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MEETING OF THE SUPREME COURT ADVISORY COMMITTEE

February 20, 2009

(FRIDAY SESSION)

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Taken before *D'Lois L. Jones*, Certified
Shorthand Reporter in and for the State of Texas, reported
by machine shorthand method, on the 20th day of February,
2009, between the hours of 9:00 a.m. and 5:01 p.m., at the
Texas Association of Broadcasters, 502 E. 11th Street,
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INDEX OF VOTES

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

<u>Vote on</u>	<u>Page</u>
Juror questions	17772
Juror questions	17773
Juror questions	17776
Juror questions	17784
Juror questions	17800
Juror questions	17815
Juror questions	17832
Juror questions	17856
Juror questions	17862

Documents referenced in this session

09-1	Senate Bill 445
09-2	Revised Order Following TRCP 226a
09-3	Draft Juror Question Rule.
09-4	Report on Jury Innovations (Judge Christopher)
09-5	Summary of SCAC Note-taking discussions
09-6	Proposed revision to TRE 606
09-7	Proposed amendments to Rules 296-329(b)
09-8	Administration Rules of Evidence recommendation

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2 CHAIRMAN BABCOCK: Well, welcome, everybody,
3 to a new term, new three-year term of our committee.
4 We've got many, many old and familiar faces, but we've got
5 some new members; and at the risk of embarrassing them,
6 and that will only be the first time, I wonder if
7 everybody could introduce themselves and tell us a little
8 bit about their background; and, Eduardo, I was going to
9 start with you.

10 MR. RODRIGUEZ: I was going to get
11 Ms. Albright a chair.

12 CHAIRMAN BABCOCK: But since you're already
13 standing maybe you can tell us a little bit about
14 yourself.

15 MR. RODRIGUEZ: I'm Eduardo Roberto
16 Rodriguez from Brownsville. I've been practicing trial
17 law there for about 40 years.

18 CHAIRMAN BABCOCK: Okay. Roger Hughes.

19 MR. HUGHES: Yes, well, my name is Roger
20 Hughes. I'm with a little firm called Adams & Graham.
21 I'm from Harlingen, Texas, and I've been doing civil
22 litigation, mostly on the defense side, since 1981, with a
23 few years defending some of the Army's finest drug dealers
24 in the JAG Corp.

25 CHAIRMAN BABCOCK: Great. Judge Evans.

1 HONORABLE DAVID EVANS: I'm David Evans.
2 I'm the judge of the 48th District Court. Prior to that
3 time I was in civil practice, appellate practice.

4 CHAIRMAN BABCOCK: Okay. R. H. Wallace.

5 MR. WALLACE: I'm R. H. Wallace with Shannon
6 Gracey in Fort Worth. I have been in private practice
7 since 1984, doing mainly commercial litigation and
8 professional liability defense.

9 CHAIRMAN BABCOCK: Mark Glasser.

10 MR. GLASSER: Mark Glasser from Baker Botts
11 in Houston, where I practice principally securities and
12 oil and gas litigation.

13 CHAIRMAN BABCOCK: Okay. Rusty Hardin.

14 MR. HARDIN: I went into private practice in
15 '91 after about 15 years as a prosecutor in Houston, so my
16 practice now is about 85 percent civil trial work and 15
17 percent criminal.

18 CHAIRMAN BABCOCK: And I think all the way
19 down to Justice Guzman.

20 HONORABLE EVA GUZMAN: Good morning. I'm
21 Eva Guzman. I'm a judge on the 14th Court of Appeals.
22 I've been there about -- coming into my eighth year.
23 Before that I was on a family district court bench.

24 CHAIRMAN BABCOCK: Well, welcome to all of
25 you. I think you'll find this work sometimes tedious, but

1 really fascinating, interesting, and of great service to
2 the Court and the State of Texas. I want to tell the new
3 members a little bit about how we operate. First of all,
4 all of these meetings are open to the public, and they are
5 transcribed by our faithful court reporter, who can go on
6 and on and on as we drone on forever. We'll have a break
7 in the morning and a break in the afternoon. If our work
8 requires it, sometimes we will spill over to Saturday
9 morning meetings, but we will not have to do that this
10 time.

11 There is a -- at these meetings we sometimes
12 have people who ask to address the committee and have
13 particular expertise and points of view that they want to
14 express. Within reason, we always accommodate those
15 people and allow them to tell us what they think and ask
16 them questions if we think that what they say will be
17 helpful to our work. We do not take formal sworn
18 testimony, but I've never in the time I've been on this
19 committee felt that anybody was trying to mislead us in
20 what they said. The transcripts and all of the materials
21 that are pertinent to our work is contained on a website,
22 and Angie, who is my colleague and assistant and has been
23 with this committee for five or six years, will you tell
24 us -- tell them how to get to the website?

25 MS. SENNEFF: Right now it's just at Jackson

1 Walker's website, which is www.jw.com, and go down to the
2 bottom of the home page, and there's a link to SCAC, and
3 that's where everything is.

4 CHAIRMAN BABCOCK: Great.

5 MS. SENNEFF: All the stuff for each meeting
6 is under the "featured items," and the stuff from prior
7 meetings and historical stuff is under the library.

8 CHAIRMAN BABCOCK: And if anybody has any
9 questions about logistics or about what's going to be on
10 the calendar or how we're going to do things, Angie is
11 available to answer your questions, and I'm sure she's
12 already been in contact with most people by e-mail.

13 Our work gets done here in this meeting
14 which is held generally every other month here in Austin
15 either at this facility, or at the State Bar headquarters.
16 We do, however, have subcommittees, and they are organized
17 by -- mostly by rule, although there are a couple by
18 topic, and the new members should have received
19 assignments to a particular subcommittee. These things
20 are not set in stone. If you want to do work in a -- on
21 another subcommittee, I'm sure that that's -- wouldn't be
22 a problem at all. The subcommittees have chairs and
23 vice-chairs, and there should be a chart that has been
24 distributed to everybody showing that.

25 Angie just told me she didn't do that, but

1 she will. But she will do that. I'm often asked how do
2 things get before this committee. That has changed over
3 the years, but a long, long time ago the committee would
4 pretty much take up -- a lawyer wrote a letter to this
5 committee and said, "We want you to look at this potential
6 rule change," and we would spend a lot of time and effort
7 looking at it and then we would give it to the Court, and
8 the Court would say, in effect, "Why did you look at this,
9 because we're not interested in changing this, and thanks
10 for the effort." So in recent years we have tried to
11 pretty much institute the procedure that we only want to
12 look at things that the Court is interested in having us
13 look at, so something gets on this docket because Justice
14 Hecht and the other members of the Court are interested in
15 the topic, and they've asked us to look at it and give
16 us -- give them our best advice about what should be done.

17 And that brings up another topic. We are,
18 as our name suggests, advisors to the Court. We aren't
19 the Court ourselves. What we say is only advice, and I
20 know those of you who have been in private practice know
21 that your clients often don't take your advice, and I
22 think you'll find in this effort that our client often
23 does not take our advice. That doesn't mean we're right
24 or wrong, it just means that they have a different view,
25 but I think they always appreciate the effort and the good

1 advice we try to -- we try to give them. That's all I
2 have right now.

3 We do have as a common practice at the
4 beginning of every meeting, Justice Hecht gives us a
5 status report. Among the things that he generally covers
6 is how our work product is doing with the Court. In other
7 words, if we referred them something recently, did they
8 like it, not like it, is it under consideration, or will
9 we never hear about it again, but thanks anyway. So with
10 that, I will turn it over to Justice Hecht.

11 HONORABLE NATHAN HECHT: Thanks, all of you,
12 for being here for this beginning of the new term of the
13 committee that has been in existence since 1940. The
14 Legislature passed the Rules Enabling Act in 1939,
15 following a movement across the country to move the
16 formulation of Rules of Procedure to the judiciary and the
17 Bar and away from the Legislature. Remember the old field
18 code in New York that was such a model for procedure for a
19 while, all of the procedure rules in all of the states
20 were made by Legislatures with a few quirk exceptions, and
21 then there was a huge wave Roscoe Pound and others
22 sponsored at the beginning of the 19th century, lawyers
23 and judges should make these rules because they have to
24 live with them.

25 This committee was formed in 1940 to take

1 the rules that existed in the statutes, a few rules that
2 had been formulated by the courts, and the Federal rules
3 and put them together into the package of some 820 rules
4 that were our Rules of Civil Procedure for awhile. Then,
5 as now, the Supreme Court looked around the state and
6 tried to select and encourage to participate the best and
7 the brightest of lawyers, judges, and academics that it
8 could find because this is a very large state, its
9 practice is very diverse, it is a leader in the civil
10 justice system in the United States, and so we like to be
11 well-acquainted with procedures that are working, changes
12 that need to be made, procedures that are not working, the
13 whole gamut of the operation of the judiciary.

14 So most of our work here will be on the
15 Rules of Procedure, civil procedure, appellate procedure,
16 and the Rules of Evidence, but there are Rules of Judicial
17 Administration, which this committee has worked on in the
18 past and will continue the work on as well as other rules
19 that govern the operation of the judiciary and the Bar
20 that the Court will want your input on. When the
21 committee reaches recommendations, Chip sends them to me,
22 and I send them to the Court. The Court discusses these
23 recommendations in conference, goes through them line by
24 line and decides whether we think this is a appropriate
25 action to take, whether we should wait, whether we should

1 look at it again, what's the right thing to do.

2 So we seek your advice even on things that
3 you would rather not see happen, so we'll ask you from
4 time to time is this a good idea, and when you vote
5 unanimously against it, we'll ask you if it was a good
6 idea, how would you do it? And because there are lots of
7 factors at play here -- and we'll talk about most of them
8 on today's agenda, as a matter of fact.

9 We have partnered with the Legislature in
10 the last several sessions in writing rules and procedures
11 to effectuate policies that they have enacted, so some of
12 these are in some detail, like the rule regarding offer of
13 judgment. The Legislature has a fairly detailed statute
14 about that. It's hard fought over there, but once those
15 policies were set, the Legislature left it to the Court,
16 and we drew on the expertise of this committee to write a
17 rule that would effectuate those policies. Sometimes the
18 directions given by the Legislature are fairly general.
19 In that same session the Legislature asked us to look at
20 class actions and essentially do whatever needed to be
21 done. So we -- but we encourage and cooperate with that
22 relationship because, again, we think that it's a very
23 good thing for the Bar and the judiciary to -- when
24 policies are set by the Legislature, to have the actual
25 working out of them done by the group that has to live

1 with them, and so this has been a good relationship the
2 last several sessions, and we hope it continues.

3 We have today some consideration of jury
4 procedures. We've talked about these for several meetings
5 and now we'll come toward finishing them up. There is
6 pending in the Senate, Senate Bill 445, introduced by
7 Senator Wentworth of San Antonio, that addresses
8 note-taking and juror questions; and my assurance to him
9 is that when that comes for hearing soon we will be able
10 to furnish him the work, the deliberation that this group
11 has done, on those issues so that the Legislature will
12 have the benefit of that as it considers that bill and
13 perhaps others.

14 So the committee has 55 members. 52 are
15 appointed by the Court. One is designated by the
16 Lieutenant Governor, one by the Speaker of the House, and
17 one by the Court of Criminal Appeals. In the past we have
18 had a district clerk and a county clerk amongst us to help
19 us with the issues on that side of our operation, and it
20 turns out that both of them have retired at the end of
21 this last three-year term, and it seemed to the Court that
22 rather than have them sit through endless discussions
23 about jury questions and jury note-taking it would be
24 better to call on them when we need them and free up those
25 two positions for someone else, and so we have done that,

1 so we will not have here as a regular matter
2 representatives of the clerks' offices, but when we get
3 into appellate or trial procedures that need their input,
4 we have -- we can easily call upon people from their
5 groups to come and to help us with that as we have in the
6 past.

7 So five other members of the committee
8 retired, and we thank them for their service, and we have
9 the seven that have introduced themselves, and I just say
10 a word about our thoughts in that regard. We have here a
11 strong proponent of the judiciary of both the appellate
12 and the trial bench, and we, of course, need that very
13 much in consideration as well as from the law schools and
14 the practice.

15 Justice Guzman, we're pleased to welcome.
16 She didn't tell you that she's a member of the ALI or that
17 her husband is a police officer in the Houston police
18 force, and it was interesting to me that the first year
19 she was on the appellate bench in 2002, the Houston Police
20 Association voted her the best appellate justice, which is
21 good. It would have been worse if they hadn't.

22 Judge David Evans is Judge David L. Evans of
23 Fort Worth, not to be confused with Judge David M. Evans,
24 former Judge David M. Evans of Dallas, and was a captain
25 in the Army infantry before he went to law school and has

1 been on the district court in Fort Worth since 2003. Mark
2 Glasser is from -- Judge Evans incidentally is from Texas
3 A&M and --

4 HONORABLE TOM GRAY: Whoop.

5 HONORABLE NATHAN HECHT: -- Baylor, Justice
6 Guzman from the University of Houston and the South Texas
7 College of Law. Mark Glasser is from Columbia and the
8 University of Texas and a law clerk to Judge William Wayne
9 Justice, former chief judge of the Eastern District of
10 Texas. He is also a former lead vocalist for Midlife
11 Crisis and Hot Flashes. His drummer was Rob Mosbacher.

12 Rusty Hardin is from Wesleyan and SMU. He
13 was an American History teacher in Montgomery, Alabama,
14 before he was a captain in the Army and finally talked SMU
15 into letting him into the law school, where he has -- in
16 which profession he has done okay. He was voted Texas
17 Prosecutor of the Year in 1989 before he went over to the
18 dark side, and tomorrow night he gets SMU's distinguished
19 alumnus medal. Anna Nicole Smith when being
20 cross-examined by him said, "Screw you, Rusty."

21 CHAIRMAN BABCOCK: Not an exact quote, but
22 the sentiment was the same.

23 HONORABLE NATHAN HECHT: So if you get
24 peeved at Rusty during these meetings you might think of
25 that phrase. Roger Hughes is a native of Topeka and from

1 the University of Kansas and the University of Texas, and
2 he, too, was -- as he mentioned was in the Army in the JAG
3 Corp. We've got lots of Army people here, and Eduardo
4 Rodriguez is a native of The Valley, of Edinburgh, and
5 operated the elevator at the United States Capitol when he
6 was going to George Washington University to help pay his
7 tuition and carried such luminaries as President LBJ and
8 Charlton Heston up and down the corridors of the Congress.
9 He is a former president of the State Bar and member of
10 the American College, and there's a bunch of other stuff,
11 too.

12 And R.H. Wallace is a good Navy man and a
13 graduate of the Naval Academy as well as the Baylor Law
14 School, former managing partner of Shannon Gracey in Fort
15 Worth, and a member of the American College. So it was
16 among those credentials that the Court found a lot of
17 expertise and experience to call upon in these new
18 members.

19 Now, with respect to the agenda, before we
20 get to that, one other thing that will be coming up soon,
21 the courts of Texas, trial courts of Texas, as you know,
22 have been experimenting with electronic filing for several
23 years, and it is now in operation in 29 counties in Texas.
24 It is approved on a county-by-county pilot project basis,
25 but the template for the operation is the same, and it has

1 been used in various counties. We, of course, are trying
2 to expand that, and there is some hope that we will be
3 able to move to a full and required electronic filing in
4 Texas trial courts in the next couple of years, but there
5 are lots of problems with that, which we don't have to go
6 into now. Funding problems, operational problems with the
7 various counties, as well as the legal problems of
8 fashioning rules to get that done.

9 Meanwhile, there is a project under way.
10 TAMES is the acronym, Texas Appeals Management and
11 E-filing Systems, which will call for e-filing in all of
12 the 16 appellate courts in Texas, and it's moving along
13 much faster, and I hope that we will have a presentation
14 on that, either the next meeting or certainly the meeting
15 after that, but hopefully the next one, including changes
16 in the Rules of Appellate Procedure that would permit
17 electronic filing in the courts of appeals, the Supreme
18 Court, and the Court of Criminal Appeals.

19 The most significant changes in that regard
20 are in the preparation and filing of the record, both the
21 reporter's record and the clerk's record, which we expect
22 this project to call for that to be done electronically
23 and throughout the state. So that's a little easier to
24 do. The courts of appeals have about 11,000 filings every
25 year. We have about 1,100. I'm not sure what the Court

1 of Criminal Appeals workload is, but anyway, 11,000 and
2 1,100, something on the -- it's going to be something on
3 the order of 15,000, which is about four percent or
4 something of the civil cases and a tenth of one percent of
5 the major criminal and civil cases that are filed in the
6 state. So there's a much smaller docket to deal with.
7 The Bar tends to be a smaller group of people. The
8 problems are smaller. We have only 16 clerks to deal
9 with, so we hope that that will move along very smoothly,
10 but as I say, the appellate courts are very interested in
11 this, are very excited about it. Chief Justice Hedges is
12 the head of the task force that's working on this, and
13 it's very far along, so we will hear something about that
14 probably next time.

15 Then on the agenda today the Court has taken
16 up the proposed changes in the standard jury instructions,
17 which are included in an order following Rule 226a of the
18 Rules of Civil Procedure, and we have made a few changes,
19 and they are somewhere available to you, and it says at
20 the top "Revised Order Following Texas Rule of Civil
21 Procedure 226a" in a little box, so if you don't have it
22 you can get one, and the changes made by the Court are
23 underscored or struck out and most of them are editing
24 kinds of things, but when we get to this on the agenda, I
25 will tell you what the two or three things are that the

1 Court thinks it needs more help on and get your responses.
2 We hope to have at the conclusion of this meeting your
3 thoughts on the order following 226a and all of these
4 issues, so, as I say, we can advise the Senate committee,
5 to the extent it wants help, what we have concluded on
6 these subjects.

7 And then finally, we have been asked by the
8 Court Rules Committee of the State Bar of Texas, which is
9 another group, but it's appointed by the Bar, and they,
10 too, study the Rules of Procedure and make
11 recommendations. Those recommendation -- all
12 recommendations that are made to us almost always with
13 rare exceptions, whether from the Bar, from Bar sections,
14 from individuals, wherever they come from, come through
15 this committee before they go back to the Court for
16 decision. So this is sort of the clearinghouse for all of
17 these things, but the Court Rules Committee has asked the
18 Court on an expedited basis to consider a change in Rule
19 of Evidence 1010, the basic import of which is to allow
20 for verification without an oath.

21 The Federal system allows this simply sign
22 it under penalties of perjury, and that means that. Texas
23 does not have that provision, except for prisoners, so
24 should we have it more widely. The request from the Court
25 Rules Committee was that the Court approve this at once so

1 that it might be considered during the session. The Court
2 declines to do that and would rather get your input on it,
3 but we out of regard for the committee's recommendation,
4 we would like to do that soon, so I think, Mr. Chairman,
5 that's all I've got.

6 Okay. Buddy Low, who has been on this
7 committee since the 1840s, I think --

8 MR. LOW: 1864.

9 HONORABLE NATHAN HECHT: -- is the
10 vice-chair of the committee. Now, I've been the Court's
11 liaison since I've got on the Court, and Kennon Peterson
12 on my left is the Court's rules lawyer, rules attorney,
13 and you are always welcome to call her at the Court.
14 These are administrative matters, so there's no ex parte
15 about this. You can call, talk about the status of
16 things, ask questions, get her e-mail address, and contact
17 her whenever you need to because she works with the Court
18 on all of these issues and has since last summer.

19 CHAIRMAN BABCOCK: Great. Thank you, your
20 Honor. One other note before we get to work, and that is
21 we -- the Court and I have decided that it would be a nice
22 tradition if at the beginning of each three-year term we
23 would get together for a reception and a picture, so
24 tonight at 6:00 o'clock at Jackson Walker, which is 100
25 Congress, it's right at Congress and Cesar Chavez.

1 There's maps I think on the back table. At 6:00 o'clock
2 there will be a reception, and at some time during the
3 reception we will have a picture of this committee taken,
4 and the Court has indicated they might even hang us all at
5 the Court.

6 HONORABLE STEPHEN YELENOSKY: Can I
7 substitute a picture of myself when I started on this
8 committee in 1993?

9 CHAIRMAN BABCOCK: If we had had that
10 tradition back then that would have been a nice
11 progression.

12 All right. So our first topic of business
13 today is the jury procedure issues, and Professor Carlson
14 and Judge Christopher are the chairs of this effort, so
15 which of you is the lead?

16 HONORABLE TRACY CHRISTOPHER: Want me to?
17 Okay.

18 Well, I'm quickly reading the proposed rule
19 from the Supreme Court, which does make a significant
20 change from what we've previously discussed and voted on
21 here. So I'll first talk about note-taking. Since we --
22 I did a summary of our previous discussions, and it's
23 dated February 20th, and it details the votes that we took
24 and the previous issues that we talked about. Since that
25 time Senator Wentworth filed his bill about juror

1 note-taking, and the significant change that he has in his
2 bill is that jurors could not take notes during
3 deliberations -- or could not take the notes back during
4 deliberations, but the language that the Supreme Court has
5 come up with keeps our recommendation that -- well, keeps
6 our recommendation that the jurors can use their notes
7 during deliberations, so that hasn't -- it's a change from
8 what Senator Wentworth's bill is, but it's not a change
9 from what our previous discussions and previous votes have
10 been on this point.

11 HONORABLE NATHAN HECHT: And could I just
12 say there, Judge, that there -- the Court has some
13 ambivalence about this because there are strong voices on
14 both sides of the debate; and as Judge Christopher says,
15 we talked about it at some length and I think the Court's
16 leaning is to approve jurors taking notes back into the
17 jury room with the caveats that are -- that follow, don't
18 tell anybody else about them and remember that they're not
19 evidence, recognizing realistically that those are not
20 always going to be observed; and so we proposed this, but
21 I should have added earlier that these changes are
22 significant enough that we -- even though they are
23 approved by order and not part of the rule-making process,
24 the Court intends to put them out for comment in the
25 public and the Bar before it makes the changes. So that's

1 there for discussion basically for the time being.

2 HONORABLE TRACY CHRISTOPHER: Okay. Well,
3 you don't want this group to discuss again whether or not
4 we should take notes back into the jury room, do you? We
5 pretty much discussed that three times and have all
6 thought it was a good idea. The majority thought it was a
7 good idea.

8 HONORABLE NATHAN HECHT: I think the
9 majority did. For what that's worth.

10 HONORABLE TRACY CHRISTOPHER: I think it was
11 overwhelming majority.

12 HONORABLE NATHAN HECHT: It was substantial.
13 It was.

14 HONORABLE TRACY CHRISTOPHER: And I would
15 like the record to reflect it was an overwhelming
16 majority.

17 HONORABLE NATHAN HECHT: But others are
18 screaming loudly.

19 HONORABLE TRACY CHRISTOPHER: Yes, but those
20 people are going backwards, not forwards in terms of
21 improving the jury system, and I will tell Senator
22 Wentworth that if he ever asks my opinion, that not
23 allowing jurors to have their notes in the jury room to
24 refresh their own memory is going backwards from the
25 current system, from what, you know, the vast majority of

1 trial judges already do in civil cases.

2 CHAIRMAN BABCOCK: Judge Yelenosky.

3 HONORABLE STEPHEN YELENOSKY: Well, I agree,
4 but -- and my question is if anyone is here who opposes
5 them going back to the jury room, what are we -- what is
6 the juror to think he or she is doing in taking notes?
7 You take notes either to review them and memorize them or
8 to refer to them. Is the juror to think when they're told
9 you can't -- you can take notes, but you can't take them
10 back to the jury room, boy, I better study up on my notes
11 real good before we go back to deliberate? I just don't
12 understand how that's supposed to work. Does anybody have
13 an answer?

14 MS. CORTELL: I believe they shouldn't go
15 back into the jury room, but I will say I was a juror
16 recently in a criminal case where I couldn't take them
17 back, and I did just what you're saying, Steve. I studied
18 like I was cramming for an exam.

19 HONORABLE STEPHEN YELENOSKY: And when did
20 you do that, during breaks or during the trial?

21 MS. CORTELL: I'm sorry?

22 HONORABLE STEPHEN YELENOSKY: Did you do
23 that during the trial?

24 MS. CORTELL: I was allowed to keep my notes
25 throughout trial. They weren't even collected at the end

1 of the day. The only time I was not allowed access to my
2 notes was during deliberations.

3 HONORABLE STEPHEN YELENOSKY: Well, that
4 would be my concern about what would happen. An
5 unintended consequence would be exactly that. If you tell
6 people to take notes but you tell them ahead of time
7 you're not going to have them later, they are going to
8 study those notes during the trial perhaps or maybe --
9 maybe during breaks, but that would be a concern.

10 CHAIRMAN BABCOCK: Professor Dorsaneo.

11 PROFESSOR DORSANEO: I haven't taken a
12 survey of this, but my sense is that students take their
13 notes into the exam, that that's the more normal method
14 used in law schools, but they may not be able to take
15 texts that weren't assigned, dictionaries and the like.
16 That's a sensible place to draw the line.

17 CHAIRMAN BABCOCK: Good point. Okay. Judge
18 Christopher.

19 HONORABLE TRACY CHRISTOPHER: The second
20 major issue that is in Senator Wentworth's bill that we
21 have discussed before was whether or not we would let
22 jurors take their notes home when the trial was finished
23 or take their notes home during the course of the trial.
24 I see that the Supreme Court's draft says that they can't
25 do either of those things, so that would be different from

1 what we had voted on before. Now, I will say I don't
2 think that that was as overwhelmingly in favor of letting
3 the jurors take their notes home, but it was a strong
4 majority that thought jurors ought to be able to take
5 their notes home; and in connection with that, we did vote
6 to amend TRE 606 just to make clear that a juror's notes
7 couldn't be used, just like a juror's testimony couldn't
8 be used in connection with questioning the validity of the
9 judgment.

10 So I had drafted proposed revisions to TRE
11 606, even though it's not my committee. I just did it so
12 we would have it here today in case we were interested in
13 looking at it. And I just simply added in "in a juror's
14 notes" in two places there that seemed to make sense to
15 me. That change would not be necessary presumably if we
16 vote to destroy jurors' notes. So I don't know whether
17 you want us to talk about that issue some more. As I say,
18 we have talked about it several times. There was a vote,
19 24 votes in favor of letting jurors take their notes home
20 if they wanted to, eight votes in favor of destroying all
21 juror notes. So -- but we can talk about that point again
22 if you would like to. I know it's one issue that the
23 State Bar committee was worried about in connection with
24 jury misconduct, so that's why I went ahead and did the
25 revision to TRE 606.

1 HONORABLE NATHAN HECHT: And we don't want
2 to -- the Court's mind is far from fixed at this point.
3 This is just the result of the last conference, but this
4 is a work in progress, so if there's more to add to the
5 discussion then I think it would be good to do that,
6 without going back -- without reploting all the ground all
7 over again. The concern is that if there are lots of
8 breaks during the trial, sometimes there are protracted
9 breaks, if jurors can take their notes with them at lunch,
10 at recesses, overnight, at the end of the trial, different
11 times, there's just a huge opportunity for mischief that's
12 not there if they don't.

13 CHAIRMAN BABCOCK: Yeah, Steve.

14 MR. SUSMAN: I think the biggest danger is
15 if they take their notes home and they have the proper
16 spelling of names, they can go to Google and find out
17 whatever they want about the case, and it is irresistible,
18 and I don't care what the judge tells them. So, I mean,
19 they're going to do it anyway, but they have a problem
20 remembering the proper names and the spellings, but if you
21 let them take their notes home the internet is too
22 powerful and too tempting, and so I think -- I am one who
23 favors, on whether they take notes, I think it's important
24 that they be able to take notes, but I see no proper
25 purpose by them taking them home at night and only the

1 chance for great abuse.

2 CHAIRMAN BABCOCK: Judge Yelenosky.

3 HONORABLE STEPHEN YELENOSKY: Well, if
4 that's a concern, then the concern is much greater than
5 just having the proper names. One of the suggestions I
6 have on the instructions from the judge is we make clear
7 on investigating, examples of not investigating, which I
8 always tell a jury --

9 MR. SUSMAN: Sure.

10 HONORABLE STEPHEN YELENOSKY: -- is do not
11 get on the internet and Google this. It's not just proper
12 names. They can Google the subject matter. They can
13 Google the name of the firm involved, and there's all
14 kinds of things they can find on the internet from what
15 they remembered during the trial. They don't need their
16 notes to do that, so if you're suggesting that the
17 instruction of the court not to do that is in effective
18 then we've got a much bigger problem.

19 CHAIRMAN BABCOCK: Judge Christopher.

20 HONORABLE TRACY CHRISTOPHER: Well -- oh,
21 there it is, okay. I thought we had -- in our previous
22 draft we had really highlighted the internet, you know.
23 It seems to have been sort of watered down. I'm with
24 Steve on, you know, you really -- and I say it in every
25 single trial. "Don't look things up on the internet," but

1 it doesn't matter whether they take their notes home or
2 not. They can look things up on the internet.

3 HONORABLE STEPHEN YELENOSKY: And they don't
4 have to go home. They have an iPhone during the day, they
5 can look it up during the day.

6 HONORABLE TRACY CHRISTOPHER: And we have
7 wi-fi at the courthouse. In long trials jurors bring
8 their computers to the courthouse to do work at breaks and
9 at lunch, and, you know, taking the notes home won't make
10 a bit of difference for that kind of mischief.

11 CHAIRMAN BABCOCK: Professor Dorsaneo.

12 PROFESSOR DORSANEO: Ultimately the issue
13 gets down to whether somebody could use in a new trial
14 hearing evidence that extraneous prejudicial information
15 was obtained and used during jury deliberations, so I
16 think a related problem is what we're going to say in Rule
17 327b and 606(b) about new trial practice after there's
18 been jury misconduct, what we would all probably regard as
19 jury misconduct. I'm not sure I would -- I think I
20 probably agree with Steve. It's very unlikely that you
21 would just be able to tell people don't do this, and I
22 think it probably would be a bad idea to have new trial
23 practice examine whether somebody went home and Googled.
24 I feel much differently about them bringing -- jurors
25 bringing dictionaries, newspapers, textbooks, into the

1 deliberations; and our current evidence rule and 327b
2 might, in fact, say that you can't raise those matters in
3 a motion for new trial, because those things coming with
4 jurors aren't outside influences.

5 I don't think that our Court has ever faced
6 that issue, but there are several courts of appeals
7 opinions that say, well, yeah, that's naughty, but nothing
8 can be done about it, so maybe that's getting us too far
9 into it, but I think that's where you ultimately go.

10 CHAIRMAN BABCOCK: Okay. Justice Gray.

11 HONORABLE TOM GRAY: The part that concerns
12 me about the -- what's under discussion and the way the
13 rule is proposed and providing the materials, it becomes a
14 question of whose notes are they if they are made on
15 materials provided by the state and the state controls
16 those notes at the end of the day and at the end of the
17 trial, does it become a state record, because it is owned
18 and controlled by the state; and if it is a state record,
19 its destruction becomes a statutory issue and has to be
20 retained and would require a statutory amendment to
21 effectuate the destruction of those notes, if they are
22 state records.

23 Whereas if they're personal property and
24 they can take it on either state provided materials or
25 their own personal materials and then we take them from

1 the juror, have we done an unconstitutional taking to the
2 extent there may be any value there, and certainly in some
3 of the trials where they are the subject of a lot of
4 publicity they could be valuable, and so that's why I --
5 actually, Richard Munzinger I think was the one that made
6 the argument that people can come into these jury
7 proceedings, they can take notes, they can take them home
8 with them, they can do whatever they want to with them,
9 and who are we as the government to say that a person
10 because they happen to be sitting on the jury cannot do
11 that, and so I like the fact that the jurors can take
12 them, they can take them into deliberations, they're told
13 what to do with them and what not to do with them and then
14 they can do whatever, but I would prefer that they be able
15 to do whatever they want to with them after the trial.

16 CHAIRMAN BABCOCK: Judge Christopher, did
17 we -- remind me. Did we say that the notes would be
18 collected by the bailiff on breaks and at the end of the
19 day, but at the end of the trial they could take them
20 home?

21 HONORABLE TRACY CHRISTOPHER: No.

22 CHAIRMAN BABCOCK: We just said they could
23 have them the whole time.

24 HONORABLE TRACY CHRISTOPHER: Right.

25 CHAIRMAN BABCOCK: Okay. Thanks. Judge

1 Yelenosky.

2 HONORABLE STEPHEN YELENOSKY: I want to
3 respond to a couple of things. With respect to, well, why
4 can we tell them, I can see both arguments about whether
5 they should be allowed to keep their notes or not, but in
6 answer to your question why should we be able to tell
7 jurors because they happen to be on the jury they can't
8 keep their notes. Because they're on the jury. We tell
9 people on the jury you can't talk to each other about the
10 case, and people out in the audience can talk about the
11 case, because they're on the jury I think that's a
12 legitimate response.

13 As to the internet, and maybe this is just
14 something we should put on the agenda for another time,
15 but I think this is a big issue. It's just touched here,
16 but looking on the internet is a much greater risk than
17 somebody going out to the accident site where a car wreck
18 happened and, therefore, obtaining evidence that they
19 shouldn't have at trial, and I do think that people maybe
20 don't consider it to be that, but we need to think about
21 how we educate them to that.

22 I take some time in telling them, "When you
23 look on the internet, what you're doing is obtaining
24 secret evidence," and people respond to that. I think
25 jurors respond to that. They know what secret is, and

1 they have an aversion to secret evidence. And I talk
2 about "If you find out things about this case over the
3 internet, you know something that the parties don't know
4 you know. That's like having a secret trial, and we don't
5 want to have that."

6 I don't know what to do other than to try to
7 educate them about that; but I am strongly against being
8 passive and assuming that they are going to go on the
9 internet and we can do nothing about it, because I think
10 that they can find out all kinds of things on the internet
11 which, one, may be true and limineed out or the other
12 parties won't know about or, two, may be false; and so I'm
13 concerned about what I'm hearing, which is, well, they're
14 going to do that.

15 CHAIRMAN BABCOCK: Okay. Any other
16 comments? Yeah, Steve.

17 MR. SUSMAN: I mean, the immediate problem
18 is whether they should take notes home during the trial at
19 night. I haven't heard anyone make an argument for why
20 they need them. Why should they -- what positive --
21 taking notes during the trial actually keeps them
22 attentive and may be a better way to comprehend, but what
23 is the -- what is the argument, the reason for allowing
24 them to take them home at night when on the other side is
25 it could encourage them, A, to discuss the case with -- do

1 things they aren't supposed to do admittedly, discuss the
2 case with their family, go get advice about issues, go do
3 research on their own on the internet. I mean, I just
4 don't understand the positive value that we would -- that
5 would be derived from letting them take them home at
6 night.

7 CHAIRMAN BABCOCK: Judge Christopher.

8 HONORABLE TRACY CHRISTOPHER: Well, I think
9 it's kind of funny, since I know Steve is a big proponent
10 of juror questions that he wouldn't want jurors to be able
11 to take their notes home at night, look them over, and
12 come up with some good questions, because on the two times
13 I've allowed jurors to do questions, that's what they did.
14 They went home, they looked over their notes, and then
15 they had questions when they came back the next day that
16 they saw from gaps in their notes. So that's one sort of
17 juror empowerment idea. If we really want them to ask
18 questions, which I know Steve does, this gives them the
19 ability to look over their notes and figure out, you know,
20 what they need to ask.

21 But more importantly, the vast majority of
22 times there are personal things interspersed in with their
23 juror notes. There will be shopping lists. There will
24 be, you know, a reminder to take the dog somewhere. There
25 will be little notes like that that jurors have written to

1 themselves thinking that those notes are theirs and
2 expecting to be able to take them home. Now, surely we
3 can tell them they can't do it, surely we can tell them to
4 be sure not to put anything personal in any of your notes,
5 but that's how they're using them now.

6 CHAIRMAN BABCOCK: Okay.

7 MR. LOW: Chip?

8 CHAIRMAN BABCOCK: Yeah, Buddy.

9 MR. LOW: One argument -- and I'm not for or
10 against this. One argument was they may want to go home
11 by themselves and then make notes of things they didn't
12 get a chance to write down during the day about a witness
13 or something like that. That was one of the arguments I
14 heard, not -- I'm not endorsing that, but that's one of
15 the arguments.

16 CHAIRMAN BABCOCK: Yeah, Justice Gray.

17 HONORABLE TOM GRAY: Following up on what
18 Judge Christopher said, I think it's an issue of the
19 control and the perception, who's in control, what happens
20 if they get lost. If the government is in control of the
21 notes overnight, on weekends, whatever, and suddenly the
22 juror can't get them back then it's a government action
23 and the juror is skeptical. Also, if the government is
24 going to be in control of them at any period of time, the
25 juror is going to take an entirely different type of note,

1 I believe, for fear of review by someone else.

2 I mean, like Judge Christopher said, there
3 may be all kind of personal comments, and then that
4 comment to me raises the question are we going to instruct
5 them about what is appropriate note-taking? We all assume
6 that it's going to be about the evidence and numbers and
7 times and difficult concepts. Are we going to tell them
8 that you can't write down your opinion of the witness'
9 credibility or actions that are taken that cause the -- or
10 cause the juror to question the credibility of the
11 witness? So if you want sort of no holds barred
12 note-taking then the juror needs to be in control of those
13 notes the whole time.

14 CHAIRMAN BABCOCK: Okay. Yeah, Justice
15 Sullivan.

16 HONORABLE KENT SULLIVAN: I just want to
17 note that I'm always afraid that we're fighting the last
18 war. It seems to me that an underlying assumption here is
19 that note-taking is going to take the form of paper
20 note-taking, and you already have generations of kids, if
21 I can use that term, who wouldn't think about taking notes
22 on paper, and I think that underlies our entire discussion
23 here. I'm worried that we're not effectively grappling
24 with technology on a lot of different levels. Paper
25 note-taking will go the way of the dinosaur very quickly,

1 quite frankly, and has already gone that way by way of
2 some of the younger generations. I would go back to Steve
3 Susman's comment in terms of the impact on juries and jury
4 deliberations. I'm very concerned about the internet and
5 trying to communicate effectively with jurors as to why
6 they should no engage with --

7 HONORABLE STEPHEN YELENOSKY: I think Steve
8 Susman said that his position was it's going to happen,
9 and I was arguing against that, that we have to --

10 HONORABLE KENT SULLIVAN: And I agree with
11 Judge Yelenosky in this sense, is that if we look more
12 proactively and more dynamically at the issue of
13 instructing jurors, we could -- and I think this is what
14 Judge Yelenosky was saying, we can communicate to jurors
15 why it's a bad idea and why at least as a group they
16 would -- they would probably effectively exclude that sort
17 of information. One reason, of course, is that the
18 internet is not necessarily reliable. I mean, there is a
19 lot of incorrect information on the internet, and I think
20 as a group you can communicate reasons why you shouldn't
21 do that, and it would probably be effective.

22 You could field test, probably objectively
23 test, whether or not it's effective, and I think that this
24 is the sort of issue that we need to try and get in front
25 of, but we are still pretty far behind. Debating paper

1 note-taking, it's not that it's completely irrelevant,
2 but, boy, it misses the mark in terms of what the global
3 far more important issue is.

4 CHAIRMAN BABCOCK: Okay. Justice -- Lamont,
5 hang on for a second. Are you -- with respect to what
6 we're talking about now, are you saying that we should
7 allow people to take their laptops into court and take
8 notes on their laptops? Is that the point about the
9 obsolescence of paper and pen?

10 HONORABLE KENT SULLIVAN: I think, quite
11 frankly, in most courtrooms around the state you probably
12 don't have an effective way to keep someone from keeping
13 something like this out because laptops, quite frankly,
14 are going by the way of the dinosaur.

15 CHAIRMAN BABCOCK: Right.

16 HONORABLE KENT SULLIVAN: Laptops for the
17 younger generation aren't useful. They're not as --

18 HONORABLE STEPHEN YELENOSKY: I thought I
19 was hip.

20 HONORABLE KENT SULLIVAN: They're not as
21 vocal. Technological convergence means you're going to be
22 able to hold all of that in the palm of your hand, and I'm
23 holding up an iPhone, and I am certainly not a high-tech
24 person.

25 CHAIRMAN BABCOCK: Is there anything about

1 this rule that would not permit somebody to take notes on
2 their iPod or --

3 HONORABLE STEPHEN YELENOSKY: It says you
4 can't.

5 CHAIRMAN BABCOCK: You've got to turn your
6 electronic devices off.

7 HONORABLE NATHAN HECHT: But in a nod to
8 possibilities, we did say at paragraph 10 on page four
9 "using the materials the court has provided," I mean, at
10 least acknowledging there is a far off chance that the
11 court might provide an electronic device on which to take
12 notes. Although, then the next sentence says, "Don't use
13 any personal device that you have."

14 HONORABLE KENT SULLIVAN: And I guess what I
15 was trying to say is I agree with Steve Susman's comment
16 that the temptation is overwhelming to do things that are
17 normal and routine in your everyday life, and if I pick up
18 my iPhone or my PDA on the way out of the courthouse, even
19 if the courtroom procedure is such that it's been taken
20 away from me, it will be irresistible for me not to make
21 notes or do something with it, and I guess what I'm saying
22 is I think we ought to be more proactive about grappling
23 with that and with internet usage and the like.

24 CHAIRMAN BABCOCK: Are you saying that this
25 sentence ought to be taken out of this, the "do not use

1 any personal electronic devices to take notes"? Should
2 that be deleted from this and the contrary be said?

3 HONORABLE KENT SULLIVAN: No. In all candor
4 -- and I did not mean to divert us, but I'm a plain
5 language advocate in that I would explain to people the
6 reasons behind your rules so that people of, you know,
7 common sense and ordinary experience will then understand,
8 and there is a greater likelihood that people will comply.
9 The best example of that would be this internet usage
10 issue. I think simply saying "Don't use the internet" and
11 saying no more will not be an effective communication to
12 the average person. It probably isn't now. It certainly
13 is unlikely to be very soon.

14 HONORABLE STEPHEN YELENOSKY: Well, that's
15 why I say a lot more.

16 HONORABLE KENT SULLIVAN: Exactly.

17 CHAIRMAN BABCOCK: Lamont.

18 MR. JEFFERSON: If the question on the floor
19 is should jurors be allowed to take notes home, I think
20 the answer to that ought to be no for some of the reasons
21 that have already been expressed, but I think the main
22 thing is we want what happens in the courtroom to decide
23 the case, and we try to control that by what the jurors
24 hear and what evidence they get and even when they
25 deliberate, and so we don't want to encourage jurors to do

1 anything outside of the courtroom to investigate or really
2 even to think about the case.

3 We want all of that to happen in the context
4 of the trial, of the courtroom, so it seems to me that
5 we -- for that reason we don't want jurors to take notes
6 with them or -- which simply encourages them to work on
7 the case outside of the courtroom; and the other problem
8 that I think should not be underestimated is the problem
9 of control, control of the notes; and if the rule says
10 that jurors can take notes home and if everybody knows
11 that jurors are taking notes home, there is going to be
12 tremendous pressure on a lot of interested parties to get
13 ahold of the notes and to maybe report on the notes; and
14 so I just think that it's vitally important. I absolutely
15 agree that jurors ought to be able to take notes, but I
16 think it's vitally important that once we do that that
17 we've got to maintain control of that process.

18 CHAIRMAN BABCOCK: Eduardo.

19 MR. RODRIGUEZ: I agree with Lamont. I
20 think that, you know, there's some things we can't
21 control. We can't control people going to their house at
22 the end of the day and getting on the computer and doing
23 whatever they want. We can tell them not to, but it gives
24 them a lot more opportunity if they've got their notes at
25 home to be able to do that, so I agree that we ought to

1 allow them to take notes. I don't think we ought to let
2 them take them home at night. At the end of the trial, I
3 think they ought to be turned back to the bailiff and
4 destroyed.

5 The rules that are set out here provide that
6 you can't use the juror notes in any way to try and get a
7 new trial or in any appellate issue, so all that having
8 notes at home do is provide another avenue for the
9 attorneys to try and go -- you have a 10-2 verdict, you go
10 to the person, if you lost, that's got some notes and find
11 something that maybe will just go into an area that we're
12 not supposed to go into anyway, and so I strongly believe
13 in allowing notes. I don't think it's beneficial for them
14 to take them home at night, and at the end of the trial I
15 think they ought to stay with the court, and the court
16 ought to either seal them or destroy them.

17 With respect to the technology and where
18 we're going there, to allow them to take notes on iPhones
19 I think is a very dangerous thing because you really don't
20 know if they're taking notes on their iPhones or they're
21 doing other stuff. If they -- I mean, there's no way to
22 monitor that in the courtroom, and it's a big temptation.
23 I mean, you look around here today, and we're all supposed
24 to be paying attention, but at some time or another all of
25 us are going to be looking at our Blackberries or iPhones

1 and text messaging something back to the office, and so to
2 expect jurors not to do that during the trial if they have
3 that vehicle available to them I think is asking too much.

4 CHAIRMAN BABCOCK: Roland, then Buddy, then
5 Roger. And then Judge Christopher.

6 MR. GARCIA: I agree with what's been said,
7 and there's also the risk, Eduardo, of the just plain old
8 inadvertent disclosure. They can take them home and
9 inadvertently something gets disclosed or it gets lost and
10 then found again by yet a third party or an interested
11 party or a neighbor or what have you, media or what have
12 you. It just seems like there's all sorts of unnecessary
13 risks by taking them outside the courtroom control.

14 CHAIRMAN BABCOCK: Buddy.

15 MR. LOW: Back in the old day, which I can
16 speak to, one of the first things a losing lawyer did was
17 go in the jury room and look in the wastebasket and try to
18 get -- that was one, notes and things. You remember,
19 Mike, they used to do that and just give them more room.

20 Another thing is that we're overlooking --
21 if we get too engrossed in notes or the iPod or whatever
22 you call it -- I don't have one -- what about visual aids?
23 You have visual aids. You have something real important.
24 That's really discouraging when you've got a super
25 document they ought to be paying attention to, and you

1 flash it up there, and they are doing that. That's -- and
2 it would be more prone to do that if you allowed
3 electronic equipment in.

4 CHAIRMAN BABCOCK: Roger Hughes, then Judge
5 Christopher.

6 MR. HUGHES: Yes, I agree with Eddie and
7 Lamont, and what I fear is -- and I've heard the phrase
8 before -- satellite litigation in the middle of trial. By
9 nature trial lawyers kind of are suspicious people. What
10 do you think a trial lawyer is going to do if he thinks or
11 she thinks that the other side has hacked into the iPhone
12 of a juror who has taken notes? What do you think is
13 going to happen if a trial lawyer thinks, you know, "I
14 don't think those jurors notes just happened to disappear
15 at home. I think they got -- I think it was somebody got
16 in and took them and I want to know the whole circumstance
17 of this." So what are we going to do? Shut down the
18 trial and have discovery against jurors about their --
19 what they're doing with their iPhones or what they're
20 doing with their notes when they take them home, what kind
21 of security they're keeping?

22 All I see -- and in high stakes litigation
23 those could be some very difficult choices for a trial
24 lawyer to have to make, none of which I think come up if
25 the government, so to speak, takes care of the notes when

1 they aren't -- when the jurors aren't in the courtroom.

2 CHAIRMAN BABCOCK: Judge Christopher.

3 HONORABLE TRACY CHRISTOPHER: I've let
4 jurors take notes for --

5 CHAIRMAN BABCOCK: You look beleaguered.

6 HONORABLE TRACY CHRISTOPHER: I've let
7 jurors take notes for 14 years. I've never ever, ever had
8 any satellite litigation about notes. I've never had
9 anyone worry about what happens to the notes when they
10 take them home. I never have had anyone worry about any
11 aspect of the notes, and I have tried big cases with big
12 law firms where a lot of money was at stake, and nobody
13 cared or thought anything of it.

14 We give the adults, the jurors in our jury
15 box, instructions. We want them to follow our
16 instructions. They might not follow our instructions, but
17 to worry about whether they're following our instructions
18 and the notes is silly. What you're doing now is you're
19 sort of -- the person with the best memory can go home and
20 Google the most effectively versus the person with the
21 worst memory that has to write notes to take them home to
22 Google effectively. That's what you're telling me you're
23 worried about, and you're worried that they might go home
24 and talk about the case. Well, they can do that with or
25 without notes. They can go home and write a blog about

1 the case with or without notes. They can Twitter about
2 the case with or without notes. You know, you're just --

3 HONORABLE STEPHEN YELENOSKY: You better
4 explain that to Buddy.

5 HONORABLE TOM GRAY: Explain it to me. I
6 don't know what Twitter is.

7 HONORABLE TRACY CHRISTOPHER: I don't know.
8 It's some new thing where at any minute of the day you
9 tell people what you're doing. That's clearly, but I --

10 CHAIRMAN BABCOCK: Her rant's not done yet.
11 Hang on.

12 HONORABLE TRACY CHRISTOPHER: I don't want
13 to be responsible. Me, the court, the bailiff, we do not
14 want to be responsible for people's notes. I totally
15 agree with Justice Gray that that causes a whole bunch of
16 problems.

17 CHAIRMAN BABCOCK: Justice Sullivan.

18 HONORABLE KENT SULLIVAN: First of all, I
19 agree with Judge Christopher, and I just wanted to try and
20 make clear my earlier comment of saying that what I was
21 trying to suggest is that in this sort of area when you're
22 worried about questions of influencing juror
23 deliberations, the point I was trying to make is something
24 like technology is going to be a far more important issue
25 than this question of, well, do they take them back in the

1 jury room or not or how can they use their handwritten
2 notes, this way, take them home, et cetera. Technology
3 has swamped that. If you'll look at it in terms of what
4 is going to have a bigger potential impact as outside
5 influence, and we don't in these proposed instructions
6 even mention, I don't think, the word "internet."

7 HONORABLE NATHAN HECHT: Yeah, we do.

8 CHAIRMAN BABCOCK: It's there.

9 HONORABLE KENT SULLIVAN: Oh, do we?

10 HONORABLE STEPHEN YELENOSKY: We do, but not
11 enough.

12 HONORABLE TRACY CHRISTOPHER: Not enough.

13 HONORABLE KENT SULLIVAN: But there's no
14 forthright comprehensive instruction to people about
15 technology is likely a part of your everyday life. You
16 use it in various ways. Here is how we want you to deal
17 with it, and I think it's really important. That's a
18 modern approach as opposed to simply this bright line, you
19 know, that tells them to ignore what they do and
20 experience every day and will more.

21 CHAIRMAN BABCOCK: Judge Peeples, will you
22 yield to Judge Christopher for a small point?

23 HONORABLE DAVID PEEPLES: Sure.

24 HONORABLE TRACY CHRISTOPHER: Just two more
25 minutes, just two more minutes. They're in trial, they're

1 not allowed to use their PDA, they're not allowed to have
2 their Blackberry there, so they're taking paper notes. I
3 give them a 15-minute break, they all run downstairs,
4 smoke their cigarette, get on their Blackberry, and they
5 can write down any notes they want to at that point.

6 HONORABLE KENT SULLIVAN: Right. Exactly.

7 HONORABLE TRACY CHRISTOPHER: And take them
8 home and have them and, you know, send them out and cause
9 satellite litigation. It just doesn't happen. It doesn't
10 happen. It's not to worry about. Sorry.

11 CHAIRMAN BABCOCK: Judge Peeples, then Judge
12 Evans.

13 HONORABLE DAVID PEEPLES: Judge Yelenosky
14 made a very helpful suggestion that I hope the Court will
15 urge. On page four toward the top, it does say in (d), or
16 actually (e), don't go to the internet. I think that
17 ought to be bolstered and made more hefty. He said he
18 tells his jurors that would be a trial on secret evidence,
19 and I think this could be bolstered and made stronger by
20 using terms like that that get their attention, because
21 the idea of a secret trial is kind of scary, and a lot of
22 people I think would identify with that.

23 HONORABLE STEPHEN YELENOSKY: They tend to
24 nod when you say that. They have enough knowledge of
25 history, I think --

1 HONORABLE DAVID PEEPLES: Yeah, some.

2 HONORABLE STEPHEN YELENOSKY: -- and

3 American values to find that important.

4 HONORABLE DAVID PEEPLES: Something like

5 that I would think ought to be on page four.

6 CHAIRMAN BABCOCK: Judge Evans, and then

7 Bill.

8 HONORABLE DAVID EVANS: My experience has

9 been the same as Judge Christopher, except recently in

10 Tarrant County we have a law firm whose appellate section

11 has started to file motions to seal and have access to the

12 juror notes, and so I think we need to address that

13 status, because I think it will continue on. We've

14 allowed jurors to take notes, take them back to the back,

15 and now we're receiving from one firm requests to have

16 access to those notes following the verdict, so --

17 CHAIRMAN BABCOCK: And, Judge, how does that

18 request come? Is it a motion?

19 HONORABLE DAVID EVANS: It comes in the form

20 of a motion, and the civil judges in Tarrant County take

21 the position -- have taken the position that they're not

22 available, that they're personal items of the jurors.

23 Now, what we do is we offer to destroy them

24 for them when they leave, but we don't allow them to take

25 them home at night, and I'm not sure why we've evolved --

1 why we've gone with that process of trying to work that
2 out, but we are receiving motions, so I just want -- it's
3 not a whole satellite. I think it's just a small sputnik
4 right now, but it's out there.

5 HONORABLE NATHAN HECHT: Let me just ask
6 Judge Evans, so then when they leave at night they leave
7 them with the bailiff?

8 HONORABLE DAVID EVANS: In my courtroom we
9 have a place for them to hang on the front of their chair,
10 and the bailiff makes sure that the courtroom is secure at
11 night and no one gets any access to it. We've also put
12 them inside the jury room, and we don't allow -- and we
13 also have a safe. The reporters all have exhibit locked
14 areas in our courthouse, and so we have taken them in
15 longer trials over the weekend into those areas so that
16 they're secured overnight.

17 CHAIRMAN BABCOCK: What about at the end of
18 the trial, Judge? Do you keep them?

19 HONORABLE DAVID EVANS: I tell my jurors
20 that they may take them home if they wish or they may
21 leave them with the bailiff, and if they are left with the
22 bailiff they will be destroyed, and I just leave them with
23 that option. I don't think you could have a mandatory
24 destruction policy and take notes at home. I just concur
25 with what I heard back here is that if they're going to

1 take them home they'll make Xerox copies. So if the
2 paramount policy issue from the Court is destruction of
3 the notes at the conclusion, then they can't leave the
4 courthouse.

5 CHAIRMAN BABCOCK: Yeah.

6 HONORABLE DAVID EVANS: And that just trumps
7 everything else in my opinion, so -- and I can live with
8 either one.

9 CHAIRMAN BABCOCK: Yeah, Bill.

10 PROFESSOR DORSANEO: Well, I just wanted to
11 point out that at the last meeting of the appellate judges
12 conference of the United States in Phoenix in November,
13 one of the topics that was most hotly debated by the
14 appellate judges who attended -- and there were hundreds
15 from across the United States -- is whether the appellate
16 judges should be allowed to use the internet or should
17 they be restricted to -- should they be restricted to the
18 record on appeal, and I'm of the same view as probably
19 everyone here, that, no, you know, you shouldn't be
20 allowed to Google things up if it wasn't part of the trial
21 record, but that is not a widespread view among that
22 fairly large group. So maybe what we think is subject to
23 being modified by what everyone else thinks subsequently.

24 CHAIRMAN BABCOCK: Buddy.

25 MR. LOW: I think Lamont really hit what

1 we're doing. Everybody agrees that we want the case
2 decided on what goes on in the courtroom. Now, does
3 note-taking help that process? What helps that process
4 and what hurts it, and that's where we have the conflict,
5 because we all want that, and note-taking certainly does
6 help that, help people to remember and so forth, but then
7 you can go beyond it where you invite them to go outside
8 the record, and we don't want any case decided on facts
9 outside the record.

10 CHAIRMAN BABCOCK: Okay. Yeah, Frank.

11 MR. GILSTRAP: I think we're all in
12 agreement that while we may not be effective at doing
13 this, what we're trying to do is we're trying to prevent
14 the jurors from getting information someplace other than
15 the courthouse. That was the old prohibition, don't go
16 out to the scene of the car wreck and look. Well, in Rule
17 6 or in part 6 on page four, I'm not sure that we've ever
18 done that, and I'm not sure the change really advances the
19 ball. The idea behind it was that in the preamble we're
20 saying don't investigate the case, and in furtherance of
21 that, don't do these things. I never thought we ever made
22 a very good connection between the rationale and the
23 prohibitions, but in this one, I think it even gets
24 further away.

25 I think if you want to try to do something

1 you need to go in there and say, "Look, we want you to get
2 stuff only in the courtroom, and this is why we want you
3 to get stuff only in the courtroom, and so for this reason
4 we don't want you to do this." Now, it's not going to
5 work, but the idea is to educate the juror and spell it
6 out, and I'm not sure we're spelling it out very well.

7 CHAIRMAN BABCOCK: Judge Yelenosky.

8 HONORABLE STEPHEN YELENOSKY: Well, again,
9 you said it's not going to work. One of the things we
10 tell them that is very natural for people to do and we
11 count on them not doing it is going home and talking to
12 their spouse or significant other about the case, and if
13 we can count as we have, I guess, for centuries on people
14 not doing that largely, why can we not count on an
15 instruction on this?

16 MR. GILSTRAP: Maybe you're right. I'm just
17 not saying what about our ability to prevent it, but at
18 least we ought to try, and the way we're supposed to try
19 is to tell them why.

20 HONORABLE STEPHEN YELENOSKY: No, I think
21 everybody agrees with that. But I don't understand the
22 distinction between other prohibitions we give them that
23 we rely upon and we don't have satellite litigation on.
24 Usually we don't have jurors questioned about whether they
25 spoke with their spouse or not, but anyway, I don't see

1 how it's more natural to Google than it is to go home and
2 tell your wife or your husband or your significant other
3 what happened during the day.

4 CHAIRMAN BABCOCK: Okay. Justice Gray.

5 HONORABLE TOM GRAY: You know, back when
6 Buddy first started practicing law --

7 CHAIRMAN BABCOCK: It's always an easy
8 laugh.

9 MR. LOW: How do you know that?

10 HONORABLE TOM GRAY: I read it in the
11 history books, Buddy. We had absolute control over their
12 access to the internet or their newspaper contact or
13 people trying to talk to them. We called it juror
14 sequestration. If we have a trial that has that level of
15 need for confidentiality and avoidance of public
16 disclosure or outside influence coming in during the --
17 we've got a way to deal with it, but I agree with the
18 comments that have been made that, you know, I haven't
19 seen this to be a problem in trials conducted now.

20 I mean, we've gotten away from that whole
21 concept of sequestering juries. I mean, just literally in
22 the back of our court's office is the old bunkhouse where
23 there's a toilet in one end and a shower in the other and
24 a place for a bunch of bunkbeds. I mean, we can go back
25 to that in any individual case in which it's important,

1 but I just don't see that that's where we are in this
2 problem.

3 CHAIRMAN BABCOCK: Okay. Justice Hecht.

4 HONORABLE NATHAN HECHT: We may be getting
5 close to the -- to having exhausted the subject, but let
6 me ask one other question about Senate Bill 445, which
7 makes rule -- I mean, note-taking mandatory. It provides
8 in Section 25.003(a), "The rule promulgated by the Supreme
9 Court must allow jurors in a civil trial to take notes
10 regarding the evidence during the trial," and I don't know
11 if the -- I don't recall the committee commenting on
12 whether it should be within the trial judge's discretion
13 because of whatever reason.

14 HONORABLE JANE BLAND: We did.

15 HONORABLE TRACY CHRISTOPHER: We did. 29 to
16 4 to make it mandatory. 29 to 4 to make it mandatory.

17 HONORABLE STEPHEN YELENOSKY: In favor of
18 mandatory?

19 HONORABLE TRACY CHRISTOPHER: 29 in favor of
20 mandatory, informing the jurors that they had the right to
21 take notes.

22 CHAIRMAN BABCOCK: Okay. Judge Evans, you
23 had your hand up a second ago. Did you want to add
24 anything?

25 HONORABLE DAVID EVANS: I just said that

1 when I rethought it, when I first confronted this in 2003
2 I decided that the notes were the personal property of the
3 jurors, that they are free to discuss the deliberations or
4 not to discuss their deliberations. We give them that
5 instruction at the conclusion of the trial, and so they
6 were free to share their notes or not to share their notes
7 with counsel. I would have to worry about the
8 admissibility of it later on.

9 I don't agree with Justice Gray where he was
10 with what they are, but I am concerned about whether the
11 notes are court records under the Supreme Court rules. I
12 know they're not evidence based on this rule, but calling
13 them for personal use, I'd like the Court to at least
14 define whether they are court records that I have to
15 maintain under the Rules of Administration or not or
16 destroy under the Rules of Administration and -- or are
17 they the personal property of the jurors subject to
18 restrictions as we restrain them throughout the trial
19 about not discussing. We can place restraints on them
20 about not taking them home, if that's possible. I just
21 think that there's a conflict, that that needs to be
22 resolved by the Court as to whether you want them
23 destroyed at the end or not.

24 CHAIRMAN BABCOCK: Justice Hecht.

25 HONORABLE NATHAN HECHT: Which reminds me of

1 one other question, and I don't think we've discussed
2 this, and that is do we fully treat the subject in the
3 standing order that accompanies Rule 226a, or should there
4 be a separate rule that says this is how jurors take notes
5 and set it out? I mean, we've kind of done it through the
6 back door here, and it seems to be working fairly
7 thoroughly, but, query, do we need a separate rule? And I
8 think the question even becomes more difficult when we
9 talk about questions.

10 CHAIRMAN BABCOCK: Bill.

11 PROFESSOR DORSANEO: I've always thought
12 that the 226a approach is a plaud approach, that if it's
13 good enough to be said in the rule book, it ought to be
14 said in a procedural rule.

15 HONORABLE NATHAN HECHT: It started in the
16 Sixties. 1967, I think, and I suppose -- we haven't been
17 able to track down why it's in an order, but I suppose
18 it's there because it's easier to change.

19 PROFESSOR DORSANEO: Well, it hasn't been
20 very easy to change.

21 HONORABLE NATHAN HECHT: Well, we haven't
22 changed it much, but we haven't felt like we had the need
23 to change it, but I guess, you know, there's a statutory
24 process for rule-making and not for orders, so for, you
25 know, keeping exhibits and stuff there's orders rather

1 than --

2 PROFESSOR DORSANEO: But you yourself said
3 that this is sensitive enough that we're not going to
4 follow that --

5 HONORABLE NATHAN HECHT: We're going to send
6 it out.

7 CHAIRMAN BABCOCK: Very unusual. Not the
8 sending it out, but no hands up right now. Judge
9 Christopher.

10 HONORABLE TRACY CHRISTOPHER: Well, do we
11 want to look at TRE 606 in terms of adding "in a juror's
12 notes" in connection with this? Because I mean --

13 CHAIRMAN BABCOCK: Yeah.

14 HONORABLE TRACY CHRISTOPHER: -- I do think
15 we all agree that if we're going to let the jurors, you
16 know, take notes home and we're going to make it mandatory
17 that everybody gets this instruction, that we should add
18 something into 606(b) about it, so my proposed revisions,
19 I just added "in a juror's notes" in two different spots.
20 Now, rather -- whether we want to do any more wholesale
21 tinkering with the rule or not, but that would just be a
22 quick fix.

23 CHAIRMAN BABCOCK: Everybody got --
24 everybody have that? There's just a small change, but it
25 would add a juror's notes as one of those things that

1 couldn't be inquired about post-verdict.

2 HONORABLE EVA GUZMAN: Or you might want to
3 add "or any electronic recordings of" -- to the extent we
4 are going to look prospectively, there may be a situation
5 where they do record things on an iPod or something.

6 HONORABLE NATHAN HECHT: Yeah.

7 CHAIRMAN BABCOCK: Okay. Any other
8 comments? Yeah, Bill.

9 PROFESSOR DORSANEO: I guess you're
10 presuming that the jurors' notes are not an outside
11 influence within the last sentence.

12 HONORABLE TRACY CHRISTOPHER: Well, my --
13 the -- I left it just like it is here because in my
14 opinion it's a little convoluted, but if a juror's notes
15 said, you know, "I was bribed to," you know, "render
16 verdict in favor of the defendant," then perhaps that
17 juror note ought to be admissible evidence. So --

18 CHAIRMAN BABCOCK: Eduardo.

19 MR. RODRIGUEZ: Yeah, what --

20 HONORABLE TRACY CHRISTOPHER: That's why I
21 left it just the way it was.

22 MR. RODRIGUEZ: I'm trying to figure out
23 where we are. Has the decision been made that we
24 recommend that jurors be able to take their notes home?
25 And if that's so, what if a juror's notes say something

1 about, you know, "Googled," you know, "A, B, C"?

2 HONORABLE TRACY CHRISTOPHER: Well, then we
3 go back to that question, is that an outside influence --

4 MR. RODRIGUEZ: Right.

5 HONORABLE TRACY CHRISTOPHER: -- which is
6 not a hundred percent clear under case law as to whether
7 it is or is not, whether it actually requires third person
8 acting on the juror versus the juror looking at things
9 themselves. I don't think that that's definitive.

10 CHAIRMAN BABCOCK: Eduardo, I think where we
11 are is that in our last meeting the recommendation was to
12 let jurors take their notes home, but the Court disagreed
13 and rewrote the -- rewrote the order to say, no, they're
14 going to leave them with the bailiff, and the bailiff is
15 going to destroy them. I think probably still a majority
16 of the committee would say let them take them home, but
17 that's up in the air, as Justice Hecht said, because his
18 Court is not of exactly one mind about the issue, and they
19 may after hearing this discussion, you know, change their
20 mind, but assume for now that the bailiff is going to get
21 it, and they're going to be destroyed. That might make
22 this revision, you know, unnecessary, but -- Alex.

23 PROFESSOR ALBRIGHT: I don't think it makes
24 it unnecessary at all, because what if in the middle of
25 trial somebody decides they want to subpoena the notes and

1 they're there, or what if the bailiff forgets to destroy
2 them or bailiff destroys them by throwing them in the
3 trash can and somebody gets them out. There are many ways
4 that things are supposed to be destroyed and they're not
5 and then they get out.

6 CHAIRMAN BABCOCK: Yeah, there could be a
7 dumpster diver who gets them out.

8 MR. RODRIGUEZ: Well, from the perspective
9 of this new member, I would tell the Court that I agree
10 they shouldn't take them home.

11 CHAIRMAN BABCOCK: Should not take them
12 home?

13 MR. RODRIGUEZ: Yes.

14 CHAIRMAN BABCOCK: Okay. Yeah, R. H.

15 MR. WALLACE: Yes, and I agree with that. I
16 mean, I have listened and since I have not heard the
17 previous debates, but I think note-taking ought to be
18 allowed. I think they ought to take it to the jury room.
19 I don't think they ought to be able to take them home. I
20 think they ought to be taken up and destroyed at the end
21 of the trial. Now, how we get there, I'm not sure, but I
22 just haven't heard any compelling reason why they ought to
23 be able to take them home. There was a comment that they
24 might -- you know, study the notes at night and come up
25 with some questions, if we're going to allow jurors to

1 submit questions.

2 I realize that's another topic, but it kind
3 of bleeds over because I just assumed because of the way
4 I've seen it in the past, if they have questions, they
5 submit them right then when that finish -- when that
6 witness is finished questioning, not after they go home at
7 night and look at their notes and come up with a list of
8 questions, because my fear there would be a very high
9 probability that there is going to be a Perry Mason
10 wannabe on the jury who comes in every morning with a big
11 list of questions to be asked, and the judge and the
12 lawyers have a hard time controlling that trial, so I
13 don't see that as a good reason to allow them to take them
14 home at night.

15 CHAIRMAN BABCOCK: Justice Hecht.

16 HONORABLE NATHAN HECHT: Another question
17 for Judge Christopher. Do we need to make a corresponding
18 change in Rule of Civil Procedure 327(b)?

19 PROFESSOR DORSANEO: Yes.

20 HONORABLE NATHAN HECHT: Yes?

21 PROFESSOR DORSANEO: Yes.

22 HONORABLE TRACY CHRISTOPHER: Yes. I think
23 I just didn't pull that one up, too, because there --

24 CHAIRMAN BABCOCK: Right.

25 HONORABLE TRACY CHRISTOPHER: Although that

1 would be a little bit harder to change, but --

2 HONORABLE NATHAN HECHT: Right.

3 HONORABLE TRACY CHRISTOPHER: -- probably
4 should add something in there.

5 HONORABLE NATHAN HECHT: They're frequently
6 cited together.

7 CHAIRMAN BABCOCK: Yeah. Okay. Orsinger,
8 you had your hand up.

9 MR. ORSINGER: You know, I just wanted to
10 mention my litigation perspective on this issue of jurors
11 taking notes home. In the family law trials that are
12 tried to juries on the property side and on the
13 parent-child side, we tend to mark a lot of exhibits that
14 we give copies to the jury because our issues could be
15 real complicated. In a property case you might ask the
16 jury 50 or 75 different cases. It may be one general
17 question, but in the list a lot of subparts, and it's kind
18 of ineffective to try a case like that unless -- unless
19 the jury has exhibits.

20 So typically in a property case each side
21 will have a sworn inventory and appraisalment, and it will
22 list all their assets, all their bank accounts, all their
23 credit cards. In a parent-child suit you're going to have
24 psychological evaluations where they're going to
25 have MMPIs, Rorschachs, all kinds of stories about people

1 that were sexually abused by their parents and all that
2 kind of stuff. Those are generally handed out to the
3 jury, been my experience. Judge Guzman was a family law
4 judge, she might have have a different perspective than
5 mine.

6 Anyway, my experience is at the end of the
7 case they generally will take those exhibits up because
8 they don't want that kind of private information floating
9 around, and I know that the original exhibits are in the
10 court's record, and the court's record are in the public,
11 and so if you wanted to make the effort you could get that
12 information, but we have that concept of practical
13 obscurity, I think is the one we use, that if it's real
14 hard to get the information you can kind of control it,
15 but if it's real easy to get the information it's easy to
16 disseminate.

17 Well, in a family law case you're going to
18 find the jurors are going to take notes on these exhibits,
19 and so your discussion about whether they take their notes
20 home is also a discussion about whether they're going to
21 take the exhibits home. And if we limit the powers, the
22 court's power to take their notes away at the end of the
23 trial, then we are also limiting the court's power to take
24 the exhibits away from them at the end of the trial, and I
25 just want to be sure that the public policy that we're

1 considering recognizes that notes may be taken on copies
2 of exhibits that we might otherwise think, oh, sure, the
3 court has the power to collect all of those social studies
4 or psych evals and not let them take them home or not let
5 them have them at the end of the trial and that they have
6 notes on them and we don't prohibit -- if we limit the
7 court's power to take notes away then we're limiting the
8 court's power to control the exhibits.

9 CHAIRMAN BABCOCK: Justice Gray, why do you
10 think that the notes are court records?

11 HONORABLE TOM GRAY: Not court records.
12 State records.

13 CHAIRMAN BABCOCK: State records.

14 HONORABLE TOM GRAY: Yeah, Texas Government
15 Code, like 442 something, I can get it for you later. I
16 mean, a court record is probably always a state record,
17 but obviously all state records are not court records, and
18 if -- I mean, we deal with that with our -- one of the
19 problems in TAMES, as a matter of fact, is the fact that
20 things become or are state records, and depending on their
21 media form, whether it's paper or electronic, controls how
22 you have to keep them and archive them and deal with them,
23 and so that's where we got off into it, in doing our
24 document retention policy at the court, and it's a huge
25 problem, and I don't remember anything of this nature that

1 has less than like a -- you know, a six-year lifetime.

2 CHAIRMAN BABCOCK: Well, do you think
3 it's -- I understand you say state records are broader
4 than court records, but is it a court record?

5 HONORABLE TOM GRAY: My understanding of the
6 way Rule 12 functions and the definition of court record,
7 it would not be because most of the -- well, that rule is
8 worded oddly with regard to judicial records versus court
9 records, and I don't have it in front of me now, and I
10 don't know. I would have to go back and study it.

11 MS. PETERSON: There's a definition of court
12 records in Rule 76a in the Rules of Civil Procedure.

13 HONORABLE STEPHEN YELENOSKY: But it's not a
14 court record under 76a.

15 CHAIRMAN BABCOCK: Doesn't sound like a
16 court record under 76a.

17 HONORABLE STEPHEN YELENOSKY: But to the
18 extent it is under 12 and the Court wants to do this, the
19 Court can change Rule 12. The only issue would be if it's
20 some kind of governmental record under a statute.

21 CHAIRMAN BABCOCK: Well, let's go to Rule
22 12. You're not talking about the Rules of Civil
23 Procedure.

24 HONORABLE STEPHEN YELENOSKY: No.

25 HONORABLE TRACY CHRISTOPHER: RJA.

1 CHAIRMAN BABCOCK: Yeah, the judicial
2 administration rule, right?

3 HONORABLE TOM GRAY: And those are -- Rule
4 12 controls judicial records, and this would not be a
5 judicial record, because -- so I think we're good under
6 Rule 12, and I haven't studied it under 76a for the court
7 record.

8 HONORABLE TRACY CHRISTOPHER: I think it
9 would fit into this definition. Judicial record means a
10 record made or maintained by or for a court in its regular
11 course of business. If my bailiffs are now maintaining
12 the note, it's a judicial record under that, made by or
13 for the court.

14 MS. PETERSON: But not pertaining to its
15 adjudicative function.

16 HONORABLE TRACY CHRISTOPHER: Well, it's not
17 my adjudicative function.

18 HONORABLE DAVID PEEPLES: Skip, Rule 12 says
19 -- Rule 12.3 says, "This rule does not apply to records
20 controlled by a Rule of Civil Procedure." So why
21 couldn't -- of course, if it's in 226a that might not be a
22 Rule of Civil Procedure, but the Court by rule could
23 control this.

24 CHAIRMAN BABCOCK: Yeah, but the question is
25 do we have to have another rule if we want to achieve this

1 result. That's the point. And what about state record?
2 You say there's a statute. Would these notes be a state
3 record, you think?

4 HONORABLE TOM GRAY: I think by the time you
5 get to -- through the analysis, if you don't clearly say,
6 "We're going to provide you pen and paper, but they're
7 your notes and you can do anything you want to with them,"
8 you know, I admit we need some control over them during
9 the course of the trial and tell them you can't show them
10 to other people and discuss them during the trial, but
11 they're yours after the trial, we don't care what you do
12 with them, but people can come get them and may create a
13 problem.

14 I think by the fact that you've given them
15 the materials, they are at that point paid because of
16 their jury fee, they are being done in connection with
17 state business, otherwise known as dispute resolution
18 through jury trials, and so I think they become as much a
19 state record as anything -- the docket sheets or anything
20 else that may happen during the course of the trial.

21 CHAIRMAN BABCOCK: Pete Schenkkan, who is
22 hiding back there behind Judge Christopher. Watch your
23 back, Judge.

24 MR. SCHENKKAN: Only because I came in so
25 late. It seems to me that it's clearly not a judicial

1 record under Rule 12. It says in Rule 12(d), "A record of
2 any nature created" -- ignore the rest -- "in connection
3 with any matter that is or has been before a court is not
4 a judicial record." That ought to be dispositive of
5 judicial record. I don't put it beyond the realm of
6 possibility that the Legislature has misspoken in some
7 statute it has created somewhere that would mean that
8 notwithstanding the fact that it's not a judicial record
9 it's still some kind of a state record. That's possible.
10 But I don't think we can ascertain that here, and if it
11 is, I believe Senator Wentworth needs to fix it in Senate
12 Bill 445.

13 CHAIRMAN BABCOCK: Okay. All right.
14 Anything more on 606(b)? Yeah. Justice Gaultney.

15 HONORABLE DAVID GAULTNEY: Just by
16 clarification, I assume that if there's something in the
17 juror's notes the way this rule would read by adding that
18 with respect to the outside influence, the juror can be
19 asked about the notes and those would be admissible, so
20 the last clause would not exclude that possibility.

21 HONORABLE TRACY CHRISTOPHER: That's what I
22 think.

23 CHAIRMAN BABCOCK: Bill.

24 PROFESSOR DORSANEO: Well, this -- you're
25 just talking about overlaps with our subsequent proposal

1 with respect to revisions of 327b, so we'll be back to
2 these issues.

3 CHAIRMAN BABCOCK: Well, how is it going to
4 work, Judge, if -- Judge Christopher, if the juror is
5 asked about outside influence, and they say "yes" or they
6 say "no," and the lawyer says, well -- no matter what they
7 say, the lawyer says, "I want to look at the notes to see
8 if there's any outside influence." How does that get
9 resolved under this rule?

10 HONORABLE TRACY CHRISTOPHER: Well, I don't
11 know. It depends on whether they were destroyed or not.

12 CHAIRMAN BABCOCK: Let's assume they
13 weren't.

14 HONORABLE TRACY CHRISTOPHER: Assuming they
15 weren't, if the -- you know, if the juror wants to give
16 them the notes, they can. Just like now, a juror can
17 choose to give an affidavit if they want. They can choose
18 not to give an affidavit if they don't want to. I mean,
19 we did discuss adding that in. You can choose to show
20 your notes to the lawyers or you can choose not to. You
21 can throw them away yourself, do whatever you want to with
22 them; and if a juror got subpoenaed to show up at court in
23 a motion for new trial and to bring their notes with them,
24 then they'd bring their notes with them if they still had
25 them.

1 CHAIRMAN BABCOCK: So they bring their notes
2 with them. What if they say, "I choose not to share my
3 notes with you"?

4 "Well, wait a minute, you've been
5 subpoenaed. Judge Christopher, make them bring the notes
6 and give them to me, I want to look at them."

7 HONORABLE TRACY CHRISTOPHER: I think if
8 they've been subpoenaed they need to bring them, but --

9 MR. GILSTRAP: Chip, that's already covered
10 in the rule. It has an exception. Anything about the
11 juror may testify as to whether outside influence was
12 improperly brought, and that trumps everything else in the
13 rule, and same with 327b.

14 CHAIRMAN BABCOCK: Right.

15 MR. GILSTRAP: You know, if a juror stands
16 up in the jury room and says, "Hey, I just got offered
17 \$5,000 to vote for the plaintiff," you know, that's said
18 in the jury room, but it still can be inquired to,
19 inquired into, because it involves outside influence, and
20 notes aren't any different.

21 CHAIRMAN BABCOCK: Yeah. What -- suppose
22 that you go interview the juror after the trial, and the
23 juror says, "Well, you know, I know I wasn't supposed to
24 get on the internet, but, frankly, I did, and I learned
25 some things about the defendant that I just wasn't too

1 comfortable with," and "Well, did you take any notes on
2 that?"

3 "No."

4 "Well, I want to see your notes."

5 "Well, I don't have them. The bailiff has
6 them." Okay. Well, we're going to go to court, and now,
7 Judge Christopher, you're in court, and the defense lawyer
8 says, "I've got some outside influence here and the juror
9 says that she didn't take any notes on this, but I want to
10 see the notes. I want to see if they show up on the
11 notes."

12 HONORABLE TRACY CHRISTOPHER: My crack
13 bailiff will have already destroyed them, will have
14 shredded them.

15 CHAIRMAN BABCOCK: And is that the right
16 result?

17 HONORABLE STEPHEN YELENOSKY: Well, the next
18 step is to go to the hard drive.

19 MR. LOW: Chip, one thing, when we're
20 talking about looking at 327 about jury misconduct, we
21 need to look at 606 of the Rules of Evidence. It also
22 goes into what a juror must testify, so when you -- you
23 need to relate --

24 PROFESSOR DORSANEO: That's what we're
25 doing.

1 MR. LOW: Well, okay, but those aren't
2 entire -- they are consistent, I think, but --

3 CHAIRMAN BABCOCK: Yeah. It's a quagmire.
4 Ralph.

5 MR. DUGGINS: No, I don't want to comment.

6 CHAIRMAN BABCOCK: Okay, no comment. Back
7 to you, Judge Christopher.

8 HONORABLE TRACY CHRISTOPHER: I'm ready to
9 move on to juror questions.

10 CHAIRMAN BABCOCK: Okay. Let's take our
11 morning break.

12 (Recess from 10:39 a.m. to 10:58 a.m.)

13 CHAIRMAN BABCOCK: All right. Judge
14 Patterson, Justice Patterson, then Justice Gray.

15 HONORABLE JAN PATTERSON: I agree with the
16 thought, with the Court's opinion to not take the notes
17 home, and I like the draft. My only concern is that in
18 that paragraph, the last paragraph of 6, and I think that
19 kind of underscores that it's based upon the evidence in
20 the court, but the second sentence, I wonder whether that
21 is inadvertent that it doesn't say, "Your conclusion about
22 this case must be based on the evidence in the courtroom,
23 presented in the courtroom," not only -- instead of "what
24 you see and hear."

25 CHAIRMAN BABCOCK: What page are you on?

1 HONORABLE JAN PATTERSON: Page four.

2 CHAIRMAN BABCOCK: Page four.

3 HONORABLE JAN PATTERSON: The last paragraph
4 that the Court added on item 6. But I also think that the
5 state record issue can be taken care of by definitions
6 both in this rule and in the statute, so I don't see that
7 as a problem.

8 CHAIRMAN BABCOCK: Okay. Thank you.
9 Justice Gray.

10 HONORABLE TOM GRAY: The definition of state
11 record, and you have to be careful about -- because it
12 uses other words that are defined and courts get defined
13 as agencies are included, is at 441.031 of the Government
14 Code, and it actually created a -- it expanded the issue a
15 little bit when I had my staff attorney read it to me.
16 It's any record that is made or received by, and that
17 would very easily capture the notes when they are received
18 by the bailiff.

19 CHAIRMAN BABCOCK: Okay. All right. Any
20 other comments on that issue? Justice Hecht.

21 HONORABLE NATHAN HECHT: On page seven of
22 the Court revisions to the proposed instructions, the
23 sentence toward the bottom, "It is also possible that you
24 might be held in contempt or punished in some other way."
25 The Court was unanimous in thinking that should be struck.

1 So --

2 CHAIRMAN BABCOCK: Okay. Anything else?

3 Richard Orsinger.

4 MR. ORSINGER: Two things. Back on page
5 four where we were talking about evidence presented in
6 open court, I'm a little concerned about the use of the
7 word "presented" rather than "admitted." It appears in
8 (c), and it appears in the final sentence of paragraph 6.
9 Because lots of times evidence is presented or the jury
10 may think it's presented when it's not admitted, and the
11 real test is whether it's admitted or not, particularly if
12 they're instructed after they hear some testimony to
13 ignore it, and I would like it if the word "admitted" was
14 in there, although it may not really actually matter in
15 practice.

16 CHAIRMAN BABCOCK: Yeah, Ralph.

17 MR. ORSINGER: On page seven --

18 CHAIRMAN BABCOCK: Sorry.

19 MR. ORSINGER: -- which Justice Hecht just
20 commented about, "It is possible you may be held in
21 contempt or punished." It may be offensive, but it also
22 tends to enforce the seriousness of these instructions.
23 It's not just like a lot of the other gobbledy-goop that
24 they have heard so far and will hear during the trial, and
25 I also wonder if it's fair to these jurors if we do have

1 the power to hold them in contempt and put them in jail
2 for violating this that we don't tell them we have that
3 power. It seems to me that if they are at risk of going
4 to jail, it's fair to them to tell them they're at risk
5 before we give them these rules and don't tell them what
6 the punishment is for not -- for violating them.

7 CHAIRMAN BABCOCK: So if you were on the
8 Court it wouldn't have been unanimous.

9 MR. ORSINGER: Well, I can understand that
10 it's offensive to people. These people are members of the
11 public that have been brought down, probably against their
12 will, but they're coming to fulfill their civic duties;
13 and to insult them by saying, "We might put you in jail
14 even though we brought you down here against your will
15 anyway," I can understand that; but on the other hand, if
16 somebody violates this, if we're serious that we're going
17 to put them in jail, I think we ought to tell them in
18 advance they might go to jail, and they might observe them
19 more carefully, and they might, therefore, stay out of
20 jail. So that's my perspective.

21 CHAIRMAN BABCOCK: Thanks, Richard. Ralph.

22 MR. DUGGINS: I think the Court should
23 consider dropping voir dire on page one, in the one, two,
24 three, fourth where they added it and over on the next
25 page at the end. I mean, a juror is not going to know

1 what those words mean, and if we're going to --

2 HONORABLE STEPHEN YELENOSKY: Couldn't hear
3 you.

4 MR. DUGGINS: Let's use plain English if
5 we're going to put something in there. There's a good
6 example where somebody might go look that up.

7 HONORABLE STEPHEN YELENOSKY: That will keep
8 lawyers from giving bad translations from the French,
9 which they always do.

10 MR. ORSINGER: Only they call it Latin, even
11 though it's French. They usually say, "This is a Latin
12 phrase that means" and they give the wrong definition.
13 It's French.

14 HONORABLE TRACY CHRISTOPHER: Well, we do
15 define it for them. We say, "They will ask you some
16 questions during jury selection, which we call voir dire,"
17 because the lawyers are going to use those words, so
18 that's why we kept it in that way.

19 CHAIRMAN BABCOCK: Okay. Fair enough.
20 What's next, Judge?

21 HONORABLE TRACY CHRISTOPHER: The next is
22 the juror questions. The senate bill offered is to make
23 juror questioning mandatory. The last time we discussed
24 this we voted to make it discretionary, so what we drafted
25 is a rule, 265.1, on the procedure if the judge decides --

1 does decide to allow juror questions. So it's a whole new
2 rule with a lot of instructions. The actual format of how
3 things are going to take place is pretty standard
4 throughout the country, it seems like, in terms of the
5 process, the jurors write down the questions anonymously,
6 give them to the judge, the judge shows them to the
7 lawyers, the lawyers have a right to object, and then the
8 question is asked. That's pretty much a standard process
9 with some slight variations throughout the country.

10 These instructions came from one of the
11 state's pattern jury charge instructions. I can't
12 remember which one.

13 MS. PETERSON: New Jersey.

14 HONORABLE TRACY CHRISTOPHER: Yeah, New
15 Jersey, and then we had Professor Schiess from UT put them
16 into --

17 CHAIRMAN BABCOCK: Texas.

18 HONORABLE TRACY CHRISTOPHER: -- more
19 understandable plain English for us. So basically it's a
20 whole new rule, subset (a), discretion of the court. "On
21 its own initiative or on a party's written motion the
22 trial court in its discretion may allow jurors to submit
23 written questions to the witnesses." We had a fairly long
24 discussion in the subcommittee about whether to give
25 specific examples on when it might be useful or not

1 useful, but decided not to, just to leave it "trial judge
2 in its discretion."

3 We did give the ability to the trial judge
4 to do it on its own motion rather than waiting for a
5 motion from the parties, which, you know, has the effect
6 of almost making it mandatory if you've got a judge that's
7 interested in the process and wants to start doing it.
8 The judge can do it in any case they want to, basically.
9 Do we want to just go spot by spot, or should I talk about
10 the whole rule, or how do you want to do it?

11 CHAIRMAN BABCOCK: Why don't you talk a
12 little bit about the whole rule and then let's go spot by
13 spot?

14 HONORABLE TRACY CHRISTOPHER: Okay. So what
15 we planned was if the judge has decided to allow juror
16 questions, the trial court has to inform the parties
17 before voir dire in case they wanted to talk to the jury
18 about it, you know, for any reason, just to give them that
19 opportunity to ask jurors about that process. "If juror
20 questions will be allowed, the trial court must read the
21 following instructions to the jury after the jury is
22 seated, and may repeat any or all of these instructions to
23 remind the jury of its role."

24 So these are fairly long instructions about
25 being a neutral, keep an open mind, don't discuss the

1 evidence. It's pretty comprehensive instructions to it,
2 and the reason why we put in there "may repeat any and all
3 of these instructions," occasionally we think that jurors
4 when they have had the opportunity to ask questions have
5 sort of deviated from their rule as neutral fact-finders
6 through their questions. So it's something to remind the
7 juror you can repeat some of these instructions, and I
8 think Steve just tried a case in front of Judge Mike
9 Miller, and he used these instructions in a case, and
10 he'll tell you about how it worked out because I think he
11 was pretty happy with it all, and Judge Miller did say at
12 one point he didn't ask a question and he reiterated to
13 the jury why he wasn't asking a question using some of the
14 language in these instructions.

15 You know, "I've made the decision, don't
16 worry about it, don't think anything about the fact that I
17 didn't ask the question. "

18 MR. SUSMAN: Yeah --

19 HONORABLE TRACY CHRISTOPHER: That's what
20 those instructions were.

21 CHAIRMAN BABCOCK: Steve wants to break in
22 about an anecdote about that trial.

23 MR. SUSMAN: No, I was just going to say it
24 worked out great. It was the first time I have ever done
25 a trial in state court where questions were asked by the

1 jurors, and --

2 CHAIRMAN BABCOCK: Glad you added that last
3 phrase.

4 MR. SUSMAN: Huh?

5 CHAIRMAN BABCOCK: I'm glad you added the
6 last phrase.

7 MR. SUSMAN: You know, and it was -- we sent
8 out a questionnaire, our own questionnaire, to the jurors
9 after the trial to see how they liked it, whether they
10 found it distracting or helpful, and most of them have
11 responded that they liked it, that they thought that it
12 was important that their thoughts were appreciated. They
13 appreciated that their thoughts were valued, and the way
14 the judge did it is he handed each juror a piece of paper
15 to write -- with each witness, and at the end of each
16 witness, while the witness was still on the stand, the
17 jurors passed all of their pieces of paper whether they
18 had written a question or not to the bailiff, who handed
19 them to the judge, and the judge would look through them.

20 Now, a couple of times there were no
21 questions, but usually there were two or three jurors had
22 questions for a witness. The judge would read them, call
23 us up to the bench, show us the questions. We didn't have
24 -- only one occasion was there a serious objection to a
25 question because it was about seeking an expert opinion

1 from someone who had not been designated as an expert, and
2 the judge wasn't going to ask that opinion question, so --
3 and then he would ask the questions and allow both lawyers
4 to further follow up with questioning the witness about
5 the question.

6 I thought it was terrific, and I think
7 it's -- his instructions were very -- if these were the
8 instructions he was using, they were very good and very
9 clear. He was a new judge. He had never done it before,
10 and I think Tracy gave him the forms to use, so it worked
11 out very well, and we didn't have any problems, and there
12 were things that were developed by the jurors that -- on
13 their questions that were important that we did follow-up
14 on.

15 CHAIRMAN BABCOCK: Who was your opposing
16 counsel, Steve?

17 MR. SUSMAN: David Beck, and, you know, I
18 think David liked it, too. I think you can check with
19 David. He thought -- well, we've talked about it since.
20 He thought it was a good thing, too.

21 MR. GILSTRAP: Did you destroy the questions
22 when the trial was over?

23 MR. SUSMAN: I'm sure they were destroyed.
24 No one was very much interested.

25 CHAIRMAN BABCOCK: But the questions are

1 probably in the record.

2 HONORABLE TRACY CHRISTOPHER: Yeah.

3 HONORABLE STEPHEN YELENOSKY: Yeah, they
4 were read.

5 CHAIRMAN BABCOCK: Sorry, Judge Christopher.

6 HONORABLE TRACY CHRISTOPHER: No, that's
7 fine. Basically the format, just as Steve said, is that
8 we would have a juror question form, and it would be
9 standardized, with the instructions again and a place for
10 the juror to write the question on it, and then you would
11 pass the forms out or have the forms available, depending
12 upon, you know, what your jury box is like for everybody
13 to do it. Then if you get a question from the jury, and I
14 think, actually, we don't specifically say this. I
15 noticed that we missed it, to wait until the end of the
16 witness, because normally we wait until the end of the
17 witness before we ask the jury if you have any questions,
18 and now that I'm looking at this, I think we dropped that
19 step out.

20 MS. PETERSON: It's in the instructions, "In
21 this trial after the parties have asked their own
22 questions of each witness."

23 HONORABLE TRACY CHRISTOPHER: Oh, there it
24 is. Okay. Good. Just to make it even clearer, we might
25 add a 3 point there. So what we had written down is you

1 get the written question from the jury, the trial court
2 must allow the parties to read the question and make
3 objections to the question on the record and outside the
4 jury's hearing. There's a question about whether we want
5 to remove the witness from the courtroom in connection
6 with that. The trial court has to rule on the objections.
7 In its discretion the trial court may reword the question
8 or decide not to ask the question at all. If the trial
9 court rewords the question, the trial court must read the
10 reworded question and allow the parties to make a new
11 objection to the reworded question on the record and then
12 the trial court actually asks the witness the question,
13 and the parties will be allowed to ask follow up
14 questions, and then we have put down that the question
15 needs to be part of the court record.

16 CHAIRMAN BABCOCK: Okay.

17 HONORABLE TRACY CHRISTOPHER: So that's sort
18 of the format that we've come up with.

19 CHAIRMAN BABCOCK: Yeah, great. Justice
20 Hecht.

21 HONORABLE NATHAN HECHT: And the Court has
22 looked at this because we're anticipating being asked to
23 respond to Senate Bill 445, so as Judge Christopher says,
24 the provision regarding juror questions is -- seems to be
25 mandatory. It says the Supreme Court must adopt rules,

1 and let's see, "The rules promulgated must require a court
2 to permit jurors in a civil trial to submit to the court
3 written questions." So we have the question of mandatory
4 versus discretionary, and if there's to be discretion --
5 let me back up. If it's mandatory, then it seems that
6 this approach like the approach on note-taking might work.
7 In other words, we just put the instructions in the
8 general instructions, and that prescribes the procedures
9 and pretty much takes care of the issue. If it's -- if
10 there's an element of discretion or if lawyers can object
11 to its use in a particular case or because of particular
12 circumstances, then that seems to need a standalone rule
13 which spells all of that out.

14 However, Senate Bill 445 is not entirely
15 clear, because the last provision of the section says that
16 the court may for good cause prohibit or limit the
17 submission of questions to witnesses, which makes it sound
18 like you have to do it unless you don't want to do it, but
19 you have to have good cause, for whatever that means. So
20 I'm not exactly sure whether the statute's mandatory or
21 not, and usually the Court does not look at drafts before
22 the committee has looked at them, but as I say, we're
23 trying to move this process along, so we've already looked
24 at it and not in detail like we will, but the -- I might
25 tell you that the Court is leaning against asking

1 questions and certainly against having it mandatory.

2 MR. HARDIN: What was the last part? I
3 didn't hear it.

4 HONORABLE NATHAN HECHT: Having it
5 mandatory. Having it mandatory.

6 CHAIRMAN BABCOCK: Not going to ask
7 questions at all, but if we do, it would be discretionary.

8 HONORABLE NATHAN HECHT: But there are
9 judges on the Court who like this like it is.

10 HONORABLE TOM GRAY: Judge, does that mean
11 you would affirmatively prohibit it --

12 HONORABLE NATHAN HECHT: Yes.

13 HONORABLE TOM GRAY: -- when you say you're
14 not going to allow it, or you're not going to require it
15 or put it in the rules?

16 HONORABLE NATHAN HECHT: Well, we didn't get
17 to that level of specificity.

18 CHAIRMAN BABCOCK: Bill, and R. H.

19 PROFESSOR DORSANEO: Both of these
20 documents, and the bill even more so than proposed Rule
21 265.1, treat these questions as juror questions rather
22 than questions proposed by jurors and asked by the judge
23 as the judge's questions. I don't -- I'm more comfortable
24 with them being the questions proposed by jurors with the
25 judge deciding whether to ask them in that form or adjust

1 them or to fix them up or the like. Now, maybe I haven't
2 thought about it that long, so I could change my mind, but
3 something -- something seems more legitimate about the
4 judge asking questions that have been proposed.

5 CHAIRMAN BABCOCK: Okay. R. H.

6 MR. WALLACE: On rule -- I'm sorry, the
7 bill, 445, there is a couple of provisions that seem to be
8 problematical to me. It says the -- one is on the first
9 page, that juror questions must be submitted anonymously
10 and before jury deliberations begin. That could be after
11 final argument, and to me it ought to be -- it ties in on
12 the next page where it says, "A witness may be recalled to
13 the stand to answer a jury question." The common practice
14 that I've seen is after both sides have finished with a
15 witness, a witness is very often excused, and they're
16 gone.

17 MR. HARDIN: Absolutely.

18 CHAIRMAN BABCOCK: Right.

19 MR. WALLACE: So I don't see that -- there
20 needs to be some tweaking of when these questions have to
21 be asked.

22 CHAIRMAN BABCOCK: Judge Yelenosky, then
23 Steve, then --

24 HONORABLE STEPHEN YELENOSKY: Last time I
25 think we talked about from the trial judge's perspective

1 whether it puts undue importance on questions to have the
2 judge read them, and of course, we'll do whatever the
3 Supreme Court and/or the Legislature requires us to do,
4 but that's one consideration. What Professor Dorsaneo was
5 suggesting maybe adds to that and emphasizes that it's a
6 judge question when all it is is the judge has received
7 the question, ruled on it as if it were asked by an
8 attorney, and then reads it because otherwise you have to
9 have somebody else read it, and you don't want one
10 attorney or the other to read it. That's the first point.

11 Second point is the statute would not --
12 would require it to be read verbatim, and I would just
13 make the point that if the Legislature wants juries to be
14 able to ask questions, to require the judge to read them
15 verbatim is going to increase exponentially those
16 questions which are not allowed because there is a good
17 objection to them. Jurors don't -- aren't expected to
18 know how to ask questions such that they're
19 unobjectionable, and so they could, for instance,
20 predicate the question upon their view of the facts and
21 then ask a question, and if that question has to be up or
22 down verbatim, a lot of those are going to have a good
23 objection to them. So I wonder if that's an unintended
24 consequence of the proposed statutory change. Of course,
25 our rule would allow the judge to reword. So two points.

1 CHAIRMAN BABCOCK: Steve, then Roger.

2 MR. SUSMAN: Well, I think the way it worked
3 in our trial and the way I think it should work is that
4 the juror questions would come from the judge to protect
5 the anonymity of who is asking the question. So it's not
6 jurors raising their hand and interrupting the proceeding,
7 but insofar as I think it's a horrible idea for the Court
8 or anyone to -- the Court or the legislators to outlaw the
9 practice, because, I mean, you learn things about
10 improving trials by experimenting, and there is going to
11 be a lot of experimentation going on with this, and I
12 think the end result will be they'll hear around the
13 Harris County courthouse how it worked in our trial and
14 the lawyers liked it and it was good, and other judges
15 will begin doing it. We should not prohibit Texas judges
16 from following practices that are being followed across
17 the country, because it improves jurors' comprehension.
18 That would be horrible.

19 I like the way the statute is worded, I mean
20 the proposed legislation, in that the rule is that you --
21 the jurors are allowed to ask questions in this way, by
22 that I mean questions through the judge, unless the judge
23 for good cause -- and I can think a lot of reasons. Maybe
24 that should not be the standard, unless the court decides
25 this should not be a case in which questions are asked,

1 because I think unless you put -- unless you do it that
2 way it will not become -- it will take a long time for it
3 to become the norm. I suspect it will become the norm
4 pretty soon, but I think it will become the norm faster if
5 we have a rule that affirmatively argues for it, but I
6 just -- I keep -- what is the thought process? I mean, I
7 would be curious, what is the thought process of those
8 that would say we should not have any jury questions? I
9 mean, in no shape or form, no none ever?

10 HONORABLE NATHAN HECHT: Chip?

11 CHAIRMAN BABCOCK: Yeah, Justice Hecht.

12 HONORABLE NATHAN HECHT: We understand that
13 that's the holding of the Court of Criminal Appeals in
14 criminal cases, and that court has allowed note-taking for
15 nearly two decades, but in Morris against State,
16 apparently they hold it as per se harmful in a criminal
17 case. Of course, there are obviously huge differences
18 between a criminal case and a civil case in that regard,
19 and there's all sorts of things that the jury might ask
20 about, like "Why didn't the defendant tell us where he was
21 that day?" That's what I would want to know if I were on
22 the jury.

23 CHAIRMAN BABCOCK: "Have you ever been
24 convicted of anything?"

25 HONORABLE NATHAN HECHT: Yeah. "Is this his

1 first time?" But the reason that it's on the table is --
2 that's the reason, is because as opposed to juror
3 questions -- I mean, juror note-taking, which seems to
4 have some level of approval up and down throughout the
5 country, the views are mixed on this one.

6 CHAIRMAN BABCOCK: Okay. Roger, then Rusty,
7 then Hugh Rice.

8 MR. HUGHES: I just wanted to echo the
9 comment made earlier about in the proposed statute where
10 it says "a witness may be recalled to the stand." When I
11 read that a whole bunch of things went off in my brain.
12 One of them was what if the witness originally testified
13 by deposition on written questions or by video? Does that
14 mean the jurors can then demand the witness be summoned
15 live to answer their questions? There is also the
16 practical problem of what happens when we have a
17 out-of-town expert or an expert witness who may be held
18 over for an extra day and certainly at the expense of one
19 party or another. That's a practical issue that may be
20 resolved by the trial judge, but I still think the statute
21 or the rule needs to be limited to witnesses who testify
22 live on the stand. I think if we get to the point where
23 the jury can say, "I'm sorry, doctor so-and-so," or, you
24 know, "I want him to come down here from Dallas and
25 testify live to answer my questions," or "Well, gee, that

1 witness is local, it's just a police officer, let's just
2 get him in here, and I want to see him answer the
3 questions." I don't think that's what the statute
4 intends, and I don't -- I think probably some tweaking
5 needs to be necessary on that.

6 CHAIRMAN BABCOCK: Yeah, Rusty. Then Hugh
7 Rice.

8 MR. HARDIN: You know, when I was a young
9 prosecutor I wanted to restrict judges as much as possible
10 because I thought I knew better what they should and
11 shouldn't be able to do, and the longer I've been
12 practicing the stronger I feel that as much discretion to
13 a judge as is possible should be given. So I think it's a
14 horrible idea for us to tell judges what they cannot do,
15 because I think that trends, as Steve says, happen, and
16 judges have some unique good ideas of their own, and they
17 ought to run their court the way they think is fair.
18 We've always got the vehicle of abuse of discretion if we
19 think they're out of control, and so I would urgently
20 argue against telling them they cannot do it.

21 Secondly, I had an experience recently, and
22 I think I can come at it pretty objectively since I lost
23 the case very badly and we had questions, and I -- so --
24 and I still very much endorse it, and the way Judge Baker
25 did it, it seems to me that a way you could do it with the

1 rules that worked very well for us. Aren't we really
2 talking about informing and educating the jurors? So if
3 that's the case, what the questions would do, it sounds
4 like similar to Steve's situation, the questions would
5 come from the juror. It was always while that witness was
6 still on the stand.

7 I think it's a horrible idea to let them
8 come back in the next day with questions for somebody who
9 is no longer there, and we've got all of those kind of
10 logistical problems and things. I think it should be
11 while the witness they've got a question about is on the
12 stand, before they're excused, and then the questions then
13 would come to the judge. The judge would have them
14 Xeroxed to us. The lawyers look at them. If either of
15 the lawyers had an objection to the question or the judge
16 did, to say the judge had an objection to the question she
17 could just say, "This one we all agree we're not
18 submitting, we're not going to deal with, right?" We
19 never had a disagreement actually, and then it was up to
20 the lawyers as to whether they asked the questions.

21 This juror has written a note saying they
22 want to know X, Y, Z. Well, if you don't want to educate
23 them about that then you do that at your own peril, but
24 either lawyer would have had the right to address it, and
25 we didn't actually read the question to the jury, to the

1 witness. We simply looked at that, okay, this juror wants
2 to know about X, and so you ask about it. You might ask
3 it in an open-ended way that would address the subject or
4 not.

5 The notes -- I didn't find out until the end
6 of the trial, all the notes were from the same juror, but
7 they were really some really good questions; and as I say,
8 I walked away from it fully in favor of the process, as
9 long as the lawyers have some control over what they
10 address with witnesses; and I don't see why it has to be
11 read by the judge outloud. The judge is just simply the
12 gatekeeper. This is a subject that would be proper for
13 you folks to go into with the jury if you want to. They
14 want to know about it, or at least one person on the jury
15 wants to know about it. And I found it worked very well
16 that way, but I would strongly say it ought to be up to
17 the judge as to how it's done.

18 CHAIRMAN BABCOCK: Hugh Rice.

19 MR. KELLY: Well, my point is somewhat
20 related to Rusty's because recalling the witness I think
21 ought to be in the discretion of the judge, and I would
22 doubt that very many judges would allow a witness to be
23 recalled, particularly an out-of-town witness, but you may
24 get the question, see what the question is, the party --
25 one party -- the party that controls that witness out of

1 town and is going to pay his bills may want him to come
2 back. He may be in favor of it. The other --

3 MR. HARDIN: He could have --

4 MR. KELLY: -- guy may just be terribly
5 opposed.

6 MR. HARDIN: -- the discretion to --

7 MR. KELLY: You know, so if you just give it
8 in the sound discretion of the judge then it would
9 probably take care of it.

10 CHAIRMAN BABCOCK: Richard Munzinger, and
11 then Judge Yelenosky.

12 MR. MUNZINGER: One of the subjects that we
13 may end up discussing some day is why people don't want
14 jury trials and they arbitrate cases. That concern has
15 been voiced all over the Bar and the bench, so now we're
16 going to adopt a rule which allows a juror to ask a
17 question in writing. If you don't say to the judges that
18 it must be done while the witness is available during the
19 trial then you give me a strategic or tactical weapon.
20 "Oh, wait a minute, Judge, that's a heck of a point, let's
21 call Mr. Smith back."

22 "Yes, but he lives in San Francisco."

23 "Well, who cares, Judge, we're here for the
24 truth."

25 "Well, I'm not going to make him come back

1 from San Francisco."

2 "Oh, wait a minute, Judge, this is an
3 important point."

4 The rule ought to make it clear to the trial
5 courts that the questions need to be asked while the
6 person is available, lest you make litigation even more
7 expensive than it is, more cumbersome than it is, more
8 time-consuming than it is. We all worry about juror dead
9 time. The judges in cases that I try are saying, "Hurry
10 up, do this, do that, do this, do that. We don't want
11 those jurors to think we're lazy." Well, now we've got to
12 sit around and wait three days while Mr. Smith, who is in
13 San Francisco, can't make it back on Monday. He's got
14 another case to testify in. This is a -- to me it would
15 be a very serious problem if you don't require that the
16 question be submitted at the time the witness is available
17 on the stand.

18 And the point over here about the electronic
19 witness, the deposition witness, that's a very valid
20 point. Are you going to write the rule where if the
21 electronic witness is available because he lives in the
22 jurisdiction he may be forced to be called for the jury
23 question to be asked of him? Doesn't that raise the very
24 same problems that I just articulated but in a different
25 context? And I think it would be a -- the rule -- if

1 we're going to have to have the rule, and it appears that
2 we're going to have a rule, we need to be very careful
3 about what we do about having these questions asked while
4 the witness is available on the stand.

5 And one last point, lawyers ought to be free
6 to object to the question and do so outside of the
7 presence of the jury, in my opinion. I think that you can
8 be prejudiced if you are required to object to the
9 question in the presence of the jury, and I also think
10 that a valid subject worthy of discussion is whether or
11 not if the court rules that the question should not be
12 asked may either party then seek to reopen the testimony
13 of the witness? I would think that could be done. I've
14 never had it -- I've had juror questions, but we've not
15 had this procedure go through, and we've not had a written
16 rule that gave us guidance, but, you know, if I say to a
17 judge in an ordinary case, "Oh, gosh, Judge, I need to
18 bring up point X that I forgot to bring up," sometimes the
19 judge may let me do it if I did forget, sometimes he might
20 not, and this question may ring a bell in somebody's mind
21 they wanted to exploit this area now that either they --
22 they may have seen but they didn't realize the jury
23 thought it was keen and they need to get after it, and you
24 may want to give some guidance as to whether you allow the
25 parties to reopen that subject matter when the judge

1 doesn't ask the question. Obviously it's going to be
2 reopened by the follow-up questions with the attorney if
3 the question is asked.

4 CHAIRMAN BABCOCK: Judge Yelenosky. Then
5 Judge Christopher, then Eduardo, and then Judge Patterson.

6 HONORABLE STEPHEN YELENOSKY: A number of
7 people seem concerned about the recall part. I think
8 that's a nonissue. All the problems you're citing are
9 going to be readily apparent to any trial judge, and no
10 trial judge unless required to wait is going to wait. As
11 they do it now, those judges who read the questions send
12 the jury out or call the counsel up, find out what the
13 questions are immediately after each witness, and that's
14 how it's going to be done. No judge is going to collect
15 questions at the end of the trial and then call them back,
16 and this doesn't require them to do that.

17 But I think a real issue is what Rusty
18 points out, and again, I think it's a policy or a
19 philosophical question that's going to be answered by the
20 Legislature or the Court; but the way Rusty described his
21 experience is how I do it, which is giving the lawyers
22 information they may not know, questions that the jury
23 has, and leaving the lawyers to decide whether to ask it.
24 If the Legislature looks at this as a jury empowerment
25 statute and jurors are getting frustrated, and therefore,

1 we need to require judges to take their questions and read
2 their questions, then they're maybe not concerned about
3 whether the lawyers want to ask the questions or not. But
4 if what you're concerned about is just getting more
5 information to both sides that they may use in their case
6 then you would use the approach that Rusty Hardin has
7 experienced and that I have used.

8 CHAIRMAN BABCOCK: Judge Christopher.

9 HONORABLE TRACY CHRISTOPHER: I just wanted
10 to make it clear that our draft rule does vary
11 significantly from the proposed legislation.

12 HONORABLE STEPHEN YELENOSKY: Yeah.

13 HONORABLE TRACY CHRISTOPHER: So, for
14 example, the intent of our draft rule is that the
15 questions would be asked after every witness.

16 HONORABLE STEPHEN YELENOSKY: Right.

17 HONORABLE TRACY CHRISTOPHER: And although
18 we didn't put it in there, we could easily put in there
19 obviously there's no questions for a witness called by
20 deposition. I mean, you know, that's just not workable,
21 that you could have questions of a witness called by
22 deposition.

23 With respect to -- and our rule allows for
24 objections, and it allows the judge not to ask the
25 question, which is different from the legislation, appears

1 to be different from the legislation. So our draft is
2 fundamentally different from the bill as currently
3 proposed. With respect to whether the judge should ask
4 the question or whether the lawyers should just look at
5 the question and ask the question, if they wanted to, we
6 discussed it in a subcommittee, and we thought it was
7 better for the judge to ask the question so that the
8 lawyers didn't seem to be currying favor with the juror.
9 Okay, the juror wants this question asked. Well, I'm
10 going to ask that question because the juror wants that
11 question asked, so the idea is to take that sort of
12 concept out by just letting the judge ask the question
13 that the juror submitted.

14 And then finally, even though I'm not a big
15 fan of jury questions myself, although, I'm willing to try
16 it if the lawyers agree to it, ten percent of the judges
17 surveyed already do it. We have two court of appeals
18 cases that say it's okay in civil cases, and in the
19 Federal circuit they consider it well-entrenched in the
20 common law and in American jurisprudence, so I really
21 would hate to see the Supreme Court prohibit it.

22 CHAIRMAN BABCOCK: Okay. Eduardo.

23 MR. RODRIGUEZ: Two points. Number one is I
24 agree with the proposed rule that's been brought up. I
25 think it's obvious we shouldn't apply questions to people

1 that have been deposed or come via that manner. I've
2 tried cases with jury questions, and they've done exactly
3 as the judge has said. The judge takes up the questions.
4 He gets the lawyers aside, and he decides which ones are
5 obviously questions that are not to be asked, and then
6 those that he's going to submit he gives an opportunity to
7 argue one way or the other, and then he asks the
8 questions, so -- precisely so that the party who has got
9 the witness on the stand doesn't have a leg up because
10 they get to ask that question first.

11 The second point is that with respect to
12 Judge Wentworth's statute, we -- some of us said on the
13 State Bar Administration of Courts task force and it was
14 my understanding that Judge Wentworth put this up -- has
15 proposed this legislation precisely to get -- to get
16 action from the Supreme Court and if -- and he wants -- I
17 don't think he's necessarily -- will not abide changes to
18 the thing, to his bill, but he wants some action on it,
19 and so I think that he can be approached after -- by the
20 Court with proposed changes that would modify this as long
21 as the substance of what he wants, which is to allow
22 jurors to propose questions.

23 CHAIRMAN BABCOCK: Yeah. Justice Patterson,
24 and then Judge Evans.

25 HONORABLE JAN PATTERSON: Well, I think that

1 our committee's approach is a good one, as is the approach
2 by ABOTA, and that we should not stand in the way of the
3 progress of the evolution of that process, that we should
4 allow questions. The problem with the rule -- the statute
5 as drafted is it has layers of mandatory conduct. I mean
6 it requires -- it's one thing to make the process
7 mandatory to allow for questions by jurors. It's another
8 thing to require every question to be asked verbatim, and
9 I agree with Rusty that it has to be discretionary with
10 the judge for a whole variety of reasons, but the good
11 cause paragraph doesn't soften the requirement that you
12 must ask every question verbatim. It seems to go more
13 towards the process of whether questions are allowed, and
14 also I really think that it's -- it's not well thought out
15 to require every question, no matter how poor, no matter
16 how inadmissible. There is no out in this statute, and
17 it's just -- it really takes all discretion away from the
18 trial judge, which is the nature of the admission of
19 evidence, so it's -- it's -- I don't think it was drafted
20 by a lawyer.

21 CHAIRMAN BABCOCK: Judge Evans, and then
22 Buddy.

23 HONORABLE DAVID EVANS: Although it's
24 infrequent there's a few times when there's a topic that
25 neither party wants to have brought before the jury, and

1 the jury -- the way I read the bill, a jury could open a
2 can of worms that neither party wants to do it, and there
3 wouldn't be a legal objection to it. They both say, "We
4 just don't want to go off in that area and because it both
5 harms us and we're staying out of it." I'm not clear
6 under the bill or under the rule whether the trial judge
7 has the authority to say, "Fine, you don't want to open up
8 that area, we're not going to open it up," and I think
9 that should be up to the advocates. If they both say, "We
10 just don't want to go off into that area," then I think a
11 trial judge should respect that of the advocates. They
12 have the duty to represent their clients.

13 HONORABLE JAN PATTERSON: It allows for
14 objection but not exclusion. I mean, it just doesn't make
15 sense.

16 HONORABLE DAVID EVANS: And the only thing I
17 see on that as an evidentiary objection, they say, "No,
18 that's relevant" and they say, "No, it's prejudicial."

19 "Well, no." I know it's infrequent, but I
20 think it is up to the evidence controlling.

21 CHAIRMAN BABCOCK: Buddy, then Steve.

22 MR. LOW: That was the point I wanted to
23 make, what if neither side wanted to open the door --

24 MR. HARDIN: Right.

25 HONORABLE DAVID EVANS: Yeah.

1 MR. LOW: -- to something like that. That
2 was my first point. The second point was -- and it's
3 already been raised just recently that the way the statute
4 reads it says you may object. Then right after that it
5 said juror questions are required to be read. What if
6 it's about insurance? I mean, they object to it. That's
7 fine. I've got to read it. Now, you come over and you
8 say, well, "the Court may for good cause prohibit," and
9 the justice is correct. It's prohibit the submission of
10 the question. The process. So those are the two points
11 that I wanted to raise that smarter people than me have
12 already raised.

13 CHAIRMAN BABCOCK: Steve, then Justice
14 Gaultney, then Carl.

15 MR. SUSMAN: And I think these are all
16 worked out because in our trial -- I mean, the judge would
17 show us the questions, and by the way, this requirement
18 that they be read verbatim is ridiculous, given some of
19 the handwriting we were dealing with. If the judge was
20 not allowed to kind of guess what the words were, the
21 question could never have been asked verbatim.

22 But there was several questions where David
23 Beck and I looked at each other and said "nope," that --
24 the judge didn't read that question. He looked at the
25 lawyers, and the lawyers said "no," but he gave us an

1 opportunity outside the presence of the jury to make a
2 record. He always put on the record, "No one objects to
3 this, I'm going to read it. Does anyone object to my
4 reading this?" No one did.

5 And so, I mean, it worked so easy. I mean,
6 to do it the way those -- we tried in Houston, it really
7 works. You had to ask the question while -- the jury was
8 told in advance the question has got to be asked while the
9 witness is on the stand. I mean, at the end of all
10 examination you -- and the judge would give them time, you
11 know, if you don't -- if you have any questions, write
12 them down now. He would give them like five minutes while
13 we were sitting there to write a question and pass it
14 down, so he would give them a little time at the end to
15 write their question and pass it down. Everyone passed
16 down the papers. The lawyers couldn't tell where the
17 question was coming from.

18 And, I mean, it worked perfect, and I think
19 to have the lawyers -- leave it up to the lawyers to ask
20 the question, that's wrong, because the reason the jurors
21 seemed to like it on our questionnaires was it showed them
22 respect, that we appreciated their words. I mean, so if
23 the lawyers -- and who would go first, and it would be
24 horrible, so I mean, I think it's the judge can ask it.

25 CHAIRMAN BABCOCK: Justice Gaultney.

1 HONORABLE DAVID GAULTNEY: Yeah, I must
2 admit that I'm thinking in terms of the number of
3 appellate issues that are going to be raised thus far in
4 this process if it's mandatory and if this bill is
5 followed, but I guess my thinking is that traditionally it
6 seems to me we have a different system than the Federal
7 system. I mean, we traditionally have thought in terms of
8 a judge doesn't ask questions because it might be viewed
9 by a juror as a comment on one side or the other,
10 particularly in a criminal case, that it might be viewed
11 as favoring the prosecution; and so, you know, I think
12 that the same concern with jury questions exists, and that
13 is that -- and it's reflected in the instructions that are
14 given, that is that you are neutral fact-finders and not
15 advocates for either party and then again that you're not
16 supposed to have -- you know, give an opinion about the
17 case, criticize the case.

18 I mean, I think a lot of times perhaps
19 questions might be coming from a juror with an advocacy
20 mind frame, so I think the problem that some of the courts
21 have had in the past with jury questions is the fact that
22 it puts the jury in a different role. It puts it in the
23 role of an advocate, potentially, rather than in a more
24 neutral role. So I have a problem with the mandatory
25 nature of it.

1 I also have a -- it sounds to me like in the
2 cases where it has been tried it's been done by agreement
3 of the parties. Well, that's one thing. If you've got
4 the agreement of both counsel saying, "Judge, we want to
5 do it this way," then I can see fewer appellate issues,
6 but if you've got a judge exercising discretion in a
7 particular case over the objection of a party to permit
8 jury questioning, you know, then I think you create other
9 problems. So I was wondering if the rule -- if the
10 drafters had thought in terms of making this by agreement
11 of the parties, in the discretion of the court with the
12 agreement of the parties.

13 HONORABLE TRACY CHRISTOPHER: We did, but I
14 think kind of our sense of the committee was that we
15 wanted it a little bit broader than that, and we also
16 talked about putting some "you can't appeal" language in
17 there, but Elaine told me I couldn't put that in a rule of
18 procedure, so I took it out.

19 HONORABLE NATHAN HECHT: That's a good try,
20 Judge.

21 CHAIRMAN BABCOCK: Okay. We've got Carl,
22 we've got Jeff, we've got Mike, and we've got Buddy.

23 MR. HAMILTON: Am I next?

24 CHAIRMAN BABCOCK: Yeah.

25 MR. HAMILTON: I assume from the bill that

1 the intent is that the juror can ask any question about
2 something that's relevant. The rule seems to say that
3 they can submit questions to clarify testimony that's
4 already been given. I'm wondering if that's intended to
5 restrict their questions to clarifying what's already been
6 testified to, or can they ask something that hasn't even
7 been brought up with that witness before?

8 CHAIRMAN BABCOCK: Good point. Good point.
9 Mike.

10 MR. HATCHELL: Ready for me?

11 CHAIRMAN BABCOCK: Yeah.

12 MR. HATCHELL: Oh. I've been reading an
13 appellate record from Florida over the last month where
14 they do allow jury questions, and I think on balance I
15 would agree that it's a useful process, because cases are
16 now so complex that I think frequently we don't realize
17 that we're shooting over the heads of jurors and missing
18 what they're really interested in; and secondarily, I
19 think it involves the jurors in the process a little bit
20 more. I think that the draft that I see probably deals
21 with most of the problems that I've seen come up in this
22 particular record, but I do think that as a word of
23 caution I will tell you that, number one, mandatory
24 reading of questions is a terrible idea because in this
25 record at least a third of the questions are totally

1 unintelligible or wacky.

2 The other thing I think that you need to be
3 aware of is there is a price you pay for doing this in
4 terms of downtime and jurors being sent outside. There is
5 an enormous amount of -- not wrangling, but going over the
6 questions, taking objections, deciding what they mean, and
7 reading them to the jury. The other thing I would tell
8 you is that only about 10 percent of the questions are
9 really relevant to anything. Most of them just show that
10 the jurors weren't paying attention. But that said, I
11 still think it's a pretty decent idea.

12 CHAIRMAN BABCOCK: Jeff.

13 MR. BOYD: I had a question that is the
14 opposite of the issue that was addressed before, and that
15 is what if both or all attorneys do want the question read
16 and none assert an objection? As I read the rule, it says
17 in spite of that the trial court in its discretion can
18 decide not to ask the question at all, and I'm wondering
19 what the reason is for that.

20 HONORABLE TRACY CHRISTOPHER: Well, that was
21 to cover the situation truthfully where both -- the
22 question itself is not objectionable, but neither side
23 really wants the question asked.

24 MR. BOYD: Okay, so if the parties agree
25 that the question shouldn't be asked.

1 HONORABLE TRACY CHRISTOPHER: Right.

2 MR. BOYD: But as written it sounds like
3 even if the parties want it asked the judge could say,
4 "No, I'm not going to ask it."

5 HONORABLE JANE BLAND: Just like if both
6 parties want an agreed continuance, Jeff. It doesn't mean
7 the trial judge has to grant it.

8 MR. BOYD: Yeah, but you're talking about
9 here evidence on the case that's not objectionable. I
10 mean, maybe there's a reason. I just don't see what the
11 reason is.

12 HONORABLE TRACY CHRISTOPHER: Well, we also
13 discussed -- we did discuss that possibility, to give the
14 judge that discretion and then the thought was the parties
15 could ask to reopen the witness if they wanted to.

16 CHAIRMAN BABCOCK: Buddy.

17 HONORABLE TRACY CHRISTOPHER: Or recall the
18 witness to the stand.

19 CHAIRMAN BABCOCK: Buddy, and then Lonny.

20 HONORABLE TRACY CHRISTOPHER: But we can
21 tinker with that language if you're unhappy with that.

22 MR. LOW: I just wanted to comment that I
23 think the committee has done a good job of explaining to
24 the jury that their questions are just like the lawyer
25 questions so they won't be offended if they're not asked,

1 and I think their instructions are excellent.

2 CHAIRMAN BABCOCK: Yeah. Lonny.

3 PROFESSOR HOFFMAN: If the Court is inclined
4 to allow this in some way, I guess I would encourage that
5 we accept the view that we're early into the
6 experimentation, and we ought, therefore, not to limit the
7 different ways that this is done so that it strikes me as
8 strange that on the one hand we're in favor of doing this
9 because we want to let this be experimentation and try to
10 do things; on the other hand, we're suddenly so sure that
11 having lawyers ask the questions is terrible and others
12 are sure that judges should do it or not do it. So I
13 would say let's leave some room for playing around, and we
14 can revisit this conversation when we actually know it
15 doesn't work.

16 CHAIRMAN BABCOCK: Judge Yelenosky.

17 HONORABLE STEPHEN YELENOSKY: I was just --
18 what Mike was recounting reminded me of some of the
19 questions that we were asked that weren't questions, and
20 if I were required to read them verbatim they wouldn't
21 have gotten asked by anybody. It would be something like
22 in a property case "I don't know what a plat is." That's
23 not a question. Now, you can make it into a question, but
24 if I'm required to read it verbatim I'm not really sure
25 how an appellate court would do with that. You put the

1 witness on, you go "I don't know what a plat is."

2 CHAIRMAN BABCOCK: Sort of a reverse
3 jeopardy kind of prize. Justice Hecht.

4 HONORABLE NATHAN HECHT: Well, and as I
5 listen to this, I don't want to lose track of the point
6 Rusty made earlier, which is maybe you don't ask them at
7 all. Maybe you just tell the lawyers --

8 HONORABLE STEPHEN YELENOSKY: That's how I
9 do it.

10 HONORABLE NATHAN HECHT: -- "The jurors have
11 asked these questions. Now, do what you want," and they
12 can go decide if they want to ask some more questions or
13 not or -- and it takes care of your question, which is,
14 you know, if you're talking about some product or
15 something and the jury just doesn't understand the
16 concept, well, then it may be a whole -- it may be two
17 hours worth of examination to go back through and say,
18 well, this is -- relay the ground work, and it sort of
19 takes -- it has two virtues. It takes all of the
20 procedural rigor out of verbatim or not or judge asks it
21 or the lawyers ask it or all of that and leaves discretion
22 not only with the trial judge, but with the lawyers
23 themselves if they don't want -- if the juror asks a
24 question that neither one of them wants to go into, the
25 judge says, "The jurors have asked this question." The

1 lawyers say, "Well, fine, we don't have anything else to
2 say."

3 CHAIRMAN BABCOCK: Pete, then Steve, then
4 Eduardo.

5 MR. SCHENKKAN: Doesn't the judge need to
6 have the -- if the questions are possibly going to get
7 asked at all, if they're not just going to go with the
8 suggestion that you inform the lawyers so they learn at
9 least what some jurors are thinking or wondering about, if
10 the question is going to be asked at all doesn't the judge
11 need to have some counterpart to the same control the
12 judge has over the questions asked by the lawyers? "Well,
13 I think the objection to that question as asked is
14 sustained. Would you rephrase the question, counselor?"
15 And, you know, obviously we don't want to engage in that
16 with the individual jurors, but the subsequent equivalent
17 of that is I've got the lawyers in here and they agree
18 that as phrased this isn't a proper question or there's a
19 problem with it, but there's a core of it that is --
20 suggests that there's something -- at least one juror or
21 maybe more than one is confused or interested in that's
22 legitimate, and we can cure that, and it seems to me we've
23 got to let the judge do that some way or another.

24 CHAIRMAN BABCOCK: Steve.

25 MR. SUSMAN: Yeah, my problem, Justice

1 Hecht, with leaving it up to the lawyers is it's awkward.
2 I mean, I put a witness on, opposing counsel crosses. I
3 do redirect, there's a recross, and that's it. And the
4 judge then takes them out after questions, sends them out.
5 We agree on the question, and they then say, "You-all do
6 what you want to do." Who's got the first shot at that
7 witness? The witness, the witness -- everyone has
8 crossed, recrossed, redirected, everything, okay. Do I
9 have it or does opposing counsel have it?

10 Now, every question virtually is favorable
11 to one side or another, so, you know, am I going to get
12 the shot at the first, and even if it's hurtful to me I'm
13 going to be asking it because it's hurtful to me. Even if
14 it's a bad question I would phrase it in a way that would
15 be hurtful. I mean helpful, or not so -- like I'm not
16 scared of it. It just seems too tactical. It's like,
17 okay, and it was much better the way -- where the judge
18 asked the question. Then he says, "Do either of the
19 lawyers have any follow-up?"

20 HONORABLE STEPHEN YELENOSKY: And who went
21 first?

22 MR. SUSMAN: Huh?

23 HONORABLE STEPHEN YELENOSKY: And who went
24 first then?

25 MR. SUSMAN: I think he let the person whose

1 witness it was go first. It really doesn't make a whole
2 lot --

3 HONORABLE STEPHEN YELENOSKY: But, I mean,
4 you still have the same issue.

5 MR. SUSMAN: Yeah, but at that point in time
6 it didn't make a lot of difference. I think he let
7 whoever's witness it was had the first right to follow-up.

8 HONORABLE STEPHEN YELENOSKY: But you could
9 do that without the judge. That would be the answer to
10 your question who asks first, if you don't have the judge
11 asking and not all the questions are for one side or the
12 other.

13 MR. SUSMAN: Not all of them are.

14 HONORABLE STEPHEN YELENOSKY: Both attorneys
15 wanted them to know what a plat was.

16 MR. SUSMAN: Not all of them are, but some
17 of them are.

18 CHAIRMAN BABCOCK: If you'll defer to me for
19 two seconds, there's another problem, too, because if the
20 judge gives the questions to the lawyers and the lawyers
21 look at it and then whoever goes first, they answer it and
22 the other guy stands up and says, "I object," well, now
23 they're objecting not to the lawyer's question. They're
24 objecting to one of the juror's questions, and they may
25 not want to do that or they may be scared to do that.

1 That would take the normal dynamic out of it.

2 MR. HARDIN: I'm sorry, I don't understand.
3 Chip, how would that work? Because if the question comes
4 from the juror, it's already been determined before either
5 lawyer has addressed it whether it's objectionable or not.

6 CHAIRMAN BABCOCK: Well, not necessarily,
7 because what I heard Justice Hecht say was that the
8 question comes from the juror, the judge gives the lawyers
9 the question or questions and says, "Okay, Susman, it's
10 your witness, you can ask any of these you want."

11 MR. HARDIN: No, but the process I was
12 describing and I think that he has is, is that all of
13 that's decided before the lawyers --

14 CHAIRMAN BABCOCK: So you hash that out
15 ahead of time?

16 MR. HARDIN: Each of us -- the bailiff went
17 back and made a copy of the questions real quick and each
18 side looks at it. Judge wants to know are you going to
19 have a problem with any of these questions. If you do, "I
20 don't think this one should be asked. You all agree?"

21 "Yeah, we agree," or so -- and then the
22 questions that each lawyer has now are the ones the court
23 has already decided --

24 CHAIRMAN BABCOCK: Okay.

25 MR. HARDIN: -- and the lawyers have agreed

1 are not objectionable.

2 CHAIRMAN BABCOCK: That solved that problem.

3 MR. HARDIN: Then the question becomes
4 whether they choose to address it, and the thing that
5 Steve is talking about is is it always happened in the
6 trial I had while -- the question was raised while that
7 lawyer was questioning the witness, so that's how you
8 decided who went first. It wasn't like, okay, the witness
9 is through on the stand now, anybody got any questions?
10 It was questions that came up during one lawyer's
11 questioning of it. That lawyer could decide not to
12 address it, and the other lawyer back on redirect or
13 recross could decide I want to address that issue, and he
14 could, but it had already been -- the gatekeeping function
15 had already been served.

16 CHAIRMAN BABCOCK: Gotcha. Eduardo, will
17 you yield to Susman for two seconds?

18 MR. RODRIGUEZ: Yes.

19 MR. SUSMAN: I just forgot to say one thing.
20 In my trial we never had to send the jury out. I mean,
21 they sat in the box while it happened at the bench. You
22 know, the lawyers would come up to the bench. The judge
23 had one of these white noise machines or something so the
24 jury couldn't hear very well.

25 CHAIRMAN BABCOCK: Don't always work, but --

1 MR. SUSMAN: I don't know, but we never had
2 to -- it was very quick. I mean, it did not take a lot of
3 time, and I assume there are trials where you would have
4 to send them out because it's going to be a huge argument,
5 but --

6 CHAIRMAN BABCOCK: Yeah. Eduardo, sorry.

7 MR. RODRIGUEZ: My experience was the same
8 as Steve's. The jury never went out of the courtroom
9 while we went to the side bench and had objections or not,
10 but my question now is a procedural question, and maybe
11 it's addressed to the justice, but is what we're doing
12 here proposing something that the Supreme Court is going
13 to go to the committee with as a substitute to this
14 proposal, or are we not going to -- or is the Supreme
15 Court not going to address this bill and then if it passes
16 write the rules the way we're -- that may be discussed
17 here?

18 CHAIRMAN BABCOCK: As I understand what
19 we're doing, is, number one, having a discussion that will
20 mostly inform the Court, but I suspect that the Senator
21 will probably get a copy of this discussion to -- for
22 whatever use he may want to make of it, and the Court may
23 or may not, you know, rewrite this draft rule and submit
24 that to the Senate if they want, but -- and in a minute
25 we'll take some votes on some big issues after we finish

1 the discussion.

2 MR. RODRIGUEZ: Well, I mean, with all due
3 respect, you know, we may -- whatever vote we take, I
4 don't foresee the Senator sitting down and reading a
5 record. It's going to take some active participation from
6 somebody to go and sit down and explain what was going on,
7 because if we just expect him or his staff to sit down and
8 sift through our thoughts and then try to change, you know
9 -- make changes to his bill, that may or may not happen,
10 and so I'm -- my only concern is, is the necessity to be
11 proactive in light of the proposed bill and how are you
12 going to make or present changes that will make that
13 proposal more palatable to the system --

14 CHAIRMAN BABCOCK: I'll defer to Justice
15 Hecht and --

16 MR. RODRIGUEZ: -- and not just rely on
17 letting it happen without somebody being involved in --
18 and seeing to it happening.

19 CHAIRMAN BABCOCK: I'll defer to Justice
20 Hecht, but I think the interface between Senator Wentworth
21 is going to be with the Court, not this committee. Lonny.

22 PROFESSOR HOFFMAN: Right, and so again I
23 was going to echo, and perhaps I'm too far in the back, I
24 don't see what we gain. I see much that we lose by if we
25 go down the route of discussing juror questions as an

1 option of mandating one form or another. We've been
2 singing the praises, most of us, of trial court
3 discretion, and there are all kinds of variances and all
4 kinds of -- we have bifurcated trials in some cases and
5 jurors that want to get ahead of the game, they want to
6 ask a question. All kinds of circumstances that we don't
7 know, and so sometimes it does make sense to have the
8 lawyers ask the questions, I would suspect. Maybe it
9 depends on the length of the trial, right? There are all
10 kinds of things, so in a sense I would sort of echo the
11 first part of what I think Eduardo was saying. I hope we
12 keep our eye on the ball of what we would be doing.

13 CHAIRMAN BABCOCK: That would be unusual for
14 us, but --

15 PROFESSOR HOFFMAN: Right, but let's focus
16 on -- I mean, the Court was leaning against the direction
17 of having questions. That's where I think the most useful
18 part of the discussion could be.

19 CHAIRMAN BABCOCK: Hugh Rice, and then R. H.

20 MR. KELLY: Let me apologize in advance for
21 making a rather long comment, but one point that I think
22 argues strongly in favor of mandatory allowance of
23 questions during trials is the limited vocabulary of
24 jurors. Now, add too -- those that attended the last
25 meeting will remember that at the end of the trial that

1 one of the members referred to the juror said in this case
2 involving personal injury at a pallet, the jurors at the
3 end of the trial said, "Oh, by the way, none of us knew
4 what a pallet was." Okay. That's one point.

5 Another point that was made earlier was that
6 at the end of a trial the jurors didn't know what the word
7 "occurrence" meant, and then lastly, two ethnic points.
8 All of you probably had the experience of dealing with
9 members let's say of a people who live let's say in an old
10 traditional black community. I had four pages of confused
11 deposition testimony once trying to communicate with a
12 woman about where the traffic light was, and finally at
13 the end she says, "You mean some lights be's on wires and
14 some lights be's on poles. This light be'd on a wire."
15 Now, that woman is going to have trouble if she was ever
16 on a jury understanding a bunch of stuff that real smart
17 lawyers, you know, are so obsessed with, you know, high
18 falutin' language. They don't get it.

19 The second one has to do with people whose
20 native language is Spanish but who are fluent in
21 conversational English. That doesn't mean they have a
22 very broad vocabulary in English. I've got household
23 workers that work for me that are perfectly fluent, but if
24 you hit them with a 50-cent word, it goes right past and
25 frequently they are hesitant to say, "I don't understand

1 that word." So that's my full speech.

2 MR. GARCIA: What's a 50-cent word?

3 CHAIRMAN BABCOCK: R. H.

4 MR. WALLACE: I've tried cases with jury
5 questions, and although the first time I faced it with
6 great trepidation because even though we all know a jury
7 trial is a search for the truth, there's some things we
8 just as soon not be too clear about, but all in all I
9 ended up liking it. I thought it worked well. It didn't
10 slow the trial down, but I think the key ought to be
11 whether we make it mandatory or discretionary for the
12 judge to do it. The manner in which he does it, he needs
13 to have broad discretion in doing it.

14 MR. LOW: Yeah, right.

15 MR. WALLACE: He asks the questions, whether
16 he allows the attorney, and what order to go in, I think
17 that could depend on the particular question, it could
18 depend on a lot of factors that the judge ought to have
19 the discretion on how to do that.

20 CHAIRMAN BABCOCK: Buddy.

21 MR. LOW: Yeah, that was what I was going to
22 suggest we have, that at the beginning discretion to ask
23 questions, but if they're mandatory, then we should put
24 "Except as required specifically herein, the trial judge
25 shall have broad discussion" -- or "discretion in

1 administering these," and you leave it up -- you've got to
2 leave a lot of it up to the trial judge. That should --
3 if it is mandatory we should still have a discretionary
4 clause.

5 CHAIRMAN BABCOCK: Yeah, Judge Christopher.

6 HONORABLE TRACY CHRISTOPHER: I love these
7 new people. They are for trial judge discretion. Yay.

8 CHAIRMAN BABCOCK: Wait a minute. That
9 comment came right after Buddy, who could hardly qualify
10 as a new person.

11 HONORABLE TRACY CHRISTOPHER: The previous
12 group had not been so nice to us trial judges, so I really
13 like our new replacements. Thank you.

14 CHAIRMAN BABCOCK: It occurs to me that if,
15 as Justice Hecht said, there are members of the Court who
16 might be inclined to say no how, no way, under no
17 circumstances should this be permitted, we might take our
18 first vote on whether or not it's the sense of this
19 committee that there ought to be an absolute prohibition
20 on juror questions. That okay with you, Judge
21 Christopher?

22 HONORABLE TRACY CHRISTOPHER: Sure.

23 HONORABLE DAVID EVANS: Can we reframe that
24 to say "questions and/or communications" because what I
25 get was not a question, it was "I don't understand this,"

1 and one of the points that Justice Hecht brought up was
2 they communicate up to you that they don't understand and
3 then leave the framing.

4 CHAIRMAN BABCOCK: Okay. Both the draft
5 rule and the statute seem to be phrased in terms of
6 written questions, but you raise a good point, because it
7 might be broader than that, but that would be language of
8 the --

9 HONORABLE DAVID EVANS: That's fine.

10 CHAIRMAN BABCOCK: -- of the rule or of the
11 statute, but everybody who is in favor of telling the
12 district judges that they may not permit juror questions,
13 raise your hand.

14 And everybody else who thinks that the trial
15 judge should either have discretion or be required to
16 allow jurors to --

17 MR. HARDIN: Can we break that down? Can we
18 break that down, could be given discretion and then a
19 separate vote on discretion versus required?

20 CHAIRMAN BABCOCK: Well, yeah, that's the
21 next vote, but everybody that thinks that juror questions
22 ought to be asked in some way, whether it's discretionary
23 with the court or mandatory with the court, raise your
24 hand.

25 So that's 38 to 1, the Chair not voting. A

1 couple of other people didn't vote either, so at least as
2 far as this committee is concerned, Justice Hecht, that's
3 how we feel about it.

4 Now, the next question it seems to me would
5 be whether the court should have discretion of some sort
6 as specified in draft Rule 265.1(a) or whether we like the
7 approach that the Senate Bill 445 takes, which seems to
8 make it mandatory except for good cause. So everybody who
9 is in favor of discretion of the trial court -- discretion
10 of the trial court, raise your hand.

11 And everybody who thinks it ought to be
12 mandatory with a good cause exception, raise your hand.
13 All right. It's 36.

14 MR. KELLY: Can I ask a clarifying question?

15 CHAIRMAN BABCOCK: Let me announce the
16 results first.

17 MR. KELLY: Huh?

18 CHAIRMAN BABCOCK: Let me announce the
19 results first, then you can clarify it. It's 36 in favor
20 of discretion. It's two in favor of mandatory with good
21 cause. Yeah, Hugh Rice.

22 MR. KELLY: Yeah, do you mean mandatory that
23 at the outset of the trial the judge decides whether or
24 not to allow questions at all during the whole trial or
25 are you talking about specific questions?

1 CHAIRMAN BABCOCK: That's not what I -- no,
2 no. That's not what I meant. I meant the approach that
3 445 takes.

4 MR. KELLY: That's to say in all cases there
5 must be juror questions allowed. Okay. Then I voted the
6 right way.

7 CHAIRMAN BABCOCK: Anybody want to change
8 their vote?

9 PROFESSOR DORSANEO: I'll change my vote
10 based upon what you just said. What I voted affirmatively
11 was that the judge is supposed to engage in the process,
12 but might rephrase the question or not ask it.

13 CHAIRMAN BABCOCK: So how did you vote?
14 Were you in the 36 or were you in the 2?

15 PROFESSOR DORSANEO: I was in the two.

16 CHAIRMAN BABCOCK: Okay. So it's 37 to 1
17 now.

18 MR. ORSINGER: Well, no, wait a minute. The
19 issue here was whether all trial judges will be required
20 to allow questions, not whether they must read them
21 verbatim as written, so you shouldn't change your vote.

22 PROFESSOR DORSANEO: Well, I didn't change
23 my vote. He changed his question.

24 CHAIRMAN BABCOCK: It's still 36 to 2. We
25 get the idea. We get the idea. Okay. Judge Christopher,

1 anything more on -- nothing on the discretion issue, but
2 we have other things to talk about on the rule itself,
3 don't we?

4 HONORABLE TRACY CHRISTOPHER: Well, based on
5 the discussion, I guess the next vote might be whether we
6 want a rule that specifically tells the judge how to do it
7 or a rule that says, you know, the trial judge has
8 discretion to do it however he or she wants.

9 CHAIRMAN BABCOCK: Okay. That seems like a
10 reasonable thing to vote on. How many people are in favor
11 of having a rule that says we could have juror questions,
12 and it's up to the discretion of the court as opposed to
13 -- that would be -- everybody in favor of that will vote
14 the first time, and then the opposite of that would be
15 discretion but with guidance. Okay. So --

16 MR. LOW: Well, wait, Chip. Guidance may
17 come from the lawyers as -- you know, as to who does that.

18 CHAIRMAN BABCOCK: I'll amend what I said.
19 Judge Christopher is saying that the alternative is a rule
20 that gives the court guidance.

21 MR. LOW: Right. Yeah, right.

22 CHAIRMAN BABCOCK: So everybody that wants a
23 rule that says discretion of the court just in -- and
24 that's it, the court has discretion, raise your hand.

25 HONORABLE TRACY CHRISTOPHER: Can I just

1 rephrase it?

2 HONORABLE SARAH DUNCAN: Please do. Please
3 do.

4 HONORABLE TRACY CHRISTOPHER: Before we take
5 the vote.

6 CHAIRMAN BABCOCK: Okay.

7 HONORABLE TRACY CHRISTOPHER: Imagine that
8 this draft rule was only (a), okay.

9 CHAIRMAN BABCOCK: That was what I thought
10 you were getting at.

11 HONORABLE TRACY CHRISTOPHER: Imagine it was
12 only (a) and all the rest of it was gone, because that's
13 sort of my understanding of the way some people think we
14 ought to let it develop, we ought to, you know, let people
15 work on it, trial by trial by trial basis.

16 CHAIRMAN BABCOCK: A laboratory.

17 HONORABLE TRACY CHRISTOPHER: Imagine we're
18 just looking at (a) versus something (a) plus, (a) plus
19 directions.

20 CHAIRMAN BABCOCK: So if we phrase the vote,
21 Judge, in terms of everybody that thinks that the rule
22 should stop after (a)?

23 HONORABLE TRACY CHRISTOPHER: Right.

24 CHAIRMAN BABCOCK: Okay. Everybody that
25 thinks the rule should stop after (a) raise your hand.

1 And everybody that thinks it should continue
2 after (a) raise your hand.

3 HONORABLE SARAH DUNCAN: Are we voting on it
4 continuing this way?

5 HONORABLE TRACY CHRISTOPHER: No, just some
6 continuation.

7 CHAIRMAN BABCOCK: All right. Seven people
8 thought that it should end after (a), and 32 thought that
9 it should continue after (a). Okay.

10 HONORABLE SARAH DUNCAN: Can we now ask the
11 question of whether there should be a procedure mandated
12 by what comes after (a)?

13 PROFESSOR CARLSON: Versus?

14 HONORABLE SARAH DUNCAN: Versus the trial
15 judge, as Lonny was saying, can adjust the procedure to
16 the case or to the court.

17 CHAIRMAN BABCOCK: Judge Christopher.

18 HONORABLE TRACY CHRISTOPHER: Can I ask,
19 because I do think these instructions are important --

20 MR. HARDIN: Yes. That's the problem with
21 limiting it to (a).

22 HONORABLE TRACY CHRISTOPHER: So, you know,
23 I think however you use them, instructions to this effect
24 that the jurors are supposed to be neutral, that, you
25 know, we may or may not ask your question, don't take it

1 amiss if we don't, those sort of instructions I think it
2 would be useful if in a rule these instructions were
3 available to the judge to use however they saw fit.

4 CHAIRMAN BABCOCK: Well, you've got --

5 HONORABLE TRACY CHRISTOPHER: So I want to
6 know whether people liked those instructions.

7 CHAIRMAN BABCOCK: You've got it as the
8 judge must read these.

9 HONORABLE TRACY CHRISTOPHER: Yes.

10 CHAIRMAN BABCOCK: Okay. Steve.

11 MR. SUSMAN: Yeah, I think I'm a big
12 supporter of setting out the procedure that she sets out
13 because so many times even if you -- I mean, what happened
14 in our trial, I remember jury -- everyone's got these jury
15 comprehension improvement projects, so it just occurred to
16 me as a last-minute thought before the first witness,
17 "Judge, could the jurors ask question?" David Beck said,
18 "Yeah, that sounds fine," but we had no idea what to do,
19 and the judge didn't have any idea. It was like his
20 second trial ever, and so we were lucky we were in a
21 courthouse where somehow he got hold of your forms at a
22 break.

23 HONORABLE TRACY CHRISTOPHER: (Indicating)

24 MR. SUSMAN: E-mail. Okay, that was it. He
25 sent an e-mail around, and she brought the forms, and it

1 worked perfectly. Well, I mean, if I hadn't been in that
2 kind of courthouse with Tracy on the e-mail we wouldn't --
3 we would have totally screwed it up and probably had a bad
4 experience with it, so I'm totally in favor of having
5 these kind of rules that -- because I think they work.

6 CHAIRMAN BABCOCK: And Sarah's question I
7 think is whether or not the word "must" ought to be here
8 in (b) (2) (a).

9 HONORABLE SARAH DUNCAN: I discern a
10 difference between guidance and mandated procedures. I'm
11 in favor of guidance. I'm not in favor of mandated
12 procedures in this instance.

13 CHAIRMAN BABCOCK: SO you would change
14 "must" to "should."

15 HONORABLE SARAH DUNCAN: I would just say,
16 (b), here's a recommendation how to do this so that when
17 you're in Steve's position and David's position and you
18 don't know what you're doing because you're in Lampasas
19 County --

20 CHAIRMAN BABCOCK: Now, he's not going to
21 admit to not knowing what he's doing.

22 HONORABLE SARAH DUNCAN: -- that here's a
23 way to do it.

24 CHAIRMAN BABCOCK: Judge Peeples.

25 HONORABLE DAVID PEEPLES: I'm in favor of

1 some things being mandated, some being discretionary. For
2 this reason I think this group needs to be reminded about
3 once a year that we're not writing rules for Judge
4 Christopher and Judge Evans and Judge Yelenosky. We're
5 writing for 425 district judges, no telling how many
6 county court judges, in East Texas, the Panhandle, South
7 Texas, Central, everywhere, and we just need to remember
8 that some of these people need more guidance than the
9 superstars of the trial bench.

10 HONORABLE DAVID EVANS: Oh, well, I'm
11 feeling good.

12 CHAIRMAN BABCOCK: Yeah, this committee is
13 nothing but good for your ego, Judge Evans. Justice
14 Hecht.

15 HONORABLE NATHAN HECHT: It's exactly 440
16 district judges and 240 statutory county judges, so we've
17 got 680 judges scattered around.

18 CHAIRMAN BABCOCK: So on the issue of the
19 trial court must read as opposed to the trial court should
20 read, you're a "must" kind of guy?

21 HONORABLE DAVID PEEPLES: Maybe.

22 CHAIRMAN BABCOCK: Judge Evans.

23 HONORABLE DAVID EVANS: The one that strikes
24 me is the limitation on the question must be to clarify
25 the testimony of the witness, which sets a limit

1 subject-matter-wise where they can go into, and that would
2 be why I would want the instructions, is at least to limit
3 the question. Now, if it's put somewhere else in the rule
4 and stated that the question could only be that, but I
5 think you do have to have standard form instructions, and
6 the rest of us are going to -- we're going to elaborate on
7 these anyway. I've never seen a trial judge just read
8 these instruction that doesn't then put its own
9 interpretation on it or additional comments.

10 CHAIRMAN BABCOCK: Yeah. Judge Yelenosky.

11 HONORABLE STEPHEN YELENOSKY: Well, I just
12 want to know whether -- and I was trying to find out from
13 Judge Christopher if I'm unclear -- do we as it's phrased
14 now by -- well, as the rule is phrased --

15 HONORABLE TRACY CHRISTOPHER: Oh, I see what
16 you're talking about.

17 HONORABLE STEPHEN YELENOSKY: -- would this
18 require a judge to decide there are either going to be
19 questions or not; if there are questions, this is the only
20 way to do it; or does it allow a judge to say there are
21 going to be questions, but not exactly like this? The way
22 I read it now, it's the former. I can either do it or
23 not, but if I'm going to do it, this is the only way to do
24 it, and that may be fine. I just want to know what we're
25 voting on, because that would disallow the procedure I've

1 been using.

2 CHAIRMAN BABCOCK: Judge Christopher.

3 HONORABLE TRACY CHRISTOPHER: Well, what I
4 wanted to have a vote on first was should we have certain
5 instructions that we give the jury every time. Not
6 necessarily the content, because as I see in here, there
7 are a few comments about -- that include the procedure in
8 this first set, so what I'm really getting at is more of
9 the substance of the instructions rather than the
10 procedure at this the time. So, for example, if we
11 ultimately wanted to vote with the Rusty/Stephen, you
12 know, let the lawyers do it version, we would have to
13 change some of the language in this set of instructions.
14 But the idea behind it is that there would be a set of
15 instructions that the trial judge should read if they
16 allowed juror questions.

17 CHAIRMAN BABCOCK: Rusty.

18 MR. HARDIN: Then people like me, and maybe
19 others like me, would like to change my vote, because that
20 was the problem of just saying (a) and afterwards. I
21 totally agree that the guidance to the judges ought to be
22 provided, and that's down here after (a). So really my
23 vote against just making it (a) would be -- in favor of
24 just making it (a) would be different now, because if we
25 could word this to where you're talking about and what

1 Judge Christopher says at the end, the instructions would
2 be if a judge discretionarily has decided to have
3 questions, then there have to be instructions, whether
4 these or others, as to how it is done and the procedure as
5 to which one -- you know, little technical stuff can be
6 changed, but I think the judges should be given guidance.

7 HONORABLE TRACY CHRISTOPHER: For example,
8 in this (2), the first instructions that we give the jury,
9 paragraph (1), (3), (4) and (5) are all just basic
10 instructions. It's only paragraph (2) that gets into the
11 actual procedure.

12 HONORABLE STEPHEN YELENOSKY: So you could
13 have -- paragraph (2) could have alternate paragraphs.

14 HONORABLE TRACY CHRISTOPHER: Right. So
15 perhaps we would vote on -- well, I guess maybe before we
16 start changing everything, let's vote on whether we want
17 -- or did we already vote on that, one procedure or
18 multiple procedures? You know, to allow -- it's got to be
19 this way with the judge asking the question after
20 objections, or we're going to allow the judge to have more
21 discretion as to how to handle the questions. If we could
22 maybe have that vote first that would sort of simplify
23 this.

24 CHAIRMAN BABCOCK: Okay. So the first --
25 people voting in favor would be in favor of having one

1 procedure which the judge must follow.

2 HONORABLE TRACY CHRISTOPHER: Right. Which
3 is multiple procedures.

4 CHAIRMAN BABCOCK: Everybody in favor of
5 having one procedure that the judge must follow, raise
6 your hand.

7 All right. How do you frame the other side
8 of this question, Tracy?

9 HONORABLE TRACY CHRISTOPHER: Giving the
10 judge the discretion --

11 MR. MUNZINGER: "Do you want chaos in the
12 courtroom?"

13 CHAIRMAN BABCOCK: Sorry. There was a
14 sidebar.

15 HONORABLE TRACY CHRISTOPHER: Giving the
16 judge discretion to craft the procedure.

17 CHAIRMAN BABCOCK: All right. Everybody in
18 favor of giving the trial judge discretion to craft the
19 procedure.

20 MR. LOW: There's a third thing.

21 CHAIRMAN BABCOCK: All right. That vote was
22 20 to 16, with some grumbling.

23 HONORABLE DAVID PEEPLES: Chip, can I make a
24 point? I would like to see a lot mandatory -- I mean, one
25 procedure mandatory, but it would contain some elements of

1 discretion, and I think that was not clear when we voted.

2 CHAIRMAN BABCOCK: Yeah, Justice Guzman.

3 HONORABLE EVA GUZMAN: I was going to say
4 the judge should have the discretion to accept an
5 agreement of the parties on how they're going to --

6 CHAIRMAN BABCOCK: Proceed?

7 HONORABLE EVA GUZMAN: -- proceed with the
8 questions, should it be mandatory.

9 CHAIRMAN BABCOCK: Yes, Elaine.

10 PROFESSOR CARLSON: Judge Lawrence, would
11 this be applicable in JP courts?

12 HONORABLE TOM LAWRENCE: Well, I was going
13 to ask that question. Does Chapter 25 of the Civil
14 Practice and Remedies only apply to county and district
15 court?

16 CHAIRMAN BABCOCK: We're scrambling for the
17 answer.

18 HONORABLE TOM LAWRENCE: Based on Justice
19 Peeples' obvious slight I'm assuming that he intentionally
20 left out 900 JPs also.

21 CHAIRMAN BABCOCK: We're researching. We'll
22 get that answer for you in a second. Eduardo.

23 MR. RODRIGUEZ: Yeah, my question is -- and
24 I may not have understood because I already realized I
25 missed -- I didn't understand one of the votes they took.

1 Is the vote that we took that asking questions is not
2 mandatory? I mean, I think that's what -- because as I
3 see the bill, he's -- he wants -- he wants judges to have
4 to ask -- allow jurors to ask questions.

5 CHAIRMAN BABCOCK: Right.

6 MR. RODRIGUEZ: How -- how that procedure is
7 done I see as being discretionary, but what we're -- by
8 voting that it not be mandatory, we're not really changing
9 anything in the law as it is now, because right now judges
10 have the discretion to ask questions, and I think what
11 he -- what he wants to do is that right now 10 percent of
12 the courts in the state may allow questions. I think what
13 Wentworth's objective is is to make all judges allow
14 questions, and I don't know that we're answering that by
15 what we're doing because we're not changing anything.

16 CHAIRMAN BABCOCK: Well, we are answering
17 it. We may not answer it in the way that it looks like he
18 wants it. Steve.

19 MR. SUSMAN: I do think this would satisfy
20 him. I mean, I have been one of the big ones who's
21 lobbying him to do something like this. I've been after
22 him for a long time, and I think something like this would
23 satisfy him because, frankly, this is a procedure. It is
24 the imprimatur this is an appropriate and proper thing for
25 courts in the state of Texas to do. It's not only you can

1 do it if you can figure out how to do it and you get the
2 lawyers to agree. I mean, this says it's appropriate to
3 do.

4 MR. LOW: Right.

5 MR. SUSMAN: Essentially. But in your
6 discretion you could, you know, not allow it, but I do
7 think that it's a lot of -- a huge step over where we
8 currently are, where you've got to -- you know, when you
9 raise the subject of questions, is there any case
10 authority that says it's proper, and you've got to go site
11 cases. Okay, now next, so how do we do it, you know.

12 CHAIRMAN BABCOCK: Judge Yelenosky.

13 HONORABLE STEPHEN YELENOSKY: I just want to
14 respond. I don't see our role as taking what the -- one
15 legislator has proposed at this point. It may have a lot
16 of support, I don't know. Certainly beyond me to predict
17 what's going to happen in the Legislature. I thought our
18 role, since the Supreme Court has told us to look at this
19 question, is to give our advice from our perspective as
20 judges and attorneys, and the rest of it's up to other
21 people.

22 MR. HARDIN: Eduardo, he has very specific
23 requirements that they must do, and he doesn't just say
24 they have to do it. He has it actually set out in this.

25 MR. RODRIGUEZ: Yeah, I know.

1 CHAIRMAN BABCOCK: Pete Schenkkan.

2 MR. SCHENKKAN: I was wondering if perhaps
3 after lunch the most useful thing to the Court might be to
4 walk through the numbered items under (b) that Tracy has
5 in here and get kind of a sense of the house on each one
6 as to whether they are fundamentally, you know, something
7 that would be useful to provide, you know, a really bad
8 idea, or if there's some third option; and that might be
9 about as much more progress as we could usefully make to
10 the Court, which obviously there's only two decision
11 makers that are going to ultimately get this done, the
12 Court or the Legislature; and I think we'll be done if
13 we've given our sense of the house on these seven items
14 and any that aren't on the list.

15 CHAIRMAN BABCOCK: Yeah. Absolutely right,
16 and we're going to take a break for lunch in just a
17 second. Judge Lawrence, was it Chapter 25 of the Civil
18 Practice and Remedies Code that we're worried about?

19 HONORABLE TOM LAWRENCE: Yeah, that's the
20 amendment to Senate Bill 445.

21 CHAIRMAN BABCOCK: Yeah, well, somebody has
22 got it wrong. David Beck, who is the author of a book
23 about the Civil Practice and Remedies Code, says that
24 Chapter 25 is blank.

25 HONORABLE TOM LAWRENCE: Well, I guess --

1 MS. PETERSON: Oh, this is adding Chapter
2 25.

3 CHAIRMAN BABCOCK: Oh, so we're going to add
4 a Chapter 25.

5 HONORABLE TOM LAWRENCE: If that's the case
6 then the language says "civil trials in this state" which
7 means it would apply to JP courts.

8 CHAIRMAN BABCOCK: Yeah.

9 HONORABLE TOM LAWRENCE: Which raises a
10 separate issue, both with this and note-taking. We don't
11 have an equivalent to 226 in the JP court, so I would
12 propose if we do this that we take No. (10) on page four
13 and five and take that language and either add it to 553
14 or 554 and that with regards to the juror questions that
15 we do the same thing.

16 CHAIRMAN BABCOCK: Got it.

17 HONORABLE TOM LAWRENCE: If we're going to
18 do that. The juror questions would actually be pretty
19 helpful sometimes in JP courts because it's not unusual to
20 have both the plaintiff and defendant rest without
21 actually mentioning what the damages are, and then the
22 jurors send questions out, "Well, what are the damages,"
23 well, you know, so, this really would be a positive thing
24 for JPs.

25 CHAIRMAN BABCOCK: Our lunch breaks are an

1 hour long and it starts now.

2 (Recess from 12:28 p.m. to 1:29 p.m.)

3 CHAIRMAN BABCOCK: All right. Judge Peeples
4 has called for a revote.

5 HONORABLE DAVID PEEPLES: But to be
6 specific, we voted 20 to 16, and I think there were people
7 who didn't know how to vote. I would like --

8 HONORABLE STEPHEN YELENOSKY: You want to
9 vote for them?

10 CHAIRMAN BABCOCK: After lunchtime
11 lobbying --

12 HONORABLE DAVID PEEPLES: I would like to
13 see us vote where one of the choices is that we think
14 there ought to be something beyond (a) that has some
15 mandatory provisions and some elements of discretion, and
16 I think that ought to be put as one of the alternatives.

17 CHAIRMAN BABCOCK: Tracy, do you object to
18 that sort of a vote?

19 HONORABLE TRACY CHRISTOPHER: Nope.

20 CHAIRMAN BABCOCK: She's a voting kind of
21 person.

22 HONORABLE TRACY CHRISTOPHER: The more
23 votes, the better.

24 CHAIRMAN BABCOCK: So just to be clear, say
25 it one more time, Judge.

1 MR. BOYD: You better give all choices.

2 CHAIRMAN BABCOCK: Yeah, give the whole
3 vote.

4 HONORABLE DAVID PEEPLES: One choice, people
5 should be given a chance to vote to say they're in favor
6 of, if they are, of having some elements that judges who
7 want to do this have to do. For example, it might be in
8 writing, the questions have to be in writing and so forth,
9 but there ought to be some room for discretion. Some
10 aspects of it should be up to the trial judge in his or
11 her discretion.

12 MR. GILSTRAP: Is it if you choose to
13 exercise your discretion to submit questions then your
14 discretion is limited in this fashion? Is that what
15 you're saying?

16 HONORABLE DAVID PEEPLES: Yeah, there's A, B
17 and C, and we can talk about that would be required and X,
18 Y, and Z would be discretionary with the court, if you
19 choose to.

20 MR. SUSMAN: Is this just for discretion in
21 general, or do you have anything particular in mind?

22 HONORABLE DAVID PEEPLES: I happen to favor
23 what the subcommittee came in with right here, but there
24 might be some tweaking of that.

25 MR. SUSMAN: Like what?

1 HONORABLE DAVID PEEPLES: But some things
2 are in here are required. For example, you need to
3 explain to the jury how they do it and their questions
4 have to be in writing and not raising their hand. I would
5 say that ought to be mandatory. A judge shouldn't have
6 the discretion to allow oral questions, just raise your
7 hand.

8 MR. SUSMAN: But what would be
9 discretionary?

10 HONORABLE DAVID PEEPLES: Well, I think we
11 need to talk about that, but, for example, one of them
12 would be the discussion we had about whether the judge
13 should always read the question or maybe let the lawyers
14 read it or ask it. That, for example, I would be willing
15 to leave probably to the discretion of the court. I'd
16 want to hear the arguments on that, but I think there are
17 some people -- and I think I'm in this category -- that
18 would say if you're going to do it, there are some things
19 you would have to do, and there would be other elements
20 where you could do it one way or do it the other way in
21 your discretion, and I just don't think there was a chance
22 to vote for that when we voted 20 to 16.

23 MR. BOYD: How does that --

24 CHAIRMAN BABCOCK: Yeah, Jeff.

25 MR. BOYD: -- differ -- just so I'm clear,

1 how does that differ from what we did vote for?

2 CHAIRMAN BABCOCK: Well, Judge Peeples will
3 answer that.

4 HONORABLE DAVID PEEPLES: I don't think that
5 was expressly given as an alternative, and the record will
6 say what it was, but I'm kind of reluctant to say it now.
7 My recollection would be contradicted by the record, but
8 it might have been, you know, are you for discretion or
9 for having it mandatory.

10 CHAIRMAN BABCOCK: Well, we'll hear from
11 your appellate lawyer, Skip Watson.

12 MR. WATSON: But, Judge, I mean, I certainly
13 don't mind revoting on it, but I'm like you. I like the
14 draft. I just was telling Tracy I thought it was just
15 superb work, and I'm afraid if I vote for your proposition
16 that I'm voting to leave some of the things that you just
17 said are mandatory are out. I mean, I'm with Steve. Tell
18 me what's discretionary, then I can vote.

19 CHAIRMAN BABCOCK: Judge Yelenosky.

20 HONORABLE STEPHEN YELENOSKY: Well, I mean,
21 the big one that's been mentioned and we've been talking
22 about is whether the judge would have discretion to
23 receive questions, turn them over to the lawyers to do
24 with what they will, or not. I mean, that's the big one.
25 Maybe we take a vote on that.

1 MR. WATSON: Can we vote on that? Is that
2 okay, David, if we vote on that?

3 HONORABLE DAVID PEEPLES: Yeah, but I just
4 think to me I didn't want this draft to go to the Supreme
5 Court with a pathetic 20 to 16 vote of confidence. I
6 mean, I think if the committee were to vote up or down as
7 to whether to send this to the Court it would be better
8 than 20-16, but this is basically do it this way, but I
9 think there is some room for discretion.

10 MR. WATSON: But the discretion would be
11 beyond the draft that we have in front of us, to add
12 something to it as opposed to take something away from it.
13 That's what you're saying?

14 HONORABLE DAVID PEEPLES: There was some
15 sentiment expressed by some of our members for giving
16 judges discretion to do it one way or the other, and I
17 didn't want them to vote against this draft thinking there
18 was no such discretion, you know, and maybe they didn't.

19 HONORABLE STEPHEN YELENOSKY: Can you think
20 of any other issue that requires --

21 HONORABLE DAVID PEEPLES: Not right now.

22 HONORABLE STEPHEN YELENOSKY: I mean, to me
23 the draft is just fine if we want to eliminate discretion
24 to submit the questions to the attorney. The only thing I
25 would changes is -- maybe is make that discretionary. I

1 don't feel particularly strongly about that, but there's
2 been some support for that procedure in some cases. For
3 one thing, it's quicker.

4 CHAIRMAN BABCOCK: Jeff.

5 MR. BOYD: Just because the one other area
6 where there may be an issue about judge's discretion is
7 the one I brought up about whether the judge can exercise
8 discretion not to ask a question that the lawyers agree
9 should be asked and there is no objection.

10 CHAIRMAN BABCOCK: Buddy.

11 MR. LOW: I'm glad to know I wasn't the only
12 person confused. I'm not positive what we voted for, but
13 I was thinking the same thing that David is thinking,
14 because this draft says "must," and when somebody tells me
15 must, I either look for a way out or I do it. And I think
16 there are certain items that we can draft that you must
17 do, and my must list would be shorter than my
18 discretionary list, and I don't know what I'd put in must
19 and what discretionary, but I would sure give all the
20 discretion to the trial court. But there are certain
21 things that David has outlined that I think should be
22 done, and it's -- and I didn't get the idea that we were
23 voting or that we were voting more or less everything is
24 "must," and maybe I'm wrong.

25 CHAIRMAN BABCOCK: Judge Peeples, would this

1 be a way to frame your vote that would be perhaps more
2 informative to the Court? Could we vote on the language
3 of (b) (2) little (a) whether people favor the language as
4 drafted, "The trial court must read all of the following
5 instructions to the jury," et cetera, versus "The trial
6 court should read all of the following instructions."
7 That sort of gets right back to where Sarah started, but
8 Tracy is shaking her head, so --

9 HONORABLE TRACY CHRISTOPHER: I don't think
10 that's the issue, because I think in these five
11 paragraphs, I think based on my understanding of people's
12 comments, most of them agree with paragraph one, three,
13 four, and five. It's only paragraph two that is actually
14 a procedural paragraph that causes them problems. So I
15 would prefer a vote that removes paragraph two, because
16 otherwise I think it will be skewed because the people who
17 don't like paragraph two are going to vote no on whether
18 instructions must be read to the jury or not.

19 CHAIRMAN BABCOCK: Well --

20 HONORABLE TRACY CHRISTOPHER: And I think
21 most of them would agree it's a good thing to read
22 instructions to the jury. It's just a matter of what
23 instructions they are.

24 CHAIRMAN BABCOCK: Rusty.

25 MR. HARDIN: I would modify that even a

1 little bit more. I'm one of those who wants the lawyers
2 to be able to do it, as you know, but I don't see that
3 paragraph two prevents that. It looks to me as I read
4 this that you could do -- even those who feel the way I
5 do, if there is anybody else, about the lawyers doing it,
6 would not be precluded from doing it all the way through
7 the juror question form. Until you get to three on page
8 two you can make everything there mandatory, and then
9 people could tinker with language as far as the other
10 stuff if they want or decide out, but we could make -- I
11 wouldn't have any objection to making all of (a) through
12 (b), and there's (b) again. There's actually two (b)s,
13 but all the way through how the question -- juror question
14 form is to be. It seems to me that that would give
15 guidance to the trial courts that we're talking about,
16 they have to do it in every case, and then we could argue
17 about whether or not the other things could be
18 discretionary.

19 CHAIRMAN BABCOCK: So you say that (2)(a)
20 and (2)(b) should be mandatory?

21 MR. HARDIN: I'm comfortable with that, even
22 though if some of the other things are not, that way
23 everybody would have to -- every trial judge in the state
24 would know that if they're going to do questions --

25 CHAIRMAN BABCOCK: They've got to do this.

1 MR. HARDIN: -- they've got to start out
2 doing this.

3 CHAIRMAN BABCOCK: Judge Peeples, how do you
4 feel about that?

5 HONORABLE DAVID PEEPLES: I think I favor
6 that, and the more we talk about it I would kind of like
7 to have a vote on 265.1 as it is, making sure that anybody
8 in here who doesn't like that would say why or why not.

9 CHAIRMAN BABCOCK: Okay. Judge Yelenosky.

10 HONORABLE STEPHEN YELENOSKY: Well, I mean,
11 can't we just take a vote, because if I lose this vote
12 then I'm going to vote for it as-is. The question just is
13 should it be modified to allow what I said before, which
14 is that the questions would be given to the attorneys to
15 read. If so, (2) does need some modification because it
16 refers to the judge asking the questions, and if that's
17 voted down then, you know, we can move on. If it's voted
18 up then we just need to make that --

19 MR. HARDIN: Just making sure, I don't mean
20 to argue about this, but if you look at paragraph (2)
21 that's going to happen whether he allows the lawyers to do
22 it or not.

23 HONORABLE STEPHEN YELENOSKY: Well, it says
24 "Do not take it personally and do not assume that it is
25 important that I decided not to ask your question."

1 MR. HARDIN: That would be the only part of
2 that. You're right. Yeah. That one "I" does, but that
3 could read it it's important -- "and do not assume that it
4 is important that your question wasn't read."

5 HONORABLE STEPHEN YELENOSKY: Well, no, it
6 could be, but if everybody votes against having the option
7 then we would just leave it like it is. That's what I'm
8 saying, so I just want a straw vote on the option.

9 CHAIRMAN BABCOCK: Well, I'm afraid if we
10 take --

11 MR. RODRIGUEZ: I don't understand, because
12 I don't read this as saying that the judge doesn't have
13 the option. I mean, this doesn't say that the judge has
14 to ask the question or that he can't let the lawyers do it
15 the way Rusty did it in his trial or do it the way Steve
16 did in his trial.

17 HONORABLE STEPHEN YELENOSKY: Well --

18 MR. RODRIGUEZ: I don't read it that way,
19 and maybe that's my --

20 HONORABLE STEPHEN YELENOSKY: Well, I do. I
21 do. At least that last sentence.

22 CHAIRMAN BABCOCK: Okay. With deference to
23 everybody, I think it might be a better thing right now to
24 have a vote on whether (2) (a) and (2) (b) should be
25 mandatory versus discretionary. We can tinker with the

1 language later and, you know, somebody brought up the
2 issue of to clarify. I mean, that's an issue and there
3 are probably other issues, but once we're satisfied with
4 what the instructions are going to be, they ought to be
5 mandatory as opposed to discretionary. So everybody who
6 is in favor of making the instructions contained in (2)(a)
7 and (b) mandatory, raise your hand.

8 MR. SUSMAN: (a) is already discretionary,
9 right?

10 CHAIRMAN BABCOCK: Right.

11 HONORABLE TRACY CHRISTOPHER: Actually, it's
12 (b) (2) (a) .

13 CHAIRMAN BABCOCK: All those opposed? 31 to
14 3 in favor of making them mandatory. So now let's go
15 through them and see what we want to change about them, if
16 anything. And, Judge Peeples, we could have the vote
17 about whether just accept it as-is, but that way if we did
18 and everybody voted let's just leave it as -- we would be
19 deprived of a discussion about these things.

20 HONORABLE DAVID PEEPLES: And being true,
21 that's fine, but, you know, this is different from what
22 445 --

23 CHAIRMAN BABCOCK: Yeah. Yeah.

24 HONORABLE DAVID PEEPLES: -- does, and I
25 think Senator Wentworth and the Legislature just might be

1 interested in knowing how strongly we think it ought to be
2 different.

3 CHAIRMAN BABCOCK: So now they know 31 to 3.

4 HONORABLE DAVID PEEPLES: 31 to 3, yeah.

5 CHAIRMAN BABCOCK: Yeah, Buddy.

6 MR. LOW: Chip, what I really had in mind, I
7 don't see anything wrong with these musts, but we might
8 not have covered everything, so what I was talking about
9 is anything not specifically mandated here and above may
10 be instituted by the trial court.

11 CHAIRMAN BABCOCK: Right.

12 MR. LOW: Subject to abuse of discretion is
13 what I meant, something that may give rise to something we
14 haven't thought of, because a lot of things --

15 CHAIRMAN BABCOCK: Trial court could
16 supplement with supplementary instructions.

17 MR. LOW: Yeah, but couldn't be inconsistent
18 with that is what I really was thinking about.

19 CHAIRMAN BABCOCK: Good point. Richard
20 Munzinger.

21 MR. MUNZINGER: Eduardo's interpretation of
22 the rule is the same as mine. As it is presently written
23 it is not clear to the trial court whether the trial court
24 has discretion to allow the attorneys to ask the question
25 that the juror has written. I believe this is your

1 interpretation. I don't want to put words in your mouth.
2 But it is not clear whether the trial court may allow the
3 attorney to ask the question, one of the attorneys to ask
4 the question, whether the trial court itself should ask
5 the question. It's an ambiguity by omission. There is
6 nothing in here that says one way or the other. The
7 implication from the rule is, is that the judge is going
8 to read the question himself, but the rule does not so
9 require.

10 I would be in favor of removing any
11 ambiguity by omission and requiring the trial court to ask
12 the question rather than allowing one or the other lawyer
13 to ask the question in as much as some tactical advantage
14 or perceived tactical advantage could be obtained by
15 allowing a lawyer to be the person who is identified with
16 the subject of inquiry.

17 CHAIRMAN BABCOCK: How would you --

18 MR. MUNZINGER: All the lawyers, he wanted
19 to do that or whatever, and it puts the lawyer who didn't
20 ask the question or wasn't permitted to ask the question
21 in a disadvantageous position. The rule should say that
22 the judge will read the question, not the lawyers. Why I
23 take that position, again, I'm not one who is in favor of
24 a lot of arbitration. At the same time I appreciate the
25 fact that jurors and judges believe that our proceedings

1 as they are are too complicated, too time consuming, too
2 expensive, et cetera. So now any time that you do
3 anything at all that allows this procedure to go on or
4 makes it more complicated in my opinion you're working to
5 your disadvantage.

6 The point here is two qualified lawyers have
7 had this witness on the witness stand and asked questions,
8 cross, redirect, recross, et cetera. Both have now said,
9 "I pass the witness." I have done all I know how to do to
10 bring those points out to the court and to the jury. I'm
11 over with, and all of the sudden a juror has a question,
12 which the judge says, for whatever reason, "I'm going to
13 read this question." Instead of letting the judge do it
14 or having the judge do it he gives it to one of the
15 lawyers to have the lawyer do it, and that again, if I'm
16 the lawyer who didn't get to ask the question, I have to
17 ask myself, making a quick decision, have I been placed at
18 a disadvantage and I need to do something about it, and I
19 think the best way to do this is to make the court read
20 the question, even though he may reframe it, and then the
21 lawyers ask whatever questions they think are necessary
22 and then go on about your business.

23 MR. SUSMAN: I agree.

24 CHAIRMAN BABCOCK: There are three ways to
25 do it. The judge can do it, the lawyers can do it if they

1 want, or we can leave it so the judge can go either way.

2 MR. MUNZINGER: I understand, and my point
3 was that ambiguity in the rule in my opinion should be
4 changed so that it is clear that the trial court itself
5 must do the reading.

6 CHAIRMAN BABCOCK: Right.

7 MR. MUNZINGER: And all you trial judges
8 that say you want the discretion, I agree that you should
9 have the discretion, but as someone pointed out, not
10 everybody is a superstar. I have practiced all over the
11 state, and I'll tell you right now there are not --
12 everybody is not as smart as you, and more importantly
13 they're not all as honest as you, and that's a real
14 problem. A compromised bench is a real problem. It's one
15 of the reasons why we have a lot of arbitration.

16 CHAIRMAN BABCOCK: Okay, who had their hand
17 up? Rusty?

18 MR. HARDIN: Why would you want them to read
19 the question?

20 CHAIRMAN BABCOCK: R. H.

21 MR. WALLACE: Well, this gets back to my
22 argument earlier about giving the judge the discretion as
23 to how to deal with those questions. Paragraph (3), if
24 you omit the paragraph (6) the way it is now, which that
25 assumes the trial court is going to ask the question. I

1 agree. It doesn't say that anywhere, but the way it's
2 written, and if instead you said something -- and though
3 this is not great draftsmanship, but that the court may in
4 its discretion decide the manner in which the question is
5 posed to the witness and the appropriate follow-up
6 questions that may be asked by the party. To me that
7 leaves that whole area within the discretion of the trial
8 court as to whether they ask them, whether they allow the
9 parties to ask them, which one goes first, who goes
10 second, so I mean, if you're a discretion proponent,
11 that's something I would propose.

12 CHAIRMAN BABCOCK: So you would put that in
13 (4), subparagraph (4).

14 MR. WALLACE: In place of (6), I think is
15 probably where it would most go and it may be some --
16 because No. (6) is the one that assumes the judge is going
17 to ask the question.

18 CHAIRMAN BABCOCK: Okay. All right.

19 MR. WALLACE: And that's the only way it's
20 going to be. That's the way I would do it.

21 CHAIRMAN BABCOCK: Buddy.

22 MR. LOW: One thing also is not -- there's
23 nothing in this rule that says if I were the judge I would
24 tell them before I started, I would say, "This is not my
25 question. This is not any of the lawyers' question. This

1 is a juror question." In other words, the judge got --
2 should have discretion to do that, not just one, two,
3 three.

4 CHAIRMAN BABCOCK: Well, it seems to me like
5 this debate is getting to the point where either we're
6 going to mandate that the judge ask the question, or we're
7 going to let the lawyers ask it at their option, or we're
8 going to give the judge discretion on how he does it.
9 Those are the three things. And we should all -- we all
10 -- it ought to be clearer whatever we decide.

11 MR. LOW: I didn't mean I'm -- I was
12 assuming that the judge is going to ask the question. I'm
13 for that. And I'm going back to my little tail-end thing
14 I put where the judge may have discretion. If he wants to
15 he can tell them specifically "It's not my question."

16 CHAIRMAN BABCOCK: Right. I hear you.
17 Yeah, Gene.

18 MR. STORIE: I have I guess a psychology
19 question, and Richard, I would ask it to you in
20 particular. That is, why is it an advantage to ask the
21 question and why is the implication not something like
22 this lawyer was either too dumb to think of getting this
23 fact out or else was trying to cover something up?

24 MR. MUNZINGER: It could be either way. But
25 the effect of having the lawyer ask the question is that

1 it's going to prolong the -- potentially prolong the
2 trial, may not, but if the judge asks the question it's
3 the jury procedure that, as the rule contemplates, the
4 judge ask the question for the juror. The lawyers are
5 free to go into it or not, but psychologically I don't
6 know whether it would be an advantage to me or not, but it
7 could be, and that's -- I'm not -- heck, every lawyer has
8 a different view of what he has to do in court in every
9 different case, and if I thought that some juror had
10 raised something really significant and the judge lets my
11 adversary ask the question, I may prolong my case by
12 calling other witnesses. There's no telling what I would
13 do. I don't know.

14 CHAIRMAN BABCOCK: Steve, then Rusty.

15 MR. SUSMAN: I have some minor questions
16 about the wording of the thing. I've already expressed
17 the view that I think the judge should be asking the
18 questions.

19 CHAIRMAN BABCOCK: Yeah.

20 MR. SUSMAN: Why must the court inform the
21 jurors before voir dire? What's the magic about that? I
22 mean, in our case in fact we didn't decide it until after
23 the jury was seated. So it seems to me that clearly the
24 judge needs to form the jury and read this instruction
25 before the first witness is excused. And again, the

1 instruction says "after the jury is seated." I would say
2 maybe you should say "before the first witness testifies"
3 or something like that, because you don't really need this
4 instruction before opening statement, opening argument,
5 right? It's before the witness testimony.

6 I also think that you should change -- it
7 says "in this trial" -- the instruction -- "this trial
8 after the parties have asked their own questions of each
9 witness and before each witness is excused from the
10 stand," comma, "you can write and submit any questions,"
11 to make it clear that you're not going to be calling back
12 witnesses to answer any of the questions that they come up
13 with later, and after -- down the first paragraph of this,
14 the second line from the bottom, "Your question should
15 not" -- "Your question should not give any opinion about
16 the case, criticize the case, identify who you are, or
17 comment on the case in any way." You don't want them
18 including in the question anything that will allow the
19 lawyers to identify who they are, particularly if the
20 judge is inclined to read it verbatim, and that is
21 actually in the questionnaire form. They are not supposed
22 to sign it for that reason, supposed to be anonymous, but
23 I would make those changes.

24 MR. HARDIN: I'm just worried about telling
25 a judge he has to do something in a given situation other

1 than these general instructions, tell him he has to follow
2 a certain -- him or her a certain procedure. What occurs
3 to me is that we're in trial, and Steve talks about a deal
4 where he and David decided, no, we don't want to go down
5 that trail, so they didn't go down it, but you can't count
6 on your opposing counsel always being that way. Some of
7 us are not all that agreeable in trial, and so you may end
8 up with a situation where the lawyer that the question is
9 directed to deliberately does not want to go down that
10 trail, but the judge says, "This says I've got to read
11 it," and that's -- that to me is what happens every time
12 we start telling judges what they have to do.

13 HONORABLE DAVID EVANS: With the exception
14 of the judges here, there may be some judges you wouldn't
15 want to ask the questions, and lawyers would rather just
16 have the two lawyers work it out.

17 MR. HARDIN: Thank you.

18 HONORABLE DAVID EVANS: You get a
19 nonresponsive answer on a witness, and the judge is asking
20 the questions, you could have a judge just go off and
21 right off the bench, and before you know it your witness
22 is destroyed, and I could see a lot of reasons for trying
23 a lawsuit where I would say, "No, Judge, you know, we'll
24 just work that out between us and we'll reopen it."

25 MR. HARDIN: What happens if the witness --

1 what happens if the witness asks the judge a question?
2 The judge reads the question, say, "Now, Judge, what about
3 so-and-so?" What's the judge can do?

4 HONORABLE DAVID EVANS: I guess I would
5 object to the question, you know, but really from my
6 perspective there are cases where lawyers may not want a
7 particular judge to do interrogation.

8 CHAIRMAN BABCOCK: David Jackson.

9 MR. JACKSON: I'm sitting here listening to
10 the debate, and I can see the lawyers using the
11 opportunity to ask the question as a chance to sell
12 himself to the juror who came up with this question. Like
13 "This is an excellent question. I wish I had thought of
14 this question." You know, I can see lawyers doing that
15 sort of stuff, so I think coming from the judge is how I
16 would want it.

17 CHAIRMAN BABCOCK: Roger.

18 MR. HUGHES: Well, I favor that the judge
19 ask the question and that for all of the reasons above I
20 would just add this. My experience generally is that if
21 the question is asked by the judge the witness doesn't
22 fence with the judge. He answers the question, she
23 answers the question, fairly straight up and fairly much
24 to the point, because the judge is not going to tolerate
25 shilly-shally; whereas if the person who didn't call the

1 witness to the stand is going to ask the jury's question,
2 the witness may fence with them a little bit, so I tend to
3 favor that.

4 The other thing is if you have the -- the
5 situation where you don't want the judge asking that
6 question, well, maybe that's a good time to ask to reopen
7 the examination for your side and start it over again, and
8 that would be a matter for a judicial discretion.

9 CHAIRMAN BABCOCK: Okay. Judge.

10 HONORABLE TRACY CHRISTOPHER: In 226a we
11 have the following statement about the standard
12 instructions that we give all the time. We say that "The
13 following oral and written instructions, with such
14 modifications as the circumstances of the particular case
15 may require shall be given by the court to the jury." So
16 my suggestion is, is that we add that language in to give
17 people a little bit more comfort that the judge can sort
18 of modify the instructions if they want to, right up there
19 at (2)(a). We can just say, "The trial court may modify
20 these instructions as the circumstances of the particular
21 case may require." So that gives you the ability as time
22 goes on to, you know, add a few things, delete a few
23 things, that sort of thing, as the process evolves.

24 I accept Steve's suggestion of adding in
25 "and before each witness is excused." I think that's

1 probably a good suggestion to that first sentence. And
2 for me, I've heard good reasons pro and con on, you know,
3 letting the lawyers ask the questions, and I guess I would
4 vote to make it discretionary, to have it either way and
5 in the judge's discretion.

6 CHAIRMAN BABCOCK: Either way in the judge's
7 discretion. Okay. Judge Yelenosky.

8 HONORABLE STEPHEN YELENOSKY: Well, I'm
9 sensitive to the point that's been made that there are
10 some 600 judges out there and all but maybe I guess five
11 or six trial judges who are here aren't going to get the
12 benefit of this discussion. They're just --

13 MR. HARDIN: And JPs.

14 HONORABLE STEPHEN YELENOSKY: I said trial
15 judges.

16 MR. HARDIN: But your numbers weren't right.

17 HONORABLE STEPHEN YELENOSKY: Oh, I'm sorry.
18 Seven or eight, whatever. I'm sensitive to the idea that
19 they will get the rule, and although it doesn't say you
20 can't do something, it doesn't say you can. I'll know
21 that I can just -- if it's ambiguous that I can just
22 submit the questions to the attorneys, but how will they
23 know that?

24 HONORABLE TRACY CHRISTOPHER: I think we
25 would have to modify No. (6).

1 HONORABLE STEPHEN YELENOSKY: Well, I think
2 I agree -- earlier it was said it's ambiguous and that
3 leaves discretion. I would rather know that I have the
4 discretion and they know that they have the discretion to
5 do it or not rather than it be ambiguous. So, you know,
6 I -- either I win or lose, fine, but let's be clear for
7 the trial judges who aren't here so they know whether they
8 have to read the questions or whether instead they can
9 give them to the attorneys.

10 CHAIRMAN BABCOCK: Yeah, Richard. Then
11 Buddy.

12 MR. MUNZINGER: That is a weakness to the
13 current draft of the rule, and it's a point that I think
14 Bill Dorsaneo just said on a different subject earlier.
15 We have some guidance or rules to the trial court that are
16 included in the text of the instructions to the jury but
17 are not set out to guide the trial court. For example,
18 where in this rule do we tell the trial court you should
19 or must have the -- solicit written questions from the
20 jury after each live witness? That doesn't appear in the
21 text of the rule. It appears in the instruction to the
22 jury, but not in the text of the rule. Why do --

23 HONORABLE TRACY CHRISTOPHER: I agree with
24 that one missing.

25 MR. MUNZINGER: -- we have a statement in

1 the rule that the question of whether or not the judge
2 should read the question is guided by the Rules of
3 Evidence and Procedures contained in the instruction to
4 the jury, but not in the formative statement to the court
5 that that is the rule that will govern what you do here.
6 My point is you've covered the subject matter of the
7 issue, but you've put it in the instructions to the jury,
8 as distinct from a separate paragraph that would give
9 guidance to the trial court.

10 CHAIRMAN BABCOCK: Buddy.

11 MR. LOW: Chip, there's some that think that
12 the lawyers, if the lawyers decide a certain way, they
13 decide it, then what would be wrong with a rule except by
14 agreement of counsel the judge must read it? In other
15 words, it gives rise to the lawyers if they want to agree
16 who is going to read it; but I can tell you, you can ask
17 the same question, two different lawyers, one is going to
18 say "Did you actually see that," and "did you actually see
19 it?" I mean, there are different ways of asking the
20 question.

21 CHAIRMAN BABCOCK: Okay. Yeah, Hugh Rice.

22 MR. KELLY: If you want a war story, we had
23 Judge Louis Dixon for years was declining in health
24 because of Parkinsonism. In his last year and a half,
25 nobody could understand a damn word he said. You wouldn't

1 want him to do it.

2 MR. GILSTRAP: There you go.

3 CHAIRMAN BABCOCK: It seems to me that we --

4 MR. KELLY: The lawyers had to all agree
5 what his rulings were.

6 MR. LOW: I know.

7 CHAIRMAN BABCOCK: We're going to take a
8 vote on how many people think it ought to be the judge
9 asking the questions, how many people think it ought to be
10 the lawyers asking the questions, and how many people
11 think it ought to be the judge's discretion to do it one
12 way or the other. Can we do a vote on that?

13 MR. MUNZINGER: Yeah.

14 CHAIRMAN BABCOCK: How many people think it
15 ought to be the judge asking the questions?

16 How many people think it ought to be the
17 lawyers asking the questions? Dissenting again.

18 HONORABLE TOM GRAY: Wait a minute, I think
19 Rusty would vote for that if he was in here.

20 HONORABLE JANE BLAND: No, he gave me his
21 proxy vote for -- to option.

22 CHAIRMAN BABCOCK: You've got to be present
23 to win.

24 HONORABLE TOM GRAY: That's right, present
25 to win.

1 CHAIRMAN BABCOCK: How many people think the
2 judge ought to have discretion to do it either way?

3 HONORABLE TRACY CHRISTOPHER: Jane's got two
4 hands up to vote for Rusty.

5 HONORABLE JANE BLAND: Yeah, the last thing
6 he just said is when this vote goes, vote for discretion.

7 HONORABLE STEPHEN YELENOSKY: And I heard
8 it.

9 CHAIRMAN BABCOCK: Okay. Here's the vote.
10 14 for the judge doing it, 1 for the lawyer asking the
11 questions, although, Rusty, we speculate in absentia might
12 have voted for that, and then 22 saying the judge should
13 have discretion to do it one way or the other. So that's
14 a good read.

15 Judge Christopher, should we go down through
16 these paragraphs one by one to see if anybody has comments
17 on them?

18 HONORABLE TRACY CHRISTOPHER: Sure. I think
19 the one that I got most questions on at lunch was the
20 limitation of clarification of the testimony. Some people
21 thought that that was too limiting.

22 CHAIRMAN BABCOCK: Yeah. The sentence that
23 says "any questions you submit should be to clarify the
24 testimony the witness has given"?

25 HONORABLE TRACY CHRISTOPHER: Right.

1 CHAIRMAN BABCOCK: Okay. Yeah, Steve.

2 MR. SUSMAN: No one has answered the
3 question why the timing of before voir dire.

4 HONORABLE TRACY CHRISTOPHER: Oh, I did.

5 CHAIRMAN BABCOCK: She accepted that.

6 MR. SUSMAN: Oh, she accepted that? I
7 didn't hear you.

8 HONORABLE TRACY CHRISTOPHER: No, no, no. I
9 did not.

10 MR. SUSMAN: See, I didn't think she
11 accepted it.

12 HONORABLE TRACY CHRISTOPHER: The reason why
13 to do that is I think it could affect the voir dire
14 strategy as to you might want to ask people, "Are you the
15 kind of person that likes to ask questions? Are you" -- I
16 mean, "the kind of person that likes to take notes?"
17 Those little facts might be useful to a lawyer in picking
18 the jurors, so, you know, interest of full disclosure, if
19 I'm going to allow it, I think we ought to allow it before
20 voir dire, and the lawyers can talk about it if they want
21 to.

22 MR. LOW: What if it's like his case and
23 they didn't even think of it or agree to till after? Then
24 they couldn't do it.

25 MR. SUSMAN: Can you -- Tracy, could you

1 word it in a way that if the lawyers ask, the court should
2 do it?

3 HONORABLE TRACY CHRISTOPHER: Sure.

4 MR. SUSMAN: I mean, the last thing you're
5 thinking about when you're thinking about conducting voir
6 dire is are these jurors going to be able to ask
7 questions, and we don't want to eliminate the possibility
8 of doing it simply because the lawyers forgot to do it.

9 HONORABLE TRACY CHRISTOPHER: Okay. Yeah,
10 we can put that in there.

11 CHAIRMAN BABCOCK: Do that. Okay, great.
12 What about this issue about "to clarify"? Yeah, Ralph.

13 MR. DUGGINS: I have one suggestion. Not on
14 that point, but I would suggest inserting "live" before "a
15 witness" in that first line, and this is real picky. I
16 would change "can" to "may" since it sounds better.

17 HONORABLE TRACY CHRISTOPHER: You know, I
18 don't think jurors will understand what we mean by "a live
19 witness."

20 CHAIRMAN BABCOCK: As opposed to a dead one.

21 HONORABLE TRACY CHRISTOPHER: As opposed to
22 a dead one. Especially if we're reading this right at the
23 beginning. They'll be like, "A live witness?"

24 HONORABLE STEPHEN YELENOSKY: "A witness who
25 appears in person."

1 MR. DUGGINS: Whatever. I was just trying
2 to address the issue earlier about that this rule should
3 have no application to a deposition, a witness who
4 testifies through an oral or written deposition.

5 HONORABLE TRACY CHRISTOPHER: I already
6 agreed with Skip that we did skip a step, and my step
7 would be to make step (b)(3), "At the end of each live
8 witness, the judge will ask the jurors to pass the juror
9 question form to the bailiff with any questions that they
10 have for that witness." And so then the judge would know
11 he was supposed to gather the forms at that point.

12 CHAIRMAN BABCOCK: Okay. Hugh Rice. Then
13 Bill.

14 MR. KELLY: You know, if a witness testified
15 by deposition, the supplemental questions could be by
16 depositions, usually not that hard, particularly if the
17 guy's local. If it's a doctor, you get him after hours,
18 take him on for 15 minutes.

19 MR. RODRIGUEZ: No, no, no.

20 MR. KELLY: No?

21 HONORABLE STEPHEN YELENOSKY: No.

22 MR. KELLY: It's been done in cases I have
23 been in.

24 CHAIRMAN BABCOCK: Bill.

25 PROFESSOR DORSANEO: I was looking at these

1 approved instructions, and it does appear that voir dire
2 doesn't start until the lawyers start asking questions.
3 That's what you mean by -- not "Thank you for being here.
4 We are here to select a jury." It hasn't started yet.

5 HONORABLE TRACY CHRISTOPHER: True, I mean,
6 I can't imagine that I would interrupt at some point and
7 say, "Oh, by the way, we're going to let the jurors ask
8 questions."

9 PROFESSOR DORSANEO: No, but you have this
10 before voir dire, voir dire.

11 HONORABLE STEPHEN YELENOSKY: Voir dire.
12 That's the Texas --

13 PROFESSOR DORSANEO: Well, it depends on a
14 lot of things, but --

15 HONORABLE TRACY CHRISTOPHER: Well, I didn't
16 want to say "before trial begins." I did want it to be
17 before voir dire.

18 PROFESSOR DORSANEO: I just wondered whether
19 you meant you're supposed to do this -- if you look at the
20 approved instructions, the first thing the judge says is
21 "Thank you for being here." Does this have to be done
22 before that or does it -- if it's done, does it have to be
23 done a couple of paragraphs lower? "They will ask you
24 some questions during jury selection, which we call voir
25 dire, but before we begin voir dire," which kind of

1 suggests that we haven't begun voir dire yet, we're just
2 talking.

3 HONORABLE TRACY CHRISTOPHER: Well, now
4 you're back on 226a.

5 PROFESSOR DORSANEO: Yeah. I want to know
6 when in your rule does voir dire start.

7 HONORABLE TRACY CHRISTOPHER: When the
8 lawyers start to ask the questions --

9 PROFESSOR DORSANEO: Okay.

10 HONORABLE TRACY CHRISTOPHER: -- is the
11 technical legal definition of when voir dire begins and/or
12 a juror questionnaire that exceeds the standard question
13 mandated by the state.

14 CHAIRMAN BABCOCK: Richard Orsinger.

15 HONORABLE TRACY CHRISTOPHER: In my opinion.

16 MR. ORSINGER: I would like to speak more
17 forcefully than has been so far that I don't think it
18 should be limited to clarifying questions, and I don't
19 think a lawyer should be able to object to a juror
20 question because it's not clarification and instead it's
21 an omitted topic. The point, I think, to having the
22 jurors have more participation in the trial is to be sure
23 that the evidence that they're hearing is the evidence
24 that answers their questions; and if the lawyers have
25 either consciously or unconsciously omitted to say

1 something that's important, I don't think that that should
2 preclude a juror asking a question. It's compounded on
3 page two where it says -- the form says "to clarify any
4 confusion." So a juror probably would say, "Gosh, well, I
5 guess if I'm not clarifying confusion, I can't ask a
6 question," and it may be in a sense that any question a
7 juror has is confusion, but I just think it's going to be
8 arguments between lawyers as to whether this clarifies
9 something or whether it goes into a new area.

10 CHAIRMAN BABCOCK: Frank. Sorry.

11 MR. ORSINGER: Also, I don't like the
12 repeated use of the term "parties" as the ones who are
13 reviewing the questions and making the objections. You
14 know, when I voir dire a jury, I always tell them, "Please
15 understand it's the attorney's professional responsibility
16 to make objections to the evidence, whether they're
17 sustained or not. If you won't hold it against my
18 client," and this is written to make it look like the
19 parties are the ones who are driving the decision on
20 whether or not the question is asked. I think they
21 understand the lawyers' role is to make objections, and I
22 think we ought to use "attorneys" throughout here instead
23 of "parties" on both of these pages.

24 And then lastly, the one, two, three, fourth
25 paragraph on page one is really not a comment about the

1 questioning process. It's more of a comment about the
2 role of the jurors generally and keeping their minds open
3 and the fact that they can deliberate later. We already
4 say that in other parts of the instruction to the jury.
5 Maybe this is salutary to remind them that they shouldn't
6 take sides in their questions. On the other hand, you
7 know, you could argue that this is already covered
8 elsewhere. I'm talking about the one that says,
9 "Remember, you are neutral. Keep an open mind. In the
10 privacy of the jury room you can deliberate," and I don't
11 know if it's necessary. I don't know that it's harmful,
12 but I don't know if it's necessary to say that in the
13 middle of this rule.

14 CHAIRMAN BABCOCK: Okay. Stephen, and then
15 Elaine.

16 HONORABLE STEPHEN YELENOSKY: Well, I just
17 have a question because Richard pointed out something that
18 hadn't occurred to me. Is this first sentence intended to
19 change the Rules of Evidence such that there's now an
20 objection that a juror question goes beyond clarification?
21 Because those are two separate issues. We might want to
22 say it's not an objection, but nonetheless we want to
23 instruct jurors to try to keep their questions to
24 clarification. So I think we need to resolve that.

25 CHAIRMAN BABCOCK: Okay. Elaine.

1 PROFESSOR CARLSON: Judge Christopher, my
2 recollection on some of our subcommittee discussions were
3 the subcommittee was fairly divided at what point the use
4 of juror questions is disruptive of the adversarial
5 process, and I thought that we had -- the subcommittee
6 compromise anyway was perhaps the best beginning of the
7 use of juror questions would be to limit it to
8 clarification as opposed to the jurors doing the
9 advocating and bringing in new and different topics.

10 HONORABLE TRACY CHRISTOPHER: I think that
11 that is the fear with juror questions. Now, perhaps we
12 could phrase it a little more broadly than it is, and I
13 certainly don't expect that to be a real objection in the
14 trial, but if you just tell them "You can ask questions,"
15 what are they going to ask questions about? You have
16 to -- you know, we want them to ask a question that's
17 pertinent to what the witness just testified about. We
18 don't want them to ask, "Well, are you asking for
19 attorney's fees," when, you know, it's four witnesses down
20 about attorney's fees, or --

21 HONORABLE STEPHEN YELENOSKY: "How much
22 money do you make?"

23 HONORABLE TRACY CHRISTOPHER: You know,
24 "Where is the wife?" You know, that's what I'm afraid if
25 we don't limit what kind of a question they can ask, that

1 we'll just get sort of these off-the-wall questions that
2 don't really pertain to what the witness testified about.
3 Now, we can work with it, but that was the idea.

4 CHAIRMAN BABCOCK: Lamont, then Judge
5 Sullivan.

6 MR. JEFFERSON: I thought Mike Hatchell's
7 comments earlier about what's going on in Florida was
8 instructive, and I think that that's kind of what we would
9 expect to see or I would expect to see in Texas, is that
10 if a jury gets that -- I mean, I think we're giving too
11 much credit to juries to ask the right questions. I don't
12 think a jury is going to come up with the -- you know, the
13 turning point question that's going to make the case. The
14 value of allowing them to ask questions is two-fold. One,
15 it allows them to participate in the process, and then it
16 gives the lawyers an idea of whether they're connecting
17 with the jury. So it's most important the jury gets to
18 ask any question that they want to ask so that the lawyers
19 have an idea of whether the evidence that they're spending
20 all their time presenting is making an impact. It's not
21 so much that we're going to get, you know, some great
22 epiphany from a juror's question. The lawyers do a pretty
23 good job of asking questions. The issue is whether we can
24 tell from the jury's communication back that there is
25 actually a connection.

1 CHAIRMAN BABCOCK: Buddy.

2 MR. LOW: They could ask, "Did anybody
3 interview so-and-so? Is he going to testify?" It could
4 be a number of questions. "Did anybody look at the
5 weather reports?" I mean, they could just ask unlimited.
6 It should be directed to a question that they feel that
7 juror has information -- that witness has information on.

8 HONORABLE TRACY CHRISTOPHER: Right.

9 CHAIRMAN BABCOCK: Eduardo.

10 MR. RODRIGUEZ: Well, I mean, that's why the
11 judge looks at the questions and decides whether they're
12 asked or not. I mean, if they ask something about how
13 much he makes, he's not going to ask that question. I
14 mean, you know, I've tried in South Texas cases with jury
15 questions; and, you know, the jurors' questions always
16 pertain to what the witness had just testified about.
17 They didn't go off in opposite directions, but some of
18 them were not appropriate and the judge didn't ask them.
19 I mean, that's why you have judges there to look at the
20 questions that are presented, and he decides whether they
21 should be asked or not.

22 CHAIRMAN BABCOCK: What if we changed "to
23 clarify" to "relevant to"? Would that help or hurt?

24 HONORABLE TRACY CHRISTOPHER: I'm not sure
25 "relevant to" is a really great word for the jury.

1 CHAIRMAN BABCOCK: Okay. Judge Sullivan.

2 HONORABLE KENT SULLIVAN: Just one thought
3 that I had as we discussed this is that when you're
4 talking about questions of relevance and issues of juror
5 empowerment generally and the possibility of opening up
6 any subject matter to the jury for questions, one problem
7 we have in our current process is that we do not empower
8 jurors with any information about what the ultimate issues
9 necessarily are. In other words, the judge really hasn't
10 told them what questions they are likely to have to
11 ultimately answer. In some cases it may be obvious, but
12 in other cases, of course, it may be absolutely not
13 obvious at all, and since we give no clue as to what the
14 jury charge is likely to be, it becomes potentially
15 problematic in this area to the extent that we don't have
16 any subject matter specific information to jurors as part
17 of this or case specific information to jurors as part of
18 this process.

19 CHAIRMAN BABCOCK: Well, for the people that
20 don't like "to clarify" what would be a better word or
21 words? Bill?

22 PROFESSOR DORSANEO: I don't like "to
23 clarify" because that just does suggest that "What did he
24 mean when he said that?"

25 CHAIRMAN BABCOCK: Right.

1 PROFESSOR DORSANEO: And that's obviously
2 too much of a limitation.

3 CHAIRMAN BABCOCK: You think it's too
4 limiting.

5 PROFESSOR DORSANEO: Yeah. And I don't like
6 "relevant" because it's too --

7 CHAIRMAN BABCOCK: Broad?

8 PROFESSOR DORSANEO: Well, it's too
9 amorphous really.

10 HONORABLE TRACY CHRISTOPHER: How about
11 "should be about the testimony"?

12 PROFESSOR DORSANEO: I would say "concern
13 the matters about which the witness testified."

14 HONORABLE TRACY CHRISTOPHER: Just "about."
15 Just "about."

16 PROFESSOR DORSANEO: Yeah, "about the
17 matters."

18 HONORABLE TRACY CHRISTOPHER: "should be
19 about the testimony the witness has given."

20 MR. LOW: Why do you have "about"? Just
21 "concerning the matters."

22 MR. MUNZINGER: How is that functionally
23 different from "clarify"?

24 PROFESSOR DORSANEO: I like "concern"
25 better. "Concern the matters about which the witness

1 testified."

2 CHAIRMAN BABCOCK: Say that again.

3 MR. MUNZINGER: How is that functionally
4 different from asking --

5 MR. BOYD: Still limited to the scope.

6 MR. MUNZINGER: -- "clarify testimony of the
7 witness"?

8 PROFESSOR DORSANEO: Well, it's a subtle
9 difference, but I think if I'm told I'm supposed to get
10 clarification, I'm really thinking like "Did you mean this
11 or did you mean that" rather than, you know, "What's a
12 plat?"

13 CHAIRMAN BABCOCK: Hugh Rice.

14 MR. KELLY: Would "related to" be any
15 better?

16 MR. RODRIGUEZ: You know, we're thinking
17 like lawyers instead of like jurors. I mean, this is for
18 jurors. I mean, "clarify" and "related to" may be some
19 language that some of our jurors unfortunately are not --
20 don't know what they mean.

21 CHAIRMAN BABCOCK: Is there anybody here
22 that can speak jury?

23 MR. RODRIGUEZ: "About what he testified" is
24 closer to what they're thinking.

25 HONORABLE TRACY CHRISTOPHER: It's "about."

1 MR. KELLY: How about "something to do
2 with"?

3 CHAIRMAN BABCOCK: Jeff, and then Steve.

4 MR. BOYD: It seems like we either have to
5 limit the discussion to the scope of the direct and cross,
6 which is what "clarify" and "concern" and "related to the
7 testimony" do, or you limit it to information that's
8 relevant to the issues in the case, which is what the
9 objections are for, and I don't -- I'll weigh in with
10 those who say you shouldn't limit it to the scope of
11 direct and cross. We don't do that in Texas for lawyers'
12 questions, and I don't know why the judge can't rule on
13 objections if the question is not relevant to the issues
14 in the case, and so I would delete the sentence
15 completely, and if the jury asks a question about, "Well,
16 what does your wife do a for a living, I think I know
17 her?" "Objection, that's irrelevant," and the judge
18 strikes the question.

19 CHAIRMAN BABCOCK: Steve.

20 MR. SUSMAN: I agree, too, but I think the
21 solution is to eliminate that sentence, just "any
22 questions you have for that witness" and then the judge
23 has -- and then the lawyers, working with the lawyers,
24 decides whether it's a proper question or not. It may not
25 be a question that clarifies the testimony. It may be the

1 witness didn't testify to something that the juror is
2 curious about. "Why didn't this something happened?"
3 Okay. "Why didn't someone make a call" or, you know, "Why
4 didn't you complain to so-and-so?"

5 CHAIRMAN BABCOCK: Hayes.

6 MR. FULLER: I realize we're searching for
7 the truth and, you know, woe be it that everybody has won
8 a trial because somebody on the other side forgot to do
9 something, but having survived someone's direct case and
10 then having them fail to prove each and every element of
11 their claim, are we now going to allow the juror to come
12 in and save the other side?

13 CHAIRMAN BABCOCK: That was sort of Judge
14 Lawrence's point, that the parties frequently forget to
15 put on any evidence of damages.

16 MR. FULLER: I think if you limit it to the
17 scope, you know, you've at least got a slim chance that
18 they're not going to be able to go beyond the scope, and
19 if they fail to do it, it may not make any difference, but
20 that is a bit of a concern.

21 CHAIRMAN BABCOCK: Tracy, how do you feel
22 about the sentence going away, the clarifying sentence?

23 HONORABLE TRACY CHRISTOPHER: I would prefer
24 to leave the sentence in and change "to clarify" to the
25 word "about."

1 CHAIRMAN BABCOCK: And you deliberately want
2 the questions --

3 HONORABLE TRACY CHRISTOPHER: Limited.

4 CHAIRMAN BABCOCK: -- limited to
5 clarification.

6 HONORABLE TRACY CHRISTOPHER: I do.

7 CHAIRMAN BABCOCK: Okay. That's a pretty
8 good thing to vote on, isn't it? Leave the sentence in,
9 take it out. Okay. Everybody that wants to leave the
10 sentence in, raise your hand.

11 Everybody that wants to take it out, raise
12 your hand. Okay. By a vote of 20 to 10, leave it in.

13 HONORABLE STEPHEN YELENOSKY: And does that
14 answer the question as to whether there's now a scope
15 objection?

16 CHAIRMAN BABCOCK: That's Tracy's intent,
17 yeah.

18 HONORABLE STEPHEN YELENOSKY: Well,
19 originally it wasn't. She said it wasn't her intent to
20 add an objection.

21 CHAIRMAN BABCOCK: She's been persuaded.

22 HONORABLE STEPHEN YELENOSKY: So you think
23 there should be an objection that it's beyond the scope?

24 HONORABLE TRACY CHRISTOPHER: I mean, I
25 think it's one of the things that we would talk about at

1 the bench. I'm not saying that -- and which is why I gave
2 the trial judge the discretion not to ask the question at
3 all.

4 CHAIRMAN BABCOCK: Right.

5 HONORABLE TRACY CHRISTOPHER: Which
6 normally, you know, I don't have the discretion to say to
7 you, "Hey, don't ask that question."

8 HONORABLE STEPHEN YELENOSKY: But I think
9 the trial judges need some guidance on that, because, you
10 know, whether they get -- I mean, the rules right now say
11 that, you know, direct us on scope, so why wouldn't this
12 rule tell us whether juror questions are limited to scope
13 or not?

14 CHAIRMAN BABCOCK: Bill.

15 PROFESSOR DORSANEO: Is this kind of what
16 you're thinking about? Let's say it's a contract case,
17 consequential damages are claimed, and the juror question
18 is, "Well, was that loss within the contemplation of the
19 parties at the time the contract was made?"

20 HONORABLE STEPHEN YELENOSKY: Well, I wasn't
21 thinking --

22 PROFESSOR DORSANEO: I mean, what would you
23 do with that?

24 MR. ORSINGER: That means you've got a
25 lawyer on the jury.

1 HONORABLE STEPHEN YELENOSKY: You might. I
2 wasn't thinking of that precise one, no.

3 PROFESSOR DORSANEO: Well, there are a lot
4 of others that could be like that.

5 HONORABLE STEPHEN YELENOSKY: Right. Sure.

6 PROFESSOR DORSANEO: Personally I don't
7 think lawyers should have enough of a stake in winning or
8 losing for that question to be kept out, since it's very,
9 you know, pertinent under the law.

10 HONORABLE TRACY CHRISTOPHER: Well --

11 PROFESSOR DORSANEO: But I could see other
12 times in this committee people have thought this should be
13 more like a game between us rather than a game that
14 concerns itself with whether the right questions are
15 asked.

16 HONORABLE TRACY CHRISTOPHER: I don't think
17 that it would become a legal objection. The way I
18 envisioned it, suppose they did ask a question about
19 damages that had not been brought up yet. All right.
20 Well, that's not clarifying the witness' testimony.
21 That's something new that they forgot to ask about. Well,
22 I wouldn't prevent the asking of that question. I might
23 say, "Oh, Mr. Plaintiff's lawyer, looks like you need to
24 ask this question yourself," okay, because we do have the
25 right in Texas to freely recall our witnesses any time we

1 want to, so even though I had passed the plaintiff and had
2 failed to ask him about future pain, I could, you know,
3 let him sit down and call him right back up and ask him
4 about that.

5 So my idea in having that language in the
6 instruction is to just sort of try to limit kind of the
7 off-the-wall questions that you would get from the jury
8 about other witness' testimony or other things that are
9 not really pertinent to that witness, and that's where I
10 kind of went down to the idea of, well, you know, that's a
11 question that the lawyer ought to be asking, not the
12 judge, if they've forgotten some element of damages or
13 something. So I kind of like the idea to go back to that
14 discretionary.

15 CHAIRMAN BABCOCK: Bill.

16 PROFESSOR DORSANEO: Mike, those things from
17 Florida that were wacky, were they questions that were
18 asked or questions that were proposed and not asked?

19 MR. HATCHELL: They were so wacky that the
20 judge wouldn't put them on the record.

21 PROFESSOR DORSANEO: How do you know they
22 were so wacky then if you don't know what they were?

23 MR. HATCHELL: You could tell from the
24 conversations between the lawyers and the judge, like
25 "Well, you're not going there." Well, most of the time, I

1 mean, the judge would show it to the lawyers, and they
2 could not even figure out what the question was.

3 CHAIRMAN BABCOCK: Okay. Let's focus on
4 paragraph (2). Does anybody have any comments about
5 paragraph (2)? Judge Christopher.

6 HONORABLE TRACY CHRISTOPHER: If we just
7 change that last sentence, "do not assume it is important"
8 to say "do not assume it is important that the question
9 was not asked," even though that would be passive, but
10 that way it would cover the idea of who is asking the
11 actual question.

12 CHAIRMAN BABCOCK: Gotcha. Any other
13 comments? Bill.

14 PROFESSOR DORSANEO: Do you want to make the
15 second or the third sentence passive, too, or do you think
16 it's good to say, "I will"? Rather than "the same rules
17 will apply to your questions that are applied to the
18 parties' questions."

19 HONORABLE TRACY CHRISTOPHER: Either way.

20 CHAIRMAN BABCOCK: Jeff.

21 MR. BOYD: Is anyone else bothered by the
22 colloquialism "do not take it personally"? Maybe "do not
23 assume" --

24 CHAIRMAN BABCOCK: "Do not take offense."

25 MR. BOYD: "We're not being critical of your

1 question." I mean, "Do not take it personally" sounds a
2 little colloquial for a judge.

3 HONORABLE TRACY CHRISTOPHER: We're trying
4 to be colloquial. We're trying to be friendly. We're
5 trying to be understood.

6 CHAIRMAN BABCOCK: "Do not take offense"?

7 PROFESSOR DORSANEO: They won't know -- I
8 think "do not take it personally" is something somebody
9 can understand. To not take offense, like --

10 CHAIRMAN BABCOCK: Yeah. Okay. Roger.

11 MR. HUGHES: Well, I guess after you said,
12 "Some questions may be changed or rephrased and others may
13 not be asked at all," it sounds rather apologetic to say,
14 "Please don't get offended." It sounds to me like -- I'm
15 just not in favor of judges apologizing to jurors or to
16 lawyers for doing their job or making a ruling. I mean,
17 bluntly, I would just take the whole sentence out, that
18 sentence out. You've told them that their questions may
19 need to be changed or rephrased. At that point the judge
20 has done the job.

21 HONORABLE EVA GUZMAN: I did look at the
22 rules in other jurisdictions addressing juror questions,
23 and most of them did contain a sentence similar to that,
24 and I think and studies have shown that the jurors may
25 assume their question was -- that there was something

1 wrong with it, and maybe one of the parties or the other
2 decided that there was something wrong with the question.
3 So most of the jurisdictions do have that sentence.

4 MR. HUGHES: Okay.

5 CHAIRMAN BABCOCK: Okay. Any other comments
6 about this paragraph? Let's go to paragraph three.

7 PROFESSOR DORSANEO: Chip, maybe Tracy said
8 something, but this end part, why do you say "and do not
9 assume it is important that I decided not to ask your
10 question"? What does that --

11 PROFESSOR DORSANEO: Judge Christopher says
12 to change that "and do not assume it is important that the
13 question was not asked."

14 PROFESSOR DORSANEO: Okay. I think the
15 change is good, but why is -- why would they think it was
16 important that the question -- do not assume that the
17 question --

18 HONORABLE TRACY CHRISTOPHER: Well, suppose
19 the jury said, "How much insurance does the defendant
20 have," and we don't ask that question. Well, we don't
21 want them thinking it's important that I didn't ask the
22 question. We want them to just sort of ignore the fact
23 that they asked that question and we're not asking it.

24 PROFESSOR DORSANEO: That looks like, sounds
25 like, a lawyer's mind at work to me.

1 HONORABLE TRACY CHRISTOPHER: Maybe, but
2 that's what we're worried about, because they will ask
3 questions like that.

4 HONORABLE STEPHEN YELENOSKY: Yeah, there's
5 a lot of "pay no attention to the elephant in the room."
6 I mean, I think we have to do that here.

7 CHAIRMAN BABCOCK: Okay. Third paragraph.
8 Any comments? Judge Yelenosky.

9 HONORABLE STEPHEN YELENOSKY: "You must
10 treat your questions and their answers the same way you
11 treat any other testimony. Some questions will be asked,
12 but not all," so it's not testimony until the question
13 gets asked and answered, so it needs to refer to "you must
14 treat any questions submitted and asked and answers to
15 those," something like that, because they can submit a
16 question, but they're not supposed to think anything of it
17 unless it gets asked. You must -- yeah, and we just need
18 to focus on the answers probably. "You must treat answers
19 to any questions asked," something like that.

20 CHAIRMAN BABCOCK: Got it. Any other
21 comments on this paragraph? All right. Paragraph four.

22 MR. GILSTRAP: Richard's comment about this
23 I thought was a good one. Probably doesn't belong here.

24 CHAIRMAN BABCOCK: Repeat the comment.

25 HONORABLE TRACY CHRISTOPHER: That it's

1 duplicative of what we say in other --

2 MR. ORSINGER: It's not specific to the
3 question answering process, and it is duplicative,
4 although it's certainly not harmful to remind them in this
5 context. On the other hand, is it important to remind
6 them that they're going to deliberate at the end of the
7 trial and they should keep their minds open.

8 CHAIRMAN BABCOCK: Justice Gaultney.

9 HONORABLE DAVID GAULTNEY: I actually think
10 this paragraph is important, because what we're doing with
11 this question answering, is taking the jury out of the
12 traditional role and putting them in a role that has the
13 danger of entering the area of advocacy, and their role
14 models in terms of asking questions are the lawyers in the
15 case or the advocates, so if they try to ask questions
16 like an advocate, it's not exactly I don't think what
17 we're trying to --

18 CHAIRMAN BABCOCK: Bill.

19 PROFESSOR DORSANEO: Well, I think this --
20 up until the point the jurors start deliberations, they're
21 not -- they're neutral fact-finders and not advocates, but
22 I'm reminded of Scotty Baldwin's book about jury selection
23 and the deliberative process where he says sensibly what
24 you're trying to do is get people on that jury that are
25 going to make your arguments during the deliberations,

1 that that's what you're doing, and I think that is what
2 people are doing. I have a little trouble with this first
3 sentence being stated or being stated so broadly.

4 CHAIRMAN BABCOCK: Okay. Other comments
5 about paragraph four?

6 Paragraph five. Any comments about
7 paragraph five? Bill.

8 PROFESSOR DORSANEO: Why do we care where
9 they get the question? I mean, people -- you know, I'm
10 sitting here next to Carl, saying, "Carl, are you going to
11 ask that question? It's a good question." So then I'll
12 ask it. It's Carl's question.

13 HONORABLE STEPHEN YELENOSKY: Well, then
14 that violates the rule against talking --

15 HONORABLE TRACY CHRISTOPHER: Because
16 they're talking.

17 HONORABLE STEPHEN YELENOSKY: -- to one
18 another about the case. It violates that rule. I mean,
19 I'm not sure that we should say it because it implies that
20 you could be talking about the questions, which we say
21 elsewhere you can't be.

22 PROFESSOR DORSANEO: I'd take it out.

23 CHAIRMAN BABCOCK: Richard Orsinger.

24 MR. ORSINGER: I don't like to do this, but
25 I disagree with Bill. I think that it's going to be

1 natural over the lunch for two people to say, "I'd like to
2 ask -- what do you think about this question."

3 "Well, you know, why don't you change it
4 this way?" I mean, it would just be second nature to me
5 that jurors might not think they were violating any rule
6 by discussing not the testimony, mind you, but a question
7 that hasn't been asked yet.

8 PROFESSOR DORSANEO: So you agree with me.
9 You don't disagree with me.

10 MR. ORSINGER: Well, maybe I misunderstood
11 you, which I don't like that either.

12 PROFESSOR DORSANEO: I don't like the fact
13 that you have so much more hair than I have.

14 MR. ORSINGER: Would you like some of mine?

15 CHAIRMAN BABCOCK: It's not even 3:00
16 o'clock yet.

17 MR. LOW: Richard, how can you discuss
18 questions without discussing the testimony?

19 HONORABLE STEPHEN YELENOSKY: Right.

20 MR. LOW: How can you do that?

21 MR. ORSINGER: Well, you could pass your
22 question to somebody and say, "Do you think this is a good
23 question?" or "Would you make any edits to this question?"

24 MR. LOW: That has to relate to the
25 testimony. It's about or related to the testimony. How

1 can you discuss that?

2 MR. ORSINGER: You better go back and read
3 the general instruction. I don't think it --

4 MR. LOW: Oh, I read everything.

5 CHAIRMAN BABCOCK: Judge Yelenosky.

6 HONORABLE STEPHEN YELENOSKY: Well, I mean,
7 we're very clear about note-taking, you can't show your
8 notes to anyone else, and what I tell jurors there is if
9 you're sharing your notes with somebody you're discussing
10 the case through written form, and that violates that
11 principle I gave you earlier. Same thing is true here.
12 Maybe we need to explain it in a different way, but surely
13 if they're discussing questions that violates that
14 prohibition, and if that's second nature then we need to
15 work harder in telling them not to do it.

16 CHAIRMAN BABCOCK: Okay. Any more comments
17 about paragraph five? Okay. Let's go to the juror
18 question form.

19 PROFESSOR DORSANEO: I have an overall
20 comment that this is too long.

21 CHAIRMAN BABCOCK: You're talking about --

22 PROFESSOR DORSANEO: One, two, three, four,
23 five is too long, and it should be shortened to the extent
24 it could be shortened.

25 CHAIRMAN BABCOCK: In plain language.

1 PROFESSOR DORSANEO: I don't necessarily
2 speak plain language, but the concept, I like the concept.

3 CHAIRMAN BABCOCK: I was being facetious.
4 Okay. The juror question form, paragraph one, any
5 comments?

6 We previously talked about the "clarify any
7 confusion," and Orsinger said that that was inconsistent
8 with "to clarify the testimony." We had a vote about "to
9 clarify the testimony" and decided to leave it in. Is
10 there a problem with it here in this part? Orsinger.

11 MR. ORSINGER: Yeah, I was going to make a
12 different point.

13 CHAIRMAN BABCOCK: Well, make this point.
14 It was yours.

15 MR. ORSINGER: Okay. Again, I think this is
16 even more limiting than "clarify." It may be that the
17 reason you want to clarify is not because you're confused
18 but because you think other people might be confused.
19 Maybe we're over-intellectualizing what the jury's process
20 might be, but frankly, I think if anybody on the jury has
21 a question they should feel free to ask it and let
22 somebody else decide whether it's relevant or not or
23 whether it clarifies or doesn't clarify or whether it
24 reflects confusion or maybe a more accurate understanding
25 than others might have. But you say that's already been

1 voted and lost, so it's just a revote.

2 CHAIRMAN BABCOCK: Well, no, I don't think
3 it has. I think the first vote was on the language about
4 should be to clarify the testimony and now we're -- we've
5 got language that says "clarify confusion." So --

6 MR. ORSINGER: I thought there was a
7 compromise that Tracy was going to say about the
8 testimony.

9 HONORABLE TRACY CHRISTOPHER: I'm okay with
10 "about."

11 MR. ORSINGER: Yeah, I like "about" too
12 because it's not as confining. I would hate for somebody
13 to be afraid to ask a legitimate question because they
14 were not sure whether it qualified as an acceptable
15 question or not.

16 CHAIRMAN BABCOCK: Okay.

17 MR. ORSINGER: I'd rather the judge decide
18 if the question is acceptable.

19 CHAIRMAN BABCOCK: Judge Yelenosky.

20 HONORABLE STEPHEN YELENOSKY: I was just
21 going to suggest, I mean, whatever we did in the first
22 section should be verbatim in the juror's question form.
23 Why complicate it by saying it a different way after we
24 worked on crafting exactly what we want to say? It's the
25 same instruction.

1 CHAIRMAN BABCOCK: Yeah. Okay. Any more
2 comments on this paragraph?

3 MR. ORSINGER: I've got one.

4 CHAIRMAN BABCOCK: Yes, sir.

5 MR. ORSINGER: I made it before, before I
6 realized we were going to do the paragraphs individually,
7 but, again, I think where we say that the parties are
8 doing things like making objections and whatnot, I wish we
9 would put the word "attorneys" in there so that the jury
10 doesn't -- if they're going to be offended they just think
11 it's the lawyers being lawyers and not the parties being
12 bad.

13 HONORABLE TRACY CHRISTOPHER: Well, we
14 started out with "attorneys" but then we had to put in
15 "and anyone," you know, "representing themselves."

16 MR. ORSINGER: Well, why don't you let the
17 judge -- instead of reading that to every jury where
18 99.999 percent are going to have attorneys, except in
19 Tom's --

20 HONORABLE STEPHEN YELENOSKY: That's
21 dropping.

22 MR. ORSINGER: -- court system, let's just
23 let the judge kind of wing that on the fly.

24 THE WITNESS: We could do "attorneys,"
25 brackets, "parties."

1 MR. ORSINGER: I'd like that better.

2 HONORABLE TRACY CHRISTOPHER: That's fine.

3 PROFESSOR DORSANEO: Just make -- don't hide
4 the actor, you know. "After the questions have been
5 asked," "after each witness has been examined," or "after
6 questions have been asked to each witness."

7 MR. ORSINGER: I mean, do we -- why are we
8 telling them there is an objection process anyway?

9 HONORABLE TRACY CHRISTOPHER: Well, they're
10 going to see it. They're either going to come up to the
11 bench and see it or we're going to send them out for it,
12 and they're going to know that they get sent out when
13 there are objections. And that way it's not hidden from
14 them that that's what we're doing.

15 CHAIRMAN BABCOCK: Okay. That was a comment
16 about the second paragraph. Any more comments about
17 paragraphs one or two?

18 MR. HAMILTON: I don't think we need the "at
19 all" at the end of that last sentence.

20 CHAIRMAN BABCOCK: And why not?

21 MR. HAMILTON: Because they may not be
22 asked, period.

23 CHAIRMAN BABCOCK: Superfluous.

24 MR. HAMILTON: What does it add?

25 CHAIRMAN BABCOCK: Judge Christopher.

1 HONORABLE TRACY CHRISTOPHER: One thing that
2 we did discuss in the subcommittee, which I thought was a
3 little cumbersome, but then it turned out that Judge
4 Miller did it, and I know Steve was just asking me about
5 it and he really liked it, is that the judge passed out 12
6 forms, so every juror had a form, and even if they didn't
7 have a question, they sent back the blank form to the
8 bailiff so that the anonymity of the question writer is
9 preserved even more versus just one person writing and,
10 you know, passing the question down over eight hands and
11 making it clear who had the one question for the witness.
12 I thought that was sort of unnecessary, but --

13 MR. SUSMAN: No, it's --

14 HONORABLE TRACY CHRISTOPHER: -- he liked it
15 and thought it was a good way to handle it, so I thought
16 we might discuss that procedure, and if we are going to
17 have that procedure, we would probably tell the jury that.

18 CHAIRMAN BABCOCK: Steve.

19 MR. SUSMAN: And really, it also kind of
20 takes -- those who don't want to question, ask questions,
21 aren't embarrassed by never turning anything in. I think
22 it lets them off the hook easy. I mean, there were many
23 times that the judge got twelve pieces of paper and there
24 was no questions. He would go through them and say, "No
25 questions." I think it's good to ask them each to turn in

1 their form after every witness. If there is a question
2 then we have a question. Otherwise it preserves anonymity
3 completely.

4 HONORABLE DAVID PEEPLES: Steve, can you not
5 see who's writing and who's not?

6 HONORABLE STEPHEN YELENOSKY: They could be
7 taking notes.

8 MR. SUSMAN: You really couldn't, because
9 you don't know whether they're taking notes. You know,
10 usually they're writing them -- I mean, I guess if they
11 waited until the end to write the question, but some of
12 them write the questions as they go. You can't see
13 whether they're taking notes or whether they're writing on
14 the question form.

15 CHAIRMAN BABCOCK: That's assuming they get
16 to take notes.

17 MR. SUSMAN: Right.

18 MR. LOW: Chip, would they be given more
19 than one form if they have several questions or how do you
20 handle somebody that might have --

21 CHAIRMAN BABCOCK: You get a form for every
22 witness, right?

23 MR. LOW: I know, but what if they've got
24 six or seven questions of that witness?

25 MR. GILSTRAP: They only get one.

1 MR. LOW: Can you only ask one question?

2 HONORABLE TRACY CHRISTOPHER: They just
3 write them all on the same piece of paper if they had more
4 than one question.

5 MR. LOW: Well, I've seen some pretty long
6 questions.

7 HONORABLE TRACY CHRISTOPHER: But anyway,
8 that was something that is not in here, if we wanted to
9 institute that procedure, and it might be something that
10 might need to be spelled out because it might not be
11 intuitive to the judges across the state that that would
12 be a good thing to do.

13 CHAIRMAN BABCOCK: Strikes me that would be
14 a good thing to do, but how does everybody else feel?
15 Richard Orsinger.

16 MR. ORSINGER: I don't think it's going to
17 preserve anonymity. Anybody that's sitting behind the
18 juror or next to the juror is going to see if they're
19 filling out a question, and I'll -- if I can't see whether
20 they're filling out questions, I'm going to be having
21 someone sit where they can see who's filling out the
22 questions. I don't think it's going to be anonymous in
23 practice, but I like the idea of having them turned in
24 because I think it encourages participation. If you have
25 to call attention to yourself if you're the only one and

1 you are repeatedly asking questions, I think people might
2 feel self-conscious that they're slowing the trial down or
3 people are rolling their eyes when you get another
4 question; and if you can just slip it in a stack and pass
5 it down to the end and nobody knows for sure whether
6 you're the guy hanging up the trial, I think it would
7 encourage jurors to ask questions; and I think this is a
8 good thing to encourage.

9 CHAIRMAN BABCOCK: Bill.

10 PROFESSOR DORSANEO: Well, I'm going back to
11 that No. 5 and then the first sentence in the next deal
12 that, frankly, I would delete both of them, but if you
13 like the idea of saying "This is because my" -- "in my
14 overall instruction that you must not discuss the case
15 among yourselves," if you like reinforcing that and not
16 just treating that as something that's, you know, merely
17 aspirational, which, I think it might be, why don't you
18 say "with anyone else"? And the same thing, "and not
19 something you got from," you know, "another person." You
20 know, personally I think you can tell people not to
21 discuss the case with their fellow jurors or with anyone
22 else until you turn blue, and that's like telling, you
23 know, rocks to fly. That's not going to happen. Maybe
24 I'm just a cynic, but --

25 HONORABLE SARAH DUNCAN: I think you have

1 children.

2 MR. SCHENKKAN: You're clearly not a
3 superhero.

4 PROFESSOR DORSANEO: Well, I knew that.

5 MR. SCHENKKAN: Or at least you don't have
6 that power to make rocks fly.

7 CHAIRMAN BABCOCK: Okay. All right. We
8 need to get back to Tracy's point about having a procedure
9 for turning in each page, but any comments on paragraph
10 three of the juror question form?

11 MR. LOW: Paragraph three, I thought had
12 already been raised the question that you may treat your
13 questions --

14 HONORABLE TRACY CHRISTOPHER: Right.

15 HONORABLE STEPHEN YELENOSKY: Right, and
16 that should --

17 HONORABLE TRACY CHRISTOPHER: Make that same
18 thing.

19 CHAIRMAN BABCOCK: Make that same change.
20 Okay.

21 MR. LOW: All right.

22 CHAIRMAN BABCOCK: Now, what about a
23 procedure for having each juror hand in this form, whether
24 they've got a question or not? I'm sorry, Tom. I missed
25 you.

1 MR. RINEY: It was related to that issue.

2 CHAIRMAN BABCOCK: Okay.

3 MR. RINEY: I agree that it may not be
4 intuitive if you don't have everybody turn one in that it
5 somehow destroys anonymity, but surely there is some way
6 to communicate that as a potential problem to the trial
7 judges without giving out a specific instruction on how to
8 pass out pieces of paper and take them up. That depends
9 on the geographic layout of the courtroom, how specific
10 judges use bailiffs, and I think we ought not to try to go
11 too far in that.

12 CHAIRMAN BABCOCK: Okay. Steve.

13 MR. SUSMAN: Again, I mean, I think it's --
14 I mean, I think it's helpful to a trial judge to know this
15 trick. Actually, it wouldn't have been readily apparent
16 to me to do it in this way to preserve anonymity, you
17 know, pass any questions you have in, and we would have
18 sat there watching who it was and knowing who was our
19 jurors and who was a bad juror and who was a good juror
20 for us, but somehow the judge -- I don't know whether
21 Judge Miller got it from you, Tracy, or how he got that
22 idea, but he came up with it, and I think it was a
23 brilliant stroke to come up with it, and I think it's a
24 great procedure. How do you get them -- how do you
25 suggest it without putting it in a rule?

1 HONORABLE DAVID EVANS: You've got judicial
2 conferences.

3 CHAIRMAN BABCOCK: And only people in this
4 room are going to know that trick.

5 MR. SUSMAN: Right.

6 HONORABLE STEPHEN YELENOSKY: Some judges
7 are going to send the jurors out, and what they prefer to
8 do there is as the jurors go into the jury room the
9 bailiff gets the questions that are there, rather than,
10 you know, keeping the jury in the jury room, so there are
11 different ways that anonymity might be preserved, and it
12 is kind of micromanaging.

13 CHAIRMAN BABCOCK: Okay. What's the
14 consensus, or do we have a consensus about whether Tracy
15 should try to write something on that or not? Judge
16 Evans, how do you feel, the superstar judge that you are?

17 HONORABLE DAVID EVANS: I think that when
18 this rule comes out it will be covered redundantly in
19 education process and discussed, and judges will come
20 forward with ideas, and anonymity of jurors on questions
21 will be paramount. If anything, it just would be in a
22 comment perhaps from the Court that would be designed to
23 preserve anonymity of the jurors and then leave it to us
24 on how to hand out papers and collect them. Otherwise we
25 will -- that would be my suggestion.

1 CHAIRMAN BABCOCK: Yeah, Bill.

2 PROFESSOR DORSANEO: I assume we're going on
3 to something else. Are we going to --

4 CHAIRMAN BABCOCK: Well, let's get closure
5 on this.

6 PROFESSOR DORSANEO: There are five lines or
7 six lines here on the page. Are you going to -- like the
8 Bar exam you have to answer in five lines? Okay. Even
9 though you might have --

10 HONORABLE TRACY CHRISTOPHER: When I put it
11 on a piece of paper I will fill up the whole piece of
12 paper, but I didn't want to do that for purposes of the
13 draft here. I don't know how many lines that actually
14 comes out to.

15 PROFESSOR DORSANEO: You're not telling them
16 that if they need more -- you know, more space to --

17 HONORABLE TRACY CHRISTOPHER: Well, that's
18 kind of one of the things where -- I mean, in my jury box
19 we've got a little rail in front of them where they can
20 put their notes, and I anticipate a bunch of these forms
21 are just going to be sitting there, for them to pick up
22 and use if they want to, but that's the sort of thing
23 where different courtrooms are going to have different
24 setups, some judges are going to say, "These forms are
25 going to be in the jury room," you know, "pick up as many

1 as you want." That's the kind of micromanaging that I
2 didn't want to get us into.

3 PROFESSOR DORSANEO: You don't want to
4 restrict the amount that you get from a juror?

5 HONORABLE TRACY CHRISTOPHER: No. I mean,
6 that wasn't the plan. It was just --

7 CHAIRMAN BABCOCK: If these jurors are
8 empowered, they'll probably flip it over and write on the
9 back if they need to. Okay. How many people think that
10 Judge Christopher ought to write some language
11 micromanaging the passing out of paper?

12 HONORABLE STEPHEN YELENOSKY: See, it's how
13 you ask the question.

14 HONORABLE TRACY CHRISTOPHER: Chip's in
15 favor of this one, too.

16 CHAIRMAN BABCOCK: How many people are in
17 favor of Judge Christopher writing some language about
18 every juror ought to pass in a piece of paper? Everybody
19 in favor of that, raise your hand.

20 PROFESSOR DORSANEO: I'm in favor.

21 CHAIRMAN BABCOCK: Okay. Everybody against?

22 There were 4 in favor and 24 against, and
23 Carl has got a comment post-vote

24 MR. HAMILTON: Well, I have an alternative.

25 Why can't we just put a sentence in there that instructs

1 the judge to use whatever procedure he wants to to ensure
2 the anonymity of the question and let him do it however he
3 wants to?

4 CHAIRMAN BABCOCK: Is there not something
5 already in there that says it's supposed to be anonymous?

6 MR. BOYD: The statute says that.

7 CHAIRMAN BABCOCK: Huh?

8 MR. BOYD: The statute, 445.

9 HONORABLE TRACY CHRISTOPHER: We do tell
10 them not to put their name on the form, but other than
11 that we don't say "try to make it as anonymous as
12 possible."

13 PROFESSOR DORSANEO: Watch out for
14 Orsinger's agent.

15 CHAIRMAN BABCOCK: Yeah, right. Steve.

16 MR. SUSMAN: There should be something in
17 the rule --

18 THE REPORTER: Whoa.

19 CHAIRMAN BABCOCK: About anonymity?

20 MR. SUSMAN: -- that the judge should do it
21 in a manner that ensures jurors' anonymity or something
22 like that.

23 HONORABLE STEPHEN YELENOSKY: We're not
24 going to create some appellate issue, are we, or satellite
25 litigation about whether the question was truly anonymous

1 or somebody figured out who it was? Is there some error
2 there?

3 MR. WATSON: I certainly hope so.

4 CHAIRMAN BABCOCK: Watson's in favor of
5 that, actually.

6 HONORABLE STEPHEN YELENOSKY: Yeah. I mean,
7 I hope not. I hope we're just saying aspirationally we
8 should try to make it anonymous.

9 MR. SUSMAN: Aspirationally.

10 HONORABLE TRACY CHRISTOPHER: Well, we'll
11 come up with a comment to that effect.

12 CHAIRMAN BABCOCK: Okay. We'll do
13 something. Let's take subparagraph (3).

14 HONORABLE DAVID EVANS: Chip, did we change
15 "clarify" to "about" in both places?

16 HONORABLE TRACY CHRISTOPHER: Yes.

17 CHAIRMAN BABCOCK: Yeah. I think, didn't
18 we, Judge Christopher?

19 HONORABLE TRACY CHRISTOPHER: Yes, I said
20 "about."

21 HONORABLE DAVID EVANS: And removed
22 "confusion"?

23 HONORABLE TRACY CHRISTOPHER: Yes.

24 CHAIRMAN BABCOCK: Subparagraph (3).

25 HONORABLE TRACY CHRISTOPHER: Okay.

1 Actually, I was adding a new (3) just to indicate the
2 issue that's kind of percolated, percolated, to say, "At
3 the end of each live witness the judge will ask the jurors
4 to pass the form to the bailiff," to indicate that it is
5 limited to live witnesses, and that's an instruction to
6 the trial judges, and we all know what that means.

7 CHAIRMAN BABCOCK: All right. What about
8 subparagraph (3)? It's got some parentheticals.

9 HONORABLE TRACY CHRISTOPHER: Okay. Yeah.
10 The paragraph (3) as written, which will become paragraph
11 (4), we had a question about whether the witness should be
12 able to hear our discussion about the questions; and right
13 now if something happens at the bench, if the -- sometimes
14 the witness hears what's going on and sometimes the
15 witness doesn't; and I just -- we wrote this rule in a way
16 to allow it to be a bench conference, if it's going to be
17 quick and short when the judge looks at the question
18 versus something that's going to require the jury to leave
19 the room to go over these questions, so I think Kent was
20 most worried about this, and I wasn't.

21 HONORABLE KENT SULLIVAN: Actually, though,
22 I think we're exactly on the same page in terms of
23 results. I mean, we both think that the judge has got to
24 have discretion to make whatever adjustments are necessary
25 under the circumstances. I just thought that because this

1 is a completely new process that it's useful to try to
2 describe the boundaries of discretion, and I mean, it kind
3 of goes back to what we were talking about a moment ago.

4 This bill, for example, talks about "juror
5 questions must be submitted anonymously." You know, what
6 does that mean, and does that force the judge's hand? My
7 intent here was just to say if you say the judge has the
8 discretion to do X, Y, and Z, you ought to let them know
9 -- ought to let everybody know. I thought it would
10 particularly help the lawyers here. If some lawyer felt
11 it truly affected the process for the witness to be up
12 there listening to some extended discussion, it's helpful
13 to tell everybody that that's within the judge's
14 discretion to remove the jury and remove the witness if it
15 was appropriate.

16 CHAIRMAN BABCOCK: So subparagraph (3) would
17 have both sentences in it?

18 HONORABLE STEPHEN YELENOSKY: How is that
19 different, though, from any other question that may be
20 debated without the jury in front of a witness that's not
21 suggested by the jurors? I mean, you know, we use
22 discretion on that now as well. I mean, there are lots of
23 times the witness is sitting there, the jury is out, and
24 the lawyers are arguing about the question. So why is
25 this a new twist?

1 CHAIRMAN BABCOCK: Well, the answer is
2 because of the case, right?

3 HONORABLE STEPHEN YELENOSKY: Because what?

4 CHAIRMAN BABCOCK: Because of the case
5 that's cited on page three.

6 HONORABLE STEPHEN YELENOSKY: Well, whatever
7 the case says, I assume it's not particular to questions
8 that come from jurors is my point, so if it's a problem,
9 we wouldn't fix it here. I mean, we need to fix it --

10 CHAIRMAN BABCOCK: Well, my question, Judge
11 Christopher, was your subparagraph (3) here, the bracketed
12 sentence is not an alternative language to the first
13 sentence. It's something that would be in addition.

14 HONORABLE TRACY CHRISTOPHER: Yeah, it would
15 be in addition. I just didn't think it was necessary, but
16 it's in addition.

17 CHAIRMAN BABCOCK: All right. Buddy.

18 MR. LOW: But that's why we went away from
19 speaking objections in deposition. You know, you can
20 object, and say, "He's already told you such-and-such" and
21 so forth, and we get away from that, and the lawyer can
22 kind of inform the witness what his answer ought to be,
23 and the judge should have discretion of removing the
24 witness if he wants to so the lawyer can't tell him how to
25 answer.

1 HONORABLE STEPHEN YELENOSKY: Well, and I'm
2 wrong if this case is specific to juror questions needing
3 more safeguard for witnesses than any other questions. I
4 haven't read the case, but I don't understand why it would
5 matter whether the witness hears a juror questions or
6 debate about it as opposed to a lawyer question and debate
7 about it, but so I'm wrong if the case says they're
8 different.

9 HONORABLE TRACY CHRISTOPHER: Well, the case
10 -- neither case discusses it, and I really considered it
11 dicta, personally, looking at it, but --

12 CHAIRMAN BABCOCK: But Justice Sullivan did
13 not, so --

14 HONORABLE STEPHEN YELENOSKY: That's usually
15 what I think when I don't agree.

16 HONORABLE TRACY CHRISTOPHER: Right.
17 Exactly.

18 CHAIRMAN BABCOCK: Okay. Is the consensus
19 to leave both sentences in or just have the first sentence
20 and delete the second? Everybody that thinks we ought to
21 have both sentences, raise your hand.

22 Everybody that thinks that we should delete
23 the second sentence, raise your hand. A close vote, but
24 12 people say both sentences, 11 say first sentence is
25 sufficient, so the Court can deal with that, the Chair not

1 voting.

2 PROFESSOR DORSANEO: I don't understand the
3 issue. I mean, it's in the bill, too, and what does the
4 second sentence add? Why would somebody want the second
5 sentence?

6 HONORABLE STEPHEN YELENOSKY: "Outside the
7 presence of the witness."

8 PROFESSOR DORSANEO: I know what it says.

9 HONORABLE STEPHEN YELENOSKY: Well, I don't
10 know why they would want it either, but --

11 PROFESSOR DORSANEO: But it showed up in
12 these two places, so there must be some motivation to put
13 it in there.

14 CHAIRMAN BABCOCK: Well, I think part of it
15 may be what Buddy just said.

16 MR. LOW: If you're sitting there as a
17 witness and he says, "Bill, such-and-such" and I say,
18 "Okay, wait a minute." "Well, Bill has testified to
19 such-and-such. Yeah, that's in the record." Judge says
20 "No, it's not the the record."

21 "Oh, he -- oh, yeah, now I know. Yeah."
22 You're my witness, "Yes, sir, he's right." The lawyer is
23 right.

24 CHAIRMAN BABCOCK: I believe I said that.

25 HONORABLE STEPHEN YELENOSKY: How is that

1 different from --

2 MR. LOW: That's why we did away in
3 objections at depositions and they just tell you how to
4 object and now, you know --

5 CHAIRMAN BABCOCK: Orsinger.

6 MR. ORSINGER: The reason I don't like the
7 second sentence is apart from the fact I don't think it
8 helps at all, because they're going to hear all the
9 objections during their testimony, is that if you take the
10 witness -- send the witness out in the hallway with no
11 constraint on it, somebody is going to be out there
12 talking to the witness about how to answer the questions
13 that may come from the jury, and we don't normally let
14 somebody take a break in -- I mean, occasionally it
15 happens that you break in the middle of somebody's
16 testimony, but here the lawyers have finished, there's
17 some questions from the jury that are going to be objected
18 about, they send somebody out in the hallway to tell them
19 how to answer the question. I really feel like it's an
20 opportunity to woodshed the witness in the middle of an
21 examination that I don't like.

22 MR. LOW: You're going to send him in the
23 jury room. You're not going to send them in the hallway
24 to --

25 MR. ORSINGER: It doesn't say in the jury

1 room, does it? It says "from the courtroom."

2 MR. LOW: No, the jury is not in there.
3 They're in the box.

4 HONORABLE STEPHEN YELENOSKY: No, the jury
5 is in the jury room. Maybe. Well, they might be. Some
6 courts send them --

7 MR. ORSINGER: I have a greater fear that
8 the witness is going to be in the hallway being
9 woodshedded than the witness is going to learn something
10 from hearing an argument between the two lawyers at the
11 bench.

12 HONORABLE DAVID EVANS: Well, what right
13 does this confer that doesn't exist already?

14 HONORABLE TRACY CHRISTOPHER: Right.

15 HONORABLE DAVID EVANS: In trial procedures.

16 MR. ORSINGER: None.

17 HONORABLE DAVID EVANS: Because a judge can
18 remove a witness while a discussion goes on without
19 objection and often do, and a party may request it, so I
20 don't know what this does that you don't already know you
21 can do and would do --

22 CHAIRMAN BABCOCK: Yeah.

23 HONORABLE DAVID EVANS: -- if you thought it
24 was necessary to protect your parties. It seems to be
25 just excess to me.

1 CHAIRMAN BABCOCK: And typically when there
2 are 12, 11 votes the Court will cast the deciding.

3 MR. SCHENKKAN: Unlike the other times?

4 CHAIRMAN BABCOCK: Unlike the other times
5 when they always follow our -- let's talk about paragraph
6 (4). Any comments on that? Anything on (4)? Ralph.

7 MR. DUGGINS: Shouldn't we combine (4) and
8 (6)?

9 CHAIRMAN BABCOCK: Well, (6) is going to be
10 rewritten.

11 MR. DUGGINS: Should we say after the word
12 "may," "ask the question," comma, "reword the question or
13 decide not to ask the question." I mean, it seems
14 obvious, but I don't know why we don't say that.

15 CHAIRMAN BABCOCK: Well, but (6) is now, as
16 I understand it, going to be reworked to say it's the
17 judge's discretion whether the lawyers ask it, the judge
18 asks it, or --

19 MR. DUGGINS: Well, I would combine (4) and
20 new (6) then is what I'm suggesting.

21 CHAIRMAN BABCOCK: Okay. All right. Yeah,
22 Jeff.

23 MR. BOYD: (4) raises the issue I've
24 mentioned a couple of times about whether the judge can
25 refuse to ask even if the parties want it asked.

1 HONORABLE DAVID EVANS: The judge may refuse
2 to ask it, but I doubt he can deny the parties the right
3 to reopen, just to point -- I mean, that is always there,
4 and you would be in a barrel if you denied a party to
5 reopen with a question in a record.

6 CHAIRMAN BABCOCK: Yeah, R. H.

7 MR. WALLACE: I'm wondering if (4) wouldn't
8 suffice just by saying, "The trial court must rule on any
9 objections to the question," period, and eliminate
10 paragraph (5). I mean, because those kind of things it
11 seems to me just obvious that the judge has the right to
12 say, "Okay, I'm not going to submit it this way, but I'll
13 submit it this way," and the parties are going to have a
14 right to object to that.

15 HONORABLE DAVID EVANS: And will.

16 HONORABLE TRACY CHRISTOPHER: Well, we
17 were --

18 PROFESSOR DORSANEO: Mr. Chairman?

19 HONORABLE TRACY CHRISTOPHER: We were trying
20 to address the bill, which said you have to read it
21 verbatim.

22 MR. WALLACE: Right.

23 HONORABLE TRACY CHRISTOPHER: So --

24 HONORABLE KENT SULLIVAN: Right.

25 HONORABLE TRACY CHRISTOPHER: Which we

1 didn't want to be ultimately the law. We wanted the idea
2 that we would be able to --

3 MR. WALLACE: Well, and it depends. I mean,
4 if you're getting away from it being verbatim, if it's got
5 to be verbatim then --

6 CHAIRMAN BABCOCK: Orsinger, or is it Bill
7 that asked?

8 MR. ORSINGER: Not me.

9 CHAIRMAN BABCOCK: Bill.

10 PROFESSOR DORSANEO: The second sentence of
11 (4), I would make that a separate thing in the list, and I
12 understand the idea, but you can, you know, rule on an
13 objection; and the ruling on the objection could be, well,
14 the question is bad insofar as it says this; but if I
15 reword it I can make it work, but I still think it stands
16 alone better being separate from "The trial court must
17 rule on any objection to the question," and I really think
18 even -- I think that's the gratuitous thing, to say that
19 the trial judge has to rule. I don't mind saying it. Or
20 make it part of (5), which is really about rewording.

21 CHAIRMAN BABCOCK: Judge Yelenosky.

22 HONORABLE STEPHEN YELENOSKY: Yeah, I think
23 it's not only gratuitous to say the court must rule, I'm a
24 little concerned that we're creating another layer of law
25 that applies only to questions of jurors.

1 PROFESSOR DORSANEO: I think we are.

2 HONORABLE STEPHEN YELENOSKY: And I made the
3 point earlier about sending the witness out, and yet here,
4 yeah, we're supposed to rule on objections, but I don't
5 think elsewhere in the rules it says at a specific point
6 the court must rule on objections, and we know objections
7 can be waived, and all that law ought to apply to this,
8 and I'm concerned about putting stuff in that creates a
9 different layer.

10 PROFESSOR DORSANEO: Me, too.

11 HONORABLE TRACY CHRISTOPHER: Well, there's
12 a lot of procedure that we all know should happen that
13 isn't in a rule, and since this is a new procedure, the
14 thought was we needed to make clear that the judge should
15 actually rule on the objections, and yes, it's true,
16 sometimes they're waived sometimes. You know, I can't
17 tell you how many times people say "objection, form" in
18 trial and just keep on going because they think they're in
19 a deposition and never ask me to rule.

20 HONORABLE STEPHEN YELENOSKY: I know. I
21 say, "Do you want a ruling?"

22 HONORABLE TRACY CHRISTOPHER: But since this
23 was new the thought was we really wanted to make sure that
24 it wasn't just whatever they asked was going to get asked.

25 HONORABLE STEPHEN YELENOSKY: But the

1 unintended consequence of that, I don't think you intended
2 that, but maybe that can be dealt with by something that
3 says, you know, other than the peculiar parts about this,
4 everything else is treated as it would be under the Rules
5 of Evidence and Procedure, something like that.

6 MR. LOW: But he must rule then. We used to
7 have a judge that would say, "Objection noted. Move on,
8 counsel, and if I find that I'm wrong I'll instruct the
9 jury to disregard that." Well, what are you going to do
10 there? You've got your witness. You can't --

11 HONORABLE STEPHEN YELENOSKY: Well, whatever
12 the appellate rule is on that ought to be the same for
13 this.

14 CHAIRMAN BABCOCK: How about the judge that
15 says, "I'll carry that objection"?

16 HONORABLE STEPHEN YELENOSKY: Right. It may
17 be bad, but it shouldn't be a different standard or, you
18 know --

19 CHAIRMAN BABCOCK: We got it. Paragraph
20 (5), comment?

21 MR. ORSINGER: I wanted to respond. Some of
22 the appellate -- some of the procedure professors might
23 want to listen to what I'm saying, but I don't think that
24 the Rules of Appellate Procedure require the trial judges
25 to rule. I think it just says that if the trial judge

1 won't rule you need to object to the trial court's
2 refusing to rule. This actually is a different tenor.
3 This is actually mandated --

4 HONORABLE STEPHEN YELENOSKY: Right.

5 MR. ORSINGER: -- that the trial judges
6 rule, which I don't think the law requires or I don't
7 think the rules require. They don't mandate a ruling on
8 objections yet. So this is kind of like moving into new
9 territory that it's probably reversible error, or at least
10 it's error not to rule even if you don't object to them
11 not doing it.

12 HONORABLE STEPHEN YELENOSKY: So you agree
13 we shouldn't do that.

14 MR. ORSINGER: I'm happy with the way we've
15 been doing it. I don't think we ought to make the judge
16 rule. I think if we do anything we ought to say you can
17 object if the judge won't rule, but --

18 MR. LOW: How are you going to ever reverse
19 that?

20 MR. ORSINGER: Well, the standard reversal
21 is probably the same. The question is probably waiver. I
22 don't know. If the rules require that you rule, I mean,
23 why do we not require the judges to rule on anything else
24 except for jury question objections?

25 PROFESSOR DORSANEO: Our preservation rules

1 put the burden on the lawyer to --

2 HONORABLE TRACY CHRISTOPHER: What rule
3 number is that?

4 PROFESSOR CARLSON: Appellate Rule 33.

5 PROFESSOR DORSANEO: 33, Appellate Rule 33.

6 MR. ORSINGER: And then it's also in our
7 packet here, is a revised Rule 303.

8 MS. CORTELL: Under tab four.

9 MR. ORSINGER: Yeah. We're going to have to
10 do some surgery on that when it comes up, but anyway, the
11 only point I'm making is we have this unique situation
12 where we're requiring the judges to rule where we
13 purportedly haven't before, and all of you proponents for
14 judicial discretion ought to be speaking up here.

15 CHAIRMAN BABCOCK: Judge Christopher, what
16 do you think about that? Speechless.

17 Justice Sullivan, you got any comments on
18 what Richard just said?

19 HONORABLE KENT SULLIVAN: I didn't hear the
20 last part.

21 CHAIRMAN BABCOCK: What he just said.

22 HONORABLE KENT SULLIVAN: We're looking for
23 Rule 103 of the Rules of Evidence.

24 CHAIRMAN BABCOCK: He's basically saying he
25 doesn't like the fact that you're requiring the judge to

1 make a ruling.

2 HONORABLE KENT SULLIVAN: I will say I've
3 just been an advocate of clarity in the rules. You ought
4 to be able to read from the face of the rule, and I would
5 go so far as to say it would be nice if someone who was
6 pro se and of reasonable intelligence if they had some
7 idea of what was going on here, and I think clarity is a
8 good thing.

9 HONORABLE STEPHEN YELENOSKY: Well, we
10 better rewrite all the Rules of Civil Procedure because
11 they're dealing with the rest of them, too.

12 HONORABLE KENT SULLIVAN: That's a different
13 topic.

14 MR. LOW: I still don't understand, Chip,
15 how the judge may say, "Okay, I'm not required to rule
16 right now. I'm going to wait until two days later when
17 he's in Mexico," and I say, "Okay, I'll ask that
18 question," and then what are you going to do? I don't
19 know how you ever reverse something like that. If he
20 ultimately rules, because the rule doesn't say that you've
21 got to rule immediately.

22 HONORABLE STEPHEN YELENOSKY: Well --

23 MR. LOW: Get a ruling.

24 HONORABLE STEPHEN YELENOSKY: But it says
25 something different than what the rest of the law says,

1 good, bad, or indifferent, might create two things to be
2 litigated that arguably could lead to different case law
3 based on whether it's a juror question or an attorney
4 question.

5 MR. LOW: This is a unique new thing, and I
6 think you ought to have rules, and a judge that's not able
7 to rule on that right now maybe ought to catch an
8 opponent. I just think that the judge should do their job
9 and rule on something that he's required to rule on now
10 and --

11 HONORABLE STEPHEN YELENOSKY: But you think
12 it should be -- it's more important for the judge to rule
13 on these questions than on other objections?

14 MR. LOW: I don't consider important and
15 what's not important. I consider this something new and
16 something that you need an answer immediately. Other
17 things you might not, who wins and loses the case might be
18 more important than that, and he might not rule on that
19 until later. This is a different thing, it's new, and the
20 judge ought to be able to rule. There's no reason he
21 shouldn't be able to.

22 CHAIRMAN BABCOCK: Carl, then Hayes.

23 MR. HAMILTON: I'm trying to think what the
24 objection would be, but essentially the objection would be
25 that the question shouldn't be asked for some reason.

1 CHAIRMAN BABCOCK: Right.

2 HONORABLE TRACY CHRISTOPHER: Right.

3 MR. HAMILTON: And so if the judge asks it
4 then he's overruled the objection. If he doesn't ask it,
5 he's sustained the objection, I would assume.

6 MR. LOW: No.

7 MR. HAMILTON: Why do we need a ruling?

8 CHAIRMAN BABCOCK: Buddy's got an answer to
9 that.

10 MR. LOW: What if he later comes up, like
11 Judge Baker and "I'll carry that along and I want to hear
12 the other testimony," and then the man's in Mexico, and he
13 says, "Okay, now I'll allow it," and you've got to call
14 him back. I mean, why not rule, get it over with.

15 MR. FULLER: But haven't we built into this
16 procedure that we're talking about now that this process
17 will take place before the witness is excused? So that
18 problem wouldn't arise. I mean, while that witness is on
19 the stand the judge either is going to ask the question or
20 not ask the question, in which case you'll know what the
21 feeling is toward your objection.

22 MR. LOW: Maybe so. Maybe so.

23 CHAIRMAN BABCOCK: I'm with you. All right.
24 Subparagraph (7). (6) is going to be rewritten.

25 Subparagraph (7), any comments?

1 MR. DUGGINS: Why do we need that? If the
2 question is going to have a discussion about whether to
3 ask --

4 HONORABLE DAVID EVANS: Which record, the
5 clerk's record, reporter's record?

6 HONORABLE TRACY CHRISTOPHER: Clerk's
7 record, just like jury questions that we get during
8 deliberations.

9 HONORABLE DAVID EVANS: And so that's --

10 HONORABLE TRACY CHRISTOPHER: Don't you
11 think?

12 HONORABLE DAVID EVANS: Well, I think
13 reporter's record maybe is a court's exhibit because
14 you're going to have some control over that question as an
15 exhibit that you don't have in a clerk's record. Parties
16 will be calling for it, but I'm not wed to it. It's just
17 got to be specified whether it's reporter's record or
18 clerk's record. Their handwriting and who asked the
19 question, I'm not sure if the question would be
20 embarrassing or not, but I'm just trying to figure out how
21 I'm supposed to keep track of it. Do I file mark it or do
22 I mark it as a court exhibit and hand it over to the
23 reporter?

24 HONORABLE TRACY CHRISTOPHER: I was doing it
25 just like, you know, the forms --

1 HONORABLE DAVID EVANS: File mark --

2 HONORABLE TRACY CHRISTOPHER: -- we get
3 during jury deliberations.

4 HONORABLE DAVID EVANS: -- and so a nonparty
5 will be filing papers in the clerk's record. I'm just --
6 I've got fees. I'm just trying to figure out where we are
7 with that, and the court's file, that's where it's going
8 to end up.

9 CHAIRMAN BABCOCK: Any more comments on
10 subparagraph (7)?

11 HONORABLE DAVID EVANS: Either way, Tracy.

12 CHAIRMAN BABCOCK: Yeah, David.

13 MR. JACKSON: If you mark it as part of the
14 reporter's record, then the question goes in the jury room
15 when they deliberate as an exhibit.

16 HONORABLE DAVID EVANS: No, a court's
17 exhibit doesn't go back.

18 HONORABLE TRACY CHRISTOPHER: Could be a
19 court exhibit.

20 CHAIRMAN BABCOCK: Okay. Bill.

21 PROFESSOR DORSANEO: Wouldn't we want to
22 change the appellate record, clerk's record provisions, in
23 appellate Rule 34? Maybe say it here, too, but it would
24 seem to be more appropriate to say, you know, "any juror
25 question submitted," okay, "pursuant to" rule whatever in

1 the clerk's record part of the appellate rules.

2 HONORABLE DAVID EVANS: What happens to the
3 unsubmitted ones that you deny? Are you talking about
4 submitted to the court or actually asked? How were you
5 using that term, submitted to the judge for ruling?

6 PROFESSOR DORSANEO: The same way it's --
7 whatever way it's here, "The trial court must include any
8 submitted juror question form in the record." I don't
9 know why you would want any one that was submitted. What
10 would you do with it?

11 HONORABLE DAVID EVANS: I'm not sure I'm
12 clear on that question, but it just needs to specify which
13 record it's going into, either the reporter's or the --

14 PROFESSOR DORSANEO: But it ought to say --
15 all my point is it ought to say that in the rule that's
16 about the appellate record.

17 HONORABLE DAVID EVANS: All right.

18 CHAIRMAN BABCOCK: Justice Hecht.

19 HONORABLE NATHAN HECHT: What's David's view
20 on this? David, should it be in the reporter's record or
21 the clerk's record?

22 HONORABLE DAVID EVANS: Well --

23 HONORABLE NATHAN HECHT: No, I mean, I'm
24 sorry.

25 CHAIRMAN BABCOCK: Jackson.

1 MR. JACKSON: I guess I'm confused on, you
2 know, if it's a juror's question and it gets an exhibit
3 sticker put on it and you haven't gone to the jury yet for
4 deliberations, so that's an exhibit that's along with all
5 the other exhibits that have been marked during all the
6 other questions and answers, and how are you going to keep
7 that separate from going back into the jury room when the
8 jury goes in to deliberate with all the exhibits?

9 HONORABLE STEPHEN YELENOSKY: But we do that
10 now. I mean, we tell the court reporter -- we accept
11 something that's not going to go to the jury and --

12 MR. JACKSON: That's if the judge has ruled
13 that it's not been admitted. Then we separate it out.

14 HONORABLE TRACY CHRISTOPHER: I think it
15 ought to be the clerk record.

16 HONORABLE NATHAN HECHT: I'm just wondering
17 practically, I mean, could you mark it as a court's
18 exhibit? Because it seems to me if you put it in the
19 clerk's record you're going to have a heck of a time
20 finding it when the case is on appeal because you're going
21 to be sitting there looking at the reporter's record, and
22 it says we've got this question and we argued about it and
23 we couldn't decide whether to ask it or not so we didn't
24 and then you're going to be rummaging around through the
25 clerk's record, which they're going to be scattered all

1 over the place because they will be in between filing
2 motions in limine and not telling what all else and it
3 would just be hard to find.

4 HONORABLE DAVID EVANS: And you're going to
5 have an anonymous question when you're making your verbal
6 record. You won't have it marked as anything, you'll be
7 discussing it. Then it gets a file mark, and it won't get
8 a page number and a Bates stamp number until the clerk's
9 record is prepared so --

10 HONORABLE NATHAN HECHT: Exactly.

11 HONORABLE DAVID EVANS: -- somebody in the
12 appellate record is going to have to -- it's going to go
13 from the statement of facts, go over to the clerk's record
14 and try to link it up, and exhibit numbers are much easier
15 to work with when you're referring to something in a live
16 trial.

17 HONORABLE NATHAN HECHT: It's already hard
18 enough to match up the jury question requests and
19 objections between the reporter's record and the clerk's
20 record because they're not -- the lawyers are talking
21 about things that are not marked, and it's just always
22 some question about exactly what they're talking about.

23 HONORABLE STEPHEN YELENOSKY: Well, would it
24 facilitate it to say, "The judge shall read the questions
25 into the record"? I know you can still put the document

1 in, but that would make it easier.

2 HONORABLE NATHAN HECHT: I just wondered
3 from David if there's any reason why the court reporter
4 can't make this part of the --

5 MR. JACKSON: I don't see any problem with
6 doing that. It's just that there's nothing out there that
7 says what you do with this document once you mark it.
8 What we normally do with documents when we mark them is if
9 they're admitted, they go into the jury room, and if
10 you're sending juror questions into the jury room then
11 you're messing up your program.

12 CHAIRMAN BABCOCK: Buddy.

13 MR. LOW: Chip, what would be -- say there's
14 a question. Judge says, "That's not a proper question."
15 Both parties say it's not a proper question. Why should
16 that be in the record anyway? I mean, what difference
17 does it make? Only if they admit something and you object
18 to it on the record or they failed to and you make a bill
19 of exception because they wouldn't allow it, so why offer
20 something that doesn't matter anyway?

21 HONORABLE DAVID EVANS: Well, Buddy, if it's
22 marked as a court exhibit, I could authorize it to be
23 removed and destroyed. If it's put in a clerk's record, I
24 cannot remove it from the district clerk's record.

25 MR. LOW: I'm talking about just --

1 MR. GILSTRAP: Why put it anywhere?

2 MR. LOW: Yeah. Why put it anywhere?

3 MR. GILSTRAP: The objectionable question is
4 the question that's asked. It's not the question
5 submitted.

6 MR. LOW: Why put it in the record?

7 CHAIRMAN BABCOCK: Judge Christopher, then
8 Skip.

9 MR. ORSINGER: That's not right.

10 HONORABLE TRACY CHRISTOPHER: Well, we did
11 actually discuss in the subcommittee the idea that the
12 judge would read the question into the record, like we do
13 often when we have juror questions during deliberations.
14 We'll go on the record and we'll say, "I've gotten a
15 question from the jury. Here's the question. Here's how
16 I propose to answer it. Are there any objections?"

17 HONORABLE STEPHEN YELENOSKY: Right.

18 HONORABLE TRACY CHRISTOPHER: But that's
19 pretty time-consuming if it's a pretty basic question, and
20 we just show it -- and the thought was we're trying to
21 sort of shorten the time frame of this bench conference if
22 it's happening at the bench versus, you know, during a
23 break or something. You show it to them. People say,
24 "yes, objection," "no objection," and you ask it. It's
25 absolutely true that if both sides agree that it shouldn't

1 be asked there's no need to keep it, I would think. And
2 if I ask the question and the objection is on the record,
3 then the question is there, so it might not be necessary
4 to admit the form, but the thought was let's do it just to
5 make sure we know what we're talking about.

6 CHAIRMAN BABCOCK: Judge Yelenosky.

7 HONORABLE STEPHEN YELENOSKY: That's a good
8 point I hadn't thought. You wouldn't really have an
9 opportunity to read it into the record because you're up
10 at the bench, doing things by -- I mean, the easiest thing
11 is just to make it a court's exhibit. We do that all the
12 time. The attorneys agree something is not going back.
13 When the exhibits go back to the jury they make sure it's
14 not in there. I don't see that as a problem.

15 CHAIRMAN BABCOCK: Hayes.

16 MR. FULLER: One issue on this. If the
17 judge refuses to read the question, said, you know, "I
18 don't like this question," but one or the other lawyers
19 said, "No, that's a real good question. We need the
20 answer to that." I guess we could reopen perhaps.

21 HONORABLE TRACY CHRISTOPHER: Right. Right.

22 MR. FULLER: If that doesn't occur, are we
23 talking about some situation where you said, "Okay, I know
24 you don't want to read the question. I think it's a
25 really good question. I've got to make my record. I want

1 that witness asked that question anyway, and I want a bill
2 on it."

3 HONORABLE TRACY CHRISTOPHER: I think you
4 have to. Exactly.

5 HONORABLE DAVID EVANS: Exactly.

6 CHAIRMAN BABCOCK: Justice Gray.

7 HONORABLE TOM GRAY: I think the word "form"
8 -- if you leave (7) in, the word "form" needs to come out
9 in light of the procedure that was used at Steve's trial.
10 If you had 12 witnesses and only one witness was asking
11 the questions, you would have 132 blank forms turned in in
12 part of the record, just to -- to gnat at the language,
13 but --

14 CHAIRMAN BABCOCK: All right. Anything
15 else? Bill.

16 PROFESSOR DORSANEO: Well, I still don't
17 know exactly what happens with this form if the question
18 isn't asked. What happens on appeal? Who can say what?

19 MR. ORSINGER: I have a comment to make
20 about that. Can I answer that?

21 CHAIRMAN BABCOCK: Certainly.

22 MR. ORSINGER: My view of it -- and I'd be
23 curious to hear what your response is -- is that the mere
24 failure to read the question to the jury by the judge is
25 not error.

1 HONORABLE TRACY CHRISTOPHER: I had that in
2 the rule.

3 MR. ORSINGER: I think what you're going to
4 have to do is you're going to have to -- if the court
5 says, "No, this is no good," you're going to have to move
6 the court to read it; and if the court won't do it, that's
7 still not enough. You're going to have to ask to reopen
8 your examination of the witness and ask the question, and
9 then if the judge refuses to allow you to do that then you
10 need to offer a bill by asking the question to the court
11 reporter and then get the answer into the record.

12 PROFESSOR DORSANEO: And the question is
13 whether we explain all of that or imply that somehow this
14 is --

15 MR. ORSINGER: I'm totally against trying to
16 spell out how to preserve error on this point in this
17 rule, but I think you ought to hire an appellate lawyer if
18 you can't figure it out.

19 PROFESSOR DORSANEO: I agree with hiring
20 appellate lawyers.

21 MR. LOW: But if you mess the record up,
22 Skip, you cure --

23 HONORABLE STEPHEN YELENOSKY: Would you like
24 to read your number into the record?

25 CHAIRMAN BABCOCK: Yeah, right.

1 PROFESSOR DORSANEO: Right now this (7)
2 suggests that if you do this, that if it gets there then
3 that does you some good. But I agree with what you say.

4 MR. ORSINGER: I think it's misleading.

5 PROFESSOR DORSANEO: I think they just
6 talked about it up there at the other end of the room.

7 MR. ORSINGER: Just remember when you're the
8 appellee you'll be able to -- harmless error every time.

9 HONORABLE TRACY CHRISTOPHER: I'm okay with
10 leaving it out. People just thought, new procedure, we
11 ought to keep track of these questions.

12 CHAIRMAN BABCOCK: It's in the bill, too.
13 It's in the senate bill.

14 PROFESSOR DORSANEO: Maybe they know why.

15 CHAIRMAN BABCOCK: They might know why, but
16 the good news is the Court's going to have the benefit of
17 this discussion. Judge Christopher, who else was on your
18 subcommittee besides Elaine?

19 HONORABLE TRACY CHRISTOPHER: Well, It was
20 Elaine's original subcommittee. Tommy and --

21 CHAIRMAN BABCOCK: Well, who else is on
22 Elaine's subcommittee?

23 PROFESSOR CARLSON: Tommy and Bobby Meadows.

24 HONORABLE TRACY CHRISTOPHER: Bobby. Kennon
25 did a lot of work for us.

1 CHAIRMAN BABCOCK: Well, it's an absolutely
2 first-rate work product, terrific job.

3 HONORABLE DAVID PEEPLES: In that case I was
4 on it, too.

5 CHAIRMAN BABCOCK: Really outstanding,
6 outstanding work.

7 (Applause)

8 CHAIRMAN BABCOCK: We'll take our afternoon
9 break. Back in 15 minutes.

10 (Recess from 3:16 p.m. to 3:39 p.m.)

11 CHAIRMAN BABCOCK: All right. We are back
12 on the record, and we are on to Item 4 of our agenda, the
13 proposed amendments to Rules 296 through 329(b). It's
14 Ralph Duggins and, once again, the hard-working Professor
15 Elaine Carlson, and, Ralph, you're going to kick it off
16 I'm told.

17 MR. DUGGINS: Thank you. At the last
18 meeting Justice Hecht and Chip appointed a group of
19 Elaine, Nina, Bill, Sarah, Mike, Judge Peebles, me, and
20 then also Kennon was gracious enough to join our
21 subcommittee to try to take a stab at looking at 296
22 through 329; and what we have done and brought in this
23 spiral bound set that's back here and also posted is to
24 revise existing Rules 296 to 299a, the findings of fact
25 rules, so those are we think substantial improvements to

1 existing rules.

2 Then Rule 300 is a new rule that defines a
3 final judgment. I guess it's safe to say it would replace
4 existing 300 and 301, but it's really a different rule,
5 and then Rules 301 to 304 are completely new rules, and
6 Rule 301 we attempted to place in one rule all of the
7 post-verdict and post-judgment motions to indicate when
8 you file a particular motion, explain the purpose of those
9 motions and the relationship to each other, and to make
10 the relationship between motions for JNOV and motions to
11 modify, we hope, clearer.

12 In Rule 302 we tried to set out the basis
13 for new trial practice because there is -- in our judgment
14 there was very little guidance in the existing rules. In
15 Rule 303, this rule was primarily found in the TRAP rules,
16 and the thought was that it needed to be moved to the
17 trial court rules, and then 304 is an effort to try to
18 redo and improve 329(b).

19 Now, that's just a very high level overview
20 of what we've tried to do. Elaine took the lead in 296 to
21 299a, so I'd like to ask her to kick off the discussion on
22 those rules and go from there.

23 PROFESSOR CARLSON: Let me give you an
24 overview of what our subcommittee felt were desirable
25 changes to the finding of fact rules. The first was that

1 the finding of fact rules should be modified to parallel
2 the jury charge rules insofar as encouraging broad form
3 findings when feasible. We also tried to address an issue
4 that came up -- Hayes, I think you'd remember if it was
5 the State Bar Rules Committee -- on voluminous and
6 evidentiary findings, so those were sort of paired
7 together.

8 The subcommittee also felt that the timing
9 of requests for findings of fact should be modified, but
10 it's a little bit counterintuitive the way it's currently
11 structured because, except for the original request for
12 findings of fact, all of the subsequent steps, such as the
13 reminder or the request for additional -- the court making
14 of the additional or amended findings, the time period
15 varies from court to court. I mean, case to case, excuse
16 me, because it depends upon when the prior triggering act
17 took place, when the original request was actually made,
18 and when the court actually made its filing. So in every
19 case that time period is necessarily unique, which is a
20 little bit counterintuitive from the situation that we
21 generally use at the post-judgment phase of having our
22 timetables often relate back to one time period, like when
23 the judgment is signed.

24 Our subcommittee also felt that the reminder
25 requirement to remind the Court when it's failed to make

1 findings of fact when you have timely requested them was
2 not a good idea. We don't have a reminder requirement in
3 other situations to preserve error, and our subcommittee
4 felt that that should be eliminated, and then our
5 subcommittee felt that the finding of fact rule should
6 clarify the effect of findings made by a trial court in a
7 judgment improperly as opposed to our separate document
8 requirement for findings. We also looked at the language
9 of the existing rules to try and modernize them as we have
10 as a committee fairly regularly, changing "shall" to
11 "must" or using "may" or "will" instead of "shall,"
12 according to Professor Dorsaneo's reminder.

13 And in fulfilling -- as Ralph said, we
14 divided and conquered after we decided on policy
15 determinations and then each subcommittee member was
16 tasked with coming up with drafts and then presenting
17 them. In fulfilling my assignment of redrafting the rules
18 under these guidelines, I suffered a very severe case of
19 deja vu because this is --

20 CHAIRMAN BABCOCK: Sarah just nodded.

21 HONORABLE SARAH DUNCAN: No, I rolled my
22 eyes actually.

23 PROFESSOR CARLSON: This is the third or
24 fourth time, but they're getting better every time. The
25 last we took this issue up was when the State Bar Rules

1 Committee brought a proposal, and I went back and read the
2 transcripts in December -- so it was quite joyous between
3 the holidays -- October from 2006 and December 2006 to
4 just try and get a sense of what the debate was and what
5 that -- what the Supreme Court Advisory Committee felt at
6 that time; and it was an interesting trip down memory
7 lane; but I won't bore you with those votes other than to
8 tell you after several meetings the final vote was 14 for
9 and 15 against not changing the rule, so we've been down
10 the road before, but we're getting better we hope in light
11 of those suggestions.

12 In dealing with the timing issue -- and I'm
13 going to go through now rule by rule. In Rule 296 we
14 thought ideally there would be a shorter time period for
15 findings to be made so as to facilitate the trial court's
16 memory in getting the process done, and so the
17 subcommittee felt it would be better to shorten the time
18 period for making the initial request for findings of fact
19 for 10 days after the judgment is signed and then maintain
20 the same -- essentially the same period we have now, 20
21 days for the trial court to make their findings of fact.
22 So in Rule 296(a) we went for 10 days instead of 20 days,
23 and as you recall from the case law, the initial request
24 for findings of fact you're not required to include
25 proposed findings, although that would probably be a good

1 idea, unlike the request for additional or amended
2 findings. So it's not too difficult to get a request out
3 in 10 days, although if you want to supply the court with
4 your proposed findings that will take a little bit more
5 time.

6 In proposed Rule 296(b) is where we worked
7 and finessed the broad finding notion, and so now we would
8 require that when findings are properly requested the
9 judge is to "State the findings of facts and conclusions
10 of law" -- and this is the new language -- "on each
11 ultimate issue raised by the pleadings and evidence," with
12 the hope "ultimate" might suggest not minute. "Unless
13 otherwise required by law, findings of fact must be in
14 broad form when feasible." Of course, that sentence is
15 trumping 277 for our jury charge. The "unless otherwise
16 required by law" is included because there are some
17 instances where statutorily the trial court is required to
18 make more specialized or specific findings, depending upon
19 what the case is.

20 And then we include -- I included a sentence
21 that did get voted up the last go around in our last
22 Supreme Court Advisory Committee two years ago session, so
23 it's certainly not binding today. "The trial court's
24 findings are to include only as much of the evidentiary
25 facts as is necessary to disclose the basis for the

1 court's decision."

2 Then the comment reinforces the notion
3 saying, "Unnecessary or voluminous evidentiary findings
4 are not to be included in the court's findings of fact."

5 Rule by rule, Chip, or --

6 CHAIRMAN BABCOCK: I think so. Unless you
7 think grouping them would be easier.

8 MR. ORSINGER: No, it's not easier.

9 PROFESSOR CARLSON: No.

10 CHAIRMAN BABCOCK: No, I wouldn't think so.
11 Richard.

12 MR. ORSINGER: Okay.

13 CHAIRMAN BABCOCK: It's not even chum in the
14 water yet.

15 MR. ORSINGER: I like everything about this
16 rule except for the going from 20 to 10 days. The biggest
17 problem I have with the finding of fact process as a
18 lawyer who handles many nonjury appeals is that the trial
19 lawyers don't realize that there's a 10-day -- 20-day
20 deadline now on findings. They think of the 30-day
21 deadline on motions for new trial and the clients
22 frequently will contact me between the 20th and the 30th
23 day after the judgment is signed when it's too late for me
24 to request findings as a matter of right.

25 Now, the Legislature, because of its

1 interest in speed in parental termination cases, adopted
2 an even more accelerated timetable to, if you will,
3 preserve error or start the appellate process in parental
4 termination cases; and that's resulted in a lot of
5 injustice because a lot of people were not aware of that
6 accelerated timetable, and we've discussed that in this
7 committee itself. I think that there is a lot of harm
8 being done already by having a 20-day deadline when most
9 lawyers are only aware of the 30-day deadline, and moving
10 it up to 10 is moving it in the wrong direction.

11 I feel like what we should do is allow
12 findings to be requested up to 30 days, and then however
13 you want to configure the process after that is kind of
14 unimportant, because by that time someone with some
15 knowledge of these rules will have gotten involved and
16 they can follow those odd timetables, so I like very much
17 what the committee has done in terms of broad form.

18 I think it's a pernicious practice for the
19 winning lawyer to draft all of these horrible statements
20 that the judge is finding about the personalities of the
21 loser and all of that, and -- but really the speed, all of
22 this speed, all of this hurry up, hurry up, hurry up, in
23 the first 75 days of the appellate process so that we can
24 wait, you know, nine months to file our briefs and a year
25 and a half for our oral argument is foolish. We're not

1 speeding anything along. All we're doing is waiving
2 people's right to present their appeal effectively, so I
3 would strongly urge everyone to consider making this 30
4 days and change the subsequent timetables accordingly, but
5 not necessarily -- I don't want to push it out over 105
6 days. I think we could play with them. I just think the
7 first 30 days is really critical.

8 CHAIRMAN BABCOCK: Frank.

9 MR. GILSTRAP: I agree with Richard on the
10 timing factor. I do have some questions or concerns about
11 the proposed part (b). I mean, I understand the goal
12 here. The goal here is to somehow deter judges from
13 making 150 findings of fact and you go up on appeal and
14 you lose because you didn't assign error to No. 73.
15 That's the abuse that we're trying to deal with here, and
16 I don't know how much good this is going to do. It
17 possibly would allow an attorney to object to voluminous
18 findings and preserve error that way. So I understand the
19 goal. I think it's a good goal. I'm not sure that (b)
20 really advances the ball that much. I think the second
21 sentence is good, "Unless otherwise required by law,
22 findings of fact must be in broad form whenever feasible."
23 The first sentence has got some problems.
24 "If findings," I guess they mean if finding and
25 conclusions or is it just finding, "are properly

1 requested." What's "properly"? Does that mean timely
2 requested or does it mean somehow you could not have the
3 right if you requested it in the wrong form? "The judge
4 must state the findings of fact and conclusions of law on
5 each ultimate issue." Is that the same as controlling
6 issue? I mean, we do have case law that talks about
7 controlling issue. I don't know what an ultimate issue
8 is, although I know the idea behind it.

9 The third sentence, "The trial court's
10 findings," you can leave out "trial court's." It doesn't
11 help anything. "Are to include," I think is that maybe
12 we're adding to Professor Dorsaneo's lexicon of mandatory
13 and permissive words, but I don't think we've said "are
14 to" before. Does it mean must or should include? I think
15 that's what it should say. "Only as much in evidentiary
16 facts as are necessary" -- not "is" -- "to disclose the
17 basis for the court's decision." I'm not sure what the --
18 I mean, we all know what it is, we all know what they're
19 trying to do with this, but I think you're putting a lot
20 of language in there that is not really going to help. If
21 people are -- you know, I think we could probably do the
22 same thing with the second sentence and maybe combine that
23 with the next rule, which is also a mandatory requirement
24 to make the findings, and simplify it that way.

25 CHAIRMAN BABCOCK: Great. Skip.

1 MR. WATSON: Well, I have two comments. The
2 first is I agree with Richard. I think it ought to be 30
3 days. I think it ought to be the same as for a motion for
4 new trial. My -- Buddy and I and one or two others may
5 have done this long enough to remember the days when a
6 motion for new trial was a short fuse, and I remember a
7 lot of malpractice from that when stuff had to be
8 preserved and trial lawyers, frankly, are healing up for 7
9 of those 10 days after a big trial, and when they get back
10 after those 7 days the desk is so full that the last thing
11 they're thinking about is their motion for new trial. It
12 was moved -- that was lengthened for a reason. This needs
13 to be consistent to it since they both extend the
14 appellate timetable, and to me it just makes sense.

15 I have a fundamental problem with tying this
16 to broad form and specifically making it ultimate issue
17 submission, and that is not because I think there should
18 be evidentiary findings. Like everybody else who does
19 this, I have to wade through the chaff of evidentiary
20 findings trying to get down to what the issues are, and I
21 understand full well what the Court, the committee,
22 everyone else is trying to do here, and that's get rid of
23 the junk and get down to what's important.

24 The issue is what's important and whether we
25 can appeal from it. I just want to focus very quickly on

1 what is a, quote, ultimate issue. What is it that's being
2 found here? Is it good enough that the court just says,
3 "I find negligence"? That's the ultimate issue in most
4 people's minds reading this. That's what would be found
5 many times in broad form. It was negligence. Second
6 question, was it a producing cause of damages? If so, how
7 much? You know, here's the number.

8 But the inherent problem with that is shown
9 on page four under Rule 299 where we get to the problem
10 that wakes me up at 3:00 o'clock in the morning, and
11 that's presumed findings for not making your request, and
12 in (b) we say when one or more what? Ultimate issues?
13 No. Elements. Elements, necessarily referable to what?
14 The ground. I assume that's the ultimate issue, the
15 ground. "Omitted unrequested elements, when supported by
16 the evidence, will be supplied by presumption."

17 Here's what's going to happen by trying to
18 pretend that this is the same thing as a jury charge.
19 Broad form charges, unless I've completely missed the
20 point here, were never intended to allow juries to go in
21 and just decide negligence, period, an ultimate issue. We
22 moved what was in multiple specific special issue
23 questions into an instruction so that the constituent
24 issues are necessarily found in an instruction by
25 answering "yes" to negligence. They find act. They find

1 that a reasonably prudent person wouldn't have done that
2 act or wouldn't have made that omission. They find
3 causation, because they are told they can't answer "yes"
4 on an ultimate issue without finding those acts.

5 Now, let me give you an example of where
6 we're going to get bitten in this. Just as simple as I
7 can make it. Let's go back to law school and the examples
8 of how you drafted a simple car wreck negligence
9 submission. You have to have the act, you know, whatever
10 was done. Let's say that was pleaded as three things,
11 speed, failure to brake, or failure to turn to the right
12 to go off the road to avoid the collision. Three things
13 are pleaded as acts. Then in the old system the jury
14 would go along and find, yes, I am persuaded that he was
15 going too fast. We have no skid marks, but he testified
16 he braked. I think he probably did, so I'm not going to
17 find failure to brake, but I am going to find failure to
18 swerve off to the right and avoid the collision.

19 They then find separately that a reasonably
20 prudent person would have done the top one and the bottom
21 one, you know, and that caused the injuries. If the only
22 finding of fact that I'm appealing is negligence, is the,
23 quote, broad form ultimate issue, without me seeing what
24 constituent element acts were submitted, I have no way of
25 knowing what the judge was persuaded to find that finding

1 on.

2 Now, let me say here that just assume, for
3 example, that there was no evidence of excessive speed,
4 that that couldn't be found. Let's assume that the judge
5 wasn't persuaded on something such as failure to brake or
6 the others, but he actually found, he actually -- there
7 was real error in this thing, and the true basis of the
8 decision was speed, but there was the same evidence on
9 braking, where it could have gone either way, based on how
10 you were persuaded. The judge was persuaded, I think the
11 person doesn't brake. You know, that would -- well,
12 excuse me, wasn't persuaded to brake, but he based it on
13 speed, he based it on the one where there was no evidence.

14 I can't show under this system without the
15 constituent elements that he based his actual action that
16 he -- that was the basis of the negligent finding was one
17 on which there was no evidence, because there was evidence
18 on the other two, but he wasn't persuaded by it. There
19 was evidence, but they didn't meet the burden of
20 persuasion with the judge. If he was forced to set out
21 the constituent elements instead of the ultimate issue, I
22 could show that, because the only one listed would be
23 speed, and what I don't understand under this attempt to
24 shoehorn dealing with the judge into the jury when the
25 same findings of fact are having to be made to come to the

1 ultimate legal conclusion, is why I can't consistently see
2 constituent elements of the cause of action, each one of
3 them, so that I have an effective right of appeal.

4 PROFESSOR DORSANEO: Mr. Chairman?

5 CHAIRMAN BABCOCK: Yeah.

6 PROFESSOR DORSANEO: I think of Jack Pope
7 here where he would say the ultimate issue in a negligence
8 case is negligence, and just -- would just say that the
9 old way of thinking that it's speed, brakes, or lookout is
10 gone and needs to be gone, that you shouldn't -- that you
11 shouldn't be even thinking about whether it was this one
12 or that one or that one because it doesn't matter.

13 MR. WATSON: Then we should take constituent
14 elements out of the second half.

15 PROFESSOR DORSANEO: And I think that is the
16 jury charge law. I think that what I said is the jury
17 charge law. That was the big complaint in McElroy Vs.
18 Members Mutual Insurance Company, and Frank Evans writes,
19 "Hey, you're not -- you're not able to make that argument
20 anymore." Yeah, it is a little harder for a defendant to
21 avoid liability if the ultimate issue is negligence,
22 because five jurors could think this and five jurors could
23 think that. That's just the way it is. That's the only
24 way to go to broad form.

25 CHAIRMAN BABCOCK: There you go citing cases

1 again. Justice Hecht.

2 HONORABLE NATHAN HECHT: Well, I just --

3 PROFESSOR DORSANEO: That's what I do.

4 HONORABLE NATHAN HECHT: -- wonder if those
5 are good examples, though, because we don't get -- I don't
6 recall seeing very many nonjury trials on negligence. I
7 was a trial judge for five years, and I tried two, out of
8 probably four or five hundred trials, negligence cases to
9 the bench. The cases that are tried to the bench are not
10 cases where the issues are that ill-defined.

11 MR. WATSON: It was an example, Judge. I
12 mean, say it's a breach of a partnership agreement and --

13 HONORABLE NATHAN HECHT: Right.

14 MR. WATSON: -- there are 10 acts of breach.

15 HONORABLE NATHAN HECHT: Right. And that's
16 why I want to say that in those kinds of cases from the
17 perspective of an appellate judge, it's very useful to
18 know what Judge Christopher thought about it, as she sat
19 there and watched the whole thing, and it's -- I don't
20 know what the other appellate judges think; but from my
21 point of view, when I see that the trial judge thought
22 this was fraud, this was a misrepresentation, but not all
23 of this other stuff, or this was relied on, not this, or
24 this was an element of the commercial transaction or not
25 that, or I believed this witness, not this one, that's

1 useful to know; and I agree that it's very unhelpful to
2 just have a stack of 150 findings that the winning side
3 thought of every way in the world to try to nail down the
4 judgment. Kind of like writing interrogatories, except
5 now you're writing findings of fact. That's not very
6 useful.

7 But every once in a while we get in the
8 appellate record a letter from the judge to the parties
9 that says, "I've thought about this, and I'm going to rule
10 this way because I think this, this, this, and thus and so
11 and somebody please draw that up," and I know there's the
12 law about how much weight that stuff like that can be
13 given, but I'll tell you as a practical matter you're
14 inclined to give it quite a bit of weight because it's
15 coming from the judge as opposed to the parties that write
16 things up, and so I want -- I would hate to discourage
17 that. I know we can't encourage it or mandate it because
18 the trial judges don't have the time or the assets to do
19 that in every case like Federal trial judges, but in the
20 few cases that it's done, it's useful, so --

21 CHAIRMAN BABCOCK: Roger, you had your hand
22 up.

23 MR. HUGHES: Yeah. I think it's not so much
24 over the phrasing of a rule, because I think it really has
25 to do with an issue we've come back to, is what are the

1 real elements of a cause of action. Once upon a time back
2 when Gus Hodges ruled the whole thing about special issues
3 I think you would have said whether the defendant braked
4 or whether he didn't or whether he swerved, that's an
5 element, but along came broad form submission; and with it
6 I think there was a philosophical shift that whether the
7 defendant braked or not and whether he turned or not and
8 whether he was going too fast, those aren't controlling
9 issues. The only question is did he do some act that
10 everybody agrees was negligent, and so what I see
11 underlying this discussion is do we really want to go back
12 to a day when one of the controlling elements was which
13 act or omission was negligent, which statement or omission
14 was a misrepresentation of fact, and what I would favor is
15 I like Rule 299 the way it is.

16 I would just conform the Rule 296 and leave
17 to the case law to decide what is a controlling element,
18 because I, frankly, think it's a good idea that findings
19 of fact and conclusions should be -- should mirror the
20 kind of findings that a jury has to make. I think our
21 problem today is we're now struggling to figure out what
22 kind of findings the jury has to make. That would be my
23 suggestion.

24 CHAIRMAN BABCOCK: Richard Orsinger.

25 MR. ORSINGER: I want to comment at two

1 levels. One level is that there is a different policy
2 that applies between jury trials and bench trials in terms
3 of the management of the trial process and appellate
4 review of the trial process, and my recollection of the
5 problems we were having with broad form submission --
6 well, before broad form submission -- was that there would
7 be conflicts in jury verdicts that we wouldn't find out
8 until the jury had been discharged, and there was an
9 inordinate amount of time spent on making fine
10 distinctions between components of claims as a grounds for
11 reversal, and the decision was kind of made that we're
12 going to just fold the jury verdict up into a kind of a
13 simple answer and we're going to close off any
14 inquiry into the thinking that they had and we're going to
15 get a verdict of peers and then the appellate court is not
16 going to reverse it unless it's really evident from the
17 appellate record that something was wrong.

18 I was on the pattern jury charge committee
19 family law when we were dealing with broad form in the
20 family law area and helped to write the charge that was
21 finally tested in E. B., which was the parental
22 termination case where broad form really I think had its
23 first test or at least the pattern jury charge approach to
24 broad form had its first test; and in the Austin court of
25 appeals, the court of appeals was concerned that there

1 were three or four different grounds of termination
2 alleged, and yet there was a finding of best interest; and
3 they returned a 10 to 2 verdict; and the Austin court of
4 appeals was concerned that you couldn't tell from the
5 broad form whether all 10 of the jurors agreed on the same
6 termination ground, did they -- or did 10 of them at least
7 agree on neglect or did five of them agree on neglect and
8 five of them agreed on failure to support within their
9 capability.

10 And the Austin court reversed, but the
11 Supreme Court reinstated or they reversed the Austin court
12 and they said we don't care if five thought there was
13 abuse, five thought there was neglect, or three and three,
14 as long as you can get 10 that agreed that grounds for
15 termination exist and that there's best interest, then
16 you've got a verdict. I can understand that better when
17 we're dealing with a jury verdict.

18 Now, in a bench trial we only have one mind.
19 There's no doubt that the one mind found that that -- if
20 you will, the equivalent of the same 10 jurors found
21 whatever the grounds of liability were, because there was
22 only one person making the decision; and if it's a bench
23 trial and there's just one person and there's five
24 alternate theories for recovery and under broad form if
25 we're not going to know which five the trial judge relied

1 on, then we've got the same problems, I guess, examining
2 the trial court's process as we did with the jury's
3 process; but it's not necessary.

4 And let me move from the philosophical level
5 to the practical level. As an advocate, the problem I
6 have briefing a case with no findings, which is kind of
7 the same problem I'm going to have briefing a case with
8 ultimate issues, is that I've got to brief every single
9 pled theory. I've got to negate every single factual
10 ground, I've got to say no evidence on one, two, three,
11 four, and five; and then five if there was evidence, there
12 was error somehow in the way that that was tried. Maybe
13 there's a reason to do that because of the jury trials and
14 the fact that we decided verdicts are going to be opaque.
15 We don't have really that for trial judges, and so why
16 shouldn't we force the trial judge to tell us which of the
17 five theories the trial judge was in favor of and then
18 let's just brief that theory. Why bother to brief three
19 or four or five theories that the trial judge didn't
20 accept simply because we won't let the trial judge tell us
21 which one she or he did accept?

22 And I don't think there is any big cost to
23 it like there is with a jury verdict. When you've just
24 got one judge it's easy to have findings. He can say, "I
25 reject," you know, "this component of that theory, this

1 component of that theory, and I accept this one." And
2 then let's take the appeal up on the basis the decision
3 was really made on without having to negate all the ones
4 it was possibly made on that we can't prove it wasn't made
5 on, if that makes sense.

6 CHAIRMAN BABCOCK: Pete Schenkkan, then
7 Gene.

8 MR. SCHENKKAN: One kind of mechanical thing
9 about page four, since we're reading page one and four
10 together, and then one more substantive thing. The
11 mechanical thing is at page four in (b) we've got, "When
12 one or more elements necessarily referable to the ground
13 omitted necessary elements will be supplied and" --

14 PROFESSOR CARLSON: There's a phrase left
15 out there.

16 MR. SCHENKKAN: Yeah, and the phrase I think
17 is "have been found by the trial court."

18 MR. WATSON: Right.

19 MR. SCHENKKAN: And the additional phrase
20 "necessarily referable to the ground" is a substitute for
21 "thereof" in the existing rule, right?

22 PROFESSOR CARLSON: Right.

23 MR. SCHENKKAN: So now with that
24 clarification, the fundamental thing I'm confused about is
25 I guess starting back where we began. What is intended by

1 the use of the word "ultimate issue" in one rule as
2 opposed to "ground of recovery or defense" and "element of
3 a ground of recovery or defense" in the second one? I
4 don't know whether I agree with the distinction or not,
5 because I don't know what distinction is being attempted
6 by the use of "ultimate issue" in the one area and these
7 other terms in the second area.

8 It may be that those that have a lifetime of
9 experience with jury trials do understand this, but I'm
10 suggesting to you that a lot of us whose practice hasn't
11 been in that area don't come into this with that
12 understanding. We need help here in understanding why
13 we're using these two different sets of words and what the
14 distinction is before we can grapple with the question
15 that Richard asks, which is should we do it or how should
16 we do it. We need help understanding what y'all are doing
17 here.

18 CHAIRMAN BABCOCK: Gene.

19 MR. STORIE: Yeah, I would like to offer
20 another illustration, and I think I have noticed that
21 Justices Pemberton and Patterson have already left. We
22 actually argued a case in the Third Court last week, and
23 the principal issue was whether the trial court needed to
24 make a finding on whether a computer program satisfied the
25 requirements of the comptroller's rule that interpreted a

1 statute. And the judge, not Judge Yelenosky, one of your
2 colleagues, found that indeed it qualified as a computer
3 program under the elements shown in the statute itself but
4 declined to make a finding under the rule. So, of course,
5 we won the case. The appellate's only argument is the
6 trial court had to make a finding that matched up with the
7 rule, and having failed to do so, the judgment has to be
8 reversed. Well, that's a fine question, but I think it
9 certainly speaks to the idea that you need more than the
10 ultimate finding in the findings.

11 CHAIRMAN BABCOCK: Who was next?

12 MR. GILSTRAP: Bill was. Bill and Nina.

13 PROFESSOR DORSANEO: Well, I think I can
14 speak for the committee and Elaine could just as well,
15 that we used the words -- thought about using an adjective
16 at all before the word "issue," and that's primarily what
17 we were thinking about. We weren't really thinking about
18 making element and ground; and listening, I think that
19 probably does make more sense; but we wanted an adjective
20 because we didn't think "issue" was clear enough, and we
21 -- for me, "ultimate issue" is a better word, although it
22 may not be as good an approach as using element and ground
23 and let that evolve.

24 MR. SCHENKKAN: Is that what is meant by
25 "issue"? Put aside the question of ultimate for a moment.

1 "Issue" means ground or defense.

2 PROFESSOR DORSANEO: It really means -- to
3 me it means -- to me it means a legal element of a ground
4 of recovery or defense.

5 MR. SCHENKKAN: Element of a ground or
6 defense.

7 PROFESSOR DORSANEO: Yeah. That's what it
8 means to me, and I think we just have the word -- we use
9 the word "issue" here because we, still thinking about the
10 word -- we're still thinking issues when we mean
11 questions. But -- so I agree that it could be cleaned up
12 a little bit, but I want to pick up on what Richard said,
13 because what Richard said made a lot of sense to me, that
14 maybe, maybe, bench trials are just different. What
15 Justice Hecht said and I started scribbling here a little
16 bit. Richard, listen to this. The last sentence I said
17 instead of what it says now, "The trial court's finding
18 must include" -- put "only" in if you want -- "as much of
19 the evidentiary facts as are necessary to disclose legal
20 and factual" or just "factual basis for the court's
21 decision," to kind of say, okay, yeah, it's broad form
22 whenever feasible.

23 There may be a -- there may be an
24 inconsistency there, but picking up the idea that, okay,
25 trial judge, there are five factual claims under whatever,

1 pick the ones that you think, but don't just pick every
2 one that could be picked. And I like -- you convinced me
3 on what you said about, well, maybe we can get the trial
4 judges to work a little harder on this, but then there's a
5 practical side, whether they ever will, and they -- and in
6 my experience --

7 HONORABLE NATHAN HECHT: They're not.

8 PROFESSOR DORSANEO: It will be a rare
9 occasion.

10 CHAIRMAN BABCOCK: The superstar judges
11 will. Justice -- hang on. Justice Hecht.

12 HONORABLE NATHAN HECHT: Yeah, I mean, they
13 take you to judge school and they say, "For god sakes,
14 don't ever tell anybody what you're thinking, you're just
15 going to get reversed," and so you just grant the summary
16 judgment. You don't say a word about it, and you hope
17 that the appellant doesn't cover all the points. And --
18 but just because that happens as a practical matter, and
19 it's going to keep happening, doesn't mean you should
20 prevent the other thing from happening when every once in
21 a while you get a judge who, for whatever good reason,
22 virtuous reason or another, wants to say, "This is what I
23 thought about this case. I didn't think this person was
24 telling the truth, and here's why, and this is why I
25 thought it should come out this way."

1 PROFESSOR DORSANEO: I'd rather, if we're
2 going to work on that, rather say -- and I do think it's a
3 very serious problem for appellate lawyers and lawyers who
4 aren't appellate lawyers who are appealing cases that you
5 have to make all of these arguments that nobody really
6 argued about. Okay? And I think that's what Richard --
7 the point he makes on that is an excellent point, but it
8 is -- it's a bigger problem, and I think it would be
9 easier in the summary judgment context to be clear as to
10 why summary judgment was granted than perhaps in other
11 contexts.

12 CHAIRMAN BABCOCK: Nina and Buddy, would you
13 yield to Alex for a second?

14 MS. CORTELL: Sure.

15 PROFESSOR ALBRIGHT: I just have one
16 clarifying thing on all of this talk about what's a ground
17 of recovery, what's an issue. Everybody is talking about
18 older cases. We also need to think about the Crown Life
19 vs. Casteel case and all of its cases. I mean, all the
20 cases following it, and it might -- those cases may have
21 some language that would be helpful. I'm not remembering
22 right now.

23 MR. GILSTRAP: That's an older case?

24 PROFESSOR ALBRIGHT: It's a newer case.

25 MR. GILSTRAP: Okay.

1 CHAIRMAN BABCOCK: Nina.

2 MS. CORTELL: I have a few comments. One,
3 just on the timetable, I think it's fine to make it
4 longer. I think there are some problems with that, but
5 this is a one paragraph filing. It's very distinct from a
6 motion for new trial or some of the other ones that we
7 want more time for, and the idea of the earlier deadline
8 was just to move the process along more quickly. I know
9 I've had the problem where I'm up on appeal and I'm still
10 waiting on findings, sometimes if it's an accelerated
11 appeal or whatever. So I just wanted to give that nod
12 toward the 10-day rule.

13 More importantly, on the language of
14 ultimate issue, that may not be the right terminology, but
15 obviously -- I think where we all are unanimous and where
16 we want to get to is we would love to have findings that
17 really clarify why the judgment was entered so that you
18 have a clear record for the appellate court. I think that
19 everyone has that goal. I think the hard part is how do
20 you get there. Using Richard's hypothetical, there are
21 four theories for breach, I think was your -- breach of
22 fiduciary duty or fraud. Let's say there's four theories.
23 My experience is that the winning party, the plaintiff in
24 this case, will put all four theories into the findings so
25 that I'm really not any better off at the end of the day

1 because you get 30 pages of findings. You often get very
2 little review at the trial court level. It just gets
3 signed, and I understand that, because trial courts don't
4 have the staffing and so forth for that, but what we were
5 trying to do was avoid this sort of barrage of findings
6 that -- many of which are extraneous, going up in the
7 appellate flow.

8 Now, the words we use and how we get there,
9 I'm persuaded we need to go back to the drawing board on
10 that. But the problem is that too often under our current
11 findings practice what you end up with is a massive
12 document that we wish looked a little bit more like the
13 letter that Justice Hecht referred to, which really
14 explains why the judge ruled the way he did, but we often
15 don't have that in the findings that are actually signed.

16 CHAIRMAN BABCOCK: Buddy.

17 MR. LOW: Chip, I don't have any answers,
18 but I have a question. These rules started in 1940 at a
19 time when you had all of these details; and people said,
20 "Well, wait a minute, I don't want to give that up to try
21 a case nonjury. I want the judge to have to go through
22 the same thing the jury did." That was so that you went
23 through the whole -- whole shebang, and lawyers would
24 write everything. "He wasn't even looking." "He was
25 looking at the floor." They would put all of that stuff

1 in there.

2 All right. If -- and then I thought, well,
3 I'll be smart and I'll ask the judge. I said, okay,
4 judge, he said, "I ruled again the defendant." I said,
5 "On what grounds?" He'd take the plaintiff's pleading and
6 say, "Everything he pled." I quit doing that. So, but,
7 why not just have a conclusion of law? The court compares
8 the pleadings and the evidence and see if it's supported
9 by he found negligence, he didn't find that. Why get into
10 the judge's mind? We were entitled to that because they
11 wanted this to substitute for a jury trial. Why have
12 findings of fact now? That's my question.

13 CHAIRMAN BABCOCK: Pete. You have an
14 answer?

15 MR. SCHENKKAN: No.

16 CHAIRMAN BABCOCK: Okay.

17 MR. SCHENKKAN: I have another question, or
18 another tack on this. Focusing on the difference between
19 bench trials an jury trials, and what we're talking about
20 here is bench trials, it seems to me the closer analogy
21 might be administrative law cases, which I have done for a
22 living for a long time; and administrative agencies are
23 generally required by their own statute and also generally
24 required by the APA when they hold the agency equivalent
25 of bench trials, so-called contested case, to make

1 findings of fact and conclusions of law; and sometimes the
2 statute tells them to do that in more detail. And then
3 the Texas Supreme Court was confronted with the question,
4 well, how close do we have to parse those findings of fact
5 to decide whether to affirm this order or not, and for a
6 number of years while the Chief Justice of the Austin
7 court of appeals was John Powers, the Austin court of
8 appeals took the view that you needed to be very good in
9 those findings of fact and conclusions of law and spell
10 out the -- you know, the exact elements of each of the
11 relevant statutory criteria and the facts that supported
12 those.

13 And the agencies said, "No, this is just
14 sticking in the bark of words and wasting time and getting
15 us reversed for the wrong reasons," and finally the Texas
16 Supreme Court sided with the agencies in Charter Medical
17 and said as long as there is a reasonable basis here that
18 allows us to see from the record how they got from the
19 record to this side wins, we don't care. I think that's a
20 fair summary of Charter Medical, and I'm wondering if that
21 same thing isn't true here; and if it's true here, then
22 if -- if that's what you want, if all you want is to make
23 sure that the trial judge, who is sitting as the
24 fact-finder as well as the law interpreter, has a
25 reasonable basis, why don't we just say that? "Explain to

1 us in your findings factually how there's a reasonable
2 basis how you got from here to there."

3 That isn't going to stop the prevailing
4 lawyer from saying what -- "Here are 10 different possible
5 bases," unless the higher courts don't like nine of them.
6 Right? And it still doesn't. In administrative law we
7 still offer findings of fact and conclusions of law that
8 are 30 pages long because nothing bad can happen to us if
9 it chops off 30 pages.

10 CHAIRMAN BABCOCK: Justice Gray, and then
11 Frank and then Judge Christopher.

12 HONORABLE TOM GRAY: Well, first, a quick
13 comment on the 10 days that I wasn't going to comment on
14 until Nina commented on, and then I'm still getting
15 appeals where it's been six months after the judgment
16 before the parties get the judgment, and so 10 days after
17 the judgment may still -- is going to present a problem in
18 being very short to the time that the judgment is actually
19 signed, and so I've got at least an issue with 10 days
20 versus the more traditional 30 days.

21 As far as the -- I thought Alex's comment
22 was dead on. With regard to E. B., probably would have
23 had a different result had someone objected to what we
24 later called a Casteel objection to being unable, i.e.,
25 not reasonable or whatever that language is in there,

1 feasible, not feasible, to submit on the broad form,
2 because in Casteel it was multiple theories of recovery
3 that one of which was not supported by any evidence.

4 PROFESSOR DORSANEO: No, one of which was
5 not legally viable.

6 MR. ORSINGER: Not legally viable.

7 HONORABLE TOM GRAY: Okay. Not legally
8 viable.

9 MR. ORSINGER: There was a following case
10 that expanded out to no evidence.

11 HONORABLE TOM GRAY: There was a follow-up
12 to it that was no evidence.

13 PROFESSOR DORSANEO: I know which ones I
14 like and which ones I don't like.

15 HONORABLE TOM GRAY: The point being that if
16 there's a ground of recovery that is not supported by
17 either law or the evidence, there is a way to get to that
18 through the appeal, and if they -- if the person who
19 prevails attempts to use the broad form and then one of
20 those grounds is shown to be not viable, then they have to
21 go back and do it all over again; and so there's an
22 incentive then for the party that prevails to pick a horse
23 for the judge to agree on that he -- that that person can
24 then support on appeal; and so I think while I understand
25 Skip's point on needing to know and the beauty of knowing

1 the different theories that the trial court may be going
2 with them on, I think there's a way to get through that
3 beyond just stopping at the attack on the broad form
4 submission.

5 CHAIRMAN BABCOCK: Okay. Frank, and then
6 Judge Christopher.

7 MR. GILSTRAP: As I understand it, I think
8 this is right, you know, a ground of recovery is a theory
9 of recovery. An element is what they used to call a
10 controlling issue. It's that the person was negligent,
11 not that he was late for lunch and that's why he was
12 driving fast. Richard is correct. We don't have the
13 problem of having all 12 jurors or 10 jurors agree on the
14 same theory, but we do have the problem in both nonjury
15 and jury in that if you have granulated findings -- that's
16 what they used to call them -- you know exactly what the
17 judge or jury decided the case on, but with -- and that
18 was the problem that -- that was what existed before broad
19 form, and the problem was there were just too doggone
20 many. You know, you had was the defendant -- did he run
21 the red light, was it the proximate cause of the accident,
22 did he fail to turn left, was it the proximate cause of
23 the accident; and you go back and see all of these old
24 charges that, you know, some of them had a hundred
25 questions, so that was the vice. They got rid of it with

1 broad form questions.

2 The vice today with findings of fact is not
3 necessarily that. I think you probably could get a judge,
4 if you wanted to, to actually say what theory of recovery
5 that he was -- he decided the case on. The problem is
6 that you have all of these evidentiary findings, and
7 they're still too many, and that's the problem we're
8 trying to deal with here. I think that you do need some
9 type of language in here. It may be aspirational that
10 would speak in these terms of controlling issues and broad
11 form issues, but you've got to put some teeth into it, and
12 it needs to be made reversible error.

13 And the only way you're ever going to put
14 teeth into this is when some court of appeals says, "Look,
15 you've sent us 150 fine evidentiary findings. It's wrong.
16 Go back and do it again." I can't imagine that happening,
17 but that would actually start to cure the problem. Right
18 now we can put all of this -- what Richard used to call
19 hortatory language in here, but the judges aren't going to
20 follow it unless it's made reversible error.

21 CHAIRMAN BABCOCK: Judge Christopher.

22 HONORABLE TRACY CHRISTOPHER: I think the 10
23 days is too short. I think often parties don't know when
24 the judgment is going to be signed. There might not be a
25 hearing that they're in front of the judge on and they

1 know it's being signed that day, and at least in our
2 county they'll -- the clerk will enter it and then they
3 get a postcard notice in the mail, and so we've already
4 eaten up three, four days at that point. I just think 10
5 days is too short to do the request.

6 And then with respect to the idea behind
7 broad form findings, I like it as a trial judge. It's a
8 nice thing to be able to do. I've already done it on
9 probably 20, 30 cases where I just said, you know, "I find
10 the defendant was negligent, and it was a proximate cause
11 of damages to the plaintiff"; and, you know, "There's this
12 much in medical bills and this much in pain"; and it's a
13 very simple thing to do because you just track the
14 language of the jury charge; and if I was really worried
15 about it, I might actually cut and paste the whole
16 definition of negligence within my finding of fact to make
17 sure that I've gotten the elements under the ground, if
18 I'm understanding the distinction between the two of them,
19 and I'm not sure that I do, frankly.

20 But from a trial judge's point of view --
21 and I'm a little interested because I don't understand the
22 appellate issue -- is it harder if you have 150 findings
23 to reverse the verdict or is it easier if you have 150
24 findings to reverse the verdict?

25 MR. ORSINGER: I would answer if they're all

1 evidentiary they generally get ignored or don't get
2 mentioned in the appellate opinion, although it's possible
3 they may have prejudiced the appellate court against you,
4 but they're usually not mentioned because they're just
5 evidentiary. The real vice is when you have multiple
6 theories that you have to brief when probably the case was
7 only tried on one theory, and you should be able to spend
8 your whole brief on that one theory.

9 HONORABLE TRACY CHRISTOPHER: But don't you
10 have that same problem -- I'm sorry -- with a jury charge
11 also? If the question is just was the --

12 MR. ORSINGER: The jury might be judge.

13 HONORABLE TRACY CHRISTOPHER: -- defendant
14 negligent and there were four or five different
15 possibilities on why the jury was negligent and the jury
16 just answers "yes," you don't know which one they did it
17 on. Why is it any different for the judge?

18 MR. ORSINGER: It's different because we
19 made a policy decision that the social cost or procedural
20 cost of exactitude in the jury is too costly to us. We
21 have that behind us. We have explored it, we have decided
22 to move a new direction. There is virtually no cost to
23 having a trial judge put in the record what their real
24 thinking is; and if they don't do a good job of it, unlike
25 with a jury trial, under the Casteel case you've got to

1 reverse it and go back and try the case with a new jury.
2 All you have to do here is remand -- is to abate the
3 appeal and remand it to the trial court saying, "We would
4 like more specific findings that set out what your real
5 foundation for your judgment is." So the litigation costs
6 or social costs, I guess, to being more accurate in bench
7 trials is very small relative to a jury trial, and I think
8 you should weigh it differently.

9 CHAIRMAN BABCOCK: Roger.

10 MR. HUGHES: I still think it comes down to
11 this. It's not just are we going to permit some sort of
12 Casteel objection to be made to the charge -- I mean, to
13 the court's findings of fact, because if it does, I think
14 the proposed Rule 298 could do what a Casteel objection is
15 supposed to do for a jury charge. I think it still comes
16 back down to a basic gut decision that we're going to
17 have -- that's going to have to be made, and I'm not sure
18 whether it has to be made as a rule or a matter of a case
19 decision as to whether we're going to say not knowing
20 which act or omission was negligent, not knowing which
21 representation the court found to be a misrepresentation,
22 obstructs the appellant's ability to present his case or
23 her case to the court of appeals.

24 It's not the social cost, because if it
25 obstructs the appellant's ability to attack a jury verdict

1 not to know which act or omission was negligent, which
2 representation was false, then it must be so for a
3 judge's, and that's plainly it to me, and I'm not sure
4 that this committee can solve it, but I think getting back
5 to my original suggestion, I think if you change Rule 296
6 to talk about the elements of a ground for relief or a
7 defense, I think you will have done as much as you can,
8 short of the Supreme Court finally resolving the issue,
9 you know, the question to begin with.

10 CHAIRMAN BABCOCK: Pete, then Skip.

11 MR. SCHENKKAN: Well, if that's what you
12 want to do, you're going to have to rewrite 299
13 substantively, because the real obstacle to doing what you
14 want at the moment is the presumed finding rule. At the
15 moment if the judge says, "I find there was fraud because
16 there was misrepresentation," then we're going to presume
17 that the judge also found that it was a proximate cause of
18 damages, even though they just immediately moved to the
19 damages, because it says in 299 if they found one of the
20 elements of a ground of recovery, broad, breach of the
21 duty, we're going to presume the findings we need for the
22 rest of them. You know, so we're not going to get there
23 by -- if we have a problem and that's the problem, we need
24 a different solution for the problem.

25 CHAIRMAN BABCOCK: Skip.

1 PROFESSOR DORSANEO: I don't think so.

2 MR. WATSON: I think the answer to the
3 question that's being asked of what is the appellate
4 problem, to me is this. It may be different to others,
5 but the Court finally enforced the idea that we have two
6 different kinds of harm that are reversible in this state
7 when it did Casteel, City of Houston, Romero, and the
8 others. It decided that it's got to know -- I mean,
9 Casteel was actually saying that we have a fundamental
10 right to determine a case was decided on proper legal
11 grounds, and if a ground has no evidence supporting it, it
12 is not a proper legal ground. That's a question of law.
13 It's not a proper legal ground, and it was really
14 enforcing 44.1(b), or whatever it is, that says that if
15 the way you do something prevents a person from showing
16 that a case was really not decided on a proper legal
17 ground when you have several grounds, some of which are
18 proper, but the finder of fact -- and I don't care -- to
19 me it shouldn't matter whether he or she is wearing a robe
20 or not, but if that person actually is human and makes a
21 mistake and doesn't decide a case on a proper legal
22 ground, then our system of submitting or showing how the
23 case was decided must show whether the case was decided on
24 the disputed ground.

25 And to me the difference between what I'm

1 talking about and what Richard was talking about in E. B.
2 is simply I don't care if the same five people came down
3 on the same issue. What I care about is if one of those
4 four grounds had no evidence. Then I care very much
5 whether I can demonstrate that they decided it on that
6 ground. That matters, and until the Court repeals 44.1
7 and says, no, it really doesn't matter if you can
8 effectively present the fact that this one should not have
9 been before the court, the finder of fact should not have
10 been able to consider this, and until it says Casteel,
11 City of Houston, Romero are out the window, then before
12 juries we are in a situation that the author of Romero
13 said you have three choices. You can either not put it in
14 the instruction or you can separate it out so that there's
15 a separate finding so that we know that's what it was
16 based on or you can get reversed under 44.1(b). And I'm
17 just asking, is that going to apply to judges or are they
18 exempt? To me that's the philosophical question.

19 CHAIRMAN BABCOCK: Elaine and Sarah have the
20 answer to that.

21 PROFESSOR CARLSON: Well, the thought
22 process of the subcommittee was that it would, I think. I
23 mean, we were trying to do that parallel for the very
24 reasons that you're suggesting, so at your own peril would
25 you stand with broad form findings of fact if you have a

1 ground unsupported by the law or any evidence.

2 CHAIRMAN BABCOCK: Sarah, then Richard
3 Munzinger.

4 HONORABLE SARAH DUNCAN: A couple of points.
5 I don't think that the Casteel line of cases -- that they
6 can repeal 44.1 if it's -- those weren't decided because
7 of harmful error, I don't think. There's a constitutional
8 right to appeal in civil cases under the Texas
9 Constitution, and Federal constitutional law says that if
10 you're going to provide appeal it has to be a meaningful
11 appeal.

12 Bill and I debated this exact question 20
13 years ago at a San Antonio seminar. My view was, as Skip
14 says, that I should be able to know what the basis of the
15 jury's decision is. Bill took the opposite view, and it
16 wasn't -- you know, we had a harmless error rule long
17 before Casteel. We have a different Court, who has a
18 different view of it, who has lived with it longer to see
19 what the problems are with broad form submission as it has
20 come to be defined, which I think actually looking back at
21 Judge Pope's comments at the SCAC meeting where that was
22 floated what has come to be known as broad form submission
23 is not what was initially proposed.

24 All that aside, I don't think we're paying
25 enough attention to what Buddy said on the historical

1 roots of our findings and conclusions rules. They were
2 trying to make it like jury trials, but we've rejected
3 doing jury trials that way, so why do we want to impose on
4 the trial judges what we have said we're not going to
5 impose on the juries because of all the reasons that we
6 said we're not going to do it? The risk of having
7 irreconcilable findings of -- it getting too
8 evidence-based and requiring too much. Now, Judge
9 Yelenosky, of course, has an answer to this, but I don't
10 see a reason for treating judges and juries differently,
11 bench trials and jury trials.

12 I don't agree with what broad form
13 submission has come to be known as, but if that's what
14 we're going to do with juries, I don't see why we don't
15 just -- and I understand, Justice Hecht, that you want to
16 know the basis of their decisions. Well, I would like to
17 have known the basis of the jury's decision, too, but just
18 because I want to know it, doesn't mean the system costs
19 aren't too high for me to impose that as a requirement.

20 CHAIRMAN BABCOCK: We're going to have to
21 break away from this for a second. Actually, more than a
22 second, because the Court is interested in hearing from
23 the great Buddy Low on the issue of the Rule of Evidence
24 1010.

25 MR. LOW: Okay.

1 CHAIRMAN BABCOCK: So we're going to defer
2 the rest of this discussion until our next meeting. We're
3 not meeting tomorrow, and, Buddy, can you take us through
4 this in 12 minutes?

5 MR. LOW: I can even beat that.

6 CHAIRMAN BABCOCK: If you can beat 12
7 minutes then we'll get out of here early.

8 MR. LOW: Okay. I got a call from the
9 chairman of the State Bar Evidence Committee claiming that
10 they need the Supreme Court to pass a Rule 1010 which is
11 called "Unsworn declarations." There is such a thing in
12 the Practice and Remedies Code pertaining to prisoners.
13 They can sign, it says, "subject to perjury," and that's
14 by statute because they can't get a notary. And I said,
15 "Well, that's fine." Said, "We want to have a conference
16 call with you tomorrow." I said "Okay." So they call and
17 they tell me that they need this because they need the
18 Legislature to amend the definition of perjury to include
19 this, and I said, "Well, why don't you go to the
20 Legislature for the whole thing? You've got the idea,"
21 and they didn't really tell me, but I heard that they had
22 been to the Legislature.

23 So I told them, I said, "My committee" -- it
24 was like two weeks ago. I said, "I can't get the
25 committee together and make recommendations to the Supreme

1 Court advisory," so feel free to go straight to -- I put
2 it on Judge Hecht. I said, "Write him, but I can't do
3 it." So Judge Hecht asked me if I would get my committee
4 together or poll them and see, you know, what we thought
5 about it. Well, my first thing was to call or write the
6 different committee members. Judge Benton, I called, and
7 he thought there was something in the uniform laws on
8 that. There really wasn't. There was something about out
9 of country declarations. Judge Jennings, who used to be a
10 prosecutor, was not in favor. He thought we were getting
11 away from formality too much, it would be very difficult
12 to prove perjury because somebody could just say, "Well,
13 you know, nobody described that to me. They just passed
14 it over and I signed it." And technically a notary should
15 keep a record and identify and go through all of that.

16 I called Professor Hoffman, and he said that
17 the notary was an unnecessary formality, that it was
18 probably pretty good, but he thought it ought to be
19 legislated. Elaine was against it. Harvey Brown, my
20 goodness, he was strongly in favor of it because he had a
21 Federal thing similar to that, and the case was in -- some
22 way got into state court, and he had to get the judge to
23 allow this to be admitted. I mean, I don't know why that
24 was a lot of trouble, but any rate, I didn't hear from
25 Tommy.

1 I did some research, and I found at the
2 Federal rule -- now, my first question to them was if
3 you're going to have a rule like that, why put it in the
4 tens. The nines are the one. Well, I found that 902 of
5 the Federal rules, they have a -- they have a comment,
6 they have a statute, particularly on it. I found Utah
7 passed a rule on it, and it was a lot of confusion because
8 some judges wouldn't apply it. They said that should be
9 statutory, so then the Legislature in Utah had to go back.
10 That's the only -- you know, and make it a legislative
11 act.

12 The pros and cons of what it does, it does
13 away with a notary, and the pros and cons, you can argue
14 them all day. The other question I asked them was should
15 it apply to criminal cases, criminal law, and they hadn't
16 really thought about that. I said, well, you know, we've
17 got to know that. The next philosophical question is if
18 we do it, we can't do it all. We can't make it a crime.
19 We can't change the perjury laws. So I guess the first
20 question -- or I don't know what question comes first,
21 whether you say should we make a rule, should it be
22 legislative, is the thing good or bad, whichever way it
23 is, and that's basically -- I told you everything I know.

24 CHAIRMAN BABCOCK: Justice Hecht.

25 HONORABLE NATHAN HECHT: And I think I can

1 just build on that and tell you what I think the Court
2 would like to know, which is pretty simple, and that's is
3 this a good idea or not.

4 MR. LOW: Yeah.

5 HONORABLE NATHAN HECHT: I don't think we
6 can do it, and I think the Court's tentative view is that
7 this can't be done by rule because at least tentatively
8 the perjury statute does not -- would not make this
9 perjury, and since that's in the Criminal Code, there's
10 nothing that can be done about that. The Federal system
11 does it by statute and says that the statement made under
12 the penalty of perjury is -- you can prosecute the falsity
13 of that as a crime of perjury, so they don't have the
14 problem, and so the only question I think the Court is
15 interested in is just in case we get an inquiry from the
16 Legislature, which we may not, but generally would it be a
17 good idea to have statements, affidavits, motions for
18 summary judgment, verified pleadings, whatever it was,
19 made under penalty of perjury, and an amendment to the
20 Penal Code that says that's perjury if it's false, or
21 should we keep it the way it is?

22 MR. LOW: Judge, their question was, they
23 said we have to pass a rule first before the Legislature
24 will consider that; and what came first, the chicken or
25 the egg?

1 CHAIRMAN BABCOCK: Yeah. Let me say that in
2 Federal court, especially in jurisdictions other than
3 Texas, you almost never see anymore an affidavit. It's
4 always declarations, and in states where they have this
5 rule and the implementing statute, you never see
6 affidavits. You always see declarations. California, for
7 example, is a jurisdiction that does it this way, and the
8 practical benefit, the reason it is a good thing, is that
9 when you're -- particularly as our economy expands across
10 state lines, when you've got a witness in California that
11 you're trying to get some testimony for and that person
12 may not have ready access to a notary, it is just much
13 simpler and costs less money to get a declaration, and the
14 only thing you have to be sure about is that the
15 declaration is treated as seriously and as formally as the
16 affidavit is when the guy presumably puts his hand up and
17 says to the notary, "I swear I'm telling the truth here."

18 MR. LOW: Chip?

19 CHAIRMAN BABCOCK: Yeah, Buddy.

20 MR. LOW: I'm sorry. 902 is the only place
21 the advisory committee commented on the statute, and they
22 said, "A declaration that satisfies 28 USC 1746 would
23 satisfy the declaration requirements of Rule 902," paren,
24 (11). Not all the others, but that really -- the others
25 are self-proven and so forth, but that's the only

1 reference in the 902, is that it satisfies section (11) of
2 902.

3 CHAIRMAN BABCOCK: Yeah.

4 MR. LOW: And that's a comment.

5 CHAIRMAN BABCOCK: Yeah. Well, I guess my
6 point is that the thing -- the reason to say it's a good
7 thing is because of the ease of getting it. Now, the
8 countervailing balance Judge Yelenosky wants to say.

9 HONORABLE STEPHEN YELENOSKY: Well, I think
10 it depends, and partly it's a -- you know, you're talking
11 about Federal court, and you're talking about witnesses
12 out of state, and you're talking about usually people who
13 are represented by counsel, but we're not talking about
14 something that would be usable only under those
15 circumstances. We're talking about something that in
16 every instance, at least as I understand it, would be
17 equivalent to an affidavit.

18 MR. LOW: Right.

19 HONORABLE STEPHEN YELENOSKY: And culturally
20 right now I don't think people think that they can be
21 subject to perjury unless something magical happens,
22 they're standing in front of a judge who has a robe on or
23 they see a notary, and maybe it would be fine if people
24 became accustomed to understanding this. One of the
25 things that might be necessary is like we do with consumer

1 notices, certain things have to be in all bold and a
2 certain font. Maybe that would get us there, but I
3 already see in court -- and we know as judges one of the
4 instructions we get is to administer the oath in a way
5 that impresses upon the person the seriousness of the
6 oath; and you just said, Chip, important to know that the
7 person knows that the -- well, who's going to make sure
8 that the pro se litigant who is signing under penalty of
9 perjury on the interrogatories knows the importance of
10 that?

11 And I'm not just saying for the purpose of
12 prosecution, because we know how little that ever happens.
13 I'm saying for the purpose of elevating what they're doing
14 to something that they truly consider serious. I see it
15 minimized even at the affidavit stage, people coming in
16 court and saying, "Well, I signed the affidavit, but the
17 attorney wrote it for me" and blah-blah-blah. It's
18 already a problem with affidavits. Unless there's the
19 huge education, there's something specific that screams
20 this is just like standing up in front of a judge, I think
21 we're going to have real problems, because it will be
22 credible that the person did not understand the
23 seriousness of it.

24 CHAIRMAN BABCOCK: Alex.

25 PROFESSOR ALBRIGHT: If you think going

1 before a notary does that then you haven't sat by many --

2 HONORABLE STEPHEN YELENOSKY: I don't know
3 that it does.

4 PROFESSOR ALBRIGHT: I have two notaries
5 sitting outside my office, and the law students and people
6 from all over the university come in all the time getting
7 things notarized, and not one word is ever said about the
8 importance of the oath or what they're doing. They just
9 show them their driver's license and get it all down.

10 HONORABLE STEPHEN YELENOSKY: Well, that may
11 be a problem with how the notaries do their work.

12 PROFESSOR ALBRIGHT: But I think it may be
13 that you can do it through the wording of whatever you're
14 signing as well as you can with the notary.

15 CHAIRMAN BABCOCK: Carl, then Hayes, then
16 Bill, and then, I'm sorry, Judge Christopher.

17 MR. HAMILTON: As a matter of background, a
18 few years ago the Court Rules Committee prepared the
19 legislation to this and sent to it the State Bar, and they
20 submitted it to the Legislature, and, Hayes, didn't you
21 work on that some?

22 MR. FULLER: I was going to comment on that,
23 Carl. Court Rules Committee addressed this five years
24 ago. It was brought to us, and it was pretty much
25 unanimous at that committee. It was approved by the State

1 Bar liaison as part of their legislative packet. It has
2 been approved by the State Bar liaison the last two
3 legislative sessions and has failed in both sessions, my
4 understanding, primarily because of the opposition of the
5 notary publics, and I think the last time it was --
6 Chairman Smithey may have changed. He may not be the
7 chair of that committee, but I believe at one time he
8 didn't even let it come up for a vote. I think they had
9 testimony.

10 In response to Justice Hecht's question, it
11 is a good procedure. The problem is right now, of course,
12 it's not sanctionable, because it's not subject to
13 perjury. Inmates in the state of Texas can use this
14 procedure, but you and I cannot use this procedure, and
15 the committee felt like -- the Court Rules Committee felt
16 like it was very useful. It is the Federal practice, but
17 there is a problem that unless the perjury statute applies
18 we can't do it. So the short answer to your question is,
19 Justice Hecht, yes, it's a good procedure; and if asked, I
20 think --

21 CHAIRMAN BABCOCK: Judge Christopher, then
22 Judge Evans.

23 HONORABLE TRACY CHRISTOPHER: Although I'm
24 not necessarily opposed to this, because I actually like
25 the language, "I declare under the penalty of perjury that

1 the foregoing is true and correct," which is a lot
2 stronger than "Subscribed to and sworn before me on the,"
3 blank, "day of," blank, which is what your notary
4 paragraph says, the one reason we do have notaries is to
5 verify that the person signing it is that person signing
6 it. So the fact that --

7 PROFESSOR ALBRIGHT: Yeah.

8 HONORABLE TRACY CHRISTOPHER: -- your notary
9 requires the driver's license and notes it down indicates
10 that, yes, you know, I really signed that document. And
11 that goes away with this declaration.

12 CHAIRMAN BABCOCK: Judge Evans.

13 HONORABLE DAVID EVANS: It doesn't state
14 that it's made on personal knowledge, and so you duck the
15 "true and correct." You say it's true and correct, well,
16 that's what I heard, that's what I understood, and so I'm
17 not comfortable with the last sentence. And "under
18 penalty of perjury," that doesn't -- they won't know that
19 that requires them to have personal knowledge of the
20 facts. We're just going to get into a series of
21 conclusionary, baseless statements to base evidence on,
22 and I have the same problem of identification, but I might
23 be willing to go with -- I would suggest maybe a witness
24 that identifies a person, so --

25 CHAIRMAN BABCOCK: For what it's worth, in

1 California their last line says, "I declare under" --
2 something about "pain of perjury under the laws of the
3 State of California," and I've got a case where all the
4 witnesses are in Aruba, and they're all signing these
5 things, and, you know, unless they show their happy face
6 in California -- but that's where the case is, so maybe
7 they will show their happy face there.

8 Yeah, Roger.

9 MR. HUGHES: Well, I was on the State Bar
10 Rules Committee when we went through this, and what's been
11 said before about our history is exactly true. The reason
12 why I so strongly opposed it is if you've ever tried to
13 get a client in Hong Kong or Canada to sign a special
14 appearance so you can get it filed on the 20th day, now
15 you understand why this statute might be necessary. In
16 Canada, notaries are very scarce. What they provide are
17 called oath takers. Now, I wasn't exactly sure I wanted
18 to go in front of a Cameron County or a Hidalgo County
19 judge and explain why a Canadian oath taker was the same
20 thing as a Texas notary, and it gets only worse when
21 you're dealing with clients who are in Mexico who cannot
22 come across the border, at least not legally, because
23 notaries over there are a lot stickier than our notaries,
24 and expensive, I might add. And it only gets worse if
25 your client is in Hong Kong, and you've got to have that

1 affidavit for the special appearance, which has to be
2 filed today at 5:00 o'clock or whatever.

3 And as far as the form that it's true and
4 correct of personal knowledge, I think that can be part of
5 the body of the affidavit to be admissible. I don't think
6 the statute of defining what an affidavit is requires that
7 it be -- everything be made on personal knowledge. That's
8 my two cents worth.

9 CHAIRMAN BABCOCK: Okay. So, Justice Hecht,
10 here's the bottom line. There are pros and there are cons
11 to this rule, and you've heard the two sides of the
12 debate.

13 We're going to recess now until our next
14 meeting on April 17th. And if you-all can get by the
15 reception and, more importantly, the picture taking
16 tonight starting at 6:00 at Jackson Walker's offices, 100
17 Congress. The parking garage is off Cesar Chavez and
18 it's -- if you go by Congress on Cesar Chavez headed to
19 Mopac, and the little driveway right between our building
20 and the next building, which is an apartment building
21 under construction, that's where the parking lot is. Get
22 your ticket and take it to the reception area. They'll
23 stamp it for you, and that will be that, and we hope to
24 see all of you at 6:00.

25 (Meeting adjourned.)

1 * * * * *

2 **REPORTER'S CERTIFICATION**

3 MEETING OF THE

4 SUPREME COURT ADVISORY COMMITTEE

5 * * * * *

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7

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

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

10 the above meeting of the Supreme Court Advisory Committee

11 on the 20th day of February, 2009, Friday Session, and the

12 same was thereafter reduced to computer transcription by

13 me.

14 I further certify that the costs for my

15 services in the matter are \$_____.

16 Charged to: The Supreme Court of Texas.

17 Given under my hand and seal of office on

18 this the _____ day of _____, 2009.

19

20

21 **D'LOIS L. JONES, CSR**

22 Certification No. 4546

23 Certificate Expires 12/31/2010

24 3215 F.M. 1339

25 Kingsbury, Texas 78638

(512) 751-2618

#DJ-236