovery and evidence rules and everything else. I would urge the committee to do one thing, and that is when you do your statistical ask how many jury trials are conducted in the Eastern District of

Virginia and compare it to the same statistic in other places, because what happens is people quit. Now, if trials are pursuits of truth and justice, you quit. You quit because your judge won't read a motion for summary judgment. I'll carry the motion for summary judgment until after the jury trial. That happens to us all in many, many cases, rocket docket or otherwise.

Is that justice? It's not justice, and it's not the implementation of rules that the Court and the Court's deciding case law. It's exalting the need for clearing the judge's docket above truth and justice and the interests of free citizens. It's offensive. The Eastern District of Virginia is not a place of you want to -- I don't want to get into a philosophical discussion, but that's what prompted it. You're going to work a change in cultures, ask yourself if you're getting more jury trials or you're just getting people quitting early in the litigation, because that's what you're getting.

CHAIRMAN BABCOCK: But you don't feel strongly about it, fortunately.

MR. MUNZINGER: No, not at all.

CHAIRMAN BABCOCK: Justice Gray.

HONORABLE TOM GRAY: Well, this actually kind of dovetails in with that, because what -- what you're fundamentally dealing with is the cost of

litigation, and not just the cost to the litigants, but the cost to the taxpayer and the need for judges, and if you're not going to create more judicial positions, the need for staff. So I would encourage Jeff as he's going through this and he looks at the places where they have implemented some type of process for accelerating the cases, what is the staffing available.

To get a motion ruled on in 24 hours required somebody to take that motion around to the judges and get it ruled on or some -- even if it's an IT solution, to put it into the judge's hands to get a ruling on it, and that takes staff and it takes IT support, and so it takes resources. So it's not just a matter of adopting a rule and saying this is the way we're going to do it. You're going to have to have some economic resources from the state behind it to say this is a worthy function and we want to accomplish it.

CHAIRMAN BABCOCK: Yeah, Skip, and then Professor Hoffman.

MR. WATSON: Well, there is a precedent for having it happen. I don't know if this has been discussed, but the wholesale Federal movement came about as a result of legislation. The 1990 Civil Justice Reform Act was Congress weighing in on this problem. That's not to say there weren't districts that were doing it before

then, but the 1990 Civil Justice Reform Act was Congress coming in and saying in response to the cry of "Our dockets are clogged up. We need more judges," "We'll give you the judges, but you're going to give us something. We have the purse strings, and what we are going to do is require every United States district to prepare a report prepared by litigants, judges, and practitioners in every court on the reason for," quote, "cost and delay in the United States district courts."

Chip, you may remember when that was done in the Northern District. Darrell Jordan headed our committee. I headed the parts from the Western Divisions, and Terry Oxford and I prepared the report for the Northern District, and the legislation had very specific criteria, some of which is being tracked in what Jeff is talking about.

One of those criteria which Congress deemed critical was early personal judicial involvement in evaluating the case, and the theory was that the judge should put the time that goes in on the back end, you know, at getting ready for trial, at the charge conference, studying the post-verdict motions, trying to undo the train wreck, do that at the front end of getting a handle on the case, and is this a case that's going to require my time, is this a case that should even be in my

court, is this 10-count complaint one that should really be one count, and do I need to assign a law clerk to Shepherd this, do I need to assign a magistrate to Shepherd it.

The beauty of that is that Congress not only required the reports, they required plans. Every United States district court by statute had to prepare a plan for cost and reduction in civil litigation. Those plans are available in every district clerk's office in the United States. The next thing that's great is that every one of us on those committees were, again, charged by statute with reviewing the statistics on every judge, and I mean it was startling the ones who moved their dockets and the ones who didn't, and the statute went further and requires every district court to have the clerk's office, the chief clerk's office, to compile statistics at the end of every year showing their success under the cost and reduction plan in civil litigation. There is a treasure trove of material out there.

I reviewed the plans just to see, you know, how bad did we blow it, you know, in trying to figure ours out because it was seat of the pants. It was good people trying to do it, but, you know, we didn't know how to do it, and we didn't want to offend the judges, and some of them really didn't like that committee telling them that

you need to adopt alternative dispute resolution or move your cases along, and I studied the ones from the other districts in Texas, and there was a tremendous variation in how they approached it.

I mean, some, like in the Eastern District said, you know, we're going to get the trains running on time and move them. Some just sort of adopted alternative dispute resolution and decided to approach it by, "Look, we know that 95 percent of the cases settle, at least by the courthouse steps. We're going to get them to settle at the front end," you know, and so ADR was the kind of panacea, but that's about all they did. But, I mean, this, this ground has been plowed, and it's been plowed in every district court, and by statute they keep statistics on how they're doing, so you can compare the plan that's sitting in a file cabinet somewhere in every clerk's office with the annual statistics of what they've done, and you can even compare those by chambers, and they're not going to publicize it, but it's there.

CHAIRMAN BABCOCK: Yeah, the genius and the curse of the Civil Justice Reform Act was that every district got to do its own plan. You had to do a plan, but everybody could do it pretty much how they wanted to, and those plans were filed in a file cabinet, and there was no mechanism for any central body to say, okay, we

like this one, we like that one. So the Eastern District of Texas developed one approach, and the Northern District of Texas, where Skip and I were were on the committee, basically said, "We sort of like the way things are."

MR. WATSON: You got it.

CHAIRMAN BABCOCK: And we didn't recommend a lot of changes. We did suggest that maybe some judges weren't working as hard as others, which we did with some trepidation, but that massive effort brought some reform, but in many districts it just was business as usual, after a lot of effort. Professor Hoffman.

PROFESSOR HOFFMAN: I think the point I wanted to make is that for -- I'm in favor of and I think that it's a good effort to think about reducing cost and delay. I think there is a danger in coupling that to this vanishing trial phenomenon, and so the point I want to make is that those are ends in themselves, and they may or may not be achievable, either centrally or otherwise, but I think that this committee that is created more likely to do work picking up on the theme I heard Justice Bland say in her comment, doing work that will actually be valuable, if we don't tie it to the vanishing phenomenon for whatever it is.

A related point I'd make is that a couple of months ago when I was at that jury trial summit in Houston

I actually had reported data that I gathered that said in Houston at least time and disposition rates are actually better today than they were 20 years ago when trial rates were higher, and so although there are some folks -- Sherry Diamond has done the work on the Federal side -- that thinks that the longer time it takes Federal cases to go to trial today may account for the drop in the trial rate, that doesn't appear to be bearing itself out, and that just goes back to Justice Hecht's point that there are a lot of explanations that have been offered up, but not all square up.

So the main point I want to make is I think there is something to be said here. I think that we ought to take a harder look at what we have done with the discovery levels because it seems to me that that goes part of the way, if not all of the way, in thinking about treating cases differently where some can move faster than others, but that's part of a larger project about cost.

CHAIRMAN BABCOCK: Professor Dorsaneo.

PROFESSOR DORSANEO: Jeff, I think you ought to contact people who have been practicing for a good long period of time and actually have been doing litigation trial court work and talk to them about, you know, basically what has happened, and I have been practicing for roughly 40 years, and I don't think that's nearly long

enough to make me appreciate what has happened over the years. I'm thinking someone like Jim Cowles in Dallas who -- and other comparable people who would have a much better idea about what really has changed over time, and they could probably tell us what they've seen with their own eyes, and that might be more meaningful than what some professor would write in a *Law Review* article, some young person.

Second, some years back when John Hill was chief justice we had another approach to this same problem that ultimately yielded our meager administrative rules, Rule 7 on times for disposition, et cetera; and I can't think of anything over all that time period, other than perhaps the effort to have uniform local rules, that was rejected more wholeheartedly by the bench and bar. Now, times have changed, but, you know, that effort could be looked at to see, you know, what was attempted and why, why was it so unpopular that it made the proponents unpopular in the legal community generally.

CHAIRMAN BABCOCK: We're not scared about that, are we?

PROFESSOR DORSANEO: Well, I think some of us are. And the last thing, where the Federal courts have kind of ended up in terms of working forward from the Civil Justice Reform Act reports probably indicates that

that's not a very good model, if we're worried about the vanishing jury trial and about things moving forward in a sensible fashion.

CHAIRMAN BABCOCK: Justice Jennings, then Buddy, then Judge Christopher.

HONORABLE TERRY JENNINGS: Well, just generally speaking, it occurs to me that a rocket docket may not have the effect that we're trying to -- or solve the problem we're trying to remedy here, which is the idea that cases that have merit should go to trial and be resolved in accordance with our jury system. It occurs to me the opposite is going to happen, that when you set up this rocket docket, as Richard Munzinger points out, it's going to force cases to settle and some cases that maybe shouldn't settle, that should go to trial, and you should go to resolution. It's going to force those kind of cases to settle rather than to have a trial.

And one thing I'd like to point out, I don't know that this is a new problem. Sixteen years ago I went from a civil law firm to the district attorney's office in Harris County to get trial experience because I couldn't get any trial experience as a young lawyer at a civil law firm, and so I don't know that this is a -- it may be getting worse and becoming far more noticeable now, but it occurs to me that this is an ongoing problem, and one

thing that I've noticed -- and there are a number of reasons why I think things haven't changed on the criminal side, as Justice Hecht pointed out. Things really haven't changed.

Well, on the criminal side, you have a much more simpler system. You have, you know, the Code of Criminal Procedure is codified in one place. It's -- I'd recommend looking at that. I mean, and, again, this may not be very popular as far as, you know, streamlining the rules, but I think that could have a great effect, because at least in a criminal case you know that -- and again, there are a number of reasons a criminal case is simpler to try and, therefore, there are more trials. You know, you're dealing with intentional crimes and so forth, and you have a system that's built up, and you have a district attorney's office where there's pressure to get cases to trial and so forth and so on. Yes, you have that, but you also have a simplified Code of Criminal Procedure, and it occurs to me, you know, as an appellate judge over the years, you know, when we get appeals from criminal trials they're over trials.

A lot of the work that we do on the civil side is over procedural matters, and it occurs to me that maybe the Code of Civil Procedure and also the Texas Civil Practice and Remedies Code have gotten so complicated and

so voluminous that we're spending so much time arguing over, you know, what this particular provision means or that provision means. That goes into increasing the cost of litigation. It has a number of other effects throughout the system, you know, making it more cumbersome, harder to get to trial, harder to get experience, and I think rather than maybe focusing on just like a rocket docket, which may or may not be helpful, that maybe it is time -- and I know that Dorsaneo has pointed this out before -- maybe it is time to maybe think about looking at the Code of Civil Procedure and going through it and streamlining it and making it easier for people to understand so that we're fighting a lot less over what various provisions mean, and you can actually get cases moving through the system.

CHAIRMAN BABCOCK: Buddy, then Judge Christopher, then Carlos, and then Justice Duncan.

MR. LOW: Chip, I don't think the idea is to have more civil trials. I think it should be to have the availability of a civil trial and make it attractive, but not more. We're not going to have more. There are going to be less because way back in the dark ages Lucius Bunton and I used to call each other. We had a client named Vernon Winchester. "How many cases did you try for Vernon this week?"

"Well, I tried one for a 350-dollar car wreck. I tried one 300." I mean, and you don't have those. They can't afford that. You're not going to have those little cases, and maybe we shouldn't have those, so when Lucius got appointed to the Federal bench he called me --

CHAIRMAN BABCOCK: He was a one man rocket, as I recall.

MR. LOW: "I think I'm going to have a docket like old Vernon and you and I had." I said, "Well, go with it," and I think he did. He told me -- I never practiced before him. I never had that much nerve, but -- and I don't mean it derogatory. He was a good friend, but from what I'd hear he would let you -- he said he was going to let them choose. You want on the rocket docket, then fine, he would encourage them; otherwise, he had his regular docket.

Now, I don't know how differently he treated them, but we're not going to have more jury trials, and that shouldn't be the idea, to get more, but it should make it available and make it attractive and affordable.

CHAIRMAN BABCOCK: Yeah. Judge Christopher.

HONORABLE TRACY CHRISTOPHER: Well, I agree that reducing cost and delay through a rocket docket does not equal more jury trials, so I don't -- you know, the

premise of looking at the rocket docket from that point of view doesn't really strike me as, you know, cause and effect. I think if you looked at state court statistics you will find that the vast majority of state court cases are disposed of within twelve months, and, you know, maybe you want it to be nine months, maybe you want it to be six months, but is that really a goal that the majority of the practicing lawyers here want?

We're looking at, you know, high-placed members of the bar here. Would people here support that idea? I don't think they would, just like Richard said. That in most lawyer's mind is not justice. The idea that a judge wouldn't grant a one-week extension on an answer that was agreed to, from a state judge's viewpoint seems crazy, crazy.

CHAIRMAN BABCOCK: Yeah, you're definitely an elected --

HONORABLE TRACY CHRISTOPHER: We're in an elected position. Why on earth would we not agree to a one-week extension on filing an answer? If we want to cut down delay in some cases, we have interlocutory appeal problems, we have increasing liberal use of mandamus problems, we have liberal pleading amendments, third party practices and responsible third party practices. Those three things slow down any important case in the state

court system and would require a huge sea change.

I've only been on this committee for three years and -- or four years, and the vast majority of the time we are trying to prevent the trial judge from doing things. Now, now, you want the the trial judge to have the control to do things. It's a huge sea change.

CHAIRMAN BABCOCK: Carlos.

MR. LOPEZ: I'll stand up since I'm way back here. I agree with much of what she just said, and I want to add one other piece to that puzzle, and that is discovery. I mean, you know, the eternal debate about how much is enough and how much is too much, and you know, it's what makes our system great because you actually know what you're talking about when you go to trial, but we all agree there's a happy medium, and I think a lot of us agree we haven't quite reached it yet. It's hard to push a case as a trial judge when you've got this idea in the minds of the lawyers, the litigants, perhaps their parties and other judges, that discovery is good and that, therefore, more discovery is better, always.

I can't speak for regional differences, but in Dallas I get these requests from the other side, and I'm thinking this is the lawyers and I ask about why we possibly need all that. The other lawyer goes, "Yeah, Judge, that's right, so, you know, we're going to agree to

continuance." And I'm like what is going on here, so I think until we -- one of the things we might need to address that's systemic, in addition to some of the things she just said, is how we feel about discovery.

I mean, I've long said we've got pattern jury charge, which kind of give the trial court some real good, I think, direction about what to do, and everybody knows ahead of time what that charge is going to basically look like in certain scenarios, and I think the reason we haven't done it is it would be such a hard thing to do, but some type of pattern discovery thing that at least as a template says if you've got a breach of contract case here are some things that are relevant. I know they're all different, but they're also all similar, and some guidance that gives the judge a template that says this ridiculous request is so off the chart, you know, I think that would help because until you -- in my experience a lot of those things delayed it, but so did the need for more and more and more and more discovery. You just can't try a case fast when you've got a nine month discovery period, and so until you address that I think you can probably do a rocket docket, but I'm not sure you could do it well until you mesh those competing concerns or at least try to.

CHAIRMAN BABCOCK: Justice Duncan.

HONORABLE SARAH DUNCAN: Yeah.

CHAIRMAN BABCOCK: Did you have a comment?

HONORABLE SARAH DUNCAN: I know nothing -- I've never been a part of a rocket docket other than accelerated appeals in the court of appeals, so my comment, my concern is more theoretical. When you talk, Jeff, about spending a year on this, there were things that came to mind that we have spent a year or years on.

CHAIRMAN BABCOCK: Oh, decades.

HONORABLE SARAH DUNCAN: And part of what always bothers me in those year and decade-long inquiries is it seems to me that either because of the charges that were given or from the Legislature or the Court or from ourselves, we don't define our goal sometimes very well; and when I'm reading this charge, the subcommittee's charge, it seems to assume that it is possible for a rocket docket to, one, reduce cost and delay, and two, promote the role and use of jury trials in the resolution of legal disputes; but then I hear from Judge Christopher you need to unlink those two.

I don't so much care what the goal is. I just think it would be helpful for the subcommittee and for all of us if we defined what the goal is. Is the goal to reduce cost and delay of the system and at what price, or is the goal to have more jury trials and at what price?

And to just assume they're linked going in can cause us to be doing this for a decade and really produce no beneficial results for anyone.

CHAIRMAN BABCOCK: Pete Schenkkan, then Frank, and then Richard had his hand up.

MR. SCHENKKAN: Following up really on what Justice Duncan just said and what Professor Hoffman said and from the particular perspective of a member of our committee, I'd like to make sure that the work we do is focused so we are not doing the wrong thing and not doing the thing that is of use to the full committee and to the Court, and there are two different kinds of discussions going on here. One is about the pros and cons of all types of a rocket docket. The other is about the causes and all cures, possible cures, for the vanishing jury trial. I don't think these are the same thing.

I hope we're not being asked to take on the latter because it seems to me to be a really large, open-ended topic with the distinct possibility that the reasons -- and I'm not even sure of the facts, but assuming that jury trials are vanishing, there's the distinct possibility that they're vanishing because of things like what happened in Dallas in November.

I mean, if you are somebody who has lots of money at stake, that really doesn't look like a very good

system for assuring you will get a good, objective, valid answer at the end of the day. Let's just sweep them all out because they're on the wrong side of the party line this time around, and, you know, I can imagine many other causes for people trying to take their cases out of the jury trial system that are different from it just costs too much and takes too long to get to an answer.

So I'm hoping that -- this is to ultimately reinforce what each of you said. I'd like to make sure for the subcommittee's purpose that our charge is narrowed to what about doing a rocket docket to save money and time and looking at the pros and cons of that and not how do we solve the vanishing jury trial problem, unless I have misunderstood the charge and it is the latter, in which case I'd sort of like to have a discussion of how we go about doing that, because I think it's different.

CHAIRMAN BABCOCK: Frank, can I just say something before you start?

MR. GILSTRAP: Please.

CHAIRMAN BABCOCK: Yeah, I think that the phrase "the vanishing jury trial" is perhaps underinclusive in the sense that it is meant to be shorthand for it appears that a lot of dispute resolution is moving out of the system that we're all part of, the civil court system, to other places; and is that a good or

a bad thing; and if it's a bad thing, what are the ways to make, as Justice Hecht said, the product, the civil justice system, more attractive; and there are a lot of people studying a lot of different things to say, okay, we can make the product more attractive by -- as Justice Jennings said, we can change some of the rules and we can make jury instructions more plain and we can do other things, but I think the charge is, is a rocket docket concept something that would be beneficial to bring things back -- bring cases back into the system, and I could be wrong about that, but I'll let the gentleman to my left correct me.

HONORABLE NATHAN HECHT: No, that's exactly right. Let me just say, I think there's as close to consensus as you can get in the legal community, in the American legal community, on any subject that something profound is happening to the civil justice system, and the numbers are just -- they're just too staggered, and they are over such a long period of time and in so many different jurisdictions, and they're all parallel, so it's very difficult to say it's cyclical or something.

But, that said, then -- you know, then there are questions that everybody has raised, is it good or bad and can anything be done about it, should anything be done about it, would the cost of doing something be worse than

what's happening; and there really aren't any answers that anybody has come up with convincingly to those questions. People have a lot of theories, and as I said at the beginning, they run the gamut from, you know, let's get out there and preach it better, to, well, let's fix this and this and this and this, to, you know, all the way from just a better campaign to tinkering, but nobody -- while there's a consensus that something's happening, there's almost no consensus that this approach or this approach is likely to be very helpful.

But, you know, it's the one percent rule, so-called, that if there's only a small chance of something happening but the consequences are going to be dire, you have to contend with it because it's just too great a risk. So the risks to the way the American civil justice system operates are considerable enough that I think we have to explore these things.

Now, I agree with Sarah that it's better to have a focused charge than not, but this is just an area where nobody knows for sure, and there's lots of opinions and not many facts, and so I know the Legislature is going to be looking at this. They're going to be looking at specialized courts, they're going to be looking at all kinds of things that are suggested that maybe would help things be better, and it would be better to have a

reasoned response like we have presented to them in the past when they were contemplating different things than just say, "Well, no, we don't think that would work," and so, you know, I myself don't know whether -- how much -- how much we're going to find at the end of this trail, and ironically, when you have fewer jury trials, they go to trial faster. So in a sense the delay part of it has been cured by the fact that there aren't any, and when I was on the trial bench it was awfully difficult for a busy judge to get a difficult case to trial in two years. You really had to work at it because you had 25, 28 cases set every Monday morning, and four or five of them wanted to go to trial. Most of them didn't, and so it was hard to get a case to trial in two years. Now the trial judges tell me, you know, you want to go sooner than that, fine.

So they are tied together a little bit, but there -- you know, there's some independence to them, too, and I'm sorry that there can't be a more focused charge given, but I do think we're just -- we're dealing with some issues that a lot of people around the country are looking at, trying to come up with good solutions, and I think we have to try in Texas courts.

CHAIRMAN BABCOCK: I think the order was Frank, who graciously deferred to me, and then Richard and then Bill and then Justice Duncan again.

MR. GILSTRAP: Starting out with what Justice Hecht said, I think one conclusion we can draw from that is probably the way to address this problem is not to try to go through some type of system-wide reform. It's going to get bogged down in some kind of discussion of goals. It's going to be thwarted by politics, and at the end of the day it may not have any effect. It's going to take years.

Go back and look at the Federal model. As Skip was talking, as a result of the 1990 Civil Justice Reform Act and the autonomy that Federal judges have, we now have some fairly good empirical information. We know about how the district courts in the Northern District of Texas as opposed to the Eastern District of Texas operate, and that is extremely valuable. We don't have that at the state court level, and if you're going to try to do a reform it seems to me it might be make more sense -- and I'll just throw this out since we're brainstorming -- to find someplace in the state of Texas, and there would be some political considerations, where the judges in a certain county could get together and say, "Okay, we're going to set up a rocket docket" and just see how it works. I think we'd get a lot quicker information and a lot more valuable information from that than going through some type of two-year reform process in this committee and

then the Court and the Legislature.

CHAIRMAN BABCOCK: Richard Munzinger, you had something? No? Yes?

MR. MUNZINGER: I don't want to bore anybody, but Justice Hecht talked about the problem we're losing business. Buddy talked about Judge Bunton. When decisions are made whether to arbitrate or to try a case in court, the decision is influenced to a large extent by those of us in this room who practice law. So my client says to me, "I have an arbitration clause, should I seek to enforce it or should I try the case in court?" The question becomes, first, which court, state or Federal? Well, let's pretend that we're dealing with a case where the case can be removed to Federal court or can be filed in Federal court originally because there is Federal jurisdiction. A client goes through a litany of considerations or you go through the litany of considerations that you have with your client, saying whether you would prefer arbitration or recommend arbitration as distinct to trial.

I once had a securities case in which the -- an issue was the propriety of the investment, and to understand the propriety of the investment required several hours of work with an expert witness, and a jury if it were a jury trial to explain the nuances of tax law

so that the jury could understand why this investment had been made or had been recommended.

We were in chambers with Judge Bunton, and he said to me, "Mr. Munzinger, you know that no case in my court takes more than three days to try." I said, "Judge, sir, I have an expert witness, it will take me at least two hours to lay the groundwork to get" -- and he began to laugh. "Mr. Munzinger, experts don't testify in my court," and this is true. In Judge Bunton's court in many, many cases you stood up as a lawyer and you read a summary of what your expert witness would say, not -- the witness didn't testify, and you didn't read that he was a professor of this and he had done that and he had done this. "He's been qualified as an expert, Mr. Munzinger. Don't waste the jury's time," when qualifications may have made all the difference in the world as to the believability and credibility of the expert, and that was the court that I was going to take a multimillion dollar investment question to a jury and so what would my -- what would your advice be?

Well, your advice would be take it to a forum in which the nuances and the details of the case may be examined with a degree of interest required for justice and truth, and if that means that you avoid the United States District Court, don't use it, and if it means you

avoid the 171st District Court in El Paso County, don't use it.

The things that prompt lawyers to recommend arbitration are questions of the integrity, intellectual integrity of the -- or intellectual ability of the judge, his or her integrity, do they play favorites, are you in front of Joe Schmoehawkin, who is a big contributor to the state court judge? Big consideration here. Those aren't things that are cured by statistical studies and rules changes.

Another thing you consider is is a jury of twelve laypersons competent to make a decision as to whether drug X will or won't work, for god sakes, and for them to understand it and listen to days and days and days of Ph.D. testimony, are they going to understand. Oh, these are the considerations. That's why I think the system to some extent is not getting cases, and I don't want to bore anybody, but that -- that's a problem, and that was why I raised the point about is the goal here to increase the number of jury trials? Then start asking whether these rocket dockets are getting jury trials or quick settlements.

And, Buddy, I worked for Vernon Winchester, too. He taught me how to try lawsuits. Vernon Winchester was the toughest claims manager in America.

MR. LOW: He was.

CHAIRMAN BABCOCK: 300-dollar claims at a time, right?

MR. MUNZINGER: Oh, he was the meanest, toughest guy you ever saw in your life. Made trial lawyers out of a lot of us, didn't he, Buddy?

MR. LOW: Boy, he did. He trained me, not very well, but a lot of it.

MR. MUNZINGER: Me, too.

CHAIRMAN BABCOCK: Bill. You know this Winchester guy?

PROFESSOR DORSANEO: No. I'm not that old, not quite. Proceduralists know how to simplify the procedural system, if that's what people want to do. I mean, in a sense the 1937 version of the Federal rules and our subsequent modification of Texas rules involved, you know, some simplification. We've had some simplification in terms of jury charge practice during Judge Pope's leadership era, but for the most part we haven't really simplified things procedurally. We've kind of made things more complicated in a variety of different ways.

I gather that these rocket docket systems somehow bypass the procedural rules that we normally go by, either because the judge doesn't go by them or some local rule or practice is used instead.

CHAIRMAN BABCOCK: Or he just says the rules real fast. Just kidding, Bill.

PROFESSOR DORSANEO: I don't hear anybody in academic circles seriously saying that we need to simplify the joinder rules or we need to modify pretrial practice rules that are, you know, mostly what academic lawyers find fascinating. That could be done, and that's something the committee could do, and a reasonably good proceduralist could tell you exactly what could be done to make the entire system, you know, more streamlined, but nobody is interested in doing that, so it seems to me. So I wonder if that should be put up as a -- as a potential goal and examined from top to bottom.

CHAIRMAN BABCOCK: Justice Duncan, then Judge Yelenosky, then Richard Orsinger.

HONORABLE SARAH DUNCAN: My apologies to Justice Hecht and the committee. I apparently didn't articulate my concern very well. If the -- if the primary concern is the vanishing jury trial, it seems to me that the subcommittee ought to be able to determine what type of cases are not getting tried, what type of cases are going to ADR, to mediation, to some other type of dispute resolution. My hunch is those cases -- I mean, just looking at appellate opinions around the state -- are cases in which there is an arbitration -- some type of

alternative dispute that's imposed upon the parties. My understanding is that that's not necessarily a less expensive system, maybe quicker, but it's extraordinarily expensive.

So all I'm suggesting is let's identify what kinds of cases are leaving the system, if our primary concern is the vanishing jury trial and that our product isn't attractive to the people we want it to be attractive to, and then let's work on resolving that problem, because, you know, I think if you look at most of the docket is family law cases. I don't perceive that those cases are leaving the system. Now, they're going to different types of decision-makers, like magistrates or whatever, but I'm not -- I'm not saying cases aren't leaving the system, and I'm not saying that that's not a concern of mine. I'm saying I don't want to impose a rocket docket on everybody just because people -- cases are leaving the system without any empirical proof that imposing a rocket docket on everybody is actually going to bring cases back into the system.

That's what I mean about the fuzziness of the linkage here, is let's identify what the primary goal is. If it's to make our product more attractive to our customers, let's figure out what about our product isn't attractive to our customers right now and fix that.

CHAIRMAN BABCOCK: Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: I want to touch on three points, so you'll know when I'm done.

CHAIRMAN BABCOCK: One.

HONORABLE STEPHEN YELENOSKY: One is public perception, the second is what lawyers want, and the third is central docket. I don't know that anybody has spoken to the public perception. In the mere two years I have been on the bench I have sat through a lot more jury trials than I ever tried myself, and in very many of those on voir dire the question is asked by the plaintiff's attorney, who is leery of what the public is thinking about plaintiffs attorneys, "How many people think there are too many jury" -- or "How many people think there are too many trials?" In liberal Travis County you will get 95 percent of the people raising their hands saying there are too many -- too many cases.

Now, that's a blunt perception. They don't say too many lawsuits or too many trials, but I think you can take that as a public perception that if they were listening to us in this room they would say, "What do you mean there's a problem? That's good." So I'm not making a value judgment on that. I'm just saying that's something you need to recognize, that this room is not -- is not representative of the public at large.

Secondly, what lawyers want -- and this will tie a little bit into the central docket -- is the problem that lawyers, when both sides want to do it, can't get it done because the judges aren't available, or is it that one side wants to do it and the other side doesn't and we need to tell judges in the proper instances to hear that dispute and under our level three force them into something that's even shorter than level two.

I'm on the subcommittee with Jeff and everyone else, and we talked a little bit about this a couple of days ago. Level three certainly would allow you to do in an individual case a rocket docket kind of thing, but I've never gotten the signal as a trial judge that I should really entertain a level three that's faster unless everybody wants to do that. Now, if we were signaled that that was the case then I think the mechanism is certainly there, but do lawyers want it?

Tying into central docket, in Travis County, this morning I was late because I was handling our own little 15-minute Friday morning rocket docket in which because -- Judge Christopher, because it's a state court and not a Federal court I granted a continuance, but the result of that continuance was because the lawyers wanted it that they're getting another hearing Monday morning at 9:00 o'clock and then a second hearing -- these are

related matters -- the following week, any time they want. The judges are available. They can get that hearing, and this is just a minor instance of it, but my understanding of our statistics in Travis County is that you can pretty much get a hearing when you want because we have a central docket. So if both lawyers want to do it, it can be done; and moreover, jury trials, the number of jury trials we didn't reach last year was probably three or four.

And the lawyers can speak better to this than I could in Travis County, but I think if you're talking about whether judges are available in a central docket system, they are. So then you're saying the problem is that one lawyer wants to do it and the other doesn't, and then you're talking about a command structure that I haven't gotten the signal we should have now, which is to force people through a rocket docket.

And then related to that -- we also discussed this at the committee meeting -- if you're going to have a rocket docket, from the lawyer's perspective, maybe less so from the judge's perspective, but if all their cases are on a rocket docket then lawyers' case loads are going to have a decrease and their turnover is going to have to increase. Rather than having 30 cases which take a year or two, they're going to have to have 15 cases that take six months and then turnover to 15 cases,

because when you have one rocket docket among all your cases that's fine, but if they're all rocket docket that is a different kind of sea change, and I am done.

CHAIRMAN BABCOCK: Okay. Good. I mean good comments, not good that you're done. Judge Patterson I think had her hand up, Richard, before you did. Sorry.

MR. ORSINGER: That's fine.

CHAIRMAN BABCOCK: And she's a judge.

HONORABLE JAN PATTERSON: I'm glad to hear Judge Yelenosky's comments because I was going to yield to him to ask about the practice because my sense also is that there are some districts, as Richard points out, that really do this job well and some maybe less well and that the ones -- and I want to -- I think statistical would be very important to know if there is a relationship between timing and jury trials and use of the system, but I think anecdotal is also very important, because my sense is that -- and you-all can tell me if I'm wrong, but we have two very different adjoining counties here, Williamson and Travis, but I think in both of those counties the system is very user-friendly, which I -- and noncoercive and yet you can get a jury trial within six months, if you want one.

And so I think that time and fast is not in and of itself a value, as Richard points out, but we

need -- we can have it all in my view. We can have the justice, and we can have a thoughtful system. Time is not necessarily the ultimate value, although it does feed into it. It is a very important factor, but I think both of these counties without straining or using the coercive rocket docket have managed to provide a very user-friendly system.

I think we also slid into -- both state and Federal courts slid into this system in a cultural manner. We became accustomed to lengthy discovery and cumbersome procedures, and I think that through judges and lawyers, and particularly efficient, effective, honest judges, that we can dredge our way back to a better point. I don't think that faster is necessarily a value, but I do think efficiency is a value, and I think that -- I'd like to think that lawyers look for -- whether it's the counties or the systems that are the most efficient or that those are the ones that do attract the good business.

I also speak up because I have practiced extensively before Judge Bunton, and I never was the target of his water gun, which was also used in the rocket docket, and that system was a little bit -- as Richard points out, a little less thoughtful sometimes, although there was also a -- an attitude of why not, why can't we get this done in a practical amount of time and why can't

we be efficient, and so I have a great deal of admiration for that tone. I don't think it has to turn into a matter as some of these Eastern District rocket dockets, Eastern District of Virginia rocket dockets, turn into as a matter of ego and "We'll show those lawyers we can get it done, whether they want to get it done or not."

I would like to think that we can have it all, that the state system is a user-friendly, effective system in most -- in many parts of the state and that we should fine-tune it and make it even better, and so I don't think it's necessarily a -- the rocket docket will produce more jury trials, but we ought to produce a better system than the rocket docket or some aspect of that, noncoercive, I point out, would move us in that direction to make it a better system.

CHAIRMAN BABCOCK: Thank you, Judge. Orsinger and then, David Jackson, you had your hand up a long time ago. I'm sorry I missed you, but we'll do Orsinger, then you, then Nina, and somebody else is down there, but Orsinger first.

MR. ORSINGER: Okay. I have several points because I have been taking notes. The first is, is that I think that this committee is as good a place as any to discuss big picture concerns over the litigation process as long as we are not being circular in our discussions.

Once we stop covering new ground I feel like we've probably done what good we can, and we have the ear of the head of the court system here in Texas concerned about the larger issues, and so I think a certain amount of our time for that is appropriate.

Second, I think that looking at the rocket docket is overly limiting. I think we ought to look at the entire dispute resolution process, particularly if what's happening is that people are telling us that they prefer alternate dispute resolution mechanisms to the traditional litigation model, and if that's true then maybe we should spend some of our time being sure that the alternate dispute resolution processes are achieving justice, and I'd say by ADR I mean, for example, mediation and particularly arbitration and then summary trials and some of the other alternate dispute resolution processes that we don't do too much. And I would a like to ask the question of how do summary judgments fit into this whole process of migration away and how does appeal fit into it.

Now, with regard to arbitration, between two big corporations and particularly on a multinational basis, arbitration is the only effective alternative because there is no international jurisprudence or trial system that can resolve issues on an international basis. What I'm concerned about is consumer cases, which I would

include family law people in consumers, but I'm talking about individuals who are contracting with businesses or even industries.

I'm concerned that when they enter into an arbitration agreement they think it's going to be cheap, and they don't realize what rights they're giving up, and they don't realize that the arbitration process is going to cost them because they have to pay for their judge and they have to pay for their court reporter and they have to pay for their courtroom, instead of those being provided for free by the government. I'm also concerned about the lack of oversight in the arbitration process. In the particular instance there is no oversight that the arbitrators are applying Texas law at all, much less correctly and either procedurally from the standpoint of evidence or substantively from the standpoint of making decisions that are founded on Texas law.

I'm also concerned about increasing arbitration as opposed to litigation that we lose the importance of contribution of the common law process of developing the law on a case-by-case basis based on specific fact problems of real people rather than just theoretical concerns that might issue from a committee and become some kind of statute, and perhaps we ought to consider more appellate review of the process and the

substantive law that's being applied in arbitration awards.

Now, on the subject matter of the jury system, which I very strongly support, to me personally, the jury system is more important to us in criminal law than in civil law. The grand jury process, which was originally, I think, conceived as a limitation on government of uses has turned out just to be nothing more than a discovery process for prosecutors, and the only human face I guess standing in front of the railroad train of a prosecution that really has got more minim than it should is the petit jury, and we do have to live with the horrible cases where obvious murders are acquitted for the wrong reason, but on the whole I favor the jury system in the criminal law as a protection of our civil rights, and that appears to be healthy. It appears that the jury system is doing well in the criminal law process.

Now, on the civil side, to me the jury is important because it puts a human face on the application of the law to individual cases, and having a jury up there interpreting the law and applying it to the facts is a humanizing process, and apart from that it brings average people into the litigation process so they can see what the law is and how it applies and see how judges act in their courtroom, and if they're influenced they can allow

their vote to be heard in judicial elections or even legislative elections.

Now then, from the standpoint of what do we do about it, we're dealing with people here, which means psychology, and the principles of psychology in modern business practice suggest that we should have an experimental approach, that we ought to have a committee that develops a model or a hypothesis, that we ought to test it intellectually or theoretically first, and then when it's been through all of our thought experiments and debates and everything then we put it in practice somewhere, and it seems to me that you should put it on a voluntary basis on a widespread basis for those people who both sides elect to a rocket docket, let them elect into a known set of procedures that they agree will apply and no one is forced in against their will and then also at the same time find one or two local jurisdictions where the judges are willing to impose a rocket docket and make it mandatory, because at some point you're going to have to experiment mandatory application of the principles.

And then I think we're going to need briefing attorney support for wherever the rocket dockets are in place because I think it's unreasonable to expect a state district judge with no briefing support to be able to deal with the many motions and things that will be

presented, and I think we ought to monitor the progress of both the voluntary systems and one or two counties of involuntary, which by the way, we did the involuntary on the electronic filing stuff and we're still at that stage where there is a few counties where electronic is filing and then there is a number where it's voluntary, and it reminds me of a story I read in some inspirational literature I'll share with you that the Apollo 11 moon project was off course 95 percent of the time, but because of mid-course corrections they were able to achieve a soft landing on the moon.

So I think what we need to realize is that our model doesn't have to be perfect before we implement it in one locale or on a voluntary basis. We can come up with a reasonable, workable model. We can promulgate it not as an official rule of procedure but as an ancillary order of the Supreme Court, subject to modification by a signature of five judges, and proceed if you will on a kind of a interactive basis. Or it could be by a local rule.

Okay. The next point I want to make is the summary judgment procedure. It is oriented right now toward eliminating meritless claims or defenses or eliminating cases that have no fact issues. In reality the primary use of summary judgment in my practice is to

present questions of law to the trial court for resolution so you can decide how to settle your case. I don't know if that's the experience of everyone else. Maybe 99 percent of the summary judgments are frivolous cases being thrown out of court, but the ones I find are legal issues that can't be resolved by the parties and they want some guidance, and maybe we ought to allow trial judges to hand down rulings in the summary judgment context on pure law questions without regard to whether there are conflicting fact issues or not and then open up some kind of interlocutory appeal to the court of appeals that's more than what we have now, which is voluntary on everybody's part, so that we can get these legal questions that are case determinative up to a final decision by the court of appeals and back down to the trial court as a basis for settlement.

Last point I want to make is that I think we should consider --

CHAIRMAN BABCOCK: What point number is this?

MR. ORSINGER: But it's the last one. The family law matters require separate consideration, and they do dominate our docket, but I'll just give you --

CHAIRMAN BABCOCK: What a novel thought.

MR. ORSINGER: I'll give you two for

instances, although I could give you many. Some divorces are filed when one party is unhappy with the marriage, but the marriage is reconcilable because the divorce is a wake-up call to the other party to attend to the complaints of the one who is willing to leave the marriage. Now, we could decide that we want to elevate the speed at which we dispatch divorce cases over the prospect of people initiating the divorce process before they really truly want to end their marriage, but if we do the other, which has been the traditional approach, that we are going to be sensitive to the fact that in family law litigation a divorce may mean you have a problem, but it doesn't necessarily mean the problem is failed, then we need to leave the litigants time to see if they can work out their personal problems before they're forced to divorce because of some rule we adopt here in Austin, Texas.

With regard to the children, sometimes children do not react well to a parent deciding to leave the marriage. It may be the result of an affair, it may be the result of just disaffection; but the children, particularly the older children, tend to take it personally; and if you are forcing a parent access plan on children who are still grieving from the breakup of their parents' marriage, you're going to force someone to put in

place a permanent arrangement with the children that's not subject to modification, short of initiating another lawsuit; and if you put that in place before the family is ready for it, we're again forcing people to put their personal relations into a formal place and a formal arrangement that's not subject to modification simply to -- because of some abstract rule of how quickly you want to work cases. So that was my comments.

HONORABLE JAN PATTERSON: We can make a decades long project out of this after all.

CHAIRMAN BABCOCK: But other than that, Justice Hecht.

HONORABLE NATHAN HECHT: Several minutes ago when he began he said "What about summary judgments," and just statistically, in state courts we only -- in Texas we only keep them for district courts, and they're down in absolute numbers and in the rate of summary judgment, unless maybe in the last year for the first time, and in the Federal system they are flatlined.

HONORABLE JAN PATTERSON: Where are pleas to the jurisdiction?

HONORABLE NATHAN HECHT: I don't think we keep statistics on that.

HONORABLE STEPHEN YELENOSKY: But aren't we doing what Richard says we need to be able to do? Maybe I

didn't understand what you were saying, but it sounded to me you were describing a partial summary judgment, which we do all the time. I mean, we clear out eight out of nine claims because --

CHAIRMAN BABCOCK: Sure.

HONORABLE STEPHEN YELENOSKY: -- the facts are irrelevant, it's not a claim.

MR. GILSTRAP: It's not appealable.

MR. ORSINGER: We're talking about cases where the law is unclear. In other words, you may have a claim if you interpret the law one way, and you don't if you interpret the other way, and it's not clearly frivolous, and yet it is outcome determinative. So we have to try a whole case to a jury verdict and appeal it before we find out what the law is.

HONORABLE SARAH DUNCAN: What statute of limitations applies.

CHAIRMAN BABCOCK: Hang on for a second. Bruce Williams is here. Bruce, do you have to speak now or else you'll miss your plane?

MR. WILLIAMS: No, no. I'm good.

CHAIRMAN BABCOCK: Okay. Let's -- we're at our normal break time. I know David and Nina for sure have been very patient waiting to say their piece, not only through Richard's soliloquy, but before that, so

we'll break, come back, hear from them, and then turn to Mr. Williams so that he can take care of his travel plans.

(Recess from 10:41 a.m. to 10:55 a.m.)

CHAIRMAN BABCOCK: Back on the record. Here's what we're going do. We're going to take two more comments on this topic, one from David Jackson and one from Nina Cortell, and then we're going to break, suspend the discussion, although we're going to come back to it, and talk about the 904 because Bruce Williams has made the trip here to talk to us and needs to talk to us, so David Jackson first and then Nina and then we'll move on to Rule 904.

MR. JACKSON: My comment --

CHAIRMAN BABCOCK: This better be good, you've waited so long.

MR. JACKSON: Well, that was one of my points, you shouldn't have taken a break for what I had to say, but mine is more from a practical point of view that sort of dovetails along with what Judge Gray was saying. California went through this in the early Nineties, and they called it the rocket docket, and there was a mad rush throughout the country to bring in court reporters from all over the country to try to get them there to solve this crisis that they had with all these trials going on in all of these courtrooms, and people were going out

there. They were leaving Texas and leaving Arkansas and leaving wherever they could leave to go to California and get these jobs, but their rocket sort of fizzled out. You know, they burned up all the cases that they had, and it worked, and now those reporters are, you know, leaving. I mean, it wound up being very successful and then it sort of just -- they didn't have anything else to do for a while. So you might want to study that from a point of --

CHAIRMAN BABCOCK: Thanks. Nina.

MS. CORTELL: I just want to say that one of the crown jewels of the judicial system is appellate review, and with all due deference to some of the criticisms that have been lodged against our trial system or trial judges, what we're hearing now are monumental horror stories coming out of arbitration, and I think the love affair with arbitrators could be coming to a pretty quick end for a variety of reasons. One of them is, sometimes at least, the perceived arbitrariness of the decision and then the nightmare of a limited appellate review.

So with that in mind, it seems to me it's good and fine to talk about expediting the trial system, but I would suggest that the subcommittee at least look briefly at the timetable of the appellate review system, because the fact that we offer appellate review is huge.

It's a big advantage. I think it may ultimately cause for a lot of people to forego the arbitration system both in the contract clause and otherwise, but the limitation on our appellate system can be you've got it, but it can itself take anywhere from one to five years, and, therefore, I think the timetable at the appellate level at least deserves some review by the subcommittee.

CHAIRMAN BABCOCK: Thanks, Nina. Okay. Buddy, would you transition us to Rule 904 and introduce Mr. Williams, who has come to speak with us?

MR. LOW: I will, but it's kind of hard to go from a rocket docket down to an affidavit, but we'll do that. We presented 904, which is the result of about two years work of the State Bar committee, including professors, judges, plaintiffs lawyers, defense lawyers, and whoever. They worked for two years on the project because the statute was not sufficient, and there are some -- I'll let Bruce tell you a little more about that. The committee, the subcommittee approved -- worked with them for about six months, and we came up with a joint recommendation. It was presented last time, and some of the comments -- I made note of some of the comments that were made.

First, there was a change from the statute from the number of days. Second, there was a question of

whether this would be considered substantive law, which the Supreme Court couldn't or shouldn't change. The answer to that is the Supreme Court doesn't do anything like that without going through the Legislature, and if we pass something then the Court has their discretion and their right to follow up and so forth, and I'll point -- that's one of the points, and the Legislature would have to be notified.

The second concern was whether medical bills have been paid by insurance and that kind of thing, and the last thing was -- and I think we've pointed out and if you need to point it out more clearly -- this affidavit by custodian or doctor does not prove that this treatment was necessitated by the accident giving rise to the lawsuit. It only goes to the reasonableness and the charges are, you know, necessary for the condition, the reasonableness, and tries to short-circuit and prevent from having to go item to item during the trial. You have that already done.

The problem we were having is initially I think somebody would just say, "I object." Then you had to prove it. Now, under what we've done you have to go in and show what you object to and why and have the proper affidavit. I asked Bruce -- Bruce has worked on this for a couple of years, and I've worked on it maybe 30 minutes,

so let's go from somebody that doesn't know what he's talking about to let you-all hear from somebody that does. Bruce.

MR. WILLIAMS: I'm thankful to be here and to have the opportunity to talk to you for a minute. I'm with the Cotton Bledsoe law firm in Midland. I'm board certified in civil trial and personal injury law. I've been on this committee for many years. I don't want to tell you how many because the board has come up with a rule that if you've been on the committee six years that you have to be off of there --

MR. LOW: Don't suggest that.

MR. WILLIAMS: -- which is part of the problem here. I have been the chairperson -- this is my second year as the chairperson, and most of the people who worked on this rule had to be kicked off the committee because they've been on the committee for too long, and so we've got a whole bunch of new people, and they're very good people. We still have law professors and a justice of the Court of Criminal Appeals and a couple of civil appeals judges, and so the quality of the people is very good, but it's kind of like herding cats a lot. You know, you have plaintiffs lawyers, you have defense lawyers, you have judges, and they all want to go a different way, and they all -- if they're new on the committee then they want

to plow the same ground and go down all the bunny trails that you just went down. So we've gotten to a point with Rule 904 that I think we're about there, but then the Legislature has now thrown a skunk in the jury box, and that is the paid or incurred statute such that, you know, the medical bills that go to the jury is not just those that are reasonable and necessary, they now also have to have been actually paid or incurred, which this rule does not address, and so those are some of the things I need some direction from you if we want to go down that bunny trail.

One of the things I do understand is you cannot solve every problem with a single rule, and for the reasonable and necessary I think the rule that we've come up with is very good and addresses a lot of the problems that we currently have and the gamesmanship that's been going on for years. Some of that gamesmanship is, you know, for the plaintiff's lawyer it's a cheap way to prove up reasonable and necessary, and that's important. One of the problems is that if the defense lawyer files a counter-affidavit then that knocks out your affidavit, and you then have to go and get somebody to come into trial and testify to reasonable and necessary.

On the defense side, there's been gamesmanship because in smaller cases defense people will

use the statute as a settlement tactic. They will actually go get somebody to do the counter-affidavit so that in a case of low cost you now have upped the ante for the plaintiff's lawyer and so that when you go to mediation they know they're going to have to bring the doctor or doctors to prove up reasonable and necessary, so you've put your chip in on how this is all going to work at trial and why they should settle it today.

Some of the other games is that the reasonable and necessary affidavits that have come in, they include language of causation sometimes. You know, you get an affidavit that looks like -- I had my secretary do one that just came in. It's a form, and it looks like this, and they all look the same, and you might get right before the time period for these to be filed you'll get a stack this high in your office from the law firm, and each one of them will have these affidavits on them. They all appear to be the same thing that you get, but they may have in there -- they may have inserted that "These are reasonable and necessary as a result of the accident of such and such date," so then if you haven't noticed that and you haven't gotten somebody to controvert that affidavit then the other attorney will say at trial, "Gee, no, you didn't controvert it, so you can't challenge it now." That affidavit has to go in.

What are some of the other games that are played? I expect that one of the games that's going to be played now is that we'll see affidavits that include the language of actually paid and incurred within the language -- within those single-spaced affidavits. So part of the problem also is that you might have as the plaintiff's lawyer submits that to the doctor, the doctor doesn't have time to fool with this, gives it to the person who is the record custodian and billing. They sign it automatically. They attach those records that were -- that have been incurred from that date, and you're going to have flu shots in there on an accident, you're going to have Pap smears, you're going to have things that don't have anything to do with this accident, but if you haven't gotten an expert to file a controverting affidavit then you're not going to be able to test those things that obviously aren't relevant to the issues that you're talking about.

So the defense lawyer is faced with what do I do about charges that are not related to this accident? The affidavit is not supposed to be about causation, but if I don't controvert it can I then complain about the Pap smear, the flu shot, that it's obvious aren't going to be part of it, but less obvious, can I complain about the ringing in the ears that has been pre-existent for ten

years before the accident that they came in and were treated for in addition to all the other things they were treated for.

So long way of saying there's lots of gamesmanship that's currently going on with regard to affidavits of cost and necessity of services, and this is our best effort at trying to cut down on some of those games, and we're not going to be able to cut down on them all. The general thought and scheme that we're trying to achieve here is that not so different from the statute as it exists, the plaintiff's attorney can file an affidavit of reasonable and necessary. The defense attorney, if he's going to contest it, has to get somebody who is qualified to fill out an affidavit -- controverting affidavit, but once that controverting affidavit is filed, under our scheme it does not knock out the original affidavit of the plaintiff's lawyer. It allows him to continue to go forward with that affidavit.

The controverting affidavit is also submitted to the jury. It becomes a fact question for the jury to figure out, for the lawyers to argue in closing argument if they want to, but it doesn't -- that makes it such that the plaintiff's lawyer once a controverting affidavit is filed doesn't have to go and get the doctor to come in and prove up reasonable and necessary. It also

allows for additional cross-examination at trial if you want to, and so I think it is a better system than what the Legislature has come up with in the Civil Practice and Remedies Code, section 18.001.

MR. LOW: Bruce, let me interrupt you for just a second.

MR. WILLIAMS: Okay.

MR. LOW: If I understand what you're saying, what it means is proper affidavit, I mean, doesn't get to necessary, a proper counter-affidavit, either one of those may introduce those affidavits at trial, but if they choose they can call a witness.

MR. WILLIAMS: They can, right.

MR. LOW: So it won't keep them from calling the witness.

MR. WILLIAMS: No.

MR. LOW: But it means you don't have to. You have a choice.

MR. WILLIAMS: That's correct.

MR. LOW: But if you don't file a counter-affidavit then you can't do that.

MR. WILLIAMS: That's right.

MR. LOW: And the counter-affidavit can't say, "I just object." It's got to point out specifically.

MR. WILLIAMS: Just like it is now.

MR. LOW: If you get like a Sloan case that came out of the Beaumont court, you can strike that part of the affidavit, that necessitated by reason of this action?

MR. WILLIAMS: Right. That's the other thing in the rule that we have included --

MR. LOW: Okay.

MR. WILLIAMS: -- is a direction to the court that if you've got that shenanigan going on of somebody including the language in an affidavit that's not supposed to be in there, that the court can strike it --

MR. LOW: Right.

MR. WILLIAMS: -- and should strike it.

MR. LOW: I apologize for interrupting. I just wanted to be sure I understood. Thank you.

MR. WILLIAMS: Right. Right. The problem -- I mean, it's -- I think it's the best that we could come up with at this point in time. The problem is the skunk that's in the jury box, and my question to you is should we go back to our committee and try to attack -- and try to put something together to assist the bar and our judicial system in addressing paid or incurred?

CHAIRMAN BABCOCK: Okay. Pete.

MR. SCHENKKAN: I don't know about the

answer to that question, but I do think that even with the more limited task some more precision in the words is needed. Both the text of the proposed rule and the text of the proposed -- the introduction to the proposed affidavit depart from the statute in a way that is not necessary and may create an opportunity for mischief, including some of the kinds you are concerned about. If we look at (d) on the second page, "This rule does not affect the admissibility of other evidence concerning reasonableness and necessity, except that the opponent of the affidavit may not contest reasonableness and necessity of the services." The statutory language which has been used up above in (a) and (b) is about the amount charged being reasonable and the services being necessary, and those are not the same things as the services being both reasonable and necessary. It's both over -- more inclusive in one way, less inclusive in another.

I think (d) should track (a) and (b). "This rule does not affect the admissibility of other evidence concerning the reasonableness of the amount charged and the necessity of the services" and, again, "except that the opponent may not contest the reasonableness of the amount charged."

MR. LOW: Pete, slow down and let Bruce have just a minute -- that's a good point -- so that he can

make a note of that because it could be misunderstood, the necessity that we want to get to.

MR. SCHENKKAN: Okay. And then there's one more that goes with it, if this is time.

MR. LOW: Yeah. Go ahead.

MR. SCHENKKAN: And that's in (f)(1) when we introduce the proposed affidavit that now says, "An affidavit concerning cost and necessity." Again, it should not say "cost." The amount charged in most of our medical system is not the cost. The cost is set by other law, and it is lower than the amount charged. The provider is often obliged by law to charge his usual and customary charge, knowing that the law is the amount that is paid or due is less, and so we don't want to introduce another word here. We want to again say, "An affidavit concerning the reasonableness of the amount charged and the necessity of the services," is okay if it's done the following way.

MR. LOW: Bruce, do you -- I don't want to stop it, but do you have that? Just one second.

MR. SCHENKKAN: I can kind of write it down if you like.

MR. LOW: Okay. Now, go ahead. I'm sorry.

MR. SCHENKKAN: And then this is -- you're quite right that there is a whole separate layer of

question about what efforts you want to try to make by rule to head off the potential for mischief for people to introduce in these affidavits that's a harder question, and all I can say about that is I don't try these kinds of cases, but I have the background that lets me know that this really is important because an affidavit that establishes the amount charged is not the same thing as establishing "This is the amount due," and for many legal purposes the relevant question is what was the amount due. An example I know about is the subrogation rights of the workers comp insurance, which is only to the amounts due under the workers comp, not the amount the health care provider charged. I don't know how to solve it, but I agree with you that's the second layer of the problem.

MR. WILLIAMS: And I'm looking for direction. You know, we've sent this up here several times. We've had good comments from you, but I want more direction before I go back to my committee and say, "Let's go back to the drawing board again and try to figure this out."

CHAIRMAN BABCOCK: Frank.

MR. GILSTRAP: Pete said he didn't want to talk on paid or incurred, but I think he did, and it seems to me if -- isn't there a threshold question that has to be answered here, and the last time I looked at this there

hadn't been an appellate opinion, but I may be wrong. I haven't looked at this in several months.

MR. WILLIAMS: No, there are no appellate opinions.

MR. GILSTRAP: That there is a split in the way some trial courts are doing this.

MR. WILLIAMS: Yeah.

MR. GILSTRAP: Some trial courts are saying, "We're not going to put paid or incurred in front of the jury, rather I'm going to address that after the jury makes its decision based on $5 million of reasonable and necessary medical expense when in fact the person was on Medicaid and didn't pay anything." And some -- but if you read the statute and it looks like that maybe does go to the jury, so it seems to me that's a crucial question that has to be answered. If it goes to the jury, it seems to me this affidavit is a perfect vehicle for putting that in, but I don't think we can answer that until we decide whether or not the jury is going to decide it or the judge is going to decide it after the jury comes in.

MR. WILLIAMS: There was a paper that was done for the personal injury -- advanced personal injury course that was very good that tracked what had been done in several district courts, I believe in Dallas County and some surrounding counties, and they were all different,

and some put the burden on the defendant, some put the burden on the plaintiff, and I've brought examples of what I'm doing to try to address this. I'm sending written jury -- written deposition questions to the person who fills out the affidavit to see was it Medicare, was it Medicaid, was it Blue Cross/Blue Shield, do you have an agreement to only take that amount and not charge the rest against to the patient, and to kind of figure that out, but that's -- that's making a whole lot of work for everybody on these issues when maybe we could address it in maybe not this rule but maybe another rule. I don't know.

CHAIRMAN BABCOCK: Yeah, Richard, and then Tom.

MR. ORSINGER: It occurs to me before you make these affidavits super admissible that maybe rather than having an affidavit that if you comply with this you're safe, but you can go ahead and play games with it and if the judge believes it then you have this super affidavit, maybe you ought to have an affidavit that says if your affidavit is exactly what this rule says then it has this powerful effect, and if it deviates even one word then it's the normal Rules of Evidence, and that would cut down on people trying to lace in causation and stuff like that. Right now it's just an invitation to follow your

form. It could be a requirement to follow your form.

CHAIRMAN BABCOCK: Tom, then Judge Yelenosky.

MR. RINEY: First, with respect to the paid or incurred statute, no one has spent more time analyzing the language of that statute than Jim Purdue, and I think that he would agree with me that the literal language of the statute itself actually does not make sense. It just doesn't even read as a logical sentence. So I think for your committee to try to tackle that is designing the impossible at this point. I would leave that alone as a separate issue.

Secondly, with respect to -- I don't really know the answer to all of this, but as I hear the discussion and how we're doing it, it kind of reminds me of our discussion earlier this morning about complexity of litigation and unnecessary cost. Gosh, this ought not to be that complicated. It is, but when was the last time that anybody spent much time dealing with medical expenses in Federal court. I mean, the answer is the judge says, "We're not going to listen to that. You-all work it out and then tell me what it is." Even if paid and incurred is an issue, "You-all figure it out or get me the information, but I am not going to listen to testimony about reasonable and necessity of medical care or any of

these other factors."

So I don't have the answer to that, but we need to try to keep it from being too complicated, which was, of course, the original purpose of the statute, was to simplify it.

CHAIRMAN BABCOCK: Right. Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: Well, I was just -- now I'm going to agree. I hadn't heard it until then, but the paid and incurred has to be resolved, and I don't think we can try to resolve it by an affidavit that's going to pick one way or the other. I'm one of the judges that deals with it post-verdict, and so if you do an affidavit that doesn't allow me to do it post-verdict without an appellate decision then you've sort of decided that issue. As far as not deviating one word from the affidavit, you know, that's going to nullify affidavits when we don't want to nullify them, and the issue -- we spoke to this last time but I'll say it again. I mean, causation shouldn't be -- it shouldn't attempt to establish it by this. If it's in there, it should be ignored by the judge, and maybe that's all you need to say rather than say you can't change one word.

You know, I mean, and some of that stuff that you described in Federal court does go on. You get the lawyers that come in and say, "Well, there's a bunch

of stuff in here about flu shots that doesn't have anything to do with the accident." And I ask plaintiff, "Does it have anything to do with the accident?"

"No."

"Well, go back, clear everything out and just give the jury, you know, what pertains to this case." So, that's what -- I mean, if we have to give that direction then we should give that.

CHAIRMAN BABCOCK: Buddy.

MR. LOW: I think one of the things that Pete was getting at is not -- I mean, one of his things was that the word "necessity" should not be misconstrued to mean necessity because of the accident, but necessity for the treatment, and that was what you were getting at, wasn't it, Pete, that that language in (d) needs to make clear what we were talking about necessity, wasn't it?

MR. SCHENKKAN: Well, I just wanted the necessity that was used here to be necessity of the services exactly as in the statute, but I agree with Judge Yelenosky.

MR. LOW: Right.

MR. SCHENKKAN: Causation shouldn't be in there, but any effort by us to say by rule what shouldn't be in there risks getting people --

MR. LOW: Yeah.

MR. SCHENKKAN: -- fighting about whether you put one word too many or different in the way that -- you know, what we need there is judges who will say, "Wait a minute. You're trying to use this affidavit for the wrong purpose. I'm going to allow the evidence on causation. We've got a trial on causation." All we've taken off the table is once this person got to this medical state the services were necessary.

CHAIRMAN BABCOCK: Professor Dorsaneo, then Judge Christopher.

PROFESSOR DORSANEO: So what this affidavit does, it does -- it does reasonableness, it does what I would regard as kind of one half of necessity, and it doesn't deal with payment at all.

MR. WILLIAMS: Just like the statute.

PROFESSOR DORSANEO: So it gets about half the job done, but it won't get you to a jury on what the jury actually determines, and that's the number.

MR. WILLIAMS: Yeah. And I would temper that with but if you don't do anything then you're left with what you've got now, which is not good.

PROFESSOR DORSANEO: So this is a half measure that's better than the current situation.

MR. WILLIAMS: Well, and that's what I'm asking from direction from you. If a rule of evidence --

which is what we've put together for you to approve to send to the Supreme Court, if a rule of evidence won't clarify what actually paid or incurred means then we have to wait for the Legislature to do that or we have to wait for these to go through the appellate process to get some -- some idea of what that means.

HONORABLE STEPHEN YELENOSKY: Bill, why are you saying it doesn't get you to a number? The jury goes to the number if you do it the way some judges do and then post-verdict you deal with the paid or incurred. What's missing for the jury? I mean, the jury gets to their number based on an affidavit. They don't get to the causation based on the affidavit.

PROFESSOR DORSANEO: Causation is missing.

HONORABLE STEPHEN YELENOSKY: Well, yeah, sure, but that's not going to be dealt with by affidavit anyway.

PROFESSOR DORSANEO: But a lot of cases call what you're calling causation necessity, made necessary by the accident or by the malpractice or by --

HONORABLE STEPHEN YELENOSKY: Well, that's what I'm calling causation --

PROFESSOR DORSANEO: Yeah.

HONORABLE STEPHEN YELENOSKY: -- and that's not what this affidavit is intended to show.

PROFESSOR DORSANEO: Well, I don't know what would be wrong with showing that. Maybe there is something terribly wrong with it, but I don't know why you would stop kind of halfway through the streamlining process, particularly if there is the ability to do a counter-affidavit. Maybe because the counter-affidavit needs to be done with respect to causation by an expert. Maybe that's the problem.

HONORABLE STEPHEN YELENOSKY: Well, I guess because I thought the streamlining was to deal with the financial aspect of this alone and that --

PROFESSOR DORSANEO: But you still need a doctor --

HONORABLE STEPHEN YELENOSKY: Yes.

PROFESSOR DORSANEO: -- to testify about -- so you're not leaving the doctor out. So if you're going to bring him, you know, what's the point? I'm sure when doctors are called to prove up causation they're asked about the other stuff. The affidavit isn't used.

MR. WILLIAMS: Yeah, the problem with the affidavit is it's not -- normally it's not filled out by the doctor. It's filled out by a record custodian, who couldn't testify to causation.

CHAIRMAN BABCOCK: Judge Christopher.

HONORABLE TRACY CHRISTOPHER: Well, I'm a

little unclear about what the counter-affidavit is supposed to do. There is currently case law that says for a counter-affidavit to be effective the doctor has to have personal knowledge basically or some basis for making his opinion, so the doctor would have to look at the records or look at something before the doctor did his counter-affidavits. We have some case law out there that says that, but I'm unclear what you want the counter-affidavit to do here.

So here's my example. The guy goes in, he has a back strain, it's treated conservatively, then he has an operation. All right. Bill comes in, the doctor says -- or custodian says total amount for these services, you know, $15,222. Is the counter-affidavit supposed to say $15,223 is too much for those services or is the counter-affidavit supposed to say, "I've looked at it and the surgery was not necessary and only this conservative treatment is reasonable"?

MR. WILLIAMS: Either one, because it's reasonableness of cost and the necessity of the services, so it could be attacked on either basis.

HONORABLE TRACY CHRISTOPHER: Well, but now that's causation.

MR. WILLIAMS: No. No.

HONORABLE STEPHEN YELENOSKY: No, it's not.

HONORABLE TRACY CHRISTOPHER: The doctor is not saying the back surgery cost was wrong or that the person shouldn't have had back surgery. He's just saying the back surgery is not related to the accident.

HONORABLE STEPHEN YELENOSKY: No, no, no. He may be saying ---

HONORABLE TRACY CHRISTOPHER: Well, I don't understand what the --

HONORABLE STEPHEN YELENOSKY: Well, the --

HONORABLE TRACY CHRISTOPHER: -- affidavit is doing.

CHAIRMAN BABCOCK: Don't talk over each other.

HONORABLE STEPHEN YELENOSKY: Well, I mean, somebody may be saying --

HONORABLE TRACY CHRISTOPHER: Let me ask the people who authored this what they think the counter-affidavit is.

HONORABLE STEPHEN YELENOSKY: All right.

MR. WILLIAMS: Yeah, what I think it's saying is that, for instance, the doctor would say, "I've looked at these medical bills." For instance, let's say it's a chiropractor. "I've looked at these medical bills. There is too much chiropractic care. I don't know what the cause of his -- I'm not saying what the cause of his

complaints are, that it was the accident or before the accident or after the accident, but I'm saying that for his complaint there are too many and it's over too long a period of time for somebody who is a chiropractor to be rendering this type of care. It's not needed or it's not necessary, it's not advisable."

HONORABLE TRACY CHRISTOPHER: So it was poor medical practice or not related to the accident? I'm trying to understand --

MR. WILLIAMS: It's not necessary.

HONORABLE TRACY CHRISTOPHER: -- what it is.

MR. WILLIAMS: Wasn't necessary. The services were not necessary.

CHAIRMAN BABCOCK: Carlos has had his hand up so long that your arm is about to fall off.

MR. LOPEZ: I'm doing the only workout I really do nowadays. I struggled through thousands of these back when I was in county court, or as I called it, car wreck court. Most of it -- and I think there may be a reason for this. Most -- I would have to think back long and hard to try to remember a counter-affidavit that actually said, "We think the treatment was fine for what physical symptoms the guy had, but we don't think those physical symptoms were caused by the accident."

So there was kind of a very fine line

between whether the treatment was necessary for the, you know, knee ligament as opposed to whether the knee ligament was caused by the car wreck, and I don't know about everywhere else, but in Dallas 99.9 percent of the time these affidavits were being used in very small amount of controversy cases where it was usually a soft tissue injury that pretty much there wasn't really a whole lot of dispute about whether or not the person's neck injury was caused by the accident. It was whether the person was telling the truth about having a neck injury in the first place and whether -- which is not in the affidavit -- and whether or not he should have gone to the chiropractor six thousand times or --

MR. WILLIAMS: They're used --

MR. LOPEZ: -- whether they agree it's a neck injury.

MR. WILLIAMS: In every personal injury case whether they're small or great they're used. I can tell you that. I do primarily a defense practice. I have tried two major plaintiff cases in which I have gotten verdicts over a million dollars, and as the plaintiff I absolutely use these.

MR. LOPEZ: I understand what Bill Dorsaneo is saying, I think, which is if we're going to streamline it, why not really streamline it, and I'm not saying

that's a good or bad idea. I think it's different and additional to what you've at least currently been arguing about, but --

CHAIRMAN BABCOCK: Justice Bland.

HONORABLE JANE BLAND: On a different subject, Bruce, I think Jim Perdue brought up at our last meeting that the proposed rule recommends that the affidavit be served on a party at least 60 days before trial and the statute has 30 days --

MR. WILLIAMS: Right.

HONORABLE JANE BLAND: -- with a different sort of deadline then for the counter-affidavit than what you-all have in the rule, and I was wondering what the committee's thinking was on having different deadlines than those in the statute and whether that's --

MR. WILLIAMS: We're trying to prevent a "gotcha." That's what we're trying to do. We're trying to get those affidavits sent, because they're done in stacks. They're not done one at a time when they get them. They amass them, and when the case is getting set for trial then it's just like anybody that's got a small office, you're saying, "Okay, what do we need to do to get ready for trial? Okay, we need to get all of these filed," and then you get them like this.

So for the defense then to try to come up

with a counter-affidavit that has to be done through an expert, not just, you know, a clerk in the doctor's office, it takes time to do that and to figure out what you've got; and for that expert to review those you've got to get them to the expert, he has to review them, he has to be comfortable with filling out a counter-affidavit; and this counter-affidavit is not a cookie cutter. You have to explain what it is that you're saying and why you're saying it so that the court can -- if it goes beyond reasonable and necessity and gets into causation, the court pursuant to the rule can strike it.

CHAIRMAN BABCOCK: Bill and then Judge Yelenosky and then Buddy.

PROFESSOR DORSANEO: Stephen, you said you tried the payment part after the jury verdict comes in?

HONORABLE STEPHEN YELENOSKY: Paid or incurred.

PROFESSOR DORSANEO: How do you get to do that in a jury case? How do you get to decide one of the issues?

HONORABLE STEPHEN YELENOSKY: That's one of the -- well, that's one of the questions that has been debated about what it means, whether it's an evidentiary issue or whether it's ultimately just a question of what's to recover.

PROFESSOR DORSANEO: Well --
HONORABLE TOM GRAY: Jan is --
PROFESSOR DORSANEO: That strikes me as --
HONORABLE TOM GRAY: Jan is going to decide --
PROFESSOR DORSANEO: -- very odd.
HONORABLE TOM GRAY: -- whether or not he gets to do that and then Nathan is going to tell Jan whether or not she decided that question correctly.
PROFESSOR DORSANEO: I mean, that seems to me --
HONORABLE JAN PATTERSON: So that's another 10-year project.
CHAIRMAN BABCOCK: Yeah, it's all very cozy.
PROFESSOR DORSANEO: That seems to me to violate somebody's right to jury trial on an issue --
HONORABLE STEPHEN YELENOSKY: Well, then --
PROFESSOR DORSANEO: -- that's important about what you get.
HONORABLE STEPHEN YELENOSKY: Well, then you need to represent somebody on that issue, but -- you know, and get an appellate decision. We haven't gotten one.
PROFESSOR DORSANEO: Okay. One other comment. Buddy said at the beginning that whether this is -- these changes are procedural or substantive should be

something for the Court and we shouldn't be getting involved with that.

MR. LOW: No, I didn't say we shouldn't get involved.

PROFESSOR DORSANEO: I misunderstood you then, but I think as part of the process of deciding that something is procedural, you know, in most systems the committees and the Court's attitude about whether it's procedural rather than substantive is treated as significant, if not determinative, of the substance/procedure distinction; and it seems to me certainly that periods of time, 30 days or 60 days, would be appropriately regarded as procedural items rather than something that's substantive in character. I think generally we should weigh in on the issue because I think that's significant in how the matter would ultimately be analyzed.

CHAIRMAN BABCOCK: Justice Hecht trumps a trial judge.

HONORABLE STEPHEN YELENOSKY: That's obvious.

HONORABLE NATHAN HECHT: Well, to give a little guidance, I think the committee -- your committee should propose what you think is the best work, and if that's not anything like the statute, well, so be it, and

then we'll take up whether it's -- whether we should go to the Legislature and say "change this," or whether we should propose it as a rule and get them to object to it or how we should -- you know, or start over, but I think we should start with the best, and one thing that strikes me about this is that it's still fairly cumbersome, because it seems to me that from my experience on the trial court a long time ago that basically all the plaintiff ought to have to do is just say this is it, and that's prima facie. It's not just an affidavit to send to the jury that somehow the jury could disbelieve. I mean, if they bring -- if they satisfy whatever we think is a threshold requirement, whether it's a pleading, specific pleading, verified affidavit, or whatever it is, that's the end of it.

And then if the defendant wants to take it on, they should have to come back and say, "Well, we disagree with this, this, this, this," and join issue like you would under Rule 90 or under -- I was thinking of Rule 193.7, which has to do with proving up documents that are produced during discovery. It seems to me the same idea, that if you come in with bills that are on a doctor's or a hospital's letterhead and they look to be like the bills, that ought to be the end of it unless somebody says, "Well, no," as you said, there are too many chiropractic

charges or you shouldn't have had a flu shot or -- and then whatever those issues are they can be fussed about. And of course, the simpler the better, but I wouldn't -- I wouldn't feel constrained to propose something that was bounded by the statute if the practice doesn't think the statute is working very well. I mean, this is our chance to make it work better if we can.

CHAIRMAN BABCOCK: Judge Yelenosky, then Carl.

HONORABLE STEPHEN YELENOSKY: Well, and, Bill, in further defense, what's going on in these cases, they don't disagree either about what was charged or about what actually is paid or incurred, and so they're not really asking for a determination. They are arguing about what the jury gets to hear. The defense wants to say, "You don't get to put in front of the jury that this operation was charged for this amount" because, of course, they don't want it to look like it was an expensive, serious operation, and likewise, the plaintiff does, and so it's a question of what gets before the jury. If you tell them the jury gets to hear everything, at the end you can argue about what's paid or incurred, they come in and they agree on what was paid or incurred. So that's what's going on, and the appellate courts can decide that.

Earlier, Judge Christopher, I think one

question you asked that maybe wasn't answered, in determining the necessity of the services, is it really you're saying that it was improper medical care, I think the answer to that is "yes," or excessive medical care. That's the issue, excessive medical care. The doctor is presented with a particular condition. Based on the presentation of that condition is what the doctor did medically necessary, or, as the defense claims, was it excessive? The causation issue is entirely different. The person could have presented with a back injury because they had a car accident, or they could be presented with that particular back injury because on the way from the car accident they were dropped off the gurney outside the E. R., in which case there is an intervening cause, or they could be presenting with a particular back condition because of a pre-existing condition, all of which are causation issues and none of which have to do with given the presentation of the condition was the medical care appropriate. So my answer to your question is "yes," and that's what it goes to, and that's all it goes to.

CHAIRMAN BABCOCK: Carlos, then Buddy, and then Jim.

MR. LOPEZ: I want to ask just a second, are you saying that it would be basically if they went through the right hoops, what the committee decides are the right

hoops, and they do so right way then it would be a rebuttal of presumption because it could be rebutted by counter-affidavit, but if not rebutted would be conclusive? It would be conclusive, a rebuttal of conclusive presumptions.

HONORABLE NATHAN HECHT: Well, I'm suggesting something like that --

MR. LOPEZ: Yeah.

HONORABLE NATHAN HECHT: -- because if it doesn't seem to be a very viable --

MR. WILLIAMS: That's the way the statute is now. If you haven't filed a controverting affidavit then you don't get to argue that it wasn't reasonable and necessary, and it's the same way in the rule that we proposed. If you don't file a controverting affidavit then the affidavit that's been provided by the plaintiff is the end of that discussion.

HONORABLE NATHAN HECHT: Well, but I read it as going to the jury, and the jury can -- the affidavit can say a thousand dollars and the jury says, "Well, $600."

MR. LOPEZ: Right.

HONORABLE NATHAN HECHT: There's no basis for disbelieving an affidavit. If it says a thousand, that's the end of it, and it shouldn't be just something

that goes to the jury. It should be established in the case unless somebody says, "No, and here's the reason why," and then they need to fuss about it.

MR. WILLIAMS: Well, there's a lot of reasons why that don't have to do with reasonable and necessity, and that is causation, right?

HONORABLE NATHAN HECHT: Oh, yes, right.

MR. WILLIAMS: And --

HONORABLE NATHAN HECHT: No, I'm just talking about the two issues here that are on the -- that we're dealing with, which Bill calls it half causation.

PROFESSOR DORSANEO: Half necessity.

HONORABLE NATHAN HECHT: Or half necessity, right. It's just that part, but, sure, you can argue about the bigger causation issue.

MR. WILLIAMS: Right.

CHAIRMAN BABCOCK: You have a presumption that can be rebutted by evidence up to a point, and at that point the presumption becomes irrebuttable and established as a fact.

HONORABLE NATHAN HECHT: Right.

CHAIRMAN BABCOCK: Carlos.

MR. LOPEZ: Well, yeah, you can argue against it. You can argue against it if you've done the right things to put yourself -- but you can if you've

filed a counter-affidavit.

HONORABLE NATHAN HECHT: Right.

MR. LOPEZ: Which I agree that's how it seemed like it should work right now, but different trial judges handle that very differently.

MR. WILLIAMS: Right.

CHAIRMAN BABCOCK: Jim Perdue.

MR. PERDUE: I hesitate to weigh in because I worry sometimes about being counterproductive, but if I could step back from this for a second, we have Chapter 18 of the code on the books, which is a legislative enactment I think on its face designed to remedy an overexpense or overcomplication within the litigation system out of basically a common law requirement that the medical bills be reasonable and necessary. So they made -- the Legislature provided us a means to wire around that, and what I've heard, at least in the presentation, is exclusively a defense perspective that there are games being played with that provision and calling essentially using the statute a game, because the game -- the statute, 18.001, provides an affidavit that is signed by the custodian of records as to the reasonableness and necessary -- reasonableness and necessity of the charges.

That is not a game. That is a legislative determination that that is a way to avoid the time and

expense of involving treating physicians and having to be deposed or come to trial to withstand appellate review of the reasonableness and necessity of their charges. That was exactly why the Legislature put this into place. So we use affidavit practice to avoid what would be extremely burdensome on physicians and extremely burdensome on plaintiffs to have a doctor essentially prove up every charge in every case. So I don't think that the suggestion that using an affidavit from a records custodian is a game should be -- should be -- can go without question, and the idea then that there is a misuse of affidavits or that plaintiffs are abusing the process of the affidavits is one that's just been put forth that I at least take some issue with because I don't know of anybody who is reporting that as a general concern.

And then what this rule does is it changes the law of both -- as enacted by the Legislature as far as the time lines and other procedural requirements and appellate review of that, specifically Turner vs. Peril, as far as what is required for a counter-affidavit. So it raises the standard apparently for plaintiff's practice, it lowers the standard for defense practice when it comes to counter-affidavits and the Turner case, and you know, we had this conversation last time.

I did not hear, at least from the trial

judges, that they felt there was any abuse that was not handled judicially. If a plaintiff puts in an affidavit and a custodian of records signs off that the charges were proximately caused by the car wreck, that's irrelevant, so what, whether it be the trial judge or the court of appeals. That doesn't stand, it seems under present practice, a present practice does not permit that to stand, so how is that a game, quote-unquote, that it needs a remedy through what appears to be a more complicated procedure?

Just on one point, because this appears like it will go back to the drawing board somewhat, but on whether this is procedural or substantive, the change from 30 days to 60 days is in my opinion extremely substantive. For example, when you have a patient who is actively treated leading up to trial, I have a severely brain-damaged patient, they're incurring medical charges over a thousand dollars a day. If you essentially create a system that is designed to gut some portion of their medical expense recovery because of the timing of their trial, that is a substantive limitation on what they've got.

This thing does provide for, it seems to me, a minilitigation on the issue. It seems to provide for cutting off the rights by extending this time line. There

is a lot about it that I tend to agree with at some level because I love the idea that a substantive counter-affidavit should be required, but if you read the rule and the comment provided for the rule, I don't see how the rule itself gets us to a substantive counter-affidavit in compliance with Turner vs. Peril. So I apologize, just to add a different perspective onto the conversation, I think there are a bunch of issues going on here.

CHAIRMAN BABCOCK: Thanks, Jim. Buddy.

MR. LOW: First of all, Bruce did not say that the gamesmanship was by the plaintiff's initial affidavit. That was not the gamesmanship. The gamesmanship is what follows.

MR. WILLIAMS: Right.

MR. LOW: Where somebody comes in and they say, "We object" then you have to bring the doctor. What we cure is they have to come in now, the defendant has to come in and say, "This is what's wrong with it," has to be specific, and then once they do that under the statute now you can't bring that affidavit that you originally filed.

MR. WILLIAMS: Right.

MR. LOW: Now you can introduce that affidavit, so the gamesmanship was not -- as you construed it. The gamesmanship was what followed, and so that's --

MR. WILLIAMS: But I can tell you insurance companies who say, "We want you to controvert every affidavit because we want those things knocked out" so that they have to bring the doctor so that when we get to mediation they know it's going to cost them money to bring that dadgum doctor. So there is a lot of gamesmanship on the defense side going on on these things.

CHAIRMAN BABCOCK: Bill, then Justice Gaultney, and then Judge Christopher and Justice Bland and anybody else on that row.

PROFESSOR DORSANEO: Would it be a bad idea to define necessity?

MR. WILLIAMS: You know, in my opinion it would not, so that when you take -- necessity is not causation, because I've had that argument lots of times at trial. Even when they haven't inserted the causation language they're saying, "See, the doctor said that this was necessary." You know, so you've got to find -- either it's the result of this accident, it's necessary, these were reasonable and necessary. I've had that argument done. I make the objection, you know, and most of the time the judge will say, "That's right, Mr. Williams," and --

PROFESSOR DORSANEO: Because in my experience lawyers use the word "necessary" as kind of a

magic word rather than without having any particular meaning assigned to it.

MR. WILLIAMS: Right. Right.

CHAIRMAN BABCOCK: Justice Gaultney.

HONORABLE DAVID GAULTNEY: Well, I in the initial discussion heard that there was gamesmanship on both sides. That was, I think, the premise for the proposal, and then also I think in the discussion I heard some disagreement on what necessity means, so there apparently is still some ambiguity. I think the rule goes towards at least eliminating that ambiguity. I think, Jim, that you wouldn't think that an affidavit could establish the second half of causation linking it up to an accident. I think you said it today, and I think you said it last time.

MR. PERDUE: I think I said it last time.

HONORABLE DAVID GAULTNEY: Right, so if the rule can clear up that ambiguity, you would be in favor of that I would think.

MR. PERDUE: If a rule requires that a counter-affidavit meeting the standard that the law says now and that if you don't have a counter-affidavit that meets that standard then you cannot challenge the initial affidavit, yeah. But I guess my primary concern is this encourages a counter-affidavit practice at a lower level

than what we have now. It is a -- this is a substantive change to 18.001.

CHAIRMAN BABCOCK: Judge Christopher.

HONORABLE TRACY CHRISTOPHER: I agree, because -- well, I don't know what it is like in Midland. I just know in Harris County in our personal injury cases nobody is filing counter-affidavits, and people still get up and say, "Too many visits to the chiropractor," and the juries are still giving about half the chiropractor visits, and I don't see how -- if we're not talking about causation in a counter-affidavit then you can't really eliminate the flu shot, okay, because nobody is going to say the flu shot wasn't necessary or that it was bad medicine. It just doesn't belong here, which means causation. Okay. It wasn't caused by the accident, so I still see these counter-affidavit -- the causation and the necessity as having a lot of troubles, and I'm not sure that this improves what we have.

CHAIRMAN BABCOCK: Okay. Frank. Sorry.

MR. GILSTRAP: I agree with Bill Dorsaneo and Judge Christopher that causation is to a certain extent implied by necessity, and if you want to think that out you could go back to that old case involving the liability nexis and the damages nexis, and I think the necessity part here is the damages nexis, and we could go

through that and we could define necessity, and that might make it a more perfect world, but for purposes of this procedure it seems to me why don't we just say in the rule that the affidavit as submitted under this procedure is, to use the words of the statute, "only evidence that the amount a person charged for a service was reasonable at the time and place the service was provided and that the service was necessary." That's all you can use this affidavit for and then they can't use it to establish some larger issue of causation. That's not why we have this procedure, and that affidavit can't be evidence of that.

CHAIRMAN BABCOCK: Okay. Justice Bland. Did you have something?

HONORABLE JANE BLAND: I was just going to say that it seems like that the types of problems that you're describing are not problems that are solved by the counter-affidavit but just by, you know, striking the original affidavit. You don't have to file a counter-affidavit to say that the original affidavit shouldn't have that causation in it. Just redact that, and as Judge Christopher mentioned, you don't have to have a counter-affidavit to say the flu shot wasn't caused by the accident, so I'm not really seeing the potential for gamesmanship being cured by this counter-affidavit and by pushing it all out more ahead of trial.

My fear is that that's just going to give everybody 60 days to fight about this and paper it up; whereas now, you know, at least if they file it 30 days before trial then somebody has to really think, do I really need to attack this affidavit, do I really have the basis for it, and if I do then I've got to get it and get it done, and so I don't see the 60 days as solving any gamesmanship problem.

MR. WILLIAMS: I don't see 60 days as being magic. You know, if this committee said, "Gee, we don't really like 60 days, we'd rather you go back to 30 days," I think all we were trying to do is prevent a "gotcha" and we can go back and change that if that's what the committee wants.

HONORABLE JANE BLAND: But what is it about this proposal that improves over what's in the statute I guess is what I'm trying to figure out?

MR. WILLIAMS: Because the defendant must find an expert and has to get this information to an expert and has to get the expert to focus upon the information and submit an affidavit on it.

HONORABLE JANE BLAND: But doesn't the statute already require that for a counter-affidavit?

MR. WILLIAMS: What's that?

HONORABLE JANE BLAND: It already requires

the defendant to get an expert.

MR. WILLIAMS: That's right.

HONORABLE JANE BLAND: To file a counter-affidavit.

MR. WILLIAMS: And so when you do that with -- if I get a stack this big 30 days before trial, I don't have any time to submit a counter-affidavit. I can't get that information to an expert. I can't get an expert to focus upon that within 30 days of trial so that I can file a counter-affidavit, so I'm stuck.

HONORABLE JANE BLAND: I mean, but how are you stuck? If the whole purpose of this is to get, you know, a qualified expert to say that these are the reasonable and necessary costs and expenses, how are you stuck under the current statute, because the current statute says exactly what I think your proposed rule says, which is get an expert --

MR. WILLIAMS: Right.

HONORABLE JANE BLAND: -- to counter it, and we want to make it difficult. That's the idea. The idea behind it is we don't want counter-affidavits to be filed willy-nilly in every -- for every single cost that's incurred because of the reasons Justice Hecht articulated. So what about what you're proposing is an improvement over the statute, I guess?

MR. WILLIAMS: All I'm saying is that it just gives you an opportunity to get an expert involved if that -- if this particular affidavit merits it.

CHAIRMAN BABCOCK: Carlos, will you yield to Buddy because Buddy is --

MR. LOW: The improvement apparently is not understood. The improvement is now you file a counter-affidavit, you can't introduce your affidavit. You don't have a choice. Now, the improvement is you can file a counter-affidavit, and the plaintiff has a choice. He can then offer his affidavit. Under the practice now once they file a counter you're to live people. You can't introduce that affidavit. That's the improvement.

As to the answer to Frank, the comment says, "The rule only addresses reasonableness of costs and necessity of services. It does not address other issues." Now, that's fairly clear.

PROFESSOR DORSANEO: Yes, too clear.

CHAIRMAN BABCOCK: Carlos.

MR. LOPEZ: I just want to -- I'm a little concerned about what Frank was talking about the language where you say it's "only evidence of" and the idea that "only" modifies which category of evidence it is, meaning it's only evidence of necessity rather than causation; but when you use the word "it's only evidence," you invite the

idea that it's not conclusive evidence, it's just some evidence, which as our instructions tell the jury you can believe all, some, or none of what a witness, including an affiant, says; and that's the argument that's always been used by the defendants to say, "Judge, why are you granting a directed verdict on this unchallenged affidavit any more than you would grant a directed verdict on any other affidavit?"

In other words, what is it about this affidavit that is so great that makes it unchallengeable, and you know, you kind of see the logic. You've got one witness who says the light's red, only one witness, and that's the only evidence on the issue. The jury says, "We don't believe the light was red because our character witness was shifty, he was beady-eyed, and we didn't believe him," and apparently, you know, you can do that. So we just have to make it real clear that it's going to be, you know, conclusive in the face -- if an unchallenged affidavit is going to be conclusive I think we need to use the word "conclusive" or some similar words.

MR. WILLIAMS: The statute doesn't provide -- now it doesn't provide it's conclusive. It provides that it's sufficient to support a finding.

MR. LOPEZ: Right, and that's to support a finding.

MR. WILLIAMS: Just like any witness would -- just like the example that you gave and that Judge Christopher gave. If it's a chiropractor affidavit, they don't have to believe it.

MR. LOPEZ: I mean, my personal opinion is that based on the way the rule, you know, is now, it allows for the defense to stand up and argue, "Don't believe this affidavit."

MR. WILLIAMS: Right.

MR. LOPEZ: And if, you know, we're going to change that, which I don't think is a bad change, but if we're going to change it we need to be very specific and explicit that that's what we're doing because I think there's a lot of confusion about that.

CHAIRMAN BABCOCK: Justice Bland, then Bill, Carl.

HONORABLE JANE BLAND: Well, it seems like we're saying the filing of the counter-affidavit knocks out the plaintiff's affidavit under the current statute.

MR. WILLIAMS: It does.

HONORABLE JANE BLAND: But only the filing of the counter-affidavit doesn't knock out the plaintiff's affidavit. It's just on the other side, if the plaintiff attacks the counter-affidavit and says the counter-affidavit doesn't comport with the requirements of

the standard, the counter-affidavit is no good, it doesn't knock out the affidavit; and that was the litigation, you know, three or four years ago; and I think that's why there are very few of these contests filed anymore because it became clear that trial judges, at least in our area of the state, were not going to accept counter-affidavits that didn't have -- that didn't fulfill the requirements of the statute and were not going to use that as a basis for knocking out the plaintiff's affidavit.

So I don't see that the current statute, you know, just basically says if something gets filed then the plaintiff is out of luck. It's just if the plaintiff files an affidavit that has, you know, causation language that's extraneous that needs to be struck or just irrelevant, you know, then it gets out. If the counter-affidavit doesn't comport with the terms of the statute, it gets out, and I'm still sitting here saying to myself, so other than having more affidavits admitted in front of the jury I'm not seeing what the new rule does, because I think what you're saying is, well, then we'll just admit the original affidavit and the counter-affidavit.

MR. WILLIAMS: That's right.

HONORABLE JANE BLAND: We won't ever have this discussion of whether the original affidavit or the

counter-affidavit meet the requirements of the rule.

MR. WILLIAMS: Except for the court -- my proposal as an addition to this rule is "By motion or objection of a party or on its own motion the trial court shall strike any portion of an affidavit or counter-affidavit that attempts to include language of causation, liability, or otherwise makes assertions beyond the scope of this rule prior to its submission to the fact finder."

CHAIRMAN BABCOCK: Professor Dorsaneo.

PROFESSOR DORSANEO: Well, I was just going to say that the City of Keller opinion, among others, points out that the all, some, or none instruction that Carlos just talked about is at best an oversimplification.

MR. LOPEZ: I'm just going on AJC. And you guys in here wrote it.

CHAIRMAN BABCOCK: Carl Hamilton.

MR. HAMILTON: Buddy, as I read the comment it says if an affidavit is controverted the parties may present additional evidence, but under rule (d) you don't have to controvert it if you specify a testifying expert; is that right? (d) says that you could introduce other evidence, but only if you file a counter-affidavit or, as specifically disclosed, a testifying expert on the issue.

MR. WILLIAMS: Right. This rule does not

affect the admissibility of other evidence concerning the reasonableness and necessity except that an opponent of an affidavit may not contest reasonableness and necessity of the service unless the opponent files a counter-affidavit or has specifically disclosed a testifying expert as to the specific issue in question, and that comes up lots of times when you've taken a -- they've filed affidavits and you haven't filed a counter-affidavit, but they bring a doctor or they take a doctor's deposition, and in the deposition before trial or at trial you ask them about that and they say, "This wasn't reasonable or necessary."

MR. HAMILTON: I know, but the comment is not accurate where it says you can only do that if you file a counter-affidavit.

PROFESSOR DORSANEO: Uh-huh.

MR. HAMILTON: The comment says if an affidavit is controverted by counter-affidavit the parties may present additional evidence, but you can present additional evidence if you designate a testifying expert also, right?

MR. WILLIAMS: Right: That's a good point.

CHAIRMAN BABCOCK: Buddy, do you -- do you think you have gotten enough feedback? More than you want?

MR. LOW: The old boy that they wanted him

to go back to school, he said, "I've already got more learning right now than a mute," so --

CHAIRMAN BABCOCK: Would you propose to try to address these comments and then come back to the next meeting with a --

MR. LOW: Yeah, what I'll do, I'll have -- the committee, we first operate together. I'll get together with the State Bar committee because it is a great committee, and they've spent a lot of time on this, and we will do that.

CHAIRMAN BABCOCK: Okay. Well, Bruce, thank you so much for visiting with us today, and I hope you still have time to get back to Midland before the sun sets.

MR. WILLIAMS: I enjoyed the experience.

CHAIRMAN BABCOCK: Fortunately you're not under oath here. Let's -- we've got about 15 minutes before lunch. Let's just bounce back to the rocket docket real quick because there were several people came up to me and said that they wanted to to speak, but if you will recall, one of the resource materials we had was a 1994 *Baylor Law Review* article entitled "Lonesome Docket," a play on the McMurtry book *Lonesome Dove*, I assume.

HONORABLE SCOTT BRISTER: Correct.

CHAIRMAN BABCOCK: And interestingly enough,

the last -- the conclusion is "The public is demanding greater efficiency in the civil justice system. At the same time the same public is neither funding more courts nor filing fewer claims. The trend of increases in pending case loads without corresponding increases in the number of judges to try them means that shorter trials are a matter of necessity, not choice. It is true that those demanding quicker trials are usually not the ones who have to live with the verdicts. Nevertheless, when attorneys making $200 per hour resist any suggestion" -- "resist any suggestion of limiting trial time, there is at least the appearance of a conflict of interest."

Now, twelve years later, we find that even though there has been no increase in funding that is perceptive, we can perceive, the case filings are down, and the author of this article was then on the trial bench in Harris County and has now ascended to the Texas Supreme Court and is here, so Justice Brister, do you have any --

HONORABLE SCOTT BRISTER: To defend my --

CHAIRMAN BABCOCK: Do you have any comments about these 200-dollar an hour lawyers?

HONORABLE SCOTT BRISTER: Well, anything that's good for the profession.

CHAIRMAN BABCOCK: We've been talking about this -- the idea of making our product more attractive,

and one of the ideas, as you know, is this rocket docket. Any thoughts that you would have or that you would like to share with us?

HONORABLE SCOTT BRISTER: Well, I'm favorable, in favor of it, in favor of giving trial judges the discretion to do it, but as we all know, with vacation letters and everything else, there's always somebody in a case that doesn't want it to get to verdict very fast, so you've got to have some discretion of trial judges to say, "I'm sorry, in the interest of justice we just have to do it." So it can't be something that's just entirely up to agreement of parties because that will rarely occur.

CHAIRMAN BABCOCK: Bill Wade, you had -- you came up to me and said you wanted to say something.

MR. WADE: Well, I, too, have appeared in Judge Bunton's court.

MR. RINEY: Briefly.

MR. WADE: Briefly, and that's a blur in my memory because it went by so fast because we didn't even get a -- well, the lawyers didn't get a break for lunch. The only reason there was a lunch break is because he did let the jurors have lunch, and I've also been appointed to represent criminal defendants in Federal court, which is another sort of a rocket docket, because in that case, if you want to liken the U.S. attorney to a plaintiff, he's

already got his case prepared before it's filed.

I really question whether or not a rocket docket is the answer to any issue that we're -- should be addressing, and I want to say "amen" to everything that Dick Munzinger said, and I'd also like to say this, that I have -- I have some real concern any time about referring to the Federal practice as the gold standard when my limited experience is that the Federal practice is designed to deter litigation and to make it so expensive and onerous that you don't want to go there, and so a lot of people don't. So I would just -- and one thing that has bothered me over the years is seeing us mirror the Federal practice, because I think what that does is it denies access to the court to a lot of people and in a lot of litigation that needs to be determined, but it's too expensive.

CHAIRMAN BABCOCK: You know, Judge Bunton is getting a lot of airtime here, but I'd like to nominate Judge McBride, a Federal judge in Fort Worth. In a trial I had with him I said, "I want to put my damages expert on now," and he said, "I don't believe I'd do that," and I said, "Well, why, Judge?" And he said, "Well, because the jury is not going to listen to him anyway." And I said, "Well, you know, the plaintiff's claiming $10 million in damages and I've got a guy who is going to say that that's

not right."

The judge says, "Well, okay, you've got five minutes to put him on," and I said, "Fine, Judge, we'll do it in five minutes," and he looks at my opponent, the plaintiff's lawyer, and he says, "You've got five minutes to cross him," and the lawyer looks at him and says -- never been in this court before, and said, "Well, Judge, you know, I can't possibly cross-examine this man. I've taken his deposition for a whole day, he's got complex formulas, and I couldn't possibly cross him in five minutes. I just can't possibly do it."

McBride doesn't say anything, looks at his watch and he says, "You have three minutes to cross-examine him," and I got him on and off in less than five minutes. I pointed that out to McBride as I sat down. The guy got up and started asking him about where he went to high school, and I think he must have thought Judge McBride was kidding because at the end of three minutes Judge McBride said, "Counselor, sit down," and he just looked at him kind of like "Yeah, right, I'm not finished," and asked another question. He said, "I said sit down," and he did. So that was a speedy trial that we had.

HONORABLE SCOTT BRISTER: Let me say in defense of rocket dockets, though, for every one of those

stories we've got a story of the judge who comes in 20 minutes late, every witness drags on day in and day out. I mean, I've had some of the most famous plaintiff's attorneys who were the biggest objectors to my rocket docket as a trial judge come to me and tell me the story about the other case they were in where the judge wouldn't make anybody do anything and it lasted for six weeks; and I'll tell you for a fact, on appeal when a four month trial comes up, from O. J. on down, the appeals court is not going to reverse it, because it's too expensive to do it over again.

Now, if that's what you want, it's like arbitration. You get one shot and whatever the jury says you're stuck with it, but the problem is the longer the case lasts, the more resistance there's going to be in the system to fixing anything in it, and so you're going to be stuck with whatever happens the first time. So there is another side of the problem, but I'm not sure whether all of those judges, the judges with that problem, can be fixed by a rule.

CHAIRMAN BABCOCK: Yeah. By the way, I agree with that, and I think that, frankly, Judge McBride did not deny anybody the right to have the evidence put on in that case. We tried it quickly, but yeah, Jan.

HONORABLE JAN PATTERSON: But, Justice

Brister, do you at least apologize for the title of that article?

HONORABLE SCOTT BRISTER: I don't know. Let me think about it.

CHAIRMAN BABCOCK: Okay. Any other comments to that rocket docket? Yes, Justice Hecht.

HONORABLE NATHAN HECHT: Pete Schenkkan asked me at the break to clarify, so I'll be happy to, that at least from my perspective and I think the Court's perspective we don't expect Jeff's subcommittee to analyze whether -- how much -- whether a rocket docket would contribute to the vanishing jury trial problem and, if so, how much, because as he rightly points out, to do that we've got to go figure out what the problem is and what's causing it and what can solve it and so on.

Rather, because we don't know with any assurance what the problem is and whether it's good or bad and what could fix it or what's causing it, we simply are in the position of having to explore various ideas. So, as Pete said, really what we're supposed to do is think about if there were a rocket docket what would it look like in Texas and what would be the benefits and debits, and that is what we would like to know. Then this committee can weigh in on is it helpful or hurtful and then the Court will have the benefit of all of that

wisdom, not only in its own deliberations but in what I anticipate will be ongoing conversations with the Legislature.

CHAIRMAN BABCOCK: Yeah. Judge Lawrence, you said at the break you wanted to say something about this.

HONORABLE TOM LAWRENCE: Well, interestingly, the JP courts are really not suffering any decrease in the civil case load. Our case load, if anything, has held steady or maybe even gone up a little bit, and invariably we have people that tell us that they'll arbitrarily reduce or sever out a part of their claim to get within our jurisdiction because they want to go somewhere that they don't have to retain an attorney and it's faster and cheaper and they don't have all the discovery problems that they hear such horror stories about, and they just want to get in and out quickly.

The -- one of the problems that I see is the binding arbitration clauses. I invariably about once every two months have a plaintiff in that is suing, defendant files a motion to dismiss because of a binding arbitration clause, and the plaintiff had no idea that when he signed this long contract to buy that refrigerator that there was a binding arbitration clause, and then they invariably come back later with a horror story about what

happened to them in arbitration and how expensive it was and how they didn't really get to say much about it.

Mediation, on the other hand, has been a very good tool for us to cases that are filed if we get them through mediation and parties settle and they're happy. I think mediation has been beneficial. Arbitration has been and is becoming more and more of a problem, but we're not having the difficulty in small claims court cases, for example. Discovery is limited to what the court approves, and there is no outright rule -- no outright right to discovery, and the cases move very fast.

Now, I know on this committee we tend to -- everything we do to try to clarify things tends to expand the rule book a little bit, and none of that makes things go faster. I don't know what the solution is, but I don't feel that having a rocket docket is going to turn around the trend toward people not filing cases in state court. I think generally it's good to have things go faster, but I don't think that's the entire problem.

CHAIRMAN BABCOCK: Yeah. Harvey.

HONORABLE HARVEY BROWN: I was just going to say that I think that the biggest issue to me is mandatory versus voluntary rocket docket. There is already a procedure in place for parties to agree to a rocket

docket. I mean, I was in Judge Christopher's court a couple of months ago and heard her say, "You want a trial in 30 days?" It was an injunction hearing, a case that had been on file a week. "You want a trial in 30 days, I'll give it to you," so the judges have the ability to put something on a rocket docket already if the parties want it.

So to me the problem is going to be mandatory. When it's mandatory you're either going to, A, kill the lawyers who can't agree to any extensions, like your judge wouldn't let them do, and we've got to be sensitive that people do have lives outside of litigation; or, B, you're going to impeck justice because the parties of necessity can't do everything under that short time frame; or, C, you're going to make these cases only be handled by huge firms that can throw tons of bodies to get it done in that short time frame and, therefore, are going to spend a lot more money. So it seems to me the mandatory is the real problem here, and what we're trying to address really isn't so much I don't think the timing of trials.

I mean, I do some arbitrations and, frankly, the thing that drives the arbitration date is the discovery. If they're not doing any discovery I can try it very quickly, but if they're doing a lot of discovery I

try some of those in arbitration just as fast as I did as a judge, and so I don't think it's really a question of anything other than the discovery process is largely driving a lot of this to arbitration, and so I think that's another problem.

For the committee, I'd suggest that there is one other overlay they need to think about when they're thinking about mandatory rocket docket, and that is electronic discovery. I was just appointed a special master in a case that was set on a pretty quick docket, nine months, a hundred million dollars in dispute, millions and millions of electronic documents. I mean, I just felt sorry for these lawyers. I mean, they were working every weekend, they had huge teams, but the electronic discovery overlay on this is going to make a rocket docket even more difficult, it seems to me. So I think they need to be sensitive to that.

CHAIRMAN BABCOCK: Okay. Well, with that said, unless there is anybody else that wants to weigh in on this now, I think we've given Jeff and his subcommittee a good healthy dose of what everybody thinks, maybe clarified their mission a little bit, and why don't we just break for lunch and be back in about an hour?

(Recess from 12:24 p.m. to 1:36 p.m.)

CHAIRMAN BABCOCK: So, Elaine, let's talk

about Rule 296. Come on, Jim. Jim Perdue. Chop, chop.

PROFESSOR CARLSON: You should have a report of the subcommittee reading, the title, on "216 TRCP to 299a," if you'll turn to page two because Chip has asked that we start with the findings of facts rules. Our subcommittee through our last meeting was asked to consider four discrete issues in connection with our findings of fact practice. One was whether or not our finding of fact rule should attempt to incorporate the situations in which findings of fact are required and when they're discretion area, whether our findings of fact should be mandated in broad form when feasible to parallel the jury charge rules. We noted from the State Bar committee report that there are complaints voiced by several appellate court practitioners, including Frank Gilstrap, dealing with the voluminous and unnecessary evidentiary findings that is going on in our current practice and whether or not the timing of request for findings of fact should be modified, should we go to the Federal approach and allow a Texas trial judge to make findings of fact at the conclusion of the evidence orally on the record, and finally whether the Federal clearly erroneous standards should be considered.

Our subcommittee did not recommend including a statement as to when findings of fact are required and

when they're discretionary, with the consensus of the subcommittee being, well, you can find that in IKB Industries, although you do have that standard set forth in Appellate Rule 21 to some extent. Nevertheless, because I had already spent time on this I'm torturing you. On page two, that was my proposed draft that you can join in rejecting. So I guess that's the first issue, Chip, is there a strong -- or do you want me to go through the whole report?

CHAIRMAN BABCOCK: No. Let's take it in pieces.

PROFESSOR CARLSON: Okay.

CHAIRMAN BABCOCK: You want to frame the issue so that everybody can --

PROFESSOR CARLSON: Does everyone concur on the subcommittee's recommendation that it would not be prudent to include in Rule 296 a statement of when findings are required as opposed to when they're discretionary?

CHAIRMAN BABCOCK: Okay. Judge Christopher, you have a view on that.

HONORABLE TRACY CHRISTOPHER: Well, you know, if I'm in the minority, I'm in the minority. I would like clarification as a trial judge. I went and read IKB Industries to see if it would really tell me when

I had to do it, and as best I could understand from reading that case, it did not tell me when I should do it. It discussed when a request can extend the appellate timetable, when such findings may be useful for appellate review, so I Shepherdized IKB Industries. 281 cases have cited IKB Industries since it came out, so I think the issue is still perhaps percolating around out there as to when findings of fact are necessary.

And from a trial judge's perspective, some of us have had situations where the appellate court has ordered an appeal abated and sent it back to us asking us to do findings of fact and in a case where we didn't think findings of fact were necessary. It was one of those discretionary ones where they're not mandatory but they might be useful, and now the appellate court says two and and a half years later, "Hey, it's really useful for us to go back and figure out the findings of fact two and a half years later."

PROFESSOR CARLSON: "Since you can't, we're going to reverse or remand for trial."

HONORABLE TRACY CHRISTOPHER: Just a very difficult situation. You know, there are so many cases, even after IKB that say things like "any time there is an evidentiary hearing you should do findings of fact" and "any time there is an interlocutory appeal or an order,

you need not do so but the better practice is to do it," and so, I mean, we get requests for findings of fact and conclusions of law all the time and after many, many, many, many different types of hearings that we have, and I would just -- you know, I'm a hard line person. I like to know, yes, I need to do them and then I get them done, or, no, I don't need to do them and I can ignore this request and I don't have to worry about getting reversed -- or not reversed, but requested two years later to do it.

CHAIRMAN BABCOCK: And that was the minority view?

HONORABLE TRACY CHRISTOPHER: That's my view.

PROFESSOR CARLSON: Yes. We're in the minority, Judge Christopher. I'd be interested if Professor Dorsaneo agrees with me, but our subcommittee was of the consensus that the only time findings of fact are required, absent a statutory special situation, is when you have a conventional full-blown evidentiary trial on the merits. That's the way we were reading IKB, and that was not to say it could be useful any time the trial court enters a judgment, even though it wasn't following a full-blown evidentiary conventional trial on the merits when the court held an evidentiary hearing that led to judgment.

CHAIRMAN BABCOCK: Bill, then Kent.

PROFESSOR DORSANEO: Well, I agree with you, but I think people -- and you added the words "on the merits," which presumably meant the merits of the claims and defenses under substantive law, right?

PROFESSOR CARLSON: Yes.

PROFESSOR DORSANEO: There is no clear articulation of what the word "trial" means, you know, if you can have a conventional trial at the bench over a separate part of the proceeding, any separate part of the proceeding; and it's been my view for a considerable period of time that a lot of evidentiary hearings on a part of the case, even if it doesn't involve merits of the claims and defenses, you know, could well be characterizable as a conventional trial. A lot of times we talk about hearings and trials when we're really talking about trials and trials, and that's a confusion that we have.

Your draft is, I think, an improvement, although it doesn't solve all of the dilemmas. I would be in favor of what you propose that your committee did not like.

CHAIRMAN BABCOCK: Summary judgment is a trial, but you don't to do findings and conclusions on summary judgment, right?

MR. ORSINGER: That's because there is no facts to find in a summary judgment, so it's kind of illogical to say that you would make a fact finding.

PROFESSOR DORSANEO: It's not a conventional trial under our jargon that we've developed over the years.

CHAIRMAN BABCOCK: Yeah.

PROFESSOR DORSANEO: Maybe it is a conventional trial now, but it wasn't --

CHAIRMAN BABCOCK: It's not thought to be conventional anyway. Kent.

PROFESSOR DORSANEO: It's not a trial at all, quite frankly.

CHAIRMAN BABCOCK: Kent Sullivan.

HONORABLE KENT SULLIVAN: Just a quick vote in favor of clarity and certainty. Whenever an experienced judge like Judge Christopher weighs in as she has, this says to me that we need to have a clearer, more plain language version of the rule that is as bright line as possible, particularly given that her Shepherd's attempt turned up 200 --

HONORABLE TRACY CHRISTOPHER: 181 cases discussing that case.

HONORABLE KENT SULLIVAN: That suggests to me a dramatic waste of judicial resources constantly

interpreting something that apparently cries out for some real clarity. I like Elaine's formulation, and I think maybe we ought to just clearly say that this is exactly what it means.

PROFESSOR DORSANEO: Is that a motion?

HONORABLE KENT SULLIVAN: I'll be happy to --

CHAIRMAN BABCOCK: Is Elaine's formulation the first thing we say here or the minority view?

PROFESSOR CARLSON: It's the minority view. Our subcommittee did not endorse this language.

CHAIRMAN BABCOCK: Oh, okay.

HONORABLE KENT SULLIVAN: My recollection, but I defer to Professor Carlson, was that absent specific statutory instruction to do so or following a, you know, conventional trial on the merits.

MR. GILSTRAP: Can I ask --

HONORABLE KENT SULLIVAN: That was the way I understood it. I'm not proposing that as the specific language, but that's what I recall.

CHAIRMAN BABCOCK: Okay. Frank.

MR. GILSTRAP: Can I ask for clarification? I'm looking at page three, and at the top it says "Rule 296," and it starts out underlined "if findings are properly requested." Is that the subcommittee

recommendation?

PROFESSOR CARLSON: Yes, on a subsequent issue.

MR. GILSTRAP: Okay. Where are you talking about?

PROFESSOR CARLSON: Frank, I am on page two, the bottom paragraph on the page, redlined.

MR. GILSTRAP: All right. Sorry.

PROFESSOR CARLSON: Beginning with "following."

MR. GILSTRAP: And that simply is added to the existing language of the rule? You're not going to take out any of the existing language of 296?

PROFESSOR CARLSON: Not so far.

MR. GILSTRAP: Okay. That's where we are. Okay. Thank you.

CHAIRMAN BABCOCK: Yeah.

MR. STORIE: I had one thought, which was a conventional trial doesn't have a specific meaning to me. The point I raised last time was the difficulty we sometimes have in substantial evidence de novo cases where you have conventional trial in terms of how you're putting on evidence, and so I would ask that maybe we add "de novo" or something like that so the findings are not requested in those kind of trials.

CHAIRMAN BABCOCK: Okay, Gene. Yeah.

PROFESSOR DORSANEO: Conventional trial has a recognized meaning, and it probably does mean on the -- it probably does mean on the merits. The word "trial" doesn't have any particular meaning, but "conventional trial" is a term coined by Judge Calvert in the Aldridge case some many years ago, and I think it has a fairly well-recognized meaning, and we've used it before. The words "conventional trial on the merits," I think is language that would say "trial on the merits of the claims and defenses, of substantive claims and defenses" and "conventional" adds that suggestion, too. It's not a trial on a plea and abatement, for example, because of a prior pending action or something like that.

MR. STORIE: Again, that's what we have, I think, in all respects except that it's not de novo, so the court is not the fact finder. Does "conventional" carry with it the meaning of de novo and fact finding authority in the court?

PROFESSOR CARLSON: I'm sorry. I didn't follow you exactly. You're talking about an appeal from an administrative decision that's tried de novo in the trial court? Do I understand that?

MR. STORIE: Correct. But it's substantial evidence de novo. It's not a true de novo trial, so the

court has to hear and admit the evidence, but the court does not have discretion in finding facts. That has to defer to the agency decision.

PROFESSOR CARLSON: I see.

HONORABLE STEPHEN YELENOSKY: Yeah. There are no findings of fact other than it was supported by substantial evidence or not.

MR. STORIE: Right, but the prior reading was if it's tried to the court you can ask for findings, and that was the question I had about the rule as it currently is.

HONORABLE STEPHEN YELENOSKY: Well, at least in -- I would think that -- we do a lot of those administrative appeals. We don't consider those conventional trials, but maybe that needs to be spelled out.

PROFESSOR DORSANEO: I don't -- that's outside of my camp. I mean, I don't know.

CHAIRMAN BABCOCK: Elaine.

PROFESSOR CARLSON: May I ask a question? Does the Administrative Procedure Act -- is that where you find the substantial evidence standard, or is that from the common law?

MR. STORIE: Yeah, the particular cases I'm talking about, though, are actually accepted from the APA

generally, so they're under the old standard, which used to be substantial evidence de novo. I think in all administrative appeals where you go introduce the evidence all over again and you have witnesses, documents, everything else, but the court's decision is limited to the legal question of substantial evidence and then whatever statutory questions may be there, too.

PROFESSOR CARLSON: So that's not a matter of statutory requirement for the review. That's just how we do it under the common law? I understand what's happening. I'm just trying to figure out is there a statutory provision.

HONORABLE STEPHEN YELENOSKY: Usually it's statutory. Usually it's statutory. I imagine there is still some common law, but mostly it's statutory. But either way, it's a substantial evidence review, which is not --

PROFESSOR CARLSON: Yeah.

HONORABLE STEPHEN YELENOSKY: -- a finding on a preponderance.

PROFESSOR CARLSON: Because I was thinking, you know, we could lead off this paragraph with "absent a statutory requirement to the contrary," or "unless a statute otherwise requires," but I'm hearing that his situation is not covered by statutory requirement of de

novo review with a deference given to the findings.

CHAIRMAN BABCOCK: Gene, is it your experience that most judges would believe as Judge Yelenosky that your -- the situation you're describing is not a conventional trial on the merits?

MR. STORIE: I think most would not think that findings are appropriate. There is case law to that effect and yet we still have probably at least three or four a year who will file findings and will think they're appropriate because of the way the rule currently reads. So it's not --

CHAIRMAN BABCOCK: They think they're required to do it or they just can do it because --

MR. STORIE: They think it's proper to request and to file findings because, as it says now, it's just any case tried to the court without a jury.

HONORABLE STEPHEN YELENOSKY: Well, and they find certain facts. They don't just say, "There is substantial evidence to support"?

MR. STORIE: Yes.

HONORABLE STEPHEN YELENOSKY: They actually find facts?

MR. STORIE: Yes.

HONORABLE STEPHEN YELENOSKY: Well, there is no cure for wrongness. I mean --

CHAIRMAN BABCOCK: Yeah, Frank.

MR. GILSTRAP: As I understand, the intent of the change is to tell the court that you only have to make findings of fact and conclusions of law following a conventional trial on the merits and in no other situation are you required to make them.

PROFESSOR CARLSON: Absent a statutory requirement.

MR. GILSTRAP: Okay. Okay. If that's the case, I'm not sure why we need the language starting in the second line from the bottom, starting with "in support of the judgment." You see, that seems to -- that seems to suggest there might be someplace where you would make findings if you were not dealing with a final judgment. It seems like you could cut off "in all other instances" you don't need findings and conclusions, period, except the -- unless you want to put in there "except by statute."

CHAIRMAN BABCOCK: Yeah, Bill.

PROFESSOR DORSANEO: That raises another ambiguity. Usually when we use the term "judgment" we mean final judgment, but not always. Sometimes we don't mean judgment at all. We just mean some sort of an order. So, I mean, the words "trial" and "judgment" are just fraught with ambiguities, and I don't know whether we

ought to use -- that might be a reason not to use "in support of the judgment" in this draft.

PROFESSOR CARLSON: You know, Frank, that language or that thought came out of the IKB decision where they actually were looking at nonconventional trial on the merits that culminated in a final judgment, but I see -- you know, remember that, that line of cases, if you dismiss for this reason but you had a hearing or if you DWOP for this reason but you had a hearing. You heard evidence, you dismiss for sanctions, but you had a hearing. The trial court could make findings of fact, but what you're saying is by including that language it's cutting off the discretionary right, or could be read that way, of a trial court to make findings in a noninterlocutory order?

MR. GILSTRAP: I'm reading it to suggest there might be a place that other than following a conventional trial that findings might be required.

CHAIRMAN BABCOCK: Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: Did you-all look at plea to the jurisdiction? There's at least one case saying that findings are appropriate because facts can be considered, but I thought the case law was that you considered the facts and you looked to whether they can be resolved sort of on a summary judgment standard, which

would lead one to think that you don't make findings, so --

CHAIRMAN BABCOCK: Appropriate or required on a plea to the jurisdiction?

HONORABLE STEPHEN YELENOSKY: Either. I mean, I would think they're not appropriate if it's really like a summary judgment standard.

HONORABLE SCOTT BRISTER: Nobody knows.

HONORABLE STEPHEN YELENOSKY: What's that?

HONORABLE SCOTT BRISTER: Like everything with plea to the jurisdiction, nobody knows, because there's not a rule.

PROFESSOR DORSANEO: Just don't say "after an evidentiary hearing" instead of those other words.

CHAIRMAN BABCOCK: Yeah, Frank.

MR. GILSTRAP: But the point is Judge Yelenosky is just opening up a huge area here.

HONORABLE STEPHEN YELENOSKY: Sorry.

MR. GILSTRAP: I think so. There are many, many times that a court will hear evidence and make a decision based on disputed facts. It may be some ancillary area. It may be a jurisdictional. It may be a lot of things, but so far in Texas we have only required findings of fact following a trial on the merits. The Federal courts, they make them all the time, and you could

do that. You could say in Texas if there is some ancillary issue that's being tried that could go up, the court can make findings of fact and require it, but that's a huge step, and we're going far beyond where we started. I mean, if we want to go there, I think we've got to realize we're taking a big step.

HONORABLE STEPHEN YELENOSKY: And resources need to --

PROFESSOR CARLSON: Yeah, we had that discussion at the subcommittee level, Frank, and Judge Peeples pointed out that Federal courts are courts of limited jurisdiction and that the Federal government can print money and they have law clerks and resources to do that.

CHAIRMAN BABCOCK: Lots of law clerks.

PROFESSOR CARLSON: And we don't.

CHAIRMAN BABCOCK: Richard.

MR. ORSINGER: From my perspective we ought to evaluate this from the standpoint of when do we want and why do we want findings of fact. We want findings of fact when the appellate court is going to decide whether to reverse a decision. We don't need it for any other purpose. So if you have dismissed a case on special appearance and it's going to be appealed, you ought to get findings of fact to help the appellate court decide

whether the case is done properly. If you have an unconventional trial on the merits, whatever unconventional would be, and it's case dispositive and required the trial judge to judge the credibility and rule between two competing versions of the facts, you ought to get findings of fact. We're trying to help the appellate court stay out of the business of weighing the evidence really or acting as a nisi prius fact finder, and we do that by giving them --

HONORABLE STEPHEN YELENOSKY: A what?

MR. ORSINGER: -- findings.

HONORABLE STEPHEN YELENOSKY: What was that? Who is that?

CHAIRMAN BABCOCK: A nisi prius.

PROFESSOR CARLSON: Who you calling a nisi prius?

MR. ORSINGER: Hey, you watch your mouth.

CHAIRMAN BABCOCK: Mr. Dirty Mouth.

MR. ORSINGER: And so it seems to me if the standard you use is when does the appellate court need to know how and why the facts were resolved the way they were, that's when they need findings, and so I would be attracted to something more like what we have done in the Family Code, which is that you give findings that are necessary to adequately present the case on appeal.

MR. GILSTRAP: Chip, but --

CHAIRMAN BABCOCK: Judge Patterson had her hand up a minute ago.

HONORABLE JAN PATTERSON: Well, the other purpose of it is to facilitate transparency of reasoning so that the appellate court doesn't have to guess at the reasoning below and so that the appellate court is not in a position of saying "will affirm on any ground" and which makes appeal less meaningful, but one thing we need to keep in mind just as we go through this process is that the criminal law has taken Richard's approach, and I think it's the Cullen case, if anybody can speak to that, is that right? Where the Court of Criminal Appeals has now required findings of fact, and I believe that's a suppression hearing, so it's not a conventional trial on the merits, and the purpose of that was to -- because lawyers always request finding of fact in a suppression hearing and courts very often ignore them, and then when it goes up on appeal it's upheld upon any theory, and the facts may or may not be relevant and may or may not have been helpful, but this is a -- to allow a certain transparency of reasoning and understanding on what facts it was decided below and to make appeal meaningful, but I think we can't ignore the movement of the criminal law in that area and the reasons why it's going -- moving also in

that direction.

CHAIRMAN BABCOCK: Judge Benton.

HONORABLE LEVI BENTON: I waive for the time being.

CHAIRMAN BABCOCK: All right, sir. Justice Duncan and then Frank.

HONORABLE SARAH DUNCAN: Well, another purpose that would be served by findings and conclusions is that whoever is appealing would know how to brief it. We have an enormous number of pages filed in the appellate courts trying to disprove a possible ground for recovery or defense without any knowledge that the trial judge thought it was a possible ground of recovery or defense.

CHAIRMAN BABCOCK: That would be summary judgment or more than that?

HONORABLE SARAH DUNCAN: Oh, much more than that. For instance, a DWOP. If you've got a dismissal for want of prosecution and the defendant files a motion for dismissal on three grounds, you know, want of -- one, of due diligence in prosecuting the case, failure to comply with Supreme Court standards, failure to appear at a trial or hearing, and the trial judge sits there -- Judge Christopher sits there and says, "They didn't fail to appear at a trial or hearing. That's garbage," but we don't know that because there's no record of it, she

didn't say it on the record. It's not in the findings, and so on appeal the only way the appellant can get that judgment reversed is to show that none of the possible bases for dismissal was viable in this case.

Well, if two of the three the trial judge rejected, we shouldn't -- they shouldn't be briefing it and we shouldn't be having to consider it, but it does take enormous resources to do findings and conclusions, and unfortunately we don't have the power to increase them.

HONORABLE TOM GRAY: I was just going to say, but now that you mention it, on summary judgments it's there, too.

HONORABLE SARAH DUNCAN: That's right.

CHAIRMAN BABCOCK: Yeah.

HONORABLE TOM GRAY: A lot of time.

CHAIRMAN BABCOCK: Oh, yeah. Big time on summary judgment.

HONORABLE TOM GRAY: A lot of times.

CHAIRMAN BABCOCK: Frank.

MR. GILSTRAP: Well, so to summarize, where we are is on the one hand it really makes a lot of sense to have findings and conclusions in other instances like where you're trying jurisdictional facts or they're being determined by the court, there is a lot of instances in

which you could have findings of fact and it would make a lot -- it would make the appeal a lot more meaningful, but do you want to pay that price or do you want to just say we're going to continue with the present system, which is we presume the facts, we presume the facts in favor of how the judge decided, and we're not going to pay that price for -- because of some higher level of transparency by requiring these findings of fact in a lot of cases in which the judges don't want to make them.

CHAIRMAN BABCOCK: Fair enough. Yeah, Bill.

PROFESSOR DORSANEO: Elaine, some of these other proposals that make it or look like they make it easier for the court to perform this function or to satisfy the requirements of the findings rule, you know, might bear on this issue as to how often we want to obligate the court to make them.

CHAIRMAN BABCOCK: Yeah, Sarah -- I mean, not Sarah but --

PROFESSOR CARLSON: Sarah wanna be.

CHAIRMAN BABCOCK: Elaine.

PROFESSOR CARLSON: I'm not speaking for the full subcommittee because we really didn't flesh this out, but when I read IKB and Progeny and other cases, it seems to me that the policy reason for requiring findings of facts following a conventional trial on the merits has

been in part to inform a losing litigant of the grounds on which they won and lost so they could possibly narrow the basis for the appeal, and in an interlocutory hearing, you have a discrete matter and you know what it is, because we ruled on it.

When you look at the Federal case law on this -- and I don't profess to have any expertise there, just a little bit of knowledge is dangerous, but I did look on the Federal side. Federal courts look much more at the issue in terms of informing the appellate court than we do, and the Federal courts admonish trial judges for accepting the parties' proposed findings of fact and suggest the trial judge ought to be doing this on his or her own and, of course, as Frank said the required in all cases in Federal court with different resources.

Richard, what I hear you saying is you appreciate as an appellate lawyer that it would be useful to be able to inform the appellate court the factual determinations by the trial court whether it was a conventional trial on the merits or not.

MR. ORSINGER: If it's an appealable question.

PROFESSOR CARLSON: If it's an appealable question.

MR. ORSINGER: And I don't mean to destroy

what you're saying, but there are lots of rulings that are preliminary to the important ones.

PROFESSOR CARLSON: Uh-huh.

MR. ORSINGER: And we don't want findings on all of those. We want "the case was decided because I went with this instead of that." Let's put that in the record so it can be reviewed on appeal.

PROFESSOR CARLSON: So you want it put in the rule that the findings are really important and you can appeal them?

MR. ORSINGER: Well, no, I don't. I think the approach of conventional trial on the merits leads us often into areas and debates that have to do with words and not with the reality of trying to get a case that was tried with a bunch of conflicting testimony up in a clean fashion to the appellate court. I think we ought to be focusing on what kinds of hearing or outcomes or rulings are appealable and how do we want to describe them. One way to describe them, which is kind of sort of the way the Family Code has handled this, although in a more narrow fashion, is that we say in the Family Code that the findings of fact have to be sufficient to allow the case to be presented on appeal.

We don't tell you what you must include or can include or the degree of specificity or when it occurs

or whatever, but it's got to be enough for the appellate court, and so that's a self-enforcing standard because if it's not enough the appellate court will abate it and send it back down. Now, maybe there is some self-adjusting mechanism to determine what kinds of hearings or rulings will require a finding, rather than argue until the cows come home on what's a conventional trial or what's the merits and what's not. Maybe we could find a different way of describing something that basically is outcome determinative, but depends on facts.

CHAIRMAN BABCOCK: Carl.

MR. HAMILTON: Is it too broad just to say any appealable decision of the trial court?

PROFESSOR CARLSON: Well, isn't everything potentially appealable?

MR. HAMILTON: Huh?

PROFESSOR CARLSON: You mean subject to an immediate appeal?

MR. HAMILTON: Yeah, immediate appeal is what I mean.

CHAIRMAN BABCOCK: That may be sweeping with a pretty broad brush, wouldn't you think?

HONORABLE SARAH DUNCAN: I would bet you that there are issues that are not subject to an interlocutory appeal on which you would very much want and

need findings and conclusions.

CHAIRMAN BABCOCK: Justice Jennings and then Justice Gray.

HONORABLE TERRY JENNINGS: Doesn't it depend on the standard review? If it's a de novo standard of review, who cares about the findings of fact. I mean, if it's a mixed question of law and fact then findings of fact come into play, and obviously if it's abuse of discretion, I mean, if you really want to think about -- I mean, you could put a lot of work and effort into trying to come up with this, but it all depends on the standard of review of the decision, right?

HONORABLE STEPHEN YELENOSKY: Right. Substantial evidence review. The court of appeals is going to review it the same way the trial court did. Why do they want anything from me?

PROFESSOR CARLSON: Justice Jennings, are you saying that because there's different levels of deference that are given to fact finding that we shouldn't try --

HONORABLE TERRY JENNINGS: Yeah, I don't know that we need a rule that covers everything, which is maybe one reason the committee didn't want to have a clear-cut rule because maybe you can't have one because there are so many factors involved. I don't know. What

was the reasoning of the committee in that regard?

PROFESSOR CARLSON: Well, I guess Bill and I are the ones who aren't that troubled by what a conventional trial on the merits means.

PROFESSOR DORSANEO: Not troubled by it at all. But the issue, seems to me, is the one that Richard raised. I mean, you could just as easily have a very satisfactory rule that would say after -- you have to have findings after any evidentiary hearing.

PROFESSOR CARLSON: Would you have to have a judgment before you -- would you require a final judgment before that requirement would kick in or --

PROFESSOR DORSANEO: No, just some sort of an order.

MR. ORSINGER: Well, see, I'm not advocating something that broad because then you get a lot of preliminary findings that get folded into the ultimate outcome. I think there ought to be some way -- perhaps this is similar to a jury verdict or something, some way to say when the ruling is case determinative and whether you admit certain evidence or not, maybe that's case determinative, but I certainly wouldn't want trial judges to do findings on what evidence they let in and what evidence they -- but if it disposes of the case, it ought to be in the category where findings are available. If

it's a special appearance that's granted, why should we have to brief it on the assumption that any one of five possible legal theories was the one the judge used?

And then family law, by the way, you end up with many things that are not conventional trials on the merits for various reasons. We might cut up some matters to be settled by agreement, some matters to be ruled on by the judge in an informal situation and then may even have a jury deciding some issues, and those don't all necessarily happen in the same seven-day period, so when you try to bring this concept of what is a conventional trial on the merits to a family law case it's going to break down, and if you --

PROFESSOR DORSANEO: It needs to except.

MR. ORSINGER: Okay. Well, you and I can talk about it some more.

CHAIRMAN BABCOCK: Justice Gray had his hand up a long time ago.

HONORABLE TOM GRAY: Well, I was going to try to interject an example of a situation when you may on an individualized ruling want some findings that would be helpful to us. For example, like on a 702 hearing on a Daubert analysis, are you saying that the expert is not qualified, are you saying it's not a reasonable area of expertise, that he did not do it properly on this

occasion? I mean, there are, as I recall, three or four discrete findings that have to be made before the expert is introduced, and it would sure be helpful to me in reviewing that trial court's decision on appeal if I knew which one of the bases the expert was not admitted on.

On another issue on the conclusions of law, I don't think there is any time that the appellate court uses the conclusions of law of the trial judge, because we are not bound by them and if they are in fact findings of fact we use them as findings of fact and so does that even need to be in the rule with regard to conclusions of law. And then I was curious kind of where the majority was, was this just on the subcommittee -- was it just a leave the rule like it was?

PROFESSOR CARLSON: Yes.

HONORABLE TOM GRAY: And just leave it alone, and was there a reason to just leave it alone or was it just too problematic to fix?

PROFESSOR CARLSON: Both.

HONORABLE TOM GRAY: Okay.

CHAIRMAN BABCOCK: Getting back to Daubert, though, Justice Gray, is there deference given to the trial court on the findings of qualification and all the things that --

HONORABLE STEPHEN YELENOSKY: Expert --

MR. ORSINGER: Abuse of discretion.

HONORABLE HARVEY BROWN: Unless it's a no evidence review.

CHAIRMAN BABCOCK: Okay. Judge Patterson, you had your hand up.

HONORABLE JAN PATTERSON: I'm not sure which way I come out on this, but the other reason to be inclined towards findings of fact is simply because I'm convinced that it leads towards disposition of cases following trials. The more reasons that a trial judge generally gives, the more explanation, the clearer the reasoning, the less likely it is to be appealed. And that may go to the transparency point, but it's a slightly different point.

CHAIRMAN BABCOCK: Okay. Richard.

MR. ORSINGER: Another rationale that maybe was included in what you said or maybe not is that I think it would improve user satisfaction. I think one of the reasons we require appellate courts to sign written opinions and some of us fought memorandum opinions as being one or two-line dispositions is that, first of all, it forces the judge to approach the case intellectually, which I think that our law would like.

We don't want just an arbitrary decision. We want a rational decision that can be explained in

rational terms, and it needs to be put on paper where the thought process that you go through in putting it on paper introduces a kind of a rationalization to it, and it holds the thought processes up to review by other people. And if the trial judge is able to just say "you win" and never say anything, it's not good public policy, just like we wouldn't want the appeal courts to say "you win" and not tell you why. So having findings help, I think, the litigants to see why they lost, which sometimes may avoid appeals if they feel like, man, I just lost because in a swearing match they didn't believe me, I'm not going to get this reversed on appeal, just let it go. I mean, as a policy issue, having judges articulate the reasons for their decisions in a rational way I think is a good public policy.

CHAIRMAN BABCOCK: Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: Well, I agree with that. I guess I'm wondering about -- certainly on dispositive things, but I'm wondering about all those motions that we hear and decide in discovery disputes where, you know, there might be multiple reasons for doing it, but judicial economy might lead the trial judge to decide based on the easiest issue that's before him or her, and then do we want to encourage people just to find on that and then appeal on that issue, or does that mean

the trial judge has got to have longer hearings to make sure that everything is covered and all the findings that are necessary on every discovery dispute are heard?

The other thing is just that I just think it's really complicated because if you say -- I mean, the substantial evidence is a good example because if you don't look at the standard of review and you say, you know, you had a final decision that's going on appeal, I don't see how anything other than, you know, it's supported by substantial evidence or it's not is appropriate, but yet you're saying the court would have to give findings.

CHAIRMAN BABCOCK: Harvey, then Bill.

HONORABLE HARVEY BROWN: Sometimes I think fact findings don't discourage appellate review, they encourage appellate review.

HONORABLE STEPHEN YELENOSKY: Right.

HONORABLE HARVEY BROWN: Sometimes if a judge gives the wrong rationale everybody thinks, "Oh," --

CHAIRMAN BABCOCK: "What an idiot."

HONORABLE HARVEY BROWN: -- "I could take that one up," I'll win that one, so that's why judges are encouraged, frankly, to not give a rationale, so I think that while it might sometimes help avoid appeals, I also think sometimes having fact finding would actually

encourage it.

HONORABLE JAN PATTERSON: When they make mistakes? I mean --

HONORABLE HARVEY BROWN: The ruling may be the right ruling but the wrong reason.

MR. GILSTRAP: Right result.

HONORABLE JAN PATTERSON: Yeah.

HONORABLE HAVEY BROWN: If it goes up on appeal only on that reason, that rationale, then you're going to have it back down and ask for summary judgment again. I'm just saying the assumption that it's necessarily going to result in less appeals is --

HONORABLE JAN PATTERSON: I think that's a very common perception that's very misunderstood because it's upheld upon any ground upon which it could have been -- but the reasoning provides the litigant -- it goes back to user satisfaction, to transparency, but also whether there is a basis for appeal. I think it's easier for the lawyer to explain why; and, frankly, the other aspect of it is that it forces the judge through the discipline of making the decision; but I think this rule and run thing that's really developed and now out of control, in my view, is not a good thing for litigants, lawyers, or judges.

It's helpful to go through the discipline,

but I agree with Judge Yelenosky that you certainly don't want to overdo it and make it available in everything, but I don't -- I've actually had conversations with trial judges who provide explanations. This is apart from the findings of fact, but in a conversation about findings of fact and explanations, and not a one of them who gives explanations has ever been burned by an appellate court just because they gave the wrong rationale, but it goes back to making a system useful and transparent and providing justice.

HONORABLE STEPHEN YELENOSKY: Those rationales, though, as we've discussed, are sometimes in a decision letter, which would be different from findings of fact, though, where you could be burned by it, wouldn't it? No?

CHAIRMAN BABCOCK: Frank.

MR. GILSTRAP: You know, Richard and Justice Patterson are right. It would be a better world if we got clear findings of fact on any dispositive decision in a case. The question is do we really want to put that administrative burden on the judges; and, secondly, how are we going to keep them from loading up on 58 findings of fact? I mean, if we can't solve that problem first then we don't have any business going around here and saying you need more findings in other kinds of cases. I

think we ought to solve that problem before we figure out whether or not we want findings of fact in more kinds of cases.

CHAIRMAN BABCOCK: Yeah, Bill.

PROFESSOR DORSANEO: You know, it is perfectly plain that the language of the rule as it stands now is unsatisfactory. I mean, "in any case tried in district or county court without a jury" as taken literally would cover a wide variety of things that people don't think should be covered and don't read the rule as covering anyway, like it could cover all preliminary motions, all pleas, you know, anything you could think of. Frankly, it could arguably cover summary judgment, although there aren't supposed to be any findings to be made in a summary judgment context.

So I think it's a tremendous improvement to provide as much clarification as we can agree on; and I think all of us or most of us could agree that the circumstance or one circumstance in which we want to have findings mandatory is when it's a trial on the merits, conventional trial on the merits, meaning the merits of the claims and the defenses, which I think is the normal understanding of on the merits rather than on the merits of venue or on the merits of jurisdiction; and then to say otherwise, in a sentence like the sentence that Elaine

has, that the trial judge may do it, well, that's -- that's an improvement as well.

We might want to add some kind of language that's coming from the Family Code, instead of just saying "after an evidentiary hearing," saying -- you know, to elaborate on it a little bit more, "after an evidentiary hearing when that would aid in the disposition of the appeal" or whatever the Family Code language that's been selected in the Family Code is; but I think it's a tremendous improvement to put those two ideas in here, rather than -- you know, rather than just kind of let it slide because we can't figure out how to solve every problem.

CHAIRMAN BABCOCK: You don't think that 296 as written is clearly applicable to nonjury trials, conventional nonjury trials?

PROFESSOR DORSANEO: It says " any case tried in the district or county court." I think people believe that doesn't include pleas and abatement and the like, but I'm not sure where that idea ever came from.

CHAIRMAN BABCOCK: Richard.

MR. ORSINGER: We chased our tail in the family law arena for 20 years about --

CHAIRMAN BABCOCK: I wish I'd been there for that.

MR. ORSINGER: -- whether a case that is partly tried to the jury and partly tried to the court, whether you're entitled to findings or not, because a lot of times you try custody to the jury but you try property to the judge, and under some court of appeals decisions that meant if you tried anything to the jury you couldn't get a finding on anything else. So the bulk of your appealable case went up without any kind of findings.

I really -- I think that I'm not sure the rule is as broken as everyone else says. I'm sorry there are so many cases that have cited IKB. I'd like to know whether they're citing them for the issue that we're debating right now. I think in the family law after decades of screwing around with it we've come to a comfort level of Rule 296 with some tweaking in the Family Code section, and I think it's working pretty well for us now, and I wish maybe there's some way for us to share our experience with the general civil litigators and you could come to peace with it, too, but I don't -- I used to -- in the Eighties this rule was so dysfunctional, this whole series of findings was so dysfunctional you could hardly succeed in bringing a nonjury appeal, and now, it's so much better now.

CHAIRMAN BABCOCK: So it's a generational thing.

Anybody feel like voting? It appears that the -- Justice Duncan, you don't.

HONORABLE SARAH DUNCAN: Well, I think I have made this comment before and maybe got laughed out of the room, but as hesitant as I am to disagree with Professor Dorsaneo, I don't want findings and conclusions after a conventional trial on the merit tried to the bench. I just want them to fill out a verdict form. I don't understand why we require more of judges, who we supposedly trust to disregard irrelevant evidence or inadmissible evidence. Why do we require them to go through this hoop of findings and conclusions when we just ask the jury more or less broad questions on claims and defenses?

MR. ORSINGER: Can I respond to that, Mr. Chair?

CHAIRMAN BABCOCK: Certainly.

MR. ORSINGER: The issue that Sarah has raised, which I totally agree with her, is addressed really in what shouldn't require findings, not when are findings required; and I personally support the idea of it ought to be ultimate issues so that in a car accident case it's negligence, causation, and damages; but in a family law case, you know, is it an ultimate issue whether 5,000 shares of GM stock are separate or community or the value

of a closely held business or a painting? Are those ultimate issues?

You know, the case is going to get reversed or not depending on the value of that business or the character of that stock, and for family lawyers that's an ultimate issue, but it's not really a ground of recovery or defense. So I think we have a lot of debate to talk about, but I agree with you that we ought to have findings only on ultimate issues, but that doesn't mean we shouldn't have findings on pretrial hearings.

HONORABLE SARAH DUNCAN: I agree, and if I could follow up on what Richard is saying, what findings and conclusions are, you know, are they findings on ultimate issues, are they finding on claims and -- or is it 150 findings on all of these subsidiary evidentiary questions? That's going to impact maybe control, the burden that's placed on trial judges by expanding findings and conclusions.

If we're talking about the kind of findings I see where there are, you know, 150 findings on every evidentiary disputed issue in the case, yes, that would be a huge burden to impose on trial judges any more than it's already imposed; but if what we're talking about is a scaled down version of findings and conclusions more like a jury verdict, then I think we would not only be able to

expand it, but we could reduce the burden that's already being placed on trial judges, because some lawyers think they need those 158 findings on all those evidentiary issues, and as a trial judge you sit there and you've listened to all the evidence, and you're like "Why, I can't agree to that." We need to decide what findings and conclusions are supposed to be.

PROFESSOR DORSANEO: That's what page three is about.

HONORABLE SARAH DUNCAN: But I'm saying that what findings and conclusions are supposed to be has impact on whether we should recommend or want to recommend any expansion of findings and conclusions practice.

CHAIRMAN BABCOCK: Judge Christopher.

PROFESSOR DORSANEO: That's what I said earlier.

HONORABLE TRACY CHRISTOPHER: Well, I kind of agree with you. I like broad form findings. I do that just sort of as a matter of course in some of my cases, but then I think to myself, well, how will a broad form finding that the defendant has sufficient minimum contacts with the State of Texas to support, you know, personal jurisdiction, how would a broad form finding like that help you any more -- help the appellate court any more than my, you know, denying the special appearance? You

know, I just -- I don't see how that factual finding would help you if we went broad form.

CHAIRMAN BABCOCK: Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: Yeah, I think that's exactly right. Last time we spent a long time actually talking about what findings of fact and conclusions of law should be, and it was this discussion exactly within the context of what it should be for after a conventional trial, but when you start talking -- and that's a legitimate debate, and I don't know that we reached consensus on that, but I agree with Judge Christopher. I don't think that's transferable or helpful really with these other questions because we don't have the paradigm that we do with broad form jury questions.

HONORABLE SARAH DUNCAN: I agree, but that --

CHAIRMAN BABCOCK: Carl.

MR. HAMILTON: Maybe we should talk about Rule 296 first, page three first, and then --

CHAIRMAN BABCOCK: Well --

HONORABLE STEPHEN YELENOSKY: Well, I think our point is it doesn't matter for these other things because it's not really transferable. You can have the debate, but it's only a pertinent debate when you're talking about findings of fact in a conventional trial, so

I don't know that it needs to be done first. I think it's -- wouldn't you agree, Judge Christopher, with that, that it's only pertinent to --

HONORABLE TRACY CHRISTOPHER: Well, truthfully I'm of two minds. I agree with Judge Patterson, Justice Patterson, that when I sit down and take the time to go through, you know, point by point by point by point I come up with a better product, but I generally don't have time to do that.

HONORABLE STEPHEN YELENOSKY: Well, my question was whether you agree, though, that the debate about this kind of broad form is applicable to a conventional trial findings of fact, but it wouldn't be, I thought your point was, to a venue issue.

HONORABLE TRACY CHRISTOPHER: Well, I mean, why not, though. I mean, it seems like -- which is kind of why when I, you know, grant or deny a special appearance, especially if it's based on affidavit evidence, and then two years later I'm asked to do finding of fact, you're kind of like, well, you can read those affidavits. I mean, you know, what was it that I found that you-all would need to know on the appeal?

CHAIRMAN BABCOCK: Elaine, the -- I'm sorry, Judge Christopher, were you done?

HONORABLE TRACY CHRISTOPHER: No, I just

want guidance.

CHAIRMAN BABCOCK: Elaine, you started this by saying that the subcommittee, the majority anyway, said no change in the rule, right?

PROFESSOR CARLSON: No change in the rule to provide when findings are required and when they're discretionary, to leave the lead-in sentence alone.

CHAIRMAN BABCOCK: Leave the lead-in sentence, so let's have a vote on how many people are in favor of that.

MR. HAMILTON: What was that again?

CHAIRMAN BABCOCK: How many people are in favor of leaving the lead-in sentence, the first sentence of Rule 296, which says, "In any case tried in a district or county court without a jury any party may request the court to state in writing its findings of fact and conclusions of law." The committee, the majority of the committee, recommended that we leave that as-is. Everybody who is in favor of leaving that sentence as-is, raise your hand.

All right. All those opposed? By a vote of 13 in favor and 10 opposed, the Chair not voting, the vote is to leave that lead-in sentence as-is.

PROFESSOR CARLSON: Okay. The second issue that we discussed --

MR. ORSINGER: Before we leave that could I make a suggestion? I know this is slightly out of order.

CHAIRMAN BABCOCK: It's way out of order, but go ahead.

MR. ORSINGER: We have a specific need for findings in a temporary injunction, which are set out in Rule 683, "Every order granting an injunction and every restraining order shall set forth the reasons for its issuance," and we have a lot of case law indicating what findings have to be in a temporary injunction. If those of us who feel like they ought to have findings in a special appearance order then maybe we can fix it in the special appearance rule like we have fixed it with temporary injunctions in the temporary injunction rule. Thank you.

CHAIRMAN BABCOCK: You bet. Elaine.

PROFESSOR CARLSON: The second issue our subcommittee looked at is whether or not it would be desirable to change the rule so that broad form findings of fact would be required whenever feasible, tracking Rule 277 in the jury charge rules; and again, the subcommittee was not in favor of mandating broad form findings of fact, but was in favor, is in favor, of giving the trial court the discretion to make broad form findings of fact.

A lot of our discussion in this area looked

at some of the things that Sarah has raised, and that was what kind of information do you get in an appellate court from the charge that you would or would not get if you had pure broad form findings of fact, and our discussion was that, you know, you really could miss out on a lot of information if you had broad findings on ultimate issues only mandated, because you don't have necessarily the insight of the court on the burden of proof or you don't have the instructions that would go to the jury to make the mixed finding of law and fact.

And our subcommittee really felt that it would not be desirable in all cases to require the trial judge to be that curt in making their findings, that it would be more helpful to have the trial court have the option of making findings of fact on each ground of recovery or defense with the option of making them in broad form if the court so desired. Now, of course, the opposite argument would be -- well, there's a couple of them. One, Sarah would say let's just have the trial judge fill out a verdict and then we would have the same information in both courts.

HONORABLE SARAH DUNCAN: But are you saying that for all instances in which findings and conclusions are --

PROFESSOR CARLSON: Requested.

HONORABLE SARAH DUNCAN: Well, that to me is the hiccup. Sorry.

PROFESSOR CARLSON: If they're requested. Well, I don't want to digress from there too much.

HONORABLE SARAH DUNCAN: Sorry.

PROFESSOR CARLSON: So, you know, it kind of surprised me that our discussion ended up going that way, quite frankly, because, you know, the opposite argument would be, well, we've got this body of law on when broad form submission is and is not feasible that is not necessarily crystal clear, but it is helpful, but for the reasons I stated earlier, our subcommittee felt very strongly that in a bench trial we don't want to try -- tie the trial judge to making only broad form findings.

CHAIRMAN BABCOCK: Okay. Discussion on that? Yeah, Frank.

MR. GILSTRAP: Richard's comment has kind of made me rethink that. I mean, I could see why that maybe the question of the value of the stock at Microsoft might not be an ultimate issue but it might be an issue that the appellate court needs. At the same time, we still need to discourage, you know, 150 findings. I mean, that's where we started, I think. At the very least we would need this comment down here, "Unnecessary and voluminous evidentiary findings are not to be included in the court's findings of

fact and conclusions of law," although --

CHAIRMAN BABCOCK: Isn't that a little bit in the eye of the beholder, though?

MR. GILSTRAP: Well, okay. Okay. But all it is is some type of, as Richard says, hortatory statement to the judge so when the one side, the winning side, comes in and submits 150 findings at least the defense can say, "Wait a minute, Judge, you're not supposed to do that." Now, I don't know how much further you can go with that. I don't know how much further you can fine-tune that, but we need something to try to discourage that. I would also add, though, that the comment probably needs to say "unnecessary or voluminous" or you're going to end up with a situation like cruel and unusual punishment, it has to be cruel and unusual. You don't want unnecessary findings, you don't want voluminous findings.

CHAIRMAN BABCOCK: Okay. Judge Patterson, then Bill.

HONORABLE JAN PATTERSON: Just a question. Is the reason that you don't want to confine it to broad form because then there might be litigation and appeals over what is necessary or unnecessary or --

PROFESSOR CARLSON: No.

HONORABLE JAN PATTERSON: No, okay.

PROFESSOR CARLSON: No, really the discussion on this was you're not going to get the same information if all you have is broad form findings of fact and a bench trial.

HONORABLE JAN PATTERSON: Okay.

PROFESSOR CARLSON: Because you don't have the other information you benefit in the charge, and maybe it's just part of our subcommittee's enamored with our current practice. Everyone agreed that voluminous findings, evidentiary findings, are a problem, and that's why we suggested adding the comment.

Frank, you asked what other steps could you take. You could parallel the position we take in objections to the charge and you could say, you know, "numerous and unfounded," "unnecessary or voluminous findings of fact, evidentiary findings of fact, negate your request for finding of fact." You could go that far, but I don't know that we would want that.

HONORABLE JAN PATTERSON: I like that comment.

CHAIRMAN BABCOCK: Bill Dorsaneo.

PROFESSOR DORSANEO: The last time we voted on this in 1997, we --

CHAIRMAN BABCOCK: That would be almost a decade.

PROFESSOR DORSANEO: -- almost came up with this language: "The judge shall state the finding of fact on each ground of recovery or defense raised by the pleadings and evidence in broad form whenever feasible in the same manner questions are submitted to the jury in a jury trial," and I understand the committee, you know, rejected having that same kind of language used. To me, you know, broad form findings don't require a particular kind of the most broad form finding you could make finding, that broad form findings, the best definition of them are that they are findings that are not granulated under the former separate and distinct system.

So something that's a mixed question of law would, in effect, be a broad form finding, mixed question of law and fact would be a broad form finding, even though it may not be the broadest way you could look at the matter. So there's some flexibility in the idea that it's going to be a broad form finding. That's not wedding you to a particular very broad form finding, even though that might be conventional practice in termination of parental rights cases at the moment or whatever. So I don't see what the problem is when it -- if you said "broad form findings whenever feasible," and I think it would make sense for the practice to -- in bench trials to be the same as in jury trials. That would be -- in my mind be

like having the judge do what the jury does --

PROFESSOR CARLSON: What about --

PROFESSOR DORSANEO: -- in rendering a verdict, but short of doing that, all of this stuff together, all three things that are underlined at the top of your page three, you know, they kind of fit together, and you say it's okay. "Unless otherwise required by law the trial court's findings may be in broad form," but if you wanted to be narrow it can't be so evidentiary that it's more than necessary to disclose the basis for the court's -- the basis for the court's judgment. Together with a comment, an improved comment, all of that seems to me to more or less advance the ball in saying, you know, how the judge ought to go about having these findings prepared by the judge or by counsel for the winning party.

CHAIRMAN BABCOCK: Yeah, Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: Well, last time we talked a little bit about -- or at least, I mean, I said at the time -- I don't know if anybody agreed with me, but the instructions in the jury charge are conclusions of law, they are not findings of fact. So to say when you get a broad form question and answered by the judge you're not getting the information that you get in a jury trial, you aren't if the judge does not state conclusions of law as to those disputed matters. But why

can't that be done either by mimicking the charge and having the argument about what instructions should be or having an argument about what the burden of proof is and having the judge say, "Conclusion of law of the burden of proof is blah-blah-blah," but that's all the instructions are, is conclusions of law.

CHAIRMAN BABCOCK: Justice Duncan.

HONORABLE SARAH DUNCAN: Well, and that was my question, is that the reason for rejecting broad form findings from a trial judge is that we're not going to get the rest of what's in a charge, why don't we just ask the judge to fill out a charge? Have them craft the charge and fill in the blanks, and then we'll get what statute of limitations is going to apply, what the burden of proof is, what the jury can consider on this disputed fact, but you can't consider this, and we'll get all of that if we just give the trial judge a charge.

CHAIRMAN BABCOCK: Carl, I think had his -- beat the other two guys just by a fraction.

MR. HAMILTON: One of the problems with that is that one advantage to a bench trial is that you don't have to prepare a charge, and sometimes that is extremely time-consuming, is to try to figure out when you don't have the pattern jury charge what the charge really ought to be, and sometimes the court isn't going to agree with

it, and so I don't know how in those instances the court can fashion and create a charge without an awful lot of time going into it.

CHAIRMAN BABCOCK: Harvey, then Richard. Harvey clearly beat Richard on his hand going up.

HONORABLE HARVEY BROWN: I was going to echo the same comment, that a lot of people try nonjury cases just to save the time and money, so going back to our discussion this morning about cost and efficiency, we would lose a little bit of that if we had a formal charge.

HONORABLE TOM GRAY: But we might get more jury trials then, too.

CHAIRMAN BABCOCK: Hadn't thought about that, had we?

HONORABLE HARVEY BROWN: Also, I think the appellate lawyers would like this rule because the first thing a lot of appellate lawyers look at is the charge to figure out the best and quickest way to reverse a trial court, so you have to say, well, you think that's a good thing or bad thing, arguments both ways.

MR. WATSON: There are.

HONORABLE HARVEY BROWN: I like the rule as crafted because I think it encourages broad form submission, but it doesn't require it. I don't think a judge should be required to do it. I remember one case

where I did not do it, and I generally did it, but I thought it was a close, close question, and it would have been easy for me just to answer one question, but the parties wouldn't have any of that transparency you're talking about, and that's one of the disadvantages of broad form submission. I mean, one of the costs of broad form submission is we don't know how the jury got there. There is good policy reasons for doing that. I don't know that all those necessarily apply in every single nonjury trial, and so I think giving the judge the discretion is the best way to do it.

CHAIRMAN BABCOCK: Richard.

MR. ORSINGER: I agree with that. I think discretion is better. I think that we can trust the judges to control the process better than in the jury charge process. You know, the fight over the jury charge can create lots and lots of ancillary issues and create a lot of error, and that's why we've kind of tamped it down, if you remember the days in the Seventies when we used to have all of those problems.

I don't like the fact that the 296 proposal here says that you state your finding. When we get to it later on I think they should be in writing and not dictated from the bench. I don't like the phrase "ground of recovery or defense," because in family law -- which is

probably 75 percent of our civil docket at this time -- there is neither a ground of recovery nor a defense for anything that we're trying, so this rule is meaningless for 75 percent of our cases.

I agree that the three elements together work like Bill said. I think if we can have an agreeable first paragraph there that the second paragraph is okay and the comment is also probably important, too. In terms of the third paragraph, though, about "necessary to disclose the basis for the Court's ultimate conclusion," again, all the plaintiffs' lawyers points of view are dominating, plaintiffs and defense. In a family law case there are many, many ultimate conclusions that are appealable, and so that word needs to be pluralized. In a plaintiff versus defendant there is only one conclusion, but in a family law case we might have 30 conclusions that might contribute to a reversal.

PROFESSOR DORSANEO: On one case.

MR. ORSINGER: Let me also say that another argument in favor of giving the judge the choice is that in family law matters most of the appellate review is by an abuse of discretion standard, and you're not going to get a reversal necessarily because of a specific fact finding. You're going to get a reversal because the overall decision is an abuse of discretion. In fact,

sometimes that's the only way you can get a family law reversal, and some judges might like to put into the record how they exercised their discretion, their reasons why they decided that they would give the wife 75 percent instead of just saying, "This is the value of everything, this is the character of everything, and this is the property division. Now, you go figure out whether I abused my discretion." I think the trial judges should have the opportunity to say that "This is why I exercised my discretion in this way," and I think we can trust them not to overdo it or abuse it.

CHAIRMAN BABCOCK: Bonnie. You didn't have your hand up, did you?

MS. WOLBRUECK: I did not.

CHAIRMAN BABCOCK: No, I knew that. I was just trying to keep you on your toes down there.

MS. WOLBRUECK: Thank you.

CHAIRMAN BABCOCK: Dorsaneo.

PROFESSOR DORSANEO: I think without the additional language about not making them too voluminous, without having that in the rule, I think we can trust, you know, some trial judges to -- I don't want to use the word "rubberstamp," but to embrace the findings prepared by the winning party, because that's been the conventional practice over time, and that is -- and that's the way --

that's the way or one way to draft findings in order to make it difficult for somebody to appeal --

CHAIRMAN BABCOCK: Right.

PROFESSOR DORSANEO: -- which is the whole point of having won, you know, in the trial court. If there's going to be an appeal, it's going to be a difficult process for you to get this set aside because I'm going to write findings you're going to have difficulty dealing with.

CHAIRMAN BABCOCK: It won't look like such a close case after I'm finished.

PROFESSOR DORSANEO: Right.

CHAIRMAN BABCOCK: Okay. Yeah, Frank.

MR. GILSTRAP: I don't see why we need to have the comment as a comment. I mean, why doesn't it belong in the rule? I mean, because, it seems to me the real corrective here is for a court of appeals to say, "We've got 158 findings here. This is too many. We're going to reverse it and send it back and have them do it over."

MR. ORSINGER: No, they're going to abate it and send it back and have them do it over.

MR. GILSTRAP: All right. Okay. But if they did that a few times because there were just too many findings, too many evidentiary findings, it might cure the

problem.

CHAIRMAN BABCOCK: Are we going to get into a fight about what's unnecessary or voluminous, though?

MR. GILSTRAP: That's for the courts. They're good at that.

CHAIRMAN BABCOCK: Well, yeah, but what are we saying? I mean, of course, you don't have any unnecessary findings.

MR. GILSTRAP: No, you have tons of them. That's the problem. You have a lot of unnecessary findings --

CHAIRMAN BABCOCK: To you apparently.

MR. GILSTRAP: -- that don't mean anything to the ability of the court of appeals to decide the case.

CHAIRMAN BABCOCK: Judge Benton.

HONORABLE LEVI BENTON: I just want the record to reflect that I'm confused. The trial judges don't do enough because they won't make findings, but they do too much because they send up 128, so tell us, please, which way you want it; but in telling us, because these rules are ultimately about the administration of justice, no rule ought to pass or be adopted by the Supreme Court unless a majority of trial court judges approve it.

CHAIRMAN BABCOCK: And so you think what we need is a Goldilocks rule, not too much, not too little.

HONORABLE LEVI BENTON: Well, I don't understand. This is kind of where we are, but I don't understand.

CHAIRMAN BABCOCK: Okay. Let's see how people -- how the committee as a whole feel about this. What's proposed by the subcommittee, Elaine, as I understand it, is this broad form language that we find at the top of page three, correct?

PROFESSOR CARLSON: Correct.

CHAIRMAN BABCOCK: So how many -- everybody who's in favor of that language, the broad form language at the top of page three, raise your hand.

HONORABLE TRACY CHRISTOPHER: All three?

CHAIRMAN BABCOCK: No, not all three, just the top one.

HONORABLE TERRY JENNINGS: What's the issue?

CHAIRMAN BABCOCK: Let me say it again. This is the language that you're voting for: "If findings are properly requested, the judge shall state findings of fact on each ground of recovery or defense raised by the pleadings and evidence. Unless otherwise required by law, the trial court's findings of fact may be in broad form." That's all we're voting on now.

MR. ORSINGER: By linking those two sentences together you've forced me to vote against the

second sentence even though I like it.

CHAIRMAN BABCOCK: You can vote any way you want, Richard.

MR. ORSINGER: I know, but it's a poor way to get a reading on this point, in my opinion.

HONORABLE JAN PATTERSON: Well, does Richard's point -- if you took out "of recovery or defense," couldn't you just say "ground raised by the pleadings and evidence"? Does "recovery or defense" really add?

CHAIRMAN BABCOCK: Well, you know, we can do anything we want. Yeah, Judge Benton.

HONORABLE LEVI BENTON: Yeah, I know this is digressing, but the appellate rules are much clearer. You can look at 28.1, it just says on an appeal from an interlocutory order, "The trial court need not but may file findings," so I'd rather -- I join Judge Christopher. I'd rather have a bright line rule. My preference would be that the trial court need only make findings from a bench trial to support a final disposable judgment because that's a bright line rule. Because otherwise, it's -- you know, I don't want to be in a position where like she says three years later the court abates and says, "Hey, we want the findings." The appellate rule is much clearer. I don't know why we just don't in some ways mirror the

appellate rule.

CHAIRMAN BABCOCK: Richard, you don't like -- you like the first sentence, but you don't like the second sentence?

MR. ORSINGER: Well, You're forcing me to vote on three things. You're forcing me to vote on whether they can state the findings or whether we ought to stick with our current practice of official written findings in separate Rule 296. I don't think we ought to fold that into this vote.

CHAIRMAN BABCOCK: We're not forcing you to vote.

MR. ORSINGER: Okay. By adopting -- by voting on the entire language we're not even debating yet on whether the trial judge should be able to state them or whether we should stick with our current practice of a separate set of written findings, and I don't think we ought to vote on that until we have a debate on that.

Secondly, why do we have to have "ground of recovery or defense" in there when three quarters of the cases we try to the court don't have a ground of recovery or defense. So, for example, Bill has written in here, "Shall state findings of fact on each ultimate issue raised by the pleading and evidence." I like that a lot better than "each ground of recovery or defense"; and

then, thirdly, I like the second sentence the way it is, with no changes.

CHAIRMAN BABCOCK: Elaine.

PROFESSOR CARLSON: Richard, we can -- let's just promise to come back to the state findings --

MR. ORSINGER: Okay.

PROFESSOR CARLSON: -- when we get to that next section. I understand now what you're saying, which scares me, but if you'll just hold that, if we promise you we'll return to that issue, depending on the vote on oral versus non.

MR. ORSINGER: All right.

MR. SCHENKKAN: Well, I'm confused here because this is -- in the thing we're voting on is the "findings on each ground of recovery or defense," which is a change; and I'm in the school at the moment that says it's not broke, let's not fix it. So I'm against the change to add on each ground of recovery or defense. Are you saying we're not voting on that now? We're going to take that up later?

CHAIRMAN BABCOCK: Richard has thrown a monkey-wrench in my voting plans here, and we're going to vote on each word, actually, to see if we can get a consensus.

HONORABLE JAN PATTERSON: Voluminous voting.

CHAIRMAN BABCOCK: I mean, we'll do it any way anybody wants, but it seems to me that the subcommittee put two sentences together, and if you don't like either one of the sentences I guess you'd vote against it, but if it's just a -- if it's just a minor word change, Richard, I mean, we can fix that, but I think what you're voting -- what you're voting on is sort of the idea about whether we need this language in the rule, even though you might make minor adjustments to it sometime later. Does that work for you?

MR. ORSINGER: Okay. As long as I'm not foreclosed from debating those issues by this vote.

CHAIRMAN BABCOCK: No, of course you're not. We've got breaks and we've got tonight, because you're easily amused.

Everybody who's in favor of this language that I just read a minute ago at the top of page three raise your hand.

MR. HAMILTON: Issues?

PROFESSOR DORSANEO: No, we're not doing -- just as-is, where is, with all faults.

CHAIRMAN BABCOCK: All opposed?

This one passes by a vote of 19 to 10.

HONORABLE SARAH DUNCAN: And some of us voted twice.

CHAIRMAN BABCOCK: Carl did, but I only counted him once.

HONORABLE SARAH DUNCAN: I voted twice, and I think you counted me twice.

HONORABLE STEPHEN YELENOSKY: The Chair voting.

CHAIRMAN BABCOCK: I had you down as against.

HONORABLE SARAH DUNCAN: I voted for and against.

CHAIRMAN BABCOCK: You voted for and against? I didn't count your for, so --

HONORABLE SARAH DUNCAN: I raised my hand. Who else who raised their hand didn't get their vote counted?

CHAIRMAN BABCOCK: Okay. We can do it again if we want, but I don't think it's close enough.

MR. ORSINGER: I think we ought to contact Jimmy Carter and have him --

CHAIRMAN BABCOCK: I think we'll get Al Gore's crack Florida team in here to check this vote out.

Okay. Are we down, Elaine, to the comment or are we down to "orally on the record"?

PROFESSOR CARLSON: I hate to do this, but I'm going to, and I'm not speaking for the subcommittee,

but I thought Professor Dorsaneo's suggestion was probably a good one, that if -- in what we just voted to be included would the sense of the committee be offended if we changed the words "ground of recovery or defense" to "ultimate issues"?

CHAIRMAN BABCOCK: Sarah, do you think now --

HONORABLE SARAH DUNCAN: I'm for it.

CHAIRMAN BABCOCK: You're for it. Okay.

HONORABLE SARAH DUNCAN: That's why I voted against. That's one of the reasons.

MR. HAMILTON: That's why I voted against.

HONORABLE SARAH DUNCAN: For that reason.

CHAIRMAN BABCOCK: Okay. So if we fix that we pick up a couple of votes.

HONORABLE SARAH DUNCAN: No. If we voted three times I would have voted for and against three times. I actually think a friendly amendment would have been a good way to resolve this.

CHAIRMAN BABCOCK: Skip.

MR. WATSON: I just need to ask a question. When we say "findings of fact on each ultimate issue," so ultimate issue means negligence, he was negligent, which is, of course, a conclusion of law.

PROFESSOR DORSANEO: No, it isn't.

MR. WATSON: And you're saying findings of fact on -- there need to be multiple then because it's plural, that on each ultimate issue we're saying finding of fact, is going too fast; finding of fact, he failed to brake; finding of fact, he wasn't keeping a proper lookout. I just want to make sure I know what I'm voting on.

PROFESSOR DORSANEO: No.

MR. WATSON: What is a finding of fact when you're talking about an ultimate issue?

CHAIRMAN BABCOCK: Okay.

MR. WATSON: That's all I'm asking.

CHAIRMAN BABCOCK: Our chair, our subcommittee chair, said that she thought that the suggestion made by Professor Dorsaneo had merit and that we should talk about it, and that was the language that says "on each ground of recovery or defense raised by the pleadings and evidence" should be changed to say "shall state findings of fact on each ultimate issue raised by the pleadings and evidence."

Okay. So that's what we're talking about. So we're going to strike ground of recovery or defense and say "shall state findings of fact on each ultimate issue raised by the pleadings."

MR. WATSON: And hence my question of what

does findings of fact mean in the context of an ultimate issue? What is being defined as an ultimate issue?

HONORABLE SARAH DUNCAN: And that's why to me it should not be "each ultimate issue" but "all ultimate issues," because then you will have more than one finding and more than one conclusion, and the sentence would make grammatical sense, but I see your point.

CHAIRMAN BABCOCK: Pete.

MR. SCHENKKAN: Do we mean this to be limited to findings, or will the judge be required and is the intent to require findings of fact and conclusions of law on each ultimate issue or all ultimate issues?

MR. WATSON: That's my point, Pete.

MR. SCHENKKAN: That's why I'm coming at it from another direction, because that's my point, too. I mean, I deal with a number of kinds of trials that maybe don't have to be tried as bench trials but always are as a practical matter, declaratory judgment actions. I don't know what the ultimate issues in those cases are. To the extent I think I know what that means I think they're generally law issues, and I think that's why the lawyers drift into treating them as nonjury trials even though often there are some disputed facts.

CHAIRMAN BABCOCK: Okay. Bill.

PROFESSOR DORSANEO: Here is my sense of it.

Once upon a time before September 1, 1973, the ultimate issue in a negligent car wreck case was speeding, failure to apply brakes, or lookout. When we went to broad form submission as a mandatory item, as Judge Pope was saying, if we went to the ultimate issue in car wreck cases negligence cases being negligence.

MR. WATSON: Correct.

PROFESSOR DORSANEO: And, you know, that's relatively clear in that one little area of the law. It doesn't matter whether it's clear all the time and in all other contexts. The words "ultimate issues" are still, you know, more congenial than on each ground of recovery or defense because they are what they are, and that's what you need to shoot for in terms of when you're making findings.

To me, to say -- second point, to me, saying "findings and conclusions" is kind of not a good idea anymore because our findings are now -- whether we mandated them or not the way we think about findings is in a more broad form way. Mixed questions of law and fact, you know, rather than discrete subsidiary issues like speed, brakes, or lookout, so to try to parse the difference between factual findings and conclusions is not profitable really. It's not -- it's not useful. I mean, once upon a time findings were very much in terms of what

happened things, okay, only. You know, those kinds of findings. When we apply the law to the facts in the context of a particular finding we eliminate the necessity for saying you also need conclusions for each thing, because each ultimate -- the answer to each ultimate issue is in effect a conclusion or on the way to the ultimate conclusion as to what the judgment needs to be.

CHAIRMAN BABCOCK: Richard, then Justice Duncan.

HONORABLE SARAH DUNCAN: To answer Skip's question, my spin on the answer to your question would be that with the rule we've adopted the trial court could have a finding on speed and on lookout and on brakes, or they could say that "I find that the defendant was or was not negligent." We've given them the opportunity to do either one, I feel like by our vote.

With regard to conclusions of law, we mentioned this in passing in the earlier debate, but conclusions of law are reviewable de novo; and even if the judge has premised the ruling on the wrong law, if the facts found applied to the correct law lead to the same result, you get an affirmance. So from a practical standpoint you don't get any mileage out of arguing that the trial adopted an incorrect conclusion of law, because the court of appeals is free and frequently they do

substitute their own view of the law to the facts found by the judge, trial judge. So do we even need to carry conclusions of law forward? Are they helpful, are they useless? I don't even attack them anymore in my briefs.

CHAIRMAN BABCOCK: Justice Duncan.

HONORABLE SARAH DUNCAN: We're going to lose -- as we discussed on the previous matter that we debated, we are going to lose the trial judge's legal conclusions that inform the findings of fact on the ultimate issues. For instance, trial judge finds a finding defendant was -- defendant breached its fiduciary duty to plaintiff. Well, in a jury charge we would -- if limitations was a question in that case, we would get an instruction on limitations and if -- all that's -- we're going to lose all that if all the judge has to do is make findings on ultimate issues and not disclose the judges's conclusions of law, and I think that's a mistake, that sometimes those are the basis upon which an appeal is going to be affirmed or reversed, is what those legal conclusions were that underlie the findings on ultimate issues.

CHAIRMAN BABCOCK: Elaine, then Frank.

PROFESSOR CARLSON: It was not the subcommittee's intention to eliminate conclusions of law. We left that in in different places. Here we were just addressing what the finding of fact should -- the form

they should take.

HONORABLE SARAH DUNCAN: Okay. Thank you.

CHAIRMAN BABCOCK: So the issue here right now that we're talking about, we can talk about it some more, but whether we're going to put "ultimate issues" instead of "ground of recovery or defense," we're still talking about it. Frank and then Richard Munzinger.

MR. GILSTRAP: I agree the requirement for conclusions of law is still going to be in the first sentence of Rule 296. The language you're talking about requires a finding of fact on every ground of recovery or defense. It doesn't limit the judge. The judge can say, "Okay, I find negligence, and I also find speed, brakes, and lookout." I mean, he can go on and make, you know, more detailed findings. There is no prohibition. It says they may be -- and this allows Richard's concern about, well, there are certain issues like division of property. He can go on and make those. All we've got is a requirement that we've got to have a ground -- a finding to support every ground of recovery or defense just like a jury issue. That's all we've done here, and I don't think we add anything by saying "ultimate issue." That's dealt -- because it's optional, you see. He can do that if he needs to. We'll deal with that in the second sentence down there.

CHAIRMAN BABCOCK: Okay. Anybody else? Lamont. I knew you were going to say something.

MR. LAMONT JEFFERSON: Yeah. I'm not sure I understand what it is we're trying to do. I mean, the rule as it's written now gives a lot of room for the judge to do what the judge is requested of doing, and this is a rule change that looks like it's designed to do something, but it doesn't really encourage any particular -- any particular action by the trial judge, so I'm -- I don't understand why the rule change is necessary. I mean, I don't understand what we're trying to encourage judges to do.

CHAIRMAN BABCOCK: Munzinger is about to tell you.

MR. MUNZINGER: He just took my point. I don't -- I've listened to the discussion for two meetings now. I come away with the belief in my own mind that no substantive change is intended by the amendments to the rule, that we seek clarity and assistance to the trial courts in the hopes that somehow we will simplify the task of appellate court justices who are often called upon to deal with hundreds of findings of facts that are immaterial, and here you come and you're going to do all of this to the rule. Are you going to add a comment saying, "We don't mean to change the substance"? If you

don't do that are you telling the bar that you intended to change the substance? Are you creating problems by changing the rule?

If it ain't broke, don't fix it. The only problem it seems to me is, is that appellate court justices are inconvenienced by the overprudence of practitioners in trial courts who are faced with a request. What happens in practice is the trial lawyer wins the case, the adversary says "file your findings" or vice-versa, and the guy sits down and spends five hours thinking of every dadgum fact he can think of, sticks it in the deal and takes it to the judge, who thinks "I better sign this," and he does. Well, now all that we've done here is solved problems for appellate justices, and to all the appellate justices I apologize to you for being insensitive to your needs, but the truth of the --

HONORABLE TRACY CHRISTOPHER: You're already hurting ours.

MR. MUNZINGER: -- matter is this, in a nonjury case every one of you will say in your written opinion, "Every presumption is indulged to support the judgment of the trial court. There was evidence in the record, even though the finding didn't specify it in a right way, Smith said X, so there was evidence to support the judgment on that issue and we're not going to remand

this case because Munzinger either didn't or did put in a separate finding in the findings of fact and conclusions of law," and so what we've done is prove that you can debate the number of angels on the head of a pin to no use. Leave it alone.

CHAIRMAN BABCOCK: Carl.

MR. HAMILTON: Well, on the subcommittee we started out with the problem being raised last time about too many findings --

CHAIRMAN BABCOCK: Right.

MR. HAMILTON: -- and that's what we were trying to do, is to cut down. So then we said, well, let's just do it in broad form and then we had problems with that because that doesn't give the court enough information sometimes, and so that's why we came up with the option, and of course, I like the minority part and which I think we ought to add to that where if the court is going to make evidentiary findings that it make them only so much evidentiary facts as are necessary to disclose the basis for the ultimate decision.

CHAIRMAN BABCOCK: Okay.

MR. HAMILTON: So we now have come up with a compromise to give the court discretion to do it broad form or -- broad form on the ultimate issue, but he's got to put in enough evidentiary facts to help the court know

the basis for the conclusion.

CHAIRMAN BABCOCK: Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: Those two words do make a difference to me as a trial judge.

CHAIRMAN BABCOCK: Which two words?

HONORABLE STEPHEN YELENOSKY: Broad form, because the lawyers are not going to submit it unless they're confident that it's okay, and putting it in the rule to indicate that broad form is okay not only makes it possible for them to do it, it allows the judge to say, "No, I want it in broad form." Judge can do that now, but unless that judge has been sitting around at these committee hearings like I have, they don't know that it's okay to do broad form because we're not sure what the court of appeals is going to want, so it does make a difference to the trial court.

The other thing I would just point out is earlier I said, you know, the instructions to the jury are conclusions of law, but they're special conclusions of law because they are reviewed by the court of appeals. The conclusions of law that a court makes and puts in the instructions as to the burden of proof can be obviously a point of appeal, so you do need to preserve that, but that's the obligation of the lawyers to get in the conclusions of law or to get the judge to admit that he

thinks or she thinks the burden goes this way when, in fact, they think the court of appeals will find it to be the other way. So they are different conclusions of law than what we're used to.

CHAIRMAN BABCOCK: Justice Brister.

HONORABLE SCOTT BRISTER: I second that. The first time I had ever heard that you could do broad form findings of fact as a judge was the last time we discussed this in committee in 1997 or 8, and I had been a trial judge for nine years and practiced for 18 years, and nobody had ever mentioned that to me. It was news to me that you could do findings and conclusions in broad form. I think it would be news to a lot of people, and it would be helpful to say that in the rule if that's what all of us sitting around the table understand it to me mean.

CHAIRMAN BABCOCK: Yeah, Bill.

PROFESSOR DORSANEO: I hate to do this to you, but I think the word "ultimate" needs to be pitched to just say "issues," because "ultimate" at least suggests to me broad form.

MR. WATSON: That's what I'm saying, Bill. It's in there twice, and I'm going to be arguing on appeal that when the finding of fact is, okay, he was negligent, I'm going to be saying, "Okay, I get a de novo standard of review because you're calling a conclusion of law a

finding of fact".

PROFESSOR DORSANEO: But it's not a conclusion of law. Get that out of your head. It's not. It's a finding of fact. What juries decide are findings of fact. I mean, that's the definition of finding of fact, not, you know, some kind of notion of how broad or narrow it is in the texture of the universe.

CHAIRMAN BABCOCK: Yeah, but I could see where a conclusion of law would have a great deal of -- to do with what kind of facts you've got to find. Suppose you're trying a nonjury libel case and you determine that the plaintiff is a private figure, not a public figure. That's going to change what kind of facts you're going to find, so --

PROFESSOR DORSANEO: But that's not a conclusion of law. That's just kind of a legal concept.

CHAIRMAN BABCOCK: No, no, no. It is a conclusion of law. It's absolutely a conclusion of law. Whether -- the status of the plaintiff is a matter of law for the court. So it's an issue of law.

PROFESSOR DORSANEO: All right. It's an issue of law, but it's not a conclusion of law.

CHAIRMAN BABCOCK: Well, so we shouldn't say the word "issue" in here then. Yeah, Richard.

PROFESSOR DORSANEO: "Factual issue."

MR. ORSINGER: In a nonjury appeal of the very scenario you outline you're still free to argue that the wrong legal standard was used, even if there's no legal standard apparent from the trial court record.

CHAIRMAN BABCOCK: True.

MR. ORSINGER: And if you can show that the facts found by whoever the binding fact finder are don't fit into the proper law, you get a reversal. On the other hand, if they do fit into the proper law, you get an affirmance whether the trial judge stated the proper law or not. So you kind of get back to the question of since the only thing that's binding really that's coming out of the trial court is the fact finding and since the appellate court is de novo review on the court's perception of the law anyway, do we even really care what the law was that the trial judge applied? I mean, do --

HONORABLE JAN PATTERSON: Yes. Yes, we do.

MR. ORSINGER: -- we want to know that because it affects our judgment or do we just want to force them to state the law on the record or what?

CHAIRMAN BABCOCK: We care if your party is trying to figure out who's going to win or lose.

HONORABLE STEPHEN YELENOSKY: What if they applied the wrong burden?

PROFESSOR DORSANEO: If the standard of

review is abuse of discretion, it makes sense to me to take into account whether the trial judge had on his or her mind some -- something that amounts to legal nonsense, because, you know, under those circumstances you could easily say, well, they could have been done for some number of right reasons, could have been within the court's decision if the right legal rules were applied, but the wrong legal rules were clearly applied, and that's on the face of -- that's confessed, okay, above the judge's signature, and I think under those circumstances it would make more sense for a court of appeals to say, "This needs to be done over. We just can't just ignore this flawed thought process that led to the result."

MR. ORSINGER: Wouldn't you agree, though, that that's going to require a change in the standard of review because right now --

PROFESSOR DORSANEO: I think there's confusion.

MR. ORSINGER: -- had a stupid idea about the law, if you can uphold the judgment based on the fact finding with a correct version --

CHAIRMAN BABCOCK: I feel like I'm on some PBS program.

PROFESSOR DORSANEO: I can show you four or five cases where the courts of appeals have reversed

because they say, "That's too stupid."

MR. ORSINGER: And I think they should.

CHAIRMAN BABCOCK: Let's vote on whether we insert the word "issue," not "ultimate issue," but "issue" in place of "ground of recovery or defense." Okay. So everybody that wants the friendly amendment suggested by Professor Dorsaneo and seconded by the subcommittee chair, Professor Carlson, raise your hand.

PROFESSOR CARLSON: I seconded "ultimate."

HONORABLE TOM GRAY: Now it's not a friendly amendment.

PROFESSOR CARLSON: It's not. It's unfriendly, but I'll take it.

CHAIRMAN BABCOCK: All those against? Only one vote, Sarah.

MR. LOW: No, no. I'm not against. I just wanted to ask a question.

CHAIRMAN BABCOCK: Well, don't raise your hand then.

PROFESSOR DORSANEO: That's what started this problem last time.

CHAIRMAN BABCOCK: 14 to 6 it passes.

MR. ORSINGER: Could I say in the record that the only reason I voted for that was that Bill said if I didn't vote for that there might be something worse

enacted.

CHAIRMAN BABCOCK: So you're under duress, so your vote may not have as much weight. Okay, Elaine.

PROFESSOR CARLSON: All right. So that brings us on page three to the third paragraph. The minority view on the paragraph was that it would be useful to include a statement that the trial court's findings are to include only as much of the evidentiary facts as is necessary to disclose the basis for the court's ultimate conclusions. Carl Hamilton was the author of that sentence, so, Carl, I'll let you sort of address what your thought process was.

MR. HAMILTON: Well, that's just sort of the Federal approach to mandating how judges write opinions. They also don't want too many evidentiary facts. We inserted the word "only," but it's just helpful to the appellate court to know the factual basis for the ultimate conclusions. If the trial court just finds negligence, that's not very helpful to the Federal court. They don't know whether they found brakes, they found lookout, what it was they found.

CHAIRMAN BABCOCK: Okay. Any discussion on that?

MR. GILSTRAP: Is the language "ultimate conclusion," does that come from the Federal rule?

MR. HAMILTON: It's not a rule. It's just --

MR. GILSTRAP: Okay.

MR. HAMILTON: -- Federal cases.

MR. GILSTRAP: Why "ultimate conclusions" as opposed to "decisions"?

MR. HAMILTON: "Decisions" is fine.

PROFESSOR DORSANEO: That would be better, Carl.

MR. HAMILTON: Or "ultimate facts" or something.

CHAIRMAN BABCOCK: Okay. Richard.

MR. ORSINGER: I like this concept. If we're going to leave the word "conclusion," I'd ask that we pluralize it because in family law cases there will be many conclusions. If we say "the decision," a singular decision is okay.

CHAIRMAN BABCOCK: Okay. Professor Dorsaneo.

PROFESSOR DORSANEO: That's my job. Call me "Bill." Trial court's findings, why don't you use "are to"? Why did you say "are too" instead of some other kind of language? What do you mean by "are to"? Do you mean "must," "should"?

MR. HAMILTON: "Must." No, not "must."

MR. ORSINGER: "Should."

MR. HAMILTON: "Should."

PROFESSOR DORSANEO: Maybe "are to" is fine, but it doesn't mean "must."

MR. HAMILTON: Well, it doesn't mean "must," no.

CHAIRMAN BABCOCK: Okay. What else? Okay. Everybody in favor of this sentence, changing the word "ultimate conclusions" to "decision," raise your hand.

MR. LAMONT JEFFERSON: Are we voting on the change to "decision"?

CHAIRMAN BABCOCK: No. We're voting on the sentence that is -- as-is, but substituting "decision" for "ultimate conclusion." Did everybody understand that?

Okay. Everybody opposed, raise your hand. By a vote of 14 to 2 it passes. Next, Elaine.

PROFESSOR CARLSON: And then --

MR. SCHENKKAN: 13 people abstaining. Does that tell you something?

MR. GILSTRAP: But what?

PROFESSOR CARLSON: We thought it would be useful to include the comment you see, that "unnecessary" -- and I'll take Frank's amendment -- "or voluminous evidentiary findings are not to be included in the court's finding of fact and conclusions of law." Frank, I don't

know if it was you or someone else that said do we want to make this only a comment or do we want to include it in the rule. So I guess first do we like the sentence and then secondly, if we do, do would we want it as a comment or in the rule itself?

CHAIRMAN BABCOCK: Yeah, Richard.

MR. ORSINGER: I like it, but I don't think we want to say "conclusions of law" if this rule is now going to deal just with findings of fact.

CHAIRMAN BABCOCK: No, the rule is not dealing with --

MR. ORSINGER: Well, where is the language then that does deal with conclusions?

MR. GILSTRAP: First sentence of Rule 296.

CHAIRMAN BABCOCK: First sentence. It's not on this piece of paper here.

HONORABLE STEPHEN YELENOSKY: How does this differ from the sentence we just voted before? It sounds like a voluminous and repetitive and unnecessary repeat of the sentence we just voted on.

CHAIRMAN BABCOCK: Yeah, Mr. Bill.

PROFESSOR DORSANEO: I don't think it does really differ, but I think this is a problem, and so it might not be a bad idea to say it two different ways since this is a problem, just so people get the point.

HONORABLE STEPHEN YELENOSKY: Well, the language we just voted on is new as well, so I would think new language is highlighted language, but --

CHAIRMAN BABCOCK: Any other comments on the comment? All right. With the friendly amendment, "unnecessary or voluminous," how many people are in favor of this comment? Raise your hand.

MR. MUNZINGER: As a comment?

CHAIRMAN BABCOCK: Yes.

HONORABLE SARAH DUNCAN: Oh, as a comment?

PROFESSOR DORSANEO: Yes.

CHAIRMAN BABCOCK: Yes. How many opposed? By a vote of 18 to 6 that passes. Next, Elaine.

PROFESSOR CARLSON: Okay. The last three amendments that appear in the final three paragraphs on page three deal with whether or not we should amend our practice to allow the trial court when requested to make findings of facts and conclusions of law orally and recorded in open court in the presence of counsel following the close of the evidence. That's close to Federal practice except Federal practice is in every case.

CHAIRMAN BABCOCK: It doesn't say "as requested," does it? "If requested."

PROFESSOR CARLSON: Well, we could put that in, but when you look at the entirety of the rules this is

all premised on a request.

CHAIRMAN BABCOCK: Okay. Richard and then Justice Jennings.

MR. ORSINGER: As much as I like and respect members of the committee I think this is a horrible idea.

PROFESSOR CARLSON: But you're sensitive.

CHAIRMAN BABCOCK: So you mean -- what you're about to say you mean as nice as possible.

MR. ORSINGER: There are so many ramifications that run off of this. If you leave the timetable the way it is then when a judge hands down some two or three findings at the conclusion of the hearing when they announce their ruling, you have now triggered the 10-day time period to file a motion for request -- requested amended or additional findings.

PROFESSOR CARLSON: That's true.

MR. ORSINGER: There will not be an appellate lawyer in sight. The thought of appeal will not have occurred to anyone because there won't even be a written judgment yet. There might not be a judgment for another 30 days, and yet we're engaged in the appellate process of drafting the rules, drafting the findings that are going to control the outcome of the appeal, and it's triggered by some maybe vague statement that the judge dictates at the end of the case like, you know, "I believe

her and I don't believe him," and so now your timetables are all running, there is not an appellate lawyer in sight, you don't have a judgment drafted yet, and so I think that that process is going to boil down to there aren't going to be any findings because the trial judges are not going to give you soberly thought out comprehensive findings off the top of their head at the end of a weary trial, and it's going to be too late to request that they be modified or amplified, and so all of that's waived, and so I think your finding process will just completely collapse on you.

CHAIRMAN BABCOCK: Justice Jennings.

HONORABLE TERRY JENNINGS: At the risk of being stoned, I just wanted to point out on Rule 296, I'd like to ask for a vote for those of us to have the ability to express ourselves that we don't necessarily need any change.

MR. LOW: Any change. So the Court would have some view that there are some people who haven't voted and that have a view, at least a number of people, that don't want to make any change.

HONORABLE LEVI BENTON: Second.

HONORABLE TERRY JENNINGS: To leave the rule as-is.

MR. LOW: Yeah.

CHAIRMAN BABCOCK: Okay. Thank you. We'll get to that vote.

MR. LOW: Okay.

CHAIRMAN BABCOCK: We'll take a vote in a minute. Justice Gray.

HONORABLE TOM GRAY: I think the fix for Richard's concern is to modify the rules regarding when to make the request for additional findings, but I think that from a practical standpoint it will at least give you an honest evaluation of what was actually motivating the trial court to make the ruling in the manner in which it did, untainted by the careful crafting of findings by the winning party that subsequently will be handed to the trial judge and the trial judge adopt as the findings, and so I like the opportunity for the immediacy and the frankness of what will be put on the record at that point.

CHAIRMAN BABCOCK: Okay. Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: Just a question. What happens if the judge both speaks at the end of the trial in phrases that could be interpreted as findings and later issues written findings?

PROFESSOR CARLSON: We have an appellate decision.

HONORABLE STEPHEN YELENOSKY: What's that?

PROFESSOR CARLSON: We did not address that.

HONORABLE STEPHEN YELENOSKY: And what does that do to the timetable? Just an issue.

PROFESSOR CARLSON: We really did not address that.

MR. ORSINGER: And what do you do if they conflict? Judge, what happens if the elaborately written findings by the winner conflicts with an oral finding from the trial judge?

HONORABLE TOM GRAY: Well, I expect that they will conflict at times.

MR. ORSINGER: Okay, so --

HONORABLE TOM GRAY: The ones we find now carefully crafted after the fact, they conflict, but that's just something that we struggle through, but I'm talking -- I mean, it's the equivalent of having additional findings and conclusions under the current practice. If you convince the trial judge to sign something that conflicts with what he stated and results in a judgment going the other way, then you've, you know, gotten yourself into an appellate box, and whatever comes out will come out, but it's going to be based first on the fact that I think it's going to be easier to -- for the trial judge to do. It's going to be more immediate timewise, and there's going to be fewer problems in the delay.

Because as some of the trial judges have said, they want to make this ruling. If they're going to have to do it, let's go ahead and make it. While it's there, it's fresh on our mind. It's not done 20 or 30 days later. It's not done in the haste of reading five or six pages of findings at this point. "This is the reason I'm making this ruling," and go with it from there. If something happens later that results in conflicting findings, we will have to deal with that on appeal. You'll have to deal with that in the briefing.

HONORABLE STEPHEN YELENOSKY: My concern may go away and I may have misread it. If it's clear that it only constitutes a finding of fact or conclusion of law if the judge says on the record, "I'm now making findings of fact, conclusions of law." The way I read it, the judge could say anything that somebody could then say are findings of fact, and they very well may be, but the judge might say a lot of things, particularly in a family law case, that he or she doesn't necessarily want as a finding of fact, but instead wants as a lecture to the parties. I mean, if I know I'm making findings of fact and only when I say I am, then I don't really have a problem with it.

HONORABLE JAN PATTERSON: A stamp, need a stamp.

HONORABLE TRACY CHRISTOPHER: I just think

it's probably an unnecessary addition to the rule that trial judges aren't asking for. And if this is supposed to be for our convenience, I haven't heard anybody really wanting it.

CHAIRMAN BABCOCK: Frank.

MR. GILSTRAP: Well, I don't know that it's necessarily for the trial court's convenience. It may be for the practitioner's convenience. I certainly think that it might be helpful to allow the trial judge to make findings from the bench, you know, a la the example of Barefoot Sanders that I talked about last time. If he says, "These are my findings. I'm going to come back today and I'm going to make my findings. Here they are. I'm going to dictate them." You know, that's fine. I understand there's a problem with the timetable, but if he says, "These are my findings," that should be enough. If he doesn't say, "These are my findings," then we shouldn't count them as such.

HONORABLE STEPHEN YELENOSKY: That's what I -- that's how I feel.

CHAIRMAN BABCOCK: Okay. We ready to vote on this? I think we can probably vote on all three because we can talk about the language more.

PROFESSOR CARLSON: Yeah.

CHAIRMAN BABCOCK: But the concept is

whether or not we're going to permit the trial judge to make oral findings under the circumstances expressed here or similar thereto.

PROFESSOR CARLSON: Correct.

CHAIRMAN BABCOCK: Okay. So everybody in favor of permitting the trial judge to make oral findings of fact and conclusions of law, raise your hand.

All those all opposed? That goes down in flaming defeat, 7 to 15, 7 for, 15 against, the Chair not voting.

HONORABLE SARAH DUNCAN: Wait. I just saw Elaine doing -- keep going, but don't do that. Keep going. I'm sorry.

CHAIRMAN BABCOCK: Keep going? Justice Jennings would like a show of hands as to who thinks that everything we've done has been irrelevant for the last two hours?

MR. LOW: Could we say wants to make no change?

HONORABLE TERRY JENNINGS: To Rule 296.

CHAIRMAN BABCOCK: All right. Is that what you think would be useful, Judge Jennings? Just everybody that doesn't want --

HONORABLE TERRY JENNINGS: If it ain't broke, don't fix it.

CHAIRMAN BABCOCK: No changes to Rule 296. Everybody here, regardless of your prior votes, who does not want to see any change to Rule 296, raise your hand. All right.

And regardless of your vote, everybody that thinks Rule 296 should be changed in some form or fashion raise your hand.

PROFESSOR DORSANEO: Chip, I voted for it. Add one.

MR. ORSINGER: He's for change.

CHAIRMAN BABCOCK: You're for change. Okay. Everybody for change keep your hands up, make sure I get the -- because it's close.

Well, it is 14 for change and 14 for no change. So maybe --

MR. SCHENKKAN: Well, we have one more voting member I know hasn't left because he's left his computer who might return.

CHAIRMAN BABCOCK: Well, I'd like the record to reflect that the Chair gets to vote in the event of a tie.

MR. FULLER: Can you add me to the change category?

CHAIRMAN BABCOCK: So I vote for no change, but it's been fun.

MR. ORSINGER: No change, okay.
CHAIRMAN BABCOCK: Let's take --
MR. FULLER: You can add me to change.
CHAIRMAN BABCOCK: You vote for change?
MR. FULLER: Yeah.
CHAIRMAN BABCOCK: Okay. Well, then it's 15 to 14, the Chair not voting.
(Recess from 3:25 p.m. to 3:40 p.m.)
CHAIRMAN BABCOCK: All right, Elaine, the ball hog that she is, wants to keep going, because she has some sort of secret rendezvous with her husband somewhere.
HONORABLE SARAH DUNCAN: Lucky you.
PROFESSOR CARLSON: It's true.
CHAIRMAN BABCOCK: So we'll talk about Rule 226a, which is something that has come to the Court via David Beck, who is now the president of the American College of Trial Lawyers.
PROFESSOR CARLSON: Mr. Chairman, I am going to defer to Carl Hamilton to present this because Carl was the principal scrivener in, I think, the very wonderful language you see, so Carl.
CHAIRMAN BABCOCK: Okay. Carl.
MR. HAMILTON: Well, Dave Beck submitted a proposed instruction to the jury, which we looked at. We thought there was a few problems with that in that he

talked about the adversary system, but he didn't tell us what that was, and I think probably a lot of jurors don't know what an adversary system is. He talked about the lawyers being criticized.

CHAIRMAN BABCOCK: Carl, speak up. The guys at the end of the --

MR. HAMILTON: Talked about the lawyers being criticized, and we felt like maybe that language wasn't appropriate for a jury instruction, and finally, he talked about lawyers doing things in the best light possible, which probably wasn't in accordance with the Rules of Professional Conduct, so we took a look at some of the articles on advocacy. There's one about ethical standards for the advocate or judge, by E. Wayne Thode and then there's the Rules of Professional Conduct, and so we came up with what you have before you, which does define the adversary system and takes out the part about the lawyers being criticized and incorporates Rule 301 of the Rules of Professional Conduct.

It's an attempt, I guess, on the part of Dave to try to paint lawyers in a better light instead of them being criticized to point out to the jury what their function is.

CHAIRMAN BABCOCK: Well, I think for my own self, I think you did a great job, Carl, very well

written. What's everybody think? Justice Gray.

HONORABLE TOM GRAY: I would just like, you know, to point out that this may give some attorneys who are being sued for malpractice a pause for concern if this is part of the mandatory instructions. That might be one in which it could be viewed as a comment on the weight of the evidence or something. I don't know. It's just I can see that some attorneys being sued would not enjoy this.

CHAIRMAN BABCOCK: Okay. Buddy.

MR. LOW: The attorney has to operate within the rules of -- I mean, not vigorously present just evidence, but within the rules and the ethical standards and so forth. It looks like he just vigorously does what his clients claim, but he should be limited to the code of conduct which you can't present certain things or side bar or so forth, not just -- this could be, I think, not as limited as it should be.

CHAIRMAN BABCOCK: Okay. Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: Well, I mean, I think it's great for civic education in the abstract, but this is something that would have to be read by the trial judge before every case and applicable to every attorney's performance in preview of that performance when we know -- and I've not seen this very often at all, but sometimes attorneys are way out of bounds, and I wouldn't

want to be saying at the beginning of trial that what you're about to see is exactly the way it should be.

CHAIRMAN BABCOCK: Uh-huh. Okay. Who else? Any other comments? Okay. Carl, you want to move it for a vote?

MR. HAMILTON: I guess so. I guess if the committee wants to have something like this then --

CHAIRMAN BABCOCK: Well, it's not the committee that much cares, it's if the Court wants it.

MR. HAMILTON: Okay. Then our subcommittee wants this, so I move that we adopt it.

CHAIRMAN BABCOCK: Okay. Any other discussion? Jeff.

MR. BOYD: Clarification, I'm trying to figure out which page has the exact language that we're actually looking at right now.

CHAIRMAN BABCOCK: It's the --

MR. BOYD: Is it December 6th, 2006, down in the bottom of this one?

CHAIRMAN BABCOCK: Yes.

PROFESSOR CARLSON: Yes.

MR. BOYD: With the line down the margin?

CHAIRMAN BABCOCK: That's it. Any other discussion? All right. All in favor of adopting this language from Rule 226, for Rule 226a, raise your hand.

HONORABLE STEPHEN YELENOSKY: Would you repeat that? I'm sorry. I apologize.

CHAIRMAN BABCOCK: Everybody in favor of this language?

Everybody opposed?

HONORABLE SARAH DUNCAN: I'm going to change my vote. I'm sorry.

CHAIRMAN BABCOCK: Okay. It is defeated by a vote of 7 to 12, the Chair not voting.

MR. LAMONT JEFFERSON: Chip?

CHAIRMAN BABCOCK: Yeah, Lamont.

MR. LAMONT JEFFERSON: I mean, David's cover letter said that kind of the purpose for this instruction was to assist in the negative perceptions and the vanishing jury trial idea, right, and I think that the idea of modifying the jury instruction is a good one, and we haven't looked at it in a long time, and I think there are ways that we can do that. And so, I mean, I'm in favor of that, but the particular -- there's a whole lot of different ways to do that and to modify the instructions to make -- kind of put the jury trial in the right perspective for jurors and for the laypeople.

I didn't vote for or against this particular language because it almost suggests that, you know, the better lawyers are the more aggressive, more zealous, at

least apparently so in the courtroom, that they're the ones who give the more forceful testimony or are, you know, the ones that are revered by our society or whatever, but I mean, so I think a change and I think looking at Rule 226a and the instructions, I think it merits the attention of the Court, but, you know, just an up or down vote on this language I think is --

CHAIRMAN BABCOCK: Yeah. I didn't express it on the record, but I will. I am concerned that language like this will sort of give the judge's imprimatur to activities or actions in the court that everybody at this table would say, "We didn't mean that when we were talking about the adversary system."

HONORABLE SARAH DUNCAN: That was Steve's comment and --

CHAIRMAN BABCOCK: That was Steve's comment.

HONORABLE SARAH DUNCAN: -- that's what caused me to change my vote.

CHAIRMAN BABCOCK: Yeah. And so I suspect that that's the motivation behind a lot of the votes against this language, but it's -- it's an issue I know the Court's interested in, and they've got -- it was a pretty close vote to begin with whether we even did this at all, 12 to 10, and then this language, you know, didn't make it, and if the Court wants to follow up on the

concept and come up with its own language, I'm sure they won't be critical of anything we've written, just say it differently if they decide to do it. Would that be true? Okay.

Well, here's some good news. We all get out of school early today because Bill has got another commitment that he has to leave for and he's got the only other agenda item on our docket, so we'll hold that over for the next time, which is unscheduled, but we'll get a schedule for 2007 out.

And let me say, we set, I think, a record today. All but eight of our members were here at one point or another during the day, and even better than that, all but three RSVP'd, which is certainly a huge record, and it really helps Angie out from everything from how big the table's got to be to the food that we order to everything else, so if you think of it and can RSVP, that would be great. And have a great holiday, everybody, and thanks for your help, as usual a terrific day of work. Buddy.

MR. LOW: Chip, I'd like to give both you and Angie a round of applause for a good year of work on the committee.

(Applause)

CHAIRMAN BABCOCK: Thank you very much.

We're in recess.

(Meeting adjourned at 3:50 p.m.)

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MEETING OF THE
SUPREME COURT ADVISORY COMMITTEE

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I, D'LOIS L. JONES, Certified Shorthand Reporter, State of Texas, hereby certify that I reported the above meeting of the Supreme Court Advisory Committee on the 8th day of December, 2006, and the same was thereafter reduced to computer transcription by me.

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

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