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MEETING OF THE SUPREME COURT ADVISORY COMMITTEE

April 9, 2010

(FRIDAY 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 9th day of April, 2010, between the hours of 9:00 a.m. and 5:11 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:

Documents referenced in this session

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

10-08 Proposed rule requiring notice to AG

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MR. LOW: I'm having to pinch hit, and then I'll be gone for a while, and then Justice Hecht will take over, and then finally our leader will be here, but I do welcome and I'm glad to see everybody here, so bear with me. We'll drive on. First I'll call on Justice Hecht to kind of let us know what's going on.

HONORABLE NATHAN HECHT: Just a brief report. The public comment period ended for Rule 737, and we got a couple of comments that we're still looking at, but have not heard any major problems with that rule. It seems to be functioning. Then we're still working on the disciplinary rules, which does not affect this group, but it's taken a lot of the Court's administrative time to go through those rules, but I think the plan is to have a complete package of the rules and comments back to the bar for their meeting this month; and they will start looking at them again, the board of directors, and will look at them through the summer; and after that we're a little unsure how we'll proceed.

There's some interest in -- in the bar in doing another sort of tour, public tour, like they did on insurance disclosure and go around the state and get comments and make sure that the process is open to all lawyers that want to comment on these very important

rules, because they will be submitted to a referendum at some point, and that may take through the fall, with the referendum then probably during the president's election the next year, but that's all sort of tentative, and this is a major overhaul of the disciplinary rules. The study has been going on for 10 years. The last ABA study took more than 10 years. Now they've started a new study which is going to take more than 10 years, so this is a very arduous process, but that's kind of where we are on that, and if we meet all of those goals, it will free up some administrative time, I hope, at the Court starting in May.

The work on the electronic filing in the appeals courts is proceeding, and there was a hope that the software that will make this workable on the court side would be developed and in place by the spring, at least in one or two courts; and, of course, as with so many things, it's taking more time than people thought; but it is still being worked on with a view toward getting it in place as soon as possible. I think the Federal circuits have now all gone to electronic filing, although there may still be one or two that are left. I know the Fifth Circuit just went to mandatory electronic filing a month or so ago, and it was one of the last ones.

So, now, that will be a very significant change in the way the appellate courts do their work. We

have approved a project with the Third Court to get their clerk's records in electronic form so that the trial court clerks will have to scan the clerk's record and send it in. So some of the trial court clerks are already doing this. Some of them want to do it more, particularly in Harris County and Dallas County. Some of them do not want to do it, particularly in the outlying counties, but we're sort of moving in that direction, and I hope within a year or so it will be fully implemented.

This committee worked on rules to allow all of that to happen within the framework of the Rules of Appellate Procedure, and some form of those will be put in place, probably to start with as an order that the courts then follow without actually going in and changing all the rules, but eventually we'll change the Rules of Appellate Procedure, but that's kind of the long-term project there.

The Texas Judicial Council approved the -- what we called the civil cover sheet at their last meeting that this committee debated six months or so, five or six months ago, I think, and so we will adopt Rule 78a of the Rules of Civil Procedure, which this committee thoroughly discussed, that will require the use of the cover sheet in all civil cases, starting September 1st, and it will be a standard form. You will be able to get it on multiple websites; clerks' offices should have it at the counters.

There is plenty of time to get ready for this. We'll make a big advertising push for everybody in the bar to realize that there's going to be a standard civil cover sheet. It's going to be required in all cases, and you've got to get one and have it with you when you want to file your lawsuit.

So I think the rule will be published in the June issue of the *Bar Journal* and then will take effect September the 1st. And, as you recall, this is a way for Office of Court Administration as the adjunct to the Judicial Council to gather statistical information about case filings in the civil justice system, so I really think it will be a great help to clerks and to the administrative side, and we'll get some more reliable statistical information about our case profiles as time goes on.

So those are the things that the Court is working on imminently, and, of course, we have several other things on the table, too, but those are the things I think you can expect to see in the next few weeks, or months. So that's all I have, Buddy. I would be happy to take any questions. Yeah, David.

HONORABLE DAVID PEEPLES: What should we do, if anything, on 18a? Are y'all ready to receive that?

HONORABLE NATHAN HECHT: Yes.

HONORABLE DAVID PEEPLES: Send it to you?

HONORABLE NATHAN HECHT: Yes, send it to us.

HONORABLE DAVID PEEPLES: Okay. Anything I can do to get it some momentum as it comes to you?

HONORABLE NATHAN HECHT: If we could get the disciplinary rules off our plate then -- but I think that's going to happen this month, so --

HONORABLE DAVID PEEPLES: Okay, thanks.

HONORABLE NATHAN HECHT: And there's obviously public concern about this, so I think we'll take it up pretty quickly. Other questions?

MR. LOW: Judge, do you know of any cases, recent Supreme Court of United States cases that --

HONORABLE STEPHEN YELENOSKY: Buddy, we can't hear you.

HONORABLE TRACY CHRISTOPHER: We can't hear you.

MR. LOW: I'm sorry. I was asking Justice Hecht if he or if any of you know of any Supreme Court of the United States cases that have come out with some ruling that might affect our rules we need to review a particular rule on, because that happens from time to time.

HONORABLE NATHAN HECHT: Well, the recusal committee is looking at Citizens Union, and I think that's

all I know about.

MR. LOW: All right. I know of none. We're going to start out this morning on 300, and Judge Peeples will lead us.

HONORABLE DAVID PEEPLES: You need to have this spiral-bound handout.

MS. SENNEFF: It didn't change from what I e-mailed out yesterday.

HONORABLE STEPHEN YELENOSKY: Is it on the website, too?

MS. SENNEFF: Yes.

HONORABLE DAVID PEEPLES: Elaine Carlson and I think maybe Nina has some earlier rules, but we're going to skip over to page eight, which is Rule 300. And I just will say that this is my effort to state in a rule the holding of the Lehmann case. If I missed some subtleties from that case, it was unintentional. The intent here is to codify the holding of Lehmann and its approach to finality of judgments. I have nothing else to say until there's a question or a comment.

MR. LOW: Wait a minute.

HONORABLE DAVID PEEPLES: It speaks for itself.

MR. LOW: All right. You want to go -- I mean, as you go through, is there anything that we haven't

discussed in detail?

HONORABLE DAVID PEEPLES: I don't think we've talked about this one, Buddy.

MR. LOW: All right. I wasn't here last time, and so do you want to lead us to show what, if any, changes are made or what we're doing?

HONORABLE DAVID PEEPLES: Well, the previous 300, I'd have to look at it, but it doesn't even approach this. We just used that number. It says basically, "The Court shall issue a final judgment."

MR. LOW: Right.

HONORABLE DAVID PEEPLES: And that's about all the present 300 does, and so we used that as a place to stick this. The rules right now don't say anything about what makes the judgment final.

MR. LOW: Okay. The Federal rules only provide that it doesn't define "final judgment." It just merely says a judgment is any order or decree you can appeal from. So there are no Federal guideline to follow. All right. Everybody look it over. What suggestions? Frank.

MR. GILSTRAP: Well, I think the threshold question is, you know, why codify Lehmann? I mean, that's -- I thought maybe we had discussed that before, but it seems to me that's the obvious question. I mean, I

think you could -- you've done a good job of codifying Lehmann. The question is should we do it. If you'll recall, before Lehmann there was a whole lot of uncertainty about finality of judgments. Since Lehmann, I don't think there has been. I had a problem involving finality awhile back, and I could find very few cases where the issue has come up. It seems to me Lehmann has fixed the problem, and, you know, if it ain't broke, don't fix it. The problem when you start codifying, of course, is you go from the common law approach, which allows, you know, the law to change over time, to a codification, and from now on we're just going to be construing the rule. That's a momentous step. I don't see the need for it.

MR. LOW: You know, you had the same thing in *Payne vs. Highway*. We had worked on that rule and then the Supreme Court came out with Payne, and after that the rule kind of went away because everybody knew --

MR. GILSTRAP: Everybody reads Payne.

MR. LOW: Yeah. So the question is, do we need this? What's your view of it, Judge?

HONORABLE DAVID PEEPLES: Well, I have myself said over the years that, you know, if it ain't broke, don't fix it, and why are we studying these things. One answer is it's easier to read this and get up to speed on the law than it is to read Lehmann, because Lehmann,

Justice Hecht wrote it, and I agree with you, it gets the job done, but you've got to dig through a lot of history and so forth; and if somebody wants to understand this, they might want to do that; but if they basically know and they want to just know what the holding is, this is the place to go. And that's about the only thing I would say.

MR. LOW: Richard.

MR. MUNZINGER: I had a recent experience where a declaratory judgment action, hotly disputed between the parties, and the judge granted one of the summary judgment motions and included the Lehmann language without specifying the relief to be granted, and both parties pointed out to the court that there is case law suggesting that if you have to go elsewhere from the final judgment to find out what the judgment did or didn't do, that it is not final, whether you've got Lehmann language or not. Now, it doesn't say "the Lehmann language or not," but that seems to be the law, and the judge who granted the summary judgment later set aside the summary judgment, but I point out the experience because a judge could believe that he is -- he or she is entering a final judgment when, in fact, the judgment is not final. It may contain the Lehmann language and the Lehmann recitation, but it is not a final judgment because it doesn't state what the rights and obligations, duties of the parties are

and what the ruling of the court is, or it may require reference to some document outside of the judgment, which prior case law makes not a final judgment. So it may be that by doing this order you're giving a false sense of security to trial courts. That's my experience, and I share it for what it's worth.

MR. LOW: Well, the final judgment is just disposing of all parties and all issues, and maybe some of them have been disposed of in another order and so forth, and you don't even have to call it final judgment. If it does that, it is final. Are you suggesting then that we leave things as they are?

MR. MUNZINGER: My personal preference is that there be something like this Rule 300 because it at least removes some of the ambiguity. It doesn't cure all of the problems, but it does remove some of the ambiguity, and trial judges are busy. They don't have staffs that can brief for them and what have you. I like the idea of requiring something like this personally.

MR. LOW: Anybody else have -- Carl?

MR. HAMILTON: I think it would help if we changed the word "or" to "and" between (1) and (2) because the way this is worded, if the judgment states that it's final and disposes of all parties, that may be incorrect. It may not, in fact, dispose of all parties and all

issues, in which event it's not going to be final, I assume, even though it states that.

MR. GILSTRAP: That's what Lehmann does.

HONORABLE STEPHEN YELENOSKY: It does by stating it.

MR. LOW: Go ahead.

MR. GILSTRAP: That's what Lehmann does. I mean, if there's a claim out there that's hanging out or a party that hadn't been disposed of, you don't have to dispose of it if you have the Lehmann language, what I call the new and improved Mother Hubbard clause. It ends the case. That was the purpose of it.

MR. LOW: Judge Gray, you had your hand raised, I believe, and then Richard.

HONORABLE TOM GRAY: I was going to address the broader question first and Frank's comment about it doesn't appear to be much of a problem or issue after Lehmann. I assure you that it is an ongoing problem and that while Lehmann has certainly helped, we find new mutations of the problem regularly. I mean, it's just the number of cases that we struggle with whether or not we actually have a final judgment, or they're fairly common, actually; and we just issued an opinion this week that where the parties after they looked at it, after we sent it back and said, you know, "Y'all take this back and

figure out whether or not y'all have a final judgment," because the trial court in his order and post-judgment hearing decided that it would be us that decided what he intended with regard to his own order; and we said, "That's not the way it's going to work. You're going to have to decide whether or not you intended it to be final"; and so some clarity would be -- I think, could be brought even beyond Lehmann.

I understand you've just tried to codify, Judge Peeples, but I think just codifying it is not going far enough. We need to try to identify those issues that remain, and I guess the -- transitioning from that general concept to speak to the specifics; and if we start at the beginning with the applicability, subsection (a), I think somehow we're going to have to say that this doesn't, you know, determine the finality for purposes of appeal of all appeals, that there are a lot of appeals that talk about finality that this rule won't touch on, the most notable of which is probably the probate law where there are various final judgments. Okay. He's directing me to the -- since I'm sitting next to Judge Peeples, he's commenting as I go along by pointing to the footnote. And so duly noted.

HONORABLE DAVID PEEPLES: I don't get to do this very often with you.

HONORABLE TOM GRAY: So then tell me what the answer to subsection (b) is, Judge Peeples, where it says, "at the conclusion of the litigation," because I thought the whole point of this was to define when the litigation was concluded, and so do we need the prefatory phrase so that we just start this final judgment subsection (b) with "the court shall render final judgment"?

My problem with the double almost verging on redundant statement, "At the conclusion of litigation the court shall render a final judgment" is that we frequently see the situation that's already been discussed of several orders and then an order that because it deals with the last claim or the last issue is technically the final judgment, but does this mean that the trial court then has to come back and do one order at the -- that in effect encompasses all of those prior, and I'm sure that's not what you intended, but that could certainly be an argument or interpretation that when you get through all of those other final orders or all those preliminary orders and get to that last one you've got to have it denominated as such.

HONORABLE DAVID PEEPLES: (c)(1) is intended to deal with that where it says "specifically disposes" and so forth "in combination," "by itself or in

combination with other earlier judgments and orders." That's intended to deal with that.

HONORABLE TOM GRAY: See, I think in large part subsection (b) is -- doesn't need to be there. I don't know that it adds anything.

MR. LOW: But, Judge, a final -- at what point does the judge enter a final judgment? It becomes -- that's when the litigation has concluded. I mean, it's not a double -- say you do it at -- the committee tells you at what point in the case, and I mean, I don't -- I don't see it that way. Richard.

MR. MUNZINGER: The problem that I had and have with this rule or any attempted codification, let me give you this example. Plaintiff files a motion for summary judgment to quiet title to property and for other relief. The defendant makes a claim to -- files a counterclaim declaratory judgment. Both parties file motions for summary judgment. The trial court enters a summary judgment granting one of the party's motions for summary judgment and recites the language in paragraph (2) quoting Lehmann. If this rule is enacted -- and that's all the judgment says. It doesn't say, Party A owns the property or Party B owns the property. Party A has right to possession, Party B has right to possession. This piece of property is excluded from the judgment. There

are underlying questions that are not clear.

This rule would say that that is a final judgment, and yet the appellate court -- and this was the quandary we found ourselves in in this exact circumstance. The appellate court doesn't know -- the motion for summary judgment has been granted. You go back to the summary judgment, and you look at what the relief it asks for, it asks for like seven separate items of relief. Were all of those granted by the judgment? In order to answer questions regarding what the judgment contained you have to go outside of the judgment to find it, and there is case law suggesting that that is not a final judgment. So now the court of appeals is sitting there, and its first task is always to determine whether there is a final judgment ripe for appeal. What is the court of appeals going to do if faced with a rule which says a judgment or order is final if it has the Lehmann/Mother Hubbard clause in it, regardless of the absence or presence of the judgment of the list of relief granted or not granted?

What are they going to do? I don't know what they're going to do in the face of a rule like this. With the common law I think the appellate court would send it back and say, "State what relief you have granted and what you have denied, Judge." But that's -- to me that's the risk that you run if you adopt something this black

and white and this simple, because I think it's a temptation to trial judges to simply say, "Here, give me the Mother Hubbard clause, it's final. Let the appellate court sort it out."

CHAIRMAN BABCOCK: Bill.

PROFESSOR DORSANEO: Well, I think in that situation it would be appealable, but it wouldn't be correct. It would be erroneous. That's the simple -- that's the simple thing.

MR. MUNZINGER: Say it again.

PROFESSOR DORSANEO: It would be appealable, but it wouldn't be a correct judgment because it didn't do what it needed to do.

HONORABLE TOM GRAY: The phrase that Lehmann uses, "It's final but erroneous."

PROFESSOR DORSANEO: Yeah.

HONORABLE STEPHEN YELENOSKY: And this rule wouldn't make that any more -- any different from what Lehmann already does.

PROFESSOR DORSANEO: But it would tell you that you shouldn't be reading all those old cases pre-Lehmann.

MR. LOW: You know, I want to raise one issue, one of our -- a wise person once told me there's no such thing as a final judgment in family law. How does

this affect that, Richard?

MR. ORSINGER: Well, things are better in family law probably since you had that conversation. There's a new breed of family lawyers now --

MR. LOW: Oh, okay.

MR. ORSINGER: -- that know something about the Rules of Procedure, but, you know, one of the -- one of the issues is multiparty/multi-issue cases, and we don't have as big a problem with summary judgments as general civil litigation. We do have a problem with multiparties and multi-issues, but with the *Texas Family Law Practice Manual*, the big form book that everybody uses, is so thorough in touching every single base that I don't -- I don't know of any problems. I haven't seen it published, I haven't heard of it personally, where they're having problems arguing over the finality.

MR. LOW: Would you vote that we leave things as they are or some form of 300 as written?

MR. ORSINGER: You know, I sympathize -- my subcommittee is, as I've said before, heavily weighted with law professors; and they have to teach this stuff to people who don't already know it; and when it's in a rule logically and clearly stated, even if it's somewhat flawed in its conception, it's a lot easier to understand it and for lawyers it's a lot easier to follow it than if you

expect them to go read and find Lehmann and figure out that it overturned the old cases that Bill's case book probably says you should ignore. So the virtue of setting it out here is that it's easy to find. If it's not perfect, well, it's not perfect even when it's hard to find, so why not just make it easy to find. And then I have a comment on (d) that I'll come back to later.

MR. LOW: All right. Tracy.

HONORABLE TRACY CHRISTOPHER: I agree it would be good to have it in a rule. Everyone in this committee knows of the case of Lehmann, but I would guess 50 percent of the practitioners if you asked them -- trial practitioners, if you asked them what that case was they would have no idea what it is.

PROFESSOR DORSANEO: That's generous.

HONORABLE TRACY CHRISTOPHER: Yeah. All right, maybe that's generous. The vast majority of judgments I got did not have anything near this, you know, language in it. I was always adding it in, handwriting it in, to make sure it was final and appealable; and I agree with Justice Gray that now in the appellate court we're sending them back because, you know, we can't tell that somebody hasn't gotten rid of a particular party or a counterclaim or something like that.

MR. LOW: Right. Let me do this. Let me

take a straw vote and see where we are. I'm fixing to have to leave, and Justice Hecht will lead you, but who thinks we should have a rule -- not voting on the details of 300, but have the rule as drafted or leave it as it is. Who would like some form of 300 as written?

HONORABLE TERRY JENNINGS: A new rule?

MR. LOW: Yeah. It's pretty unanimous, all right. So I think we need to avoid going into why we shouldn't have 300. We've already talked about it. So, Justice Hecht, if you will take over and go on this form of 300, and I'll be back shortly.

HONORABLE NATHAN HECHT: Okay.

MR. LOW: Thank you very much.

HONORABLE NATHAN HECHT: Yes, Bill.

PROFESSOR DORSANEO: I would like to go back to talk about that subdivision (b). I think that that needs work, too, looking at it and after listening to the comments. I actually think that the draft of this proposed rule that was done by Clarence Guittard some years ago from which we kind of started, that Clarence meant one piece of paper, right, final judgment at the end of the game like Federal Rule -- was it 58? Because he told the story of the Runnymeade case at this committee where when he was chief justice of the Dallas court he was confronted with a situation where somebody was saying that

there wasn't a final judgment because there wasn't one piece of paper at the end, and he thought that that was good, but in the Runnymeade case he wrote -- and I might be getting this a little bit wrong. It's been about 10 years since I heard this story. He went with you could have a series of pieces of paper being final judgment, and he hoped that the Supreme Court would reverse him, okay, but instead of reversing him they refused the writ outright.

So that's where we get this series of pieces of paper, but I think that Clarence actually did mean "The Court shall render a final judgment or order disposing of all claims," you know, like in Federal practice. I don't recommend that we go to that, so I think we, you know, should either get rid of (b) or perhaps do something else by reference to current Rule 300 and the first sentence of current Rule 301. Now, both of those rules are the only rules about what a judgment -- you know, general rules about a judgment; and the thing that they make it plain is that there needs to be a written document, not for there to be a judgment, not for there to be rendition of judgment, but that a judgment should be -- well, 301's first sentence says, "The judgment of the court shall conform to the pleadings, the nature of the case proved, the verdict, if any, and shall be so framed as to give the

party all the relief to which he may be entitled either in law or in equity"; and it's the idea that the judgment is supposed to be in writing, you know, or in a series of writings, rather than just be orally rendered from the bench; and I would like to see that added into this rule 300 so that it's a little more than Lehmann and finality; but it's a rule that says what -- at least in general terms what a judgment is supposed to do.

HONORABLE NATHAN HECHT: Tom.

HONORABLE TOM GRAY: With regard to -- I think that a definition like that of the objective of the final judgment would be good and would be an appropriate -- like subsection (b); and what I would do with the current subsection (b) is I would keep the heading and make that the heading for subsection (c), because that is what defines the final judgment; and the current heading on subsection (c) is really subsection (c)(1). In other words, you can have a final judgment in basically one of two ways, and it's subsection (1) and (2), so I would change the heading of (c) to that of (b) and then include a description of what the goal is and then recognizing that it can be in one or more pieces of paper and that it is -- the final judgment is that last piece of paper from which the appellate timetable runs.

HONORABLE NATHAN HECHT: Frank.

MR. GILSTRAP: What is the purpose of (a)? And I may just be -- not know this, but is there some context for finality other than appeal and plenary power?

PROFESSOR DORSANEO: Yes.

PROFESSOR CARLSON: Res judicata.

MR. GILSTRAP: Res judicata, okay. All right.

HONORABLE NATHAN HECHT: Richard.

MR. ORSINGER: On (b), I see (b) as being different from what we've been talking about, because I consider this to be a rendition issue rather than an appealability issue. Under the law of Texas at the present time -- and I hope and pray we don't change it -- the judgment is the oral rendition or maybe the letter rendition, and the written document that's eventually signed is the memorandum of the judgment. In fact, that's so woven into criminal law I'm not sure we could even change it; and in divorce law it's very important because the community estate continues to acquire income until the divorce; and typically when you settle a family law case, which 99 percent of them settle, you settle with an oral rendition that cuts off the community estate and then you go about all the difficulties of papering the true property division.

I mean, just this morning when I was coming

here I was going over probably on the telephone with my paralegal the 15th draft of a divorce that was proved up on April 13th of last year. We're still fighting over the oil and gas terms and stuff like that, but these people have been divorced. If we change this rule or do anything to eliminate the oral rendition as the operative judicial event then we're going to greatly complicate those instances where you're doing more than just entering a money judgment or denying all requested relief. So I see (b) as the issue of whether a judgment is effective on rendition, which I see as a separate question from whether the judgment is appealable. A judgment is effective on rendition if it's noninterlocutory and it disposes of all claims between all parties, but it's not appealable until it's reduced to writing and signed by the judge, and those are different concepts, and our focus here has really all been on when does it become appealable. (b) is when is the judgment effective or involves the rendition.

Those are different questions, so I think we should debate them differently, and I don't know that there's any real desire here to change the rule that the oral rendition that's noninterlocutory is dispositive of everyone's legal rights. I would be against dropping (b) because it would endanger in my view the concept that the operative event is the rendition of a noninterlocutory

judgment, whether that be oral or in writing.

HONORABLE NATHAN HECHT: Jan.

HONORABLE JAN PATTERSON: Well, and my concern was similar, whether the use of the word "render" was purposeful and intended to enlarge or narrow, so I had a similar concern, but more or less what the intent of the particular use of that word was.

HONORABLE NATHAN HECHT: Yes, Terry.

HONORABLE TERRY JENNINGS: I had a question for Judge -- or for Professor Dorsaneo. You had mentioned, you know, Rule 58 of the Federal rules, the separate document rule, and then you said something I thought to the effect of "Well, I don't think we ought to go that way." Is there a certain weakness in regard to the separate document rule in regard to the Federal rule?

PROFESSOR DORSANEO: Well, we just haven't -- we haven't ever -- we haven't done that, and I think that would be a pretty big change. I also don't like Federal Rule 58, and the people practicing under that rule have a hard time and have always had a hard time, meaning the Federal judges, have always had a hard time complying with it. It's a --

HONORABLE TERRY JENNINGS: Creates the counter-problem where you're --

PROFESSOR DORSANEO: You never get it final.

HONORABLE TERRY JENNINGS: Right.

PROFESSOR DORSANEO: They don't do it. So, I mean, it's like ordering rocks to fly, I suppose. You know, they're just not gonna, a lot of them; and, you know, granted, Justice Guittard thought that was the right way to go, but -- and he convinced me at the time because he could convince me of a lot of things, but I don't really think so. I think a series of pieces of paper, that works out just fine. People want to think it's the last piece of paper is the final judgment for appeal purposes, that's fine; and we don't seem to have a lot of trouble with it, although I guess some people could be troubled by it if they came from a different training.

HONORABLE TERRY JENNINGS: So you'd basically be substituting one problem for another. Okay.

HONORABLE NATHAN HECHT: Lonny.

PROFESSOR HOFFMAN: So I think this maybe is just a -- it could be a small kind of language problem I've got with it, but maybe it loops back around to the kind of first question about why do we need a codification, which apparently Buddy has already driven a train through that issue. Unmistakable clarity, so two things I guess about that; and without regard to judicial opinions that say that, I've never understood that something could be clear in that sense but not be -- but

be mistakable or something less than mistakable. So that's one point, and then a related point is that's an odd adjective to use in a rule. In other words, it seems to me that when we have rules that tell judges what to do -- and maybe I can't quite put my finger on why it is, but it doesn't feel like the kind of thing that we normally put in a rule. That feels like the kind of thing that all it will do is create mischief and argument as to when something was or wasn't unmistakable, and then that just moves back around to my first point, which is we get these inane conversations among lawyers about when something is mistakably clear as opposed to unmistakably clear or something in between, which seems strange.

HONORABLE NATHAN HECHT: Bill.

PROFESSOR DORSANEO: I agree with that, because I don't think we need "unmistakable" there. When we drafted Rule 329b some years ago we borrowed the language that came from the Three Bears case. We talked about a "motion to modify, correct, or reform," and that's -- that was stupid, even though it came right from a Supreme Court case.

HONORABLE NATHAN HECHT: Well, sometimes you use sort of exhortatory language in an opinion that you don't expect to see in a prescriptive rule. Elaine.

PROFESSOR CARLSON: Justice Jennings, I

wanted to respond to your inquiry because a former constitution of this committee did look at the desirability of having a required written judgment in every case, and it was debated fairly extensively, and we visited it several times, and the -- my memory is the clear consensus of the group was it was not a good idea. One of the big concerns was if that is not accomplished then you leave judgments open, and you'd have too many interlocutory judgments, and litigants would not have the finality that they currently have.

HONORABLE TERRY JENNINGS: That makes sense.

HONORABLE NATHAN HECHT: Well, doesn't -- the Federal rule solves that by saying if you don't have something within 150 days --

PROFESSOR CARLSON: Now it does.

HONORABLE NATHAN HECHT: Yeah. You've got a judgment whether you like it or not. Of course, where the 150 days starts is -- begs the question, so --

PROFESSOR DORSANEO: Happily we don't teach those rules in first year civil procedure since it's only a four-hour course now. We never get to judgment.

HONORABLE NATHAN HECHT: Frank.

MR. GILSTRAP: I think, does this rule break new ground by using the term "final judgment"? I mean, previously we've always just talked about the judgment,

like in Rule 329b(a), which says that -- you know, starts the appellate timetables, it says "when the judgment is signed." Now we're talking about multiple judgments. I mean, the idea was that there was only going to be one judgment in a case and now we have a final judgment, and so, you know, I guess you begin this whole problem, you know, people calling it final judgment, therefore, it's the final judgment. I mean, are we kind of -- are we kind of making it less clear by using the term "final judgment"?

HONORABLE NATHAN HECHT: Alex Albright.

PROFESSOR ALBRIGHT: Well, isn't it that there's -- you only -- you may have many judgments in a case, but you only have one final judgment, right? So and the rule now says, "There shall be only one final judgment in a case," and I think we probably should still say that, but you may have multiple judgments and then the last one that finally disposes of the last claim or the last person becomes the final judgment, and it takes all those back.

HONORABLE STEPHEN YELENOSKY: Well, the other ones are part of the final judgment.

PROFESSOR ALBRIGHT: The other ones are part of the final judgment.

HONORABLE STEPHEN YELENOSKY: It's just the last piece of paper in the final judgment.

PROFESSOR ALBRIGHT: Yeah, we still have one final judgment.

MR. GILSTRAP: Well, Rule 329b says -- talks about when the judgment is signed, 329b(a). Are we talking about the final judgment? Because previously we've just talked about the judgment as if there could only be one judgment in a lawsuit.

MS. CORTELL: These rules kind of have final when we get to it.

HONORABLE NATHAN HECHT: Bill.

PROFESSOR DORSANEO: Well, in the rule book judgment tends to mean final judgment, but it doesn't always. That's the problem, is that it's a question of what -- when is something appealable, and we say it's appealable when it's final, say, okay, when is it final? When it disposes of all parties and issues expressly or by necessary implication, and then we have got Lehmann to put on top of it, but as far as the rule book is concerned normally the term "judgment" is meant to mean final judgment, but -- and I personally prefer leaning that way such that I call things before the final judgment "orders," but, you know, we have partial summary judgments. They're called judgments.

PROFESSOR ALBRIGHT: Default judgments.

PROFESSOR DORSANEO: Default judgments,

interlocutory default judgments, so, you know, it's just not clear. I mean, Lehmann is -- and its predecessors, Ulrich case, none of that stuff is in the rule book, and the rule book isn't all that clear about this -- the thing that Richard was talking about, judgments rendered orally from the bench are well-recognized, but you have to have a written draft of the judgment to be the kind of judgment that you -- that you need for filing a motion for new trial, et cetera, in terms of the hooking up to the other rules.

The only rules that we have about that are, you know, the one paragraph in Rule 300, which says the court's supposed to render judgment without saying how, and then that first sentence in 301 that I read and then this sentence that Alex is talking about, which is a very odd sentence, that there "shall be only one final judgment." Well, say, wonder what they meant by that, okay, because we know we have the series of pieces of paper that, you know, we say, okay, it amounts to one final judgment, but I don't know if that's a helpful sentence.

MR. GILSTRAP: Bill, do you think that we make it clearer by putting the term "final judgment" in this rule?

PROFESSOR DORSANEO: Yeah. But I would add

some of this other stuff that people have talked about to this rule, say generally what a judgment is supposed to do and say that it needs to be, you know, a written draft of a judgment is what's contemplated; and maybe we need to put in there what Richard says about judgments being rendered orally from the bench. I mean, that's just something that you kind of learn along the way, that that's how judgment can be rendered, you know, in the English manner or by -- as he said, or by signing a written draft of the judgment, and I would put a little bit of that in there, not a lot, but a little bit, and I would replace or put it where (b) currently is.

HONORABLE NATHAN HECHT: Richard, then Roger.

MR. ORSINGER: I would like to propose that we break (b) into two concepts, one, rendition, and one, signing a written judgment, and that we associate the word "final" with the signing of the written judgment. We do want courts to render a complete judgment that takes care of all parties and all claims. That's fundamental. You can't bring the lawsuit to an end without that rendition of judgment, but if that rendition is oral, we have another question of reducing that to writing and getting it signed, and it's the signing of the written memorandum of the rendered judgment that starts the appellate

timetable and the plenary power timetable.

So what if we had a rule like the one Bill just suggested at the start, is at the end of the case you must render a judgment that disposes of all claims between all parties and then have another paragraph that says you should then sign a judgment and the judgment is final, meaning appealable, if the following terms are met, and that way we don't confuse the two.

HONORABLE NATHAN HECHT: Roger, then Stephen, and then Richard.

MR. HUGHES: Well, I think if we're going to go that -- that that's a good idea. There is a separate problem, because you can tell Professor Dorsaneo mentioned it. There is a problem about successive final judgments, and I see this from time to time when you have a multiparty case and the judge grants a series of summary judgments by the defendants and all the out of town lawyers come with their orders and they want their judgment to be final, and so you have all these defense lawyers tossing their orders granting their summary judgments, which, of course, include the supermodified deluxo Har-Con order, and so, you know, Monday the judge signs Defendant 1's order granting his summary judgment and denying everybody else relief. Wednesday he signs Defendant 2's summary judgment granting his summary

judgment and denying everybody's relief, which does that mean that the Monday judgment has just been upset? And Friday signs another one, so what does that do to the prior two ones?

I think if -- what we're going to do is if we're going to preserve the distinction between rendition and signing, I think there should be something about the judge directing counsel to cooperate to prepare one final document, because right now there's nothing that -- it's left in limbo as to who is going to draft it; and second, there's no incentive, no push from the rule, to make, so to speak, all those maverick lawyers cooperate to come up with one document rather than just do what it takes to protect their client.

HONORABLE NATHAN HECHT: Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: Yeah, Tracy actually raised a point, and I'm sure Richard can solve this for us because it's family law. When we orally render judgment for a divorce, usually without a decree there, usually it's on a mediated settlement agreement or something, and if they don't come in with a decree approved as to form as to both sides then they maybe have a motion to enter or something; but what if we render judgment for divorce, there isn't a mediated settlement agreement? Is it possible that they come back and have a

trial on the property division, and was the divorce a final judgment because it didn't deal with that?

MR. ORSINGER: You've got to -- let's, first of all, talk about noninterlocutory rather than final.

HONORABLE STEPHEN YELENOSKY: Okay.

MR. ORSINGER: But it's well-established in the case law that you can't dissolve the marital bonds without also dividing the marital estate, and if you purport to do that, it doesn't work. So if you get a divorce orally without dividing the property and then go remarry 31 days later, you've just committed bigamy.

HONORABLE STEPHEN YELENOSKY: So if you do -- well, putting the bigamy aside for a moment, but if you orally render judgment for a divorce and then later on you have to divide the property --

MR. ORSINGER: It's ineffective.

HONORABLE STEPHEN YELENOSKY: -- then the first one was not good?

MR. ORSINGER: That's right. It's ineffective. There's plenty of cases -- I don't know if there is any Supreme Court cases, but there's plenty of court of appeals cases that you can't differentiate the dissolution of marital bonds from the division of property.

HONORABLE TRACY CHRISTOPHER: Well, what

about your people that are still working on it for a year?

MR. ORSINGER: Our property is divided.

HONORABLE TRACY CHRISTOPHER: Can they get married?

MR. ORSINGER: Yes.

HONORABLE STEPHEN YELENOSKY: Why, because --

MR. ORSINGER: The Family Code and the case law both say that you can get married 30 days after you're divorced, and the case law indicates that an oral -- a noninterlocutory oral rendition is the judgment.

HONORABLE STEPHEN YELENOSKY: Well, if it's already divided what are you working on?

MR. ORSINGER: We've got to get the paperwork in a condition that the judge can sign. All I've got is a 35-page mediated settlement agreement.

HONORABLE STEPHEN YELENOSKY: Well, suppose you-all don't agree on what that should say. Then has it really been divided?

MR. ORSINGER: Yes, it has been divided.

HONORABLE STEPHEN YELENOSKY: What proves that?

HONORABLE NATHAN HECHT: And things are much better in family law.

HONORABLE STEPHEN YELENOSKY: Yeah, I see a

problem.

PROFESSOR DORSANEO: There will never be a Supreme Court case that said these people are still married, trust me. That is an impossible outcome.

MR. ORSINGER: You know, I mean, the problem is when you have all this joint ownership of all this variety of assets and it's not just a simple case, implementing he gets this and she gets that and then he's got to pay this and she's got to pay that, it sometimes can be very complicated and sometimes requires the concurrence of third parties on the language that you put in or whatever, and so that's inevitably going to take time.

HONORABLE STEPHEN YELENOSKY: Well, my point is just that if it takes time to do it and you're trying to get agreement then theoretically there's a possibility that you won't get agreement, which means things haven't been divided.

MR. ORSINGER: No. No, it's been divided. It just means that you have to go back to the court to figure out how you paper the division.

MR. MUNZINGER: That's a legal fiction, Richard. It's been divided, but nobody knows who gets what.

MR. ORSINGER: Oh, no, you know who gets

what. It's just a question --

MR. MUNZINGER: You don't know who gets what until the judge says you get the silver spoon and he gets the pitcher.

MR. ORSINGER: You may have a problem with that, but 99 percent of the people that move the cases through our legal system are living with this system somehow.

MR. MUNZINGER: I understand that you --

MR. ORSINGER: And we do not want to tell them that they're not divorced until after all the paperwork is done.

MR. MUNZINGER: It's insufficient --

HONORABLE STEPHEN YELENOSKY: Well, I agree we should --

HONORABLE NATHAN HECHT: One at a time.

HONORABLE STEPHEN YELENOSKY: -- be able to divorce them with finality. I just don't understand how it works.

HONORABLE NATHAN HECHT: It seems to me like you could get agreement faster if you wouldn't let them remarry, but I don't know.

MR. ORSINGER: You could get quick divorces if you wouldn't let people have personal relations after separation until they're divorced. Boy, that would speed

things up.

HONORABLE NATHAN HECHT: Judge Christopher.

HONORABLE TRACY CHRISTOPHER: Well, on the civil side, when you render a judgment on the terms of a settlement that someone announces in court, I mean, you do have sort of -- the idea behind that we were always taught in judges school is that that is final, they can't back out of it.

MR. ORSINGER: Right.

HONORABLE TRACY CHRISTOPHER: You have rendered judgment on the terms of the settlement, and then they come back in and one said, you know, "Well, I want indemnity" because that's what's, you know, normal and customary. Everybody knows that, but they didn't say it in their settlement on the record, and I just sign a judgment without it in there.

MR. ORSINGER: I think you're doing it right.

PROFESSOR ALBRIGHT: That's right.

HONORABLE NATHAN HECHT: Justice Jennings.

HONORABLE TERRY JENNINGS: Just to try to clarify, again, the proposed Rule 300 with subsection (a) is -- the whole purpose of it is for purposes of appeal and plenary power. In regard to your concerns, Richard, might it be better just to maybe address those concerns in

a comment saying, you know, "This does not affect the rules in regard to oral rendition" or anything like that, rather than to try to put it in the rule, because the focus here is just for purposes of appeal and plenary power.

MR. ORSINGER: I would think that that would be an excellent solution, but we've got to do something about the use of the word "rendition" in this rule if we're going to do that, because the truth is this rule is not supposed to relate to rendition. It's supposed to relate to signing, and so I think we better take the word "rendition" out of here and put the word "sign" in, and then if do you that we can drop that comment, and everything will be wonderful.

HONORABLE NATHAN HECHT: Alex.

PROFESSOR ALBRIGHT: I think this rule talks about two things, actually. It's not just about signing. It's about fine -- when I teach this we're always -- there's a vocabulary problem, and if we can fix the vocabulary problem that would be great. There's a final judgment in that it disposes of all claims and all parties or it says that it does with unmistakable clarity and then it's a final judgment. But you can do that -- you can have a final judgment that's not -- then you have to have one that's signed that then the 30 days go by, and after

the 30 days then you have a finally final judgment because the plenary power has expired, and so what -- in one sense we're talking about renditions of judgments that are final and then we're also talking about signing judgments so that plenary power expires, and if we can -- and I guess I'm wrong. This really doesn't -- this doesn't go into the signing especially because it's more the rendition actually in an order, and it confuses --

MR. ORSINGER: I think the linguistic difficulty is that we're confusing noninterlocutory with final. What you've -- the first one you described was a noninterlocutory judgment, meaning that it adjudicated permanently all of the claims, but it's not final for purposes of appeal or motion for new trial until it's reduced to writing and signed.

PROFESSOR ALBRIGHT: Right.

MR. ORSINGER: So if we could differentiate between noninterlocutory -- well, first of all, rendition, noninterlocutory, and signing, I think that will eliminate the language confusion, and we can just debate the concepts.

HONORABLE NATHAN HECHT: Frank.

MR. GILSTRAP: Let's keep the old Rule 300, although we have to rewrite it, which involved rendition, and then make this Rule 301, which involves the written

judgment and signing, and so we take the reference to rendition in part (b) out and leave that in the rule involving rendition. This rule doesn't involve rendition. It involves the written judgment and how it becomes final. I think that solves that problem.

HONORABLE NATHAN HECHT: Professor Dorsaneo.

PROFESSOR DORSANEO: I think that's a good idea, rather than making this -- rather than making this rule do several things, just have it be the -- have it be the Lehmann rule, as David worked on it, and that would mean keeping 300 and some of current 301, like the first sentence at least. And that's a good fix. And I don't know about anybody else, but I don't think I've ever heard anybody use the term "noninterlocutory" before.

PROFESSOR ALBRIGHT: Yeah, I don't like that one.

PROFESSOR DORSANEO: So that may be what family lawyers -- how they talk, but I don't talk like that.

HONORABLE NATHAN HECHT: Richard.

MR. MUNZINGER: Trial judge states from the bench a noninterlocutory judgment, and he does it orally. Does he have the plenary power to change that judgment at all? And if so, for how long a period of time?

PROFESSOR DORSANEO: Forever.

MR. MUNZINGER: If he has it, the plenary power to change the judgment, as I understand the law, up to 30 days after the signed judgment is entered. So, again, I don't want to belabor the point, but when you start using rendition in a rule and attempting to make these things hard and fast for purposes of a rule, you run into that problem. You can say it's a noninterlocutory final judgment, but the judge still has the plenary power to change his or her mind. "I changed my mind, you're not divorced and the property judgment that I now 62 days ago or a year ago, I set aside. We're going to start over again. Heck with you people, you can't get along." He's got that power, and that's what the law is.

HONORABLE NATHAN HECHT: Chief Justice Gray.

HONORABLE TOM GRAY: One thing that would help on this, and I want to echo Justice Jennings' comments that the objective, as I understood Lehmann, and, therefore, as Judge Peeples has attempted to do in this rule, is almost singularly to define finality for purposes of the running of the appellate timetable. That's the objective and the focus. That's the problem that Lehmann was dealing with, and so if -- I think the splitting of the rules between rendition and finality for purposes of appeal is salutary and should be pursued.

I had jotted down a partial fix in

subsection (c). "A judgment or order is final for purposes of appeal if it" and then goes into that. After hearing the comments we probably need to include some other elements of finality for purposes of appeal that it has to be in writing and signed by the trial court. Those are also elements of a judgment that is final for purposes of appeal.

This is much like what we did or y'all did before -- long before I got on the committee in 306a(2) where you do everything you can to encourage the trial court, if not require them, to include the date of the signature of the trial court, and you do that by rule, and so you do something with regard to that in a rule that is trying to accomplish the finality for purposes of appeal. One of the cases anecdotally that we're dealing with now, and so I'll just tell you the facts and not what we're thinking about, but the trial judge has signed an order that includes the word that this document -- "this ruling is appealable," but the question then becomes if they just use that language as a part of it, the question becomes appealable when, because we don't know if it is yet final, because inserting the word "appealable" in the order may or may not have added anything to the actual finality with regard to the rest of the issues in the case. So, you know, the permutations that can happen are just

innumerable, and so it's going to take some time, Judge Peeples.

HONORABLE JAN PATTERSON: So that judge should have used the word "noninterlocutory."

HONORABLE TOM GRAY: Obviously.

HONORABLE NATHAN HECHT: Yes, Gene.

MR. STORIE: I wondered if we need the language in (c)(2) saying "in language placed immediately before or adjacent to the judge's signature." I mean, I think every one I've seen is going to put it there, but does that imply some drafting error if it's somewhere else or if you have a cost provision later? I mean, why would we really need that there?

HONORABLE DAVID PEEPLES: It shouldn't be buried in the text somewhere, and it would be effective and the judge wouldn't see it and wouldn't --

MR. STORIE: Okay.

HONORABLE DAVID PEEPLES: It needs to be right where the judge and, frankly, the parties would notice it, couldn't help but notice it.

HONORABLE TOM GRAY: Should we specify type size and bold font?

HONORABLE NATHAN HECHT: Yes, Bill.

PROFESSOR DORSANEO: We talked about using -- I guess it didn't happen, but if I was a judge I would

probably have a rubber stamp, you know, to use, and we thought that that's what would happen. It didn't happen, though, did it?

HONORABLE TOM GRAY: Kind of the problem that happened with the old magic language of the Mother Hubbard clause is it did happen, and it got inserted in everything, and that became the problem. So --

HONORABLE NATHAN HECHT: Yes, Elaine.

PROFESSOR CARLSON: If we rework -- well, first of all, I want to say I think Judge Peeples did a fine job of encompassing Lehmann in the draft, and I do agree (b) needs a little tweaking for the series of orders problem. If we redo Rule 300, I notice that it is an original rule, and I'd be interested to hear what people on the committee think. Is Rule 300 saying you need a judgment after conventional trial on the merits only? I mean, look at the language "where a special verdict is rendered," okay, so jury charge, "or conclusions of fact found by the judge," I guess they're talking about findings of fact and conclusions of law. That suggests to me that the drafters might have thought -- they're saying to the bar if you have a conventional trial on the merits you need to have something called a judgment at the end of that, but if you don't, you could be disposing of the case by different orders like summary judgments or dismissals

for want of prosecution or other methods. Is that how everyone reads that rule, or does anyone read it that way?

MR. GILSTRAP: No one reads it.

HONORABLE NATHAN HECHT: Bill Dorsaneo.

PROFESSOR DORSANEO: I think its essential meaning is that the idea is that the judge is supposed to render judgment without a motion for judgment, that it's just a ministerial duty to render judgment, and I think that's all it's really saying on a verdict or a -- it looks like, you know, fact findings, too.

MR. GILSTRAP: But the court could also render judgment when there weren't any fact findings, see, and it needs to be able to do it there, too.

HONORABLE NATHAN HECHT: Yes, Judge Peeples.

HONORABLE DAVID PEEPLES: My final thought is that my rule is kind of like great literature in that every reader brings something else to it and finds something else there.

HONORABLE NATHAN HECHT: Richard Orsinger had a comment about (d).

MR. ORSINGER: I would think that we should change the phrase at the start, "A judgment rendered after a conventional trial" to "a judgment signed" if what we're going to do is agree that this rule relates to appealability and plenary power, because rendered doesn't

relate to appealability or plenary power, and if we put "signed" in there then I'm okay with it, and I just had the following thought process: To say that a judgment is presumed to be final I suppose means that the court of appeals doesn't have to dig around in the record to verify whether it's final, but if the appellee comes forward with a motion to dismiss, saying because of documents A, B, and C it's therefore not final, then they've rebutted the presumption. So am I right this is a rebuttable presumption?

HONORABLE NATHAN HECHT: Yes. Well, one of the ideas in Lehmann was that people give up on things during trial, but they don't say so. They just give up. They give up on counterclaims or third party claims or causes of action, and so when they get ready to submit the case to the jury, for example, they may have made a decision, "We've pled all these other things, but we -- you know, we're going to go with this," and maybe that's not reflected in the charge conference or anywhere, but after the trial it's presumed that you've tried everything you wanted to try, and unless you specifically reserve something out and said, "We're going to try attorney fees after we get through with this" or "We're going to try this little piece of the case later," you have to say so. Otherwise, you're presumed to have tried everything. Now,

that was the idea.

MR. ORSINGER: And is that presumption irrebuttable then as you've explained it?

HONORABLE NATHAN HECHT: No. I think it would be rebuttable, but it has to be rebuttable by some sort of a reservation.

MR. ORSINGER: Okay.

HONORABLE NATHAN HECHT: You can't rebut it by just saying, "Well, back in the trial pleadings we pled this cause of action, and just because we didn't submit it doesn't mean we weren't serious about it. Now we want another trial on that." You couldn't do that.

MR. ORSINGER: Okay.

HONORABLE NATHAN HECHT: Yes, Bill.

PROFESSOR DORSANEO: Well, to maybe move it along I'm going to move that we eliminate (b) from Rule 300 and have either existing rules of 300 and part of 301 or a separate rule to deal with the requisites of a judgment and what a judgment is supposed to look like. I guess I'm influenced by Frank Gilstrap's suggestion and Justice Gray's point on it, and I make it a motion so we can get down the road rather than arguing about what rendition means or doesn't.

HONORABLE NATHAN HECHT: What's your thought on that, Judge Peeples?

HONORABLE DAVID PEEPLES: I think I need to hear it again. Would you say it one more time, Bill?

PROFESSOR DORSANEO: Oh. I'd eliminate (b) from 300 because of all the things people have said about it, and I would have a separate rule dealing with rendition of judgment, if I can use that term, which would include what a judgment is supposed to contain.

HONORABLE TERRY JENNINGS: Well, 301 --

HONORABLE NATHAN HECHT: Judge Jennings.

HONORABLE TERRY JENNINGS: Yeah, I'm sorry. Rule 301 goes to pretty much what a judgment should contain, you know, "It shall conform to the pleadings," nature of the case, et cetera, and then when you look at Rule 306a at the beginning of periods it talks about, you know, the signed order or judgment and so forth, and a lot of this stuff I think we're talking about may already be contained in these rules. So what I'm wondering is, is if maybe this proposed Rule 300 just in order of sequence of how subsection (h) is outlined, judgments, maybe it ought to come after Rule 306a and be a new 306b or something like that, because that's really what you're getting at here. A lot of the stuff I think we're talking about is covered in a lot of the rendition and everything like that.

PROFESSOR DORSANEO: But it's kind of like

when you start teaching this to somebody -- and I do have that as a reference point -- you go and you talk about -- you go to 306a first, because -- or after 300 you go to -- because you want to talk about, okay, you know, what you need is -- to get things started is you need a signed draft of the judgment, you know, trying to work through the rule book, and it's really just sloppy that there's -- you know, we have some information in Rule 300, some of the information in Rule 301, and then you have to jump forward to 306a, and you have to put all of that together, and then you're really not quite sure about the need for a written judgment in order for there to be rendition and stuff that Richard was talking about. I think that could be put in one rule pretty easily, and I think that would be a worthwhile endeavor. Of course, we don't need to do it. We could have it messy.

HONORABLE DAVID PEEPLES: I think what I would rather do, Bill is on the subcommittee, you know, look at the record of this discussion when it gets typed up, and the committee ought to talk about these things. A lot has been brought up that we didn't think about. When you're focusing on Lehmann you're not thinking about divorce rendition, and signing is in a different rule. I mean, if the committee wants to vote that, that's fine. I think I'd rather leave the discretion in the subcommittee

to assimilate everything that's been said and come back with another draft.

HONORABLE NATHAN HECHT: All right. What do you think about that, Bill?

PROFESSOR DORSANEO: That's fine.

HONORABLE NATHAN HECHT: All right. Well, let's try that approach. This is helpful. Yes, Ralph.

MR. DUGGINS: Can I ask what the consensus of the committee is about whether to -- what I'd like to know is whether this group wants to include in this proposed Rule 300 some definition that's -- that sets out the requisites of a judgment, some combination of current Rule 300 and 301, just to know whether you would or would not like that in this rule as we go back and work on -- as our subcommittee goes back and works on it.

HONORABLE NATHAN HECHT: I take it Bill would like to see it addressed separately, and whether it's two pieces of the same rule or two rules, I don't guess it makes much difference, 300.1 or 300.2.

MR. DUGGINS: Okay. Fair enough.

HONORABLE NATHAN HECHT: All right. What's next? Elaine, were we waiting on you to --

MR. DUGGINS: Could we go to -- I would suggest letting Elaine start with 296.

HONORABLE NATHAN HECHT: All right.

PROFESSOR CARLSON: All right.

HONORABLE NATHAN HECHT: Same packet of stuff, page one.

PROFESSOR CARLSON: Okay. I'd like to -- instead of going through rule by rule, I would prefer to kind of talk about concepts --

HONORABLE NATHAN HECHT: All right.

PROFESSOR CARLSON: -- and see what we can gain consensus on because I think some are more controversial than others. So from our last time we discussed this rule I had understood from the transcript that there was a consensus that we should tweak these rules in the area of findings of facts and conclusions of law a bit for the time period for a couple of reasons. One, I think Nina Cortell suggested, and I think there was some other folks who chimed in, that it's somewhat -- because this is an appellate step primarily, this is part of the appellate process, seeking findings of fact to attempt to narrow the grounds for appeal, that it would be desirable to have a time frame for requesting findings of fact near other post-judgment 30-day deadlines after the date the judgment is signed.

There was also some discussion about the fact that the way our current rules are a little bit -- are problematic in that the way you compute time periods

often depends upon the prior triggering act; that is, from the date the court actually makes the findings. So looking at the transcript I gathered there was a consensus that the timing should be reworked, and Rule 296 would enlarge the time to make a request for findings of fact following a bench trial on the merits to 20 days. I'm sorry, to 30 days after the date the judgment is signed. It's currently 20 days. So people who are dealing -- used to doing appellate stuff knowing "I've got 30 days after the judgment is signed" can throw this in that same hopper.

Then over in the next rule, 297, the proposal is basically to maintain the current 20 days for the trial court after the day of the request to make its original findings of fact and conclusions of law. So it essentially retains the same thing. It says instead "Within 50 days after the date the final judgment is signed" because we want to try and tie as many deadlines to the date the final judgment is signed because that's how we generally compute post-judgment appellate steps. But it is problematic when you get over to Rule 298 because counsel cannot control behavior of the trial judge in making timely findings of fact, but that time period has to have some elasticity. So the modified suggestion for proposed Rule 298 is to allow a party to make a

request for additional or amended findings after the trial court makes its original findings with the time period being by the latter of 20 days after the court actually files the original findings or conclusions or 70 days after the date the judgment is signed.

Now, 70 days would be timely if the judge acted timely, but in instances where the trial court fails to timely make findings of fact and conclusions of law we have to have that latter of elasticity, otherwise the litigant is going to be punished by not being able to make a request for additional or amended findings if the trial court doesn't act on it. And you'll notice that we enlarged the time to request the additional or amended findings of fact to essentially 20 days from the day the court makes its original findings. Currently I believe it's 10. And the same we see in proposed Rule 298(b). The court is required to make its amended findings within the latter of 20 days after the request is filed or 90 days after the judgment is signed. 90 days would be timely if everybody did what they're supposed to, but we have elasticity of the latter of. So that is the time frame that our subcommittee felt was reflective of the discussions we had here last time, and I'm wanting to hear from everybody now.

HONORABLE NATHAN HECHT: Alex Albright.

PROFESSOR ALBRIGHT: Just a clarification, I have to look this up every time. A request for findings of fact does extend plenary power, does it or not?

PROFESSOR DORSANEO: No.

PROFESSOR CARLSON: No.

PROFESSOR ALBRIGHT: It does not. So the judgment --

PROFESSOR CARLSON: Not if -- I don't know that --

PROFESSOR DORSANEO: The answer is, no, it does not.

PROFESSOR ALBRIGHT: I never can remember which way it goes, so you request findings of fact and conclusions of law, the judgment becomes final, and you're still going through this process.

PROFESSOR CARLSON: It is true now, and I don't know if the Texas Supreme Court has addressed that issue, but I know there are intermediate court decisions that say a mere request for findings of fact will not extend plenary power.

PROFESSOR ALBRIGHT: Have to have a motion for new trial.

PROFESSOR CARLSON: You need some motion seeking a substantive change in the judgment according to the court of appeals cases. We discussed -- you know,

Alex, the years have not been kind. I don't remember if we discussed that this term or if we discussed it in the prior term of the committee. Because we've discussed this several times.

PROFESSOR ALBRIGHT: It comes up every -- yeah.

PROFESSOR CARLSON: But and we discussed should plenary power be extended by virtue of the request for findings of fact, and the majority vote of this or its predecessor committee has consistently been no.

PROFESSOR ALBRIGHT: Because the idea is -- now that I'm reminded which way it goes, it's that because just requesting findings of fact and conclusions of law you were not -- you're not fighting that judgment. You haven't put into question the judgment. You're just asking for an explanation.

PROFESSOR CARLSON: You're trying to find out what the grounds were that the trial court based his judgment upon.

PROFESSOR ALBRIGHT: If you're going to question the judgment, you file a motion for new trial.

PROFESSOR CARLSON: That's our current practice --

PROFESSOR ALBRIGHT: Yes.

PROFESSOR CARLSON: -- as I understand.

HONORABLE NATHAN HECHT: Bill Dorsaneo.

PROFESSOR DORSANEO: I know I'm on the committee, Elaine, but I'm having a little trouble --

PROFESSOR CARLSON: I know I'm in trouble when you say that, Bill.

PROFESSOR DORSANEO: -- in 298 with the -- and maybe I just am not thinking clearly, but how do you request additional or amended findings before you get the original findings? Am I just reading that wrong? I mean, it's the later of 20 days after the filing of the original findings, 20 days after the original finding, I understand that, or 70 days after the judgment is signed. It's the later of -- I have -- maybe I'm just not following.

PROFESSOR CARLSON: Well, you're right, a literal reading is -- you're right, Bill. That's confusing. That language was meant to say here's the time frame if everybody does what they're supposed to. We could take out "the latter of" and just say, "20 days after the filing of the original findings and conclusions" and leave it at that.

PROFESSOR DORSANEO: That's what I would like to do, because I don't -- I don't know how to request additional or amended things before I see what's --

PROFESSOR CARLSON: You're absolutely right.

MR. GILSTRAP: And sometimes the court can

make the findings later.

PROFESSOR CARLSON: Well, that's what was anticipated here, that the court might. And I don't think that would change what was envisioned. We just still would have that problem that we can't solve, and that is when the trial court fails to act timely we've got to allow the litigants a fair amount of time to ask for additional or amended findings, even though the court acted tardily.

HONORABLE NATHAN HECHT: Nina.

MS. CORTELL: The confusion on plenary versus as to the findings might arise, because we do give extended time to file the notice of appeal based upon --

PROFESSOR ALBRIGHT: Oh, that's right.

MS. CORTELL: That's where the confusion is.

PROFESSOR ALBRIGHT: Yeah. Yeah.

PROFESSOR DORSANEO: That's Elaine's fault. Years ago you wanted to have a basis for the longer appellate timetable and request for findings and conclusions to simplify things.

PROFESSOR CARLSON: I still do.

PROFESSOR DORSANEO: I know, because that was your suggestion.

PROFESSOR CARLSON: But I was being diplomatic saying that it never carried at the committee.

PROFESSOR ALBRIGHT: This is why I teach my students to never answer a question without looking at the rule book.

HONORABLE NATHAN HECHT: Other comments --

PROFESSOR ALBRIGHT: So they have to --

HONORABLE NATHAN HECHT: -- on the time frame? Okay.

MR. ORSINGER: Well, I'll throw in here, since almost all of my appeals involve these, I think this is going to be very helpful. Most family law trial lawyers are not appellate lawyers, and they don't get the client over to the appellate lawyer until right before the motion for new trial deadline, and it's been my experience it's too late to request findings by the time they come into your office. So making those deadlines the same is really going to preserve a lot of rights, and then having a little more time to react to what the judge does on the findings I think is helpful also, so I think this is very beneficial.

HONORABLE NATHAN HECHT: All right. Next idea?

PROFESSOR CARLSON: All right. The next subject I'd like to broach, it was a consensus of the subcommittee -- and I did not hear objection to this last time, but we just broached upon it very quickly, so there

may be. The subcommittee felt that we should eliminate the current preservation requirement that a litigant not only timely make a request for findings of fact, but timely file a reminder of past due with the trial court. The sense of the subcommittee was we don't have a reminder preservation requirement in other instances of preservation of error, and we thought this could be a trap that folks might end up not preserving their complaint the trial court failed to make findings of fact because they didn't file the notice of reminder to the court. So in the redraft of Rule 297, the proposed new rule does not contain the reminder. It only requires the timely request to the trial judge.

HONORABLE NATHAN HECHT: Comments? Chief Justice Gray.

HONORABLE TOM GRAY: Well, I think there is another context in which we require a reminder, and it's where you raise an objection to the trial court's failure to rule, and I think the reminder serves a very useful purpose for the busy trial judge that sets it aside thinking he's got some period of time in which to do them or review them and sign them and then gets busy and does something else. I just -- I think before anything adverse to the trial judge is imputed by not making them that the trial judge is entitled to be reminded, and I think the

reminder is a very good provision in this context.

HONORABLE NATHAN HECHT: Bill Dorsaneo.

PROFESSOR DORSANEO: Well, I don't -- there are all kinds of trial judges, but I think under the current system it's probably likely that trial judge would pretty clearly put aside the first request knowing that if somebody doesn't ask twice then there's no duty to make findings. I bet that's more of the state of the art than somebody who just has a lot of work to do and needs somebody to remind him.

HONORABLE NATHAN HECHT: Roger.

MR. HUGHES: Well, my suggestion, I don't know whether to put it in these rules or in TRAP, is I think part of the reason that the -- doing findings and ignoring reminders is done is that findings of fact, conclusions of law, I have a hard time getting courts to order them to be done when they're not done. I have -- my research when I do that, I find some courts go, "Well, yeah, we really need them, so, trial court, do it," and then some courts will just go, "Yeah, it's just harmless error." And so you have trial judges being told, "Yeah, you're supposed to do it, and you're supposed to do it in these days, and you're going to get these reminders, and it's really bad" and then they get -- then they read opinions from the court of appeal, going, "Yeah, doesn't

make any difference, we really didn't need them after all" then that might explain why they're in some instances being ignored.

And so I would propose either as part of the rule or as a TRAP rule that if they aren't done the appellant has the option to force that they be done, but -- or put the appeal on hold, because we all -- I mean, I can't speak everywhere, but usually it's the appellee who drafts the request to begin with, and I think it's useful because if you have a complex case with multiple theories of recovery that might justify the same relief. If the trial judge really did say, "Yeah, I'm finding for the plaintiff on all of his theories, A through E," but, well, then you're going to have to brief all of them, but if the trial judge is going to say, "Oh, well, just A, B, and C. D and E I didn't buy," well, that saves you having to address those issues on appeal and I would save the court of appeals having to decide them.

HONORABLE NATHAN HECHT: Justice Jennings.

HONORABLE TERRY JENNINGS: Well, might it be that part of this -- that the old rule about requiring an additional notice to the trial court because that some litigants will just make a request for findings of fact and conclusions of law to extend the appellate timetables; and in defense of the trial courts, maybe they're just

waiting to see if the litigants really mean it or if they really want it and they're not just doing it to extend the appellate timetables?

HONORABLE NATHAN HECHT: Well, the subcommittee's -- we've talked about this before. Did we vote on it before?

PROFESSOR CARLSON: No.

HONORABLE NATHAN HECHT: So after we've discussed it at some prior meetings, which none of us remembers, but we did, and so now the recommendation is 297 without the reminder, so perhaps we should find out what the committee thinks about that before we vote. Justice Gray.

HONORABLE TOM GRAY: Quick comment with regard to the criminal context, and maybe some of the other appellate court judges can help me get this specifically. I think it's in the context of the admissibility of a defendant's statement or admission, but the Court of Criminal Appeals has held that we must abate those for written findings. Isn't that the context? Somebody -- Terry.

HONORABLE TERRY JENNINGS: I think that's absolutely right.

HONORABLE TOM GRAY: Yeah. And so consistent with what the professor was saying, if that's

part of what we do, that could really change the way I view the necessity of the reminder, but that's a secondary good fix to the reminder.

HONORABLE NATHAN HECHT: All right. Justice Patterson.

HONORABLE JAN PATTERSON: I do think it is a trap for the unwary, and usually there is some kind of communication over the necessity of findings of fact, so there is some knowledge of whether it's needed. A party can make a request or give a reminder, but I think it's unseemly for, first of all, for a party to waive its rights, but second of all, to have to send to the trial court a notice of past due, and it just strikes me as an aggressive act that puts them in an uncomfortable position that they shouldn't have to do. I've always wondered about this, and it is a trap, and many courts have upheld the -- and used it as a waiver, so I applaud the committee on this.

HONORABLE NATHAN HECHT: Justice Christopher.

HONORABLE TRACY CHRISTOPHER: Well, ideally the trial judge shouldn't need a reminder notice, but sometimes the first request just gets put in the file and doesn't actually get presented to the judge. So, I mean, I would assume in all the major counties that -- where the

filing just goes -- handled by somebody else, it's not always brought to your attention like it should be. So that's --

MR. GILSTRAP: Is the reminder handled differently, or does it just go in the file, too?

HONORABLE TRACY CHRISTOPHER: Well, no, because for some reason people are like, oh, past due, findings of fact. That wakes them up a little bit. You tell your clerk, you know, "Be sure and give me this, you know, request for findings of fact," and you're kind of waiting for them. You don't want to do them until they ask you to do them, and, you know, and then all of the sudden you think, "Oh, well, 20 days has gone by, they haven't asked for it," and then all of the sudden reminder of past due. You're like, oh, gosh.

HONORABLE JAN PATTERSON: So, Judge, what percentage come with drafted findings of fact and what --

HONORABLE TRACY CHRISTOPHER: That was my next request.

HONORABLE JAN PATTERSON: Okay.

HONORABLE TRACY CHRISTOPHER: Okay. I think it would be -- if we're redoing findings of fact I think we should make the winner -- I don't know how we would, you know, call it that, but prepare a draft.

HONORABLE JAN PATTERSON: Well, isn't that

the practice?

HONORABLE TRACY CHRISTOPHER: Well, no, it's not. I mean, you would think it would be, but it's not. They file their request for findings of fact. The other side just sits there, waits for the judge to do something. You know, then you call your clerk, and you say, "Clerk, can you ask the winner, you know, to please send me in a draft." And then a couple of weeks later, "Where's that draft?" And I would like the lawyer to have to do it, if we're changing the rules.

And can I go back to my request that trial judges -- I know y'all disagreed with me on this, but there is still a question as to when you actually have to file what -- you know, do you do it for special appearances, yes. Okay, but that doesn't follow this language that's in this rule, but, you know, we know we're supposed to do it for special appearances, but it's not a case tried in court, and we're not going to have jury issues in connection with special appearances. So, I mean, that's another substantive problem with saying, you know, like it would be a jury issue. But, I mean, there are certain things the court of appeals says we've got to do findings of fact that do not fit into trial on the merits

HONORABLE NATHAN HECHT: R. H.

MR. WALLACE: I've always thought the judges could make the lawyers do it, and that is simply saying --

HONORABLE TRACY CHRISTOPHER: You can ask them, but that's just a lag time. You know, if it said in the rule, okay, you know, somebody makes a request and then each side files their draft request 10 days after that.

HONORABLE NATHAN HECHT: Well, let's -- first let's see if we're going to retain the reminder. Is that fair? Let's get a sense. The subcommittee recommends we take it out. There's the proposal on page three of the handout, so we'll vote on whether to keep the reminder as something like existing rule or take it out, something like the rule as proposed. So all in favor of taking it out as the subcommittee recommends, raise your hand. 25.

Opposed? 25 to 2.

HONORABLE TERRY JENNINGS: The appellate judges.

HONORABLE NATHAN HECHT: All right. Elaine, now -- Bill.

PROFESSOR DORSANEO: I'm sitting here learning things about, you know, what this useless reminder actually could accomplish, and some of these things sound like real problems in that they ought to be

maybe not dealt with today, but they ought not to be forgotten. Like I don't know how you would deal with that, a clerk's office that doesn't cooperate with the judiciary that it's meant to serve. I mean, I don't know how you solve that exactly, but there might be something we could do.

HONORABLE TRACY CHRISTOPHER: Well, especially somebody does it electronically, you know, it hits the electronic person, who looks at it and then sends an e-mail to your own clerk that it's supposed to get pushed over into your file, and so it gets pushed over into your file, and, you know, the clerk forgets to tell you about it. I mean, we don't even see a paper anymore if it's done electronically, so --

HONORABLE NATHAN HECHT: All right. Elaine, next subject.

PROFESSOR CARLSON: All right. I think that's the end of success. The next subject is the one we had the most debate on the last time we met, and that is should the findings of fact rule set forth the level of specificity the trial court's findings of fact should encompass. Currently our rules are silent about whether the trial court's findings of fact are supposed to be in broad form or on every element or on every ground, and quite frankly, I think it's changed over time as the

corresponding change in the jury charge rules have been modified with courts doing all of the above. Some courts are making broad form findings of fact, some are doing it element by element, some are doing it by ground.

When the jury charge rule, 279, changed to broad form submission, mandated in 1988, I believe, I don't recall -- but again, the years have not been kind -- that we really considered whether there should be a parallel change in broad form findings of fact when there's a bench trial. I don't recall that being debated or considered in any great length. At the prior meeting of this group I presented the subcommittee recommendation that broad form findings of fact should be mandated when feasible on the findings of fact side. There was a fair amount of debate and a clear lack of consensus as I read the transcript. Some folks thought broad form findings of fact would be wonderful. Other folks thought very strongly it's a very bad idea because you don't have the other information that you'd have in the jury charge when you have just findings of fact, contract breached, you know, that kind of thing. You don't have the definitions and the instructions and all the trappings that go along with the jury charge. A lot of folks said they thought that there should be some parallel structure to the findings of fact that you would see in a jury charge. So

having no clear sense of direction or consensus on our subcommittee, but reading the debate of the last transcript, I drafted the alternatives that you see in Rule 297(b) --

HONORABLE NATHAN HECHT: 296.

PROFESSOR CARLSON: I'm sorry, 296(b) on page one and two, and I don't know, Justice Hecht, whether you want to reopen the debate or how we should proceed.

HONORABLE NATHAN HECHT: Well, we want to close the debate, but after how long we'll see, but keeping in mind that that's all true, and I trust that was fairly recent that we went through this and we had differing views and we talked about it enough to sort of see the considerations, and now we have them set out for us, so let's discuss the proposals with a view towards taking a vote before too long on which one or trying to reach some consensus. So discussion of the proposals. Frank Gilstrap.

MR. GILSTRAP: Last time one of the problems we discussed was the fact that the practice has offered this. The losing side requests findings and conclusions, the winning side then prepares voluminous detailed granulated findings that cover every aspect of the case and resolve every issue in his favor, including whether or not the defendant had bad breath, and then the court signs

them, and I don't think that any rule -- and the court of appeals won't reverse on those grounds. That being the case, I don't think that anything we can do here is really going to change that. I think we need some type of precatory rule that says you should have broad form findings, and that's an admonition, and leave it at that and move on, because -- because until the courts of appeals reverse a case because we have granulated findings or voluminous findings, and I don't ever recall seeing such a case, I don't think we're going to change nothing.

HONORABLE NATHAN HECHT: Bill Dorsaneo.

PROFESSOR DORSANEO: The other side of the thing and the other types of findings that are -- make it like difficult are findings that are so broad that you can't really get a handle on them, like the -- in some family law cases before the statute was changed some courts made findings that the division of property was, you know, just and right. Enjoy yourself attacking that. And, you know, I would lean toward saying the same thing that the jury charge rules say, even though it's taken us -- if we understand what they mean now, it's taken us 20 years to understand, you know, what "broad form whenever feasible" means, but I agree with you, Frank. It's not probably going to make things nonadversarial in the fact finding process.

HONORABLE NATHAN HECHT: So we'll be clear, Elaine, we've got the three proposals are broad form, details, and sort of a combination.

PROFESSOR CARLSON: Yes.

HONORABLE NATHAN HECHT: We've got cold porridge, hot porridge, and --

PROFESSOR CARLSON: And just right.

HONORABLE NATHAN HECHT: -- just right. Okay. Carl.

MR. HAMILTON: I think the first two overly complicate it by referencing how it would be submitted to the jury. I think the third one is better, and it gives the judge instructions that he needs and the detail that he needs to put in there.

HONORABLE NATHAN HECHT: Chief Justice Gray.

HONORABLE TOM GRAY: Until we have a rule that requires some type of broad form and granulated submission and a issue, you won't get a reversal, and so that would be my response generally to Frank's comments. My comments on each of the three proposals, to me they all suffer from one kind of subtle but I think very important flaw, is that they all require the findings on each ground raised by the pleadings or evidence or recovery or defense. They only need to be on those grounds necessary to support the judgment, because there's no need to reject

a theory that is not part of the judgment, and that should substantially narrow those findings needed for the trial judge to make.

HONORABLE TRACY CHRISTOPHER: Well, what about a cross-appeal? What if the plaintiff, you know, moves for a breach of contract and fraud and the judge only does breach of contract and they want the findings on fraud to cross-appeal?

HONORABLE TOM GRAY: Why would you need the findings on fraud if the judgment is breach of contract and the judge is rendering a final judgment? You know they've rejected your fraud theory.

HONORABLE TRACY CHRISTOPHER: Well, I would assume that you need to know why they rejected it. I rejected it because there was no reliance. I rejected it because the misrepresentation was not material. I rejected it because this is the Southwestern Bell case, and it's a breach of contract case, not a fraud case. I mean --

HONORABLE TOM GRAY: And so that's in favor of granulation.

HONORABLE TRACY CHRISTOPHER: No, that's each theory that they presented to me. Not granulation, that's just each theory.

HONORABLE TERRY JENNINGS: Well, you

attack --

HONORABLE NATHAN HECHT: Justice Jennings.

HONORABLE TERRY JENNINGS: You would attack that on legal and factual sufficiency. If the ruling was against you, you'd say, "Well, I presented conclusive evidence of it or the factual sufficiency." That's how you attack it, right?

HONORABLE TRACY CHRISTOPHER: But don't you need findings to do so?

HONORABLE TOM GRAY: I could see in some of the circumstances that a finding on a fraud theory like that in response would be necessary, but what I'm trying to avoid is where maybe the -- it has been pled with every theory under the sun and the trial judge just says, you know, "I'm not even going to look at these because I'm granting judgment on this theory," and that way it avoids having to make findings on maybe 8 or 10 theories that the trial judge has never even considered because they either were just in conflict with the theory he was granting judgment on or otherwise.

I'm just trying to limit what the trial judge has got to do because I am one of those that favor narrowing substantially what the findings have to be because, you know, the example that I've given each time we've had this conversation was where we had 115 pages of

findings of fact in a trial with -- or in a case with seven or eight findings on each page; and from a practical standpoint, there just wasn't any way for the appellant to begin to attack, you know, that level of detail; and like Frank, I think it was, saying, I mean, they made every finding on every evidentiary issue that you could possibly have wanted to know about the case; and it was just horrible to try to wade through.

HONORABLE NATHAN HECHT: Nina.

MS. CORTELL: I think that's an interesting suggestion, and it would narrow it, and I think it picks up the cross-appeal because you have to explain why you didn't in your judgment grant relief on the claims raised, right? So I think -- I think that's an interesting way to try to narrow it down because I do agree there's a lot of abuse at this stage of the proceedings.

HONORABLE NATHAN HECHT: Bill Dorsaneo.

PROFESSOR DORSANEO: I'm leaning that way, too, and we could use language from the first sentence of Rule 299, which talks about grounds of recovery and defense that form the basis of the judgment. You know, that language could be added to the -- let's say the third alternative, "raised by the pleadings and the evidence and which form the basis of the trial court's judgment" or something like that.

HONORABLE NATHAN HECHT: Judge Christopher.

HONORABLE TRACY CHRISTOPHER: I like broad form. I think it's a good thing to have in there. I question whether we should say "and in the same manner as questions are submitted to the jury" because there's a lot of judge trials where you're finding things that would never be submitted to a jury, so you don't really know exactly how to do that. I mean, you find the contract is unambiguous, you know, that's not a question we give the jury, for example. You know, the judge has to decide it is ambiguous first before we ask the jury a question about it. So just the "and" is bothering me there.

HONORABLE NATHAN HECHT: Bill Dorsaneo.

PROFESSOR DORSANEO: I didn't turn the page to see the third alternative until you mentioned it was on the next page, Justice Hecht; but I think that's clearly superior to the first two, provides a lot more guidance, and, you know, it does use the term "ultimate issue," which the cases sometimes use; and although that's not a particularly helpful, you know, term, "ultimate issue," because it just means that which -- by itself or in combination with something else, you know, is a basis for -- is a basis for the judgment. So there's really no definition of an ultimate issue other than a pragmatic one, what we think is about the right size, the right

level of detail, but I think it's helpful to have it in there because the cases say it and people have a sense of what the ultimate issues are in a negligence case. You know, negligence. So I think we should, you know, look at the third alternative whenever the other ones are considered, too, which would be my clear preference.

HONORABLE NATHAN HECHT: Frank Gilstrap.

MR. GILSTRAP: I like the third one, too. I would change "ultimate" to "controlling." "Ultimate" sounds too metaphysical to me, and I don't see any reason not to put the comment in the rule. I mean, that's the evil we're trying to avoid, unnecessary and voluminous evidentiary findings. Why not stick it in the rule so, as Justice Gray says, the courts might actually have a chance to reverse on that ground.

HONORABLE NATHAN HECHT: Jim Perdue.

MR. PERDUE: What -- I like the third one as well, but I'm trying to figure out how after you get past the first sentence, what's intended by the words, "broad form when feasible"?

HONORABLE NATHAN HECHT: Elaine?

PROFESSOR CARLSON: Jim, we were trying to parallel the jury charge concept in the cases construing that terminology in Rule 277 to the findings of fact rule. The committee thought that would be a benefit.

MR. PERDUE: So could a judge just make the conclusory finding, "I do not find that the defendant committed negligence"?

PROFESSOR CARLSON: "Do find the defendant is not negligent," is that what you're saying?

PROFESSOR DORSANEO: My answer to that would be "yes."

HONORABLE TRACY CHRISTOPHER: Yes.

MR. PERDUE: But that would be inconsistent, wouldn't it be, with the idea of the elements of the cause?

PROFESSOR DORSANEO: No. Negligence is the ultimate issue in negligence cases, not speed, brakes, or lookout. I mean, we've gotten past that.

MR. PERDUE: No, but duty proximate cause is.

PROFESSOR DORSANEO: Well, that to add proximate cause, that would be another.

MR. PERDUE: I'm not talking about the details of the evidence, but you have elements of a negligence claim.

PROFESSOR DORSANEO: Well, it would be -- when I answered your question "yes" that would be for the negligence component. There would need to be another finding, at least one other finding for causation.

MR. PERDUE: Well, because it seems to me that we've got a lot of law now on this concept of conclusory opinions, conclusory statements, and that you go behind just a conclusory statement. It seems to me to be fair to hold, whether it be a judge or an expert witness or a jury, to the same standard, which is you -- you've got to get into the details a little bit more than just pure, "I hereby find the defendant did not commit negligence," which is the broad form.

HONORABLE STEPHEN YELENOSKY: But that's all the jury finds.

MR. PERDUE: Yeah, but it's looked behind pretty thoroughly these days.

HONORABLE NATHAN HECHT: Alex Albright.

PROFESSOR ALBRIGHT: Couldn't you -- what I've always thought would be good about -- to do something like this is then if you're a judge you can go to the pattern jury charge, and you can just make it a statement instead of a question, and you can say just use the pattern jury charge as a draft for your conclusions and findings.

HONORABLE NATHAN HECHT: R. H.

MR. WALLACE: And I think if you go to the pattern jury charge you'll see it will say, "Did the negligence, if any, of the following proximately cause

damages to the" --

HONORABLE STEPHEN YELENOSKY: Right, causation is in there.

MR. WALLACE: Now, duty, the proximate cause and the definition of negligence is going to be defined, but presumably the judge knows that. I don't know. It seems like to me that could be a finding.

HONORABLE NATHAN HECHT: Judge Peeples.

HONORABLE DAVID PEEPLES: I think we all in this room have an idea of what we think proper findings ought to look like, but if I'm a lawyer doing this for the first time, where would I go? I mean, I know there's not a pattern findings of fact book. I don't know if Bill's treatise has it, but --

PROFESSOR DORSANEO: It will.

HONORABLE DAVID PEEPLES: -- eventually if we want to change the practice out there, we may need to look at that.

HONORABLE NATHAN HECHT: The Federal district courts a long time have been required to explain their decisions, even on summary judgments. Do people -- is that -- is that a model, or is that too much or too little? Sometimes you read them and they seem to go on and on, but sometimes you read them and you think you would -- as an appellate judge you'd like to know that the

trial judge thought he ruled the way he did because he thought somebody was lying, they just weren't credible, and maybe it doesn't come across on the page, and it's helpful to -- it's helpful to know that.

HONORABLE TERRY JENNINGS: That's the only time I've ever found findings helpful, and it's usually not in the civil context because they're usually not helpful in the civil context, but they're helpful in the criminal context in regards to motions to suppress evidence. "Police officer testified to A, B, and C. I believed his testimony. The defendant testified to X, Y, and Z. I disbelieved him in regard to X and Y, but I believed him on Z." So then you come to the legal conclusion, well, was there reasonable suspicion to detain or probable cause to search; and that's when it's really helpful, because regardless of whether the trial judge believed him on this, there was still this other fact and this other fact negates probable cause. That's the only time I've ever found findings helpful.

HONORABLE NATHAN HECHT: Lamont.

MR. JEFFERSON: I'm with Jim on the phrase "shall be in broad form whenever feasible." I mean, I agree that the third option is the best of the three. I mean, I think that does add a lot to the previous rule, but I don't know why we ought to constrain a judge to

making their findings in broad form. I understand why when you're spinning a case to a jury why you would want to submit it in broad form fashion so you don't have the argument about how each particular juror thought, but when we're asking a judge to explain the basis for a judgment I don't think we need to have this kind of guidance.

HONORABLE NATHAN HECHT: Bill Dorsaneo.

PROFESSOR DORSANEO: Well, I think it's helpful guidance, but we don't need that sentence in the third alternative for it to be a vast improvement, and it is true that broad form doesn't mean, you know, one thing. It means a multitude of things. I mean, when we did broad -- in 1978 I guess it was when we did broad form submission whenever feasible, I mean, Rusty McMains and I asked of this committee, "Well, what do you mean by broad form whenever feasible?" And nobody could say, and it really has taken 20 years, and we now know that broad form whenever feasible is not separate and distinct old style submission, and that's what it means. It means it's broader than the old days, and it can be broader than -- you know, it can be McElroy Stovall charge. You know, "Whose negligence, if any, was a proximate cause of the occurrence of whatever date," but it still would be broad form if you had "Was the defendant negligent?" And then another question, "Was the negligence, if any, a proximate

cause?" That would be broad form.

So broad form is not some sort of a straightjacket. You know, it does provide the trial judge an opportunity to do things different ways and still be within, you know, broad form submission. Maybe it's -- maybe it's not helpful.

MR. JEFFERSON: I mean, if I'm the trial judge and I'm looking at this, aren't I thinking jury charge? Aren't I thinking --

PROFESSOR DORSANEO: Yeah.

MR. JEFFERSON: You know, so as a judge all I have to do is the same thing that I would do if it were a jury charge, and I think we're talking about something fundamentally different if we're talking about a judge explaining their judgment versus a jury finding facts.

PROFESSOR DORSANEO: Why?

MR. JEFFERSON: Well, because a judge is including a lot of items to me that a jury doesn't consider, like the ambiguous contract situation. A judge ought to have the -- and why have this -- I just don't understand why you would have this direction to a judge, what that adds. The judge should have the ability to explain what the judge thinks is necessary to support the judgment that the judge is rendering.

HONORABLE NATHAN HECHT: Judge Yelenosky,

then Nina.

HONORABLE STEPHEN YELENOSKY: Well, it would help me if there was some direction to the lawyers. When I get a request for a finding, obviously I ask the winning lawyer to draft something, and I say -- I say something like, you know, "include only what's necessary to support the judgment," and I get all kinds of things, and I basically have -- if I'm going to do, you know, what I should do, which is find what I found in conclusions of law, sometimes it's almost like starting from scratch. Sometimes it's crossing out a bunch of things, but I think if lawyers read this rule and submitted to me the broad form, it would be easier for me to take that and then work from that to perhaps some additional things like credibility. Even though a jury wouldn't state who they found credible, the court of appeals would say they could have. They wouldn't have to know that, but I might throw in those kind of things, but the problem right now is, you know, some people send you every thought and tittle and, you know, it's more work to come through that and come up with something than to start from a framework that perhaps is broad form.

HONORABLE NATHAN HECHT: Nina Cortell.

MS. CORTELL: I think, as I recall the history of this, was that the evil we were trying to get

rid of, were these voluminous unnecessary findings, and I think I recall correctly, Elaine, the original version of this did not have the broad form language, and we brought it to the committee, and the suggestion was made why don't we make it parallel to jury issues, and that's what led to this version, but hearing the discussion, I would be inclined to -- to delete the concept, that it may have some problems that are being suggested here, and haven't we resolved the evil we're trying to get rid of by the third sentence in the comment, and with that and then with the notion from Judge Gray that what we really want are the findings that support the judgment and don't make it too voluminous, use this other language that maybe you can get there without the broad form reference.

HONORABLE NATHAN HECHT: Justice Gaultney.

HONORABLE DAVID GAULTNEY: I like broad form reference for the same reason the professor mentioned. It gives some guidance about what is expected. I also like Frank's suggestion about putting the comment into the rule. I think if you have that -- and really the problem with voluminous findings and conclusions, I think, is that it prevents the proper presentation of the case on appeal for the appellant as well as for the court of appeals that may be presented with voluminous points of error trying to cover every conceivable point that may affect the result.

So if the rule actually required something like that, I think an appellate court instead of reversing would look at Rule 44.4, which says if you've got remediable error you can abate it and get those findings of fact that actually conform to the rule. So I would be in favor of the third option with the current language and then adding the comment into the rule.

HONORABLE NATHAN HECHT: Justice Patterson.

HONORABLE JAN PATTERSON: I agree with the judge's conclusions. I like the third proposal. I think it has the benefit of making the rules parallel so that there is some coming together of the jury/nonjury, but broad form would be interpreted in the context of a nonjury trial, so I think it has the virtue of flexibility in that it makes them more alike, but not identical, and I don't think there's any suggestion that they have to be identical. In a judge trial, a bench trial, it would be what passes for broad form, and it would be ultimate issues, and I think that the findings would be perhaps more detailed because that would be more helpful on appeal. You know, very often, credibility, if you're talking about civil cases, it's helpful as well, so I think it is a useful concept.

The reference earlier to the abuse of findings of fact, I think there's less of an abuse than

there is a lot of ignorance. People just don't know what it's supposed to look like and what they're supposed to address, and so I think this rule has the virtue of giving them sufficient guidance, trying to knock it down to some ultimate issues, but allowing some flexibility on that score, so I like the third proposal.

HONORABLE NATHAN HECHT: Does -- I'm just trying to see if I sense the direction of the committee directly. Are we generally in favor of something like on page two versus something on page one? Anybody holding out for page one and they just haven't said so? Sarah Duncan.

HONORABLE SARAH DUNCAN: Yes.

HONORABLE NATHAN HECHT: You are. You want to speak to that?

HONORABLE SARAH DUNCAN: Well, we've already had a disagreement even within one person of what an ultimate issue is. So I think I would have to say I don't think anybody around the table can really say what an ultimate issue is. If Professor Dorsaneo says, "Well, it's negligence, but you've got to have a separate finding on proximate cause," but as we all know, the pattern jury charge says you conclude proximate cause in the negligence question, so to me to say "ultimate issue" doesn't really help much.

I disagree with Chief Justice Gray. If there's not -- he wants to reduce the grounds to just the grounds that support the judgment. That to me is the problem with the system we have. If the ground that supports the judgment warrants reversal, we have no idea what the trial judge would have done on any other ground, and so you've got to reverse, even though the judge may have found and concluded that none of those other grounds warrant a judgment in favor of whatever party the judgment was in favor of. I don't understand why it would be different with a bench trial, never have. I think that was my first comment. Never have understood why it would be different with a bench trial than it would be with a jury trial. I do agree with putting the comment into the rule.

HONORABLE NATHAN HECHT: All right. Judge Christopher.

HONORABLE TRACY CHRISTOPHER: I like keeping the broad form concept in because, you know, on occasion when I've tried bench trials at the end of the trial it wasn't that I felt that the defendant was not negligent. I felt that the plaintiff hadn't proved by a preponderance of the evidence that the defendant was negligent, and that was my fact finding that I put in my findings of fact because, you know, I wasn't a hundred percent sure, but to

me they hadn't carried their burden of proof. So I've been doing -- in fact, when I was a trial judge I did broad form frequently, and no one ever complained, and I never saw anything on appeal that said I'd done it wrong, but maybe they didn't appeal after I did it.

HONORABLE NATHAN HECHT: Nina.

MS. CORTELL: I understand the interest in the broad form language. I guess the question I have for the committee, does anyone sense a tension between the sentence saying "use broad form whenever feasible" and then the very next sentence talking about evidentiary facts? I mean, there's a little bit of a conflict I think there, and so to me the question is if we keep broad form in, how best to interweave these other concepts.

HONORABLE NATHAN HECHT: Chief Justice Gray.

HONORABLE TOM GRAY: That was exactly what I was going to bring attention to because the "whenever feasible" and then the next phrase, "the trial court findings must include," I would suggest that changing the word "must" to "may" alleviates that tension somewhat, and therefore, it allows for the inclusion of, but, you know, that has its own problems as well. So --

MS. CORTELL: I would probably go the other way and say broad form is okay but "also shall include." The problem is there's a lot of times when you want to

know why negligence was found or not found and just a few facts. That's why this is so hard to write. We don't want all the extraneous facts that people tend to put in, but there are often pivotal facts that are very helpful in the appeal to understand what led the court to that broad form conclusion.

HONORABLE NATHAN HECHT: Justice Jennings.

HONORABLE TERRY JENNINGS: You know, on the appellate court we're, of course, starting with the presumption that the trial court's judgment is correct, the trial court made all findings that it needed to make to get to its judgment, so I don't know that really broad form is really helpful. Again, my understanding of the purpose of findings of fact is, is to narrow the issue to pertinent facts, and whether or not that fact is controlling in regard to the ultimate conclusions of law.

So I don't really see, given the fact that, you know, the judgment is presumed to be correct, that broad form is really being helpful to the appellate court. I don't see how that could be helpful to the appellate court because if you're signing a judgment saying someone is liable and you're awarding damages, well, you understand the trial court made the findings it needed to make to get to that judgment in regard to just simple broad form submission.

HONORABLE NATHAN HECHT: Chief Justice Gray.

HONORABLE TOM GRAY: Taking into consideration those comments because of the broad form issue, what if we just said -- combine the second and third sentence as follows: "Unless otherwise required by law, findings of fact shall" -- cut out the end of that sentence, the beginning of the next sentence, and pick up, "include only so much of the evidentiary facts as are necessary to disclose the basis for the court's decision," which in effect is the judgment, include the comment then as the next sentence. "Unnecessary voluminous evidentiary findings are not to be included in the court's findings of fact and conclusions of law," and then conclude with the final sentence, "The judge should make conclusions of law on each ground of recovery or defense necessary to support the judgment." I mean, that seems to meld some of those concepts together.

HONORABLE TERRY JENNINGS: And gives the parties guidance and then if one side doesn't get the finding they want then, of course, they can come back and request their finding and say, "Well, this is a critical fact that we need a finding on for the appellate court to make its ultimate decision."

HONORABLE NATHAN HECHT: Richard Orsinger.

MR. ORSINGER: I prefer the third option,

but I think the first sentence and the last sentence are trying to say the same thing in different ways. What I would propose is to delete the first sentence and to take the last sentence and put it first with the following changes. This would be the start of the rule. "The judge should make findings of fact and conclusions of law necessary to resolve each ground of recovery or defense that were tried to the court." So that's the ultimate standard, is you've got to give both findings and conclusions that were necessary to resolve every claim or defense, and then you can follow that up with whatever we decide on broad form and then conclude with these two statements, "avoiding excess detail."

Now, having said that, especially in family law, but not only in family law, a lot of trial judge decisions are a mixture of discretion and fact resolution, or should I say they are fact resolution followed by the exercise of discretion, and the San Antonio court of appeals and a number of others, but not all of them -- and I don't know if the Supreme Court has taken a position -- that if your appeal is on an abuse of discretion point that you're not really bringing a separate sufficiency of the evidence analysis, and I'm not sure exactly how you're supposed to brief it, so I brief both of them, but there's a lot of case law out there saying that if it's a

discretionary decision with the trial court, sufficiency of the evidence is just one aspect of the overall abuse of discretion appellate standard.

And so this idea of just getting a statement of the facts that are essential to accept or reject a proposition kind of leaves untouched the whole area of why the trial court exercised their discretion the way they did; and, Justice Hecht, your comment that you made earlier about Federal judges explaining the rationale behind their decision, what I find in family law property divisions, which are a mixture of fact findings on specific disputes as well as a very broad exercise of discretion based on equitable factors, is you end up with a finding or sometimes it's a conclusion that says, "The property division is just and right." They never tell you why. It doesn't help, so the appellant is guessing, the appellee is guessing, and the court of appeals is guessing, and usually there's a lot of disagreement among witnesses, and there's a lot of conflicting evidence, and so it's really difficult for the appellate court to figure out why the judgment was what it was.

So maybe in addition to requiring a resolution of the specific factual disputes for every claim or defense, maybe we ought to also ask where the court is exercising discretion that they explain why they

exercised their discretion the way they did. Now, maybe that would create fights that we don't want to have, but, you know, ultimately if the discretionary decision is hidden behind a conclusion that "I find that this is the correct thing to do," it's really useless.

HONORABLE NATHAN HECHT: Well, we need to take a break here in a second, but let's see if we can finish this up. Bill Dorsaneo.

PROFESSOR DORSANEO: I didn't hear all of that, but I've thought for years that the conclusions of law part of the fact-finding process is a -- is either useless or it's unclear what it's for, and the reasons for the decision sometimes can be found in the conclusions of law, but you think you could find them, but I'm never sure what the conclusions of law are meant to be for, but that would be a good thing for them to do, assuming we're going to -- assuming we're going to be concerned about why the judge exercised discretion in a particular way in terms of, you know, judgment-making in the court of appeals. You know, if we're just not concerned about that at all, if we're just going to affirm if the judgment is supportable under the broad form findings on mixed questions of law and fact, then I don't guess -- I don't guess we need that. But I think that's a good point.

MR. ORSINGER: Can I respond?

HONORABLE NATHAN HECHT: Yes.

MR. ORSINGER: In most cases where the law is clear the conclusions of law naturally follow from the judgment; and I agree with you, Bill, that for the most part they're useless; and, furthermore, if the judge applied the law incorrectly, the appellate court can fix it by applying the correct law to the findings and give the judgment that should have been rendered; but there's some areas where it's unclear which law applies to a certain set of facts; and in that situation it may be helpful to everyone to know that the reason one person won and the other one lost was they decided this was closer to a duck than it was a swan. It's not clear whether it's a duck or a swan, but if it's a duck you go one way, if it's a swan you go the other, and maybe that's a bad example because you might have a fact finding that says that it's not, but sometimes your resolution is close to one rule of law, but arguably could have been resolved by a different rule of law, and to know that the judge ruled the way he did because of the law is helpful there. Now, in jurisprudence they call those the hard cases. 99 percent of the cases are not hard cases, but where it's unclear which rule of law applies, the conclusion can really clarify everything for everybody.

HONORABLE JAN PATTERSON: Sometimes people

can't tell the difference between facts and the law.

PROFESSOR DORSANEO: Frequently.

HONORABLE NATHAN HECHT: Judge Christopher.

HONORABLE TRACY CHRISTOPHER: I just don't see the reason why we require -- why we would require the judge to be more specific than the jury. So, for example, the plaintiff puts on evidence of $10,000 in medical bills, and the jury comes back with $5,000 in medical bills, and then on appeal basically the court of appeals says, "The jury is the sole judge of the credibility of the witnesses and the weight it's given the testimony and they had the right to cut those medical bills down to 5,000 if they wanted to basically because, you know, well, they might not have thought that, you know, they didn't need nine months of physical therapy." So why as a judge would I have to specifically say, okay, well, there were $10,000 presented, but I'm rejecting this because of this and I'm rejecting this because of that and I'm rejecting this because of that to come up with my $5,000? Why are you entitled to more information from me than you are from the 12 jurors?

HONORABLE NATHAN HECHT: Gene.

MR. STORIE: One response I have to that is I have occasionally had trouble getting a clear ruling on an evidentiary objection because the judge will say, and

perhaps properly, "I'll give it the weight to which it's entitled," so when I get down to what's the real basis of the decision I would like to know if that evidence that I objected to was possibly the basis of the decision.

HONORABLE NATHAN HECHT: Justice Jennings.

HONORABLE TERRY JENNINGS: Maybe that's the key there. Maybe it should be -- because the only good findings of fact I've ever found are usually because the advocates have kind of given some serious thought about, well, what's really controlling here. Maybe the point would be that instead of saying "the judge must state," saying "the parties must submit what they consider to be the pertinent," because that's what you're really getting at, right, is what is the controlling fact or what is the controlling point here and requiring the parties to submit that to the judge for a specific finding.

HONORABLE NATHAN HECHT: Jim Perdue.

MR. PERDUE: I understood this effort to begin as an effort to reduce the size of findings of fact, and this discussion has now changed into a concept of how to write the rule such that a trial judge can do what he or she wishes and not get reversed. If you want to reduce the volume of findings of fact, it seems to me the rule -- I think Justice Gray's proposal as far as the rewrite made sense to me. But if you're trying to broaden a judicial

fact-finder into the equivalent of a lay fact-finder, which is a different role, then you could go broad form, but that seems to me inconsistent with where we started.

HONORABLE NATHAN HECHT: Richard.

MR. MUNZINGER: What would be wrong with saying, "Findings of fact need be no more specific than a jury verdict sufficient to support the judgment"?

HONORABLE NATHAN HECHT: Well, I think that sort of -- it seems to me that's the issue that -- one of the core issues that we've got, so the draft rule on page two incorporates broad form whenever feasible, and that's sort of the jury standard, jury submission standard. So one issue that was not resolved last time, as Elaine says, that we need to resolve is -- and Judge Christopher and others have raised it -- should the judge be more specific than the jury? Do we want -- in a bench trial do we want the findings and conclusions to be more specific than the answers in a jury charge?

MR. JEFFERSON: Is that the question, or is the question do we want to direct the court to be as specific as if it were the jury? I mean, without -- if you took out the broad form language from the draft rule, a court could be more specific if the court chose to, but with that language in the rule it suggests that the appropriate thing for the judge to do is to not be more

specific, is to go broad form.

HONORABLE NATHAN HECHT: Right. So do we think that the judge should be more specific or less specific? And we can think about it in terms of taking that standard out, but I think that's the issue that was hanging over from last time that we didn't have a clear view of, so before our break let's see if we can get --

HONORABLE SARAH DUNCAN: Can I ask a question on that?

HONORABLE NATHAN HECHT: Sarah Duncan.

HONORABLE SARAH DUNCAN: I'm sorry. Can I ask a question first?

HONORABLE NATHAN HECHT: Yes.

HONORABLE SARAH DUNCAN: I agree, I would like to know what evidence the trial court considered, Jim, because if it was erroneously admitted and formed the basis of the decision, you're not going to know that in broad form submission; whereas in a jury trial we do know that. So I'm in favor of broad form submission, but I want rulings on evidentiary matters.

MR. ORSINGER: Justice Hecht, may I say something --

HONORABLE NATHAN HECHT: Yes.

MR. ORSINGER: -- prefatory, too?

HONORABLE NATHAN HECHT: Yes.

MR. ORSINGER: In family law some matters of dispute are for the jury and others are for the judge, and there's not in my mind a clear delineation, but I served on the pattern jury charge committee that did the original PJCs for family law, and we arrived at our consensus on what were jury questions and not, but let me just give everyone a heads-up that in the family law arena many things are not ever submitted to a jury either in the pattern jury charge or in practice or in courts of appeals opinions, and so we don't know how those issues would be phrased if they were submitted to the jury. So this isn't going to give guidance to a wide swath of decisions in family law if we say the findings need to be like what the jury would find, because nobody ever submits them to the jury, and we don't know what the right way to do it is.

HONORABLE NATHAN HECHT: Justice Patterson.

HONORABLE JAN PATTERSON: I'm curious, Nina, if you were suggesting while ago that it would be preferable to say, "Findings of fact may be in broad form submission and must include only so much of the evidentiary facts as are required" so that you give the judge that option, but it does allow for a greater specificity -- it does seem to me that while we might want some uniformity or some parallel roots, at the same time there is a reason why we don't want these -- the

specificity from a jury. You know, to some extent we close our eyes and don't want to hear all of the array of answers, but with a judge it does have a different function at the time for the sake of justice and for the sake of appeal, so I wonder if that might -- if you had suggested that earlier.

MS. CORTELL: I'm a little concerned that there will be great tension between the concepts and whether we don't have to use a different term. I'm sympathetic to broad form in this way, that it gives judges sort of the guideline and practitioners of the PJC and the elements and so forth. On the other hand, I've been sitting here thinking about many nonjury appeals I've had that have been extraordinarily helped by more specificity by the judges who may have been given a set of findings but then struck some of them --

HONORABLE JAN PATTERSON: I agree with that.

MS. CORTELL: -- or added some additional finding that made it very clear as to what the thinking was behind the judgment, and we don't have that option in a jury verdict. So I do think it's a different function, it's a different trier of fact, and we ought to treat it a little bit differently; and again, all of this, just thinking about what the goal was, it was to give the appellate court guidance as to what the thinking of the

trial court was in reaching this judgment, and all the rest is how do we word it as far as I'm concerned. I mean, I think that's the goal, and then the question is how best do we word it.

HONORABLE NATHAN HECHT: Richard.

MR. MUNZINGER: It seems to me philosophically that if you ask more of a judge than you do of a jury you're working counter to the purpose of the whole rule revisal, which is to simplify findings of fact and conclusions of law. If you can enter a judgment today based upon a jury verdict where the jury finds certain issues and we are precluded from going into their mindset to determine why they reached certain issues under almost all circumstances, why would we want to do any different with a judge? Rights of parties are taken or awarded based upon law, based upon findings of fact. If you're going to change the rule, why would you want more specificity from a judge than you want from a jury if the purpose of a rule is to simplify it?

Once again, I really think that the solution may be simply to say in the rule, "Findings of fact need be no more specific than a jury verdict sufficient to support the judgment." Why do you care what the trial court did or didn't think? If you say, "Well, I need to know because he allowed inadmissible evidence did he rely

on it," if there is any evidence that was admissible to support the judgment it's going to be sustained on appeal if it's more than a scintilla. It doesn't make any difference whether he or she considered 10 items of inadmissible evidence if there is one item of admissible evidence sufficient to support the judgment if the law is honored. So my personal belief is, is that if you ask more of a judge you're simply asking the trial bar to put every single thing but the kitchen sink, put it all in there, don't leave anything out, because they're trying to examine what the judge is thinking.

HONORABLE NATHAN HECHT: All right. One more, then we're going to get a show of hands. Roger.

MR. HUGHES: Well, I got to thinking what Mr. Orsinger said because there are a number of decisions the trial judge has to make that aren't punted to the jury. There are equitable things about passion and injunctions, several family law members, but then I got to thinking that these are findings of fact and conclusions of law, and to ask a judge to start setting out the judge's reasoning on why the injunction was fashioned this way, why this seemed fair, and what was rejected, or to try to explain it in more detail why this parent was -- in the best interest of the child and the other one wasn't, well, it would be helpful, but what you're really asking

is for an opinion, a memorandum opinion like we get from Federal judges. That's literally what you're -- I'm thinking is what you're asking for when you tell trial judges "anything more than stating findings of fact, conclusions of law, in broad form," and while I like those memorandum opinions, I enjoy reading them, I think they're very helpful. I just don't think that we have -- we can expect Texas judges -- I don't think they have the resources to be writing those kinds of opinions in all of those cases, and that's why I think the rule is as it is.

HONORABLE NATHAN HECHT: All right. Let's get a show of hands so we can take a break. Is this a fair way to put it, whether the standard that's in the proposed rule shall be in -- "findings of fact shall be in broad form whenever feasible," we should include that or not, that should be the standard in the rule or not a standard.

PROFESSOR DORSANEO: Could I ask a question?

HONORABLE NATHAN HECHT: Yes.

PROFESSOR DORSANEO: Do you mean the "shall" part to be --

HONORABLE NATHAN HECHT: Yes.

PROFESSOR DORSANEO: -- part of that?

HONORABLE NATHAN HECHT: Yes.

PROFESSOR DORSANEO: Meaning "must"?

HONORABLE NATHAN HECHT: Yes. Yes. Meaning "must." All right. Let's have a show of hands. Should we leave that phrase in a draft of the rule or not? Those in favor of we should, raise your hands. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13.

And not? 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13.

MR. GILSTRAP: The Chair's got to vote.

HONORABLE JAN PATTERSON: Judge? Judge? Judge?

HONORABLE NATHAN HECHT: I always get a vote. Bill Dorsaneo.

PROFESSOR DORSANEO: I wonder if the vote would be different if it was "should" instead of "shall."

HONORABLE JAN PATTERSON: Yes.

HONORABLE NATHAN HECHT: All right. Let's take that vote so we can take a break. "Findings of fact should be in broad form whenever possible," so that we would -- who wants to put that phrase in the draft of the rule?

HONORABLE STEPHEN YELENOSKY: Is the next vote going to be "may"?

HONORABLE NATHAN HECHT: We're going to do "should" out of deference to Professor Dorsaneo.

MR. HAMILTON: "Should"?

HONORABLE NATHAN HECHT: "Should"?

HONORABLE TRACY CHRISTOPHER: Is this like an alternative --

HONORABLE NATHAN HECHT: Yeah.

HONORABLE TRACY CHRISTOPHER: -- to "shall"?

HONORABLE NATHAN HECHT: Yeah.

MS. BARON: Can I make a suggestion?

HONORABLE NATHAN HECHT: Yes.

MS. BARON: Could you ask the people who voted against "shall," just that group to vote on this question?

HONORABLE NATHAN HECHT: Okay. People that voted against "shall," would you vote for it if it was "should"? One. All right.

PROFESSOR CARLSON: We only need one.

HONORABLE NATHAN HECHT: 14-12.

MR. JEFFERSON: Now we know.

HONORABLE NATHAN HECHT: Let's take a break. Ten minutes.

(Recess from 11:25 a.m. to 11:41 a.m.)

HONORABLE NATHAN HECHT: One more thing, one more thing before we leave 296. There seemed to be consensus that the comment should be in the rule whenever we finish drafting it. Is that -- did I misread that? Is there objection -- does someone have objection to putting

the comment, "unnecessary or voluminous evidentiary findings," et cetera, in the rule? No? All right.

All right, back in the hands of the vice-chair.

HONORABLE JAN PATTERSON: So what did you conclude, that it will be included?

HONORABLE NATHAN HECHT: Yes.

HONORABLE JAN PATTERSON: Okay.

MR. LOW: And I will turn it over to Elaine.

PROFESSOR CARLSON: All right. So are we satisfied we have a clear picture --

HONORABLE NATHAN HECHT: Yes.

PROFESSOR CARLSON: -- of where we stand on what we changed?

HONORABLE NATHAN HECHT: We are.

MR. GILSTRAP: Clearer than it's ever been.

PROFESSOR CARLSON: All right. Rule 297 and 298 we've really covered. Those deal primarily with the time frame, unless anyone has a suggestion for inclusion. I think they're substantially the same as our current practice, but the time frames have changed.

MR. ORSINGER: Elaine?

PROFESSOR CARLSON: Yes, sir.

MR. ORSINGER: The comment that was made before about the absolute deadline in (a), would that also

not apply to (b) --

PROFESSOR CARLSON: Yes.

MR. ORSINGER: -- or did I misunderstood?

PROFESSOR CARLSON: It would. It would.

MR. ORSINGER: Okay.

MR. LOW: Anybody have any questions or comments about that? Or follow the wise course and do what Elaine says?

MR. GILSTRAP: Question. Elaine, what -- in (b), does the words in the third line, "that are appropriate," does that add anything?

PROFESSOR CARLSON: I don't think we really use "appropriate" in most other instances where we are making reference to the trial court's discretion. We usually say "proper." But I don't know if that really --

MR. GILSTRAP: I'm not -- I'm not sure what "that are appropriate" or "that are proper" adds to the rule anyway.

PROFESSOR CARLSON: I guess it's the "must."

MR. GILSTRAP: Okay.

PROFESSOR CARLSON: See what I'm saying, because it says, "The court must make," you don't want to say they have to make "additional amended findings," do you?

MR. GILSTRAP: "Any additional," "make any

additional amended findings," okay. All right.

MR. LOW: Satisfied? Okay. Anybody else? All in favor? Bill.

PROFESSOR DORSANEO: One thing, I think I've said this at the committee meeting over again, but it seems to me that this last sentence on (b) is just a separate thing and should be a separate subdivision. "No findings or conclusions will be deemed presumed by any failure of the court to make any additional finding or conclusions." Maybe I'm -- maybe I'm quibbling, but --

MR. LOW: Elaine, what --

PROFESSOR CARLSON: Isn't that our current practice, Bill?

PROFESSOR DORSANEO: Yeah, but I thought it should be broken into a separate subdivision. I'm not sure what the title of it should be.

PROFESSOR CARLSON: Of the same rule or --

PROFESSOR DORSANEO: Yeah, same rule.

PROFESSOR CARLSON: Okay.

MR. LOW: What do you think, Elaine?

PROFESSOR CARLSON: We'll work on that. It could be, but I don't think that's a problem.

MR. LOW: Okay. Any other suggestions? Okay. What do you have next, Elaine?

PROFESSOR CARLSON: All right. The

remaining two rules are 299 and 299a. There was a little bit of wordsmithing done by our full subcommittee to try and make the meaning of the rules a bit clearer in plain English. I hope we accomplished that. There was no intent to change the current practice, so if you would look at those rules and if you disagree that it's plain, not plain English or it changes the meaning, I'd love to hear from you.

MR. BOYD: Well, I'm not trying to be critical, but I found it real awkward language. The second sentence of (a) as well as the first sentence of (b), "Upon appeal, a ground or defense not conclusively established under the evidence, no element of which have been requested or found as" -- my stab was "Upon appeal, any finding that is not requested or included in the court's findings is waived unless it is conclusively established under the evidence." Is that close? It was real hard for me to understand, kind of work through it.

PROFESSOR CARLSON: Jeffrey, could I ask you to repeat that?

MR. BOYD: "Upon appeal, any finding that is not requested or included in the court's findings is waived unless it is conclusively established under the evidence."

PROFESSOR DORSANEO: Sounds like a winner to

me.

MS. CORTELL: What did you say right after "upon appeal"?

MR. BOYD: "Any finding that is not requested or included in the court's findings is waived unless it is conclusively established under the evidence."

MS. CORTELL: I have a problem with the word "finding." Because it --

MR. BOYD: Yeah, I had a problem distinguishing along my -- a ground and a finding in this context.

MS. CORTELL: Right.

MR. BOYD: So I agree with that, and --

MS. CORTELL: Could you say "ground or defense" instead of --

MR. BOYD: Well, do you waive a ground, or do you waive a finding?

PROFESSOR CARLSON: It's a ground. I mean, that's the difference between (a) and (b).

MR. BOYD: So "Upon appeal, any ground or defense that is not requested for which a" -- and it gets complicated, "for which a finding is not requested or otherwise included."

MS. CORTELL: That goes back to the difficulty we were having on the prior rule about are we

talking about little bitty findings, so everybody has to request this myriad of findings unless they waived something, or does it really have to be essential to -- so much as to constitute ground or defense?

MR. LOW: I think Carl had his hand up next.

MR. HAMILTON: In the last line of (b), "omitted element for which an additional finding," should that be "has not been requested"?

PROFESSOR DORSANEO: No.

MR. HAMILTON: Because if you've requested, it's not waived, so --

MR. LOW: I'll let Elaine answer that when she's ready and then I'll get to you, Bill.

PROFESSOR CARLSON: Again, I'm sorry, I didn't follow you.

MR. HAMILTON: The last sentence, "No finding shall be presumed on an omitted element for which an additional finding has been requested," or "has not been requested"?

PROFESSOR CARLSON: "Has."

MR. LOW: "Has been," yeah.

PROFESSOR CARLSON: You requested it, so we're not going to presume a finding one way or the other. It's been requested, but the court didn't make it.

MR. HAMILTON: Okay.

MR. LOW: All right. All right, Bill.

PROFESSOR DORSANEO: All right, on that point I think it would be helpful to say "and denied" at the end of (b).

MR. ORSINGER: Usually they're not denied, they're just ignored.

MR. DUGGINS: They're refused.

MR. ORSINGER: No.

MR. LOW: Let Elaine comment. As we make suggestions let's see her view and then I'll come to each of you. What about that?

PROFESSOR CARLSON: I agree with really Richard's comment. It would be nice, Bill, if you got an express denial, but as I understand the case law, if you ask for a finding of fact and the trial court does not make it and we're in additional findings here, we're not going to presume that finding as we would as if you asked for some findings on a ground but not all.

MR. LOW: Bill.

PROFESSOR DORSANEO: Well, we could make it "and not," whatever, but the reason I had my hand raised was really in (a). Didn't we leave out the words "after ground of recovery" such that it says "ground of recovery or defense"? I mean, a ground is not --

PROFESSOR CARLSON: We can put that in.

PROFESSOR DORSANEO: -- a claimant or a defendant. It's just a ground.

PROFESSOR CARLSON: We can put that in.

PROFESSOR DORSANEO: That I'm sure of what it should say.

MR. LOW: Elaine, you agree to that?

PROFESSOR CARLSON: Yeah.

MR. LOW: When we get through as these suggestions are made then we'll go back and have you show what has been added or deleted from this so we know that each person has had their issue addressed.

PROFESSOR CARLSON: Okay.

MR. LOW: I believe Steve had his.

HONORABLE STEPHEN YELENOSKY: I don't know if we reached closure on Jeff's suggestion, but it does seem that there can be a plainer language version. Can't it just say -- the first sentence ends with "grounds of recovery or defense." Couldn't the next sentence say, "A ground of recovery or defense is waived unless an element of it has been requested or found or it is conclusively established under the evidence," period?

MR. LOW: And you would leave out "upon appeal"?

HONORABLE STEPHEN YELENOSKY: Well, I mean, why it's --

MR. LOW: No, I just --

HONORABLE STEPHEN YELENOSKY: Yeah, I would. It gums it up.

MR. LOW: I guess it doesn't really matter unless you appeal.

PROFESSOR CARLSON: I think that's a correct statement of the law.

MR. LOW: All right. Elaine, you have what you agree to and what you don't agree to, and then we're going to come back. All right. Terry.

HONORABLE TERRY JENNINGS: I think use of the words "ground or recovery" is problematic because when you're talking about fact-finding you're not just talking about a fact-finding after a court trial. You're talking about fact-finding after various hearings, special appearances, things like that where the findings of fact don't concern a ground of recovery or defense.

HONORABLE STEPHEN YELENOSKY: Well, then Dorsaneo is wrong, not me.

HONORABLE TERRY JENNINGS: You see what I'm saying?

HONORABLE STEPHEN YELENOSKY: Yeah, I do. Bill, why didn't you know that?

PROFESSOR DORSANEO: You know, some days it's just like that.

MR. LOW: Okay.

PROFESSOR DORSANEO: Most of them.

MR. LOW: Wait until Elaine -- Elaine, did you get that?

PROFESSOR CARLSON: No. I'm sorry, I must be losing my hearing on top of my memory. Justice Jennings, could I ask you to repeat that?

HONORABLE TERRY JENNINGS: I think using the terms "ground of recovery or defense" are problematic because when you're talking about findings of fact you're not always talking about findings of fact after a court trial on an issue of liability. You're talking about, you know, findings of fact after, you know, hearings on motions, you know, special appearances, things of that nature, where the pertinent finding is not concerning the ground of recovery or defense. It's concerning an important legal issue, which --

PROFESSOR CARLSON: You're talking about discretionary findings.

HONORABLE TERRY JENNINGS: No, I'm just talking about I think use of that language is problematic because not all findings are --

PROFESSOR CARLSON: Going to a ground.

HONORABLE TERRY JENNINGS: They're not going to a ground, and actually, most things, like interlocutory

appeals, concern findings in regard to, you know, some pertinent legal issue like a special appearance or something like that, so it's -- I think it needs to be tweaked.

PROFESSOR CARLSON: Okay.

MR. LOW: All right. Frank.

MR. GILSTRAP: I think Justice Jennings has kind of opened Pandora's box here. I mean, the way we've been proceeding so far is we're talking about findings and conclusions after a bench trial.

MR. LOW: Trial, yeah.

MR. GILSTRAP: And there is an argument for having findings and conclusions after preliminary -- after preliminary hearings, but if we're going to do that we need to know we're doing it, and I don't know that we have any agreement as to whether or not those are proper or that's what these rules are about, so if we're going to do that, I think we need to talk about it.

MR. LOW: Elaine, hadn't traditionally findings and conclusions have been keyed to a bench trial that could be a jury, not just hearings on this or that; is that correct? That was the original idea of findings and conclusions.

PROFESSOR CARLSON: It was. In fact, we originally had suggested the language back in Rule 296

"following a conventional trial on the merits," because generally the trial court is not required to make findings on interlocutory orders, and so we proceeded as if we were dealing with that.

HONORABLE TERRY JENNINGS: Right.

PROFESSOR CARLSON: Conventional trial on the merits.

HONORABLE TERRY JENNINGS: Of course, a party can request findings after the entry of any order if they would be helpful to the appellate court.

PROFESSOR CARLSON: Yes. Would it be the sense of the subcommittee -- I mean, of the full committee that you would like an additional rule dealing with discretionary findings? Because we did not attempt to do that.

MR. LOW: Well, let me say this, that even the Federal rule says "in an action tried." They don't anticipate anything other than an action, a lawsuit like we have traditionally. That's been -- so the question is do we want to expand this to the things that Terry is talking about? And I don't think your committee -- it wasn't charged to consider that, was it?

HONORABLE TERRY JENNINGS: It seems like the old rules talk about "elements" as opposed to -- you know, findings on certain elements as opposed to --

MR. LOW: I'm not talking about -- it was traditionally handled as a bench trial, though. That was -- and I'm not saying you're wrong. I'm just saying that's been the approach, both Federal and state.

PROFESSOR CARLSON: And, Justice Jennings, we were paralleling Rule 299 and the case law on findings of fact, which do make distinctions, of course, on waiver of grounds versus omitted findings of a partially determined ground. So that was sort of the dichotomy we were using, and we really weren't considering discretionary findings following an interlocutory rule.

HONORABLE TERRY JENNINGS: I think "ground or defense" is probably okay, but when you add in "ground of recovery" --

PROFESSOR DORSANEO: How about "claim"?

HONORABLE TERRY JENNINGS: I like "ground."

MR. LOW: All right. Elaine.

HONORABLE TERRY JENNINGS: Because there could be a ground for a special appearance or -- "claim" is again limiting it.

MR. LOW: Give Elaine time to consider that.

PROFESSOR CARLSON: Well, how does that work? If you have a discretionary finding and you don't ask for those findings, then on appeal is that ground waived?

PROFESSOR DORSANEO: Huh-uh.

PROFESSOR CARLSON: No, and that's our current case law, right?

HONORABLE TERRY JENNINGS: Yeah, my concern is about adding the term "of recovery."

MR. LOW: Just a minute. Let's see what -- Elaine, what Terry is objecting to, the "of recovery," I mean, how does that affect the rule as you've written it, and what's your opinion on that?

PROFESSOR CARLSON: As Pam just pointed out to me, we tie everything in these rules back to the judgment, and you're going to have grounds of recovery or defense, right?

HONORABLE TERRY JENNINGS: Or an order. You've got interlocutory order.

MR. LOW: I've been waiting to hear from Richard.

HONORABLE TERRY JENNINGS: That's appealable.

MR. MUNZINGER: Well, I think he is talking about the non -- nonjury trial hearing, for example, the hearing on a special appearance.

PROFESSOR CARLSON: Right.

MR. MUNZINGER: But Rule 296 addresses a trial of the entire case on its merits in front of a judge

rather than a jury --

MR. LOW: Right.

MR. MUNZINGER: -- and doesn't speak to -- as I read it, "In any case tried in district or county court without a jury." It seems to me it's talking about a trial, final trial on the merits of the case, so that these rules all tie back, as you pointed out, to Rule 296 and would not apply at least on their face to a --

PROFESSOR CARLSON: Right.

MR. MUNZINGER: -- hearing on a special appearance, for example, or a temporary injunction, although the temporary injunction at least do contemplate -- the case law does, contemplates requests. They're unnecessary but they contemplate it.

MR. LOW: Elaine, we --

MR. MUNZINGER: I like the idea of ground of recovery because it's the theory of the case. I've got a breach of contract ground of recovery. I've got -- and an element of breach of contract is consideration. That's the language I think we are dealing with in these rules.

MR. LOW: But we're going to deal with this rule today, and if it needs to be dealt with more broadly, we do it at a later time. Let's deal with it today as the traditional findings of fact, conclusions in a bench trial. Richard.

MR. ORSINGER: Well, just briefly on that and then the next point you wanted to move onto, if the case is dismissed on a special appearance or for forum non conveniens I think the appellant is entitled to findings because it's a final judgment, it's all over, it's not interlocutory. It may have been a pretrial hearing that resulted in the case ending, but in my view if your case is over and you're going up on appeal you get Rule 296 findings on that.

Now then, to move onto the new point, I've noticed that in going from 299, old 299, (2) on presumed findings that the concept of factually sufficient evidence has been introduced. Under the old rule about admitted unrequested elements, it was "omitted unrequested elements when supported by evidence." That's the third and fourth to last line in the old rules, and now it says "when supported by factually sufficient evidence." I don't know if that's based on case law, but that's an interesting distinction. When you talk about the standard up under (a), it's "conclusively established under the evidence," is a legal sufficiency standard for the party who had the burden of proof in the trial court. This clearly is a factual sufficiency standard, and factual sufficiency is not written explicitly under the old rule, and so I'm wondering if there was a conscious process, and if so,

what is the conscious thinking about specifying factually sufficient?

PROFESSOR CARLSON: That's my understanding of the case law.

MR. ORSINGER: It's in the case law?

PROFESSOR DORSANEO: No, it's in the rule changed in 1988.

MR. ORSINGER: Where is it in the rule change? Is it in old Rule 299?

PROFESSOR DORSANEO: Oh, well, maybe it's not. Maybe it's not in --

MR. ORSINGER: It says "supported by the evidence" --

PROFESSOR DORSANEO: Okay.

MR. ORSINGER: -- and we're now differentiating what degree of support from, if you will, legal sufficiency or conclusive or legally insufficient versus factually insufficient, great weight, preponderance.

PROFESSOR DORSANEO: I misspoke. We changed Rule 278, which is the companion rule for jury cases, to require, you know, factually sufficient evidence. My recollection is, though, is that three or four times that the Supreme Court has applied the Rule 278 that they haven't noticed that it changed from supported by, you

know, evidence to factually sufficient evidence, so that kind of has always struck me as odd.

MR. ORSINGER: Well, is the standard --

PROFESSOR DORSANEO: But it should be parallel. It should be the same in 278 and in 298, I think.

MR. ORSINGER: Is there --

PROFESSOR DORSANEO: Deemed findings should have the same standard -- or presumed findings in bench trials should have the same standard as deemed findings in jury cases.

MR. ORSINGER: Are we comfortable that the standard in (a) for waiver is you must conclusively prove, but the standard for implied findings is factual sufficiency? Are we making a conscious decision to treat them separately? You see what I'm saying?

PROFESSOR CARLSON: Yes.

PROFESSOR DORSANEO: No, not exactly.

MR. ORSINGER: Well, on 299a you waive it if you don't get a finding on a ground or defense unless you've conclusively established it.

PROFESSOR DORSANEO: Right.

MR. ORSINGER: But if it's partially omitted and not completely omitted, the partial omission is patched up by an implied finding if there's factually

sufficient evidence. So our standards are different, and you could, I guess, defend that by saying you got the trial judge to rule on at least one element, then you ought to have an easier job to win than if you didn't get a ruling on any elements, but is that a conscious intellectual decision we're making, because I think the standards are different, and why?

PROFESSOR CARLSON: Yes, we are consciously making that decision.

MR. ORSINGER: Okay.

PROFESSOR CARLSON: As Bill points out, that is the parallel to the case law of the Rule 279. It starts before the jury charge, starts with this sentence, "Upon appeal, all independent grounds of recovery or defense not conclusively established under the evidence and no element of which is submitted or requested are waived." Then the rule goes on to talk about the partially submitted ground, so we have that parallel right now, Richard.

MR. ORSINGER: Then let me ask when y'all made that decision did you do it consciously for a reason, or did it just creep in that the standards are different?

PROFESSOR CARLSON: It didn't creep in. It leaped in. I mean, I'm surprised that you see a problem there because that's been the case law, Richard, that if

you don't ask for in the jury context any elements on an entire ground, it's waived. Right? Unless you conclusively establish every element of that ground, but once you do partially submit a ground, you get some elements of the ground, and of course, these rules were written when we had non-broad form submission.

MR. LOW: Right.

PROFESSOR CARLSON: The case law says if you request some elements of a ground, so you have a partially submitted ground, and no one objects or requests an omitted element of the ground, then the ground is deemed found under Rule 279, presumed found, which is a similar concept in the bench trial, as long as there is sufficient evidence. So whether you have jury findings or you have presumed findings or deemed findings, they're supposed to be supported by factually sufficient evidence.

MR. ORSINGER: Well, see, the factual part is what I'm saying, and I don't want to belabor this because maybe this decision was made a long time ago, but you could justify as a matter of policy a deemed finding on evidence that's between legally sufficient, but not factually sufficient. You could rationally justify a deemed finding on that basis. It's kind of interesting to me that -- see, the factual sufficiency is a standard for granting a new trial, so I don't know. I'll withdraw my

comment. I'm going to think about this, but I'm curious as to why the deemed --

HONORABLE TERRY JENNINGS: I withdraw my comments, too.

MR. ORSINGER: -- finding requires factually sufficient evidence rather than just legally sufficient evidence, but I'll do that on my own.

MR. LOW: All right. Bill.

PROFESSOR DORSANEO: If that's a mistake, it's a mistake in the other rule, too.

MR. ORSINGER: That's what I'm saying. That's why I asked did you do it on purpose back when you changed the other rule or was it an accident?

PROFESSOR DORSANEO: No, it was on purpose.

MR. ORSINGER: Okay.

PROFESSOR DORSANEO: It may not have made sense, but it was certainly on purpose.

PROFESSOR CARLSON: Well, one's a waiver and one's a finding, and I think that's why you have the distinctive treatment.

MR. LOW: Any other comments on -- Judge Gray.

HONORABLE TOM GRAY: Elaine, is there a concept in the proposed rule equivalent to the last sentence of the current rule? And the reason that's

important to me is based on some -- what someone to my right said, and I don't remember who said it, but you've got the last sentence of subsection (b) -- I think it was Carl, now that I think about it. "No finding, however, shall be presumed on an omitted element for which an additional finding has been requested."

Now, the way I see this coming up is the plaintiff has prevailed on a fraud claim. Trial court makes findings that a material false representation caused detriment. Now, forget I used the word "cause" because there is no finding on reliance. Now the plaintiff realizes they have a problem and asks for a finding of reliance. Trial judge doesn't make one. Now, he doesn't get the presumed finding on the omitted element. The defendant complains on appeal that there's no finding of reliance. Unless the plaintiff can appeal the court's refusal, like under the old rule, the defendant wins.

PROFESSOR CARLSON: That's right. That's the complaint, the trial court failed to make my requested finding.

HONORABLE TOM GRAY: No. No. The trial court -- I mean, the appellate court is going to have an appeal from the defendant that says there is no finding of reliance, therefore, trial court's judgment should be reversed, and I win. But if we have the sentence "refusal

of the court to make a finding," if it shows up somewhere in the new proposed rules, then what the plaintiff has to do is file a cross-appeal, "Trial court erred in not making the finding on the omitted element." So we've got to have that somewhere in there to protect that situation, and I don't see it right now.

PROFESSOR CARLSON: I thought we had moved that, but I will double-check, but you're right, that needs to remain in the rules. It was not a conscious decision to omit it. I think we moved it, but let me take a look at that.

HONORABLE TOM GRAY: Okay.

PROFESSOR DORSANEO: I now know after listening a little more what was bothering me about the last sentence of 298(b) when I said it should be separated from 298(b), and it's that I have frequently had trouble finding this sentence. I mean, I know it's there, but I think it would be better in 299, that sentence as a separate thing or part of -- or part of 299(b), because it's about presumed findings, and to make it better than when we added it some years back I think it would be just better to say, "No findings or conclusions will be presumed," because there's no deemed finding in nonjury trials. There are presumed findings. A deemed finding is in the jury trial thing. That's the terminology over

there.

Now, this is obviously a big quibble because what I want to do is move a sentence from Rule 298 into 299 because I'm more confident that I will be able to find it next time I don't know where it is if it's in 299.

PROFESSOR CARLSON: Just for the record, it is all about you. So we can do that if that's the sense of the full committee.

PROFESSOR DORSANEO: Well, I assume that if I can't find it then it's hard to find.

MR. LOW: Does anybody -- let's go -- to keep on the same track, does everybody understand what Bill is saying, to not change the wording but move to that, and what do you think about that, Elaine, first, and then we'll get others' views?

PROFESSOR CARLSON: I don't mind moving it, Bill. I would like it to have its own title there.

PROFESSOR DORSANEO: Okay.

MR. LOW: Do you feel strongly about that, Bill, or do you want to see --

PROFESSOR DORSANEO: I don't feel -- my problem is finding it.

MR. LOW: I understand.

PROFESSOR DORSANEO: Okay. If it has its own heading, it will be easier to find. It seems

logically to go in -- it's slightly better in 299 because it says there won't be a presumed finding if --

MR. LOW: Elaine.

PROFESSOR CARLSON: I'll work on that.

MR. LOW: Can you consider that? And I believe Judge Gray had a suggestion also that you had more or less accepted. Can you comment on that? Judge Gray's -- Judge Gray had a suggestion.

HONORABLE TOM GRAY: Well, it was less of a suggestion than observation that the last sentence of current 299 --

PROFESSOR CARLSON: Oh, yes.

HONORABLE TOM GRAY: -- needs to be somewhere, and, Elaine, you were looking for where it might have moved to.

MR. LOW: All right. And you will so draft something that has that in it.

PROFESSOR CARLSON: I will.

MR. LOW: All right. Other comments? Carl.

MR. HAMILTON: This word "additional" --

MR. LOW: In what rule?

MR. HAMILTON: In 299 and also the last sentence in 298, does this just apply to the request for additional findings or all findings? It says -- it says, "No finding shall be presumed on an admitted element for

which an additional finding has been requested," and that would fall under 298, "additional findings," but not under the original findings?

PROFESSOR CARLSON: No, it would apply on original findings as well.

MR. ORSINGER: Well, can I comment on that?

MR. LOW: Just a minute.

MR. HAMILTON: We don't need the word "additional" there then, do we?

MR. LOW: In other words, the original omitted something. We're talking about omitted now. All right, Elaine.

PROFESSOR CARLSON: So your statement is if you make a request in your original findings of fact, but you don't have to, of course, make a request for a specific finding. I think that's why "additional" got worked into the rules, but if you did make a request for a specific finding of fact in your original request and the court didn't make it then it's not going to be presumed.

MR. LOW: Right.

PROFESSOR CARLSON: But, of course, Carl, as you know, you don't have to make a request for findings of fact originally that includes any specified findings.

MR. LOW: Right.

PROFESSOR CARLSON: And that's why I think

we had the word "additional" in there.

MR. LOW: All right, Richard.

MR. ORSINGER: I would think that you would want to leave "additional" in there because almost all original findings are going to be generic.

MR. LOW: Right.

MR. ORSINGER: And if we try to change this concept up to apply to the rare occasion where somebody actually specifies in their initial request, we're going to work the rule I think the way it applies to most instances, and the idea is, is the initial request is a broad request, "Tell us everything you found to resolve this case." And then if there are holes or if you disagree then you can come back in for fill this hole or change this finding, and it's that act of filling this hole is what we're trying to focus on here, that I'm a litigant, I saw that he skipped a step or she skipped a step, and I asked her to fill it, and she didn't. So to me the word "additional" makes this work better. If you take it out then we're going to have to have more complicated discussions about in my view of how it's requested, because I would argue that I requested everything when I made my initial request for "Give me findings." You see what I'm saying?

PROFESSOR CARLSON: What's the sense of the

committee on that? Because that's why the word "additional" is in there, Carl. But --

MR. LOW: You want to -- all right, Tracy, and then we'll --

HONORABLE TRACY CHRISTOPHER: Well, and I'm sorry if I missed this, where does this last sentence of the new 299(b) come from? Because, like Justice Gray was saying, I think this puts somebody in a terrible hole if the judge leaves out an element of something, and you see it, and you say, "Oh, please, add this element in" and then the judge doesn't do it because, you know, they're used to ignoring requests for additional findings and they think they did it right the first time. You know, what if I said, "Joe was negligent" or "the defendant was negligent and the plaintiff's damages are A, B, C"? Well, I failed to say proximate cause of the occurrence in question.

MR. LOW: What are you suggesting?

HONORABLE TRACY CHRISTOPHER: Shouldn't there be a presumption of that when I've signed a judgment in favor of the plaintiff and awarded a certain amount of damages? I mean, where does that sentence come from?

MR. GILSTRAP: The winning party should not be in the business of requesting additional findings.

HONORABLE TRACY CHRISTOPHER: Right.

MR. GILSTRAP: He ought to keep his mouth shut.

HONORABLE STEPHEN YELENOSKY: Right.

HONORABLE TRACY CHRISTOPHER: Right.

MR. GILSTRAP: That's the point of that, and it's just like if -- you know, in a jury trial if I object then I've objected, and the other -- the other side doesn't have to object to leaving out this particular element. I mean, I don't have a problem with the way it's written.

MR. LOW: What are you suggesting we do to the way it's written, Tracy?

HONORABLE TRACY CHRISTOPHER: Well, I'd just eliminate that last sentence because I think it's new and will cause problems.

MR. LOW: All right. Let's concentrate on that. Bill, do you have a comment on that?

PROFESSOR DORSANEO: It's not in any of the rules right now, is it? I don't think it is. Is it, Elaine?

PROFESSOR CARLSON: No, it's in the case law.

PROFESSOR DORSANEO: There are, of course, cases that stand for this proposition, and they involve the facts that they involve, and, you know, I don't want

to tell you about one because it would take too much time, but it's an accurate proposition as a general proposition, that if something is requested and the judge doesn't -- doesn't find it, then the judge, you know, rejects it. So it can't be -- it can't be presumed that it was found, if it was requested and the judge says, "No, I'm not going to make that finding." Now, maybe -- but if it's requested, wouldn't it be all covered by -- it wouldn't be able to be a presumed finding anyway, would there?

PROFESSOR CARLSON: Not if you request it.

PROFESSOR DORSANEO: I end up thinking I agree, that we don't need that sentence.

MR. LOW: Okay. Let's keep the comments now to whether or not we eliminate the last sentence. What do you think, Elaine?

PROFESSOR CARLSON: Well, it is already in Rule 298 at the end, which Bill wants to move to 299.

MR. LOW: Does anybody object to eliminating that sentence?

HONORABLE TRACY CHRISTOPHER: But that strikes me as a very different --

PROFESSOR DORSANEO: Yeah, that's a different --

HONORABLE TRACY CHRISTOPHER: -- concept. "No findings or conclusions will be deemed or presumed by

failure of the court to make additional findings or conclusions."

MR. DUGGINS: It's in current 298, the last sentence.

HONORABLE TRACY CHRISTOPHER: Right. Well, that sentence is different. The last sentence of 298 is different in my mind from the last sentence of 299. I don't think they mean the same thing.

MR. LOW: All right. Just a minute. Let's let Elaine give us her view on that.

PROFESSOR CARLSON: That was -- we dealt with this at the subcommittee, and that was our understanding of the case law. If that's not your understanding, we'll go back and look at it.

HONORABLE TRACY CHRISTOPHER: Well, I just want to know the answer to Justice Gray's question, because I don't -- I haven't looked at the case law and the deemed -- I can't tell you. But it seems to me if I'm the plaintiff and I've asked the judge for findings and he just says -- he leaves out an element, so should I just sit there and be quiet about it so that it's deemed, or do I ask him for it and then if he doesn't do it then I'm hosed? I mean, that just, you know, seems wrong.

MR. LOW: All right, Bill.

PROFESSOR DORSANEO: Well, looking at it

again, I think the current rule uses the term "omitted unrequested elements" in terms of things that can be presumed, and we took that out, and maybe this last sentence is meant to supply that, and I think we would be better off using -- you know, if you want to do it singular, a -- I'm not sure how we would do it. You know, a finding is presumed is what the rule -- the proposed rule says. I would want to capture the idea of omitted un -- only omitted things, only omitted unrequested things can be presumed found. That's what the case law rests on now, and the case that I was thinking about, it does involve that problem, where the plaintiff -- you know, the plaintiff argues later that something could be presumed, and the lawyer had to decide whether to make a specific request for that and did and then they argued on appeal that it should be presumed, and the court says, no, when you decided to make that request you bet the ranch on it.

HONORABLE TRACY CHRISTOPHER: That sounds -- is that a Supreme Court case?

PROFESSOR DORSANEO: -- and it can't be presumed. No.

HONORABLE TRACY CHRISTOPHER: That sounds like bad law. I mean, it just puts you into a trap, and I thought we were trying to rewrite these to avoid traps.

MR. LOW: Elaine, you understand what Bill's

saying?

PROFESSOR CARLSON: Yeah, I do.

MR. LOW: And what's your view of that?

MR. PERDUE: You said "requested"?

PROFESSOR DORSANEO: Uh-huh.

PROFESSOR CARLSON: We can rework it that way. I don't think -- right now I don't have the language to wordsmith it, but I understand the debate, and I'd like to bring a rewrite back after I get a chance to reread those cases.

MR. LOW: Does anybody have any comments that haven't been made on the rule or suggestions for change so Elaine has everything before her and if and when we come back to it we won't wake up with something new so we can get it done?

HONORABLE TOM GRAY: Buddy, there's no guarantee that when I come back from lunch I'm not going to wake up with something new.

MR. LOW: I know, but we don't have to express it.

HONORABLE TOM GRAY: You don't have to listen to it, right?

MR. LOW: No. Tracy.

HONORABLE TRACY CHRISTOPHER: I would still like to ask for the committee to consider requiring the

lawyers to present a draft of the findings of fact and conclusions of law, especially since we voted to take out the past due reminder notice.

MR. LOW: Elaine, you have that?

HONORABLE TRACY CHRISTOPHER: To make that part of the rule.

PROFESSOR CARLSON: I would love to have a sense of the committee on that.

MR. LOW: No, I know, but you've noted what she's suggested?

PROFESSOR CARLSON: Yes. But it would be helpful to know what the committee felt about that.

MR. LOW: All right. How can I -- let's find out how they -- would you state it in terms so we can get a vote?

PROFESSOR CARLSON: Do you think the rule should require that when a party makes a request for findings of fact that they must specify the findings of fact and conclusions of law they're asking for, they want the court to make, or should they be able to make a general request?

HONORABLE TRACY CHRISTOPHER: Oh, no, that wasn't my statement.

PROFESSOR CARLSON: Oh, I thought that's what you said.

HONORABLE TRACY CHRISTOPHER: I'm sorry, no, my statement was that once a finding of fact has been made, that the person who's -- who has the judgment in their favor should send in draft findings of fact for the judge within 10 days after the request, or 20 days, whatever amount you think is reasonable.

HONORABLE TOM GRAY: So, in other words, if the losing party makes the request then the obligation is on the winning party?

HONORABLE TRACY CHRISTOPHER: Right. So we don't have to send letters, you know, and --

HONORABLE TOM GRAY: So it's not the party making the request that has to submit them at the time they make the request.

HONORABLE TRACY CHRISTOPHER: The person -- if the request for findings of fact have been made, because sometimes the winner asks for them, the person whose judgment -- who is the winner, judgment is in favor of, has to provide a draft within a certain number of days. That's my proposal.

MR. LOW: Where would you put that and --

HONORABLE TRACY CHRISTOPHER: 299.1 or 299.2. I don't know, just somewhere.

MR. LOW: Elaine, do you have -- is that what you --

PROFESSOR CARLSON: That was not part of our proposal.

MR. LOW: All right. That's the suggestion. That's not a voting item. All right. Someone else over here raised -- yeah, Nina.

MS. CORTELL: I think if we do establish a protocol, there would be a great benefit to everybody, because a lot of times this happens under the wire where findings get sent to the court and they're not served on the other side, and it could kind of serve to bring the whole thing up to the daylight, which could be helpful.

HONORABLE TRACY CHRISTOPHER: Yeah, I mean, we do that in the judgment rule about where, you know, party can prepare and submit a proposed judgment, and we just make that -- we don't make it mandatory. Rule 305 talks about proposed judgment, but I'd have something sort of similar to that, but put the burden on the winner to get a draft down there to the judge.

MR. LOW: Do you know how to fit that in?

PROFESSOR CARLSON: Sure, but is that the sense of the full committee?

HONORABLE TRACY CHRISTOPHER: She wants to know whether other people agree with me or whether I'm the lone --

MR. LOW: All right. You phrase it, and

we're going to vote on who said -- who agrees with it and who doesn't.

MR. ORSINGER: I think we need some discussion of that proposition before we vote. I've got something to say.

MR. LOW: Okay. All right, go ahead.

MR. ORSINGER: Every single time someone requests findings it's someone that lost, and if they submit findings to support the judgment they're going to waive their appeal. So obviously the party who requests the findings can't be the one who's making findings. It has to be the party in whose favor the judgment lies. However, in a divorce case you probably can't pick a winner because there may be 15 or 30 different issues, each of which has different importance to different people, and you get all this ruling from the judge, and you've got you won some and you lost some, so it's not always obvious who the winner is.

So if we're going to have a rule like this, what I would suggest, if you don't want the judge to have to write a letter after findings are requested, I would just say at the time that the judge renders judgment the judge should specify which party has to do the findings, if anybody requests them, because the judge will kind of know who is more the winner than the other, if you want to

avoid a second letter.

MR. LOW: So that's a pretty good change from traditional, correct?

MR. ORSINGER: Well, what happens right now in almost every case that I'm involved in that goes up, is that the loser requests the findings, and the judge -- the winner either puts the findings in on purpose because they want to pack them in there and look good on appeal, or the judge will call somebody on the phone, send a letter, or now these days and times send an e-mail saying, so-and-so, submit some findings within a certain period of time.

MR. LOW: Ralph.

MR. DUGGINS: Well, I think that complicates it to require the judge to determine who won what. I don't have a problem with having a requester submit the proposed findings and conclusions with the request, but I don't think we ought to say this rule ought to try to determine who won or who lost or then put it with the judge to have to go to this next step and determine who ought to submit the findings. Why not just simplify it and say if you request findings and conclusions you've got to submit them, if that's the consensus of the committee. Keep it simple.

MR. LOW: Anything you think we want a vote on that somebody suggests, let me know. I'm going around

the table. Who else on this side? All right. Judge.

HONORABLE DAVID GAULTNEY: I guess my question would be what would be the effect if a party didn't -- if the party that won the case did not comply with a rule that we drafted that said they had to submit findings? How would that work with our existing rules? I mean, I understand generally the winning party submits findings. You're saying that doesn't always happen. I think the court should be able -- should have the ability to ask for proposed findings, but I think if we build in a mandatory rule, you must -- the winning party must submit findings, I'm just wondering how that would work in the event you have a failure to do it, like we apparently occasionally have now anyway.

MR. LOW: Anybody else? Terry.

HONORABLE TERRY JENNINGS: Well, the winner shouldn't have to do it because to the victor go the spoils, and they shouldn't have to do the extra work. It's the one who's attacking the judgment who ought to have the burden of saying, "Okay, here's the element I'm concerned about, here's the one I'm challenging, here's where I need the fact findings." The one who's attacking the judgment ought to be the one to -- it ought to be on their burden since they're attacking the judgment to say what they're attacking it for and get a specific finding

that they think they need to help the appellate court make the decision in their favor to overturn the judgment.

HONORABLE STEPHEN YELENOSKY: Well, but then the judge is going to want the opposite of that anyway.

MR. LOW: Yeah.

HONORABLE STEPHEN YELENOSKY: I mean, the trial judge wants the winning party to write what they think the judge decided on, so we need that.

HONORABLE TERRY JENNINGS: Right.

MR. LOW: The trial judge is going to want somebody putting something down that supports what he ruled.

HONORABLE SARAH DUNCAN: That was going to be my point. I don't think Ralph's suggestion that the party requesting the findings and conclusions be required to provide draft findings and conclusions because that doesn't resolve the concern of the judge who wants findings and conclusions that support the judgment she's rendered, which he's not going to get from the party who generally usually files the request.

MR. DUGGINS: But, Sarah, in practice when the loser submits the request then the winner turns around and has to submit the findings to support the judgment, which 298 permits him to do.

HONORABLE SARAH DUNCAN: I think what Judge

Christopher is saying is that doesn't always happen, and she's not getting draft findings and conclusions to support, wasn't it?

HONORABLE TRACY CHRISTOPHER: In five percent of the cases that you will automatically get somebody to send in one and then you'll wake up on the 50th day and say, "Oh, gosh, winner, please send me something in."

MR. LOW: All right. Let's take a break.

HONORABLE STEPHEN YELENOSKY: Winning party doesn't have any incentive to do it.

HONORABLE TRACY CHRISTOPHER: To do it, because, you know --

HONORABLE STEPHEN YELENOSKY: They're better off without them.

HONORABLE TRACY CHRISTOPHER: Right.

MR. FULLER: Why would they not --

MR. LOW: Just a minute. One person at a time. All right, Nina.

MS. CORTELL: I had one other sort of global thought to be thinking about, and that is that here we're talking about elements, requested elements, and we might think of that as we're talking about also the broad form discussion, because all of this needs to work together.

MR. LOW: All right. Elaine.

PROFESSOR CARLSON: I just wanted to respond to Justice Christopher's suggestion. Currently under Rule 166 the court may as a pretrial matter request the parties to make proposed findings of fact and conclusions of law. I don't know if that's done regularly, but I would think that would be helpful to the trial judge. I always looked at this as a system where the trial judge is protected by the result of presumed -- or presumed findings or omitted grounds, that the litigants may not give you much to work with to begin with, and they don't have to, but you get a targeted request by the -- or you should -- by a litigant from which you've made some findings but not all on a ground or on which you've made no findings on any element. The rules then require that you get the specified additional or amended finding, so I guess I'm -- I guess I'm not sure why that isn't working.

MR. LOW: Steve.

HONORABLE STEPHEN YELENOSKY: Well, I heard Judge Christopher to say so we don't have to write the letter that I guess maybe a hundred percent of trial judges send, even if I were going to write my findings of fact from scratch I would probably want to know what the winning party thinks they ought to be. Maybe it's nothing more than that, but the winning party doesn't have any incentive to propose findings because the standard of

review if they don't get findings is in their favor, isn't it?

PROFESSOR DORSANEO: Uh-huh.

HONORABLE STEPHEN YELENOSKY: So why would they want to write them?

HONORABLE TRACY CHRISTOPHER: And they can ignore your request. You send them an e-mail and say, you know, "Please send me proposed findings," and you know, they may or may not get around to it.

HONORABLE STEPHEN YELENOSKY: Well, but usually they will if you ask and for obvious reasons, and we're just saving the trouble of that automatic letter, I guess, from the trial judge by putting it in the rule.

MR. LOW: Last one to speak before we break for lunch is going to be Bill.

PROFESSOR DORSANEO: The problem is the rules don't talk about it. We have this -- if there aren't findings, the appellee can argue that the comprehensive presumption on all factual issues, you know, controls. That's why they don't -- if they could take advantage of the comprehensive presumption they can't do any better than that.

HONORABLE STEPHEN YELENOSKY: Right.

PROFESSOR DORSANEO: So some incentive would have to be given to the appellee to write these findings

to at least approximate the comprehensive presumption, which I guess is what people try to do. They try to write findings that the other side lost on every issue.

HONORABLE STEPHEN YELENOSKY: Well, the incentive right now is you get a letter from a district judge that says, "Please prepare findings of fact," and number two, I guess you would assume if you don't prepare them the judge may come up with something that's inadequate.

MR. LOW: All right. We're adjourned for lunch.

(Recess from 12:33 p.m. to 1:24 p.m.)

CHAIRMAN BABCOCK: I apologize for missing this morning, and I thank Buddy Low for ably pinch-hitting for me, and he informs me that with respect to the findings of fact, conclusions of law, that Elaine has a proposal that Judge Christopher has come up with that she has put into writing that we're going to vote on.

PROFESSOR CARLSON: It would be helpful to know whether the subcommittee should be working on the issue and just --

HONORABLE TRACY CHRISTOPHER: I'm pretty sure I'm going to lose this vote, but --

MR. LOW: Don't be negative.

PROFESSOR CARLSON: And please correct me --

CHAIRMAN BABCOCK: What a hell of a campaigner, "I'm pretty sure I'm going to lose."

HONORABLE TRACY CHRISTOPHER: Just from the sense of the room.

PROFESSOR CARLSON: I could go exactly with your proposal, which I understood was once a timely request for findings of facts is made after an evidentiary bench trial you said should the winning party be required to file proposed findings of fact with the court within X number of days. I might suggest that we ask the committee a broader question, whether the litigants -- you could get them from both -- should be required to file proposed findings of fact once a request has been made, but I don't know if that's --

PROFESSOR ALBRIGHT: What happens if you don't?

PROFESSOR CARLSON: I don't know. How about we vote, and we'll think about it and try and figure that out. Right now we don't have anything in the rules obviously.

HONORABLE TRACY CHRISTOPHER: I think it would be great to have them both do it, but it is added expense and what would be the point of having the --

PROFESSOR CARLSON: Then let's go with your proposal.

HONORABLE TRACY CHRISTOPHER: -- draft something.

PROFESSOR CARLSON: Let's go with your proposal and try and get a sense of the house.

CHAIRMAN BABCOCK: Okay.

HONORABLE TOM GRAY: I want to answer that question, what's the advantage of having the loser prepare something. If the loser has to prepare findings within some period of time after they make the request or at the time they make the request, it's a disincentive to just automatically make the request, and it discourages them from automatically firing off and making a request.

CHAIRMAN BABCOCK: Richard Orsinger.

MR. ORSINGER: I think that requiring the loser to prepare findings is pointless because losers will be afraid to prepare findings that support the judgment out of fear that they might be waiving their attack on the sufficiency of the evidence, which I think there is case law to support, that if you submit a finding that's against you, you've waived your evidentiary attack to sufficiency of the evidence. So the findings the losers are going to present would always lead to the reversal of the judgement, and so you're going to end up with opposite of what the judge could sign, and what good does it do to have a piece of paper that has the opposite of what the

judge could sign? Somebody is going to have to go type it the other way, and that's why I think asking the loser to submit them is pointless.

CHAIRMAN BABCOCK: Bill, then Justice --

HONORABLE TOM GRAY: Gray.

CHAIRMAN BABCOCK: -- Patterson, and then Gray.

HONORABLE TOM GRAY: Oh, Patterson.

HONORABLE JAN PATTERSON: It's not always Gray.

CHAIRMAN BABCOCK: Bill.

PROFESSOR DORSANEO: Well, I remember Gus Hodges years ago saying that one thing that could be done that the law is otherwise now for additional findings would be to ask the judge to find on particular issues or elements; and maybe the loser could do that, you know, ask, you know, to indicate where the findings need to be, what they need to be about. Otherwise, I agree with Richard. It's kind of pointless to ask somebody to request the judge to make findings that are completely contrary to what the judge has indicated she's going to do judgmentwise.

CHAIRMAN BABCOCK: Justice Patterson.

HONORABLE JAN PATTERSON: I agree with Richard's point, and I think the incentives are for the

winner to prepare them and to defend the judgment below, and then the so-called loser can make potshots at those, but I -- and I despair that we design a rule for lawyers by judges, and I think we need to take the lawyer's perspective at this point.

CHAIRMAN BABCOCK: Justice Gray.

HONORABLE TOM GRAY: I'm looking to incentivize the winning party to do a good job in their findings because of what the requesting party has proposed. Justice Christopher has stated that it's difficult to motivate the lawyers to do these findings. There's no negative if they don't. If all that is in front of the trial judge is the requesting party's findings and they don't support the judgment to the satisfaction of the prevailing party or to the nonrequesting party, it really gives an incentive to the nonrequesting party to do a good job and get them in timely for the assistance of the trial court.

That's the balance that I was trying to hit in doing the making the requesting party do them first and then the nonrequesting party -- and all of this is before the trial judge actually signs some, so they're not actually doing additional findings being requested. So that was my thought process.

CHAIRMAN BABCOCK: Jeff, still have a

comment?

MR. BOYD: Slightly off topic, but the answer to this question will help me make a decision on this one, and I think it's the dumb question of the day, but what happens if the judge won't file -- or doesn't or won't -- I mean, I think the answer is obvious, but this committee always shows me that what I think is obvious isn't obvious. Do you mandamus? Do you --

HONORABLE TRACY CHRISTOPHER: You appeal.

MR. BOYD: If the judge won't file findings of fact and conclusions of law, under the old or current rule you file the reminder saying, "Hey, you haven't done it," but we've gotten rid of that. Now what happens if the judge doesn't do it?

CHAIRMAN BABCOCK: In answer to your dumb question, Orsinger beat everybody to the punch with raising his hand, so --

MR. ORSINGER: I've got a lot of experience with this. 20 years ago you would get a reversal, but what's happening now is the appellate court will decide whether they can dispose of the case without findings because there are not so many different theories that if it's a one theory case, it's obvious that you lost all the findings, and that's the way you brief it, but in a complicated case where they truly can't figure it out,

what they do is they abate the appeal and send it back to the trial court with instructions to enter findings and then findings come back up and then you go forward with the appeal.

So I used to do this by my first point of error was it was reversible error for the trial court to refuse to render findings, but I now started filing a motion with the courts of appeals in advance of writing the brief saying, "I don't know what brief to write until I get some findings," and I'd say some of the time I'll get some relief at the motion stage, and some of the times I have to go ahead and file my brief and then they'll either rule on it without it or they'll abate it and request the trial court to forward findings, and I've had that happen a number of times.

CHAIRMAN BABCOCK: Be sure to put your answer in the form of a question when you're doing a Jeopardy thing.

MR. ORSINGER: Okay.

CHAIRMAN BABCOCK: That's good. Thank you. That's great. Any other discussion about Judge Christopher's proposed rule that we're going to vote on? All right. You want to state what it is that people would vote -- raise their hands "yes" for?

PROFESSOR CARLSON: Yes. Once a timely

request for findings of fact is made after an evidentiary bench trial, should the successful litigant be required to file proposed findings of facts and conclusions of law with the trial court within X days?

CHAIRMAN BABCOCK: Everybody that says "yes" to that question raise your hand.

MR. HAMILTON: You mean automatically?

MR. ORSINGER: No, there needs to be a request.

PROFESSOR CARLSON: Or upon direction of the court. Tell me how you want it, Tracy.

HONORABLE TRACY CHRISTOPHER: Yeah, after request for findings has been made, the winning party has to do it within a certain number of days. Has to.

HONORABLE TERRY JENNINGS: But, of course, any party can make a request.

HONORABLE TRACY CHRISTOPHER: Yeah.

HONORABLE TERRY JENNINGS: So even the winning party could make a request.

HONORABLE TRACY CHRISTOPHER: Right.

CHAIRMAN BABCOCK: Okay.

PROFESSOR ALBRIGHT: I guess if they don't make the -- if they don't do it in a certain number of days then the case goes up on -- I mean, then you have the situation like Richard just talked about where you have a

case with no findings and conclusions.

CHAIRMAN BABCOCK: I don't think that's exactly what Richard was talking about, was it, Richard?

PROFESSOR ALBRIGHT: Well, I mean --

CHAIRMAN BABCOCK: You were talking about where a request had been made and ignored.

MR. ORSINGER: Exactly, but that's what's happened. What's happened is a request has been made. The Rules of Procedure now make the winner do it. The winner won't do it either because they're not getting paid or they've been fired or they would rather have a presumption working in their favor than specific findings, so you've got no findings, and now what?

PROFESSOR ALBRIGHT: Now what?

MR. ORSINGER: Does the winner lose because they failed to do findings, or do they get held in contempt, or do they just be put on a blacklist where the judge pays them back next time, or, you know, what happens? How do you enforce it?

PROFESSOR ALBRIGHT: Unless you have an incentive, there's no --

CHAIRMAN BABCOCK: Isn't that different from what Judge Christopher's proposal is, though?

HONORABLE TRACY CHRISTOPHER: No. The question is what happens when they don't do it.

CHAIRMAN BABCOCK: Okay.

HONORABLE TRACY CHRISTOPHER: My proposal is just to state a rule saying they shall do it and then the --

HONORABLE TERRY JENNINGS: Figure out the consequences.

HONORABLE TRACY CHRISTOPHER: The question is what are the consequences if they don't.

CHAIRMAN BABCOCK: Nina, then Bill.

MS. CORTELL: I don't have any problem with the concept, but I do with a rule. I don't know why this can't just be done under court order or under 166a, pretrial order. It's just odd to me that we're making this part of the findings rules per se.

CHAIRMAN BABCOCK: Bill.

PROFESSOR DORSANEO: I agree with Nina. I think trial judges ought to order the parties to do proposed findings, you know, during the trial or before trial and get the template through findings that way. I think that would be desirable anyway. Presumably trial judges make findings or go through some process of finding on the elements of claims and defenses during the -- you know, during the trial. They don't just atmospherically decide that one party won and the other party lost, and the lawyers could be made part of that process. Now,

maybe someone would tell me that that's just too much to ask of the lawyers, that it won't happen, but that would be a way to ask in advance, to ask during the trial.

The other thing that I think is almost the opposite idea, if we're not going to have these findings, proposed findings or findings, be part of the judgment-making process, then why are we in such a big hurry to get them done before, you know, appeal has been perfected? I mean, it would stretch things out a little bit, but it takes a long time to get an appeal through the process of -- at least my appeals take a long time, and my sense is that -- and I don't know whether this is true in all courts of appeals districts -- that it takes six months to a year to get the case submitted, doesn't it? Huh? So why not wait until we know for sure that somebody is going to make use of these findings? I mean, either have them make use of the finding in making the judgment or have them make use of the findings in an appeal that's more likely to happen than the one that might not happen because it's not time to make that decision yet. So I'd either stretch out the process and key it to notice of appeal or something like that or by court order or in some means make it part of judgment-making.

CHAIRMAN BABCOCK: Okay. Roger.

MR. HUGHES: It kind of gets back to what I

said this morning. If ultimately the court of appeals is going to say, "It's not reversible error, we don't see why we need findings of fact," then ultimately there's not going to be any great incentive to do it. We will have the problem that the trial judge will say, "Winning party, send them to me." Winning party will go, "What do I want to do that for?" And then the appellant goes to the court of appeals and files a motion, and the court of appeals goes, "Oh, we'll just carry it along with the case," and then they brief it, and it's not until you get the opinion you find out whether you needed the findings of fact or not.

My humble suggestion, besides getting rid of the reminder rule, would be some form of -- and I hate to use the phrase, but Draconian automatic grounds to force the trial judge that upon application to the court of appeals the trial judge has so many days to prepare findings of fact and conclusions of law or it will result in a mandatory presumption that there is no evidence to support the findings. The reason I say that is that I did handle a case a couple of years ago where the appellee was just content to drag things out as long as possible. The longer the appeal dragged on, they were happy. He had gotten an injunction he wanted, and as long as the appeal was going on he had that injunction, and so he was happy

that the trial judge didn't file findings of fact and conclusions of law, happy that the court of appeals wouldn't order it, and so on and so on and so on.

So it seems to me what I hear is that these findings can be of great value to the court of appeals, and we ought to build in some means to get them here, but I'm sorry to say the only one that I think will actually be meaningful and will make -- motivate people to do it is the possibility of a procedural trap door, and that I think will result in people -- I mean, I don't like it personally. We all hate these, you know, procedural trap doors or whatever you want to call it, but other than that then you run into the case exactly like Mr. Orsinger has been with and I have, is you can't get findings of fact and now you have to write a 50-page brief, maybe attacking theories that even the trial judge didn't find on, and I'm not sure that's efficient either.

CHAIRMAN BABCOCK: Your proposal is not inconsistent with Judge Christopher's. I mean, she wants to require it. You just want to go further, right?

MR. HUGHES: Unless there is a procedural -- I mean, if you leave it, so to speak, and I hate -- if you leave it to be discretionary with everyone along the way whether to enforce it, I think you'll see fewer -- you'll see fewer and fewer findings of fact and conclusions of

law being prepared.

CHAIRMAN BABCOCK: Yeah. Well, her proposal is silent on what you just said, but it takes the first step. Carl.

MR. HAMILTON: Is there a problem now with the lawyers not preparing them when the court says "prepare them"?

HONORABLE TRACY CHRISTOPHER: Judge Yelenosky says no. I say it probably happens about 50 percent of the time, maybe 25 percent of the time, that even after you ask them to do it they won't do it, and certainly not within the time frame that they're supposed to get done.

CHAIRMAN BABCOCK: If you've just gone to the trouble to try a case and you win, why wouldn't you timely prepare the findings and conclusions --

MR. ORSINGER: I can answer that.

CHAIRMAN BABCOCK: -- and load up all the fact findings that you think the evidence supports and go for it? I mean, that doesn't seem sensible to me.

HONORABLE TRACY CHRISTOPHER: Time and money.

CHAIRMAN BABCOCK: Yes. Richard.

MR. ORSINGER: It's exactly what Roger said. Strategically if you have a multiple theory case and you

don't commit on which theory the judge relied on, the appellant has to overturn the judgment on all of those theories to get a reversal.

CHAIRMAN BABCOCK: Right.

MR. ORSINGER: So the only thing that makes an appellee want to do findings in a multitheory case is not to make the judge mad at them, which is why I think it's sensible for judges to tell people who should do the findings and I made the suggestion earlier on. When I try a divorce case, which is complicated and it's hard to pick a winner, the experience I have is that the trial judge will at the conclusion say, "And the wife's lawyers will draft the judgment" or "The husband's lawyer will draft the judgment," and they pick the lawyer that they trust is going to try to write a good judgment that isn't going to be reversed because they kind of know who the winner is. I made the suggestion that the trial judge should specify who is to do the findings.

Now then, I'm not going to go as far as Roger did to say that you should reverse the case. I think that maybe what you should do is fine the lawyer or put him in the jailhouse with a pencil and a paper until they come up with some findings. I mean, there's ways to get findings short of reversing a valid judgment.

CHAIRMAN BABCOCK: Is that Draconian enough

for you, Roger?

MR. ORSINGER: Well, I mean, it's self-enforcing. I mean, I don't disregard things that I am told to do by district judges, but apparently half the people in Judge Christopher's court do.

CHAIRMAN BABCOCK: Her former court.

MR. ORSINGER: And so if she put one of them in jail for 24 hours and then put up a little notice, you know, or something like that it would probably make that half go away.

CHAIRMAN BABCOCK: It may make the judge go away, too.

MR. ORSINGER: Well, that's the problem.

CHAIRMAN BABCOCK: Lamont.

MR. JEFFERSON: I understood Judge Christopher's concern to be, you know, deadline comes up, and all of the sudden the findings aren't there, and now the judge has extra work that the judge can't do and -- doesn't have the time to do. I think in the whole discussion, we -- we need to keep in mind that these really are the court's finding of fact, and that's the problem, is there's so much room for gamesmanship if one of the parties or the other is in complete control of what the findings and conclusions look like. At the same time, at the same time, I appreciate --

HONORABLE TRACY CHRISTOPHER: Let us make them orally on the record, which we talked about a long time ago, that, you know, then you don't have this problem.

MR. JEFFERSON: That's another possible rule, but what I was going to say is I'm not offended at all by the winner having to defend their judgment, and I think, you know, at least putting in something to the court that says, "Here's what we think you ought to do, court, in the way of finding of fact and conclusions of law that we can defend on appeal. We're going to be the ones defending this judgment" is a good starting point for the judge. Then the question becomes what's the consequence if that doesn't happen, and I think it -- you know, and one of the reasons that will, I think, influence everyone's vote is no one can come up with what an appropriate consequence might be, and I think maybe -- and this is complete brainstorming, but one possible consequence is the judgment doesn't become final, so it doesn't become appealable, or the appellate timetables get delayed until you get that draft or the draft somehow is tied to getting -- or the appellate timetables are tied to getting a draft from the winning litigant so that they can't appreciate their winnings until they've done their job. I wouldn't go as far as finding -- or throwing them

in jail, but I think that would give them enough of an incentive to at least do it, and there is nothing offensive about requiring the winner to do a little extra work to defend their win.

CHAIRMAN BABCOCK: Justice Jennings.

HONORABLE TERRY JENNINGS: I do disagree with that because, again, the presumption is on appeal that the judgment is correct after a trial because both sides have had their day in court, the issue is supposed to be decided, and the presumption is, is that the trial court's judgment is correct; and it seems very wrong to me to at that point in time put an additional burden on the winner of the case, the prevailing party, however you want to describe it, to have to go through the additional expense, now billing more hours, working harder, and going through the record and trying to pick out what's important and putting the burden on them to defend the judgment.

If the purpose of findings of fact is to help the appellate court in regard to any attack upon that judgment, it seems to me that the person who wants to rely on findings of fact to attack that judgment, they ought to be the party that bears the expense, because they didn't get what they wanted, the presumption is the judgment is correct because both sides have had their day in court, and it seems very wrong to me to put that burden on the

prevailing party, especially given the fact that under the law as it is right now a party can strategically file a request for findings of fact for the sole reason of extending the appellate timetable. Why cause someone to do additional work when the party who is requesting the findings of fact may be doing so only to buy time to determine whether they really want to appeal or not?

CHAIRMAN BABCOCK: Okay. Anybody else? All right. Why don't you restate Judge Christopher's proposal again, Elaine, if you don't mind?

PROFESSOR CARLSON: Sure.

CHAIRMAN BABCOCK: This is the third reading.

HONORABLE TERRY JENNINGS: I don't think findings are that helpful.

PROFESSOR CARLSON: Once a timely request for findings of fact have been made after a bench trial, an evidentiary bench trial, should the successful litigant be required to file proposed findings of fact and conclusions of law with the trial court within an enumerated number of days?

CHAIRMAN BABCOCK: Everybody in favor of that raise your hand. Not altogether now.

Everybody against? By a resounding margin of 5 in favor and 18 against, your prediction comes true,

Judge Christopher.

HONORABLE TRACY CHRISTOPHER: I had the sense of the room.

CHAIRMAN BABCOCK: Hayes.

MR. FULLER: I would be interested to know how everybody feels about expressly stating something in the rule that says the court may order one or more parties to submit proposed findings of fact.

MR. STORIE: Right.

CHAIRMAN BABCOCK: Okay. How do people feel about that?

MR. FULLER: So it's clear that the court has the right to do it and can enforce that order.

CHAIRMAN BABCOCK: Yeah, Richard Munzinger.

MR. MUNZINGER: They have the authority now in a pretrial order. I mean, a judge -- if I'm a judge and if I'm Judge Christopher and I don't want to spend all of that time, I can tell these two lawyers, "You fellows prepare your proposed findings of fact and conclusions of law before we start the evidence" or "Give it to me before the evidence is closed. I want it. I'm not going to enter a judgment without it." Am I going to say "no"? Of course not. I don't think you need to have a rule that says that specifically at all. I think the judge now has it within his or her discretion to require people to

produce timely requested findings of fact and conclusions of law.

CHAIRMAN BABCOCK: Nina.

MS. CORTELL: We do have it in the pretrial conference rule specifically, 166a -- no, it's a different deal. It's proposed findings. I think that's contemplating before the trial, but I guess that's the concern I have. I mean, I definitely have no problem with the court ordering it. I think if it's ordered it ought to be against the prevailing party, but I think the court has that authority.

CHAIRMAN BABCOCK: Okay, Hayes.

MR. FULLER: I don't disagree, and in Federal court that happens all the time. I mean, as part of the pretrial order we're required to submit proposed findings and conclusions, and but I think that would address the issue. Maybe we just need to put a note or something that the findings of fact -- reminding the court that they've got the ability to do that, although that's really kind of after the fact.

HONORABLE TRACY CHRISTOPHER: You know, it was in my standard pretrial order, and I would guess it was complied with 25 percent of the time.

CHAIRMAN BABCOCK: Jeff, then Frank.

MR. BOYD: Well, I wonder if there's a

difference between the two; and if there is, we just voted, no, we're not going to make it mandatory; but now we're saying that the rule ought to say that the judge can make it mandatory, which means it's mandatory. I guess the only difference between the two is it's only mandatory if the judge tells you to do it. Is that the key difference? Because if that's the only difference, then why -- I mean, isn't that what happens now? What we're saying is the judge already has that authority.

CHAIRMAN BABCOCK: Frank.

MR. GILSTRAP: Well, there's nothing explicit that says the judge has that authority unless he or she requests -- you know, has a pretrial. We're talking post-trial. It doesn't seem like it would be that bad to at least give the judge the express power to order one side to prepare it, and if Judge Christopher is tired of people ignoring her orders, she can come down on them and enforce it, but right now it's not clear that she can.

CHAIRMAN BABCOCK: Okay. Nina.

MS. CORTELL: Would a middle ground be to put a comment in?

CHAIRMAN BABCOCK: Okay.

MR. FULLER: That's kind of --

CHAIRMAN BABCOCK: "By the way, Judge, you may order" --

MS. CORTELL: Well, apparently there's some confusion about it.

CHAIRMAN BABCOCK: "In case you're curious." Yeah.

MR. BOYD: If right now it's not clear that a judge does have that authority, so let's say Judge Christopher orders the winning party to do it, and the winning party says, "No, your Honor, we're not going to do it. My client hasn't paid me, and I'm not going to do it."

HONORABLE TRACY CHRISTOPHER: "And it's going to mess me up on appeal if I do them."

MR. BOYD: Yeah. "Why would I? You know, it's all deemed in my favor," and right now under the current law can she enforce that order through contempt or otherwise? And I don't know that she can, so it's a bigger step that I think we're taking because we are basically saying, okay, let's do this alternative rule that says the judge, in fact, does have that authority, which is not just putting into writing in the rule what's already the case. It's creating some power that may not currently exist.

CHAIRMAN BABCOCK: Okay. Yeah, Carl.

MR. HAMILTON: Did this committee vote down the idea that Justice Christopher just mentioned about

having the judge orally put it on the record?

CHAIRMAN BABCOCK: I don't -- no, I don't think we voted that down.

MR. HAMILTON: I think that's a good idea.

CHAIRMAN BABCOCK: Well, doesn't the trial judge have the power to do that now?

MR. ORSINGER: Well, the Supreme Court has ruled that oral statements made by the judge do not serve the function of written 296 findings; and there is a reason for that, because a lot of times you've got some inaccurate statements or vague statements; and I believe -- there's a case, *In Re: W.E.R.*, I think is the case in particular where a judge in San Antonio was trying to justify an adoption proceeding; and the comments he made in the record were contrary to the judgment, which is, by the way, the same reason that we preclude findings in the judgment serving as Rule 296 findings, because you end up with kind of a mishmash of things that you have a hard time attacking on appeal or even figuring out whether they support the judgment or not.

CHAIRMAN BABCOCK: Justice Patterson.

HONORABLE JAN PATTERSON: Richard, does that case say that they can't be orally, or does it say that oral statements on the record are not necessarily findings?

MR. ORSINGER: It says that they're not findings but --

HONORABLE JAN PATTERSON: Because I think you could say, "These are my findings" and put them on the record; and, in fact, that's what has now happened in criminal cases, that we do have findings that are on the record that are formal findings; and we still have that bit of law that oral statements are not findings; but when the judge makes the statement that they are findings, they become findings and not just oral statements on the record. There's a -- I think the purpose of it is so that just statements that are made in the nature of a letter to lawyers or a statement on the record don't become formal findings, but I don't think that prohibits you from making formal findings on the record, but I'm not sure of the law in that area.

CHAIRMAN BABCOCK: Justice Gaultney.

HONORABLE DAVID GAULTNEY: I think Richard might be right that even when the courts have said, "These are our findings," the result has been that has not been treated as a finding of fact under the rules; and because you can have inconsistencies, say, between a finding of fact stated on the record and one that gets in writing later, or you might have something which is ambiguous, did he really mean that or she mean that to be a finding of

fact even though she said "I'm finding" or I -- you know, so you get an ambiguity that you presumably don't have in writing, and I think the case law is, as he says, that even if the trial court is saying on the record orally that these are intended to be the findings of fact, they're not treated that way currently.

HONORABLE JAN PATTERSON: It could be. Maybe that's what we ought to change.

CHAIRMAN BABCOCK: Bill. Dorsaneo.

PROFESSOR DORSANEO: Oh. My recollection is that Federal Rule 52 expressly provides for findings made orally in open court, but I don't know whether it's done that way with any particular regularity.

MR. GILSTRAP: Yeah, they do it. I've got a conference call at 2:30. I'm about to do the judge's findings.

PROFESSOR DORSANEO: That always seemed to me to be an easier way to facilitate the process of getting findings, where at this point we don't want any findings to be in the judgment, you know. We just want it to say, "I considered the law and the evidence," and here we go. We don't -- we want it to be in a separate piece of paper. We don't want it to be done orally on the record. We're stuck with this idea that we need these separate findings that have to be pretty detailed as a

matter of historical development. Maybe we just can't afford that anymore. Maybe we should do what the Federal courts -- at least some of them apparently do for the mind run of cases anyway.

CHAIRMAN BABCOCK: Rule 52 of the Federal rule says, "The findings and conclusions may be stated on the record after the close of the evidence or may appear in an opinion or a memorandum of decision filed by the court," et cetera, et cetera, and I've had it happen several times in my cases. R. H.

MR. WALLACE: Well, and what I've seen happen is everybody is done putting on the evidence, the judge says, "Okay, the evidence is closed, I'm going to take it under advisement, and everybody submit me your proposed findings of fact and conclusions of law," and you find out who wins or loses when you see which ones they sign, or somewhat. The judge doesn't have to annunciate who won or who lost at the close of a nonjury trial, I don't think, do they?

MR. ORSINGER: No.

HONORABLE TERRY JENNINGS: Well, you don't make your request until after a judgment, right?

MR. ORSINGER: Right.

MR. WALLACE: Well, maybe that's just one of those things they do, and they may be wrong.

CHAIRMAN BABCOCK: Richard Munzinger.

MR. MUNZINGER: Just back to the current rules and whether they contemplate a pretrial handling of this issue, Rule 166, the pretrial conference rule, subsection (k), the judge can have the parties or their authorized agents to appear before it for a conference to consider, separate (k), "Proposed jury charge questions, instructions, and definitions for a jury case or proposed findings of fact and conclusions of law for a nonjury case." I don't think there is a reason for us to add a specific statement in any rule relating to findings of fact and conclusions of law. I think the authority is there now, both pretrial, post-trial, and you're causing a problem I think that doesn't exist.

CHAIRMAN BABCOCK: Yeah, Nina's point was even though that's in the pretrial rule there's nothing parallel like that in the -- for the post-trial. Bill.

PROFESSOR DORSANEO: Why don't people do that? If you have that in your pretrial order, because it has a lot of other stuff that they don't want to do either?

HONORABLE TRACY CHRISTOPHER: Uh-huh.

MR. MUNZINGER: Because the assumption is that you won, why would you fool with it.

PROFESSOR DORSANEO: If the pretrial order

just orders a lot of stuff to be done that people are resistant to do because it's, you know, maybe --

HONORABLE TRACY CHRISTOPHER: Time, money.

PROFESSOR DORSANEO: -- they might regard it as pointless.

HONORABLE TRACY CHRISTOPHER: No, I ask them to, you know, identify their exhibits, motions in limine, jury charge or findings of fact. Those are the three things I ask for, and I would guess 20 percent of the people that get ready to start trial have done those things on any given day.

PROFESSOR DORSANEO: So you just give up.

HONORABLE TRACY CHRISTOPHER: No, I mean, it gets done. I mean, you know, you've got two philosophies when you're -- everybody's there, the lawyers are there, the witnesses are there, you know, the clients are there. I could say, "Boy, you guys didn't do your pretrial work, go away" or I can say, "Call your first witness." I mean --

PROFESSOR DORSANEO: Joe Estes would say --

MR. JEFFERSON: I think R. H. makes a good point. I mean, the timing is part of the problem. I think he's right. Try a case, the judge then says who wins, who loses. There's no judgment at that point, but the judge kind of gives you an idea of who is winning and

who's losing, and those aren't really findings because there is no judgment yet, which is the same kind of problem that you have because before you've tried the case, you know, he can guess what the findings are going to look like, but they're not findings. They're not findings and conclusions until after you've got a judgment.

CHAIRMAN BABCOCK: Okay. Elaine.

PROFESSOR CARLSON: You know, Bill, we did take to the prior subcommittee -- and maybe it's fertile ground to revisit -- the idea of using the Federal approach and allowing the trial judge the option of pronouncing the findings at the conclusion of the evidence, and that was rejected, but maybe we want to revisit that. I don't know. Richard, can I ask you a quick question?

MR. ORSINGER: Yes.

PROFESSOR CARLSON: Are you satisfied that the case law is if a request for findings of facts is made, or is it if findings of fact is made that the presumption is negated in favor of the judgment winner that they won on all grounds? Because I don't --

MR. ORSINGER: No, there's a waiver if -- as these omitted rules -- if you don't get at least one element on some --

PROFESSOR CARLSON: No, no, no, no. I'm talking about when no findings of facts are made. Someone asks Judge Christopher to make findings of fact. She doesn't make them. So is the case law if there's no findings of fact made, going back to Roger's point, we're going to presume that the trial court found on all grounds in support of the judgment winner?

MR. ORSINGER: That are supported by the pleadings and the evidence. So if you're the appellant and you don't have any findings and you have multiple theories, you have to show how each theory is reversible error or else you don't get a reversal.

PROFESSOR CARLSON: I understand the presumption. I mean, I'm just confused of when it's triggered. Is it triggered by a request for finding, or does the trial court have to actually make them to negate the finding presumption? In other words, if a request for findings of fact is timely made by a party, do the appellate courts still apply the presumption that the -- when no findings are made in response to that timely request, do the appellate courts presume that --

MR. ORSINGER: That's my experience. If they don't give you the relief of abating the appeal and sending it back down for findings then they are saying basically, "We're going to handle this case on -- on the

presumed findings."

PROFESSOR CARLSON: So the incentive for Judge Christopher were she still sitting on the trial bench would be to never make the findings.

MR. ORSINGER: Well, that's why several of us have said the appellees are not really -- the winners are not incentivized to give findings in a multiple theory case because the burden is greater on the appealing party to negate -- to use their 50 pages to negate four or five or six theories instead of just one or two.

PROFESSOR CARLSON: I thought -- and I must have been misinformed on this. I thought once a request for findings of fact was made timely that the presumption then was off the table.

MR. ORSINGER: That's not been my experience, but I've been, you know --

CHAIRMAN BABCOCK: Alex.

PROFESSOR ALBRIGHT: The way I remember it -- and it's been a while since I've looked at it, but the way I remember it is that if there is only one issue in the case --

PROFESSOR CARLSON: Right.

PROFESSOR ALBRIGHT: -- then you still presume that the judge found against you on that issue and then you feel like they don't have to send it back for

findings, but once you've asked for findings you have a right to findings if you have more than one issue, so then that's when you get this abatement or remand to get findings.

MR. ORSINGER: But, see, the problem the appellant has, you have a dilemma, which Roger talked about. If you go to the court of appeals on a motion and say, "Hey, I shouldn't have to brief six alternate theories of recovery in 50 pages. We ought to find out from the trial judge which one they believed." If the court of appeals abates, that's great, but if they don't abate, you have to make a choice of whether you want to submit a brief that's premised on it was reversible error, not to give me findings or whether you want to go ahead and brief your case to win it on the merits. I always brief my case to win it on the merits, even if my first point of error is it was reversible error not to give me finding. Is that the way you do it, Roger?

MR. HUGHES: Yes. I have had to do it that way, and the problem is you get to the end of the road and the court may see, "Well, we really don't need findings of fact now because, you know, you've fully briefed all of the issues that would attack every theory that could possibly support the judgment, so why do we need findings of fact now? Let's just get to the merits of your

objections." And, you know, my response to that is "Well, maybe the trial judge agreed with me on theory C and D and we don't need to deal with theory C and D; and, well, once again, that's like I said. Sometimes I don't find out the answer to the problem until I get the opinion.

CHAIRMAN BABCOCK: Jeff.

MR. BOYD: I just wonder, since the rule says, "The judge shall file findings," is there any case law on mandamus and whether a court of appeals has ever mandamused a judge to file them?

CHAIRMAN BABCOCK: Anybody know?

MR. ORSINGER: I don't think there is any case law on it.

MS. BARON: No.

MR. ORSINGER: And as a practical matter, whenever I've tried to do it over the many years it's been by motion, because I already have jurisdiction in the trial court, and it's -- the motion is derivative of the jurisdiction that already exists. Where mandamus is natural is where there's no appellate jurisdiction existing and you need to create original jurisdiction, but maybe mandamus would work, but then a lot of people don't want to pay to have a mandamus over one little teenie procedural step before they start spending all the money on writing the briefs.

CHAIRMAN BABCOCK: Didn't we have a discussion many years ago about whether or not upon request a trial judge would have to state the basis for a grant of a summary judgment?

MR. HAMILTON: Yeah, we did.

MR. ORSINGER: I would bet that we did debate that, and this is the same argument, you know, basically.

CHAIRMAN BABCOCK: Yeah.

MR. ORSINGER: If you have four different grounds in the summary judgment motion and the summary judgment is granted, you have to brief all four of them.

CHAIRMAN BABCOCK: Right. I mean, it was the exact same debate, because the argument was, look, if there's a summary judgment on five grounds and the judge grants the summary judgment then the appellant has got to brief all five grounds, but there should be a mechanism where the losing party can request and say, "Hey, which grounds did you grant them on?" And the trial judge would then say, "Oh, I did it on one, two, and five," and that way you wouldn't have to brief three and four.

HONORABLE TERRY JENNINGS: Or they always say all five.

CHAIRMAN BABCOCK: What's that?

HONORABLE TERRY JENNINGS: Or they would

always say all five.

CHAIRMAN BABCOCK: Yeah. Presumably, that's -- but, I mean, some judges might say, "No, I really didn't like No. 3 very well." So --

MR. ORSINGER: In the summary judgment context the policy is clearer than it is on a final trial, but if you just grant the summary judgment, and let's say we know that only grounds two -- one and two were upheld by the trial court and grounds three, four, and five were really rejected. We know that, but it's not in writing.

CHAIRMAN BABCOCK: How do we know that?

MR. ORSINGER: Well, I'm trying to set my argument up. So let's call it a hypothetical.

CHAIRMAN BABCOCK: So osmosis we know that.

MR. ORSINGER: So just imagine that -- well, without saying that, let's say there are five grounds, and the motion is granted, but if they had been forced to specify they would have specified grounds one and two. The appellate court can say, "Well, the summary judgment was wrong on grounds one and two, but it was okay on ground four, so no reversible error."

CHAIRMAN BABCOCK: Right.

MR. ORSINGER: If you force the trial judge to say, "I denied it on grounds three and four and five and granted it on one and two," does the appellate court

then have the right to say, "Well, one and two, which you actually did rely on, are wrong. We wipe them out, but we're going to go ahead and overturn your rejection of ground No. 3," because in truth, all we're trying to do is correct error. We're not -- I mean, theoretically we're not here to pick winners and losers. We're trying to correct errors.

CHAIRMAN BABCOCK: Wouldn't the appellee have to cross-appeal under your hypothetical?

MR. ORSINGER: Yes. And so --

CHAIRMAN BABCOCK: And then the court could do that.

MR. ORSINGER: In fact, I think the Supreme Court has even discussed this in cases, but I know we discussed it on this committee. Yes, it does make the appellant's job easier to overturn a summary judgment if you know which grounds they were granted on, but the appellate court's job is to reverse bad judgments, not just to reverse wrongly reasoned judgments that happen to be correct, and so you would think on summary judgment you would want the appellate court to be looking at all the grounds, even the ones that weren't granted, which I think the Supreme Court has ruled that, but it's been a long time.

HONORABLE NATHAN HECHT: I'm thinking

Delaney against City of Houston, or it might have been the other way around, but we said that you could do it, although the court of appeals might not want to do it because they might rather have the trial judge look at it first. Just depending on the size of the record, the trial judge might decide for prudential reasons, you know, summary judgment shouldn't be granted, it's just too complex, I can't really tell for sure. You know, there might be a lot of reasons why a trial judge might not grant the motion, and if he just said, "I didn't reach it," you might send it back to him to reconsider or her. But you could.

MR. ORSINGER: I think the policies are similar but more obscure in a final judgment because if you have alternate theories of recovery and it's ruled one way but for a reason not relied on by the trial court, that was the correct judgment. Do we want to reverse it and send it back down even though it could be justified on an independent ground that was unsuccessful but the appellate court finds would have been sufficient to support the judgment? It's a more obscure argument, but it's the same argument.

CHAIRMAN BABCOCK: Right. Okay. We got any more votes to take?

PROFESSOR CARLSON: No, I'm done.

CHAIRMAN BABCOCK: No?

PROFESSOR CARLSON: Thank you, everybody, for your comments. I will read the transcript and work on a rewrite.

CHAIRMAN BABCOCK: Okay. Great.

HONORABLE JAN PATTERSON: Do we have in there sufficiently that we ought to provide varieties of ways to give findings of fact, including oral, and consider the Federal rule. Is that --

PROFESSOR CARLSON: I can do that.

HONORABLE JAN PATTERSON: It just seems to me that we shouldn't have side litigation over findings of fact, that it is something that's helpful to the appellate courts, it should be facilitated. However, it should be done, whether it's oral and brief, and in some cases you only need three to five findings of fact perhaps, but it seems to me that we ought to be in the position of facilitating this process in some way. That's my only concern. I'm not sure which direction we're headed.

CHAIRMAN BABCOCK: Well, it seems to me that the Court would want to know any kind of improvements which -- and that might or might not be an improvement, but I'm always worried about that myself in Federal court when a judge sits up there and reads some stuff into the record, because I worry that they missed things, and

there's some things that they should find and they haven't found yet.

HONORABLE JAN PATTERSON: That's true, but if the only option is to not have them or to have side litigation over them once it goes up, I wonder whether that's not a better alternative; and I know that we have moved this way on the criminal side, that there is case law that if findings were not made that -- and they were requested, that we should have them and that they're sent back, and that there is some allowance of oral; but I just -- I think it might -- I think we deal with such a variety of cases from small to large in state court that we need some flexibility and that we shouldn't have a hard and fast rule in all cases in all parts of the state. I just don't see how that could work in this area.

CHAIRMAN BABCOCK: Carl.

MR. HAMILTON: We oftentimes say we're going to try something before the court because we don't want to go through the process of jury selection, the jury charge, which is often very complicated, but if we're going to just substitute the trial court for the jury then arguably we would submit to the trial court the same jury charge we would submit to the jury and just let the trial judge answer it, but we don't want to have to go into all of that. We want to let the trial judge shorthand all of

this and not have to deal with jury charges and complex questions, so he ought to be able just to dictate something on the record and say, "Here's what I find and here's who I rule for," and that ought to be the basis for his ruling, and I think that the oral dictation into the record is what we ought to do.

CHAIRMAN BABCOCK: Anybody feel that the oral dictation into the record idea is a bad idea? Anybody want to speak to the con side of that? Richard.

HONORABLE JAN PATTERSON: I think you're asking a leading question, Chip.

CHAIRMAN BABCOCK: I am, but I'm trying to speed up the discussion.

MR. MUNZINGER: All the presumptions on appeal and all the presumptions of law that come to my mind right now are that the court -- the law is interested in finality of judgments, and given the many different kinds of cases and the great commands placed upon our trial bench, the likelihood that a trial judge would dictate all the necessary findings in a correct form in a complicated case is slim, I think, and you might be creating problems with finality of judgments and creating points on appeal to require them to do that.

Federal judges, recall, they have the majesty of divinity behind them and, B, have all that

money and all those law clerks that let them do all this research and all this stuff before they get to trial. Our judges don't. They just -- Monday they handle a criminal case, Tuesday it's a divorce, Wednesday it's an auto accident, Thursday it's an anti-trust case; and that's not fair to trial judges, in my opinion.

CHAIRMAN BABCOCK: Bill.

PROFESSOR DORSANEO: Well, I agree with what Richard said. That's the downside, that they won't do it in an -- they don't want to do it because it won't be done well, so put the burden on the lawyers to do the paperwork.

CHAIRMAN BABCOCK: Yeah. Judge Christopher. Judge Christopher.

HONORABLE TRACY CHRISTOPHER: Well, I do think that there's a -- everyone here generally deals with big cases, and if a judge asks them to do proposed findings of fact and conclusions of law, they do it, but when we're talking about a rule -- and you know, maybe we could go back to our tracks. You know, in a track one case or a track two case we can do oral, findings of fact and conclusions of law. In a, you know, track three it needs to be written. Just so that you have, you know, in a simple case you don't get bogged down with this who's going to draft the findings of fact, the extra time and

money involved, when they're generally not really that necessary. You know, I could -- at the end of a trial I could say, you know, "I found in favor of the plaintiff on this breach of contract. I found against the plaintiff on the fraud claim, and I find damages of $30,000," and, you know, that should be enough.

CHAIRMAN BABCOCK: Gene.

MR. STORIE: I agree with those comments. I think the problem would come if the oral findings were exclusive in some way, because I've certainly had bench trials where the judge said, "Okay, I'm ruling for you and in your" -- you know, "I'll ask you to propose or prepare findings" or something like that, but in any event the judges say, "Well, these are my findings, and someone can submit more or possibly amend them, too." But if it's exclusive and the judge has to say it all right then, that's bad, but the good point about making oral findings is that gives the judge a chance to say right then and there while everything is fresh what the judge really had in mind so that three weeks or four weeks later when somebody has got to draft actual findings they'll know the direction they should be taking.

CHAIRMAN BABCOCK: Judge Peeples.

HONORABLE DAVID PEEPLES: Gene said a lot of what I wanted to say. I could go with oral findings if,

number one, there are presumed findings to fill in the gaps that support the judgment and, second, if written findings later can negate the oral findings. I think we would want both of those.

CHAIRMAN BABCOCK: Carl.

MR. HAMILTON: You could always provide that the -- after the judge says what the findings are the lawyers could also ask at that time for additional findings orally, and if the judge wanted to agree to them they could so that it all gets done orally.

CHAIRMAN BABCOCK: Richard.

MR. ORSINGER: An advantage to this process is that it's actually the judge's findings, because in most of the cases that I'm experienced with it's really the winner's findings that the judge just countersigns. So if you're going to get it from the bench at the conclusion of the hearing when the evidence is fresh, those will -- that will actually be the thinking of the judge, and so that could be a really important policy reason to allow it, because if you just do it the way we're doing it now it very seldom reflects the true views of the judge. It's just the views of the victor who wants to do everything they can to sustain their victory.

CHAIRMAN BABCOCK: Okay. Justice Gaultney.

HONORABLE DAVID GAULTNEY: I have some

concerns that have already been expressed about oral findings. I'm not opposed to them, but I think that if we're going to permit it we ought to make it clear that that's, in fact -- the judge ought to have some guidance in terms of making it clear on the record that that's exactly the exercise that he or she is engaged in at the time as opposed to simply thinking out loud.

CHAIRMAN BABCOCK: Yeah. Well, it's -- yeah, Buddy. Sorry.

MR. LOW: Well, one thing, if we want to tell or reveal, the same thing would be revealed in a jury trial that the rules require the court to prepare the charge. That's not the way it happens. The court has a charge conference. If you want findings of fact and conclusions of law, why couldn't the judge just have a findings of fact and conclusions of law, and you submit like you do your charges? And then you're going to be there and you're going to submit what you think they are, and the court can review them just like he does the charge to a jury.

CHAIRMAN BABCOCK: Well, it sounds like there's some significant support for the oral findings, at least to allow some flexibility on that, so I guess, Elaine, as you're going back over this, you might -- you and your subcommittee might look at that.

PROFESSOR CARLSON: I just have three final words.

CHAIRMAN BABCOCK: Three final words, okay.

PROFESSOR CARLSON: Groundhog Day.

CHAIRMAN BABCOCK: Groundhog Day.

PROFESSOR CARLSON: Back to the drawing board.

HONORABLE JAN PATTERSON: Or is that hyphenated? How many words is that?

CHAIRMAN BABCOCK: Justice Hecht has asked us to skip forward to item six, which is Orsinger, just as item four is, so he won't feel slighted since he gets to talk either way, and that is the notice to the Attorney General when the constitutionality of a statute, ordinance, or franchise is challenged in litigation; and I wondered if the exclusion of a rule of court was intentional on the theory that perhaps this committee would never, nor would the Court, sanction an unconstitutional rule.

MR. ORSINGER: I didn't understand your question, Chip.

CHAIRMAN BABCOCK: The proposed rules requiring notice to the Attorney General when the constitutionality of a statute, ordinance, or franchise --

MR. ORSINGER: Oh, you're talking about

constitutionality of a rule?

CHAIRMAN BABCOCK: Yeah.

MR. ORSINGER: So this is a quest of who guards the guards and who judges the judges?

CHAIRMAN BABCOCK: Well, it just occurred to me.

MR. ORSINGER: Well, I would suspect that the Attorney General doesn't want to have to defend the constitutionality of our rules.

CHAIRMAN BABCOCK: Why not? Somebody's got to do it.

MR. ORSINGER: Well, we're lucky to have with us today the Solicitor General of the State of Texas, James Ho, in the back of the room here. I'll introduce him to everyone. You can ask him if he wants to add that to his plate.

CHAIRMAN BABCOCK: Don't put him on the spot, but he can hop up any time he wants.

MR. ORSINGER: Unfortunately James is going to have to leave fairly soon, so the Attorney General's office has a policy not to comment on pending legislation; and they have, therefore, concluded not to comment on specific rule efforts, but they do have desires. They have pressures on the office. They have resources that are limited, and so James is here to answer any questions.

I wish we had a little bit more time to lay the groundwork so that the questions might come to the floor, but if he has to leave in about 10 minutes I'm thinking that any of you who have views about these issues or who have read this packet and would like to ask any questions about the practicality of the practice in Texas today or how a possible change might impact the Attorney General's office, if you have those ideas already, can you let it be known now and we'll have James address it? If not then I'll go forward with my introduction.

CHAIRMAN BABCOCK: Well, maybe since James has agreed to come, maybe he would have some comments or things he would like to say to us. So here's your shot.

MR. HO: I will just make one brief comment, which is I don't want to pressure the committee for time. I will stay as long as I can. I just needed to hit the road, frankly, to vote, to vote in Dallas County. I will take as much time as the committee sees fit.

CHAIRMAN BABCOCK: Well, as you can see, we can talk forever about things, so --

MR. HO: Just don't deprive me of my right to vote, that's all I ask.

CHAIRMAN BABCOCK: Okay.

MR. ORSINGER: I'm hoping in the run up to the meeting that this packet of information made it out to

you, April 9th, proposed rule regarding the notice of the Attorney General. Did people receive that by e-mail, anyone by e-mail? Okay. Got it by e-mail, so that means it got distributed. There are copies over there. This is just broken down to try to streamline our discussion. The information in here is, first of all, what are the issues we are considering. That's Roman numeral I. Roman numeral II -- and by the way, James, this packet is in writing in the folders on the desk if you want them.

Roman numeral II is the actual Civil Practice and Remedies Code provision that's current law that requires notice to the AG. Roman numeral III are cases interpreting the current Civil Practice and Remedies Code provision. Roman IV is the Federal statute that's the equivalent to the state statute. Roman V is the Federal rule, which implements the Federal statute and which is a model for one version of the rule the subcommittee is proposing. Roman VI is a student note written back in 1951 about the Federal rule when it was adopted. Roman VII are comments from the Texas Solicitor General in the form of James' e-mails back and forth about different concerns the AG had or proposals they would make about our proposed rules. Roman VIII is a proposed rule to adopt here in Texas that's patterned after the Federal Rule 5.1 but with a lot of deletions to reflect our

narrower scope, and then Roman IX is kind of a streamlined version of the rule that's just made up. It's not patterned after 5.1 at all.

On page two of the packet there's actually, believe it or not, a *Law Review* article that discusses this whole issue at the Federal level about the giving of notice when the constitutionality of statutes is being challenged, and this professor has proposed five matters of policy in making these decisions. You have to decide when notice is required, who provides notice, who receives notice, what happens if notice is not given, and what are the consequences if you broaden or narrow the notice requirements. The professor just said to broaden, but in one of our instances here we actually -- there's some desire to narrow the notice requirement to less than what the Civil Practice and Remedies Code suggests.

Roman II is Civil Practice & Remedies Code section 37.006. It's part of the uniform Declaratory Judgment Act. It only applies to declaratory judgments. Subdivision (a) says join everybody that has an interest that would affect the declaration, and subdivision (b) is the notice requirement here in Texas. If the proceeding involves the validity of a municipal ordinance, franchise, then you must make the municipality a party to the proceeding. If a statute, ordinance, or franchise is

attacked as unconstitutional, the Attorney General must be served with a copy of the proceeding and is entitled to be heard.

So that subdivision (b) there is the one operative statute we have to reference when we're designing a rule if we decide to adopt a rule; but understand that this last three words or four words that the Attorney General is entitled to be heard is also a kind of a standing rule; and it's kind of an intervention rule, because it implies that the AG has standing to participate in or be heard in private litigation that impacts constitutionality of statutes or ordinances or franchises; and it, likewise, at least insinuates that they can intervene in the proceeding and become a named party; and they do that a lot when there's a judgment that requires them to intervene for appellate purposes, but sometimes I understand -- and, James, maybe I can throw you a question. Does the AG's office sometimes participate before judgment once you receive notice of unconstitutionality?

MR. HO: Absolutely, and, in fact, one way to frame this question is to look at the Federal rule and to ask whether we want a similar rule in Texas. Under Federal rules, as you note in this package, we already have this notice and right to intervene, and the best

example is a recent example where we were in Marshall, Texas, in Federal district court intervening on behalf of a state statute that was being attacked as unconstitutional in a purely private litigation. We got notice pursuant to the Federal rule, and we did, in fact, exercise our discretion to intervene. So it works already in Federal law, been in Federal law for sometime. I think the question before the committee is do you want a similar regime in Texas law?

MR. ORSINGER: Okay. Let's move onto some of the cases interpreting this Civil Practice and Remedies Code provision, and we have to have this in context when we discuss some of our policy issues. The first case cited here is McPherson. It's a memo pending out of Amarillo court of appeals, but if you look in the paragraph at the bottom of the page, up about five lines, six lines, "We conclude the trial court was without jurisdiction." What happened was they failed to give notice, this litigant did, to the Attorney General regarding a declaratory judgment that an ordinance was unconstitutional, and that court held that the failure to give notice to the AG was jurisdictional, not reversible, but jurisdictional.

And if then you go over to the next page you'll see the commissioners court of Harris County case

out of the 14th District, and you look down at the last paragraph on that case, last sentence, "We hold that the requirement in section 11 of the Uniform Declaratory Judgments Act" -- which is identical to our section 37.006 -- "We hold that the requirement is mandatory and that failure to notify the Attorney General of the pendency of an action under the act in which the constitutional validity of a statute, ordinance, or franchise is challenged deprives the trial court of jurisdiction to proceed." So when we go back and ask what are the consequences for the failure to notice, which is one of the five proposed policy considerations proposed on page one, we already have case law indicating that it's jurisdictional if you fail to notice the AG.

The next case, *Gutierrez vs. Trevino,* if you'll look at the bottom of page -- pardon me, go to page five and look at footnote 6. This court, which was San Antonio, said in footnote 6, "This court has previously held service on the Attorney General is required even when a constitutional challenge is not brought under the Declaratory Judgment Act. Other courts have determined no service on the Attorney General is necessary when the constitutional challenge arises in the context of a nondeclaratory judgment proceeding," and I asked James by e-mail if there are situations in which he sometimes

receives notice of nondeclaratory judgment claims of unconstitutionality and sometimes where he finds out later on that it was litigated outside of the context and would have liked to have known that it was being litigated, even though it wasn't a dec action, and, James, what is your view on that?

MR. HO: It's definitely -- as you said, it's episodic. On occasion people will do it even though they're not technically required to, but it is by no means a universal practice, far from that.

MR. ORSINGER: And what is your preference since the statute, the only statute we have on point, only applies to the declaratory judgment actions and some courts have said nonetheless notice is required in non-dec actions, others have said, no, it's only required in dec actions? If we had the ability to write a rule that applied only to dec actions or to any civil actions, would you have a preference that we expand it to include any civil actions?

MR. HO: I think what I would say is it would help our office to know what issues are out there and then to be able to exercise our discretion to jump in where it seems appropriate. It would be helpful to know what's out there, and as in the Federal rule, if we had a state rule counterpart I think that would improve our

ability to serve people's interests.

MR. ORSINGER: Okay. So that's going to be one question that we need to discuss, is whether we want to expand the scope of the statute so that the notice requirement applies to any civil litigation governed by the Rules of Civil Procedure and not just dec actions. And I don't know, frankly, that we can do anything about the consequence of not giving notice to the Attorney General. If it's jurisdictional then possibly a rule can't change that. I don't know. That might be a point for us to consider, but if these courts have already decided that the failure to comply with the statute is jurisdictional, can we in our rule overrule those cases and provide for some other sanction besides a dismissal of the case?

CHAIRMAN BABCOCK: What's the basis for saying -- what is their rationale proclaiming that it's jurisdictional? Is it something found in the Declaratory Judgment Act? Is it something in the Constitution? Is it something in the way the courts are created?

MR. ORSINGER: Chip, I don't really know where the -- whether the first court that so held that had a rationale. I didn't read back far enough to find out what was the first court that said it and whether they justified it. The courts that have been writing on it

more recently seem to just be quoting earlier cases that say that it's jurisdictional.

CHAIRMAN BABCOCK: Gene maybe has the answer.

MR. STORIE: I'm going to take a guess anyway; and, Jim, just be close enough to bang me in the head if I say something dumb; but I know the rule used to be that statutory actions, you had to strictly comply with the statute; and there's a whole bunch of law on that. So my guess, and it's purely a guess, is that it might relate to that; and my follow-up guess would be not sure you'd get the same answer today after cases like Juvite Petroleum and all that stuff.

CHAIRMAN BABCOCK: Pam.

MS. BARON: Well, the Legislature after the Dubai case, which said all preconditions to a suit against the government that used to be jurisdictional or aren't jurisdictional under Dubai are now jurisdictional. So if this is considered a precondition to suit it would be a jurisdictional requirement under the statute.

MR. ORSINGER: Well, you know, it would make more sense if you were going -- if you're required to join a municipality and you don't, that makes a lot of sense that it's jurisdictional, but if you're just suing somebody else and they're trying to invoke a statute that

you think is unconstitutional, it doesn't necessarily follow that you don't have jurisdiction by failing to tell the AG in case they decided to get in the middle of your private fight.

MS. BARON: I agree with that, but there is a statute in the Government Code now, and I guess the question is what does it mean and would it encompass this as a precondition to suit that's jurisdictionally required.

CHAIRMAN BABCOCK: Preconditioned to suit against the government, though.

MS. BARON: Right.

CHAIRMAN BABCOCK: And so the classic cases he's talking about, the government would not be a necessary party and would not be a party.

MS. BARON: Right.

CHAIRMAN BABCOCK: Yeah, Justice Patterson.

HONORABLE JAN PATTERSON: I think the exceptions have now arisen to that statute, and so it's not quite as clear I think as it was after Dubai, and I wonder whether the U.S.A.A. case also speaks to that in some respect.

MS. BARON: No, it does not. Doesn't.

MR. ORSINGER: If we're going to consider it to be subject to the rule -- if we're going to consider it

to be subject to the rule, I guess we have to ask do we want to say that you have to reverse and dismiss, or would we allow the Attorney General to come in like they sometimes do on appeal? I mean, the real issue here is whether -- how do you be sure that the Attorney General knows that the constitutionality of a statute is at stake? If you tell the trial judge, "You can't grant a judgment," that will solve the problem because the plaintiff won't get what they want unless they give the AG notice, but then if it's the defendant that's raised unconstitutionality, they don't want a judgment. So, you know, what is their big drive to give the notice to the AG?

CHAIRMAN BABCOCK: Does it matter if the attack is facial versus as applied?

MR. ORSINGER: No, it really doesn't.

CHAIRMAN BABCOCK: Or should it?

MR. ORSINGER: You know, I don't think it should. I mean, if the statute is unconstitutional, that has an impact on everybody in Texas at least through stare decisis.

CHAIRMAN BABCOCK: Not if it's as an applied application.

MR. ORSINGER: Well, for all people who are similarly situated, aren't they bound by the stare

decisis?

CHAIRMAN BABCOCK: Well, it certainly would have precedential effect, but it's rare that two situations are exactly alike.

MR. ORSINGER: Well, I mean, if every professor at a public university in Texas is unconstitutionally impacted by a certain provision, their situations may be similar enough that stare decisis would affect it, but to me the question here is do we want to ensure that the lawyer representing the State of Texas has the opportunity to intervene and argue where their view of the public policy on the enforceability of the statute warrants government involvement in private litigation, and we know that the government is not itself bound by the result of the private lawsuit by any doctrine of res judicata or collateral estoppel, but it does issue a precedent that has some stare decisis effect that may influence subsequent decisions or subsequent trial judges.

So this is an option that the state Attorney General has to decide is this important enough that we care, and I've seen some of their correspondence. They say, "We think that the rights of the parties" -- pardon me, "We think that the issues will be adequately explored or defended by the parties, and we choose not to intervene," and other situations they do intervene, and

the question here is, you know, when and how often and what punishment?

CHAIRMAN BABCOCK: Okay. Justice Gray.

HONORABLE TOM GRAY: I note in one of the cases y'all were talking about what was the basis for this and whether or not they discuss it. On page seven of your memo, line one, two, three, four, five -- eighth line down in talking about jurisdiction it was, as I suspected, the discussion of indispensable parties; and the service on the AG to bring -- to at least bring them in was considered obtaining service on indispensable parties, so that's why they construed it as jurisdictional. And that general concept of indispensable parties, although still having some breadth in the law has been severely trimmed over the --

MR. ORSINGER: Justice Gray, that would imply that the State of Texas is an indispensable party to every lawsuit that raises the constitutionality of a statute, wouldn't it?

HONORABLE TOM GRAY: Arguably.

MR. ORSINGER: Surely that's overbroad. Surely the state ought to have the right to intervene if they wish, but they shouldn't have to be joined in every lawsuit that raises unconstitutionality.

HONORABLE TOM GRAY: Well, the way the

statute is worded, however, may limit that, Richard, and the statute says they are served with a copy of the proceeding and "is entitled to be heard." By service of a copy of the proceeding they are probably at least arguably made a party to the proceeding and they have the standing. Whether or not they choose to exercise it is their choice.

CHAIRMAN BABCOCK: Jeff.

MR. BOYD: I think the question of whether the state must be joined when the statute is challenged is actually one that's unresolved in the case law and pending in the court now in at least one case that I know of, but in getting back to sort of the prefatory issue about whether we can pass a rule that -- I mean, if the courts have said this is jurisdictional, this requirement is jurisdictional, I agree we can't pass a rule that says, no, it's not.

On the other hand, the converse is true, which is if we add to this rule, so, for example, we say you -- if we add to this statute by passing a rule that says you also must give notice if it's not a declaratory judgment action, for example, we can't make it jurisdictional by rule. In other words, I don't know how to enforce a requirement of our rule that goes beyond the requirement of this statute.

HONORABLE NATHAN HECHT: Well, the Federal

rules say the trial court can't render a judgment -- a final judgment holding the statute unconstitutional unless the Attorney General has been given notice, so if --

MR. BOYD: Does that make it jurisdictional?

HONORABLE NATHAN HECHT: Well, that's -- as the U. S. Supreme Court has said, the word "jurisdictional" has many too many meanings, and so I don't know the answer to that, nor can I tell from these cases exactly what they're saying, but I think by providing that the trial judge can't go forward, which is surely something that the rules could do, you've sort of preempted the issue. That's the remedy, and if the judge --

MR. BOYD: It's reversible, if not jurisdictional.

HONORABLE NATHAN HECHT: Yeah. And then if the judge went forward, you just send it back, and the Federal Rules Enabling Act is certainly no broader than the state Rules Enabling Act. So --

MR. ORSINGER: Chip?

CHAIRMAN BABCOCK: Yes, sir.

MR. ORSINGER: I would like to call attention to the *Willard vs. Davis* case out of the Fort Worth court of appeals, which is on page eight, the first full paragraph there is one of these anomalous situations

that's in the case law where neither party pled unconstitutionality but the trial judge nonetheless ruled based on unconstitutionality, and the question was whether the failure to give notice to the Attorney General somehow made that a problem on appeal, and what the Fort Worth court of appeals said is that if nobody pled unconstitutionality there was no duty triggered to give notice to the AG, and when the trial judge ruled that a statute was unconstitutional it was not a problem because the notice provision was not triggered by someone putting it in a pleading or a motion or a motion for summary judgment or as a response to a motion for summary judgment.

So I know that's kind of odd and we don't have to accept that as a correct statement of the law, but they say, "When neither party challenges the constitutionality of a statute, ordinance, or franchise, neither party is required to serve the AG with a copy of the pleadings, and the failure to serve the AG will not deprive a trial court of jurisdiction."

HONORABLE TOM GRAY: Richard, just to clarify the record, I think that's *Scurlock Permian vs. Brazos County* as opposed to the *Willard vs. Davis* case.

MR. ORSINGER: Oh, well, then I have misstated that.

HONORABLE TOM GRAY: I mean, you spoke correctly as to what the holding of the court was.

MR. ORSINGER: Yes. It's on page seven. I'm sorry. It was the Houston First District. Thank you for pointing that out. I didn't mean to lead us in error.

CHAIRMAN BABCOCK: Intentionally anyway.

MR. ORSINGER: Same thing, only First Court of Appeals.

CHAIRMAN BABCOCK: It would be -- it would be interesting to me to know whether the Federal Rule 5.1 that Justice Hecht just read deals with facial attacks on state or Federal statutes as opposed to applied attacks, because the way the language is drafted it sounds like it's referring to a facial attack; that is, the court's going to say that this statute is unconstitutional on its face and, therefore, should not be -- cannot be enforced consistent with the -- consistent with the constitution, as opposed to two private litigants are involved and the court says, "Well, as applied to the plaintiff here, it can't constitutionally be applied, but it's not unconstitutional on its face"; and so, therefore, the judge has not determined or entered a final judgment holding the statute unconstitutional, only the application of the statute, which makes a difference on a whole bunch of things. It would make a difference to me on

jurisdiction. It would make a difference on how -- and how serious the issue is with respect to notice to the Attorney General and the consequences of failure to give notice.

HONORABLE NATHAN HECHT: I was -- I don't remember if the Federal committee discussed that issue. We probably did in amending 5.1, but there's a lot of scholarship, of course, of what's facial and what's as applied.

CHAIRMAN BABCOCK: I know. And the Court's been -- Supreme Court's been quite interested in that.

HONORABLE NATHAN HECHT: Yes, and it's sort of a difficult line to discern, and I suspect that's why the -- neither the Federal rule nor the comment to it makes reference to it. So I don't -- I agree with you it obviously affects the calculus, but I don't think -- I think the Federal rule is intentionally broad.

CHAIRMAN BABCOCK: So you think the -- you would read the Federal rule to -- it says "may not enter a final judgment holding the statute unconstitutional," and I can see and I can think of cases where the court -- the trial court has said the statute is not unconstitutional, but the application of the statute to this set of facts would be unconstitutional and, therefore, can't be applied. That's different.

HONORABLE NATHAN HECHT: It is, and I think there's a question in the rule. I think the thinking was it's broad.

MR. LOW: Chip, wouldn't there be a third situation where you say the state -- they're saying it's unconstitutional, you would say, "Well, it does not apply."

CHAIRMAN BABCOCK: Not applicable law.

MR. LOW: Not applicable, and then the other where you're saying that in this particular case we're limited, it would be unconstitutional to apply it here, and then the third where you say it's just unconstitutional across the board.

CHAIRMAN BABCOCK: On its face, right.

MR. LOW: Yeah.

CHAIRMAN BABCOCK: Right. Gene.

MR. STORIE: Well, I have had several varieties of experience with this, so I would say for one thing I don't read the notice as requiring or suggesting intervention because the Attorney General can also show up and has shown up in the capacity of amicus. In fact, we had a case that Justice Jennings wrote on where I filed one for the agency. You also will see pleadings, for example, let's say the statute would be unconstitutional if construed in the manner suggested by, say, the taxing

authority, and so whether that's really as applied or on the face I'm not sure, because I guess it depends on how the Court ultimately construes the intent of the Legislature.

So you get several variations on the theme, and I do absolutely think that a broader notice provision is better because, again, using the property tax cases as an example, we would sometimes hear about those and get a chance to show up; but if the taxpayer says "Well, I'm not paying because it's unconstitutional" then that doesn't necessarily raise the declaratory judgment claim, but sometimes we would get notice of that, sometimes not, but purely on a sort of capricious basis of who the counsel were; or if they just did say that, in fact, it should be declared unconstitutional then we would. So I do think the broader approach is better to have the Attorney General say what the Attorney General thinks about the law when the constitution is in question.

CHAIRMAN BABCOCK: Yeah. I think, of course, we're all worried about our own personal experiences. When we challenged the advertising rules in Federal court we did give notice to the Attorney General, maybe some other people, too, and the Attorney General chose not to get into the fight, but let's say we hadn't, either because the lawyers for the plaintiffs were dumb or

overlooked it or something. It seems somewhat Draconian if a Federal judge goes to all the trouble to try the case, write a 50-page opinion, and then all of the sudden you say, no, he didn't have any jurisdiction because somebody forgot to give notice. Yeah, Buddy.

MR. LOW: Also you don't know until you've tried the case. The notice has to be given before. You don't know whether the judge is going to say on its face, you know, factually doesn't apply or what.

CHAIRMAN BABCOCK: Yeah, but you can plead that way.

MR. LOW: You can plead, but the Attorney General, if they're given notice then they can determine whether they -- in their judgment they think it's what it is.

CHAIRMAN BABCOCK: Right. And a judge, some Federal judges, can go beyond the pleadings --

MR. LOW: Yeah, that's right. That's right.

CHAIRMAN BABCOCK: -- and say, "I know you've only made an as-applied attack, but I'm looking at it, and it's facially" --

MR. LOW: They very well can. As long as it's in there it can be raised in any capacity during the trial.

HONORABLE NATHAN HECHT: Let me ask --

CHAIRMAN BABCOCK: Justice Hecht.

HONORABLE NATHAN HECHT: Could I ask Jim one question? Would the Attorney General ever intervene in state court to argue that a state statute was unconstitutional?

MR. HO: I don't want to say never. That would be obviously not frequent, but if you're asking situations where one of the parties calls a statute unconstitutional and we're asked to weigh in or we're given the opportunity to weigh in, certainly that's definitely an option. It would not be our traditional, customary function. Frankly, often what would happen is if we felt uncomfortable, we might just not intervene at all, but it's possible.

HONORABLE NATHAN HECHT: It is not a confinement of the Attorney General's office to defend the statute. If he thinks it violates, for example, the U. S. Constitution, he can take that position in state court.

MR. HO: If you're asking whether we consider ourselves to have the discretion to take any number of these positions, yes, I think we would assert that discretion.

CHAIRMAN BABCOCK: Yeah, Lonny.

PROFESSOR HOFFMAN: I guess my comments -- two. First is I'm sort of reminded of another statute

about notice which arises in a different context, not about challenging constitutionality but on the Federal side, the Federal Class Action Fairness Act has a provision that requires in any proposed settlement that you have to give notice to both Federal and state officials, but there are specific provisions that are in that statute that talk about the consequences of failure, have to do everything with you don't have -- the class members don't have to -- they're not bound by the settlement. In other words, the effects are written into the statute.

So my first comment is that this statute, the Federal -- the state one -- by the way, also the Federal one -- when it talks about constitutionality, it doesn't speak about the consequences of failure to give notice. That said, it leads to my second point, which is if there are court decisions that are out there telling us that that's a constitutional -- I mean, that's a jurisdictional issue, are there any precedents where this body would make a recommendation for a rule change that could potentially be broader than the statute? That would seem to be kind of ultra vires for us, I would think, because you have the possibility of us, you know, making a rule that could potentially trump that interpretation, so I would think that that would be something we would be

loathe to do.

HONORABLE NATHAN HECHT: Well, I don't think of a specific case, but if the statute doesn't specify the consequences, the rule certainly could, and --

PROFESSOR HOFFMAN: Even in the face of judicial opinions saying that we read the statute to have this effect?

HONORABLE NATHAN HECHT: I think even in the face of that.

PROFESSOR HOFFMAN: Okay.

CHAIRMAN BABCOCK: Roger.

MR. HUGHES: Well, two things. I agree. I don't think a proposed rule ought to get into the business of advising the Court or deciding what the effect of failure ought to be other than what was proposed in the rule, you can't enter a judgment until it's granted. I think it would be better off for the courts to work that out on a case-by-case basis. What I did want to speak to was I looked at the proposed rule, and it creates an exemption that the rule doesn't apply if the state of Texas, one of its agencies, or one of its officers or employees is involved in the suit. I assume that's sort of a presumption that when you're suing one of Texas' own they'll tell the Attorney General.

I think that might be looked at, part of the

rule might be looked at, because, for example, if it would apply to any low level officer and employee; and I think it might be wiser that if we're going to create an exemption it ought to be as tight as possible and restricted to cases in which either the Attorney General is already representing somebody, the State of Texas or a state level agency; and the reason we get into this, I know in 1983 cases we have -- there are real -- Federal civil rights cases, there are real fist fights over when you're suing the state or not, because there's an 11th Amendment problem and certain other issues. So you'll find scads and scads of cases trying to decide, well, is this particular department or agency an arm of the State of Texas or not, et cetera, et cetera, and they get into all these classifications. So I think if -- if the purpose of creating an exemption is simply not to require a useless act, we ought to draw it as narrowly as possible rather than as broadly as possible.

CHAIRMAN BABCOCK: Which would be different than the Federal, what Justice Hecht just said was the objective of the Federal rule.

MR. HUGHES: Well, I'm saying if we create an exemption saying, "In the following cases the rule doesn't apply," it ought to be more restrictive --

CHAIRMAN BABCOCK: Okay, I'm sorry.

MR. HUGHES: -- so that we're sure, rather than broader and creating situations where because you're suing the janitor the state has, he didn't tell the AG.

CHAIRMAN BABCOCK: Yeah, I'm with you. Bill, and then Ralph, and then --

PROFESSOR DORSANEO: In response to Lonny's question, I thought whenever the Texas Supreme Court makes a rule that's the equivalent of every other kind of decision that the Court makes and has the same effect as a court decision, so there wouldn't be any impediment to eliminating lower courts' interpretations.

CHAIRMAN BABCOCK: Okay. Ralph.

MR. DUGGINS: What was the origin of proposed 58.3(d), the rule Roger was just commenting on?

MR. ORSINGER: You're on page 16?

MR. DUGGINS: Page 17, the very last paragraph.

MR. ORSINGER: Well, Frank Gilstrap is the one who --

MR. GILSTRAP: Which one, (d)?

MR. DUGGINS: (d) as in dog.

MR. GILSTRAP: That was the exemption. That's based on the exemption in Federal Rule 5.1, which the idea is if the Attorney General is already in the case then you don't need to give him notice.

MR. DUGGINS: But what happens when you -- I understand as to the Attorney General being in the case, but what happens if it's a suit against an agency or an agency official which has its own legal department that handles matters and may or may not communicate that to the AG?

MR. GILSTRAP: I think that boils down to a practical question of whether or not the Attorney General would get notice in that case. You know, we had the comment that we ought to draw the exemption as narrowly as possible. Frankly, I don't see any harm in leaving the exemption out as long as the courts take the commonsense approach that if the Attorney General is already in the lawsuit --

CHAIRMAN BABCOCK: Probably got notice.

MR. GILSTRAP: -- that then he probably has notice.

HONORABLE NATHAN HECHT: It looks to me like -- Frank, is this right, you took 5.1(a)(1) --

MR. GILSTRAP: Yes.

HONORABLE NATHAN HECHT: -- and just moved it down to here?

MR. GILSTRAP: That's right. That's right.

MR. DUGGINS: Well, does that -- James, is that an issue where you sometimes have an agency legal

department handling a matter and your office doesn't hear about it?

MR. HO: There are some agencies that have their own representation either formally -- like Child Protective Services, for example, generally has their own litigation departments. Other agencies we generally defend, but there may be episodic situations where they'll want outside counsel, but I agree with Justice Hecht. I think this language you-all took from 5.1, I read that provision as trying to faithfully copy 5.1.

MR. DUGGINS: But do you think that -- would you prefer that it not have the exclusion for agencies and agency officers in light of the fact that you do have agencies with independent law departments? If you had a preference, which would it be on that?

HONORABLE JAN PATTERSON: Like state universities.

MR. HO: Like?

HONORABLE JAN PATTERSON: State universities.

MR. HO: We actually represent -- unless there are exceptions I'm not aware of, we actually represent universities in most cases, with the occasional outside counsel arrangements, but I think to answer your question, I don't have -- I can't think of any strong

reasons one way or the other. I think our default position was 5.1 seems to have worked pretty well on the Federal side, although obviously the Federal 5.1 applies in states, so we've had experience ourselves living under 5.1 in Federal court, and so I guess as sort of a prudential move, copying 5.1 as closely as possible seemed like one kind of safe approach, but to answer your question, I'm not sure a lot turns on this aspect. I'd have to think about it more before I could answer.

MR. DUGGINS: One other question. Somebody said earlier that they may read this proposed rule as mandating that the AG become a party. You're not seeking that, are you?

MR. HO: No. In fact, quite the contrary. We want the discretion. It would be a huge taxpayer resource issue if we would be forced to participate. One regime of giving us the opportunity I think is something that might prove helpful.

MR. DUGGINS: I just want to be sure about that. For those in the room that used to do energy practice, at one point they ruled that the department -- the temporary emergency court of appeals ruled that the Department of Energy had to be a party to every case seeking overcharges, and it just killed the Department of Energy, and so they had to change the rule.

MR. HO: That would seem unfortunate. To us I think the two core elements of 5.1 are the notice so that, you know, the opportunity to know that constitutional attack is taking place either by plaintiff or defendant and then, two, the accompanying opportunity to intervene at our discretion. Those are the two core elements we saw in 5.1.

CHAIRMAN BABCOCK: Justice Gaultney.

HONORABLE DAVID GAULTNEY: Frank, if the premise of the rule is to not apply if the Attorney General is already in the case, can the exception just say that; that is, doesn't apply if the Attorney General is already counsel?

MR. GILSTRAP: If the Attorney General already represents a party.

HONORABLE DAVID GAULTNEY: Yeah, represents the state, one of the agencies.

MR. GILSTRAP: I kind of like that. I'm a little leery of simply getting rid of the exemption because there's these cases out there where the courts say it's jurisdictional if you don't give notice, and they're obviously lusting to get rid of the constitutional claim anyway, and I'm a little suspicious of that approach, so I think that would be the best approach. It doesn't apply if the Attorney General is already in the case.

HONORABLE TOM GRAY: Would you include "or has already been provided notice of the proceeding"?

MR. GILSTRAP: I don't know.

CHAIRMAN BABCOCK: Richard Munzinger.

MR. MUNZINGER: I don't sue the state often, but some years ago I did, and as I recall, briefing an issue I couldn't join the division of the state. I had to sue the director of that particular department, so the suit is styled Munzinger versus director of whatever it is. How does that fit in the language of this rule? Is there some rule that makes the director of that department notify the Attorney General? If there isn't, have you met your policy reasons by a rule that doesn't require notice to the Attorney General when the suit is against an officer or an employee, but the state is not a party? They aren't a party. The party is Joe Schmoe, the director of whatever it was I sued, and that seems to me to be a problem.

I know in that case the Attorney General got involved, but I don't know their rules, didn't know their rules, and frankly didn't care about their rules. I just wanted to get jurisdiction over them to do what I had to do, but I do think that's a problem if you sue the officer, and he is the formal party. You haven't served the Attorney General. You haven't given notice to the

state. The state is not a party, but that department is implicated by the judgment, as would the state be if the claim were that some action of that department or what have you was unconstitutional.

MR. LOW: But did you sue him in his individual capacity as well as in his official capacity?

MR. MUNZINGER: I don't recall how I sued him, Buddy. I just know that the Austin court of appeals held I had jurisdiction over him, and I don't -- I'm sorry, it's years ago, and I just don't --

MR. LOW: No, I mean, if you sue them in their official capacity you're coming closer to --

MR. MUNZINGER: It's clear I sued him in his official capacity, but whether or not -- the statute may have required I send something to the AG. I just don't recall, but I do recall there is this distinction between suing a department of the state and suing the individual. You have to sue the officer who's in charge of the agency to get jurisdiction over the agency, or you had to then.

CHAIRMAN BABCOCK: Jim.

MR. PERDUE: I was just going to make an observation, Chip, on what you raised on 5.1 and now what would be this 53 is whether this is a facial challenge --

CHAIRMAN BABCOCK: Yeah.

MR. PERDUE: -- which makes a lot of sense,

because if the idea is that every piece of private litigation that raises a constitutional question in a pleading now has to get a letter of some sort to get a rule -- I will just tell you from personal jury practice right now every medical malpractice case that is filed has either in a pleading or in a response some issue in the case regarding the statute and whether it's constitutional, whether it be open courts and almost -- in every personal injury case that I can think of that has got punitive damage claims in it, there is usually a defense in the answer that will be a claim that exemplary damages are violation, you know, on due process right; and if you're -- I don't know that you're trying to capture that, that every single personal injury case with a paragraph either in a pleading or in a response that raises, you know, "Due process is violated by plaintiff's claims of exemplary damages" or plaintiff says that the statutory requirement for an expert report of 120 days violation of the court's rule requires that the Attorney General gets a full copy of the pleading, because it's just -- that's really just an issue between the two parties, as I see it, not a facial attack to the statute itself. So that would be a whole lot of filing into your office, it seems to me.

HONORABLE STEPHEN YELENOSKY: You mean a

facial attack or a declaration?

MR. PERDUE: Not even -- I don't think it raises a declaration. I think it kind of raises an affirmative defense or as an issue, but we've already got an opinion on whether the expert report requirement is constitutional that -- I don't know that raised a jurisdictional question of whether it was or wasn't because the Attorney General got notice or not. So, I mean, there are constitutional challenges obviously in effect which the Attorney General has been given notice of, but when you've got, you know, Joe Schmoe vs. Swift Trucking and there's an issue about due process if you get exemplary damages, I don't know that you're really trying to propose a procedure where there has to be a cover letter and that petition sent to the AG every single time.

CHAIRMAN BABCOCK: Yeah, there is hardly an answer in a case where there's punitive damages alleged that doesn't say something about the constitutionality of punitive damages if in this case it gets above, you know, really, one to one what is people are saying now.

MR. PERDUE: One to one. Yeah.

CHAIRMAN BABCOCK: Yeah. But Jeff, and then Tom, and then Frank.

MR. BOYD: I think what would help us kind of vet through this issue is if we read the *City of El*

Paso vs. Heinrich decision that the Court issued last year because it addresses in part what Richard -- I mean, Frank raised because, I mean, there's three really kinds of cases here. One is what we just talked about, private party versus private party; and usually in defense of some claim the party says, "Well, that statute you're suing under is unconstitutional." Then there are cases and what Heinrich dealt with is clarifying what is an ultra vires claim, what is a claim against a state officer or state official -- it was Richard who was saying that -- a state official where you claimed that that official is not acting as required by the law that governs that official.

So the purpose of the suit is to require the state official to comply with the requirements of the law; and what the Court said in Heinrich was clarified that, yes, in that kind of case, an ultra vires case, you must sue only the state official, you can't sue the state agency because it's sovereign immunity; but a footnote in that case said but if you are suing under the Declaratory Judgment Act, under 37.006, to attack the validity of the statute on which the official is acting then the governmental entity must be made a party; and so, I mean, there's a lot of details that come into play here that create a variety of scenarios that is what's, I think, making it difficult to figure out how to come up with one

rule that addresses all the different scenarios.

CHAIRMAN BABCOCK: Tom.

MR. RINEY: I was just going to say an affirmative defense attacking punitive damages as unconstitutional probably isn't covered by this rule because you're not specifically attacking constitutionality of the statute, you're attacking the process. But Jim's absolutely right on how frequently -- I would just say generally tort reform statutes are having constitutional challenges, and I think the language of this is broad enough to invoke it, and that's a lot. That's a lot of cases.

MR. PERDUE: That's a lot of --

CHAIRMAN BABCOCK: That's a lot of stuff, yeah. Frank.

MR. GILSTRAP: I agree that the language clearly captures those cases. I mean, the proposed Rule 5.1 says, "A party that files a pleading questioning the constitutionality of a Texas statute." The same thing on the next page, "A party who files a pleading or motion or response that alleges that a Texas statute, ordinance, or franchise is unconstitutional"; and even if you go back to the Declaratory Judgments Act, 36.006(b), on page two, "In any proceeding that involves the validity of" -- excuse me, second sentence. "If the statute, ordinance, or

franchise is alleged to be unconstitutional the Attorney General of the state must be served with notice." I mean, if you're going to exempt out private litigation, we need to have some -- and I think that we need to have some express language, and I think the Attorney General probably wants to get notice in those cases. That's what I'm sensing here.

CHAIRMAN BABCOCK: Yeah, Ralph.

MR. DUGGINS: As written, this is limited to the constitutionality of a statute. James, I note in your e-mail to Richard you suggest we -- this committee should consider challenges to agency rules and regulations?

MR. HO: If I was unclear, I'll try to --

MR. DUGGINS: No, I'm not suggesting you were. That was your --

MR. HO: We were suggesting that obviously so the committee can consider it or --

MR. DUGGINS: And I think we should consider that while we're looking at it.

CHAIRMAN BABCOCK: Okay. Roger.

MR. HUGHES: I realize the force of what everyone is saying about the length and breadth of where constitutional issues are popping up, either as, you know, a defense or, you know, a repost by plaintiffs in personal injury suits and tort reform, but once again, I go back to

I see this as a notice rule. I think we can leave it up to the Attorney General or the Solicitor General to decide on a policy basis whether they want to get involved in these cases as amicus or leave them alone and wait until they percolate up into the system.

As a suggestion, a corollary might be to enact a similar rule in TRAP so that if a case is going to be presented to one of the courts of appeal or Supreme Court, the Attorney General will be similarly notified because, number one, while a ruling by, you know, a judge in Willacy County or someplace might not carry a great deal of weight at one point, certainly an opinion from the court of appeals might be -- might be something that the Attorney General's office might want to get involved in, so that they can monitor issues and watch them. So that would be another suggestion.

CHAIRMAN BABCOCK: Okay. Yeah, Richard Munzinger.

MR. MUNZINGER: My memory is that there is a provision in the Texas Trust Code or the Property Code -- and I'm sure y'all could tell me if I'm right -- that the Attorney General is required to be notified in litigation involving trusts.

PROFESSOR DORSANEO: Charitable trusts.

MR. MUNZINGER: And they're never made --

they may become parties or not become parties, but you have to give them notice and then if they choose they want to come in and fight over it or your interpretation of trust bothers them or what have you, they're entitled to come in, and that's essentially every trust, isn't it?

MR. BOYD: Charitable.

MR. HO: Yeah, charitable.

MR. MUNZINGER: I understand, but, I mean, there's a whole bunch of charitable trusts.

CHAIRMAN BABCOCK: All right. Last comment before we break for our afternoon session and let Jim go vote in Dallas. Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: I apologize for missing the beginning, but in whispering to Tracy it sounds like this hasn't been covered. As long as we're doing a notice provision and the consequence is not jurisdictional, no harm done, but if it's jurisdictional then we need to be very, very careful.

CHAIRMAN BABCOCK: That's what I was trying to say earlier.

HONORABLE STEPHEN YELENOSKY: Maybe I missed that.

CHAIRMAN BABCOCK: All right, one final final. Nina.

MS. CORTELL: If I could just ask one

question of Jim, because I do think Jim Perdue's point is well-taken, and that is there are thousands and thousands of suits that will if you look at it very broadly bring into question the constitutionality of a statute, particularly as applied, as opposed to a direct attack against a statute facially; but if the Attorney General's office wants that notice, I would say fine, so to me it's a question of what the office wants.

MR. HO: Sure. Well, I think there are two values that we're trying to -- that's why I think there may be actually a way to accommodate everybody's concerns, and on the one hand, you know, at the end of the day the more information the Attorney General's office has, the more we can make wise decisions in terms of litigation. On the flip side, yes, absolutely we don't want to overburden lawyers or litigants. No question of that. I think the rule as has been drafted includes an electronic notification option, which I hope and expect to keep the burdens on litigants to a minimum, particularly for those who have these sort of frequent recurrences. It would be a matter of telling your secretary, you know, "Do the standard e-mail," if you will, you know, so please let me know if we should discuss or if that's not sufficient, but it seems like there may be ways to make this really nonburdensome for the parties.

MS. CORTELL: From your perspective, from the Office of Attorney General's perspective, you're not -- you still would prefer the more expansive notice. In other words, the presumption is you would prefer notice and then you-all make the decision whether to get involved.

MR. HO: Right. Especially when it comes to statutes, that's something where the more information we have about what's going on in the courts --

HONORABLE STEPHEN YELENOSKY: Do you have a position on the jurisdiction question?

MR. HO: I don't think we do.

CHAIRMAN BABCOCK: Jim, do you have an electronic address established for this purpose at this time?

MR. HO: We certainly can. That is very easily done.

CHAIRMAN BABCOCK: Yeah. Okay.

MR. HO: I think the rule as drafted contemplates that we would.

MR. ORSINGER: The version of the rule on page 18 has electronic notice.

CHAIRMAN BABCOCK: Yeah, I know. Yeah.

MR. ORSINGER: The version on 17 doesn't, but we can put it there.

CHAIRMAN BABCOCK: Okay. Jeff, final final final.

MR. BOYD: Does the AG also desire that when it is a municipal franchise or ordinance that's being challenged as unconstitutional? Does it matter to you?

MR. HO: It seems like it would make most sense to limit it to state statutes. That addresses your point and also addresses the earlier discussion about rules. Our, obviously, biggest responsibility is state legislative actions.

CHAIRMAN BABCOCK: Okay, great. Let's take our afternoon break. Jim, thanks so much for staying. You're welcome to stay longer, but not if you're going to get to Dallas on time.

(Recess from 3:15 p.m. to 3:46 p.m.)

CHAIRMAN BABCOCK: All right, Richard, what else do you want to say about this rule?

MR. ORSINGER: Well, one thing that we haven't mentioned so far is that the Federal rule requires the Federal court -- and so does the statute, I might add -- requires the Federal court to give notice to the affected Attorney General as well, which I think anyone who thinks about the state practice knows that that's impractical because they don't have the staff; and of the 3,000 cases on the typical district judge's docket, unless

somebody calls it to their attention, they wouldn't even know if the pleadings raised constitutionality; and here they are, you know, ruling on a summary judgment or something, and they have no idea.

CHAIRMAN BABCOCK: Yeah.

MR. ORSINGER: During the break we had some discussion that it's probably impractical to perpetuate the idea that this notice is jurisdictional. Among other things, if it's truly jurisdiction, the judgment would be subject to collateral attack; and so that means that if you didn't like your judgment you could come in two or three years later, rifle through the file, find out that there was no notice to AG, and then, voila, it's a void judgment. So it's probably never going to be upheld at the gift of the Supreme Court, and we should probably not assume a constraint. I mean, here I am talking like I have some sort of influence over the law, but Justice Hecht might.

CHAIRMAN BABCOCK: Richard, you are an architect of Texas law.

MR. ORSINGER: I would --

CHAIRMAN BABCOCK: You and Gilstrap, the two of you.

MR. ORSINGER: This might be an inappropriate thing to do, but, Justice Hecht, should we

assume for purposes of discussion that it will not ultimately be found to be jurisdictional?

HONORABLE NATHAN HECHT: Well, the -- it would never be designed to be jurisdictional. I mean, the Court would never write a rule like this thinking that it was going to be -- have any jurisdictional consequences.

MR. ORSINGER: Okay. So I think that we could be just brave and --

CHAIRMAN BABCOCK: Wait a sec, he didn't finish.

MR. ORSINGER: Oh, sorry.

HONORABLE NATHAN HECHT: Now, what the Legislature might do, we said -- I thought we reached a very reasonable decision in Lautzenheiser and said, you know, as long as the people know what's going on, the government is not prejudiced by the lack of notice, and the plaintiff should keep his judgment; but the Legislature came along and said you're suing the government, you've got to play hopscotch, you've got to do it all just right if it's a prerequisite to suit. Well, that's fine, but I mean, surely everyone can tell since Dubai that this court is very dubious about anything that has any of the classic characteristics of summary judgment jurisdiction, which two predominant ones are you can raise it at any time and you can attack the judgment after it's

become otherwise final.

So, you know, there are just lots -- there are things that that has to be true for, if the judge didn't have any power to act, wasn't subject matter jurisdiction; but for other things the Court does -- this court does not -- and for 20 years the Court has not wanted to see things be jurisdictional because the consequences are just too great, so I think that would be the Court's attitude about any rule that it proposed.

MR. ORSINGER: Okay. If you look on page 16, this is Jim Ho's e-mail from some inquiries I made, and number three, paragraph three, he indicated that in their view "unconstitutional" meant whether it's under the Texas or U. S. Constitution; and in paragraph four he said they would be interested in knowing not only about constitution challenges on state statutes, but also agency rules or regulations, which would be broader than the Civil Practice and Remedies Code. And there is, of course, a fundamental issue on page two about whether the -- whether this should apply to all proceedings or just to declaratory judgment actions; and, as you remember, the courts of appeals differ on that.

Paragraph (a) of 37.006, "When declaratory relief is sought," paragraph (b), "in any proceeding that involve it is validity of," so you could see how you could

argue that either way. Even though it's in the declaratory judgment statute, (b) seems to be quite broad. I think that if we write a rule we should respect the desire of the Attorney General's office, as I think we understand it, that they would like to know if the statute is being challenged, whether it's a declaration that's sought or not; and that kind of ties in a little bit, Chip, with your facial attack versus your as applied, because a facial attack probably will be broad as a declaratory judgment; but as applied is probably going to be a defense or the basis for a tort claim or something that's unique to the individual. So at any rate, Jim didn't seem --

CHAIRMAN BABCOCK: It's a little bit a matter of pleading, too, so you don't want a rule that people can plead around, or at least you might not want a rule that people can plead around. Ralph.

MR. DUGGINS: And for that reason I would urge that we change the draft rule where it says "drawing into question" and use "questioning," which I think is -- that's the Federal rule and broader to take into account your circumstances.

CHAIRMAN BABCOCK: But it would be interesting to hear what Jim has to say about, you know, every med mal case that is attacking the statute as

applied to the facts of that case, and is that going to be a big problem to give notice, Jim?

MR. ORSINGER: Jim is gone.

HONORABLE NATHAN HECHT: Jim Perdue.

CHAIRMAN BABCOCK: Jim Perdue.

MR. ORSINGER: Perdue, oh.

HONORABLE STEPHEN YELENOSKY: He's just wearing glasses. He looks different.

MR. PERDUE: Yeah. I was trying to find the language again because it's -- I mean, if you practice med mal law, you're real used to jumping through procedural hoops that sound pretty arcane, so the idea that you'd just have one more out there probably isn't going to be that big a deal, but, you know, Jim was talking about a specific e-mail device. I mean, Tom knows as well. I mean, this comes up on both sides. "Identify the statute that is claimed to be unconstitutional together with a copy of the paper challenging it." I just -- I mean, as long as -- if that is truly what they're trying to capture, that is, private litigation between two private parties who have just one paragraph amongst a bunch in a -- in an answer or in a pleading, you know, it's not a big deal to .pdf it and send it to whatever site they want, I guess. I mean, as long as it's -- the language -- the answer about jurisdictional has got my comfort level a

lot higher on the pro forma of the idea.

CHAIRMAN BABCOCK: Yeah. Yeah. I bet that helps. I'm sorry, Richard, I didn't mean to interrupt.

MR. ORSINGER: That's all right. Maybe the last thing is to just call everyone's attention to the rule on page 18, which is written more in the style of the Texas Rules of Procedure and doesn't purport to mimic the Federal rule at all, but it has essentially the same concepts. It's a little more elaborate. It says "pleading motion, response, brief, or other paper," and that "other paper" is meant to mean anything that might be filed, and it's still limited to statute, ordinance, and franchise. It could be broadened to include rules or regulations by a state agency, and it provides for notice either by certified mail or e-mail, and the notice is a letter with the style of the case and identifying the target of the constitutional attack, together with a copy of the paper, and I think I talked to Jim about that.

They probably will use the letter to decide whether to bother to read the pleading. I could be wrong, but if it's a fairly unique application that isn't going to have widespread effect on the people of Texas or whatever, they might not even bother to process the whole document. I don't know whether that's true or not, but he did desire to have a kind of a cover sheet or a letter

that they could read that would tell them what was at issue and then back that up with a copy of the summary judgment motion or the pleading or the response or whatever, and so that's just thrown out.

Also, there's a difference in placement. The last rule on page 18 is 47a is -- Carl, can I borrow your Rules of Procedure for just a second? I'm sorry.

MR. HAMILTON: Yeah.

MR. ORSINGER: Rule 47 is the rule that governs claims for relief, which seemed to me to be a natural place to put this. Rule 57, where Frank's located the proposed rule on 17, is the rule for special act or law, and it's right before pleading conditions precedent as a condition to recovery. So there is some issue here about exactly where would you put it and whether we want to follow the Federal format or whether we want to do more of a state format.

CHAIRMAN BABCOCK: Yeah, Ralph.

MR. DUGGINS: Well, since Mr. Ho is the one who raised it, and I have to agree with it, I would urge that we expand the proposed Rule 53(a) to include an -- state agency rule, other regulation, which you would have to add to that. In the caption you could say, "A statute, rule, or regulation," and then in proposed (a) after the word "statute" insert "or state agency rule or

regulation." And I think "rule or regulation" would follow after the word "statute" in (a)(1) and also in (2)(b), as in boy, after the word "statute."

CHAIRMAN BABCOCK: Justice Hecht.

MR. DUGGINS: And I also --

CHAIRMAN BABCOCK: Sorry.

MR. DUGGINS: One last suggestion, on (d), as in dog, I would strike "one of its agencies through capacity" and just have it read, "This rule shall not apply if the State of Texas is a party."

CHAIRMAN BABCOCK: Okay. Justice Hecht.

HONORABLE NATHAN HECHT: I wanted to add one other thing in response to Jim Perdue's comment, too, and that was something else that we talked about at the break, which is I wonder whether something should not be added to (c) or some other provision like (c) in the proposed rule on 17 that would make clear that the private party cannot take advantage of the failure to follow this rule, so that, for example, if the plaintiff in a med mal case claims that some provision of Chapter 74 is unconstitutional, but he doesn't give notice to the Attorney General, and he gets a big judgment and the defendant appeals and then one of the appellate points is that he never gave notice to the Attorney General of his claim, there's not going to be any consequence to that.

The only person this is supposed to benefit is the Attorney General, not any private party, and so if -- the private party cannot take advantage of any failure to give the notice provided. This is purely to preserve the state's interest in the state's own courts.

CHAIRMAN BABCOCK: Frank, and then Richard, and then Carl.

MR. GILSTRAP: I would agree with Justice Hecht. I don't think -- I mean, there are cases that have been cited in Richard's workup where the courts of appeal have said that there is a challenge -- there is a private challenge to a state statute, notice was not given, plaintiff loses, and I don't think we can just think that ultimately that's going to be rejected when it gets to the Supreme Court. You know, there are 14 courts of appeals, and I think between then and now I think some of them will seize on these cases, and I think we do need something in the rule akin to the Federal rule which says that there's a requirement, but there's no penalty, or there's a requirement, and the other side can't prevail on the fact -- based on the fact you didn't give notice to the Attorney General.

One other thing on the question of notice to state agencies, there was an e-mail from Pete Schenkkan, and I can't lay my hands on it --

CHAIRMAN BABCOCK: I've got it right here.

MR. GILSTRAP: Okay. Where he says there's something in the administrative code that requires that, and we just need to be mindful of that.

CHAIRMAN BABCOCK: Richard.

MR. MUNZINGER: Is the word "agency" a word of art to distinguish it, for example, from a bureau, a division, a commission, a board, or what have you?

CHAIRMAN BABCOCK: Sarah says yes.

HONORABLE SARAH DUNCAN: It's been interpreted by the Attorney General and in some instances the Legislature, but like it includes courts, even though they're an independent --

MR. MUNZINGER: That's my point. We want to be careful about the use of the word "agency" that we're using the correct word.

MR. ORSINGER: I have an alternative suggestion that may skirt that, which is "This rule shall not apply if the Attorney General of the State of Texas is already representing a party." Isn't the Attorney General going to be a lawyer in the case and not a defendant in the case, and whether you've sued the state or sued somebody that's an employee of the state, the AG will be representing them. So why don't we just say if the Attorney General is not already representing -- "This rule

shall not apply if the Attorney General of the State of Texas is already representing a party to the lawsuit," and then that eliminates all these distinctions.

MR. GILSTRAP: Otherwise you have to give notice.

CHAIRMAN BABCOCK: Carl.

MR. HAMILTON: If the Attorney General does not get notice, can the Attorney General attack the judgment collaterally somewhere or another on the grounds of jurisdiction?

HONORABLE NATHAN HECHT: Well, I don't think there should be any possibility of a collateral attack by anybody; but I do think if on appeal there is a constitutional issue and the Attorney General didn't get notice of it in the trial court, that the court of appeals ought to have the flexibility to either allow the intervention in the appeal and consider the AG's argument or, if necessary, which would wouldn't ordinarily be but for some odd reason it was, abate the appeal and let the trial judge hear anything the Attorney General want to present and then proceed with the appeal; but, again, the Attorney General doesn't have any interest that I know of in trying to set aside judgments. Its only interest is in being sure that the state's views on the constitutionality of statutes is represented, is heard by people that are

going to decide it and not just the private parties.

CHAIRMAN BABCOCK: Yeah. Richard, and then Justice Gray.

MR. ORSINGER: Couple more points. Under the Federal statute on page 11 there is an actual timetable, and it specifically gives the AG in the Federal system the right to intervene within 60 days, and it says, "Before the time to intervene expires the court may reject the constitutional challenge, but may not enter a final judgment holding the statute unconstitutional." So in the Federal side they give the U. S. or state AG 60 days after notice to intervene, and they give them an absolute king's X on any adverse ruling during that period of time. We're not discussing or proposing that.

I can tell you in my private conversation with James, by the way, my approach to this was let's let interventions be governed by the intervention rule and let's not have a specific intervention clause for the Attorney General. He would actually like to see this rule give the Attorney General a right to intervene.

MR. GILSTRAP: So they couldn't be thrown out for good cause. The court couldn't kick them out.

MR. ORSINGER: Yes, that's what the Federal statute does. It gives them an express right to intervene, and while the AG's office is not taking an

official position on anything, in private discussions it appears they would be happy if they had a clear right to intervene when unconstitutionality is an issue. That was two things we hadn't discussed, and then on Pete Schenkkan's e-mail -- and Pete has some experience in administrative areas. He said the Uniform Declaratory Judgment language -- Uniform Declaratory Act language in the Civil Practice and Remedies Code does not cover constitutional challenges to the validity of statewide agency rules, and then he points out that James Ho in his e-mail says the committee may wish to consider -- Pete says, "I recommend that our rule not cover them. A separate declaratory judgment statute, Government Code 2001.038, authorizes a declaratory judgment action to determine the validity or applicability of a statewide agency rule. Rule validity challenges can include constitutional validity challenges as well as challenges as to whether the rule is authorized by statute and consistent with statutory substance requirements and challenges to whether the rule was adopted in compliance with the procedural rule-making requirements of the Government Code.

"Under Government Code 2001.038 the state agency must be made a party to the action, a state agency," he says, "is always represented by the AG unless

the AG or state statute specifically authorizes other representation." That is good enough for notice purposes. So what Pete is saying is that there is a Government Code provision about attacks on state agency regulations that requires that the state agency be made a party and that we, therefore, don't need to handle that problem in this rule.

MR. DUGGINS: But he's mistaken when he says that every state agency uses the AG. Parks & Wildlife, for example, has its own legal staff and we sometimes do, and sometimes don't use the AG.

HONORABLE STEPHEN YELENOSKY: But those are all in Travis County and they're -- AG has always represented them. I mean, the AG or in-house counsel is always there.

MR. ORSINGER: But he says "unless there is a specific statute that authorizes other representation."

HONORABLE STEPHEN YELENOSKY: Well, the point is it's -- it doesn't need -- I think his point is it doesn't need to be addressed by this rule, isn't it?

MR. ORSINGER: That was his point, and so then the question becomes if the lawyer for the agency is defending the agency's regulations, do we need to tell the AG that an agency is defending its own regulations, or can we let the agency defend its own regulations?

CHAIRMAN BABCOCK: Justice Patterson.

HONORABLE JAN PATTERSON: I agree with Pete that they will be advised by their own counsel in some form. That was why I asked Jim while ago about the other agencies or institutions because, for example, the state universities very often have their own staffs handle litigation, but presumably they will notify the AG, and I agree with Pete that they will be parties and that we should not extend this to that -- that it's unnecessary to extend it to the rules.

CHAIRMAN BABCOCK: Okay. Yeah, Gene.

MR. STORIE: My question, and I don't know the answer, is whether a constitutional challenge to a rule would come up in the course of purely private litigation the way a statute might. I mean, it seems kind of unusual to me because it seems like you would also have some sort of exhaustion of administrative remedies issue in that instance, but I really don't know.

HONORABLE JAN PATTERSON: I can't envision one.

MR. STORIE: I can't think of one.

CHAIRMAN BABCOCK: Judge Yelenosky.

MR. PERDUE: Isn't it dispositive, I mean, a facial dispositive resolution of it? Well, I mean, there was a challenge that the -- for example, the expert report

120 days requirement was unconstitutional, which was rejected and found that it was. The AG's office was not involved in that case, you know.

MR. STORIE: But that's a statutory requirement.

HONORABLE STEPHEN YELENOSKY: Yeah, he's talking about --

MR. PERDUE: Oh, I'm sorry.

HONORABLE STEPHEN YELENOSKY: He's just talking about rules, and on rules if our rule is not going to address agency rules then why are we concerned about the issue of whether it's in-house counsel or the AG who is notified, because our rule isn't going to require or address notification of constitutional challenges to rules?

MR. DUGGINS: I don't think that's been decided, has it?

CHAIRMAN BABCOCK: No.

HONORABLE STEPHEN YELENOSKY: Well, okay. Well, then I want to make the point that we don't need to address it like -- as Pete said, because it's taken care of in the Government Code, isn't it, Justice Patterson?

HONORABLE JAN PATTERSON: I think it is, and also, I was trying to think back through any possible litigation where the AG would not be involved, and I think

even among private parties on the off chance that it might involve a rule, one of those parties is going to notify the AG, and they're going to --

HONORABLE STEPHEN YELENOSKY: Well, you're certainly --

HONORABLE JAN PATTERSON: There's going to be an incentive there, and so even in that instance -- I do have this concern that the AG be consulted on these because sometimes it is unsettling because you don't have all the real parties in front of you, and you wonder whether all of the sides are getting adequately represented, but in the case of rules I cannot think of an instance.

HONORABLE STEPHEN YELENOSKY: And there's no way you would get a declaration under, what is it, 2001.038, because, one, it would be mandatory venue in Travis County; and, I mean, we deal with that stuff all the time. We're never going to do that without having the AG in there from the beginning, no matter what the parties think.

CHAIRMAN BABCOCK: Jeff, did you have your hand up?

MR. BOYD: I'll pass for now. Thanks.

CHAIRMAN BABCOCK: Justice Gray.

HONORABLE TOM GRAY: I guess to address

several of the comments, the intervention, I think that it's well-served to make it clear that the AG can intervene and is not subject to being stricken at the trial court's discretion. They talked about the constitutionality being both the Federal and the state in Mr. Ho's memo, and I think that that needs to be expressly stated in the rule, that it is both the Federal and the state constitutionality being addressed, because some parties when they read that they're going to think only about the Texas Constitution or only about the Federal Constitution. So I think it would be well-served, and, frankly, I like the format and the structure of utilizing -- breaking it out into individual paragraphs and subparagraphs as is done in the -- on page 17 rather than where it's all run together on page 18. It's just easier to comprehend and kind of get your mind around each of the concepts individually.

And as far as the last discussion on the whether or not to notify the AG on some of the challenges, I think the agency rules or agency regulations should be included in the rule and that the AG -- even if the agency has already been notified and a party and everything, AG still ought to get notice because his comment was we would rather get the notice and choose not to participate than not have the notice and not have the opportunity to make

that decision at all.

CHAIRMAN BABCOCK: All right. Jeff, now you're revitalized.

MR. BOYD: So what will this rule do other than perhaps require notice in a non-UDGA case? What will this rule do that 37.006 and 2001.038 don't already do? And that's my concern with the rule, is I'm not sure it's going to require anything other than what the statutes already require.

CHAIRMAN BABCOCK: Judge Yelenosky, and then Frank.

HONORABLE STEPHEN YELENOSKY: Yeah. Yes, and James' -- James Ho isn't here anymore, but during the break I was saying if -- do they really want notification on things, number one, that they're already going to be represented on routinely without exception, 2001.038, do they want notification in all of these things because at some point it's sort of like the discovery response that says, "Oh, you want that stuff? Here's the warehouse." They're not going to be able to find the trees for the forest if they're getting notification on all this stuff, so I guess I would put the question back to him, as long as we're not talking about jurisdiction, as I said, they want notice, fine, but do they really want all of those notices.

CHAIRMAN BABCOCK: I think Bill and Jim had their hand up before you, Frank. Sorry. Bill.

PROFESSOR DORSANEO: I want to go back to the intervention idea. Is this a -- what kind of intervention is it? I mean, do you get the full party status, or do you have your rights as an intervenor limited to the extent that you can participate in the proceeding insofar as it involves a question of constitutionality only? What does this Federal statute mean when it says the Attorney General can -- may intervene? I don't think we want somebody from the Attorney General's office, you know, examining all of the witnesses on other issues and, you know, getting involved in the case the same way of a party, a real party would be inclined to do. It looks like it's an intermediate kind of thing, or ought to be, rather than a standard intervention, and if that's so -- or if it ought to be so, something ought to be said about that if we're going to go intervention rather than "entitled to be heard."

CHAIRMAN BABCOCK: Jim.

MR. PERDUE: Actually, I can address that, but the first thing I wanted to observe to the subcommittee was I kind of like the belts and suspenders concept, and the title of your proposed 47a says -- 47a says "Notice," and the first sentence makes it clear that

it is a notice rule as opposed to the proposed 53a, which does not read purely as a notice rule. It doesn't -- the first sentence doesn't talk about -- it says "a party shall," as opposed to "the notice shall be given." 47 reads more consistent, it seems to me, with a nonjurisdictional notice rule than 53. I don't know where you put it, and I don't know that the structure of 53a is not completely workable, but it seems like the title of 47a and the first sentence of 47a is more consistent with the discussion.

I actually had the U. S. government intervene under this 2403 for the limited purposes of the constitutionality of a provision, and it was -- it was purely a briefing question. They did not get involved in the evidence whatsoever. It was -- we had -- they intervened as a party for the constitutional issue. Because they were a nonparty, they came in, they fully briefed it. They were able to argue it. They actually participated in the appeal on the issue, but it was a purely legal issue. Now, I don't know that -- that was just the practice of it. I don't know if there was anything in a rule that would allow them to do more, but they never sought to do more, so the practice under the rule was let's tee the legal issue up and let them come in for that purpose.

CHAIRMAN BABCOCK: Frank.

MR. GILSTRAP: Apparently, I think, pretty much the whole proposal is up for discussion. I just want to call everyone's attention to one more item, and this has to do with the intervention. On page 17, part -- the third paragraph from the bottom, when we drew this, we were -- the approach we took was, well, the Attorney General didn't have to have the right to intervene, he already has the right to intervene subject to being stricken. Now, since then the idea has been raised that, well, maybe he can't be stricken, and that's a different thing. So we didn't give the Attorney General a right to intervene, but what we did do, excuse me, in the last paragraph -- excuse me, third paragraph from the bottom, (b), that's the one. We said the court could not enter a final judgment until 60 days after the Attorney General had been given notice, giving him the opportunity to intervene.

Now, having said that, I'm not sure that there may not be some circumstances under which the court might need the power to go ahead and declare a statute unconstitutional right away. I could think maybe in the face of an election or something like that, so maybe the hard and fast 60-day rule isn't a good idea, but that was the approach we took.

PROFESSOR DORSANEO: Well --

CHAIRMAN BABCOCK: Richard Munzinger, and then Bill. Then Nina.

MR. MUNZINGER: Does the Attorney General intervene in his own name, or is it the state that intervenes? If I intervene in a case as a party I'm bound by the judgment if I remain in the case, and does it raise problems if the Attorney General intervenes as to if the state intervenes? I don't know the answer to the question.

HONORABLE NATHAN HECHT: It's complicated, very complicated.

MR. MUNZINGER: That's why I raise it.

HONORABLE NATHAN HECHT: And the short answer is that the Attorney General, being a constitutional officer in Texas, is not congruent with the state and not just the state's lawyer. He can also take independent positions, and we wrote on this about 20 years ago, but more than that, it's hard to say, but that's why I asked Jim earlier if they would ever take the position that a statute was unconstitutional. He said they might, but it would be -- obviously the way the rule is written it presumes that he won't, but he's always showing up to defend the statute, but I think the real answer in Texas at least is that he could take the opposite position if he

wanted to. So he is a different -- he is different from the state.

CHAIRMAN BABCOCK: Bill.

PROFESSOR DORSANEO: I would prefer that proposed Rule 53 have specific language talking about the Attorney General's ability to intervene for the limited purpose, blah, blah, blah, rather than saying that this is like every other kind of an intervention under Rule 60 and 61.

CHAIRMAN BABCOCK: Gene, then Richard.

MR. STORIE: It is complicated, and during my 20 plus years of practice at the AG's office we would sometimes intervene. We would sometimes show up as amici. We would sometimes get involved at district court level. We would sometimes be very equivocal about whether a statute was unconstitutional because we might have litigation spurred by one of our opinions that concluded that the statute was probably unconstitutional, so there really is a very broad landscape of possibilities on that; and my idea -- which I haven't personally talked to Jim about it, my idea would be this is just a way to have notice to give the AG a chance to come in and talk about statutes where the constitutionality is raised.

So, for instance, if there are a whole bunch of suits that raise a particular issue, most likely

someone knows about that, but that clearly would be, you know, a factor in the AG deciding whether to weigh in; and sometimes you'll get stuff just like any of you could imagine where some guy says the whole damn tax code is unconstitutional. Well, fine, so, you know, maybe I'm not going to spend a lot of time on that; but if I see it's popped up in three or four district circuits around and there's possibly even a case pending about the scope of property tax issue, maybe I want to show up as an amicus or maybe we want to get involved as parties, I don't know. So that's kind of my overview of things.

CHAIRMAN BABCOCK: Okay, Richard.

MR. ORSINGER: Two points. Under that Rule 53a, paragraph (b), it only stays the entry of a final judgment. It doesn't stay the entry of a temporary injunction, and I discussed that with James, and he was -- he was not -- had no interest in this rule attempting to interfere with temporary injunctions. I'm not saying that we shouldn't consider it, but this is just a final judgment rule, not a temporary injunction rule.

On Bill's point about what is your degree of intervention and what will your participation be, on page 10 the Federal statute provides that the U. S. or the state is allowed to intervene for presentation of evidence if evidence is otherwise admissible and for argument on

the question of unconstitutionality. So the U. S. Congress gives the Texas AG the right, it appears, to present evidence if evidence is being taken. I don't know whether we want to be that specific.

I myself like just the regular old intervention rule, but if we're going to say that they have a right to intervene and we're going to try to define what that intervention is, we better have some serious discussions here. Are we going to preclude the AG from ever calling a witness? Is it going to be discretionary with the trial judge whether they can call a witness? You know, if we're going to try to get real specific on what their intervention is, we're taking the discretion away from the trial judge, and we should be very careful about what we do.

MR. DUGGINS: But, Richard, I mean, isn't 53a silent on intervention by design?

MR. ORSINGER: No, I don't know. Frank, you designed it, but there's been a lot of talk here about having a specific intervention right.

MR. GILSTRAP: Yeah, it was, because we were not contemplating at the time we drew it that the Attorney General would want a right to intervene as a matter of right and not be thrown out. We thought that it was enough that the Attorney General could intervene like

anyone else, subject to the right of being stricken for good cause.

MR. ORSINGER: But, see, James has made it clear in his e-mails and conversation that they would actually like a right to intervene just like in the Federal court system and that they can't just be told to leave. So then the question is if they have a right to intervene, does that mean they have a right to cross-examine every witness and attend every deposition and take their own depositions, or do they just show up and argue or what?

CHAIRMAN BABCOCK: What would be the good cause to strike their intervention under the current rule?

MR. GILSTRAP: Already waited too late.

HONORABLE STEPHEN YELENOSKY: Yeah.

MR. GILSTRAP: Case has been tried, that type of thing, you know, and there's still no final judgment.

HONORABLE STEPHEN YELENOSKY: Yeah.

CHAIRMAN BABCOCK: Okay. Anything else?

MR. GILSTRAP: That's all I can think of.

CHAIRMAN BABCOCK: I mean, that -- you're saying if you make it as a matter of right then you're saying that after all the things have happened, after you've tried it and, you know, you have a matter of right

to intervene.

MR. GILSTRAP: That's what they want.

CHAIRMAN BABCOCK: Roger.

MR. HUGHES: Well, I for one am not for cabining or restricting the right of intervention. I mean -- I mean, I don't think we should by rule limit the Attorney General's office to whether they can present evidence, et cetera, number one. Supposedly the whole purpose to giving the state notice is so they can come in and protect the statute, and I'm not sure we should get into the business by rule of limiting what methods are available to the Attorney General.

The second is I'm not particularly worried that the Attorney General is going to decide to become its own version of the Lone Ranger going around in these lawsuits and doing right as it sees fit. They have a budget like everybody else. I think they will be economical and limit their activities to what's necessary rather than just sort of take an interest in getting involved.

CHAIRMAN BABCOCK: Judge Yelenosky, then -- Nina, did I skip you?

MS. CORTELL: That's okay.

CHAIRMAN BABCOCK: No, no, no. Judge Yelenosky, sit down. Nina.

HONORABLE STEPHEN YELENOSKY: All right. Well, I mean, this issue is sort of there now. We had another district judge -- and it involves family law as well -- render judgment for a divorce from the bench to a same sex couple, and the AG moved to intervene afterwards, and the intervention was denied, and so is what we're proposing something that would dictate a different result there, allow that same result?

MR. BOYD: There was no challenge to the validity of a statute.

HONORABLE STEPHEN YELENOSKY: Well, that's what I think the judge who ruled that way thought in part, but the AG obviously thought they were entitled to intervene and may be taking it higher, so --

CHAIRMAN BABCOCK: Nina, then Richard, then Sarah.

MS. CORTELL: Sort of related to that point maybe, the way I read it anyway, I like the language in the proposed Rule 47a versus the 53a or whatever it is. The language that says this all comes into play when you have somebody alleging that a statute is unconstitutional. I far prefer that language to "bringing into question" or "questioning," with all due respect to the Federal scriveners. That just is a little bit broader and a little bit more ambiguous to me, so I prefer the language

that we proposed there. I do think if we provide a right of intervention we can't go with the current title in 47a. I mean, it has to be a broader title, maybe one such as in 53; and I, for the reasons stated by Roger and others, would be inclined to agree that the Attorney General have a right to intervene and that we leave it to the discretion of the trial court as to the parameters of that intervention. It doesn't seem -- it doesn't make sense to me that we go to all this trouble to give notice without a corollary right to intervene.

CHAIRMAN BABCOCK: You know, while you're talking about the difference in that language between 53a and 47a --

MS. CORTELL: Right.

CHAIRMAN BABCOCK: -- I think 47a can be read to apply only to facial challenges, whereas 53a could be more easily read to apply to -- as applied challenges, and it doesn't matter, but we might want to be clear whether we want to capture only facial or facial and as applied, because there's ambiguity in both of them, although I think the -- as you say, the 47a is more narrow, more limited; and 53a, which is modeled on the Federal rule, I think is intentionally, as Justice Hecht said, broad. So Justice Hecht.

HONORABLE NATHAN HECHT: And the "drawing

into question" language, the author was the Congress, and the Federal rules writers didn't think that we had any discretion to deviate from the language chosen by the Congress.

CHAIRMAN BABCOCK: But we do.

HONORABLE NATHAN HECHT: We do.

CHAIRMAN BABCOCK: All right. Richard, and then Sarah.

MS. CORTELL: Chip, if I could just --

CHAIRMAN BABCOCK: Sorry, Nina. She wasn't done.

MS. CORTELL: To your point I would just be more specific, and I would say whether the challenge be facial or as applied or something like that.

CHAIRMAN BABCOCK: Yeah, you could easily say if as a matter of policy you wanted to --

MS. CORTELL: Right.

CHAIRMAN BABCOCK: -- that "a statute, ordinance, or franchise is unconstitutional either on its face or as applied."

MS. CORTELL: Right.

CHAIRMAN BABCOCK: If you want it to be the broadest.

MS. CORTELL: Right.

CHAIRMAN BABCOCK: Richard. Sorry.

MR. MUNZINGER: On the question of intervention, we have a rule that says you may intervene subject to being stricken for cause, which would apply to the Attorney General's intervention as a party.

CHAIRMAN BABCOCK: Right.

MR. MUNZINGER: Declaratory judgment action statute says that the Attorney General is entitled to be heard, which no doubt, I would assume, means they knew the difference between saying someone is entitled to be heard and someone can intervene, and it would seem to me that that is a nice distinction to draw for a rule that we might write, he's entitled to be heard, which would not prejudice his right to intervene should he choose to do so.

CHAIRMAN BABCOCK: Great point. Sarah.

HONORABLE SARAH DUNCAN: Nothing.

CHAIRMAN BABCOCK: No, okay. Who else had their hand up? Justice Gray.

HONORABLE TOM GRAY: In the discussion of facial versus as applied, I don't think we're intending to; but we may be inadvertently changing some common law in that my recollection is that you can raise a facial challenge for the first time on appeal. You cannot raise a facial -- as applied challenge for the first time on appeal; and what we seem to be saying here, particularly

if we make it where it is a facial challenge, you have to send notice, that could be in effect a preservation requirement as well. I mean, in effect it is a preservation requirement, and may change some common law that we're not really thinking about changing specifically.

CHAIRMAN BABCOCK: Yeah, that's why I said to Richard earlier you may want to worry about somebody pleading around your notice requirement.

HONORABLE TOM GRAY: Well, and which raises the question of the -- in the way that 47a states it, it uses the term "alleges." The problem there is that actually mean it that way in a pleading, alleging in a pleading, the term that I thought was -- kind of fit better than what the apparently Congress wrote was just "challenging" the constitutionality, a broader term wouldn't be limited to, you know, alleging that a statute was unconstitutional.

CHAIRMAN BABCOCK: Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: Well, I would suspect that the AG wants notice of as-applied challenges, too, as I was recently tutored by the Third Court when it reversed me. Facial unconstitutionality is typically reserved for First Amendment type of unconstitutionality. When I reversed -- or rather I held that a statute was

unconstitutional because it provided -- it didn't provide basically a hearing, it went straight from the administrative agency to the court and then was on a substantial evidence review, I said that was facially unconstitutional. The Third Court reversed and said that because you could imagine a paper review in some instances, there was at least that instance in which it could operate constitutionally, and therefore, it can only be an as-applied challenge. So to say only facial challenges would take away notice regarding lots of things that the AG is probably interested in.

CHAIRMAN BABCOCK: Gene.

MR. STORIE: Yeah, I hope I'm not repeating, but I've seen at least one instance where the person deliberately pled it was only as applied in order to try to prevent the AG from getting involved in the case. So --

CHAIRMAN BABCOCK: Yeah. That was exactly what I said, you want to be careful not to have a rule that somebody can plead around for tactical reasons. Yeah, Jim. Oh, Nina.

MS. CORTELL: No, sorry.

CHAIRMAN BABCOCK: Oh, you're just scratching?

MS. CORTELL: Just scratching.

CHAIRMAN BABCOCK: Okay. Anybody else?

MR. ORSINGER: Well, since we're down here to the smaller issues, we're tacitly ignoring the directive in the statute regarding ordinances and franchises, and it was obvious that -- on page two, 37.006(b). It was obvious that James Ho was not that excited about getting notices on attacks on ordinances and franchises, and we are -- our two versions of the rule and our conversation is kind of neglecting that part of the statute. Of course, the obligation is still there because it's a statutory obligation, we're just not implementing it in the rules. So let's just be aware of the fact that we're requiring a rule-based notice for some kinds of things that are in the statute and not others.

CHAIRMAN BABCOCK: Okay. Why are we eliminating that?

MR. ORSINGER: Well, nobody seems to really --

MR. GILSTRAP: They're too much trouble, and we don't know what "ordinances and franchises" means. I mean, an ordinance is a municipal ordinance.

CHAIRMAN BABCOCK: We know what that means, don't we?

MR. GILSTRAP: I think that's what it's talking about. What's a franchise? It says "a municipal

franchise"? Is that like a cab company?

CHAIRMAN BABCOCK: Cable company.

MR. GILSTRAP: Yeah, but they're not talking about state franchises like corporate charters. See, it's just not very clear, and that's kind of why we're shying away from it.

CHAIRMAN BABCOCK: Okay. R. H., does that trouble you?

MR. WALLACE: (Shakes head.)

CHAIRMAN BABCOCK: Scratching your chin? Okay. Anything else? Yeah, Carl.

MR. HAMILTON: I just think it's a bad idea if we write a rule that purportedly is supposed to be implementing a statute and we leave something out like the franchises and the ordinances. That's going to send the wrong signal to lawyers. I think they're going to say, well, under the rule we don't have to give notice, but under the statute they do, so there's a conflict there.

CHAIRMAN BABCOCK: Well, to cure Frank's problem why don't we say "Municipal ordinance or franchise," paren, "whatever that means."

(Laughter)

MR. ORSINGER: We could put in a comment and refer to the statute. Those who are industrious will look the statute up and see it.

CHAIRMAN BABCOCK: That's an idea.

MR. GILSTRAP: And then you have kind of the whole area of, well, there are other local governmental entities that don't pass ordinances but do have enactments that have the force of law, such as a school board policies. You know, are we not going to give notice there? And those are challenged frequently, by the way.

CHAIRMAN BABCOCK: Okay. Yeah --

MR. LOW: A lot of the violation of agency rules or regulation or ordinances can be involved without the city or state being involved. For instance, evidence of violating agency rules is evidence of negligence just between private parties, or violating an ordinance is evidence. The train doesn't blow its whistle like an ordinance says, and railroad comes in and said the ordinance is unconstitutional. So there can be other attacks that the city or agency won't be directly involved in, but if they don't necessarily want to see an opinion that says this ordinance is unconstitutional.

CHAIRMAN BABCOCK: Tom.

MR. RINEY: I was just going to say if someone is attacking the constitutionality of a cable TV franchise locally, chances are the cable TV company is going to let someone know locally to get them involved. Same thing with a municipal ordinance. It's easier for me

to imagine that in some remote county in Texas the Attorney General doesn't find out that a state statute is being challenged than it is on a local basis with a municipal ordinance or franchise. So I think that the policy there could justify being different, and how do you write it in there? Who do they notify? How do you take care of the school boards? We can't solve everything in a rule, and I think the way that we have it, which doesn't specifically address municipal ordinance and franchise, may just be the best we can do.

CHAIRMAN BABCOCK: Okay. Is the plan, Richard, to take this discussion and try to meld our comments into a -- some version of 53a and 47a, or what's the plan going forward?

MR. ORSINGER: I don't think there was any support for 47a other than the title and the use of the word "allegation."

HONORABLE STEPHEN YELENOSKY: To title another proposed rule or the Texas --

MR. ORSINGER: I think we ought to work with 53a, which is an amendment or a modification to the Federal rule, and then we ought to probably fold in some of these terms. We haven't taken votes on anything, but there does seem to be some consensus or consensi or whatever you call it.

CHAIRMAN BABCOCK: Consensi?

MR. ORSINGER: And bring them back here next time for a clean look at the rule.

CHAIRMAN BABCOCK: Yeah.

MR. ORSINGER: On the other hand, if we've used up all the time that's available for this topic, we can just go draft one and submit it rather than bringing it back for further discussion.

CHAIRMAN BABCOCK: Well, I don't know if I've got an opinion on that. Justice Hecht, do you?

HONORABLE NATHAN HECHT: I don't yet. The Attorney General asked us to take a look at this last year, and we've had some other business of importance, and I think they recognize that, but I don't know if there is any urgency about it or not, and if not, we should just follow our usual procedures, and if there is, I'll let you know.

MR. ORSINGER: Then I would say let's draft a new version that kind of reflects some of these views, maybe have an alternative clause or two to put on the table and bring back a clean version and take a shot at it again, take shots at it again.

CHAIRMAN BABCOCK: Okay. Anybody object to that? Let's do that then. All right. It's -- we've got 20 minutes to go, we've got two items. The next one is

recusal and then we have juror questions during deliberations.

MS. CORTELL: We still have some from item 3 left over.

CHAIRMAN BABCOCK: Oh, we didn't finish 3, sorry. Okay. Well, let's go back to that one then, sorry.

MR. DUGGINS: Chip, that will definitely carry over, if you care to adjust it.

CHAIRMAN BABCOCK: If I what?

MR. DUGGINS: If you care to adjust the agenda, those discussions of new 301, 2, 3, and 4 will definitely run over to tomorrow.

HONORABLE JAN PATTERSON: That means we can cover recusal. I'm just kidding.

CHAIRMAN BABCOCK: In the 20 minutes remaining we can cover recusal.

HONORABLE JAN PATTERSON: No, I'm just kidding.

CHAIRMAN BABCOCK: Oh, okay. Well, then let's go back to our third agenda item and pick up where we left off, which is where?

MR. DUGGINS: 301.

MS. CORTELL: 301.

MR. DUGGINS: Which is Bill.

PROFESSOR DORSANEO: Okay. Well, 301 was discussed for about a hundred or so pages at the last meeting, and it's -- it had been redrafted to take into account the discussion, which I read again yesterday or the day before yesterday, and I've got a greater appreciation of what the discussion was about than I had the first time I read it, so there are some things that won't be in this Rule 301 that I'm going to mention, but probably before we do 301 -- and this also comes from the review. It would be good to look at proposed Rule 304 on page 18 because it's difficult to talk about plenary power in the context of Rule 301 without knowing what the plenary power rule that will replace 329b or part of 329b says, and it's really pretty simple, and it's not that much different. It's a little different.

In terms of duration, 304(b) on page 18 of our draft indicates that the plenary power expires 30 days after the judgment is signed, but it lasts for 105 days after the judgment is signed if a party timely files a motion for new trial, motion to modify, motion to reinstate after dismissal for want of prosecution. It actually says "until the earlier of the expiration of 30 days after the motion is overruled or 105 days after the judgment is signed," so we don't have a 75-day overruling by operation of law in this plenary power rule, which

maybe it was always necessary. We have overruling it, and maybe it should say "by order" in the plenary power rule, "or 105 days after the judgment is signed," and then you have exceptions where there -- you don't need plenary power, including "file findings of fact and conclusions of law if a timely request has been filed." It just says you don't need to have plenary power.

HONORABLE STEPHEN YELENOSKY: Right. Okay.

PROFESSOR DORSANEO: Right. So if you just do that, that's an exception. That's like correcting a clerical error. So that's the plenary power rule, and it takes me back to Rule 301, and there are actually two versions of Rule 301. The first one is more faithful to the draft that we discussed last time. The second one is more faithful to -- modified by me in trying to come up with a good Rule 301, drafted at the meeting last time by Justice Hecht to try to deal with some of the things -- to deal with some of the things that we addressed, but with Justice Hecht's permission I'd like to start with -- at least start with the 301 draft that was discussed at the meeting last time.

The first thing that was changed from the earlier draft was to make it clear that we're talking in this 301 about prejudgment motions and post-judgment motions, so there is a division by subdivision. The first

subdivision articulates the prejudgment motions, and the subdivision (b) is post-judgment motions, and that I think dispels some of the complexity or by having a more detailed organization makes things a little plainer.

The motion for judgment on the verdict draft that was presented at the last meeting had as an alternative in the second sentence for when the motion for judgment on the verdict is overruled by operation of law, which is a new concept. At the last meeting it was "as to any requested relief not granted by a final judgment under Rule 300" and then there was an alternative, "or on the date when the court's plenary power expires under Rule 304." Now, at the last meeting I said that the committee thought that the first alternative, "as to any requested relief not granted by a final judgment under Rule 300," was the better alternative, because it's -- it's much earlier than the expiration of plenary power, and maybe the expiration of plenary power is just too late in the process.

After reading the transcript, I now think at the very least that the issue is still alive as to whether it should be when the date the final judgment is signed or the date when the court's plenary power expires under Rule 304, and that's because of a fairly complicated discussion that we had. Justice Bland wanted the -- wanted all of

these motions prejudgment and post-judgment to be overruled by operation of law on the expiration of 75 days after the judgment was signed, including the prejudgment ones, and there was pretty substantial sentiment for that, and then Judge Evans said, well, but that won't really be true under the plenary power rule unless there's a motion for new trial, because you'll never get to 75 days, you'll run out of plenary power on the 30th day. So I'm thinking it can't be 75 days because you'll run out of time unless there's a motion for new trial. It's got to be either when the judgment is signed -- or when the final judgment is signed as in the current draft, Rule 301 on page nine, or when plenary power expires.

Now, I don't know whether that would be acceptable to Justice Bland. I was going to ask her that, and her concept is it all ought to be -- it all ought to be at the same time, right, and that kind of makes it more at the same time, huh? But it's a different time. All right. It's a different time. It's not just 75 days, and so that issue is still a live issue. I don't know whether we want to debate it in the 20 minutes here, but it's a live issue for (a)(1) and (a)(2). If we've gotten past the point, which I think we have at the last meeting, that these motions ought to be overruled by operation of law at some point, what point? And I thought we got through that

last time, but reading the -- all of the discussion and what people wanted, it became crystallized in my mind that those choices are still two legitimate choices. Huh? And that's something to be decided.

Now, this draft on prejudgment motions has a new paragraph (a)(3), "A party must submit a proposed form of judgment with a motion for judgment." That was in another part of this rule, but it seemed to me that -- that it's best placed in a separate paragraph under subdivision (a), prejudgment motions, that there is what you want a proposed form of judgment with some motion for judgment either on the verdict or notwithstanding the verdict or to disregard a jury finding. That doesn't have to be there, but it seemed to me to be a good place for it rather than leaving it in some larger paragraph later. So that goes -- and I'll -- I could keep talking, or we could stop talking and everybody else talk, or whatever you prefer, Mr. Chairman.

CHAIRMAN BABCOCK: Why don't we see if there are any comments on what you've been talking about so far? If not, you can keep talking. So all in favor of listening to Bill talk more.

MR. ORSINGER: Well, can I -- I'd like to ask a question.

CHAIRMAN BABCOCK: Richard.

MR. ORSINGER: Is there going to be a separate rule that talks about directed verdicts still?

PROFESSOR DORSANEO: Well, I don't -- I think the answer to that is yes. We didn't -- we didn't plan to repeal the directed verdict rule, which, frankly, could stand some work. I mean, it's not in this draft, but --

MR. ORSINGER: I have a concern that I may as well state now that this rule as rewritten seems to me to contemplate the use of these motions only in jury trials, but these motions are also used in nonjury trials, and in particular the motion to modify judgment may be the only way to preserve error to certain rulings that occur in a nonjury trial, and so I think that we should be sensitive to that fact. You're going to hear from me as this discussion progresses unless we take it up next time when I won't be here. I'm a little bit concerned that the use of some of these motions in nonjury trials is different from its use in jury trials, and I don't want to overturn that practice.

PROFESSOR DORSANEO: So do you think we need to put in the -- in this rule the directed or instructed verdict rule or some successor to it?

MR. ORSINGER: It makes perfect sense to me if you're going to gather your prejudgment motions

together --

PROFESSOR DORSANEO: Yeah.

MR. ORSINGER: -- that you ought to put in a motion for directed verdict, which does affect -- it is a prejudgment motion that does affect the judgment, but if you do that you should also mention a motion for judgment, because if you don't have a jury and the plaintiff rests in a nonjury trial, you don't move for a directed verdict. You move for a judgment.

PROFESSOR DORSANEO: Uh-huh.

MR. ORSINGER: And so I don't mind coming back or e-mailing you some language that might make sense for nonjury. I just think that we ought to be sensitive to the nonjury application of this rule.

PROFESSOR DORSANEO: I think those are good points, and maybe in the prejudgment motions we should have, you know, motion for judgment in a nonjury case.

MR. ORSINGER: And a motion for directed verdict in a jury case.

PROFESSOR DORSANEO: Motion for directed verdict, but not a motion for summary judgment.

MR. ORSINGER: No.

PROFESSOR DORSANEO: Okay. Make the dividing line along those lines. I think those are good suggestions.

CHAIRMAN BABCOCK: Roger.

MR. HUGHES: I was just voting for the professor to keep speaking.

CHAIRMAN BABCOCK: Okay. Frank.

MR. GILSTRAP: The purpose of having these motions overruled by operation of law is to preserve error without requiring the court to make a ruling.

PROFESSOR DORSANEO: Yes.

MR. GILSTRAP: And that's the only purpose, and so the only need is that they be overruled by operation of law at some point. For uniformity Justice Bland proposed 75 days. Justice Evans pointed out, well, sometimes you don't reach 75 days. We just need a date. Well, we know that the court is going to lose plenary power at some point, so why don't we make them all overruled by operation of law when the court loses plenary power because at that point the court can't grant them anymore, and that solves that problem. It's simple, it's one date.

PROFESSOR DORSANEO: Well, I'm -- as you can tell from my comments, I'm kind of leaning in that direction, otherwise I wouldn't have made such a big deal out of it.

MR. GILSTRAP: Well, I agree.

MR. ORSINGER: Well, I might comment on the

motion for -- any time you're moving for what the judgment should say rather than moving to set the judgment aside, the existing case law is that if you make a motion for a judgment and a judgment that's contrary to that gets signed, it was implicitly overruled; and that makes logical sense to me; and there's lots of history for that; and I would hate to lose the case law that says you preserved your error, although maybe it doesn't matter if you preserved it the other way by operation of law; but if I move for X and the judge signs Y, he's implicitly -- she's implicitly overruling X.

CHAIRMAN BABCOCK: Okay.

MR. ORSINGER: So I kind of like this idea that your motions on what the judgment should look like are defacto ruled on when the judgment is signed. Whether it's where you've got a separate order or not, the judgment speaks for itself.

PROFESSOR DORSANEO: The motion for judgment makes good sense to put in here. The directed verdict one is a little harder for me because of the context in which -- how those things happen. You know, they're done sometimes -- sometimes by a written pleading, but perhaps not.

CHAIRMAN BABCOCK: Okay. Any other comments about the proposed 301(a)? You want to talk a little bit

about 301(b), Bill?

PROFESSOR DORSANEO: Yes. And, Richard, I would be glad to receive your e-mail --

MR. ORSINGER: Okay.

PROFESSOR DORSANEO: -- draft suggestions. Okay. Post-judgment motions, I put motions for new trial first and the term "ordinary motion for new trial" perhaps is not a good idea. I put it in there as an adjective in front of "motion for new trial" to distinguish the ordinary motion for new trial from the motion for new trial on judgment following citation by publication, and I don't really think "ordinary" is necessary, but it's at least for our discussion purposes helpful to understand, you know, what I'm talking about.

Now, the primary rule in our package here for motions for new trial, as those of you know who were here last time is Rule 302, which provides a lot of information about the grounds for motions for new trial and how the new trial practice operates, and all this rule is doing with respect to the motion for new trial is indicating how it operates from a timetable standpoint, and otherwise the manner in which the ordinary motion for new trial is determined to a small extent.

Now, the timetable is the same generally as 329b, but as we talked about last time, there is several

significant -- and the time before that, too, there are several significant changes. The first change in the first paragraph on nine is the addition of the wording "regardless of whether a prior motion for new trial has been overruled." 329b in a case decided by the Supreme Court make it plain that if a motion for new trial has been overruled then you can't amend the overruled motion simply because it's not permissible to do that under the language of the rule, which is the way the rule is interpreted. So one big change -- and I don't think this is controversial anymore -- is that "one or more amended motions may be filed without leave within 30 days, regardless of whether a prior motion for new trial has been overruled."

The next paragraph is added as a result of some discussion that we had about whether trial judges actually get to see these motions or whether they, as we've discussed earlier, just kind of find their way into some file that's really not the court's file, and I think Harvey Brown suggested after we had a discussion that we use the same kind of language that's in Rule 296, discussed earlier, about the clerk having the obligation to call the motion to the attention of the judge, and the idea there, as I understand it, is that that language could be shown to the clerk and the clerk will behave, or

maybe behave or behave more than happens now, and that that was kind of an okay fix.

Now, I put this fix only in post-judgment motions. I didn't put it in prejudgment motions, and I don't know whether it needs to go in prejudgment motions, too, but I wanted to point out that I didn't put it in prejudgment motions. Then I added a sentence, "but the failure of the clerk to do so does not affect the preservation of complaints made in the motion." Now, that's not exactly the language that Chief Justice Gray suggested or the language that Justice Duncan suggested, but I thought it was good enough, but it might not be. I thought that it was satisfactory in my own humble opinion, and that's new material in this draft. Again, I restrict it to the post-judgment motion context.

"The overruled by operation of law within 75 days after final judgment is signed, if not determined," you know, "earlier by signed written order" is the same taken from 329b, and then again at the end there is a big change that takes the law back to what I thought it was some years back, that the court has discretion to consider and rule on a motion that's not filed within 30 days, discretion to consider and rule on, but also discretion not to. Again, in my experience you could get trial judges to do that most of the time so that the complaint

could be preserved for appellate review, and then there's the sentence, "The trial court's substantive ruling on the merits of such a late-filed motion is subject to review on appeal," and what I intend for that to mean is that if the trial judge ruled on it, it's subject to review on appeal. Excuse my phone, where is it? I'm sorry, I'm in trouble now, but I'll have to wait.

The -- so that's the motion for new trial provision. And the biggest change in that is the clerk must immediately call such a motion to the attention of the judge.

The motion to modify is put second because instead of repeating everything, as in the prior draft, instead of repeating the second unnumbered -- the second unnumbered paragraph in (b)(1), the third, the fourth, and the fifth unnumbered paragraph in (b)(1), I wanted to be more economical, so I added the second paragraph in (b)(2), "A motion to modify a judgment must be filed within the time" -- and maybe "within the manner" -- "prescribed by subdivision (b)(1) of this rule for an ordinary motion for new trial." That's the way current 329b handles the timetable and procedure between motions to modify and motions for a new trial, and I thought -- I tried to do it a variety of different ways, and that's the best I could do to not be redundant, and I thought it was

clear enough. If people think it should be repeated, it can be repeated, changing the words "motion for new trial" to "motion to modify."

HONORABLE JAN PATTERSON: Bill, is the motion to be -- to call it to the attention of the judge by the clerk, is that addressing the notion of presentment?

PROFESSOR DORSANEO: Yes. If I'm understanding your question, that's -- that's -- it's kind of in lieu of a party's presentment. That's the presentment by the clerk, as I understand it, as a mechanism for judges to maybe have a better shot at seeing these things that are filed that are overruled by operation of law, at least post-judgment ones. Was that helpful? Was that answer helpful or no?

HONORABLE JAN PATTERSON: Yes.

CHAIRMAN BABCOCK: Carl.

MR. HAMILTON: On the motion for new trial, why did we change "shall be filed within 30 days" to "may be filed within 30 days"?

PROFESSOR DORSANEO: You know, I went -- I changed that the other day back to "must," okay, but the idea is that it -- is the last paragraph cuts you more slack. "As long as the trial court retains plenary power the trial court has discretion to consider and rule on an

amended motion for new trial." Okay. Maybe it should say "must." Right, Carl?

MR. HAMILTON: I think so.

PROFESSOR DORSANEO: I thought that --

MR. GILSTRAP: Except that you don't file one.

PROFESSOR DORSANEO: -- the "as long as the trial court retains plenary power" paragraph was kind of a getting a little more discretion, but I wouldn't -- I don't have trouble having it say "must."

MR. GILSTRAP: The reason you say "may" is because you don't have to file one. This way it sounds like you've got to file a motion for new trial, you must file it.

CHAIRMAN BABCOCK: Jeff, and then Sarah.

MR. BOYD: I was going to say the same thing, is that language, either "may" or "must," has to apply to either, whether or not you file or whether or not if you file you file within 30 days. If you write it either way it's confusing unless you add language like "An ordinary motion for new trial, if filed, must be filed within 30 days," but if you just say "may" then it sounds like, well, if you want to file it you can do it within 30 days, but you don't have to. If you say "must," it sounds like you have to file one.

CHAIRMAN BABCOCK: Sarah.

HONORABLE SARAH DUNCAN: I think that was my point in it saying "may," is that you don't have to file a motion for new trial within 30 days after the judgment is signed. It may be that only some things are preserved if they're filed with -- if the motion is filed within 30 days. It's certainly that the trial court doesn't have to rule on it if it's not filed within 30 days, but even under current practice it doesn't have to be filed -- a motion for new trial doesn't have to be filed within 30 days. So it seems a bit odd to tell people it must be filed within 30 days when in truth it doesn't have to be.

MR. BOYD: But then why have this sentence in there at all?

HONORABLE SARAH DUNCAN: Well --

PROFESSOR DORSANEO: Well, what does 329b say?

MS. CORTELL: 329b(a) says --

MR. HAMILTON: Says "shall be filed."

MS. CORTELL: -- "a motion for new trial, if filed, shall be filed prior to or within 30 days after the judgment or other order complained of is signed."

PROFESSOR DORSANEO: Why don't we do that --

MS. CORTELL: Yeah.

PROFESSOR DORSANEO: -- or take the "shall"

-- make "shall" "must, if filed." I think that's a good suggestion.

MR. BOYD: Well, but Judge Duncan is saying that, actually, it doesn't have to be filed within 30 days.

HONORABLE SARAH DUNCAN: It's whether the trial court has to rule on it. Right, I can file it. As long as the trial court has plenary power I can file a motion for new trial. The judge may not have to rule on it or consider it because it wasn't filed within the 30-day period, but I can file it, and the trial court has discretion to grant it.

PROFESSOR DORSANEO: Yeah.

MR. ORSINGER: Does it preserve error, Sarah, if you file it late?

HONORABLE SARAH DUNCAN: I think not, because they don't have to rule on it.

CHAIRMAN BABCOCK: Carl.

MR. ORSINGER: It's overruled by operation of law.

HONORABLE SARAH DUNCAN: No, it's --

MR. HAMILTON: The paragraph on plenary power says the trial court has discretion to consider and rule on an amended motion for new trial, and it doesn't say it has that power on the --

HONORABLE SARAH DUNCAN: That overrules Brookshire.

PROFESSOR DORSANEO: There could be plenary power if there was a motion to modify, but not a motion for new trial. There could be another motion that would extend plenary power.

HONORABLE SARAH DUNCAN: This is one of the first lessons my mentor, Dr. Hatchell, taught me 20 years ago, is that just because the rule says it has to be filed in 30 days, that only goes to whether it's going to be preserved error, whether it's going to -- judge is going to have to either rule on it or it's going to be overruled by operation of law, but that doesn't mean you can't just file one because you want a new trial, and the trial judge has plenary power, and there's nothing anybody can do about that at least until --

CHAIRMAN BABCOCK: Recent.

HONORABLE SARAH DUNCAN: -- the last few months.

MR. BOYD: But if -- okay, then how long does plenary power last if no post-judgment motion of any kind is filed?

HONORABLE SARAH DUNCAN: 30 days.

PROFESSOR DORSANEO: 30 days.

CHAIRMAN BABCOCK: 30 days.

MR. BOYD: So then you must do it within 30 days if no other motion extending plenary power has been filed.

HONORABLE SARAH DUNCAN: If you want to extend plenary power, but if plenary power has already been extended by somebody else or something else --

MR. BOYD: Okay. So if nothing else has extended plenary power then a motion for new trial must be filed within 30 days if you're going to file it.

HONORABLE SARAH DUNCAN: If you want to file one.

MR. BOYD: So that's the distinction is if there's more plenary power then it's not "must," it's "may."

PROFESSOR DORSANEO: Well, the question is how much of that do you want to write down --

MR. BOYD: Right.

PROFESSOR DORSANEO: -- in this little sentence.

CHAIRMAN BABCOCK: David Jackson.

MR. JACKSON: Bonnie is sitting here telling me I need to point something out.

CHAIRMAN BABCOCK: That she's tired.

MR. JACKSON: The clerk --

CHAIRMAN BABCOCK: Yeah, we're over our time

limit, so let's recess till tomorrow at 9:00.

MR. JACKSON: Well, do I not get to say this?

CHAIRMAN BABCOCK: What?

MR. JACKSON: Do I not get to say this?

CHAIRMAN BABCOCK: Yeah, say it.

MR. JACKSON: Okay.

CHAIRMAN BABCOCK: I thought you were trying to help her out.

MR. JACKSON: No, I can feel her whispering in my ear. "The clerk must immediately call such a motion to the attention of the judge." Different courthouses, that feels a little strange the way that's worded. Why not just say, "The clerk must notify the judge of such a motion," because they have different procedures for sending stuff --

CHAIRMAN BABCOCK: Oh, okay. I'm sorry.

HONORABLE JAN PATTERSON: Yes.

MR. JACKSON: -- and calling it to the attention of the judge just sounds like something that --

HONORABLE JAN PATTERSON: Yes.

CHAIRMAN BABCOCK: You said "Bonnie." I thought you were saying "Holly."

MR. JACKSON: No, I said "Bonnie."

PROFESSOR DORSANEO: Bonnie.

MR. ORSINGER: The ghost of our former district clerk.

CHAIRMAN BABCOCK: The ghost of our former district clerk. Okay. Now we're in recess. Thanks, David.

(Meeting recessed at 5:11 p.m.)

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REPORTER'S CERTIFICATION
MEETING OF THE
SUPREME COURT ADVISORY COMMITTEE

* *

I, D'LOIS L. JONES, Certified Shorthand Reporter, State of Texas, hereby certify that I reported the above meeting of the Supreme Court Advisory Committee on the 9th day of April, 2010, and the same was thereafter reduced to computer transcription by me.

I further certify that the costs for my services in the matter are $_____.

Charged to: The Supreme Court of Texas.

Given under my hand and seal of office on this the _____ day of _____, 2010.

_____
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