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MEETING OF THE SUPREME COURT ADVISORY COMMITTEE

April 10, 2010

(SATURDAY SESSION)

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Taken before *D'Lois L. Jones*, Certified
Shorthand Reporter in Travis County for the State of
Texas, reported by machine shorthand method, on the 10th
day of April, 2010, between the hours of 8:59 a.m. and
12:03 p.m., at the Texas Association of Broadcasters, 502
East 11th Street, Suite 200, Austin, Texas 78701.

INDEX OF VOTES

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

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Rule 302	20149
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Documents referenced in this session

10-07 Proposed amendments to Rules 296-329 (4-8-10 revision)

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2 CHAIRMAN BABCOCK: All right. Good morning,
3 everybody. When we left off yesterday Bill was talking
4 about the new proposed Rule 301, and we had a little
5 discussion right in the middle of his discussion, so,
6 Bill, why don't you jump back into where we were?

7 PROFESSOR DORSANEO: All right. I think we
8 were just finishing the ordinary motion for new trial
9 item; and to recapitulate, with everybody's permission I'm
10 going to take out the term "ordinary" from in front of it.
11 I'm going to make that change on that "may"/"must" issue
12 to have it be like 329b, which talks about "if filed, a
13 motion for new trial must be filed within 30 days after
14 final judgment is signed." I'm going to make it
15 absolutely clear in the last paragraph that we need to
16 have an express ruling, the last unnumbered paragraph in
17 the motion for new trial part. We need to have an express
18 ruling on an amended motion for new trial that was not
19 filed within 30 days rather than have it be overruled by
20 operation of law, which it may well be clear enough
21 already. So that takes me to the motion to modify. Now,
22 the motion to modify language -- okay. Sorry.

23 HONORABLE TRACY CHRISTOPHER: In
24 relationship to what we talked about yesterday, how the
25 rule never uses the word "final judgment" --

1 PROFESSOR DORSANEO: Uh-huh.

2 HONORABLE TRACY CHRISTOPHER: -- but you've
3 thrown "final judgment" in here a few times, so I don't
4 know whether that was on purpose or we're trying to
5 introduce something different here.

6 PROFESSOR DORSANEO: No, I think that it
7 means -- in the current rule it means final judgment, but
8 doesn't say it. It should say it.

9 HONORABLE TRACY CHRISTOPHER: So like in
10 (a)(1) you say -- well, when we were at 300 we didn't call
11 it a final judgment, did we?

12 MR. BOYD: Yes. In 300?

13 HONORABLE TRACY CHRISTOPHER: Oh, you're
14 right. Never mind. It hadn't been before, but we're
15 starting --

16 PROFESSOR DORSANEO: And I think it's fair
17 to say that yesterday that most of the time when the term
18 "judgment" is used in these rules it means "final
19 judgment," and otherwise the term "order" was used, but
20 that's not -- we're not consistent, you know, and it's
21 particularly important to be consistent in these
22 post-judgment motions so that we know, you know, if you
23 must do something that it's after the final judgment, not
24 after every order that comes down the road. I think Jeff
25 was talking about having that issue just recently. David.

1 HONORABLE DAVID GAULTNEY: Bill, did you
2 want to leave it as "amended motion" in that last
3 paragraph, or did you want to say "motion or amended
4 motion"? I guess if there was a motion to modify that
5 was --

6 PROFESSOR DORSANEO: Yeah. Yeah, I think
7 "motion or amended motion."

8 HONORABLE DAVID GAULTNEY: "Or amended
9 motion."

10 PROFESSOR DORSANEO: Because of the point
11 Sarah made that it could be in the original motion if
12 there had been another motion that extended plenary power.
13 We'll have to look at that after -- see if it does create
14 more confusion than benefit. The committee can look at
15 that.

16 So now I'm ready for the motion to modify,
17 which is essentially the same as it was last time around.
18 The key wording in the motion to modify rule that's added
19 to the motion to modify provision in 329b(a), the keywords
20 are "in any respect." Okay, "in any respect." Right now,
21 I better open my rule book instead of -- I do believe that
22 I have this memorized, but it's not an accurate belief.

23 HONORABLE STEPHEN YELENOSKY: It's an
24 interlocutory?

25 PROFESSOR DORSANEO: I'm pretty familiar

1 with it, but I don't have it memorized. Okay. Oh, 329b,
2 not (5)(g) says, "A motion to modify, correct, or reform a
3 judgment, if filed, shall be filed and determined within
4 the time prescribed by this rule," but never says what
5 kind of a modification, correction, or reform they may be
6 talking about. The idea was we got that "modify, correct,
7 or reform" from two Supreme Court cases, and Clarence and
8 I must have thought at the time that we didn't need to say
9 anything about it because if you read those cases you
10 could tell what was going on, and that just proved not to
11 be accurate. So I guess the two significant changes, one
12 is to drop the "correct or reform." That actually sounds
13 like a nunc pro tunc anyway, sounds like fixing a clerical
14 order, and to just use the term "modify," but to pick up
15 the language "in any respect," which is in 329b(h), and I
16 guess the Lane Bank case, there was a big debate in the
17 Supreme Court about whether you would need to have a
18 modification of some character like a material
19 modification or a substantive change in the judgment
20 rather than just any change, you know, and basically
21 including the date, okay, and Justice Hecht lost that
22 argument, but I hope -- you won at the last meeting
23 ultimately, and I hope he wins it here again today.

24 It makes better sense to say, "After
25 judgment a party may move to modify the judgment in any

1 respect," so that we don't have arguments about whether
2 this change is sufficient to expand plenary power and
3 under rule -- under appellate Rule 26 to get to the longer
4 appellate timetable. If you filed a motion to modify and
5 then you found out that what you were asking for didn't
6 amount to a modification then that would be, you know,
7 unfortunate. So and it's been controversial, so our
8 committee wanted to go with "in any respect"; and then
9 this additional language, which really just is additional,
10 is in there to make it plain that you can file in effect a
11 motion for judgment on the verdict, a motion for judgment
12 NOV, or a motion to disregard one or more jury findings as
13 a motion to modify, that a motion to modify can do all of
14 those things; and from my perspective it doesn't even
15 matter whether you call it a motion to modify. If you
16 called it a motion for judgment NOV, it would be a motion
17 to modify if it was after judgment.

18 So if you did it before judgment, that would
19 preserve things. If you did it after judgment, that would
20 preserve things, and the only -- I don't think there is --
21 there isn't a place in between in my view. So the idea is
22 "in any respect" means by moving for judgment on the
23 verdict, moving for judgment notwithstanding the verdict,
24 or moving to disregard one or more jury findings, and I
25 think that's consistent with the case law, because those

1 requests under the -- you know, under the case law are
2 requests that would satisfy the tougher current standard,
3 seeking a substantive change in the judgment.

4 Then again, the next paragraph is meant to
5 absorb or to embrace for motions to modify the second
6 unnumbered -- second or third unnumbered, fourth, fifth
7 ones that are expressly included for the motion for new
8 trial, and as I said yesterday, the only reason I did it
9 this way, "A motion to modify must be filed to determine
10 within the time" and perhaps "in the manner prescribed by
11 (b) (1) of this rule for an ordinary motion for new trial"
12 is just to make it shorter. And it may not be desirable
13 just to make it shorter. It may be desirable to
14 recapitulate and change in terminology. Frank Gilstrap
15 mentioned to me yesterday, well, is that supposed to cover
16 the "as long as the trial court" paragraph, and it is, and
17 the only thing I could do to make that clearer other than
18 repeating would be to provide some sort of enumeration
19 next to those paragraphs in (b) (1), like, you know,
20 (b) (1) (a), (b) (1) (b), (b) (1) (c), (b) (1) (d), (b) (1) (e), and
21 have the cross-reference, you know, embrace (a), (b), (c),
22 (d), (e). Am I making myself clear enough on that? Yeah.
23 HONORABLE TRACY CHRISTOPHER: Why don't we
24 just say "if filed, it has to be filed within 30 days,"
25 rather than referring back?

1 PROFESSOR DORSANEO: Because we then have
2 all the other stuff, too, because they operate the same
3 way. Motion to modify operates on the same timetables as
4 the motion for new trial, and that's current Rule 329b.
5 That's the one thing it says clearly, that you have to
6 file it within the time prescribed by this rule for a
7 motion for new trial, "It shall extend the trial court's
8 plenary power and the time for perfecting an appeal in the
9 same manner as a motion for new trial," and that language
10 isn't really perfect, but the idea is it says -- I'm not
11 repeating all of the timing requirements for the motion to
12 modify. They're the same as they are for the motion for
13 new trial. The last couple of drafts I just repeated
14 things, because myself, I like it to be clear for people
15 who are not smart. Okay? All right. And people who are
16 very busy and have lots of cases, too, and maybe not a lot
17 of experience, would be a better way to put it in working
18 through this stuff. I don't like making it difficult for
19 somebody to understand, but that's the reason for the
20 paragraph.

21 And then the penultimate paragraph in (b) (2)
22 basically says that "a prejudgment motion for judgment on
23 the verdict, for judgment notwithstanding the verdict, or
24 to disregard jury findings is not a prerequisite to a
25 post-judgment motion to modify a judgment." That's,

1 again, to reinforce the idea that anything you could do to
2 preserve your complaint or to get the relief you want
3 before judgment you can do after judgment, and that will
4 be treated as a motion to modify, and you didn't have to
5 do something before judgment in order to make the
6 complaint after judgment, which is I think consistent with
7 our law now. So I think the biggest change, really, aside
8 from trying to eliminate confusion, the biggest change is
9 the "in any respect," "the motion to modify in any
10 respect," which picks up the dissenting opinion in Lane
11 Bank rather than the Chief Justice Phillips' majority
12 opinion.

13 CHAIRMAN BABCOCK: Okay. Any comments on
14 this? Richard.

15 MR. ORSINGER: Bill, I would like to focus
16 on this clause about -- you're listing the three
17 prejudgment motions as being grounds for modification.
18 Those, the motion for judgment on the verdict, NOV, and
19 disregard, if filed before judgment don't affect plenary
20 power. By listing them here and including them in the
21 motion to modify that means that if you filed a motion for
22 JNOV after the judgment was signed, it would increase --
23 it would extend plenary power and give you the expanded
24 appellate timetable.

25 PROFESSOR DORSANEO: That's true.

1 MR. ORSINGER: And I think we all need to
2 understand that we're doing that, because previously those
3 haven't been thought of as motions that would extend
4 plenary power in the appellate timetable.

5 PROFESSOR DORSANEO: But I think the Lane
6 Bank majority opinion says that they are motions to
7 modify.

8 MR. ORSINGER: If filed after the judgment.

9 PROFESSOR DORSANEO: Right.

10 MR. ORSINGER: Now then, I would ask whether
11 if you filed a motion for JNOV after the judgment, and
12 since we are equating that to a motion to modify, is it
13 overruled by operation of law if it's not --

14 PROFESSOR DORSANEO: Yes.

15 MR. ORSINGER: -- ruled on by signed order?

16 PROFESSOR DORSANEO: Yes.

17 MR. ORSINGER: Now, that's not true if
18 they're filed before judgment.

19 PROFESSOR DORSANEO: Well, it is in this
20 draft.

21 MR. ORSINGER: It is in this --

22 PROFESSOR DORSANEO: This draft overrules --
23 picking up on what the Court Rules Committee requested, in
24 this draft a motion under Rule 301, current Rule 301, for
25 JNOV or to disregard is overruled by operation of law.

1 MR. ORSINGER: I see. So there's no change
2 there.

3 MS. CORTELL: By the entry of the judgment.

4 PROFESSOR DORSANEO: Huh?

5 MS. CORTELL: By the entry of the judgment.

6 PROFESSOR DORSANEO: By the entry of the
7 judgment. Or by expiration of plenary power, whichever
8 one we end up using.

9 MR. ORSINGER: Okay. I recall that
10 discussion. And then I think that -- I know that no one
11 is trying to do this, but just in case the Supreme Court
12 considers it, that parenthesis, "without limitation," is
13 really, really important to me because the prejudgment --
14 pardon me, motions to modify are used to attack error that
15 occurs in the rendition of judgment that hasn't been
16 otherwise preserved, which is a frequent phenomenon in a
17 nonjury trial. The first time that you find out that the
18 judge is going to make an error of a certain kind is when
19 they hand out a judgment, and a lot of cases require you
20 to object or somehow call to the trial court's attention
21 the mistake they made in the rendition of judgment, which
22 to me is what the primary function of a motion to modify
23 is. It's to preserve error that hasn't been preserved
24 until the rendition of judgment occurred.

25 So the "without limitation" to me is really

1 important for the nonjury part, and then also you'll see
2 it if you actually research these cases, prejudgment
3 interest calculations are the dominant area in jury trials
4 where they use these motions to modify where they screwed
5 up the calculation of the prejudgment interest. So just
6 for the record, I think it's very important that the
7 "without limitation" stay in there so that people realize
8 that an important function of this motion to modify has to
9 do with attacking the judge's ruling and rendition.

10 CHAIRMAN BABCOCK: Jeff. And then we'll go
11 around.

12 MR. BOYD: I'm trying to figure out why we
13 feel it's important to list these three examples as a --
14 as examples that technically qualifies a motion to modify,
15 because in practice these three are all typically used as
16 prejudgment motions. I've never seen one -- a motion for
17 JNOV filed post-judgment, and so I understand that
18 technically you could do it, you could call it a motion
19 for judgment notwithstanding the verdict even though a
20 judgment's already been entered, but why would we
21 encourage that when in practice it's not typically done?

22 PROFESSOR DORSANEO: Well, my only answer to
23 that is the case -- the plenary -- some of the plenary
24 power cases and motion to modify cases involve exactly
25 that. You know, there are two of them, one is a motion

1 for judgment that came after the judgment -- motion for
2 judgment on the verdict that came after the judgment; and
3 the Dallas court of appeals, Craig Enoch writing the
4 opinion, said that qualifies as a motion to modify; and
5 when it qualified as a motion to modify then it extended
6 plenary power and you got the longer appellate timetable.
7 Lane Bank follows that case.

8 Now, Lane Bank isn't -- Lane Bank is a
9 motion for sanctions case, and the motion for sanctions
10 qualified as a motion to modify, because it's sought a
11 change in the judgment, the imposition of a sanction, and
12 the main idea is that we want people -- and I think the
13 people who argued about how the draft should be done last
14 time, we want people to have -- if they don't understand
15 whether something needs to be filed before judgment or
16 after judgment and if they don't understand the structure
17 or don't do it exactly right or the timing gets off, we
18 want that not to matter.

19 MR. BOYD: Which I want -- I mean, instead
20 of focusing on labels, would we accomplish the same thing
21 more clearly if we said, "A party may file a motion that
22 seeks to modify, alter, or otherwise revise a final
23 judgment that has been entered"?

24 HONORABLE STEPHEN YELENOSKY: However named.

25 MR. BOYD: "Modify, alter, or otherwise

1 revise in any respect a final judgment that has previously
2 been entered," without saying what it has to be called.

3 PROFESSOR DORSANEO: To me the "in any
4 respect" language is good enough, and Justice Hecht's
5 draft didn't include all of the "including" extra stuff,
6 and for me it would be enough to say "in any respect." I
7 understand what that means.

8 MR. BOYD: The example I'm --

9 PROFESSOR DORSANEO: You know, by myself and
10 in terms of what the case law was arguing about, but it's
11 in there just to give people comfort.

12 CHAIRMAN BABCOCK: Justice Christopher, then
13 Sarah, then Nina.

14 HONORABLE TRACY CHRISTOPHER: People do file
15 JNOV motions after the judgment has been signed just
16 because they probably don't realize it would be more
17 appropriate to file it before, but they do, so it's a
18 pretty common motion to --

19 PROFESSOR DORSANEO: It's also a Federal
20 practice, so --

21 HONORABLE TRACY CHRISTOPHER: In terms of
22 making things clear, rather than putting sort of
23 timetables under each motion, would it be better to say
24 "prejudgment motion" -- you know, have a thing about
25 timing and just say, you know, "Prejudgment motions are

1 overruled when the judgment is signed. Post-judgment
2 motions filed within the 30" -- "within 30 days after the
3 judgment is signed extends plenary power and can be
4 overruled by operation of law," but if you screw up on a
5 motion for new trial and file it after the 30 days you've
6 got to get a ruling on it. Just so that it's all in one
7 place as to what the timing is, because like this last
8 paragraph in (b)(1), that's my understanding of it.

9 PROFESSOR DORSANEO: Right.

10 HONORABLE TRACY CHRISTOPHER: So you file a
11 JNOV motion, but you don't file your motion for new trial
12 until the 31st day, so it's still within my plenary power,
13 but you have to actually get a ruling on it, and I'm not
14 sure that paragraph tells most people that's what you have
15 to do. And then if you flip over to, you know, "overruled
16 by operation of law" over here in 303 in terms of
17 preservation of complaints, that would still be unclear to
18 me that if I filed my motion for new trial late I have to
19 get a ruling on it to preserve error.

20 PROFESSOR DORSANEO: So where we are is that
21 people don't have disagreement with -- with the concepts,
22 but there's some question about whether it's drafted too
23 awkwardly, and I've -- I've had trouble drafting these
24 things --

25 HONORABLE TRACY CHRISTOPHER: Obviously.

1 PROFESSOR DORSANEO: -- and I've tried
2 several times to make them into something shorter and
3 easier to understand. I'm perfectly willing to keep
4 trying to do that until we're happy.

5 HONORABLE TRACY CHRISTOPHER: Just a
6 thought. Yeah, because, you know, if I flip over to, you
7 know, overruled by operation of law, well -- and your
8 people are used to thinking, "I filed a motion for new
9 trial, it can be overruled by operation of law, I don't
10 have to worry about it," but you do have to worry about it
11 if you filed it on day 31; and, you know, a lot of people
12 think they can't even file it at day 31, so apparently
13 there's some case law that says you can; but like this
14 whole paragraph is a new concept for probably a lot of
15 people; but it will give them another opportunity to "Oh,
16 gosh, you know, I've got to run out here and get it, but
17 if I file it then I've got to get the judge to rule on
18 it."

19 PROFESSOR DORSANEO: Well, all that means to
20 me, what you just said, is that we need to rewrite it
21 because there is a lot of confusion about what you can do
22 or must do and how things are handled. The other thing
23 that Richard didn't mention that I should mention is that
24 if somebody filed a motion for judgment notwithstanding
25 the verdict after judgment, and that's a motion to modify,

1 which I think is clear, then the motion to modify
2 timetable applies, so that's -- it would be too late if it
3 was -- if it was more than 30 days after judgment, if you
4 needed it for plenary power.

5 HONORABLE TRACY CHRISTOPHER: Right.

6 PROFESSOR DORSANEO: So we won't be able to
7 eliminate complexity here. It just alters it, and it
8 makes it -- and what this is intended to do is to make the
9 complexity friendly.

10 CHAIRMAN BABCOCK: Complexity friendly.
11 Sarah.

12 HONORABLE SARAH DUNCAN: I think this does
13 represent a substantial change in the law, and I'm again'
14 it. As it is now I can -- and maybe Jeff and we practice
15 in different states. We file motions for JNOV after the
16 30 days period after judgment has been signed all the
17 time, and we are entitled to do that under current law at
18 any time, and as long as we get a ruling on it by a court
19 that has plenary power over the judgment, we've preserved
20 whatever can be preserved in that motion, and Mike and I
21 have been talking about to Bill about this for it seems
22 like years, and maybe it is years. We don't want that to
23 change. That's essential to what we do, and if that's
24 going to change, it's going to change appellate practice
25 in Texas substantially.

1 HONORABLE TRACY CHRISTOPHER: I don't
2 understand what you think -- I didn't understand your
3 comment. What is it that you think this is changing?

4 HONORABLE SARAH DUNCAN: There's nothing
5 that requires us to file a motion for judgment
6 notwithstanding the verdict post-judgment now within 30
7 days.

8 HONORABLE STEPHEN YELENOSKY: Nor in this.

9 HONORABLE SARAH DUNCAN: Bill is saying that
10 this, it will be considered a motion to modify and has to
11 be filed within 30 days.

12 MR. BOYD: Well, wait a minute. If nothing
13 else is filed -- okay. A final judgment is signed and
14 entered against your client. Nothing else is filed that
15 would extend plenary power beyond 30 days. The law right
16 now says, well, you can file a post-judgment motion,
17 including a motion for JNOV, but you've got to do it
18 within 30 days.

19 HONORABLE SARAH DUNCAN: There has to be
20 something to extend plenary power within 30 days.

21 MR. BOYD: Right.

22 PROFESSOR DORSANEO: That's the same -- it
23 comes out the same way. If there's something that extends
24 plenary power then you're okay as long as there's plenary
25 power to file a motion for new trial or a motion to

1 modify.

2 CHAIRMAN BABCOCK: Well, if that's true,
3 Sarah, how does Bill's proposal change existing law, if
4 what Bill just said was true?

5 HONORABLE SARAH DUNCAN: Well, the last
6 paragraph on page nine where we're talking about filing
7 additional motions for new trial or amended motions for
8 new trial after 30 days -- no, that's not -- that's
9 Brookshire.

10 MR. GILSTRAP: What you want is the ability
11 to file a motion to modify after 30 days --

12 HONORABLE SARAH DUNCAN: Right.

13 MR. GILSTRAP: -- which would solve your
14 problem. And I think Bill's intent is that that is
15 subsumed in the general reference to time limits under
16 motion to modify. Am I correct, Bill?

17 PROFESSOR DORSANEO: Yes. Makes me think I
18 ought to do what Justice Christopher wants or try to do it
19 or just repeat the language.

20 CHAIRMAN BABCOCK: Because you're not
21 intending to change the law that Sarah is worried about,
22 right?

23 PROFESSOR DORSANEO: I'm not intending --
24 I'm agreeing that that's a nice interpretation of current
25 law and would like to see it in the rule.

1 CHAIRMAN BABCOCK: Okay. Okay, good. Nina,
2 did you have your hand up earlier?

3 MS. CORTELL: I'll pass for right now.

4 CHAIRMAN BABCOCK: I think Judge Yelenosky,
5 and then Justice Christopher.

6 HONORABLE STEPHEN YELENOSKY: This is just a
7 drafting thing, but Jeff's comment made me think of it.
8 Is there any appetite for moving some of this archaic
9 language -- I consider archaic language -- like "judgment
10 nunc pro tunc" to a comment so that the old-timers know
11 what you're talking about, but future generations don't
12 continue to have to use Latin. Moreover, where you're
13 going to call it a motion to modify the judgment, whatever
14 the title is, why do we need, as Jeff said, to refer to
15 various titles that it might be given?

16 If it's because people need to understand
17 that, it seems to me that could be in a comment that would
18 wither on the vine in future generations when they don't
19 need it anymore, and so, for example, "motion for judgment
20 nunc pro tunc" would be something like "motion to correct
21 clerical error in judgment" and then there could be a
22 comment, "For those of you who are over 40 years old, you
23 may know of this as judgment nunc pro tunc." Number one,
24 because so much of law is just learning this lingo that's
25 unnecessary, and number two, frankly, as we've had in

1 prior discussions, increasingly people are representing
2 themselves.

3 CHAIRMAN BABCOCK: Justice Christopher.

4 HONORABLE TRACY CHRISTOPHER: This -- one
5 thing I'd just kind of like to say about the -- because
6 until we had this discussion I was not aware, for example,
7 that you could file a motion for new trial on the 31st day
8 and have it preserve anything, so assuming some other
9 post-trial motion had been filed; and sometimes judges,
10 you know, don't rule on motions for new trial because they
11 know they're going to get overruled by operation of law.
12 In fact, before I left the trial court bench I was talking
13 with some appellate lawyers, I said, "Does it really
14 matter for appellate review whether I rule on this, or
15 just let it be overruled by operation of law?" And
16 they're like, "Oh, just let it be overruled by operation
17 of law. It doesn't really matter. It's got the same
18 legal effect." So a lot of trial judges are in that mode
19 of thinking, and I think we need to make it clear, clearer
20 here, that, you know, you've got to actually -- you've
21 actually got to deny it.

22 PROFESSOR DORSANEO: If it's after the 31st
23 day.

24 HONORABLE TRACY CHRISTOPHER: If it's after
25 the 31st day.

1 CHAIRMAN BABCOCK: Yeah, Nina.

2 MS. CORTELL: That was bothering me as well,
3 that we're giving false comfort to people to open the door
4 to the 31st day. It's like it's been this little secret
5 known to some people, but everybody generally understands
6 the 30-day rule, and I hate to lead people in a false
7 sense of comfort about the 31st day filing. So I think
8 it's fair to recognize it, but I think we need to be very
9 careful to clarify that it is, you know, a kind of
10 at-your-own-risk sort of thing, that you may not get a
11 hearing within 30 days. I was trying to think of all the
12 practice problems that can arise from this, but mostly I'm
13 worried about leading people to a false sense of comfort.
14 I think they need to really understand that that 30-day
15 time period is an important one.

16 PROFESSOR DORSANEO: Well, this rule, if it
17 ever gets to be a rule, before we actually propose it to
18 the Court would be -- would need a comment because it does
19 do several very significant things. It changes three
20 Texas Supreme Court decisions.

21 CHAIRMAN BABCOCK: Sarah.

22 HONORABLE SARAH DUNCAN: I'm wondering how
23 Elaine's going to teach -- I mean, I agree with Steve
24 that, you know -- and I agree with Tracy that clear is
25 better, concise is better, antiquated is not so hot, but

1 how do you teach something -- how do we teach people how
2 -- what motion to file when if they don't have the names?
3 That aside, it seems to me that we're talking about at
4 least two things, very different, as Nina was referencing,
5 what's going to extend plenary power and what is required
6 to preserve what. If those are the two big issues here,
7 why don't we divide the rule into to extend plenary power
8 you've got to file something within 30 days that seeks to
9 change the judgment; to preserve, we don't care what you
10 call it, but the court has to have plenary power to act on
11 it, and you can file that, whatever we're going to call
12 it, any time the court has plenary power. Because that's
13 what we're talking about, right, is extending --

14 CHAIRMAN BABCOCK: Yeah, but what about
15 overruling by operation of law? That's one, too.

16 MR. ORSINGER: It's not overruled by
17 operation of law. If it's filed after 30 days it's not
18 overruled by operation of law. You have to --

19 HONORABLE SARAH DUNCAN: Right. You have to
20 get a hearing.

21 MR. ORSINGER: You've got to have the
22 hearing and the judge has to sign an order and then --

23 CHAIRMAN BABCOCK: Yeah.

24 MR. ORSINGER: -- you've preserved error.

25 CHAIRMAN BABCOCK: And that's got to be

1 clear.

2 HONORABLE SARAH DUNCAN: And that to me is
3 what we're talking about, is --

4 PROFESSOR DORSANEO: Maybe you want to look
5 at the alternative.

6 HONORABLE SARAH DUNCAN: -- what are you
7 going to do to extend plenary power, what are you going to
8 do to preserve complaints.

9 PROFESSOR DORSANEO: Look at the alternative
10 draft, which --

11 MS. CORTELL: Page 12.

12 PROFESSOR DORSANEO: -- which is kind of
13 what you're talking about. The question that I have about
14 it, is it too compact? You know, is it -- would people be
15 able to understand it if they don't understand it already?

16 MR. ORSINGER: Bill, why do you need the
17 "after the verdict is returned" if it's going to be after
18 the judgment?

19 PROFESSOR DORSANEO: Where does it say that?

20 MR. ORSINGER: Page 12, paragraph (a).

21 HONORABLE SARAH DUNCAN: Because there could
22 be a prejudgment --

23 PROFESSOR DORSANEO: Oh, that's because
24 it's -- this is -- this is -- keep reading. It's "after
25 the verdict is returned and within 30 days after the date

1 the judgment is signed." It's both.

2 MR. ORSINGER: Well --

3 PROFESSOR DORSANEO: This alternative draft
4 -- and I should let Justice Hecht talk about it. One of
5 the things it does is it eliminates this point of
6 distinction between prejudgment motions and post-judgment
7 motions. It says the time frame is this time frame. You
8 know, the time for doing things is controlled by a
9 different time frame, okay, which is friendlier arguably
10 because people who were waiting after the trial were
11 filing things, you know, willy nilly without regard to
12 whether the judgment was signed will be okay here. But I
13 think they'll be okay under the other one too, but --

14 CHAIRMAN BABCOCK: Judge Yelenosky.

15 HONORABLE STEPHEN YELENOSKY: Just to reply
16 to Sarah on this plain language thing, of course things
17 need names, but perhaps we have too many names for things
18 that could be called one thing, and so perhaps now
19 everybody thinks they've got to file it as a judgment --
20 motion for judgment NOV, and in the future people will say
21 it's a motion to modify, and this type -- this particular
22 motion to modify asks the court to enter a judgment that's
23 different from what the verdict did in the same way that
24 we have many types of motions for summary judgment, but we
25 don't have different names -- we have two at least now, no

1 evidence and traditional, but we don't have names or
2 motion for judgment on liability. We don't routinely do
3 that, and so I'm asking us to sort of shift paradigms for
4 the future.

5 HONORABLE SARAH DUNCAN: And doesn't the
6 alternative draft really do that? I mean, it encompasses
7 that simpler -- I mean, this would just be --

8 PROFESSOR DORSANEO: What I think it does,
9 it kind of does what you're saying. It says, okay, you
10 can file any one of these things after the verdict is
11 returned and within 30 days of the date of the judgment is
12 signed, that that's okay, that you can amend them, you
13 know, file more than one of these and amend any of them,
14 and this -- I added "as long as the court retains plenary
15 power as provided in Rule 304 regardless of whether the
16 court has already denied such a motion."

17 MS. CORTELL: And then what you have to do
18 in Rule 304 is make it parallel, that any motion filed
19 would extend plenary.

20 PROFESSOR DORSANEO: Yeah.

21 MS. CORTELL: The current Rule 304 doesn't
22 do that, but we would parallel those.

23 CHAIRMAN BABCOCK: Okay. Richard Orsinger.

24 MR. ORSINGER: Bill, on your alternative
25 rule I can't imagine a situation in which the verdict is

1 returned after the judgment is signed, and the way this is
2 written there's ambiguity when you're talking about a
3 prejudgment thing and then within 30 days of the date the
4 judgment is signed. That could be 30 days before or 30
5 days after. Since you'll never have a verdict after the
6 judgment is signed, why don't you take out "after the
7 verdict is signed" and just say within 30 days after the
8 date the judgment is signed? Because that's the time
9 period you really mean, 30 days after the date the
10 judgment is signed.

11 MS. CORTELL: But you're making clear you
12 could file it before.

13 HONORABLE SARAH DUNCAN: That wouldn't
14 encompass a prejudgment post-verdict motion.

15 MR. ORSINGER: Well, that's not what --

16 HONORABLE SARAH DUNCAN: The way it's
17 written now it does.

18 MR. ORSINGER: Well, but you're telling me
19 then you have -- you have to file -- let's see. Your
20 verdict has come in, but if there's more than a month
21 between the verdict and the date of the signing of the
22 judgment you can't file your motion for JNOV until
23 you're -- how do you even know what the 30th day is before
24 the judgment is signed if you don't know what day the
25 judgment is signed?

1 HONORABLE SARAH DUNCAN: I think what this
2 is intended to say is at any time after the verdict is
3 returned, and that encompasses the pre -- post-verdict
4 prejudgment motion --

5 MR. ORSINGER: Okay.

6 HONORABLE SARAH DUNCAN: -- and at any time
7 within 30 days after a judgment is signed you can do one
8 of these things. I think that's the intent here, isn't
9 it, Justice Hecht?

10 MR. ORSINGER: Okay. Well, that's not what
11 this says at all.

12 HONORABLE STEPHEN YELENOSKY: But you could
13 just say that no later than 30 days after the judgment,
14 which includes everything from the verdict to 30 days
15 afterward.

16 PROFESSOR DORSANEO: See, but the more you
17 make it simpler the more opaque it becomes. Okay? You
18 can't tell what it means. Unless you know.

19 HONORABLE SARAH DUNCAN: I like the
20 alternative a lot. My only --

21 CHAIRMAN BABCOCK: Comment of the day so
22 far.

23 HONORABLE SARAH DUNCAN: -- question is
24 nothing is overruled by operation of law in the
25 alternative draft, and as I -- I'm like Elaine, time has

1 not been kind with respect to my memory, but there was a
2 reason we got overruled by operation of law, and it was
3 so the trial court didn't have to sign an order overruling
4 a motion for new trial or whatever motion is filed within
5 30 days after the judgment is signed, and it gets
6 overruled by operation of law, and everything that's in
7 there is preserved, and I would think we would want to
8 continue that.

9 CHAIRMAN BABCOCK: Yeah, it's you and
10 Hatchell that are screwing it up with these post-31-day
11 motions.

12 HONORABLE SARAH DUNCAN: Our clients love
13 us.

14 HONORABLE NATHAN HECHT: Well, the --

15 PROFESSOR DORSANEO: This is --

16 CHAIRMAN BABCOCK: Hang on for a second.

17 PROFESSOR DORSANEO: I'll try to draft it
18 one more time and see what people think.

19 HONORABLE NATHAN HECHT: The alternative
20 draft just takes out operation of law because you just
21 don't need it as a concept. All you need is that you put
22 it in the motion. You don't care whether it got --
23 whether anybody ever looked it or not, and the idea that
24 in the file cabinet it got overruled when the clock ticked
25 doesn't really matter. The point is that you put whatever

1 issue you wanted in the motion, and that's good enough,
2 and -- unless the motion is filed out of time --

3 CHAIRMAN BABCOCK: Right.

4 HONORABLE NATHAN HECHT: -- and then you've
5 got to get a ruling. So it just says any ground raised in
6 a motion is preserved if the motion is timely filed and
7 such relief --

8 HONORABLE SARAH DUNCAN: And the relief
9 wasn't granted. That's where the overruled by operation
10 of law effectively is important.

11 HONORABLE NATHAN HECHT: Right.

12 HONORABLE SARAH DUNCAN: Is that right?

13 HONORABLE NATHAN HECHT: Yeah.

14 PROFESSOR DORSANEO: That's great. I like
15 that.

16 MR. PERDUE: Would that language trump,
17 though, the preservation language in 303(e) that's always
18 been the rule?

19 HONORABLE NATHAN HECHT: No. It --

20 MR. PERDUE: I wouldn't think so, but --

21 HONORABLE NATHAN HECHT: Yeah, 303(e) just
22 says if you don't put these things in a motion somewhere
23 you're not going to preserve them no matter what.

24 CHAIRMAN BABCOCK: Right. Richard Orsinger.

25 PROFESSOR DORSANEO: That's details on what

1 has to be in the motion.

2 MR. ORSINGER: Bill, I wanted to go back to
3 page 10 on the motion to modify. You know, the concept of
4 a prematurely filed motion for new trial, if you file your
5 motion for new trial early it's deemed to have been filed
6 on the day the judgment was signed, but immediately after
7 the judgment was signed.

8 PROFESSOR DORSANEO: Uh-huh.

9 MR. ORSINGER: And if you define these three
10 JNOV motion to disregard, if you define them as motions to
11 modify then if one of those is filed before the judgment
12 is signed, does it constitute a prematurely filed motion
13 to modify, which is going to give you the expanded
14 appellate timetables and expanded plenary power?

15 PROFESSOR DORSANEO: If I'm understanding
16 you and we talked about this -- this came up last time. I
17 think what is 306(c) now is going to need to be changed.

18 MR. ORSINGER: And how would that eliminate
19 the prematurely filed concern?

20 PROFESSOR DORSANEO: Well, we would say that
21 something is filed prematurely, it's treated as if it's
22 filed.

23 MR. ORSINGER: So you're taking the concept
24 away?

25 HONORABLE SARAH DUNCAN: Adding to it.

1 PROFESSOR DORSANEO: No, I'm expanding the
2 concept.

3 HONORABLE SARAH DUNCAN: 306(c) would have
4 to change. Right now it's limited to motions for new
5 trial and request for findings and conclusions. It would
6 have to be changed to say "any motion filed under the new
7 301, if filed before the judgment is signed, is deemed
8 filed on the day but subsequent to" --

9 PROFESSOR DORSANEO: Yeah.

10 HONORABLE SARAH DUNCAN: -- "the signing of
11 the judgment."

12 PROFESSOR DORSANEO: You file your motion to
13 modify before the judgment --

14 MR. ORSINGER: But traditionally --

15 PROFESSOR DORSANEO: -- you're okay.

16 MR. ORSINGER: Traditionally a JNOV or
17 motion to disregard filed before judgment was not seen to
18 be something that expanded plenary power. Now it will be
19 under this new regime, and so we're making that change,
20 and we all just need to understand that there's going to
21 be some post-verdict prejudgment motions that are going to
22 extend plenary power when we have never had that before
23 and we're not used to that. I'm not necessarily opposed
24 to that, but it's just to me a huge change that we ought
25 to note.

1 PROFESSOR DORSANEO: I think that's where we
2 started when the Court Rules Committee wanted that to
3 happen.

4 MR. ORSINGER: Okay. Okay.

5 CHAIRMAN BABCOCK: Judge Peeples.

6 HONORABLE DAVID PEEPLES: What is the policy
7 reason for requiring there to be an overruling order on a
8 late filed motion?

9 PROFESSOR DORSANEO: It's late.

10 HONORABLE SARAH DUNCAN: Expectation.

11 CHAIRMAN BABCOCK: It's late.

12 MR. ORSINGER: Habit, custom.

13 HONORABLE DAVID PEEPLES: That's the policy
14 reason?

15 PROFESSOR DORSANEO: And the trial judge --
16 well --

17 HONORABLE DAVID PEEPLES: I guess we know if
18 the judge overrules it by order we know the judge knew
19 about it, and I guess that's a little bit of a reason, but
20 is there a good reason? I mean, think about it. Think
21 about it. If I'm the lawyer, I've been hired late, and I
22 want to get some new grounds in there, if I think the
23 judge will seriously consider those grounds, I will get
24 them before him or her, because I might win it in the
25 trial court and the other side has to appeal. If I know

1 the judge has his mind made up and it's hopeless, what's a
2 good reason for not letting me get those issues before the
3 legal system so they can go up? I mean, is that not
4 what's at stake here?

5 HONORABLE SARAH DUNCAN: I think it is.

6 CHAIRMAN BABCOCK: Well, what about the
7 situation that's in the middle? You don't know.

8 HONORABLE SARAH DUNCAN: I think there is a
9 good policy reason, and I think it's the fundamental basis
10 of why we require the complaints be preserved, is to give
11 the -- give the trial judge and opposing sides the
12 opportunity to fix a problem, and if -- and to me that's
13 the reason for the 30 days is -- I think we're to the
14 point that just about everybody knows if something is
15 filed within the 30 days after the judgment is signed,
16 it's going to be good for something; but as demonstrated
17 by our comments today, when it's filed after the 30 days
18 there's not a lot of clarity, bench or bar, about what
19 does that do, does it extend plenary power, does it
20 preserve anything, do I have to get a ruling on it; and it
21 would be kind of unfair to trial judges and opposing
22 counsel, I think, if I can file something on the 103rd
23 day, not get a ruling. They know it wasn't filed within
24 30 days. The trial judge knows it wasn't filed within 30
25 days if the trial judge even knows about it, and it's

1 going to preserve 101 complaints that neither the trial
2 judge nor opposing counsel has had an opportunity to fix.

3 HONORABLE DAVID PEEPLES: But these are as a
4 matter of law points, legal sufficiency points, not
5 evidence came in and it shouldn't have. These are --
6 these go to the heart of it.

7 HONORABLE SARAH DUNCAN: I agree.

8 HONORABLE DAVID PEEPLES: And why should the
9 legal system --

10 HONORABLE SARAH DUNCAN: And to me if the
11 judgment is wrong as a matter of law I should be able to
12 raise that at any point and preserve it, that the court
13 has plenary power to fix it.

14 CHAIRMAN BABCOCK: Richard Orsinger.

15 MR. ORSINGER: It's late in this discussion
16 that we are not giving the trial judges notice of our
17 complaints when we allow them to be overruled by operation
18 of law, and I do that all the time, because I find that if
19 I come in and too effectively attack the judgment in the
20 trial court in the kind of cases I have they'll fix it,
21 and then when I take it up on appeal basically they find a
22 different way to achieve their purpose without -- by
23 meeting my complaints and then I have a harder time
24 getting it reversed on appeal, so I almost never get a
25 hearing on my motions for new trial or motion to modify

1 because I don't want it modified.

2 HONORABLE SARAH DUNCAN: If I could just
3 inject a funny here, can I just inject a funny?

4 CHAIRMAN BABCOCK: Yeah.

5 HONORABLE SARAH DUNCAN: During oral
6 argument one day a person, who will go unnamed, was
7 arguing a charge point; and I asked him if he had
8 presented that to the trial judge, that complaint; and he
9 just looked at me and went, "Heavens, no, Judge"; and I
10 said "Why not?" And he said "Well, then they could have
11 fixed it," and I was like "Isn't that why we require
12 preservation of error, is to give them an opportunity to
13 fix it?" "Well, then I wouldn't be here, then I wouldn't
14 have an appeal."

15 CHAIRMAN BABCOCK: There wouldn't have been
16 any error.

17 HONORABLE SARAH DUNCAN: Right.

18 MR. ORSINGER: But my original point is, is
19 that the operation of law is, in fact -- we are
20 sandbagging the trial courts.

21 HONORABLE SARAH DUNCAN: That's exactly
22 right.

23 MR. ORSINGER: And we just -- you know, all
24 this idea about notice to the judge and everything else,
25 you know, it's not -- I mean, this is built in so that

1 judges don't find out what your complaints are.

2 HONORABLE SARAH DUNCAN: It's like we've all
3 got a tacit agreement that we are permitted to sandbag as
4 long as we do it within 30 days after judgment.

5 MR. ORSINGER: Okay.

6 HONORABLE SARAH DUNCAN: But I agree with
7 Judge Peeples completely. To me if the judgment is wrong
8 as a matter of law, that ought to be able to be preserved
9 at any point the trial court has plenary power to fix
10 it --

11 CHAIRMAN BABCOCK: Well --

12 HONORABLE SARAH DUNCAN: -- and put the onus
13 on me to go to Judge Peeples and say, "This is wrong as a
14 matter of law, you need to fix it." Of course, he, being
15 a good judge, will fix it and then it's over with.

16 HONORABLE DAVID PEEPLES: I'd grant summary
17 judgment.

18 HONORABLE SARAH DUNCAN: That's right.

19 HONORABLE DAVID PEEPLES: How often, those
20 lawyers, how often do you go to judges with a late motion
21 with legal sufficiency points and they will not give you
22 the order overruling? Does that ever happen?

23 CHAIRMAN BABCOCK: Yeah, I was just about to
24 say that my memory is a little fuzzy, but I thought that
25 the operation of law thing was in part because you would

1 file your motion within 30 days, you might even have a
2 hearing, and then the judge say, "I'll take it under
3 advisement," and then you never hear, and if it's never
4 ruled upon, if you don't have the operation of law then
5 you haven't preserved error, and that -- my recollection
6 was we had a lot of discussion about that way back in the
7 day, but Bill would remember better than I maybe. Yeah,
8 Jim.

9 MR. PERDUE: Having been on two sides of
10 this, on both, the only observation I would make is that
11 at some point you need a final judgment --

12 MR. LOW: Right.

13 MR. PERDUE: -- and if the 31st day allows
14 you to get another crack at it and then another crack at
15 it and another crack at it, you know, from the trial
16 lawyer's perspective -- I know the appellate lawyers love
17 the idea that you just keep on preserving new things, but,
18 you know, at some point you would like to have a final
19 judgment that you know you're going to go up and you know
20 what you're going up on, and if the system is to just kind
21 of keep allowing new people to come in and get another
22 crack, another crack, that's the policy concern I've got,
23 that you don't ever have --

24 HONORABLE DAVID PEEPLES: But these
25 late-filed motions don't extend the plenary power.

1 HONORABLE SARAH DUNCAN: They wouldn't
2 extend the timetable.

3 HONORABLE DAVID PEEPLES: I mean, the clock
4 is running.

5 MR. PERDUE: But you've got new appellate
6 issues that are coming in.

7 HONORABLE DAVID PEEPLES: Yeah, could be.

8 CHAIRMAN BABCOCK: And I don't know if this
9 works a change in the law, but probably doesn't, but your
10 subpart (c) on the bottom of 11, "If the judgment is
11 modified in any way," even a nunc pro tunc, then you have
12 the whole -- the whole timetable starts again, Bill,
13 right? So I could file --

14 PROFESSOR DORSANEO: No, not if it's
15 modified -- if it's modified within plenary power, yeah.

16 CHAIRMAN BABCOCK: Right.

17 PROFESSOR DORSANEO: But that's been the law
18 for a long time.

19 HONORABLE SARAH DUNCAN: That's current law.
20 *Check vs. Mitchell.*

21 CHAIRMAN BABCOCK: But that talks to Jim's
22 point there. Yeah, Richard.

23 MR. ORSINGER: On that point of the nunc pro
24 tunc that we technically haven't gotten to yet, I think a
25 nunc pro tunc that's filed within 30 days is really

1 nothing but a motion to modify.

2 PROFESSOR DORSANEO: That's true.

3 MR. ORSINGER: The way this is written it
4 looks like it's different, something different from a
5 motion to modify because of what's bracketed, and I think
6 we should be careful. If they are trying to nunc pro tunc
7 it within the first 30 days, why don't we just say it's a
8 motion to modify?

9 PROFESSOR DORSANEO: Well, I think it does
10 say it, but it does it -- it says it implicitly, and the
11 part -- this is partially taken from the 329b as
12 constructed. When that was redrawn there was an argument
13 to be made that if you got something nunc pro tunced and
14 just changed the spelling of something, that that started
15 everything over again.

16 CHAIRMAN BABCOCK: Frank.

17 PROFESSOR DORSANEO: That that got the
18 plenary power started over again, so I know Justice
19 Guittard wanted to say that's not what happens, but if it
20 happens during plenary power, the clock starts over. If
21 it's after plenary power, then, no, the only thing that
22 the clock starts over on is the change.

23 CHAIRMAN BABCOCK: Frank.

24 MR. GILSTRAP: Bill -- I mentioned this to
25 Bill yesterday. I think that we should take the motion

1 for new trial following citation by publication and the
2 motion for judgment nunc pro tunc and take them out of
3 this rule. They are different, and they -- for example,
4 they don't extend the plenary power in the same way, that
5 type thing, and then instead of the current (3) and (4),
6 you could take the time limit provisions that are
7 currently in (1) and (2), motion for new trial and motion
8 to modify, and put them down in (3), and it seems to me it
9 would give you a lot more -- you could make your drafting
10 a lot clearer.

11 PROFESSOR DORSANEO: Uh-huh.

12 MR. GILSTRAP: But the problem is that the
13 motion for new trial following citation by publication and
14 motion for judgment nunc pro tunc are kind of flies in the
15 ointment in this rule, and they need to go back to their
16 own rule.

17 PROFESSOR DORSANEO: Yes, trying to draft it
18 there, they don't want to be in this rule. Okay. They --
19 they are suspiciously different, and they have their own
20 problems, particularly the, you know, motion for new trial
21 after citation by publication, which how many of you have
22 done one of those? Right? That's what I -- I think you
23 could be in most rooms and ask that question and get the
24 same response. It's very hard to tell exactly how that
25 works because it hasn't happened very often. I would be

1 happy to take these -- those things out of this rule and
2 try to draft it the way that Frank said. That seems
3 consistent with what other people have said about
4 simplification of it or making it easier to follow.

5 CHAIRMAN BABCOCK: Okay. Yeah, Nina.

6 MS. CORTELL: I just want to say, generally
7 speaking, that the current timetable of 30 days to file
8 after judgment overruled operationally has 75 days and
9 then another 30 days of plenary has generally served us
10 well, and the notion of keeping everything open until the
11 expiration of plenary bothers me in terms of the due
12 process of the motivation of getting it before the court
13 trying to get a ruling. So just as a general matter as a
14 policy I would endorse the current system in that regard.
15 I agree with a lot of the simplifications we're talking
16 about here, but I wouldn't extend everything to the
17 expiration of plenary.

18 PROFESSOR DORSANEO: Do you mind that little
19 part where you have to go to the judge and say, "Judge,
20 would you please rule on this because we're late?"

21 MS. CORTELL: I think the late motions
22 should be restricted to the extraordinary circumstance
23 where almost like in Federal court, a Rule 60(b)(5), or
24 something where there's been something really new has
25 happened, there's a fraud on the court or some -- you

1 know, I do think that a court certainly in that last 30
2 days if something important has arisen that there ought to
3 be an opportunity to present it to the court and the court
4 to rule on it to correct an injustice, absolutely, but to
5 create another 30 days just to sandbag the court, that
6 bothers me.

7 CHAIRMAN BABCOCK: Justice Christopher.

8 HONORABLE TRACY CHRISTOPHER: Well, I was
9 just telling Stephen that we don't really address in here,
10 while we're just sort of talking about the concept, oral
11 motions, which you would be surprised how many times I've
12 gotten that. In the face of a bad jury verdict someone
13 will pop up and say, "Judge, I move for a new trial" right
14 in front of the jury and everything. I'm "Well, we'll
15 talk about that later" or they'll ask for JNOV because
16 they're just shocked at the -- you know, the result and
17 think that they have to do it, so I would address that
18 somewhere in here.

19 I also would like to -- I think I've spoke
20 about it before, but speaking in favor of what David said
21 that, you know, why do we have sort of this trap for
22 important issues that it has to be, you know, filed and --
23 especially in light of what we discussed before that the
24 vast majority of time -- not vast majority, I would say 50
25 percent of the time you don't really want the trial judge

1 to rule on it.

2 CHAIRMAN BABCOCK: What's the trap?

3 HONORABLE TRACY CHRISTOPHER: You know, if
4 you don't get your new trial, you can't raise sufficiency
5 of the evidence, the ones that are --

6 PROFESSOR DORSANEO: 324b.

7 CHAIRMAN BABCOCK: Oh, okay.

8 HONORABLE TRACY CHRISTOPHER: -- that are
9 not preserved. You know, like a plaintiff who got
10 liability but low damages, okay, they kind of play chicken
11 with the defendant, who is unhappy about the liability but
12 is okay with the low damages in terms of, you know, who's
13 going to file the motion for new trial, you know, to
14 preserve sufficiency issues, because in that case maybe
15 the plaintiff doesn't really want the new trial, but, you
16 know, they feel like they have to because the damages were
17 low, that they need to put that on file, but they don't
18 want both of us to go for the new trial because they don't
19 really want the new trial. I mean, it just -- we play
20 games as a result of that.

21 CHAIRMAN BABCOCK: Yeah, a lot of times
22 neither side wants the new trial.

23 HONORABLE TRACY CHRISTOPHER: Right.

24 CHAIRMAN BABCOCK: They just want to go up,
25 but they want to preserve error.

1 HONORABLE TRACY CHRISTOPHER: They just want
2 the appellate court to review these issues without that
3 new trial issue.

4 CHAIRMAN BABCOCK: But is that a problem? I
5 mean, do judges grant new trials when neither side really
6 wants one?

7 HONORABLE TRACY CHRISTOPHER: No.

8 HONORABLE STEPHEN YELENOSKY: That's one we
9 especially like to grant.

10 CHAIRMAN BABCOCK: It happens.

11 PROFESSOR DORSANEO: Lawyers say, "The last
12 thing we want is to do another trial in this case. I'd
13 rather lose."

14 CHAIRMAN BABCOCK: In the real world either,
15 you know, you don't set it and it just gets overruled by
16 operation of law, or if it gets set, you go and you say,
17 "Judge, we're trying to preserve error here, you
18 understand that, but we don't really want to waste the
19 court's time retrying this thing."

20 HONORABLE SARAH DUNCAN: I wish Judge Benton
21 were here because he said after the Williams trial that he
22 would leave the bench before he tried that case again, so
23 nobody better want a new trial.

24 (Laughter)

25 MR. PERDUE: But the counter to that is that

1 you encourage the sandbag without the preservation rule
2 regarding new trial because if -- I mean, I've got that
3 exact issue where the defendant didn't really want a new
4 trial, so they couldn't file a motion for new trial, but
5 they file an amended -- they request for amended judgment,
6 but they haven't preserved the damage complaint.

7 CHAIRMAN BABCOCK: Yeah.

8 MR. PERDUE: So because they didn't want a
9 new trial, they wanted to -- they wanted to essentially
10 take up, you know, what they could take up, so why would
11 you -- why would you create a rule that encourages the
12 ability to sandbag the trial court? Because I don't know
13 that it was a chicken thing. They couldn't ask for what
14 they needed to -- because they didn't really want it.

15 CHAIRMAN BABCOCK: Yeah, I mean, I know a
16 lot of defendants will forego preserving the error that is
17 in the laundry list complaint on which evidence must be
18 heard, like misconduct and all of those four things,
19 because they don't want to run the risk of a judge saying,
20 "Oh, okay, new trial," because they don't want that, so
21 they'll just waive those errors.

22 MR. PERDUE: Yeah.

23 CHAIRMAN BABCOCK: Richard.

24 MR. ORSINGER: Slightly different topic,
25 Bill, but on your citation by publication new trial, I'm

1 puzzled by the terms "the parties adversely interested in
2 such judgment." I'm not sure what an adverse interest. I
3 would assume that everyone that was an original party who
4 took a default judgment would be supporting the judgment
5 and not be adverse to it, and it seems to me like what we
6 ought to just say, "The parties to the judgment must be
7 served." I'm not sure I understand what that --

8 PROFESSOR DORSANEO: Well, I'm not either.
9 I took that right from --

10 MR. ORSINGER: Well, I mean, it's time to
11 revisit it.

12 PROFESSOR DORSANEO: -- Rule 329.

13 MR. ORSINGER: This is a motion for new
14 trial that says that you have to serve citation on people
15 who are adversely interested, so why would -- if I'm
16 filing -- do I have to get a citation issued on my motion
17 for new trial?

18 PROFESSOR DORSANEO: Yes, because it's not
19 really -- I think maybe this rule needs its own
20 discussion.

21 MR. ORSINGER: Okay.

22 PROFESSOR DORSANEO: I mean, the current
23 Rule 329 says -- is entitled "Motion for new trial on
24 judgment following citation by publication," but in
25 addition to that sentence being in the current rule

1 verbatim, the mechanics of the rule says -- say that the
2 court may grant a new trial upon petition of the defendant
3 showing good cause, so it's pretty clear to me that this
4 was once done as kind of like a bill of review and then
5 it's done now as a motion for new trial, but it seems like
6 it's halfway in between.

7 CHAIRMAN BABCOCK: Roger.

8 MR. HUGHES: Well, maybe I'm speaking in an
9 area I'm not familiar, but we struggled with some of these
10 issues in the rules committee. The citation by
11 publication is often used to clear titles for property so
12 you can sell it, so I can understand that if you -- if the
13 property has been sold in the meantime, the new owners
14 might like to know about a suit that's going to affect
15 their title.

16 PROFESSOR DORSANEO: Uh-huh.

17 MR. HUGHES: So you -- and maybe that only
18 serves to prove the point that this really needs to be in
19 a separate rule.

20 HONORABLE SARAH DUNCAN: And probate
21 proceedings. I would think this is used not infrequently
22 in probate proceedings, and you could have a lot of
23 parties to the court's judgment who get exactly what they
24 should have gotten and they're not adversely interested in
25 the judgment, but you could have other heirs or

1 prospective heirs, whose expected interest wasn't
2 encompassed by the judgment who had been served by
3 publication, because nobody knows where they are, and if
4 you're going to get a new trial as to them -- I don't
5 know.

6 CHAIRMAN BABCOCK: Elaine.

7 PROFESSOR CARLSON: Yeah, Bill, following up
8 on Roger's comment, I noticed -- and I don't even know
9 what this means -- in the current Rule 329 there's a
10 couple other paragraphs that you didn't carry forward.

11 PROFESSOR DORSANEO: Right.

12 PROFESSOR CARLSON: (b), dealing with
13 suspending the judgment. I don't know if that means
14 during this motion for new trial? And then (c) speaks to
15 what Roger was alluding to, that the property has been
16 sold under judgment, but you can't get the property back
17 in this motion for new trial following citation by
18 publication, but you get the proceeds. I don't know where
19 that comes from or if it needs to be carried forward, but
20 that's something to consider.

21 PROFESSOR DORSANEO: Well, I thought,
22 Elaine, that this rule has appellate rule material in
23 it --

24 PROFESSOR CARLSON: It does.

25 PROFESSOR DORSANEO: -- that wasn't carried

1 forward into the appellate rules because it just wasn't,
2 and the whole rule needs attention. The last -- like the
3 last paragraph, (d), 329(d), I don't even know what that
4 means.

5 PROFESSOR CARLSON: I don't either.

6 PROFESSOR DORSANEO: And I tried to figure
7 out what it means, and whatever it meant to me years ago I
8 can't remember what it means now. I can't tell from
9 reading it. So what I'm going to do is take the motion
10 for new trial on judgment following citation by
11 publication and treat that as a separate job and the same
12 thing with nunc pro tunc, and I am going to do what Frank
13 suggested with everybody's permission and try to move the
14 timetable stuff for motions, for post-judgment motions,
15 motions for new trial and motions to modify, into a
16 separate provision and see if that works.

17 CHAIRMAN BABCOCK: Okay.

18 PROFESSOR DORSANEO: And I think you said
19 yesterday three words, but it was really two words,
20 "Groundhog Day"?

21 (Laughter)

22 PROFESSOR CARLSON: Can I ask you another
23 question, Bill? In the 301 alternative draft, the second
24 paragraph says, "Any ground raised in a motion, including
25 a motion for new trial is preserved for appeal if the

1 motion was timely filed and the judgment has not changed
2 or it's expressly denied." How does that work with a
3 motion for new trial regarding the presentation of
4 evidence, like jury misconduct? Do we say that that error
5 is preserved, but if you didn't have a hearing you don't
6 have any evidence? Is that how that plays out? Or is it
7 not preserved if you don't present evidence on a ground
8 that requires evidence?

9 PROFESSOR DORSANEO: I can't answer that.

10 PROFESSOR CARLSON: And the other question I
11 had is if there's a motion to modify before judgment -- I
12 think that's what you said would be possible under this
13 revision to preserve error, are we envisioning that takes
14 place after rendition but before entry, and do you
15 preserve error if the actual judgment entered doesn't
16 comport with the court's pronouncement? I mean, it's sort
17 of this sentence in here is -- and maybe I'm just reading
18 too many of the tricks that could result into the rule,
19 but it seems like this second paragraph in (a) might give
20 false sense of security in those instances to the
21 litigant.

22 PROFESSOR DORSANEO: Well, I think with the
23 more abbreviated statement of the proposition you get a
24 lot of extra questions.

25 PROFESSOR CARLSON: I agree.

1 CHAIRMAN BABCOCK: Okay. Any other
2 comments? Do we want to move on to the next rule, Bill?

3 PROFESSOR DORSANEO: Yes, and I'm off duty.

4 CHAIRMAN BABCOCK: Who's on duty?

5 MS. CORTELL: Not so fast.

6 PROFESSOR DORSANEO: I'm not completely off
7 duty, but I'm --

8 MS. CORTELL: Not so fast. The original
9 author sits to my right. I've inherited this.

10 CHAIRMAN BABCOCK: All right. Move to the
11 second chair then.

12 PROFESSOR CARLSON: Okay. Let's look at
13 them all together just real quickly again. We reviewed
14 these at the last time we took them up, but probably
15 worthwhile looking at them over one more time, and this
16 would be Rules 302, 303, and 304. In your packet that's
17 pages 13 to 19 I believe. Right, 13 to 19.

18 So Rule 302 is a -- just on motions for new
19 trial, to avoid confusion I want you to look at 303, and
20 in particular 303(d) and (e), which is on page 17, and
21 this picks up prior provisions that you're familiar with
22 in the current rules, and I just don't want anyone to be
23 confused. We could put this -- if we go forward with
24 these rules you could put (d) and (e) in Rule 302 to avoid
25 any confusion that we are not expanding the grounds upon

1 which a motion for new trial is required or grounds for
2 which it is not required. I just don't want anyone to be
3 confused about that, and then on 304 it's a new rule for
4 plenary power. So --

5 PROFESSOR DORSANEO: I think that would be a
6 good idea to move those things into 302.

7 MS. CORTELL: Yeah, I think so, too, and we
8 talked a little bit about that at the last meeting, but we
9 didn't have consensus so we kept the rules as they were
10 when we last presented them. So going back to Rule 302,
11 which is your motion for new trial rule, and for those of
12 you that were not here, we did take a vote on whether it's
13 a good idea to have a listing of potential grounds, a
14 nonexclusive list of potential grounds for motion for new
15 trial, and it's pretty close, but by a vote of 16 to 13
16 the decision was that we should have a listing. There was
17 a general belief in a listing, keeping in mind that
18 302(a)(11) is pretty much an open door for any ground
19 wanting a new trial in the interest of justice, and then
20 we added from the last meeting a phrase intended to be
21 consistent with *In Re: Columbia* which now asks that the
22 courts provide a listing of grounds if a motion is granted
23 in the interest of justice. There was some discussion at
24 the last meeting about the actual wording of the grounds,
25 and I tried to pick up some of those comments from there.

1 Also, we were requested by Justice
2 Christopher -- and we agreed but failed in our commitment
3 -- to provide a kind of a listing of authorities to
4 support each ground, but should we go forward along these
5 lines we will do that. We will hopefully provide you with
6 comfort that these are consistent with current authority.
7 At this point you have the voucher of Professor Dorsaneo
8 on that, so but we will supplement as desired. So the
9 discussion I think at the last meeting that we left on on
10 the grounds was whether a new trial ground had to be tied
11 to the concept of reversible error. There was fairly
12 robust discussion on that, and I don't know how to get a
13 sense of the committee, but it was maybe toward not
14 requiring that it be tied to reversible error, but I don't
15 know if that's where you want to start the discussion
16 again or what, but that was sort of an open issue. I
17 don't know if you want to revisit in any way the issue
18 upon which the vote was taken, which is whether we should
19 even have a list of new trial grounds, so, Chip, I don't
20 know whether you want to -- how you want to handle --

21 CHAIRMAN BABCOCK: Well, I generally am not
22 in favor of revoting when we've already discussed and
23 voted on something.

24 MS. CORTELL: Okay. Okay.

25 CHAIRMAN BABCOCK: Even if it's a close

1 vote.

2 MS. CORTELL: All right. All right. I
3 know.

4 MR. BOYD: Just confirmation, does this
5 address motions for new trial as opposed to a motion to
6 modify the judgment? I think that's a key distinction.

7 MS. CORTELL: This is intended only for
8 motions for new trial.

9 CHAIRMAN BABCOCK: Orsinger, did have you a
10 question?

11 MR. ORSINGER: Yeah. I just wanted to
12 clarify that the way this is written the list is
13 exclusive, and there is a catch-all provision at the end,
14 which is any other basis that the judge wants to use,
15 which now have to be articulated, but this list is
16 exclusive, and so whenever you make exclusive lists you
17 have to kind of catch your breath and be sure that you've
18 got everything you want listed listed because it appears
19 to me that you can grant the new trial only if you can
20 meet one of these 11 grounds.

21 MS. CORTELL: I don't think that's the
22 intent. Bill.

23 MR. ORSINGER: You don't?

24 MS. CORTELL: No. I mean, that may be then
25 something we would want to consider changing the wording

1 on, but let me confirm that.

2 PROFESSOR DORSANEO: Well, before, in an
3 earlier iteration this had a good cause concept in (a),
4 didn't it?

5 MS. CORTELL: Well, it says for good -- that
6 was discussed at the last meeting. It says "for good
7 cause" up here that's the struck provision. The reason it
8 got struck in the last meeting or the suggestion was made
9 to strike it was because the question raises does that
10 mean that all of the enumerated items have to meet a good
11 cause standard or not and how did that really work
12 together, so we took it out. We could put that back in or
13 another open-ended phrase, or we could in the preamble
14 make it clear that this is not -- I don't think the intent
15 is, Richard, for this to be in any way an exclusive
16 listing.

17 MR. ORSINGER: Well --

18 PROFESSOR DORSANEO: I don't know whether
19 "in the interest of justice" and "for good cause" are, you
20 know, sufficiently synonymous, but our current rules say
21 that we're going to have a new trial for good cause,
22 without ever saying what that means, except excessive or
23 inadequate verdicts. There's no specification in the
24 rules. The closest we get is we get in Rule 324b certain
25 things that have to be in motion for new trial so we know

1 that they're appropriate for motions for new trial. I
2 thought the way that it was originally drafted in 1998 was
3 it had a good cause and then these were kind of like
4 examples of things. I don't like the idea of the list
5 being exclusive either unless one of the things in the
6 list says you can, you know, add other things for good
7 cause in the interest of justice or whatever you want
8 to -- whatever phrase you want to use as a basis for a new
9 trial motion.

10 CHAIRMAN BABCOCK: Carl.

11 MR. HAMILTON: I'd like to suggest that the
12 phrase "in the interest of justice" be taken out. It just
13 says, "whenever any other ground warrants a new trial."
14 That's got to be in the interest of justice, so why put
15 that in there? You have other grounds that warrant a new
16 trial provided the court specifies the reason in the
17 order.

18 PROFESSOR DORSANEO: Well, I guess that --
19 that doesn't -- that doesn't say "good cause," but it
20 ought to be good enough, shouldn't it? "Whenever any
21 other ground warrants a new trial." Pretty economical if
22 we don't -- you use the term "in the interest of justice,"
23 or we use the term in the rules "good cause," but I don't
24 know that they're essential. May be helpful to retain one
25 or the other of them.

1 CHAIRMAN BABCOCK: Does the presence of that
2 subparagraph (11) just automatically mean that this is a
3 nonexclusive list without saying so?

4 MR. JEFFERSON: Yeah.

5 CHAIRMAN BABCOCK: Seems to me it does.

6 PROFESSOR DORSANEO: "In the interest of
7 justice" is more of an appellate concept, isn't it?

8 MS. CORTELL: Right. The Rule 320 currently
9 says "may be granted for good cause." That's the phrase
10 in 320.

11 CHAIRMAN BABCOCK: Justice Patterson.

12 HONORABLE JAN PATTERSON: Well, I thought
13 that the "interest of justice" had some content that had a
14 greater significance that did not make (11) an automatic
15 catchall.

16 HONORABLE SARAH DUNCAN: It does. I mean,
17 it's -- you know, you can remand, decide to remand a cause
18 in the interest of justice, but you have to find
19 reversible error first. Right? It's like you get all
20 those briefs that talk about cumulative error. Well,
21 if -- you don't have cumulative error if no error
22 encompassed by cumulation is reversible error, and what
23 this does is say that you can grant a new trial for a
24 reason that is less than reversible error.

25 HONORABLE JAN PATTERSON: Well, and I think

1 it's a grand notion that we ought to retain, but I think
2 it is different than whether it's an exclusive or
3 nonexclusive list. I think it probably should be
4 nonexclusive, and my recollection was that we intended for
5 these to be examples of the current practice or -- and
6 that it was nonexclusive, and so maybe we could just add
7 the language "including the following," which would --

8 CHAIRMAN BABCOCK: Sarah.

9 HONORABLE SARAH DUNCAN: One of things that
10 gets left out is the whole second prong of the reversible
11 error standard. Probably, it would have been a big punt
12 from presenting -- properly presenting its case to the
13 appellate court, and that's nowhere in this. I'm against
14 the list, though, so don't listen to me.

15 CHAIRMAN BABCOCK: Yeah, Roger.

16 MR. HUGHES: Well, I'll start off by
17 admitting that I was against the list, because I don't --
18 I don't care how you label it, the judges are going to be
19 looking for this to define the reasons to grant, and
20 they're not going to like going outside the list, but I
21 want to address No. (11). I, too, would like to delete
22 the phrase "in the interest of justice" because I can't
23 speak to every area of the state, but in where I come from
24 the phrase "interest of justice" means "I don't like the
25 result and I don't have to tell you why," and that was the

1 substantive content of that phrase, and it comes with that
2 baggage going on behind it.

3 I would suggest something like No. (7) when
4 it talks about default grounds being set -- a default
5 being set aside upon legal or equitable grounds. I think
6 it's appropriate that whatever ground warrants a new trial
7 has to be some sort of error -- or some sort of ground for
8 new trial recognized by case law or some other rule that
9 the court can point to. I'm just a little worried that
10 No. (11) is going to be an authorization not to go
11 looking -- not to perform any kind of legal or equitable
12 analysis at all, but rather to simply articulate some
13 reason and say that's good enough.

14 For example, "Gee, I'm pretty certain trial
15 counsel committed malpractice in his strategic planning
16 for case." Is that going to become a ground in the
17 interest of justice? I know some people might consider
18 the possibility that counsel has committed malpractice or
19 made a shortsighted blunder that -- you know, a decision
20 that blew sky high in the middle of trial, and they may
21 think that's quite a just reason to allow a do over, and
22 then we're going to be faced with the question of whether
23 is that a ground or by creating No. (11) we have simply
24 given trial judges carte blanche that whatever ground you
25 can articulate will be in the interest of justice because

1 you articulated it, not because you could point to
2 anything in the case law or the philosophy of the law or
3 anything like that.

4 CHAIRMAN BABCOCK: Okay. Yeah, Nina.

5 MS. CORTELL: Well, we had a pretty full
6 discussion on that at the last meeting, and I remember
7 Judge Evans in particular felt strongly that sometimes
8 that may just be right, that something went terribly awry
9 in the trial, it may not be a conventional legal basis for
10 a new trial. I believe one of the examples was maybe a
11 lawyer showing up drunk or whatever, but that there may be
12 circumstances where the court needs that discretion to
13 grant the new trial. No doubt it can lead to
14 inappropriate outcomes, but I know that Judge Evans spoke
15 very powerfully, I thought, toward allowing the trial
16 court that discretion.

17 CHAIRMAN BABCOCK: Okay. Justice Patterson.

18 HONORABLE JAN PATTERSON: Well, and I'd also
19 like to think -- and I hate to reveal my naivety on the
20 record, but what I strongly believe is that the Supreme
21 Court made an effort to restore the loftiness to this
22 concept, and that is the reason for the articulation, and
23 that's something we should all support, and if it works,
24 it should be high-minded and lofty, and that was the
25 intent of the case law. So that's my hope, that it has

1 restored that notion, and that's what it was speaking to.

2 CHAIRMAN BABCOCK: Richard Orsinger.

3 MR. ORSINGER: We tend to focus on the
4 subjectivity of the trial judge having unlimited
5 discretion to grant a new trial, but, you know, there
6 are errors the trial judge can correct really that the
7 court of appeals can't correct, and one that comes to mind
8 is some kind of statement by a witness or argument by a
9 lawyer that is inflammatory, but it's not incurable, and
10 so the trial judge gives an instruction to the jury to
11 disregard it, but the verdict, you can tell from the
12 verdict that something happened.

13 Now, at the appellate court level I think
14 that's not a reversible error because unless the argument
15 is incurable, the instruction cured it, but we all know
16 that sometimes things are not incurable. I mean, things
17 can't be cured by an instruction, and the trial judge is
18 the last person in the legal system that can do anything
19 about that, and so that's -- that's a very subjective
20 thing. It's not -- by definition it's not
21 reversible error, but the trial judge should, I think,
22 have the ability to say, "Notwithstanding all of our
23 presumptions about how instructions cure things, this was
24 not a fair trial, and I'm going to give them a new one."

25 CHAIRMAN BABCOCK: Yeah. Yeah, Sarah.

1 HONORABLE SARAH DUNCAN: I completely agree
2 with Justice Patterson and Richard, and that's why I'm
3 against a list. What I would do since we're not going to
4 have a revote on that, is I would simply have the rule as
5 is, trial judge can grant a new trial for good cause;
6 however, if it's in the interest of justice, just codify
7 Columbia and say you've got to state the ground. We still
8 don't know what the remedy is once you've stated the
9 ground, but --

10 MR. ORSINGER: That's further down the
11 slippery slope.

12 HONORABLE SARAH DUNCAN: That's further down
13 the road, and I wouldn't want to try to anticipate that
14 because you never know what's going to happen, but I'm
15 afraid with a list as -- who was it that said no matter
16 how you -- what words you use, whether you say "including"
17 or anything else -- it was Roger, I think, was saying the
18 trial judges are going to view this as the only grounds
19 for granting a new trial, and I would not take that
20 discretion away from trial judges. As Richard says, there
21 is only so much the court of appeals can do to do --
22 effectuate what it believes to be justice, and not having
23 been there, that's a pretty limited realm.

24 CHAIRMAN BABCOCK: Yeah. Nina.

25 MS. CORTELL: I would suggest restoring good

1 cause to (a) and then making it clear that this listing is
2 nonexclusive saying -- using the word "including without
3 limitation" or some such --

4 CHAIRMAN BABCOCK: Okay. So where would you
5 put "good cause," Nina?

6 MS. CORTELL: You could keep it where it was
7 before. "For good cause a new trial may be granted or set
8 aside for" -- maybe we want to say "for grounds including
9 the following" or something like that.

10 CHAIRMAN BABCOCK: Okay. Justice Gaultney.

11 HONORABLE DAVID GAULTNEY: I'm in favor of
12 putting "good cause" back in it, but if you do the
13 "including" --

14 MS. CORTELL: Right.

15 HONORABLE DAVID GAULTNEY: -- Nina, would
16 there be a requirement that the court specify the reasons
17 for its order, or could it just say "for good cause"? In
18 other words --

19 MS. CORTELL: Right.

20 HONORABLE DAVID GAULTNEY: -- (11) seems
21 limited to in the interest of justice.

22 CHAIRMAN BABCOCK: Orsinger.

23 MR. ORSINGER: I would propose -- this may
24 be too radical for everyone, but if we just put "good
25 cause" in the front then trial judges are going to stay

1 away from (11) about "in the interest of justice" where
2 they have to specify a reason, and they're just going to
3 say "good cause" and maybe they don't have to specify a
4 reason. Why don't we just require that the judge specify
5 the reason any time a new trial is granted? You may have
6 a motion for new trial based on four different grounds,
7 and the new trial is granted, and you don't know which the
8 ground is. Is there any harm in just asking the trial
9 judge in each instance when a new trial is granted to tell
10 us why?

11 HONORABLE TRACY CHRISTOPHER: You have to
12 under Columbia, no matter what reason.

13 MR. ORSINGER: It's not just "in the
14 interest of justice" ground?

15 PROFESSOR DORSANEO: No.

16 HONORABLE TRACY CHRISTOPHER: No, it's any
17 time you grant it.

18 HONORABLE SARAH DUNCAN: Sometimes -- it's
19 like we were just talking about. Sometimes there's
20 something that happens that needs to be fixed, and we
21 don't really want to put on the record what that is as a
22 trial judge. We know that it happened, we know that it
23 was unfair to one or the other or both parties, and we
24 know the only remedy is going to be a new trial. We know
25 it wouldn't get reversed if it went up, but it needs to be

1 fixed.

2 CHAIRMAN BABCOCK: Why don't you want to put
3 it on the record?

4 HONORABLE SARAH DUNCAN: It could be -- who
5 was it was talking about something in our last meeting
6 that was a very personal problem one of the trial lawyers
7 was having?

8 MR. GILSTRAP: Yeah, like he lost his career
9 case and he needs another shot.

10 MR. MUNZINGER: Or he's a big campaign
11 contributor.

12 HONORABLE STEPHEN YELENOSKY: The example I
13 gave was somebody told me in private he was going through
14 chemotherapy.

15 CHAIRMAN BABCOCK: Would you guys go to your
16 separate corners, please?

17 HONORABLE SARAH DUNCAN: You could have
18 somebody who's --

19 HONORABLE STEPHEN YELENOSKY: But now I
20 think I would have.

21 HONORABLE SARAH DUNCAN: -- addicted and has
22 not been able to properly represent someone, and it
23 reflects poorly on that person, on the legal profession,
24 and everything else. I just -- there's a reason trial
25 judges have discretion, and I think we're really --

1 HONORABLE STEPHEN YELENOSKY: But haven't we
2 lost that?

3 HONORABLE TRACY CHRISTOPHER: We lost that
4 in *In Re: Columbia*. We have to put it in the order.

5 HONORABLE SARAH DUNCAN: We didn't. We
6 didn't. That's a very narrow -- in my view it's a very
7 narrow -- and in Mike's view, it's a very narrow holding.
8 But I think we're really getting ready to --

9 CHAIRMAN BABCOCK: Richard the Second.

10 HONORABLE SARAH DUNCAN: -- make a mistake.

11 MR. MUNZINGER: I just don't understand how
12 the government can hide its reasons from citizens that are
13 supposed to be free and in charge of government. I don't
14 understand it. I didn't vote to give anybody wearing a
15 black robe the right to do something that goes contrary to
16 law, and if it's contrary to law, it ought not to happen.
17 No one votes to give judges unfettered discretion, or at
18 least they don't do so intelligently. If you've got a
19 reason, state it. If your reason won't survive the light
20 of day, it's a despicable reason and ought not to be used.

21 MR. ORSINGER: Chip?

22 CHAIRMAN BABCOCK: Yes. Apparently that was
23 Richard the First. Now Richard the Second.

24 MR. ORSINGER: I'm going to have to go back
25 and reread *Columbia*, but if Tracy is right that all of

1 these grounds you have to specify then that "provided that
2 the court specifies the reasons in its order" ought not to
3 be in (11) but broken out and moved to the left margin so
4 that it indicates that any of the first 11 grounds you
5 have to specify the reason you're granting the new trial.

6 MS. CORTELL: Well, my recollection of the
7 facts on Columbia was that the trial judge in Dallas
8 simply stated no basis at all and maybe used the "in
9 interest of justice" phrase in the order, but I don't
10 remember. I don't recall it being quite as broad as the
11 committee is taking it right now. We can look back at it.
12 Maybe -- I guess I would like a sense of the committee, if
13 the case is unclear. Is the sense of the committee that
14 we want grounds stated, and this is reminiscent a little
15 bit of the discussion we had yesterday and the reference
16 made to summary judgment orders where it's either granted
17 or denied and you don't have to set out grounds, so this
18 would not be completely unique in Texas jurisprudence not
19 to require it.

20 CHAIRMAN BABCOCK: Yeah, Carl.

21 MR. HAMILTON: Well, I think the list from
22 (1) to (10) ought to remain because a lot of judges need
23 help in what the reason for the new trial is, and they
24 can't articulate it without some help from the list, but
25 when you get to No. (11) it's true that we're going to

1 have the court specify the reasons, but, you know, (11)
2 could say, "When any other good cause exists for granting,
3 provided the reasons are specified," because if they don't
4 specify the reasons we're back to where we started.
5 They're going to grant new trials because they don't like
6 the outcome of it.

7 CHAIRMAN BABCOCK: Nina, in the *In Re:*
8 *Columbia* case, what did the motion -- what was the basis
9 for the motion for new trial? I mean, usually you'll
10 specify in the motion what your reasons are.

11 MS. CORTELL: Well, but a typical motion for
12 new trial will have --

13 CHAIRMAN BABCOCK: What's that?

14 MS. CORTELL: -- a great number of grounds.
15 I'm sure it did here. I think it was a med mal case,
16 right, and, I mean, I don't -- I don't know that it
17 narrows it down any more than a potential summary judgment
18 order would. It also occurs to me that just in terms of
19 how one sets out the rule that we probably might need
20 another subsection for order.

21 CHAIRMAN BABCOCK: Yeah.

22 MS. CORTELL: Unless it's going to be really
23 tied to one minor part.

24 CHAIRMAN BABCOCK: But if you analogize it
25 to summary judgment, when you move for summary judgment

1 you've got, let's say, four grounds --

2 MS. CORTELL: Right.

3 CHAIRMAN BABCOCK: -- why you ought to get
4 summary judgment. If the order says, "I grant the summary
5 judgment," then it can go up on appeal and the appellant
6 will have to meet all four grounds. The problem with
7 motion for new trial is that generally it's not
8 appealable.

9 MS. CORTELL: Right.

10 CHAIRMAN BABCOCK: So if there is going to
11 be review, isn't the review going to be limited to
12 whatever is in the motion? Say it's going to be mandamus
13 review, for example, it's got to be limited to what's in
14 the motion.

15 MS. CORTELL: It would be the same.

16 CHAIRMAN BABCOCK: You would think. Lamont.

17 MR. JEFFERSON: Just looking at *In Re:*
18 *Columbia*, it says in the motion that "The motion for new
19 trial was sought because the jury's answers to the
20 negligence question was manifest and unjust and against
21 the great weight of the preponderance of the evidence, the
22 evidence conclusively established the defendant's
23 negligence, and a new trial was warranted in the interest
24 of justice and fairness." The order adopted the third
25 prong, that the new trial was granted in the interest of

1 fairness and justice.

2 HONORABLE SARAH DUNCAN: As another example
3 in the case we had that was that same day, there were like
4 three grounds in the motion for new trial, one of which
5 was that there had been a newspaper article about this
6 trial, but every juror testified they hadn't read it.
7 Well, how can that be a basis for new trial if none of the
8 jurors had read it? And each of the complaints had a
9 similar problem. There was the evidentiary legal and
10 factual sufficiency, the opposite from the plaintiff's
11 perspective, and yet the evidence -- there was evidence,
12 and there was sufficient evidence, and the response
13 pointed that out. So, really, none of the grounds in the
14 motion was sufficient to support an order for new trial,
15 and yet an order was -- a new trial order was signed in
16 the interest of justice, but that's why I said Columbia is
17 very narrow, is that it doesn't say if the trial judge
18 grants a new trial without stating a reason that that is
19 subject to review. It doesn't say that. I mean, it's a
20 very narrow holding.

21 CHAIRMAN BABCOCK: Well, but if -- but if
22 the order is "I'm granting a new trial in the interest of
23 justice," then you've got to state a reason. But if the
24 order says less than that, you don't think they have to
25 state a reason?

1 HONORABLE SARAH DUNCAN: I don't think we
2 know. I think it's going to be a reflection of what's in
3 the motion, what's in the trial record, and what's in the
4 order, and I mean, what we're looking for is abuse, right?
5 We're looking for the instances that Frank was talking
6 about. You know, "I don't like the result and this is a
7 big campaign contributor, so we've all got to like the
8 result," but I don't -- I don't think we can codify that
9 here.

10 CHAIRMAN BABCOCK: Yeah. Carl.

11 MR. HAMILTON: I don't think it really
12 matters what's in the motion, because the rule gives the
13 judge the right to do this on his own initiative, so he
14 can do it for some reason other than what's in the motion.

15 CHAIRMAN BABCOCK: Yeah. Good point.
16 Ralph.

17 MR. DUGGINS: What if you, pardon me, in (a)
18 after "initiative," you inserted "on any ground," comma,
19 "including the following instances" and then took out (11)
20 and had a separate provision that was entitled "order" and
21 just says, "Where a new trial is granted a trial court
22 must specify the reasons"?

23 CHAIRMAN BABCOCK: How do you feel about
24 "for good cause"? Somebody suggested putting that in (a).

25 HONORABLE SARAH DUNCAN: Won't that just

1 become the new words for "in the interest of justice"?

2 MR. DUGGINS: Well, I think if you say "on
3 any ground" it would include good cause, and it would then
4 pick up the 10 items that are in here and then have a
5 separate provision that, if this committee agrees, that
6 would require the trial judge to state the reasons,
7 whether it's -- state the ground, whether it's a different
8 ground than one of the 10 in here or one of the 10.

9 CHAIRMAN BABCOCK: Yeah. Yeah, Justice
10 Christopher.

11 HONORABLE TRACY CHRISTOPHER: Well, you
12 know, we might have different interpretations of Columbia,
13 but it was a -- you know, what, a five-four; and the
14 dissent was like "We need a rule of procedure that
15 explains what we're doing here"; and instead of leaving it
16 more unclear, if we're going to change the rule we ought
17 to make it clear; and if what we want is the judge must
18 always state the reasons, that needs to be in the rule;
19 and if what we want was it can be one of these or good
20 cause, we need to put that in the rule; and if we want is
21 you can grant a new trial for less than reversible error,
22 that ought to be in the rule, because, you know, Sarah's
23 argument is, well, there was no reversible error shown in
24 that motion for new trial because there was -- you know,
25 there was evidence to support A, B, C and the jurors

1 testified that they hadn't seen the newspaper article.

2 Okay. So she's saying there's not
3 reversible error. Well, you know, in my mind that's up in
4 the air. Can you still grant a new trial for less than
5 reversible error, and I think -- I think we would be
6 better off discussing all of those things, not confining
7 ourselves to what Columbia may or may not have meant and
8 decide the right way to do it.

9 CHAIRMAN BABCOCK: Does the judge have the
10 discretion not to believe the jurors when they said they
11 didn't read the inflammatory newspaper article?

12 HONORABLE TRACY CHRISTOPHER: Right. Or
13 maybe they thought -- perhaps the plaintiffs or the
14 defendants, the party, did something to, you know, get
15 this inflammatory article into the newspaper. All right.
16 Well, maybe the judge thought, "They ought to be punished
17 for that," even though none of the jurors read it, because
18 they were trying to subvert the judicial process, okay,
19 even if it didn't work. You know, maybe that's what the
20 judge was -- you know, I don't know what the judge was
21 thinking, but, you know, I just think we need to -- if
22 we're going to mess with it we should be clear what we've
23 done.

24 CHAIRMAN BABCOCK: Bill.

25 PROFESSOR DORSANEO: Well, I agree with most

1 of that. The list ought to be nonexclusive, so there
2 ought to be -- which is implicit in what Justice
3 Christopher is saying. The list ought not to be
4 exclusive, but it ought to be clear. Good cause ought to
5 be the item that's an unknown as to how much that covers
6 or what it covers and what it doesn't cover. The other
7 things are pretty well established in bunches and bunches
8 of cases. I don't know whether it's necessary -- I think
9 it's helpful for the committee to discuss this
10 reversible error, not reversible error thing, but I don't
11 know if it's necessary for that to be decided because
12 that -- if we get the reasons specified in the -- in the
13 order, that will get decided pretty quickly. You know,
14 there will be a case that comes up where it's not
15 reversible error, but the question would be was it
16 sufficient for a new trial, and I don't think that will
17 happen until the rule gets to require that reason is
18 always to be specified.

19 CHAIRMAN BABCOCK: One of the things that I
20 noticed from yesterday was we took, I think, a historic
21 low in the number of votes we took. We only took one vote
22 yesterday the whole day, unless we took one in the morning
23 that I don't know about, but in the afternoon we only took
24 one, so I think we should take some votes.

25 HONORABLE SARAH DUNCAN: Because we've got

1 to catch up.

2 CHAIRMAN BABCOCK: We're going to get rusty
3 if we don't start voting on some things, and Bill just
4 laid out some things that we could vote on. One would be
5 if we're going to have a list should it be nonexclusive.
6 That would be a good thing to vote on, right? Okay. So
7 everybody who, if we're going to have a list, thinks it
8 ought to be nonexclusive -- yeah, Justice Gaultney.

9 HONORABLE DAVID GAULTNEY: Well, I was just
10 going to suggest, I agree that that ought to be a vote,
11 but I'm wondering whether the requirement that the reason
12 be specified in the order -- in other words, I might not
13 think that a rule -- a list should be exclusive, but if
14 it's going to be nonexclusive and there's not going to be
15 a requirement that the reason be stated in the order, I
16 mean, that might affect whether I think it ought to be
17 exclusive.

18 CHAIRMAN BABCOCK: Yeah. Here's the votes I
19 was thinking about taking, nonexclusive, whether it should
20 be or shouldn't be, whether "good cause" ought to be in
21 there, whether reasons ought to be given on everything,
22 and whether it ought to be only for reversible error
23 versus nonreversible error.

24 MR. ORSINGER: Can we have further
25 discussion on that last vote?

1 CHAIRMAN BABCOCK: Yeah, we can talk about
2 anything we want. But let's -- everybody who is in favor
3 of if we have a list, if we have a list --

4 HONORABLE SARAH DUNCAN: How about assume we
5 have a list --

6 CHAIRMAN BABCOCK: Assume we have a list.

7 HONORABLE SARAH DUNCAN: -- whether you like
8 it or not.

9 CHAIRMAN BABCOCK: Whether you like it or
10 not.

11 HONORABLE JAN PATTERSON: Assuming arguendo
12 we have a list.

13 CHAIRMAN BABCOCK: You could be an anti-list
14 person.

15 HONORABLE SARAH DUNCAN: And still get to
16 vote.

17 CHAIRMAN BABCOCK: Assuming we're going to
18 have a list. Assuming we have a list, everybody in favor
19 of it being nonexclusive, raise your hand.

20 Everybody opposed? Voices and -- no, two,
21 Riney. 23 to 2 in favor of it being nonexclusive. Now,
22 how many people think there should be a good cause feature
23 in this rule? Everybody in favor of good cause.

24 MR. MUNZINGER: Chip?

25 CHAIRMAN BABCOCK: Yes, sir.

1 MR. MUNZINGER: May I ask a question before
2 you call for that vote?

3 CHAIRMAN BABCOCK: Certainly.

4 MR. MUNZINGER: The words "good cause" in
5 varying contexts have been defined by the courts, and I
6 wonder if you -- if "good cause" has a distinct meaning
7 that has been applied by appellate courts in different
8 contexts, and if so, would the words be importing those
9 standards into this rule?

10 CHAIRMAN BABCOCK: Is "good cause" in here,
11 Bill?

12 MR. MUNZINGER: I mean, I may be wrong that
13 "good cause" has been defined in various contexts, but I
14 don't think I am.

15 PROFESSOR CARLSON: It has. It has.

16 CHAIRMAN BABCOCK: Yeah, Bill.

17 PROFESSOR DORSANEO: Well, "good cause" is
18 used in Rule 320, the main motion for new trial rule, as
19 the principal standard, and I don't know whether we know
20 very much about how it's been defined in that context.

21 HONORABLE JAN PATTERSON: But we know it
22 when we see it.

23 PROFESSOR DORSANEO: Yeah, we know it -- but
24 because it's -- until Columbia we would never have the
25 question addressed, but I think because it is the

1 traditional standard in our rules that I would use it even
2 though I'm not sure what it means.

3 CHAIRMAN BABCOCK: Yeah, it's -- 320 now
4 says, "New trials may be granted and judgments set aside
5 for good cause on motion or on the court's own motion in
6 such terms as the court shall direct." So it's in there
7 now. Carl.

8 MR. HAMILTON: Before we vote can we know
9 where "good cause" is going to be put?

10 CHAIRMAN BABCOCK: Yes, I think the proposal
11 was that it would be in (a).

12 MR. HAMILTON: In (a).

13 MR. GILSTRAP: So "good cause" --

14 MR. ORSINGER: Before the list. Before the
15 list.

16 CHAIRMAN BABCOCK: Before the list.

17 MR. GILSTRAP: Good cause has to be met and
18 then the list.

19 CHAIRMAN BABCOCK: Here's the nonexclusive
20 list.

21 MR. GILSTRAP: Okay.

22 CHAIRMAN BABCOCK: Okay?

23 MS. CORTELL: Chip, I've got the language if
24 you want to --

25 CHAIRMAN BABCOCK: Yeah, go ahead, Nina.

1 MS. CORTELL: "For good cause a new trial or
2 partial new trial under paragraph (f) may be granted, the
3 judgment may be set aside on motion of a party or on a
4 judge's own initiative on any grounds, including the
5 following," colon.

6 CHAIRMAN BABCOCK: Okay. So that tells you
7 where "good cause" is going to be. Justice Gray.

8 HONORABLE TOM GRAY: It seems very odd to me
9 that you would put the "good cause" in the introductory
10 portion of the rule that includes the list. How could
11 granting a motion for new trial when the evidence is
12 factually insufficient to support a jury finding also
13 require a good cause determination?

14 CHAIRMAN BABCOCK: Sarah.

15 HONORABLE TOM GRAY: It seems redundant to
16 me.

17 HONORABLE SARAH DUNCAN: A friendly
18 suggestion, if you move "good cause" to the end of the
19 sentence instead of at the beginning of the sentence I
20 think you solve that. "A new trial, partial new trial,
21 blah, blah, blah, "or on the judge's own initiative for
22 good cause, including the following" and then you pull in
23 the list. "Including, but without limitation, the
24 following."

25 CHAIRMAN BABCOCK: Carl.

1 MR. MUNZINGER: The intent -- the intent
2 being to limit good cause to the judge's initiative.

3 HONORABLE SARAH DUNCAN: No.

4 CHAIRMAN BABCOCK: No.

5 HONORABLE SARAH DUNCAN: "Or on the judge's
6 own initiative for good cause, including, without
7 limitation, the following."

8 MR. MUNZINGER: Okay.

9 HONORABLE SARAH DUNCAN: But I would like to
10 say, you know, in one context good cause has been
11 construed as attorney negligence, and you think, you know,
12 one of the -- look at (7), defaults, Craddock, that can
13 just be miscalendaring.

14 CHAIRMAN BABCOCK: Carl.

15 MR. HAMILTON: Well, if you word it that
16 way, some of our judges will say, "I grant a new trial for
17 good cause, and my reasons are in the interest of
18 justice."

19 MR. ORSINGER: They're allowed to do that
20 now. They're allowed to do that now.

21 MR. HAMILTON: I know, but we don't want
22 them to do that. That's the problem.

23 MR. ORSINGER: Some of us don't want them to
24 do that.

25 CHAIRMAN BABCOCK: Okay. Bill.

1 PROFESSOR DORSANEO: I would put "good
2 cause" in (11) and do away with "in the interest of
3 justice," and have -- in other words, explaining it, but
4 that's if we vote that way.

5 CHAIRMAN BABCOCK: Okay. Nina, are you
6 persuaded by any of this to take "good cause" out of (a)?

7 MS. CORTELL: Well, that's where I started
8 the day, taking it out based on the discussion last time,
9 but I had kept in "in the interest of justice" at the back
10 end, so --

11 CHAIRMAN BABCOCK: Yeah. Okay. Just so we
12 can vote, let's vote on Nina's idea that we put it into
13 (a), the introductory paragraph. Some people don't like
14 that, and they'll vote against that, but Justice Gaultney.

15 HONORABLE DAVID GAULTNEY: Now, I assume
16 we're taking this vote on the concept that this is a
17 nonexclusive list.

18 MS. CORTELL: Right.

19 CHAIRMAN BABCOCK: It's a nonexclusive list.

20 HONORABLE DAVID GAULTNEY: So if we don't
21 have "good cause" in there, that means the trial court
22 could grant it for any reason.

23 CHAIRMAN BABCOCK: That might lead you to
24 vote in favor of good cause.

25 MR. ORSINGER: Well, but we might prefer to

1 have "good cause" on the list, so it's not a fair -- can
2 we -- maybe we should --

3 CHAIRMAN BABCOCK: All right. You structure
4 a vote that --

5 MR. ORSINGER: I would say let's take the
6 first vote on who's in favor of having "good cause"
7 somewhere.

8 CHAIRMAN BABCOCK: That's a good idea.

9 MR. ORSINGER: We'll get our arms around
10 that and then we can decide whether it's introductory or
11 whether it's (11).

12 CHAIRMAN BABCOCK: That will work. Okay.
13 Everybody in favor of having "good cause" somewhere in
14 this nonexclusive listed rule, raise your hand.

15 All right. Anybody against? Justice
16 Sullivan not voting.

17 MR. JEFFERSON: I'm abstaining, too. I
18 don't know what "good cause" means.

19 CHAIRMAN BABCOCK: What?

20 MR. JEFFERSON: I'm abstaining. I don't
21 know what it means to put it in there or not put it in
22 there.

23 HONORABLE KENT SULLIVAN: I agree. I've
24 gotten to the point where I refuse to vote on things I
25 don't truly understand.

1 HONORABLE JAN PATTERSON: Boy, that's
2 limiting.

3 CHAIRMAN BABCOCK: 26 to nothing, with the
4 Chair, Justice Sullivan, and Mr. Jefferson not voting.

5 Okay. Now, where do we put "good cause"?
6 Front, middle, or back? Justice Gaultney.

7 HONORABLE DAVID GAULTNEY: I think it ought
8 to be right in the front. I mean, it's the -- you ought
9 to have some minimal standard for granting a new trial.
10 Good cause ought to be it, particularly if the list is
11 going to be non --

12 CHAIRMAN BABCOCK: Exclusive.

13 HONORABLE DAVID GAULTNEY: Right.

14 CHAIRMAN BABCOCK: Okay. There's a vote for
15 front. Nina.

16 MS. CORTELL: I agree.

17 CHAIRMAN BABCOCK: Another vote for front.

18 HONORABLE JAN PATTERSON: And what does up
19 front mean, at the very beginning where we have it now?

20 MS. CORTELL: I would take out the
21 strike-through, keep it right there.

22 HONORABLE JAN PATTERSON: Because you could
23 also put it where the rule currently has it, "may be
24 granted and the judgment may be set aside for good cause
25 upon motion."

1 CHAIRMAN BABCOCK: Okay. Sarah. Oh, I'm
2 sorry.

3 HONORABLE SARAH DUNCAN: I think it ought to
4 be in the --

5 CHAIRMAN BABCOCK: Huh?

6 HONORABLE SARAH DUNCAN: I just wanted --
7 that's okay.

8 CHAIRMAN BABCOCK: Okay. All right, Carl.

9 MR. HAMILTON: Well, I think if you put it
10 up at the front that tells somebody reading it that good
11 cause is the primary reason you might want to grant
12 something, and then here are some other reasons you might
13 use. If you put it at the end you're telling them, "Here
14 are the main reasons you want to grant a new trial," but
15 if you put it in No. (11), "and if there's other good
16 cause, provided you specify it." So I think it ought to
17 be in No. (11).

18 CHAIRMAN BABCOCK: Okay. Judge Peeples.

19 HONORABLE DAVID PEEPLES: Well, I was going
20 to reiterate what Tom Gray said a few minutes ago. It
21 just seems to me redundant in (a) because the list (1)
22 through (10), those are good cause, but if you don't do it
23 in (a) you need to have the catchall require good cause.

24 CHAIRMAN BABCOCK: Okay. Frank.

25 MR. GILSTRAP: I agree that it needs to go

1 in the catchall provision. If we put it at the beginning
2 then the judge is going to say, "Well, you know, the
3 evidence is factually and legally" -- "is factually
4 insufficient, but I don't think there's good cause as
5 well." In other words, it's good cause plus these things
6 if it's in the beginning. It says a new -- "for good
7 cause a trial may be granted in the following instances,"
8 so I think you're adding good cause to all of these
9 things, and I don't think -- I think it needs to go in the
10 catchall.

11 CHAIRMAN BABCOCK: Judge Yelenosky.

12 HONORABLE STEPHEN YELENOSKY: Well, I
13 thought it was a nonexclusive list, so it wouldn't say in
14 this instance. It would say, "For good cause, including,
15 but not limited to," and then that doesn't mean plus good
16 cause. That means these are examples of specific good
17 cause, and I don't care either way, but I thought we were
18 talking about a nonexclusive list.

19 CHAIRMAN BABCOCK: We are. Justice
20 Sullivan.

21 HONORABLE KENT SULLIVAN: I think my nonvote
22 is looking pretty good right now. It seems to me that --

23 CHAIRMAN BABCOCK: Duly noted.

24 HONORABLE KENT SULLIVAN: -- if "for good
25 cause" goes in (a) then even with a nonexclusive list it

1 means whatever it is has to have -- has to constitute good
2 cause. That's -- but, you know, that's why it matters,
3 and that's why I thought the vote was ambiguous.

4 CHAIRMAN BABCOCK: Okay. Any other
5 discussion? All right. How many people think "good
6 cause" should go in subparagraph (a) at the beginning?

7 HONORABLE SARAH DUNCAN: It depends on how
8 it goes into subparagraph (a).

9 CHAIRMAN BABCOCK: Well, how Nina just read
10 it.

11 MS. CORTELL: I'm okay either way. To me it
12 doesn't make any difference, Sarah. It could go in the
13 first part or the back. To me it has the same meaning.

14 CHAIRMAN BABCOCK: Okay. Everybody in favor
15 of "good cause" going in subparagraph (a) as Nina wrote
16 it, raise your hand.

17 Everybody against? All right. The againsts
18 prevail by a vote of 14 against to 10 in favor.

19 MR. ORSINGER: Can we vote on (11) now
20 because --

21 CHAIRMAN BABCOCK: Yeah.

22 MR. ORSINGER: Okay.

23 CHAIRMAN BABCOCK: Okay. Now, let's vote on
24 having "good cause" in subparagraph (11).

25 HONORABLE SARAH DUNCAN: What's it going to

1 say?

2 CHAIRMAN BABCOCK: Judge Peeples. Judge
3 Peeples. Oh, you're in favor.

4 HONORABLE DAVID PEEPLES: I'm voting.

5 CHAIRMAN BABCOCK: I thought you wanted to
6 say something.

7 MR. ORSINGER: He's an early voter.

8 CHAIRMAN BABCOCK: The early tallies.

9 HONORABLE DAVID PEEPLES: Where's my mail-in
10 ballot?

11 CHAIRMAN BABCOCK: Justice Christopher.

12 HONORABLE TRACY CHRISTOPHER: Well, I'd kind
13 of like to know what the difference -- what people think
14 the difference is between "good cause" and "in the
15 interest of justice."

16 CHAIRMAN BABCOCK: Yeah, Nina, how would
17 "good cause" work into paragraph (11) here?

18 MS. CORTELL: I do think that's the
19 question, as Justice Christopher just said. I mean, are
20 we replacing "the interest of justice"? Is that the
21 notion?

22 CHAIRMAN BABCOCK: I don't know. Richard.

23 MR. MUNZINGER: That was one of the reasons
24 why I raised the point about "good cause" having a known
25 definition in certain contexts. I'm not opposed to having

1 trial judges have discretion. What I was opposed to in my
2 colloquy with Sarah was allowing judges to keep it a
3 secret. I think trial judges need to have the discretion
4 to say, "This is screwed up, and I'm not going to allow it
5 and" -- but they ought to be required to state why they
6 believe that and then if there is a mandamus or what have
7 you arises from that, so be it. I do think that
8 discretion in government officials, they all have to have
9 it, has to be lodged somewhere, give it to the judge, but
10 I think if you use "good cause" in paragraph (11) you may
11 be imposing unintended constraints as distinct from giving
12 the judge the discretion but to articulate his reasons or
13 her reasons.

14 CHAIRMAN BABCOCK: That was part of your
15 black robe speech a minute ago?

16 MR. MUNZINGER: Yes. Yes.

17 CHAIRMAN BABCOCK: Okay. Yeah. Either one.

18 HONORABLE KENT SULLIVAN: Go ahead.

19 CHAIRMAN BABCOCK: Gene.

20 MR. STORIE: I had a similar thought, and I
21 wondered about substituting "good cause for any other
22 ground," because I had some questions in our last meeting
23 about whether "ground" sort of brought in reversible error
24 or something more specific than the judge thinks the deal
25 is hinky.

1 CHAIRMAN BABCOCK: Yeah, we're going to talk
2 about reversible error in a minute. We're going to talk
3 about reasons in a minute.

4 MS. CORTELL: It was not intended to be a
5 back door for reversible error.

6 CHAIRMAN BABCOCK: Justice Sullivan.

7 HONORABLE KENT SULLIVAN: The concern I
8 have, and I don't want to move backward here, but we're
9 talking about a nonexclusive list, but No. (11) really
10 does read like a catchall provision. It really reads like
11 any other reason, meaning it would fit within (11), and
12 have we ultimately then created a good cause standard for
13 any reason that would be articulated in a granting of new
14 trial? Is that what is intended here --

15 CHAIRMAN BABCOCK: Justice Gaultney.

16 HONORABLE KENT SULLIVAN: -- by inserting it
17 in (11)?

18 HONORABLE DAVID GAULTNEY: Well, that's my
19 question, because I think if you start (a) with "including
20 any of the following," so that one is just one of the
21 inclusions, and there could be something other than (11).
22 So if we have no "good cause" in paragraph (a), which vote
23 I lost, you have no standard under this list. Now, (11)
24 has a standard, "in the interest of justice." You can do
25 that, but if you've got some other reason, may not be in

1 the interest of justice, but it's not in one of these
2 lists, but the list is noninclusive. So (11) is really
3 not a catchall deal if you have "including" in
4 subparagraph (a). If you take "including" out and it
5 becomes a so-called exclusive list, it then becomes more
6 of a catchall provision.

7 HONORABLE KENT SULLIVAN: And that's my
8 concern. I just wanted to echo Justice Gaultney's
9 thoughts, and that is the key to -- the pivot point for
10 this in my view is how do you interpret (11)? I think
11 that's very significant. Is that simply just another
12 reason for possibly granting a motion for new trial, or is
13 it a catchall saying that any other reason not previously
14 enumerated is swept into category (11), in which case this
15 language then modifies everything?

16 CHAIRMAN BABCOCK: Judge Yelenosky.

17 HONORABLE STEPHEN YELENOSKY: Well, I mean,
18 what Columbia says, as I read it, is that our grant of
19 a motion -- or granting a motion for new trial has to be
20 reviewable in some sense, and so the higher courts need to
21 know why, and the higher courts will ultimately determine
22 whether or not a particular factual situation is good
23 cause or not. So, I mean, it's not opening the door to
24 say "good cause" if you say "good cause" and the judge
25 says, "I'm granting a trial for good cause" and is

1 required to specify something specific like "I'm granting
2 a trial for good cause because I don't feel well today" or
3 "I don't like the attorney," well, then the higher court
4 is going to say that wasn't good cause; and if I say I'm
5 granting good cause and I have to state it because the
6 attorney was undergoing chemotherapy and I thought did an
7 inadequate job, I don't know whether that's good cause or
8 not, but we'll find out.

9 CHAIRMAN BABCOCK: Bill.

10 PROFESSOR DORSANEO: Well, the one other
11 list, and I think it was talked about at the last meeting,
12 and Nina told me that we have had developed is for
13 affirmative defenses, and, you know, Dean Clark, when he
14 wrote the 1937 version of Federal Rule 8(c), you know,
15 wanted to have a list, so he put down 19 things in the
16 list of affirmative defenses rather than the old way of
17 doing it, which just had a general statement like good
18 cause, you know, the defense of new matter; but at the end
19 of that he says, "and any other matter constituting an
20 avoidance or affirmative defense"; and I think that that's
21 the better structure and that that's what (11) ought to
22 be. You know, "and any other ground warranting a new
23 trial for good cause."

24 CHAIRMAN BABCOCK: Okay. All right. Let's
25 vote on whether "good cause" ought to be in (11).

1 Everybody in favor of "good cause" being in (11) raise
2 your hand.

3 HONORABLE STEPHEN YELENOSKY: As opposed to
4 in the front or --

5 CHAIRMAN BABCOCK: Yes.

6 MS. CORTELL: Chip, can I make one comment
7 first?

8 CHAIRMAN BABCOCK: No. Everybody raise your
9 hand. Everybody against it being in (11)?

10 PROFESSOR DORSANEO: I voted for it, so I
11 was tardy.

12 HONORABLE STEPHEN YELENOSKY: As long as
13 it's in there.

14 CHAIRMAN BABCOCK: That vote's 14 to 5.
15 Yes, Nina, now you can --

16 HONORABLE JAN PATTERSON: Against?

17 CHAIRMAN BABCOCK: In favor.

18 MS. CORTELL: I think Justice Gaultney made
19 a very good point, and we lose the strength of "good
20 cause" being in (11) if this is nonexclusive, and this is
21 the problem with all the moving pieces of the votes,
22 because if the idea is that at the end of the day any
23 order granting new trial has to be based on good cause, by
24 inserting it only in (11) and having this rule being
25 nonexclusive then we've lost the good cause requirement as

1 to other grounds not covered by the rule. So that's my
2 concern with kind of the way we've taken votes this
3 morning.

4 CHAIRMAN BABCOCK: Well, but the flip to
5 that, Orsinger, if he was thinking, would say that good
6 cause is embodied in the other specific things, which is
7 why some people voted against "good cause" being in (a).
8 Carl.

9 MS. CORTELL: No, wait, wait, wait. This is
10 a nonexclusive list, though.

11 CHAIRMAN BABCOCK: Right.

12 MS. CORTELL: So whether it's embodied in
13 the listed items doesn't matter. See what I'm saying?

14 CHAIRMAN BABCOCK: Yeah. Carl.

15 MR. HAMILTON: This may be assumed, but it
16 doesn't say so, that if the grounds are going to be (1)
17 through (10) it doesn't say that the judge has to specify
18 what grounds.

19 CHAIRMAN BABCOCK: That's precisely the vote
20 we're about to take.

21 HONORABLE SARAH DUNCAN: Well, can we take
22 one other vote? Maybe there's a meeting place here.

23 CHAIRMAN BABCOCK: Yeah.

24 HONORABLE SARAH DUNCAN: "For good cause a
25 new trial or partial new trial under paragraph (f) may be

1 granted and judgment may be set aside on motion of a party
2 or on the judge's own motion for good cause," period.

3 "Examples of good cause include, but are not limited to,
4 the following." And then a list.

5 CHAIRMAN BABCOCK: Okay. Did everybody hear
6 that? Hayes.

7 MR. FULLER: I think you hit on a very good
8 point, Nina, and that is we've got moving parts here.
9 We're not sure what the final rule is going to look like.
10 I think the vote, the true vote we ought to be asking for
11 is if a new trial is granted for whatever reason, must
12 that be -- must that embody good cause, because if it
13 should then where "good cause" goes is going to be
14 determined ultimately by how the rule is written, but if
15 our object is to make sure that whatever the grounds of
16 the new trial is it constitutes good cause, that's -- I
17 think that's the critical point to me.

18 CHAIRMAN BABCOCK: Yeah. We were 26 to 0 to
19 say "good cause" ought to be in there somewhere.

20 MR. FULLER: And we've said that. Well, we
21 said it needs to be in there. Are we saying it just needs
22 to be in there, or are we saying it needs to be the basis
23 of any motion granting new trial or any grounds for it?

24 CHAIRMAN BABCOCK: Nina.

25 MS. CORTELL: I'm afraid we've lost that

1 thread under the current votes, and so if "good cause" is
2 in (11) only then I think you have to ask for a recall.

3 MR. ORSINGER: On exclusivity.

4 MS. CORTELL: I don't know whether this is
5 an exclusive list or not.

6 MR. ORSINGER: That's why I voted against it
7 being --

8 CHAIRMAN BABCOCK: R. H.

9 MR. WALLACE: I agree with that. I mean, if
10 you're going to say this is a nonexclusive list, what else
11 could there be? By the time you go through (1) through
12 (10) and then say "any other reason for good cause," what
13 else could there be? So it ought to be an exclusive list.

14 CHAIRMAN BABCOCK: Here's what I hear people
15 saying, (1) through (10) embodies good cause. If you have
16 that, you've got good cause.

17 MS. CORTELL: Right.

18 CHAIRMAN BABCOCK: But (11), which is a
19 catchall --

20 MS. CORTELL: Right.

21 CHAIRMAN BABCOCK: -- which is part of what
22 we've already now said in (a), which we made clear this is
23 not exclusive, but (11) is a catchall, and what we're
24 saying if we put "good cause" in (11) is, by the way, (1)
25 through (10) would be good cause, and if you've got a

1 catchall, if you thought of something else, that's got to
2 be good cause, too.

3 MS. CORTELL: But then you have to in (a)
4 take out "including."

5 HONORABLE DAVID PEEPLES: She's right.

6 MS. CORTELL: Because otherwise you've got
7 grounds other than (1) through (11) and you have no "good
8 cause" modifier.

9 CHAIRMAN BABCOCK: Right.

10 HONORABLE SARAH DUNCAN: That's right.

11 CHAIRMAN BABCOCK: That's right. I think
12 that's right.

13 MS. CORTELL: That's the problem.

14 CHAIRMAN BABCOCK: Richard the First.

15 MR. MUNZINGER: Is it the intent to make the
16 order granting a new trial appealable?

17 CHAIRMAN BABCOCK: Well, we'll get there.

18 MR. MUNZINGER: And that's -- and I always
19 was taught they aren't appealable, and then the Columbia
20 Medical Center comes along, we understand that there may
21 be a niche here where you can take a look at what a trial
22 judge is doing and make him say why he's doing something
23 because that appeared to be so manifestly unjust or
24 questionable, et cetera, but when you start saying "for
25 good cause" and doing all these things, it seems to me

1 you're telling the bar these orders are appealable whether
2 you're saying so or not.

3 HONORABLE SARAH DUNCAN: Reviewable.

4 CHAIRMAN BABCOCK: Justice Sullivan, then
5 Buddy. And be quick because Buddy really wants to say
6 something.

7 HONORABLE KENT SULLIVAN: Part of our
8 semantic entanglement I think is over whether it's
9 exclusive or nonexclusive. In my view if (11) is truly a
10 catchall, meaning it sweeps in any other reason for motion
11 for new trial, then indeed this is an exclusive list, it
12 seems to me, because you've got to fit it in somewhere (1)
13 through (11). A nonexclusive list means you don't have
14 to, there could be something that doesn't fit in (1)
15 through (11).

16 CHAIRMAN BABCOCK: Buddy.

17 HONORABLE KENT SULLIVAN: And so I think our
18 interpretation is contrary to the way we're characterizing
19 it. I think this list is exclusive.

20 CHAIRMAN BABCOCK: Buddy.

21 MR. LOW: To answer Richard's question, the
22 reason for "the interest of justice" not being sufficient
23 could be two. A basis for review, we don't know, or that
24 the parties are entitled to know the reason. So we don't
25 know which way they're going to go, and if they go that's

1 the basis of review then you've got questions of abuse of
2 discretion, does it have to be by mandamus, but you could
3 even live in a dream world and think that maybe it's
4 because they changed the rule on summary judgment and the
5 parties need to know. So which world are we in?

6 CHAIRMAN BABCOCK: Richard.

7 MR. ORSINGER: I was one of the two people
8 that voted that this be an exclusive list, and my view of
9 it is that it should be exclusive and "good cause" should
10 be in (11), and I think that's different from having "good
11 cause" up at the front and in having it be a nonexclusive
12 list. I think even though it's all very abstract it's
13 more restrictive, and if your catchall is good cause then
14 it's okay. It's safe for the list to be exclusive
15 because --

16 HONORABLE SARAH DUNCAN: Yeah.

17 MR. ORSINGER: -- everything that we want to
18 be included would be included in (11), and I also like it
19 because, first of all, I think the grounds should always
20 be stated when a new trial is granted, but at the very
21 least it should be in (11), and if you put "good cause" at
22 the front and you only require a finding on (11), you're
23 going to have a lot of kind of arbitrary motions for new
24 trial that are granted without a finding because they're
25 not under (11), they're under "good cause" in (a). So I

1 like "good cause" in (11), and I like the list to be
2 exclusive.

3 HONORABLE SARAH DUNCAN: That's a whole
4 different concept, though.

5 CHAIRMAN BABCOCK: Yes, that's a different
6 concept.

7 MR. ORSINGER: Well, but I think it gets us
8 to where we want to be in a more structured and
9 understandable way.

10 CHAIRMAN BABCOCK: Okay. Our court reporter
11 needs a break, so we'll take our morning break belatedly.

12 (Recess from 11:00 a.m. to 11:12 a.m.)

13 CHAIRMAN BABCOCK: All right. Let's get
14 back to it. We need a vote, another vote.

15 MS. CORTELL: Well, the vote I'd like to tee
16 up is if "good cause" is in (11), I propose we revote
17 whether this is an exclusive or nonexclusive list. I
18 think it needs to be exclusive if we put "good cause" in
19 (11), so that changes the nature of that vote.

20 MR. JEFFERSON: Are we voting whether the
21 list ought to be exclusive or whether it is exclusive, if
22 there is an exception that says -- or anything else?

23 MS. CORTELL: Well, the vote we took, first
24 vote we took, that went 23 to 2 said nonexclusive. So
25 currently the preamble, 302(a), would have something like

1 "on any grounds, including the following," but now that --
2 but that I think was the assumption you had "good cause"
3 up front. "Good cause" in (11), my proposal would be that
4 we take out "including the following" in (a). I think we
5 have to revisit the exclusivity vote in light of "good
6 cause" being in (11).

7 HONORABLE SARAH DUNCAN: So (a) would be
8 "one or more of the following."

9 CHAIRMAN BABCOCK: Judge Yelenosky.

10 MS. CORTELL: No, (a) would be that you can
11 grant a new trial based upon the following and then you
12 have your list and then you have your catchall in (11) so
13 that if you fall -- if you're not in the first 10 and
14 you're only in (11) then it has to be on good cause, and
15 then I am also assuming that we're going to end up
16 somewhere saying "specifying the grounds." It could be as
17 stated right now in (11) "provided the court specifies the
18 reasons."

19 CHAIRMAN BABCOCK: Judge Yelenosky.

20 HONORABLE STEPHEN YELENOSKY: Well, I mean,
21 I don't think it really matters. I mean, we're calling it
22 exclusive, but as somebody pointed out, good cause may be
23 any number of things, and what we know is true is for
24 whatever reason a trial judge grants a new trial, the
25 trial judge is going to think it's good cause. I mean, if

1 we're talking about something more than that, you know,
2 that a trial judge is going to say, "Well, I can do this
3 even though it's not good cause," the trial judge isn't
4 going to think that.

5 CHAIRMAN BABCOCK: Yeah. I think based on
6 the votes and the discussion we've had, it's obvious what
7 the inconsistencies are. What we haven't really talked
8 about, but we might productively talk about and take a
9 vote, is whether or not the reasons ought to be -- whether
10 or not --

11 HONORABLE STEPHEN YELENOSKY: Specified.

12 CHAIRMAN BABCOCK: Whether or not we feel
13 that Columbia Hospital case is narrow or broad. As
14 somebody pointed out, I think somebody said that the
15 dissent said a rule could clarify all of this. So
16 shouldn't we talk about whether by rule we ought to say it
17 ought to be broad, it ought to be narrow, or --

18 MR. ORSINGER: Yes.

19 HONORABLE STEPHEN YELENOSKY: Yes.

20 MR. ORSINGER: Let's vote on it. I think
21 we're ready to vote on it.

22 MS. CORTELL: I think that's correct. I
23 just want to clarify my understanding because I will be
24 redrafting this.

25 CHAIRMAN BABCOCK: Yes.

1 MS. CORTELL: We will put "good cause" in
2 (11), but I will delete from (a) the language "including."
3 Is that the consensus of the group?

4 HONORABLE DAVID PEEPLES: Yes.

5 MS. CORTELL: Okay.

6 HONORABLE JAN PATTERSON: I only --

7 CHAIRMAN BABCOCK: Justice Patterson.

8 HONORABLE JAN PATTERSON: Yeah, I kind of
9 feel like Nina, that we're being kind of whipsawed here,
10 and that we're voting at different stages on different
11 issues, but we have to assume that the list that we have
12 now in every instance is going to provide a basis on its
13 own apart from good cause, and the other thing is that we
14 do have good cause in (8) as well. So I'm where Nina is,
15 that if we -- I voted the other way, but if we change
16 these then we need to change the whole --

17 MS. CORTELL: I just wanted to make sure I
18 understood.

19 HONORABLE JAN PATTERSON: Yeah, our theory
20 needs to be clear.

21 CHAIRMAN BABCOCK: We should all recognize
22 that these are not binding votes. I mean, just because we
23 voted 14 to 10.

24 HONORABLE JAN PATTERSON: Well, I figured.

25 MS. CORTELL: I think I have a sense of the

1 committee, so I'm okay on that.

2 HONORABLE JAN PATTERSON: I fear this is a
3 little bit of the last trip down the slope, you know, that
4 we get a little bit --

5 CHAIRMAN BABCOCK: Oh, no. Oh, no, we'll be
6 skiing this slope.

7 HONORABLE STEPHEN YELENOSKY: You'll never
8 take the last group down the slope. That's the one you
9 always --

10 CHAIRMAN BABCOCK: Justice Christopher.

11 HONORABLE TRACY CHRISTOPHER: Did we take a
12 vote or is "in the interest of justice" remaining in (11)
13 or is it --

14 CHAIRMAN BABCOCK: We didn't take a vote on
15 that.

16 HONORABLE TRACY CHRISTOPHER: Okay. I do
17 think we need to discuss that point.

18 CHAIRMAN BABCOCK: Okay.

19 HONORABLE JAN PATTERSON: I assumed if "good
20 cause" was in, it was out. Is that not your assumption?

21 MS. CORTELL: That was my assumption, but --

22 HONORABLE STEPHEN YELENOSKY: Wouldn't the
23 interest of justice be a type of good cause?

24 HONORABLE TRACY CHRISTOPHER: I mean,
25 there's a lot of case law that says the judge has the

1 right to grant a new trial in interest of justice, and
2 Columbia reaffirms that. You just have to say what you
3 mean, what your reason for it is.

4 HONORABLE STEPHEN YELENOSKY: Right.

5 HONORABLE TRACY CHRISTOPHER: So if we're
6 making this a nonexclusive list in the interest of justice
7 is still out there. Okay. So --

8 HONORABLE JAN PATTERSON: Interest of
9 justice --

10 HONORABLE TRACY CHRISTOPHER: So if we're
11 trying to get rid of that, we need to be specific in some
12 way.

13 HONORABLE JAN PATTERSON: Interest of
14 justice is not a type of good cause. Good cause is a type
15 of interest of justice.

16 HONORABLE STEPHEN YELENOSKY: Well, to me --

17 HONORABLE TRACY CHRISTOPHER: Well, I don't
18 know.

19 HONORABLE STEPHEN YELENOSKY: The issue is
20 what you have to specify. The rest of it will take care
21 of itself in my opinion.

22 CHAIRMAN BABCOCK: The record should
23 reflect, by the way, since we don't have a video record of
24 this, that Sarah Duncan has now moved over to where the
25 action is.

1 HONORABLE STEPHEN YELENOSKY: She thought
2 the iPad was still here, but it's over there.

3 (Laughter)

4 CHAIRMAN BABCOCK: That's the problem.

5 HONORABLE JAN PATTERSON: I thought you were
6 going to comment on my yoga clothes.

7 CHAIRMAN BABCOCK: You know, we're obviously
8 coming back to this. It just occurred to me that we might
9 benefit from a little discussion about whether the reasons
10 ought to be specified, whether we should say by rule that
11 Columbia is narrow, broad, or we don't like Columbia at
12 all. Richard Orsinger.

13 MR. ORSINGER: The most compelling reason --
14 well, there are several compelling reasons, and I'm sure
15 we all share some of these. If a party has just won a
16 jury verdict and it's been taken away from them and nobody
17 else can look at that decision, I think they're entitled
18 to know why it was taken away from them so that we keep
19 them committed to the system, so that they can buy into
20 the process. It's awfully difficult to have something
21 really, really important happen and to not know why, and
22 there are psychological studies on that. You find it --
23 you know, if you're in the hospital, you want to know why
24 you're in the hospital. Even if it's bad news it makes
25 you feel better.

1 But there's another reason why this is
2 important and it's distinguishable from the motion for
3 summary judgment situation. A motion for summary judgment
4 can only be granted on grounds stated in the motion, so we
5 know what those grounds are, but a trial judge can grant a
6 motion for new trial on its own initiative, and so the
7 three grounds in the motion for new trial may not be the
8 ground that the judge granted the new trial on, and unless
9 we make the judge tell us, we'll never know.

10 CHAIRMAN BABCOCK: Ralph.

11 MR. DUGGINS: I would prefer that we have a
12 separate provision that specifies the order must state the
13 grounds in accordance with Columbia, regardless of what
14 the ground is.

15 CHAIRMAN BABCOCK: Did you say in accordance
16 with Columbia?

17 MR. DUGGINS: Well, whatever the Columbia
18 standard was.

19 CHAIRMAN BABCOCK: Well, there's some
20 disagreement.

21 MR. DUGGINS: Okay. Well, I think there
22 should be a separate provision in the rule that specifies
23 the order granting a new trial or partial new trial must
24 specify the reasons, joining Richard.

25 CHAIRMAN BABCOCK: Yeah, Roger.

1 MR. HUGHES: Well, two things. I think we
2 need a general provision specifying what the grounds for
3 the motion are; and if they do no more than say, you know,
4 (a)(1), (a) whatever, that would be sufficient except for
5 (a)(11); and I think if you're going to have a catchall
6 provision that it's going to fulfill Columbia, you're
7 going to have to say something more than "good cause in
8 the interest of justice." You have to say "because."

9 The second thing of it is I think part of
10 what's causing problems with (a)(11) is behind it is the
11 constitutional right to jury trial. I mean, ultimately
12 some of these issues cannot be handled by a Rule of
13 Procedure. We're going to have -- I mean, my opinion is
14 it may require a judicial determination whether good cause
15 that isn't reversible error can take away a jury verdict.
16 I'm not troubled a whole lot by a judge taking away his
17 own bench trial decision because the judge has come to a
18 decision, "Oh, I think I made a wrong credibility
19 determination." That doesn't trouble me, but it does
20 begin to bother me that we've never had to cross any of
21 these bridges about the right to -- the constitutional
22 right to trial by jury, placing limits about what kind of
23 errors is it going to take to take away a verdict, whether
24 they have to be reversible. As long as the rule is merely
25 a Rule of Procedure, and I'm not sure I have a lot of

1 problems so long as we don't just have a Rule of
2 Procedure, any reason is good enough, just tell us what it
3 is, and we'll buy it.

4 CHAIRMAN BABCOCK: I'm sorry, I missed what
5 you just said. You think that's not sufficient?

6 MR. HUGHES: I said I don't think we should
7 have a Rule of Procedure that says, "Any reason you give
8 is good enough, just tell us what it is."

9 CHAIRMAN BABCOCK: What would you propose
10 instead?

11 MR. HUGHES: I think right now I'm with the
12 -- pardon me, the good cause crowd.

13 CHAIRMAN BABCOCK: Okay. Who else? Judge
14 Yelenosky, was that a hand in the air?

15 HONORABLE STEPHEN YELENOSKY: Well, I mean,
16 yeah, I mean, the rule isn't saying that anything is good
17 cause. The rule is saying that you have to have good
18 cause, and we know that that's reviewable now, or I think
19 it's reviewable now, and the facts that are stated-- the
20 question is how much does the trial judge have to state in
21 order for a higher court, whether it's on mandamus or on
22 appeal, to determine whether, in fact, that was good
23 cause.

24 CHAIRMAN BABCOCK: Yeah. Okay. Nina.

25 MS. CORTELL: I would suggest that we take a

1 vote on whether there should be a separate subsection that
2 says "order" and says that "The order granting a motion
3 for new trial must specify the reasons for the order or
4 the grounds upon which granted."

5 CHAIRMAN BABCOCK: Okay. Good. Yeah, I
6 like that. Judge Peeples.

7 HONORABLE DAVID PEEPLES: I'd like to ask
8 this question. If we require the judges to state their
9 reasons, does that mean that it's mandamusable if the
10 reason is no good?

11 MR. GILSTRAP: That's the unanswered
12 question.

13 HONORABLE DAVID PEEPLES: Huh?

14 MR. GILSTRAP: That's the unanswered
15 question.

16 MR. ORSINGER: We know you can't get a
17 mandamus without the finding, and we know you could get a
18 mandamus with the finding, and so it's just up to the
19 Supreme Court whether there's going to be a mandamus or
20 not, and stay tuned.

21 CHAIRMAN BABCOCK: Yeah.

22 HONORABLE DAVID PEEPLES: And a couple of
23 other points. There's a large part of me that says
24 judges, you know, ought to have reasons for the things
25 they do and that it's healthy for judges to know -- it

1 chills arbitrarians when you know you've got to give your
2 reasons, and that's a good thing. Now, having said that,
3 I've got a second point. One of the most valuable tools a
4 trial judge has, it's very important to the administration
5 of justice, is the ability to grant a new trial if a
6 lawyer goes out of control and won't mind -- and won't
7 obey your orders, won't obey the motion in limine, just
8 out of control; and I think right now the fact that
9 lawyers know the judge has this unreviewable new trial
10 power helps control lawyers; and there are some of them,
11 not many, who need controlling; and I think we need to be
12 very careful not to make inroads on that power.

13 CHAIRMAN BABCOCK: I was just going to ask
14 you, Judge Peeples, if -- for example, if there was this
15 provision that Nina has suggested and the judge, Judge
16 Peeples, says, "I'm granting a new trial based upon the
17 conduct of counsel as reflected in the record of the
18 trial," would that undermine your authority to do what you
19 want to do?

20 HONORABLE DAVID PEEPLES: Here's -- okay,
21 it's very easy now just to grant it, and the lawyers know
22 you can do it, but if I'm an elected judge and I've got to
23 state in an order "Lawyer Jones violated the motion in
24 limine twice, he wouldn't stay seated when he was supposed
25 to," and so forth, I've condemned that lawyer in writing,

1 and I just think some people, elected judges, might be
2 reluctant to do that.

3 HONORABLE STEPHEN YELENOSKY: Well, all the
4 more reason they won't do it. They'll behave.

5 CHAIRMAN BABCOCK: Okay. Carl.

6 MR. HAMILTON: On the question about the --

7 CHAIRMAN BABCOCK: He wasn't talking about
8 you.

9 MR. HAMILTON: Huh?

10 CHAIRMAN BABCOCK: He wasn't talking about
11 you.

12 MR. HAMILTON: On the question about the
13 reviewability, are we not going to have something in here
14 about that? Because it's a horrible thing to spend
15 \$500,000 in the four- or five-week trial of a case and
16 then have it overturned on a motion for new trial for
17 really no reason, and shouldn't that be reviewable before
18 the parties have to start all over again?

19 CHAIRMAN BABCOCK: Judge Peeples would say
20 no, but that was on my list of things we ought to talk
21 about, but right now we're just talking about Nina's --
22 whether you ought to state reasons. Buddy.

23 MR. LOW: Yeah, Judge Peeples is absolutely
24 right. I was involved in a case where the other lawyer,
25 certainly wasn't me, kept making sidebar remarks, and he

1 called us in chambers, and he said, "You might win this
2 case, but if you continue that conduct, I'm going to look
3 very favorably on any motion, if the other side files a
4 motion for new trial." Well, things kind of leveled down,
5 but he didn't put in a record. You know, it was just kind
6 of just an in chambers thing. So having that power does.
7 I'm not saying I support it, but there's an argument for
8 that.

9 CHAIRMAN BABCOCK: Yeah. Yeah. Justice
10 Christopher.

11 HONORABLE TRACY CHRISTOPHER: Well, even
12 though I want to discuss everything, I think we have to
13 take it as a given that the Supreme Court wants us to put
14 our reasons for our orders in granting the motion for new
15 trial, and so the next question is, how specific does it
16 have to be? What Nina said I don't think would do it
17 because the way I sort of understand how we've made it, I
18 could just say in my written order, "for good cause,"
19 okay.

20 CHAIRMAN BABCOCK: Yeah.

21 HONORABLE STEPHEN YELENOSKY: That's the
22 question.

23 HONORABLE TRACY CHRISTOPHER: And, you know,
24 so and not be specific as to what I meant by "good cause."

25 CHAIRMAN BABCOCK: Right.

1 HONORABLE TRACY CHRISTOPHER: So I think we
2 need to sort of think outside the box, and so, for
3 example, and again, with that interest of justice problem
4 that's sort of hanging out there. In, for example, *In Re:*
5 *Columbia*, they had four or five substantive reasons, most
6 of which were on these lists, and then No. 5 was in the
7 interest of justice, and then the judge grants the motion
8 for new trial in the interest of justice. So the question
9 in my mind after *Columbia* is if I'm a trial judge and I
10 say, "I'm granting this motion for new trial for all
11 reasons stated in the motion," is that sufficient? Well,
12 we've got this tag of "in the interest of justice," and
13 after we change the rule I'm going to have this tag of
14 "for good cause," and we're going to be back to the same
15 problem. I have -- if I've really focused on something
16 other than the four enumerated ones and I've gone to good
17 cause in my mind for granting the new trial, I haven't
18 spelled it out.

19 CHAIRMAN BABCOCK: Okay. Sarah.

20 HONORABLE SARAH DUNCAN: I would just ask
21 Judge Peeples, as I understand it you're not against
22 reviewability of the order granting a new trial in all
23 instances. You're just concerned about losing the
24 ability -- the leverage you get from the lawyers knowing
25 that you can grant it without stating the reasons.

1 HONORABLE DAVID PEEPLES: Yeah, I don't want
2 that power weakened very much. I don't think having to
3 explain myself would weaken it, although politically it
4 might be hard for someone who still runs to do that. I'm
5 not sure how I feel about everything being appealable. I
6 don't know yet. Or mandamusable.

7 CHAIRMAN BABCOCK: Richard Orsinger.

8 MR. ORSINGER: If this eventually becomes
9 mandamusable, the standard unless they -- unless the
10 Supreme Court radically breaks from history, the standard
11 is going to be abuse of discretion, and it's going to be
12 hard to show an abuse of discretion, but I don't think it
13 will be impossible to show abuse of discretion, and for
14 those in this room that are -- that favor the independence
15 of the jury and the significance of the constitutional
16 right to a jury, if you have a judge that you know is
17 going to grant a new trial in favor of a lawyer if the
18 jury doesn't go that way, they're not getting their
19 constitutional right to a jury trial because the trial
20 judge isn't giving it to them, and there's just got to be
21 some situations, and maybe you just -- maybe the Supreme
22 Court will know it off the record, I don't know, but there
23 will be some situations where the higher court might need
24 to set aside a new trial because someone is being
25 unconstitutionally deprived of their right to a jury by a

1 trial judge.

2 HONORABLE STEPHEN YELENOSKY: But we have to
3 be careful about saying it's unconstitutional. I don't
4 know of cases saying that -- requiring you to have a
5 second jury trial deprives you of your right to a jury, do
6 you?

7 MR. ORSINGER: No, but as a practical
8 matter, Steve, you've got a situation like Carl's talking
9 about, you've invested a half a million dollars in the
10 case --

11 HONORABLE STEPHEN YELENOSKY: I understand.
12 I'm just saying we have to be careful about saying it's
13 unconstitutional. If you want to say it's wrong, it costs
14 people too much --

15 MR. ORSINGER: Well, maybe I should say it
16 encroaches on that constitutional right --

17 HONORABLE STEPHEN YELENOSKY: Yeah.

18 MR. ORSINGER: -- to an excessive degree.

19 HONORABLE STEPHEN YELENOSKY: Right.

20 MR. ORSINGER: And there should be somebody
21 that can say, no, you don't have a legitimate ground for a
22 new trial in this case. Now, we're not deciding that
23 today. The Supreme Court will decide that eventually, but
24 we do have the abuse of discretion standard to protect the
25 independence of the trial judges, even if there is

1 mandamus.

2 CHAIRMAN BABCOCK: Justice Gray.

3 HONORABLE TOM GRAY: I would hate to see our
4 votes presume based upon what the standard of review might
5 be, because on some of these grounds for granting a motion
6 for new trial it would really be fairly easy to have an
7 appeal of the granting of a motion for new trial such as
8 is the evidence factually sufficient, because that review
9 would be fairly standard. I mean, we do it all the time,
10 not an abuse of discretion. The question would be whether
11 or not the trial court erred in that determination, or
12 under No. (4), when the trial judge has made an error of
13 law that probably caused the rendition of an improper
14 judgment, but, again, not an abuse of discretion. So I'm
15 not as comfortable as Richard is with presuming that it's
16 an abuse of discretion standard in the event that you're
17 going to go up on a mandamus with a review of these
18 grounds.

19 CHAIRMAN BABCOCK: Justice Gray, what if you
20 said -- what if the provision that Nina has suggested were
21 to say that you've got to state your grounds if they are
22 (1) through (10), but if you're basing it on (11), the
23 catchall, then you've got to state some reasons for
24 what -- why you're granting it under (11)? Nina, would
25 there be anything wrong with that?

1 MS. CORTELL: No, I agree with that.

2 CHAIRMAN BABCOCK: Judge Yelenosky.

3 HONORABLE STEPHEN YELENOSKY: Well, I just
4 wouldn't -- I guess -- and maybe Judge Christopher agrees
5 -- it would help us if we understood what you mean by
6 reasons. Do you mean something in the record, or is it
7 just -- is it just that we articulate better than good
8 cause? It would help us if you say by "reasons" what you
9 mean. Or use some other language.

10 MR. HAMILTON: Basis for the good cause, the
11 basis for it.

12 CHAIRMAN BABCOCK: I know, that's -- yeah,
13 that's what I'm saying. If you have to state in your
14 order why you're granting a new trial and you say, "I'm
15 granting a new trial under (a)(6)," okay, so you just go,
16 you read (a)(6), and you see noncumulative evidence has
17 been discovered that was not available at the time of
18 trial. Okay. If you say, "I'm granting it under (a)(11),
19 in the interest of justice," you would have to go further
20 and say "based on the conduct of counsel during" --
21 plaintiff's counsel or defendant's counsel, whichever it
22 may be -- "during trial, which is of record." Now, would
23 that --

24 HONORABLE STEPHEN YELENOSKY: How do we say
25 that?

1 CHAIRMAN BABCOCK: Huh?

2 HONORABLE STEPHEN YELENOSKY: And you think
3 "basis" would that do that or "reasons" would lead to a
4 judge understanding that's what he or she should do?
5 Maybe so. I'm just wondering.

6 CHAIRMAN BABCOCK: I don't know. But in
7 Judge Peeples' example, you know, an elected judge
8 obviously is going to be loathe to criticize a lawyer, but
9 on the other hand, if he's not willing to criticize the
10 lawyer, the threat is empty. I mean, if he's going to do
11 it in chambers and say, "Hey, if you guys keep doing this,
12 I'm going to grant a new trial," and he's not willing to
13 go out and grant the new trial and say that's why he's
14 granting it, he doesn't have much of a threat.

15 HONORABLE DAVID PEEPLES: Well, what I'm
16 saying is pre-Columbia it was just not appealable,
17 nothing, no grounds, nothing, no mandamus. It's just an
18 unreviewable power that trial judges had, and now that
19 you've got to give reasons it's harder to exercise. I'm
20 not against that, but I do think it does clamp down a
21 little bit on this power that I think is so important, and
22 I just want to be sure we don't damage that power too
23 much.

24 CHAIRMAN BABCOCK: Yeah. And, of course,
25 the flip is, as Carl says, you know, you go to trial, you

1 spend a whole bunch of money trying the case and then for
2 no reason at all in an unreviewable order, you know, all
3 that's wiped away, all that time, effort, and money.

4 Richard Orsinger.

5 MR. ORSINGER: I think Justice Gray made a
6 good point about grounds (1) through (10), and my response
7 to it is that if these concrete grounds are not present
8 and the judge erroneously grants a new trial then maybe a
9 higher court should undo that, but the place where the
10 abuse of discretion standard is going to count is in the
11 paragraph (11) where the judge says "good cause" and then
12 is required to articulate the good cause, and that's where
13 you're going to have -- that's a purely discretionary
14 call. It doesn't have anything to do with certifiable
15 reversible error. It's just a discretionary call, and
16 that discretion right now has no limits, other than I
17 guess if there's a mistake in understanding of a conflict
18 in the jury verdict, we'll intervene for that, but it is
19 discretionary, and it's broad discretion, and it's subject
20 to mandamus only if it's abused, and I don't know how
21 you're ever going to prove abuse, but there are probably
22 going to be some situations where you can show that
23 there's really no reason why that verdict shouldn't stand
24 and yet it was taken away from you, and that's your shot
25 at the court of appeals and the Supreme Court.

1 CHAIRMAN BABCOCK: Okay.

2 HONORABLE TOM GRAY: Chip, in trying to
3 articulate the basis of granting one under (11), I'm
4 thinking that somewhere else in the rules or in the case
5 law there is a, you know, "for good cause stated on the
6 record." I don't find that satisfactory, but if it said
7 something about the "legal or evidentiary basis for good
8 cause" then that kind of gives some guidance of was it the
9 conduct of trial counsel as Judge Peeples has explained or
10 if there's some -- if you find that counsel really was ill
11 and that's an evidentiary issue that you want to state
12 that, you know, we proceed forward with trial, they didn't
13 ask for a motion for continuance, but it was clear that
14 counsel was not performing well because of an illness or
15 something of that nature or some -- you know, I'm also
16 sensitive to -- I think it was Sarah that said something
17 about you may not want to put on the record a -- an
18 addictive type problem of counsel, but there's enough of
19 it you could put on the record to satisfy Richard that the
20 reason is there, as given by the public elected official,
21 but it doesn't, you know, call an attorney out that needs
22 some counseling of some type particularly. So I think
23 that's an adequate standard to put the basis in there, the
24 legal or factual basis upon which they determine the good
25 cause.

1 CHAIRMAN BABCOCK: Okay. Jim Perdue.

2 MR. PERDUE: I've gotten more than a few odd
3 coalitions in the room it seems like, so I'll be Felix to
4 Mr. Munzinger's Oscar. The Columbia case --

5 CHAIRMAN BABCOCK: Was Felix the neat one,
6 or was he the slob?

7 MR. PERDUE: Columbia says that they -- as I
8 read it, everybody reaffirms the broad discretion of the
9 trial court, but a trial court who uses discretion can't
10 be arbitrary and capricious. So I disagree with Mr.
11 Orsinger's last sentence, which is you can't -- broad
12 discretion is unreviewable because Columbia stands for it
13 is, because there's a standard, and I don't have any
14 problem with the concept of if a trial judge grants a new
15 trial to either party, it can't be done for an arbitrary
16 and capricious reason. The only question then becomes is
17 do they have to state a nonarbitrary, noncapricious reason
18 in an order.

19 Well, that's a procedural rule consistent
20 with Columbia, and that seems to be fair, but the redraft
21 of the rule -- and I agree with Justice Gray -- is you're
22 now what you're doing is you're laying out new kind of
23 standards that allow not a question of whether it was
24 arbitrary and capricious, but whether it was a legally
25 correct ruling to grant a new trial, and that seems to be

1 your -- what's occurring is we're incorporating more
2 standard in the basis for the discretion than is the
3 question under -- as I read Columbia, which is give us the
4 reason, and as long as it's not -- as long as it's not
5 arbitrary and capricious, it's consistent with 200 years
6 of jurisprudence and everything everybody has laid out.
7 So if we're continuing down that road, that is consistent
8 with what I think everybody seems to agree is good policy,
9 but they've got to state a basis for it. Then you can
10 satisfy every concern.

11 HONORABLE STEPHEN YELENOSKY: But, Jim,
12 aren't you just saying (11) should be -- "good cause"
13 should be replaced with "any reason that is not arbitrary
14 or capricious," and then we're back onto the next
15 question, which is, again, how much does the trial judge
16 have to explain?

17 MR. PERDUE: Well, but that would be then --
18 that would be a trial judge question and a party's
19 question, and you take that risk if you're going to -- if
20 you're going to say, "He had a bad day on chemotherapy on
21 day three of trial," well, maybe that is mandamusable,
22 maybe that's nonarbitrary and capricious, but at least
23 you've got a reason, and you can possibly take it up.

24 HONORABLE STEPHEN YELENOSKY: But the whole
25 thing is what we have to specify, because I would posit

1 that any time I grant a motion for new trial, me and any
2 trial judge is going to think that both it is good cause
3 and it is not arbitrary and capricious. So whatever you
4 say in (11), that doesn't bind the judge but to the
5 judge's -- but that the judge has to have something other
6 than a whimsical decision or a bad decision then it takes
7 care of it. I don't care whether you say it's good cause
8 or not arbitrary and capricious. Whatever you call it,
9 the real issue is how much do we have to say.

10 MR. PERDUE: Well, I guess that's a little
11 different view of it because it seems to me the real issue
12 is you don't want them granted for whimsical and nonbasic,
13 without foundation reasons.

14 HONORABLE STEPHEN YELENOSKY: Sure, but the
15 trial judge, the trial judge is always going to think --
16 unless the person is evil, is always going to think they
17 have a nonarbitrary, noncapricious reason, which also
18 constitutes good cause and also is in the interest of
19 justice for doing it. Now, others may disagree, including
20 higher courts if there's a review, but once you say that
21 in any fashion, you're basically -- you've basically
22 accomplished what needs to be accomplished.

23 CHAIRMAN BABCOCK: Okay. Bill, then
24 Richard, and then Justice Christopher.

25 PROFESSOR DORSANEO: I still think good

1 cause ought to be a standard, notwithstanding the fact
2 that we don't really know what it means, and the reasons
3 should be given with enough specificity for someone
4 looking at it to determine whether the good cause standard
5 has been met. Now, those are two abstract things put on
6 top of one another, but that's really what we're after,
7 and abuse of discretion is not just -- you're not just
8 abusing your discretion if you act in an arbitrary manner.
9 It's if you're unreasonable. That's regarded as an abuse
10 of discretion, too. Granted some cases leave out the
11 unreasonable part, but it's as specific as we can get.
12 The Beaumont court had a case where it said the reasons
13 given were not sufficient under *In Re: Columbia*, so there
14 is some case law that's developing. I don't know if we
15 can do better than reasonable specificity --

16 CHAIRMAN BABCOCK: Yeah.

17 PROFESSOR DORSANEO: -- in a drafted rule.

18 CHAIRMAN BABCOCK: Yeah. Richard Munzinger.

19 PROFESSOR DORSANEO: We have to go,
20 otherwise we'll be here until tomorrow.

21 CHAIRMAN BABCOCK: Yeah. Well, Richard,
22 will you yield to Nina --

23 MR. MUNZINGER: Sure.

24 CHAIRMAN BABCOCK: -- who's got to go, real
25 quick?

1 MS. CORTELL: I would just say that we'll be
2 guided by the balance of the discussion and propose
3 language for the next meeting. I can't be at the next
4 meeting, but also, to let you know, 303 is a preservation
5 rule. It really embodies other rules. The only question
6 is whether -- in the appellate rules -- whether we need to
7 bring them also into the state court rules, and then 304
8 is a brand new rule on plenary that you ought to look at
9 and that we recommend. And I'm sorry I've got to leave.

10 CHAIRMAN BABCOCK: That's okay. Richard
11 Munzinger. Sorry.

12 MR. MUNZINGER: With all due deference to
13 Judge Yelenosky, I don't -- my experience is such that I
14 have been in front of trial judges who do things without
15 good reasons and reasons that they would never admit, and
16 that is part of the problem that we have. Just looking at
17 this rule here for a moment, let's pretend that I am a bad
18 judge. I am a judge who is going to grant a new trial
19 because either the party or the lawyer is a large
20 contributor to my campaign or because I'm afraid he will
21 go out and hire someone to run against me and I'll have to
22 go out and campaign and collect money and what have you
23 because he's powerful in the community. Whatever it is,
24 my motive is not worthy. The party files a motion for new
25 trial alleging grounds one, three, five, seven and nine.

1 I enter an order saying "new trial granted." None of the
2 grounds one, three, five, seven, and nine have any merit
3 at all. I just say, "I grant the motion."

4 The way the rule is written I can get away
5 with that because I am not granting it for "in the
6 interest of justice." I don't have to explain my reason,
7 so now that raises the question, well, are we going to
8 appeal that or attempt to mandamus that or what have you.
9 I guess my point is any order granting a new trial ought
10 to require that the reason be specified. "I grant this
11 new trial on point three in the motion for new trial" or
12 "in all points of the motion for new trial." Now we know
13 why the order -- why it was granted.

14 If the judge is going to grant it on the
15 basis of justice or in the interest of justice, as he
16 claims or she claims, let them articulate it as well, but
17 every order should require. If you're going to do this
18 now, if you're changing -- I think it's a hundred and some
19 odd years of jurisprudence where we gave judges this
20 discretion. If we're going to change it, let's recognize
21 the reality and make them state their reasons in every
22 instance, and that way if it's going to be testable it can
23 be tested.

24 CHAIRMAN BABCOCK: Justice Christopher.

25 HONORABLE TRACY CHRISTOPHER: Well, I think

1 it was interesting what Justice Gray said with respect to
2 some of these points, (1) through (10). We know what the
3 legal standard of review is on appeal for these points,
4 and again I go back to my question. You know, I have a
5 jury trial where the damages were cut in half. The
6 defendant was found 50 percent negligent. The damages
7 were pretty much not controverted. The jury cut the
8 damages in half, despite the instruction to them not to
9 cut the damages in half. I chat with them afterwards and
10 say, "Did you cut the damages in half because you found
11 the, you know, plaintiff 50 percent negligent," and they
12 tell me "yes." Okay, now that's not jury misconduct,
13 because my conversation with them is prohibited by the
14 Rules of Evidence and the Rules of Procedure from being
15 presented in a motion for new trial.

16 I am sure that if we reviewed the evidence
17 on appeal the appellate court would say, "Oh, jury is
18 entitled to cut those \$10,000 worth of damages down to
19 \$5,000 because they're the, you know, sole judge of the
20 credibility of the witnesses and the weight to be given
21 their testimony." So we know the legal standard for both
22 of those things. Can I still grant a new trial as the
23 trial judge? Or not? I mean, that's, you know, why I
24 think this whole reversible error question is key. I
25 might think that -- you know, maybe I am a real softy, all

1 right, and --

2 HONORABLE SARAH DUNCAN: This would be --

3 CHAIRMAN BABCOCK: Hypothetically speaking.

4 HONORABLE SARAH DUNCAN: This would be in
5 another life.

6 HONORABLE TRACY CHRISTOPHER: I'm in a
7 certain part of the state that thinks plaintiffs should
8 always win, and I always believe the plaintiff's evidence,
9 and I always believe the plaintiff's testimony, and that's
10 who I really am. Well, then the defendant wins, and I
11 think, "Well, no, that's against the great weight of the
12 evidence. That's factually insufficient to support a jury
13 finding. New trial granted." I could understand
14 Richard's point, and he might be ascribing to various
15 reasons why I'm such a softy and believe the plaintiffs
16 and believe their evidence and believe their testimony,
17 but, again, you know, where's our standard of review on
18 that?

19 CHAIRMAN BABCOCK: Okay. Richard Orsinger,
20 and then Justice Gray.

21 MR. ORSINGER: I would answer Justice
22 Christopher's comments by saying that it doesn't have to
23 be reversible error for the trial court to grant a new
24 trial. The way the judicial structure works is a pyramid,
25 and the trial court is at the bottom and the largest, the

1 court of appeals is above that and smaller, and the
2 Supreme Court is the top, and it's got the smallest
3 grounds available to reverse a judgment. The Supreme
4 Court has the smallest grounds, the court of appeals has
5 larger, but still smaller than the trial court, and the
6 trial court has the broadest grounds to grant a new trial.
7 If we say that a trial judge can only grant a new trial
8 when there's reversible error then their grounds now are
9 as narrow as the court of appeals.

10 We don't want the test for a trial judge to
11 achieve justice to be the limited powers of the appellate
12 court to reverse the trial judge. There's a reason why
13 the Constitution was set up with the court of appeals
14 having more limited power to overturn a judgment, and if
15 we say that the trial judge can only grant a new trial on
16 the same grounds that a court of appeals could reverse a
17 trial court's judgment, we've eviscerated this concept of
18 the pyramid and of the trial judge having broader power,
19 the court of appeals smaller, and the Supreme Court the
20 smallest.

21 CHAIRMAN BABCOCK: Have you thought of this
22 before?

23 MR. ORSINGER: A few minutes ago.

24 CHAIRMAN BABCOCK: The pyramid thing?

25 MR. ORSINGER: A few minutes ago.

1 CHAIRMAN BABCOCK: Justice Gray.

2 HONORABLE TOM GRAY: In answer to the very
3 hypothetical set of facts that Judge Christopher set out,
4 I think it would be fairly easy for the appellate court
5 reviewing that to say if you granted the new trial under
6 (1), (a)(1), it would be error, because as you said
7 yourself that the evidence is factually sufficient, but if
8 you granted it under the new and improved and revised
9 (11), stating the factual basis upon which you granted the
10 new trial, as an appellate reviewing -- or appellate
11 justice reviewing that, I would tend to apply abuse of
12 discretion. I think that that is something that is --
13 would be appropriate for the trial court to consider
14 reversing a case on, and probably would not take the
15 mandamus of that.

16 HONORABLE TRACY CHRISTOPHER: Well, if
17 that's the case, that sure needs to be clear because
18 otherwise the judge is going to say, "Oh, let's see, one
19 and five seem to fit here. One and five."

20 CHAIRMAN BABCOCK: Richard Munzinger, and
21 then Sarah.

22 MR. MUNZINGER: We have a Constitution that
23 says to my client you have a right to a jury trial. I
24 want the jury. I don't want a judge in a black robe
25 deciding my case. I want 12 people deciding my case.

1 HONORABLE TOM GRAY: And when you get that
2 new trial you'll have 12 new people decide it.

3 MR. MUNZINGER: I understand. But I'm out
4 money. I'm the client, I'm out money, I'm out time, I
5 have been deprived of something which my state
6 Constitution gave me because a judge believes, for
7 whatever reason, honestly held in front of God that that
8 jury was wrong. Now, the hypothetical that Judge
9 Christopher gave, you couldn't -- a lawyer could not come
10 in and attack the reasoning of the jury. Did Judge
11 Christopher interview all 12 jurors? Did all 12 jurors
12 admit that they did what she said they did, or was it four
13 or five, or did three keep quiet because they wanted to go
14 home? I don't know the answer to the question. I do know
15 using Richard's phrase, you eviscerate the Constitution if
16 you give me a constitutional right and then take it away
17 because a judge wants to do what the judge wants to do. I
18 don't -- I don't want to say that I don't trust judges.

19 HONORABLE SARAH DUNCAN: You need to say it.

20 (Laughter)

21 MR. MUNZINGER: But I didn't vote to give
22 them a veto power over my right to a jury trial because of
23 their philosophy. When they take an oath to the
24 Constitution they should subsume their philosophy under
25 the Constitution. If they don't, have they done right,

1 and why should my client pay the price?

2 HONORABLE STEPHEN YELENOSKY: Well --

3 HONORABLE SARAH DUNCAN: Your client doesn't
4 have a constitutional right --

5 HONORABLE STEPHEN YELENOSKY: Right.

6 HONORABLE SARAH DUNCAN: -- to --

7 HONORABLE STEPHEN YELENOSKY: One jury
8 trial.

9 HONORABLE SARAH DUNCAN: -- keep a judgment
10 that's based upon a jury verdict that the judge, the trial
11 judge, knows was obtained only by virtue of violating
12 their instructions. Nobody has a constitutional right to
13 that. I think Tracy has brought forward an excellent
14 example. Chief Justice Gray might be writing a great
15 opinion saying that's good cause. I can easily imagine
16 somebody else writing another opinion, perhaps Justice
17 Munzinger, who says that's not good cause because jury
18 misconduct is covered by whatever subsection it is, and
19 that, Judge Christopher, was not admissible evidence and
20 cannot form the basis of a good cause finding. I don't
21 think we've really progressed very far if that's going to
22 be the law that's developed as a result of this now
23 exclusive list.

24 CHAIRMAN BABCOCK: Even though out of order
25 Munzinger has got to go next.

1 MR. MUNZINGER: Here's the point.

2 CHAIRMAN BABCOCK: Then R. H.

3 MR. MUNZINGER: Judge Christopher now
4 interviews the jury. Was my client permitted to examine
5 the jury to flesh out the evidence that supports her
6 belief or her finding that this was a total and complete
7 disregard of her instructions and of the law? If, in
8 fact, it was a total disregard of law, I agree with you a
9 hundred percent. No one has a constitutional right to
10 perverted law, but I did have a right, ought to have a
11 right, to be present when some fact is determined
12 affecting my right and erasing my right to a
13 constitutional right. What gives Justice Christopher the
14 right to examine a jury without my being present?

15 I tried a case once where a Federal judge
16 went into the jury room and gave the jury verbal
17 instructions with no court reporter present and then came
18 back and falsified by having his court reporter write up a
19 false statement of what he had told the jury. The court
20 reporter wasn't there. He couldn't walk. He had no legs.
21 He had no legs, and he couldn't walk through the
22 courtroom, and yet he came up with a jury instruction.

23 CHAIRMAN BABCOCK: This is a John Irving
24 novel, right? The legless court reporter?

25 (Laughter)

1 MR. MUNZINGER: I'm just telling you, but
2 would you ever allow a citizen to be deprived of rights in
3 a jury trial without the right to cross-examine? If you
4 did, you're kidding yourself. Why give that power to a
5 judge?

6 CHAIRMAN BABCOCK: R. H.

7 MR. WALLACE: Well, I won't rehash
8 everything Richard said.

9 CHAIRMAN BABCOCK: All right, but say it
10 with passion.

11 MR. WALLACE: But I do agree, with all due
12 respect to the judges, if you could do that, because it
13 was obviously clear that they didn't understand the
14 instructions on the damages, then do you go a little bit
15 further and say in a complicated commercial case, "It's
16 obvious they were confused about the whole concept of
17 something and they didn't understand what they were doing
18 when they made that finding, and now I'm going to reverse
19 that"? I agree with -- I think it's common for judges to
20 talk to jurors and lawyers to talk to jurors, but I come
21 down on Richard's side on that. That may have been my
22 whole trial strategy.

23 HONORABLE STEPHEN YELENOSKY: I have a
24 question for Richard.

25 CHAIRMAN BABCOCK: Judge Yelenosky.

1 HONORABLE STEPHEN YELENOSKY: My question --
2 Richard, my question is, I understand basically your
3 position on that is you shouldn't have a motion for new
4 trial unless it's reversible error, I guess.

5 MR. MUNZINGER: No.

6 HONORABLE STEPHEN YELENOSKY: But do you
7 think a trial judge should have discretion not in that
8 scenario, but in the one that I posited, where you just
9 think that the lawyer went into it in good faith, told you
10 off the record what his physical condition was, and fell
11 apart in the middle of the trial? Should I have that
12 discretion, and if I have that discretion, then how do you
13 describe that?

14 MR. MUNZINGER: If your reasons for granting
15 a new trial are that the lawyer was sick and this, that,
16 whatever it might be, if you articulate those in an order,
17 somebody has to have discretion. All the world --
18 everything depends upon morality and honesty in the final
19 analysis. It doesn't make any difference whether you're
20 buying something or you're going to trial. So you as a
21 judge, if you honestly believe that justice was miscarried
22 because Munzinger was on chemotherapy and couldn't
23 articulate or couldn't think, if you say that in the
24 order, you ought to have that discretion, and an appellate
25 court is then going to have to say, "Well, you should have

1 granted a continuance," or "We agree this was unique
2 circumstance, we're not going to reverse this," if these
3 orders become appealable.

4 But what I don't like, I mean, why in Judge
5 Christopher's example -- we've all tried cases -- I
6 remember when we first got away from post-verdict
7 interviews of jurors and you could only show that the
8 verdict was eviscerated by some outside event. We all
9 were thunderstruck by this because it was commonplace for
10 people in the early days to go get jurors and ask them if
11 they did that. That was routine. You went off and got
12 affidavits from all the jurors in the hopes that you could
13 find somebody that mentioned insurance or did whatever,
14 and the verdict changed. That was what we all did 25 and
15 30 years ago, so it was a huge change when you couldn't do
16 that anymore.

17 But now we're being told that a judge can do
18 this, that a judge can set aside a trial and deprive a
19 party of a jury right when you couldn't do that with a
20 juror -- I mean, with juries, and there is no right to
21 cross-examine, no right to be present, no right to argue
22 the law, no right to do anything about it? That doesn't
23 make sense to me. I do think that the judges should have
24 discretion. I do think that they need to set forth their
25 reasons because they're not all like you, Judge.

1 HONORABLE STEPHEN YELENOSKY: Well, I'm not
2 saying --

3 MR. MUNZINGER: You two judges, they aren't
4 like you. There are a lot of people out there that do
5 things wrong.

6 HONORABLE STEPHEN YELENOSKY: I think I
7 agree with you that we should state it, should state some
8 reason. I think here, you know, maybe as Bill Dorsaneo
9 said, all we can say is "with some specificity." My point
10 earlier about a judge thinking that it's good cause, maybe
11 some don't, but there's nothing we can do in a rule about
12 the judge who is going to reverse for the wrong reason
13 because they'll just say what they're going to say. My
14 point was it doesn't really matter to me on number --
15 we've started just calling it No. (11), which proves my
16 point, it's good cause, it's nonarbitrary, that a judge
17 has some discretion there, and the real issue is how much
18 do they have to state should it be reviewable.

19 CHAIRMAN BABCOCK: Richard Orsinger.

20 MR. ORSINGER: A less emotional example,
21 which at this point basically somebody can think about in
22 the break is ground (a)(1). When the evidence is
23 factually insufficient to support a jury finding, that's a
24 ground for a new trial. Now, let's say I'm a trial judge,
25 and the evidence is factually sufficient, but in my

1 opinion it doesn't constitute a preponderance, so the
2 appellate court can't reverse it, but I'm a trial judge,
3 not an appellate court, and the evidence is between
4 factually insufficient and a preponderance, and in my
5 opinion it's not a preponderance. Am I allowed under (11)
6 to reverse -- pardon me, grant a new trial because I don't
7 think it's a preponderance? That's a core question
8 because --

9 HONORABLE SARAH DUNCAN: Great example.

10 MR. ORSINGER: -- if you agree that the
11 trial judge can do that, we know the trial judge has
12 broader discretion in the review of the evidence than the
13 court of appeals. If we say, no, a trial judge under (11)
14 saying that it's between factually insufficient and a
15 preponderance is not a grounds for a new trial then we've
16 essentially said you have to prove reversible error to
17 grant a new trial.

18 CHAIRMAN BABCOCK: And the reason why the
19 judge has that discretion in your view of the world is
20 because they're on the ground floor, they're at the bottom
21 of the pyramid, and they're seeing what's going on.

22 MR. ORSINGER: I'm in favor of the trial
23 judges having more discretion than the courts of appeals,
24 but I'm not in favor of the trial judges having no limit
25 on their discretion and no one reviewing that limit.

1 CHAIRMAN BABCOCK: Ralph.

2 MR. DUGGINS: Before we break, can we take a
3 vote so our committee will know on whether or not this
4 group thinks that what -- what reasons, if any, should be
5 stated or what grounds must be specified in any order?

6 CHAIRMAN BABCOCK: Yeah. I think --

7 HONORABLE SARAH DUNCAN: Vote on whether.

8 MR. DUGGINS: Whether, and, if so, what.

9 CHAIRMAN BABCOCK: Let's do whether first.

10 HONORABLE SARAH DUNCAN: Whether in all
11 instances.

12 CHAIRMAN BABCOCK: Yeah. Yeah. Whether --
13 so let's vote. How many people are in favor of -- Justice
14 Sullivan.

15 HONORABLE STEPHEN YELENOSKY: I'm in favor
16 of Justice Sullivan.

17 CHAIRMAN BABCOCK: Me, too. The Chair votes
18 on that.

19 HONORABLE KENT SULLIVAN: The question I
20 have is are answering this -- are we voting as if this is
21 a blank slate, or are we supposed to vote on our
22 interpretation of Columbia?

23 CHAIRMAN BABCOCK: Yeah, blank slate.

24 HONORABLE KENT SULLIVAN: Turning into a
25 more shock test, I think.

1 CHAIRMAN BABCOCK: Blank slate.

2 HONORABLE KENT SULLIVAN: Okay. What would
3 be good policy.

4 CHAIRMAN BABCOCK: Yeah, what would be a
5 good rule. So how many people are in favor of a
6 subsection of this rule requiring judges to give reasons
7 for their grant of a new trial, raise your hand?

8 And how many against? 17 in favor, 4
9 against, Chair not voting. Okay. Sarah, maybe you can
10 help me out. How would we frame the next vote about what
11 you say?

12 HONORABLE SARAH DUNCAN: I don't know. I'm
13 against having to say it, so how would I know what they
14 have to say?

15 CHAIRMAN BABCOCK: Okay.

16 MR. GILSTRAP: The question is do we require
17 a judge to state his reasons in all instances --

18 CHAIRMAN BABCOCK: Okay.

19 MR. GILSTRAP: -- even if it's (1), (2), or
20 (3), or are we going to require it there?

21 CHAIRMAN BABCOCK: I think so.

22 MR. GILSTRAP: Is that what we voted?

23 CHAIRMAN BABCOCK: I thought so, but now can
24 they just say -- can they get away with saying, "I'm
25 granting it in the interest of justice"?

1 HONORABLE STEPHEN YELENOSKY: No.

2 CHAIRMAN BABCOCK: I don't think you can do
3 that. Carl.

4 MR. HAMILTON: I think they should be able
5 to say, "I'm granting it (1) through (10)" just by --

6 CHAIRMAN BABCOCK: Right.

7 MR. HAMILTON: -- that language, but if they
8 get to (11) then they have to specify the basis for the
9 good cause.

10 CHAIRMAN BABCOCK: How many in favor of
11 that?

12 How many opposed to that? That carries by a
13 vote of 14 to 4, and I think that -- that should do it for
14 today.

15 HONORABLE SARAH DUNCAN: Did we vote enough?
16 Did we catch up?

17 CHAIRMAN BABCOCK: Yeah, we caught up big
18 time. I think we had a ton of votes today.

19 HONORABLE SARAH DUNCAN: Oh, good.

20 CHAIRMAN BABCOCK: I'm proud of you all.
21 Our next meeting is June 4th. That is -- that evening is
22 the Supreme Court Historical Society dinner, I believe, so
23 I hope everybody can make our meeting and that dinner. So
24 we're in recess. Thanks.

25 (Meeting recessed at 12:03 p.m.)

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2 **REPORTER'S CERTIFICATION**
 3 MEETING OF THE
 4 SUPREME COURT ADVISORY COMMITTEE

5 * * * * *

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 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 10th day of April, 2010, and the same was
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13 I further certify that the costs for my
 14 services in the matter are \$_____.

15 Charged to: The Supreme Court of Texas.

16 Given under my hand and seal of office on
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