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MEETING OF THE SUPREME COURT ADVISORY COMMITTEE

November 21, 2008

(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 21st day of November, 2008, between the hours of 9:09 a.m. and 5:01 p.m., at the Texas Association of Broadcasters, 502 E. 11th Street, Suite 200, Austin, Texas 78701.

INDEX OF VOTES

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

Documents referenced in this session

08-14 Documents related to Jury Procedure Issues (Agenda Item 3)

08-15 Judicial Administration Rule 12, memo and e-mail. (Agenda Item 5)

08-16 Letters from Dr. Ellis and e-mail from Ms. Peterson. (Agenda Item 6)

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CHAIRMAN BABCOCK: Sorry we're starting a little late, but my bad on that. Nice to see everybody. Looks like we're almost at full strength today, and as some of you may know, this is the end of our term today, the end of our three years together. The Court is going to move with characteristic speed in reappointing our committee, and we expect that there will be an order by the end of this month or at the latest the very first of January because we obviously have to be up to full speed and functioning while the Legislature is in session next year, so expect that to happen right away. And, Justice Hecht, as is customary, has some remarks, so I'll turn it over to Justice Hecht.

HONORABLE NATHAN HECHT: Well, first of all, on a personal note, Kent Sullivan it turns out can't keep a job, and he's moved from the district court to first assistant Attorney General and now has been appointed to the Fourteenth Court of Appeals, so we congratulate Kent on that. David Peeples has been reappointed presiding judge of the Fourth region.

HONORABLE DAVID PEEPLES: That's the same job, though.

HONORABLE NATHAN HECHT: You didn't screw it up so bad that you didn't get reappointed, so that's good.

Judge Yelenosky won a close contest here in Travis County.

HONORABLE STEPHEN YELENOSKY: I did note, however, among all the uncontested judges I got the least number of votes. I'm attributing that to Yelenosky versus Jenkins.

HONORABLE NATHAN HECHT: You might want to talk to Cathy Cochran about that.

Then we have some minor changes to the rules since we visited, mostly housekeeping changes in Article 3 of the State Bar rules, although we did have a dialogue with the Bar about proposed changes that would have made lawyers' personal addresses and telephone numbers confidential unless the lawyer opted to make them public. That appears to be the opposite default of the statutory provision, which goes the other way and says -- seems to say that that personal information of the lawyer is public unless the lawyer makes -- opts to make it confidential.

So we changed that where it remains consistent with the statute, and that was a change in the law last session allowing lawyers to make that designation, and so if you are interested in having your personal information confidential you might want to -- I think it's easy to do. I think you just go on the Bar website and change something, and it happens.

We, of course -- I told you last time about

the promulgation of the appellate rules, and someone has asked about changes that were made before those were adopted. The principal changes, I think I mentioned at the last meeting, were to simplify Rule 9, which had to do with disclosing minors' identities in various different kinds of cases, and the change in that was made simply to simplify it.

Then the change in the rule regarding accelerated appeals, there was a provision that would -- the recommended provision and the one we put out for comment would have tried to treat all accelerated appeals the same and give them a standard 20-day deadline and build on that like other accelerated appeals under the appellate rules, but in looking at the various statutory provisions around that would be affected by that, we uncovered some that there was some resistance to that kind of change. For example, I think there's a three- or five-day rule in some election contests, and we called the Secretary of State's office, and they thought that a change of that rule would significantly affect those procedures, and they were not in favor of it.

And so we called a couple of legislators and asked if there was any interest in the Legislature in trying to go through all of these provisions and standardize them or figure out which ones the Legislature

is really serious about having a different time frame and which ones would work just as well under a standard time frame, and they reported that there was some interest in that, so we decided to change that provision back so that it did not repeal those statutes, which unfortunately has the effect of undoing a lot of good that the rule would have done, but it was just too much risk that it would conflict with too many other statutory provisions.

Those were the two big changes and -- but if there are others that people are interested in, I'd be happy to discuss them. Yes.

PROFESSOR DORSANEO: When we did that, that Rule 28.1 modification, we discussed going in perhaps one direction rather than another. One way to solve this problem would be to tell the lawyers that they need to go look at these statutes because the timetable prescribed by the appellate rules for accelerated appeals, you know, does not apply, and we talked about if we did that to maybe write a -- maybe say it twice or write a comment. There is no comment like that in what has become effective, right?

HONORABLE NATHAN HECHT: Right.

PROFESSOR DORSANEO: So I suggest we might want to do that.

HONORABLE NATHAN HECHT: We might want to do

that, yes.

PROFESSOR DORSANEO: And I was interested in the changes for motion for rehearing rule and its relationship to en banc reconsideration, but I can figure that out. But you made the offer to explain it to me, I'll take you up on it.

HONORABLE NATHAN HECHT: Let me get refreshed on what it was, and I'll tell you what I know about it. On the -- you know, these accelerated appeals are a very difficult thing, and we have a number of cases pending in which their effect on parental termination cases is at issue, and not to take too much time on this, but in parental termination cases the Legislature has moved over the last several sessions to have very strict post-judgment deadlines. Well, very strict prejudgment deadlines as well as post-judgment deadlines, out of concern that children are languishing in the -- in these proceedings, and those, because so many lawyers in those cases are appointed and are not always up to date on these -- these peculiar rules then these deadlines are missed, which has a very significant impact on the appellate proceedings.

And so the question about how those -- how those are to be applied and constitutional issues and all sorts of things, which is one of the motivations for the

change in the accelerated appeal rule. But we -- I think we still need to keep working on this, but the problem is more complicated than at least I thought at the beginning.

So we have work today on jury rules, and just some background on that, the Legislature has become interested in this subject. Senator Wentworth was good enough to come to a conference in Houston two years ago that Steve Susman and some others helped sponsor and the National Center for State Courts helped teach, and they presented at the conference all sorts of ideas to make jury service easier on jurors and better, to make sure that the result is better, such as -- and things that we've talked about, including taking notes, arguments during the course of the trial, particularly a long trial, and similar ideas, questions that jurors can ask.

So Senator Wentworth sponsored a bill, which is in the materials in the back today, last session that was not enacted, but has remained interested in the subject. The Lieutenant Governor charged the Senate Jurisprudence Committee during the interim to revisit those terms, and they have, and some of that material is in the back, too, and they remain interested in some of these same ideas that we have been talking about in connection with the changes to Rule 226a. So we need to today settle, if we can, on the best approaches to these

ideas.

I wrote a letter to the jurisprudence committee in September telling them about this committee's work and mentioning some of the difficulties that we have encountered with these ideas, such as with respect to notes, do the jurors get to keep them, do they get to use them in deliberations, what happens to them after the case is over, can you use them on appeal, all sorts of questions that this group has debated; and I hope that we will be able to report this body's views of that, of the nuances of the issues.

Very easy to say, well, jurors should be allowed to take notes, but as so often is the case, the devil is in the details, and we need to be sure exactly what we're doing if we make those kind of changes. So that's part of the agenda today, and it's especially important because the Legislature will almost certainly take up the subject again in the next session, and I know Senator Wentworth is especially interested in it, so we need to make as much progress on that as we can. I think that's all I have.

CHAIRMAN BABCOCK: Great. Thank you very much. So that will lead us into the first agenda item, which Judge Christopher and Professor Albright have been leading, and I know we have a report from Judge

Christopher, so whichever one of you wants to dive into this.

HONORABLE TRACY CHRISTOPHER: Okay. I'll start. My report to the Supreme Court Advisory Committee on jury innovations is a compilation of all of the other material that you have seen, except for one thing that came in at the last minute, so it's not in there, but I think I have gotten -- I have summarized all of the other various committees that have weighed in on this issue. I also did a short survey of trial judges to get their feelings on the issues. I reviewed the ABA and National Center for State Court publications, made a review of other state's instructions, and did some cursory legal research.

The first innovation is note-taking, which we have discussed quite a bit here in the committee already in connection with 226a, putting it in 226a that jurors may take notes, and the last time we were here we discussed that we should have cautionary language with respect to the use of notes during deliberations. So in connection with the 226a discussion we have that language. I don't know whether you want to jump to that or come back, but just about everyone agrees that note-taking is a good idea.

There are apparently two groups that think

you shouldn't allow the jurors to take notes, or take their notes back during deliberations, and that would be the Senate Jurisprudence Committee and the State Bar Standing Committee on Court Rules. I will say that, as I indicated, I did a survey of trial judges. I got over a hundred responses. 88 judges are already allowing note-taking, 17 are not. Only 2 of the 88 prohibit the jurors from taking their notes back during deliberations.

HONORABLE NATHAN HECHT: Does it matter whether they're civil or criminal?

HONORABLE TRACY CHRISTOPHER: I asked specifically about juror note-taking in civil cases, so it was only sent to judges that tried civil cases. I got replies from 70 -- from judges representing 72 counties, and I thought actually that the larger counties were underrepresented in my survey. For example, in Harris County, there would have been 34 judges that could have answered the survey, and I got about six answers, so the same with Dallas, Tarrant, Travis. My guess is in those counties because -- well, at least I know in Harris County that every civil judge of the 25 allows note-taking and allows them to take notes back to the jury room during deliberations, so if all of those people were included, I think we would have an even higher number in terms of percentages, but right now we're -- just of the 105

people -- judges surveyed, it's 88 to 17 of note-taking in civil trials of note-taking allowed, with only two not allowing them to take notes back during deliberations. So --

HONORABLE STEPHEN YELENOSKY: And that's true of Travis County as well.

HONORABLE TRACY CHRISTOPHER: Yeah, and I got maybe two responses from Travis County. Yours.

HONORABLE STEPHEN YELENOSKY: But I know that the others do, so --

HONORABLE TRACY CHRISTOPHER: So I hate to use the word "with all due respect" to the committees who said don't take your notes back during deliberations, but I'm going to do it. I just think we're going backwards if we start discussing that again in terms of not allowing juror notes during deliberations, but we can discuss that more if we want to. Certainly the last time we talked about it as a group we only talked about the -- giving them instructions about how they are supposed to use their own notes to refresh their own memory and not to show or read their notes to the other jurors during deliberations.

MR. MEADOWS: Is that what the judges -- do they give that cautionary instruction?

HONORABLE TRACY CHRISTOPHER: Yes.

MR. MEADOWS: All of them do?

HONORABLE TRACY CHRISTOPHER: Right now 79 give that specific instruction and 3 do not, in terms of don't show or read your notes to other jurors during deliberations, something close to that. So it appears that the judges that are doing note-taking are already giving a version of that instruction to their jurors. The ABA, National Center for State Courts, both support juror note-taking. As I got more and more into this there were just an incredible number of committees looking at this issue with a huge overlap, and they're all listed in here in terms of the various State Bar committees and/or private organizations that have been looking at it, but as I said, they all support jury note-taking.

I've included the *Price V. State* from the Texas Court of Criminal Appeals, the specific language that they've used. Even in the criminal context since 1994 they have allowed jurors to take their notes back during deliberations, so, again, I really think we would be going backwards to prohibit that in civil trials. The two civil cases -- or there's a few more than that. All say that juror note-taking is not error and harmless.

We have already started -- we, the Supreme Court Advisory Committee, have already started to discuss the actual language on note-taking, which we can get to later. I think that this would be the appropriate rule to

use. We had at least one comment in here that said they're not happy with some committee that's working on a juror bill of rights, those sort of things like juror note-taking ought to be in a rule of procedure instead of in a juror bill of rights, and I think by using 226a we're putting it in a rule of procedure, so but the people working on the juror bill of rights who have been working on it for a long time are kind of like, "Oh, we had no idea you were working on this," so a little bit of that.

We did not tackle the issue of destruction of notes and the use of notes for appellate issues, and this issue could also tie into jury misconduct. So I don't know -- the last time we discussed it we sort of punted those issues. I don't know whether we want to go back and start discussing those and come to some resolution on it. Right now among the judges who responded to my survey, 52 tell the jurors that they're going to destroy the notes and 30 are -- gave no instructions about it. So, again, that's about like two to one, but a sold majority tell the jurors already, "We're going to destroy the notes."

The vast majority of the people that have weighed in on this support destruction of notes. Senate Bill 1300 did, the Senate Jurisprudence Committee, the ABA, National Center for State Courts. The other states I

surveyed, they were about 50/50 on destruction of notes at the end of the trial. So that's still an issue, destruction of notes and the use of notes for appellate issues and potential jury misconduct.

(Sotto voce discussion)

THE REPORTER: I can't hear you.

HONORABLE STEPHEN YELENOSKY: Oh, I'm sorry.

HONORABLE TRACY CHRISTOPHER: The ones that do not --

THE REPORTER: Wait, wait, wait. I need him to repeat what he said out loud.

HONORABLE STEPHEN YELENOSKY: Oh, I'm sorry. I asked if there were any other judges who allow them to take the notes home. I know I do that, and I think the other judges in Travis County do.

HONORABLE TRACY CHRISTOPHER: Yes. I mean, it was 52 that destroy them. 30 are either silent or say you can take them home, but if they get left behind they're destroyed. That seems to be sort of the general process with respect to that.

The reason I've brought in jury misconduct, and it's sort of at the end of this memo on page 11 *Golden Eagle Archery, Inc. vs. Jackson* case from the Supreme Court; and this was talking about testimony of jurors and when the testimony of jurors is admissible to show jury

misconduct; and the Court, the Supreme Court, distinguished between juror conversations that took place before deliberations and juror conversations that took place in deliberations; and juror conversations that took place before the actual deliberations were considered admissible testimony for possible misconduct versus testimony during deliberations. So since people are taking notes all along, if they were sharing their notes before deliberation or doing something with their notes before deliberation, we could fall into that area of misconduct, since it was happening before the sacrosanct deliberations that's protected by the Rule of Evidence 606 and TRCP 327.

So my recommendation is to stay the course on what we were doing previously on note-taking and then using 226a. I think that that would be the appropriate rule to use, and then my question was do we want to tackle the issues of destruction of notes and use of notes for appellate purposes and potential jury misconduct.

CHAIRMAN BABCOCK: Okay. Thank you, Judge. Any comments on what the judge has said? Anybody in favor of going backwards? Raise your hand high now. Angie, keep your hand down. Okay. Well, then let's move forward. Of the topics, Judge, that you've identified, is destruction of notes the first issue?

HONORABLE TRACY CHRISTOPHER: Right.

CHAIRMAN BABCOCK: Who has comments about destroying notes? To destroy or not to destroy? Okay, let's move on.

MR. MEADOWS: Is there a recommendation?

HONORABLE TRACY CHRISTOPHER: I am not making a recommendation on it.

CHAIRMAN BABCOCK: Frank.

MR. GILSTRAP: Judge Christopher, were any of the judges -- I mean, are they all insisting on taking notes in pen and ink? I mean, is anybody allowing them to do it on their iPhone or something like that? I hadn't seen that mentioned, but, you know, the whole idea is to enhance the juror experience, and we want to make them all happy, and, you know, some of them can't write, they can only use their iPhones.

HONORABLE TRACY CHRISTOPHER: Well, I've been letting my jurors take notes for 14 years, and I've never had a juror ask me to use their computer, but if they did, I would probably allow it.

MR. GILSTRAP: That's interesting.

HONORABLE TRACY CHRISTOPHER: But as far as I know, no one has discussed the issue. It hasn't circulated among the 25 of us, if anybody has asked a question about it.

MR. GILSTRAP: Anybody disturbed by the problem of, you know, they take them home and they send them out to their friends? I mean --

CHAIRMAN BABCOCK: David Jackson has got a --

MR. JACKSON: Don't you run into a problem if somebody has a wireless computer, them sharing notes during the trial with anybody anywhere in the world and using their computer to make those --

HONORABLE TRACY CHRISTOPHER: Sure.

MR. JACKSON: I mean, I can see iPhone and computers and note-taking that way would become a real issue.

CHAIRMAN BABCOCK: Justice Bland, then Judge Yelenosky.

HONORABLE JANE BLAND: On the issue of destroying notes, I would feel uncomfortable telling a juror, "You can't keep your notes," because a member of the public in a courtroom could take notes, a member of the press could take notes, and although I think probably the better practice is to destroy the notes after the trial, if some juror says, "I'd like to keep my notes," as a memento or for whatever reason, you know, don't they have some sort of interest in -- you know, in keeping them, that we ought to allow just like any other member of

the public would be allowed to take notes.

I realize that creates problems with potential jury misconduct issues, but if someone said to me -- we destroyed notes and if someone -- but occasionally I had a juror that asked if they could keep their notes, and I always said "yes."

CHAIRMAN BABCOCK: Okay. Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: Well, I agree with Justice Bland on that. I don't see the point of destroying notes. You just make it clear in the law that they're not pertinent or not. As far as if we're going to ask the question about computers or iPhones to take notes, I don't know that that is part of what we're going to address, but if we were to address it, I would at least want the trial judge to have discretion not to allow that and -- or just prohibit it, because it just presents too many problems, not only those but just distraction if nothing else.

Of course, right now all I have on my computer is what we're dealing with, but how do you know the juror in the box is only taking notes and not -- even if they don't have wireless connection, not playing solitaire or something.

MR. JACKSON: On Ebay.

CHAIRMAN BABCOCK: Checking up on their

e-mails. Yeah, Frank.

MR. GILSTRAP: Well, I mean, I was under the impression that all of these people were giving the judge discretion over whether or not to allow the jurors to take notes. I mean, if we're not going to give the judge discretion, that might be something that we want to talk about. Where are we on that?

HONORABLE TRACY CHRISTOPHER: The intent of the 226a rule change was to make it part of the rule and that, therefore, the judge would read to the jury, "You may take notes if you want to." We did briefly discuss whether that should be optional --

MR. GILSTRAP: Okay.

HONORABLE TRACY CHRISTOPHER: -- or at the trial judge's discretion. I don't think that there was a whole lot of support for making it optional, but I don't know if we took an official vote on that.

CHAIRMAN BABCOCK: Justice Jennings, and then Bill.

HONORABLE TERRY JENNINGS: It seems to me the question to destroy or not to destroy has to focus back on what is the purpose for allowing the jury to take notes in the first place. If you have a long, complicated trial and the purpose of allowing note-taking is to facilitate the process so that, you know, you could jog

your memory faster, and if that is the only purpose of it, then it would seem to me that you would want to destroy the notes afterwards because the purpose has been fulfilled; whereas, you know, if the purpose is, well, a juror has a right to take notes, well, then you might want to say, well, okay, well, they shouldn't be destroyed because they have this -- you know, this jurors bill of rights or whatever we want to call it to do it; but it occurs to me that if the whole purpose of this is just to facilitate, you know, jurors in their memory so that, oh, yes, this witness did testify to X, then when it is all said and done it seems the better course would be to destroy them so that there's no controversy that arises after the fact, either on the Larry King Show or whatever.

CHAIRMAN BABCOCK: Bill, and then Frank.

PROFESSOR DORSANEO: This is a small matter, but I've wondered for years why the Court's order following Rule 226a is not the rule. I mean, we're treating this as having the same status as a rule, but -- and I suppose it does, but not quite, so I would just make it part of the rule.

CHAIRMAN BABCOCK: Okay.

PROFESSOR DORSANEO: Rather than a separate court order. I don't think it makes any difference in terms of how easy or hard it is to change, and I doubt

that anyone knows how it started out to be a separate order. Maybe Justice Hecht knows. Do you know why the Court's order following Rule 226a is not Rule 226a?

HONORABLE NATHAN HECHT: Before my time.

PROFESSOR DORSANEO: Yeah.

HONORABLE NATHAN HECHT: Could I mention --

CHAIRMAN BABCOCK: Yes.

HONORABLE NATHAN HECHT: Judge Barbara Walther from 51st District Court in Tom Green County has joined us, and she worked on the juror bill of rights and has an interest in this, has been all over the national news the last six months.

HONORABLE BARBARA WALTHER: It makes me nervous coming into a place that says "broadcast."

CHAIRMAN BABCOCK: Nice to have you here, Judge. Thank you.

HONORABLE BARBARA WALTHER: Thank you.

MR. GILSTRAP: Well, let's mention that, because it's come up several times, you know, that somehow the juror has a right that's separate from the right of a citizen that arises from his jury service, and I'm troubled by that. I mean, you know, it's a great marketing thing. You know, I just got something from my bank, you know, you've got a depositor's bill of rights, but, you know, I really don't; but, you know, this is the

law; and when you start listing some things and putting "bill of rights" on the top, it's possible some judge is actually going to think that you're creating rights; and, you know, people like rights; and some of them like to sue to enforce them. And, you know, are we backing into creating some type of liberty interest that a juror can use to file suit in Federal court? I don't know, but it seems like that needs to be at least thought about before we call something a bill of rights.

CHAIRMAN BABCOCK: Well, if we are, Munzinger is going to spot it.

HONORABLE STEPHEN YELENOSKY: I sure don't want them suing over the food in the cafeteria.

CHAIRMAN BABCOCK: Yeah, that would be a bad thing. Yeah, Bill.

PROFESSOR DORSANEO: Well, I've been thinking about this and whether this Golden Eagle Archery case is a good idea or not, and I kind of tend to think it was a bad decision on the definition of deliberations, because it's moving in the opposite direction from the policy behind changing evidence Rule 606(b) and modifying civil procedure Rule 327(b), is that we're not going to mess with these people and we really don't want to know how the sausage was made by the -- you know, by the jurors, and regardless of whether that's right, it seems

to me to be a bad idea to treat these notes as some sort of an available resource to challenge the process.

Maybe, maybe, every great once in a while something would turn up that would cause a case to need to be reversed because of some abuse in the note-taking or note use process, but I just don't think we want to go in that direction, and I would treat the -- whether the notes are destroyed or not, I would just treat them as not in bounds, not something that could be used to impeach the verdict or as a basis for any kind of a post-verdict challenge.

CHAIRMAN BABCOCK: Justice Jennings says that the reason -- or at least what I heard you to say, Judge, is that the reason for destruction is to avoid subsequent controversy, obviously the losing party using the notes to claim jury misconduct and using that as evidence of the misconduct. Is that the reason we want to destroy them? Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: Well, the same logic would require us to destroy the judge's notes. We don't worry about that because we know people can't use judges' notes, and so if you apply the same principle and law to juror notes it's irrelevant whether you destroy them.

CHAIRMAN BABCOCK: Bill.

PROFESSOR DORSANEO: And if we take the approach that I suggested at least as a something to try, maybe we would change our mind later if we found out that these notes contain information that indicates that there had been a miscarriage of justice in a significant number of cases, and maybe we need to do something the other way around.

MR. GILSTRAP: By then the jurors have a right to them.

PROFESSOR DORSANEO: Well, I think my notes, I ought to have a right to them.

MR. GILSTRAP: There you go.

PROFESSOR DORSANEO: I mean, I think I'm taking notes here, I ought to have a right to them.

CHAIRMAN BABCOCK: What if the notes presented strong evidence that there was racial animus on the part of the note-taker, note-taker juror? Would you want to be able to use that?

HONORABLE STEPHEN YELENOSKY: Well, if you say you could use it for that purpose then you have to allow discovery of it to determine it. I mean, then you're opening a can of worms.

CHAIRMAN BABCOCK: I'm sorry, Stephen, I couldn't hear you.

HONORABLE STEPHEN YELENOSKY: Well, I mean,

once you say that notes which have in them X could be evidentiary then you open the door to finding out whether the notes do have X in them, and if you use the analogy again to judges, do we do that with judges? Do we allow discovery of judges' notes to see if there's an animus?

CHAIRMAN BABCOCK: I don't know. Judge Benton.

HONORABLE LEVI BENTON: You know, currently an advocate could meet with a juror and get the juror to sign an affidavit and try to offer that as evidence. Now, they could put it in the record, but the trial court judge and the reviewing courts, of course, wouldn't consider the testimony of the juror, but it would still be in the record. The civil justice system, the criminal justice system, is made better when we put these things in the record, even if we don't regard them as competent evidence. It sheds light on the process, it sheds light on abuses of the process, even if they're not competent evidence, and so we ought not mandate that notes be destroyed. We ought not try to, quote, respectfully, Terry, prevent controversy. That's what courts are for, controversy.

And so let them take notes, say to them, "You can take them. If you don't want to take them, we'll destroy them," because Justice Bland is right. How can we

say to the juror, you know, if you were out there with Wayne Dolcefino taking notes you could walk out of the courtroom everyday with your notes, but you have the status as a juror, but so you, therefore, have no right at the end of the trial to take your notes. There's no harm when people put these things in the record post-verdict. The fact that some judge says it's not competent evidence is not the issue. You know, let's just let the sun shine in on the process, is what we ought to be trying to accomplish.

CHAIRMAN BABCOCK: I just have one comment following that. Anybody that owns a white Mazda SUV, tag number is S50ZGS, is there anybody in here like that?

HONORABLE LEVI BENTON: Not mine, but I have one comment following that.

CHAIRMAN BABCOCK: Okay.

HONORABLE LEVI BENTON: Judge Christopher said we weren't going to go back. Justice Hecht couldn't be my agent. He talked about Kent Sullivan can't keep a job. He didn't say anything about Judge Benton looking for a job.

CHAIRMAN BABCOCK: Yeah. We need equal time here. Anyway, this car, if it belongs to anybody here, is about to be towed. So, yeah, Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: Well, Levi,

are you suggesting then that they be allowed to take them home but they also be -- that the litigants are allowed to discover them and put them in evidence?

HONORABLE LEVI BENTON: If a juror wants to voluntarily or by subpoena the jurors ought -- yes, ought to be discoverable or the juror ought to have the right to volunteer them to the lawyer. It's no different now. You've had jurors who have signed affidavits post-verdict, and they come into the trial record, the post-trial record, but then the other side objects to that evidence being considered by the court, but it's in the record, and so there's sunshine on what happened. There's no harm from the sun shining on the process.

HONORABLE STEPHEN YELENOSKY: Well, sure there is, because if we allow that then it would be incumbent on us, I think, to tell the jurors, "You may take notes. However, if you take notes, they may be subpoenaed at the end to determine if there has been any jury misconduct," and that's the harm. Then they don't take notes and we create this satellite litigation. I mean, the same principle applies, why don't we allow sunshine on judges' notes?

CHAIRMAN BABCOCK: Judge Christopher, and then Nina.

HONORABLE TRACY CHRISTOPHER: Well, we

already tell the jury that the lawyers might ask them, call them up and ask them for an affidavit and that it's their right to give one or not give one. That's in the current instructions, even though the vast majority of the affidavits obtained violate 327 or TRE 606 and are not competent evidence, so I don't really think it would be that big a difference if we changed 606 and 327 to say juror notes are not part of -- are not admissible for jury misconduct purposes.

HONORABLE STEPHEN YELENOSKY: Well, and the --

CHAIRMAN BABCOCK: Nina.

MS. CORTELL: I just want to think of this in the context of another debate that we've talked about a little bit but others are also talking about a lot, and that's the vanishing jury trial, and I'm reluctant to see us go in a direction that creates another avenue for satellite litigation. That point's already been brought up, but if we have notes, they will be used. I mean, people will go after them and try to make arguments out of them, and maybe we're already there because people are getting juror affidavits, but I just wanted to look at it in that context. I hate to open up another way that the process gets burdened and prolonged.

CHAIRMAN BABCOCK: Carl.

MS. CORTELL: It's more appellate work, however, as I've been advised.

MR. HAMILTON: A number of years ago one of the judges in Travis County permitted the taking of notes, and the concept was that, number one, the jurors were furnished with a pad that belonged to the court, and whatever notes they took were part of the procedure, belonged to the court. The only purpose of the notes was to assist that juror in the deliberations in remembering what occurred during the trial. The bailiff picked up those pads at the end of each day, passed them out the next day, and at the end of the trial they were all picked up and destroyed, because their purpose had been served, only to help that juror in the deliberations, and that seems to me to be a fairly good system that solves a lot of problems.

CHAIRMAN BABCOCK: Justice Jennings.

HONORABLE TERRY JENNINGS: Well, not to be too repetitious here, but again, I think the focus needs to be on what is the purpose. If the purpose is to aid the fact-finder in, you know, deliberations about the evidence, I think that needs to be -- that needs to be spelled out specifically, that you can only take notes about the evidence, you don't want notes about, well, you know, this lawyer made a smug remark or whatever, or "I

don't like that lawyer," or, you know, the judge or whatever. They need to be focused specifically on you can take notes about the evidence; and if that is the purpose, is to facilitate, you know, their memory in understanding what the facts were, then that purpose is fulfilled; and with all due respect to what Levi is saying, I understand and I respect the purpose of, you know, shedding light on this; but it's not part of the appellate record.

You know, when you're looking at, you know, the legal and factual sufficiency of the evidence and so forth, you're looking specifically at the appellate record, what's in the reporter's record, and we don't really want to be concerned on appeal about whether or not a juror had a proper recollection of the evidence in the jury room because you're then talking about opening all kinds of problems, and if you're allowing them to keep their notes afterwards, if you're not requiring them to be destroyed, any good lawyer post-verdict or post-judgment, when they try to get a motion for new trial, they're going to subpoena those notes, and they're going to try to use them. And then, you know, you get into all these questions about litigating about litigating what happened in the jury room. It's a very dangerous prospect. You know, I think we just need to be focused on the purpose, what is the purpose

CHAIRMAN BABCOCK: Judge Christopher.

HONORABLE TRACY CHRISTOPHER: I've never had anyone ever subpoena the juror notes, and it's never been an issue, and I've been allowing note-taking for 14 years, and I've had some big cases where no-holds-barred in trying to get cases reversed. I just -- I think the jurors ought to be able to take their notes home if they want to, and I think the way we fix any problem is by mentioning them in the other two rules about what is competent evidence of jury misconduct.

Oh, and one other thing, now that we give all the jurors a copy of the jury charge, as I said before, I think I tell them if they want to take notes while the jurors -- while the lawyers are talking on the charge itself, you know, feel free to do so, and a lot of them do at that point, which I think is very useful in a long, complicated charge when you have a long closing argument or where you have complicated dollar figures that may or may not have been summarized in the evidence in a way for the jury to remember it all.

Certainly, I think -- and a lot of those jurors take that home, because it is a souvenir of their jury service. It is an interesting reminder to them of what they did, who the parties were, what the result was, and we give them those copies now. Just to say, yeah,

okay, you can write notes on them, but we're going to destroy them afterwards, I think jurors should have the right to take them if they want to.

CHAIRMAN BABCOCK: Well, but aren't -- Justice Hecht, did you have something to say?

HONORABLE NATHAN HECHT: I just want to point out that Judge Orlinda Naranjo from the 419th District Court joined us this morning. She has an interest in these and --

HONORABLE ORLINDA NARANJO: Hello. Sorry that I'm late.

CHAIRMAN BABCOCK: You can have a seat momentarily. David, we're getting one so everybody is seated. Who had their hand up first? I'm sorry.

HONORABLE STEPHEN YELENOSKY: I think I did, but that's my personal --

CHAIRMAN BABCOCK: Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: Well, two things on destruction, one hasn't been mentioned, which is the idea that destruction would be as effective as a solid rule that you can't use them is speechless because, you know, I mean, jurors could go home at night and think about the case and write notes, but we're never going to get those notes and be able to destroy them. So I guess an enterprising lawyer might try to subpoena any notes

that the jurors had taken at home while they were thinking about the case, and those might actually exist. That destruction isn't foolproof.

On the other side, the sunshine issue, the point is to make sure that they don't become evidentiary in the case before the court. If the juror takes them home and, I don't know, some legislative committee wants to do a study of jurors and wants to subpoena those, I don't know whether that would be allowed or not, but it wouldn't be foreclosed by this. All that would be foreclosed is the use of those notes as an evidentiary matter in the case before the court.

CHAIRMAN BABCOCK: Judge Christopher, before I go to Bill and then Frank, were you suggesting a system whereby if a juror wants to take the notes home, that's okay, but the notes that are left behind are destroyed?

HONORABLE TRACY CHRISTOPHER: Yes.

CHAIRMAN BABCOCK: I'll get to you in a second, Judge. Bill, and then Frank, and then Judge Benton.

PROFESSOR DORSANEO: Well, I think everybody is right on this. If there's no --

CHAIRMAN BABCOCK: You feel strongly both ways.

PROFESSOR DORSANEO: -- downside risk to not

destroying because nobody is going to try to discover and make use of this information, then it makes sense not to -- to just eliminate the information from the -- you know, from the juror's possession, but if there is any kind of a significant risk that discovery will take place by any good lawyer or some good lawyers or that that will be recommended at seminars in the future and it will get back to where we were before, then I'm going to change my mind and say that the better thing to do would be to maintain security rather than to open up a big can of worms.

What happened -- has anything happened after Golden Eagle Archery, which basically said that it might make sense to talk to all of the jurors to find out if there is any useful information that is, you know, outside of the contours of 606(b), or is that just a dead practice? You know, when I started practice that was what you were taught to do if you were a defense lawyer and you lost, is to go interview all the jurors and get an affidavit, get affidavits. Has that started up again after Golden Eagle Archery or no?

HONORABLE HARVEY BROWN: I've had a case where that happened, since I left the bench.

PROFESSOR DORSANEO: And as a related question, I suppose, we have in Rule 320 that a new trial

is granted for good cause, and we don't right now have a rule that explains exactly what that means. I mean, the recodification draft has such a rule, but the -- and some of our materials have it, but we don't have such a rule. Would it be not good cause for a trial judge to grant a new trial on the basis of information that was disclosed in notes, something, as you said, about racial prejudice, or is that just out of bounds? But I don't know that the answer to that question is now under 327(b) and 606(b), coupled with 320.

CHAIRMAN BABCOCK: You could have something in the notes about insurance.

PROFESSOR DORSANEO: Well, that hasn't really -- that didn't bother us for a -- that hasn't bothered us for a long time, just basically say it's so hard to establish jury misconduct. Even if you can get the information, it doesn't happen.

CHAIRMAN BABCOCK: Yeah, Frank.

MR. GILSTRAP: You know, we had some comments saying that the position of the juror in the jury box is like someone in a spectator in the courtroom, they can take their notes home. Well, it's fundamentally different. A spectator can't go into the jury room. These notes are for the purpose of jury deliberation, and if we think they ought to be destroyed, you know, we ought

to say that they ought to be destroyed. I don't think the juror -- somehow to make the juror happy or to give him a souvenir, it doesn't seem to me should have any weight in this process.

Secondly, if we're going to let them take them home, we need to tell them they may be subpoenaed so they can destroy them if they want to. I mean, they know they can destroy the notes and they might be subpoenaed.

CHAIRMAN BABCOCK: Justice Brister, we'll have a chair for you momentarily.

HONORABLE SCOTT BRISTER: Oh, that's all right. That's all right.

CHAIRMAN BABCOCK: Judge Benton.

HONORABLE LEVI BENTON: I was trying to find the case and I can't find it, but I believe Jane, Justice Bland, reminded us in *Hyundai vs. Cortez* that a jury is a government actor, and there's something very unseemly in my mind to require something that the government does to be destroyed. Very unseemly. You know, we don't have a rule that says "Bobby Meadows, thou shall not contact the juror for any reason" now, somehow shall not ask the juror to prepare an affidavit or sign an affidavit. My god, this is -- you know, this is court process. If somebody wants to obtain notes, put them into the record, have the trial judge say this is not competent evidence and make

Terry write on that, there's no harm.

HONORABLE TERRY JENNINGS: Well, but it's a deliberative process, and you want to have that process work, and you don't want -- I don't want to go back, but I mean, you do still have this problem of, well, you're going to have jurors who take notes and jurors who don't take notes and the juror who takes notes may have more influence over the juror who didn't. And they may be wrong, their recollection of the evidence may be wrong, but it is a deliberative process, and it should be secret.

You know, the appellate process, you know, yeah, we're deliberative on appeal, but what we basically discuss and talk about in our conferences is secret, and those notes certainly can't and should never be released. The same thing with the jury. It's a deliberative process. It should be secret, and those notes shouldn't come out as far as what people are thinking. So, again, I just want to make sure we're focused on the purpose here, and that purpose is to aid the fact-finder in their knowledge of what happened during the trial about the evidence, and if that purpose is fulfilled -- anyway, I'm being repetitious.

HONORABLE LEVI BENTON: Well, reconcile that with the notion that courts should be open and --

HONORABLE TERRY JENNINGS: Courts should be

open, but not the jury deliberations. That shouldn't be open.

HONORABLE LEVI BENTON: Well, but I don't think -- letting someone discover notes doesn't open up the deliberations, and no one is saying they're competent evidence about anything. But if the --

CHAIRMAN BABCOCK: It seems to me that there may be three --

HONORABLE TERRY JENNINGS: Three camps.

CHAIRMAN BABCOCK: -- three ways of going about this. One is to have the jury notes collected at the end of the trial and retained in the court record. That would be the Benton openness thought. The other would be to keep them all and destroy them at the end of the trial. That would be the Jennings no controversy approach. Then the other would be to be neutral of it, just like any trash that the juries leave behind, you throw out the trash, which would include their notes, but if they want to keep it, that's fine. They can take it home with them, and if a lawyer comes and says, "Hey, let me see your notes" then they can either show them the notes or not show them the notes at their pleasure, and those are the three options it seems to me. Are there any others I've missed? Yeah, David.

MR. JACKSON: In addition to the third one

you probably want to give them the right to destroy their own notes if they want to as well.

CHAIRMAN BABCOCK: Yeah, the Judge Christopher take them home and do with them what you want, keep them as a souvenir, throw them out, or, you know, make paper airplanes out of them. That's up to them. Nina.

MS. CORTELL: Could I ask one question? Maybe it's implicit when we talk about -- but what about notes during deliberations, and have we talked -- does this cover that, and is that then a problem in terms of privacy of other jurors? I don't know. Does that -- is it clearly just you can take notes up through the end of trial, or what happens during deliberations?

CHAIRMAN BABCOCK: Bill was talking about the old days. In the old days if you were an insurance defense lawyer and you won a case, the very first thing you did was go in the jury room and pick up the trash to see if there were any notes in there so that your opponent could not use them to claim jury misconduct and attack the verdict. Who had their hand up? Harvey.

HONORABLE HARVEY BROWN: I just want to make a point that jury deliberations are not secret. They're inadmissible. There's a difference. A lawyer can call a juror and ask. There's no privilege. There's a right to

say, "I don't want to talk to you," by a juror, but there's nothing that prohibits the lawyer from asking. The juror could write a book about deliberations if the juror wanted to.

CHAIRMAN BABCOCK: Yeah.

HONORABLE HARVEY BROWN: So it seems to me that the note-taking is somewhat analogous to that. The juror would have the right to take the notes home, to feel like they are -- I think this is part of the dignity of being a juror, frankly, that they do have some rights. It may not be the primary purpose, it may not even be the main purpose, but to me it serves some function, which is we're trying to get jurors to be comfortable and feeling at least some sense of fulfillment from the jury service, and I don't think we can just ignore that role completely.

CHAIRMAN BABCOCK: Justice Gaultney.

HONORABLE DAVID GAULTNEY: My understanding of the Golden Eagle Archery rule for not allowing attacks on jury verdicts is not that, you know, we wouldn't gain some information from it or that there isn't -- misconduct doesn't occur, but just we've decided that that satellite litigation is just too much for the system, the jury system just cannot take that, and I think my -- and Golden Eagle Archery was a situation where, as I recall, an individual juror said something prior to the deliberations

and repeated it during deliberations. So the information prior to deliberations said at a coffee break was admissible to show misconduct, but that during deliberations was not.

The problem I have with -- the problem I have with allowing -- not destroying notes, I come down on the side of collecting and destroying the notes because the notes have served the purpose that the system is allowing them to be taken. We don't want jurors distracted. We're going to allow the distraction of note-taking for -- to help with the deliberation process, but once that's over, the note-taking has served its purpose as far as the court system is concerned.

The problem I have with allowing them to be taken home and not destroying them at the end of that process is exactly the satellite litigation process. A lawyer, whether you say it's not admissible, that note's not admissible, well, but is the testimony? Some lawyer will find a way to use the notes in a way that creates satellite litigation. That's what happened in Golden Eagle Archery. A lawyer found a way to get what was not deliberations into evidence.

CHAIRMAN BABCOCK: Okay. When you talk about the purpose of the note, certainly from the jurors' perspective, the purpose of allowing note-taking is to

allow them to refresh their recollection in a long, complicated trial or maybe even a short one, but what I heard others saying is there may be another purpose for those notes, and that would be to reveal some misconduct, and so that there would be a different purpose there. It doesn't mean that that purpose is illegitimate. It just means it's different from what you're allowing them to do in the first place.

HONORABLE DAVID GAULTNEY: And I understand at one point we did allow as a system the attacking and the getting into of what happened in the jury deliberations and what happened -- what was in the juror's mind back then, what prejudices were shown during jury deliberations; and I understand that prior to the adoption of the current rules there was this satellite litigation which could occur; but at some point, I think the system decided it's just -- it's too much. We just can't carry that burden, and I think if we allow the note-taking, the notes to be retained, even if we say the notes themselves are not going to be admissible, it will encourage satellite litigation; and if we're willing to accept that, then I think we ought to let them take their notes. If we've got a problem with that, then I think the way to handle it is simply to realize that the system has an interest in controlling the conduct of a juror while

they're serving as a juror.

CHAIRMAN BABCOCK: Okay. Well, and of course, if you're not going to make them admissible, why keep them? Skip.

MR. WATSON: Well, I'm not sure it is going to cause satellite litigation. I mean, as I've been listening to this, I -- from an appellate standpoint I come down to look at does it really matter whether the evidence is testimony or documentary as long as the standard is what it is. I mean, as long as we cannot invade the mental process of jurors, but as long as there are a handful of very narrowly defined other things that are juror misconduct and only those things are going to be worth the time of day in even turning the computer on to do something, then I really don't care whether the evidence that comes in is testimony or documentary.

If it's documentary and it's invading the mental process of the juror, I'm going to say, "Sorry, there's the door, go away." But if it's documentary and it shows that actual juror misconduct has occurred, so-and-so brought a dictionary in, and according to the American Heritage Dictionary, proximate and proximate cause is not defined the way the court does it, it's closeness or it's proximity, or as a juror once told me, "You keep mispronouncing it. It's 'approximate,' not 'a

proximate cause after the verdict.

I want to know that and I would just as soon -- I would as soon have that on a note as well as testimony. To me it just comes down to the standard. As long as the Court doesn't change the standard, I don't care what the evidence is, because it's not going to change my decision of whether to take the case, and if it doesn't change that decision, there will be no more satellite litigation.

CHAIRMAN BABCOCK: Judge Yelenosky, and then Richard Munzinger.

HONORABLE STEPHEN YELENOSKY: Well, we're acting as if this might happen if we do this. For years now at least 30 judges have been allowing jurors to take notes home. Golden Eagle Archery is a 2000 case. Have we had a bunch of satellite litigation over this? Can anybody tell us?

MS. CORTELL: I have seen it where it gets brought in at the trial court level. It may not make it to an appellate court opinion, but it certainly plays out in the trial court.

HONORABLE STEPHEN YELENOSKY: Well, people try all kinds of things in the trial court.

MS. CORTELL: I'm just saying.

CHAIRMAN BABCOCK: Richard Munzinger.

MR. MUNZINGER: Well, there's a distinction between taking notes during the trial and taking notes during deliberations. Skip's example of proximate cause doesn't mean what the judge says would be a note taken during deliberations, which would be different, but Skip's point is correct, in my opinion. Right now it doesn't make any difference that a person took notes during the trial and said something during the deliberations based upon his notes, because we couldn't invade that in a post-verdict motion that he had the wrong idea about this or he had the testimony wrong or something else.

It troubles me that citizens are called to participate in the judicial process, they become finders of fact, they become officials of government to decide rights, they take notes, and then they're told by the judge, "Give me those. I'm going to destroy them." Why are you going to destroy them? Well, because we don't want people looking at your notes after the trial and causing problems about this verdict.

Well, if, first off, what took place in the trial is not admissible -- I mean, in deliberations is not admissible, it troubles me that a citizen can take notes but then have them confiscated by government in a process that pursues truth. Why do you care that the person takes the notes home? If you get a post-verdict subpoena and

there's somebody that comes along and says, "Well, did so-and-so say so-and-so during the trial?"

"Well, my notes say this." They're gone now. They're destroyed. Why? Because government destroyed them. I don't think you ought to be doing that. Just let the guy -- if you're going to take notes, let him take them home, and if the verdict requires a post-verdict hearing to determine the truth about something, leave the evidence in existence so that truth is served.

HONORABLE TERRY JENNINGS: But the court or the system itself -- if the system is going to allow the juror to take notes, the system or the rules can impose restrictions on the taking of those notes. You can take notes about the evidence, but you can't take notes about deliberations; and if the system is going to allow that and if Senate Bill 1300 is going to allow it for a specific purpose, you don't have to tell the jurors that, well, we're going to take them away because we're afraid you might misuse them. We're going to take them away because Senate Bill 1300, which allows you to do it, allows us to take them back and destroy them because the purpose has been fulfilled.

There's no -- nobody here is trying to, you know, keep somebody from exercising a right that they have. If they want to talk about the case, great, but the

problem is mischief can arise. It may not always arise, and it may not arise a majority of the time, but, you know, if you get just a few cases where it arises where, you know, one juror has notes and then it's subsequently found out that that juror was wrong and then they start trying to attack the judgment on that basis, well, you know, stuff like that happens in the jury room all the time, but now you're opening up the potential for attacking a judgment that wasn't there before.

MR. MUNZINGER: Well, my recommendation to the Senate would be that if you're going to create a right and if you're concerned about the truth, let the Senate say that they don't want these notes to be considered in some kind of a post-verdict motion. I don't -- I wouldn't vote that way if I were in the Senate. I don't know that the -- if it's the Senate that gives me the right to take a note, right now judges are letting people take notes without the Senate's authority. It's just human nature. I want to take a note that helps me remember.

HONORABLE TERRY JENNINGS: Well, the Legislature could pass a bill -- the Legislature could pass a bill within its power to prohibit note-taking if they want to.

MR. MUNZINGER: I agree with that.

HONORABLE TERRY JENNINGS: And if they're

going to pass -- and if the Legislature is going to pass a bill allowing note-taking and recognizing it, it could certainly define the circumstances under which those notes can be taken and what's to be done with them after the trial.

MR. MUNZINGER: No doubt they have the power. My question is simply if I'm a citizen, why do you want to destroy my notes? They're mine. I took them. I didn't do anything. I just took my notes. "Give them to me, I'm going to destroy them. I'm government. You can't have them." Wow.

CHAIRMAN BABCOCK: Judge Naranjo has got a TRO, as I understand it, maybe at 11:00?

HONORABLE ORLINDA NARANJO: At 11:00.

CHAIRMAN BABCOCK: And we could all benefit from her insight on this, and if you're prepared to share your thoughts with us, we'd love to hear them.

HONORABLE ORLINDA NARANJO: Well, actually, I was coming to talk about -- I do allow jurors to take notes, and I'm a district court judge here in Travis County. I have been on the district court for two years and on the county court at law for 12 years before that, so I have been on the bench 14 years, and on the note-taking, I've allowed jurors to take notes since I started. I guess perhaps because I'm a note-taker, that's

the way I learn, that's how I remember, and so I just give them that opportunity. And then, you know, I've given I'm sure the admonitions that you've heard about, it's not evidence, you can't compare your notes with each other, and I do allow them to take them back into the jury room when they deliberate. I tell them to leave them, though.

HONORABLE STEPHEN YELENOSKY: Yeah, I didn't know you did that.

HONORABLE ORLINDA NARANJO: Yeah, and then we destroy them. I look at it as it's not discoverable because it's their deliberative process. Well, they're -- you know, the jury is acting as the judge of the finder of fact and determining the credibility of the witnesses, et cetera, and so that's -- to me the notes are part of their deliberative process. There -- so that's basically how I handle the notes. And you're right, not all jurors take notes. Just some of them do, some of them who may be note-takers like me, but I just tell them they have that opportunity.

The other issue that I wanted to -- and I know that this committee is addressing is really allowing the jurors to ask questions of the witnesses, and so I'm -- I'd like to visit on that point, because I'm sorry that I can't stay. I am the duty judge, and that means I have to hear everything that walks in the door, and I have

a real emergency TRO at 11:00 o'clock scheduled. And so I do allow jurors to ask questions of the witnesses, and I've been doing that since 2002, and I have -- and I have the procedure here that I brought copies of it with me, and I have spoken to different groups across the state and in Travis County about the procedure. And basically, I look at it as a way to enhance their experience so that when they come in they know that, one, they can take notes and, second, that they're going to be allowed to ask questions of the witnesses.

I explain the procedure once they're in the box, and basically what I do is I tell them as they're taking notes, you know, just as questions come up in your mind about the evidence, just write it in the back, and then what I'll do is when we finish with one witness I will then say, "Does anybody have any questions?" And they will have written -- again, it's written questions. We'll collect them, send them back to the jury room.

Outside their presence I review those questions with the lawyers. I tell the jurors, "Don't worry about the fact that your question might not be asked because we don't expect you to know the Rules of Evidence." I let them know that I will be making a determination whether the question will be asked or not. I review the questions again with the lawyers outside the

presence of the jurors. They can make any objection -- legal objection that they would make and then I'll rule on that and bring the jurors back in, the witness is back on the stand, and I read the questions to the witness, and the identity of the juror asking questions is not known unless there was only one juror that raised their hand. Then obviously we know who the juror was that asked that question. Then I allow -- once I ask all the questions of that particular witness, I turn it back over to the lawyers to follow up with any questions that they may have, limited to the scope of the questions and answers.

I can tell you that this experience has been a very good experience. The lawyers may initially have a heart attack when they learn that I do it and that I require it in every case. They can object to it, but I believe that the Rules of Evidence allow me to control -- I have the inherent authority to control my trial and allow me to do this. I know I'm not the only judge in the state that does it. I've talked to various judges across the state that have -- that allow this procedure.

The jurors love it. They absolutely -- I send a questionnaire to them at the end of the trial, and on that questionnaire I ask them, "Did you ask questions," and usually that is what they focus on as one of the best experiences, especially if they've had other experiences

in other courts. They just say it -- you know, as a fact-finder they really thought it was really good for them to be able to address any questions that they have about the evidence that the court determined was a question that could and was allowed. They feel like their verdict is based on understood evidence instead of misunderstood evidence, and they all say that was one of the best part of the experiences, so it enhances their experience as a juror.

I wish I had time to share some of the questions that I've gotten, and I do that when I make this presentation because I've kept a diary of the questions, and it's part of the record. That is part of the record, you know, all the questions that we ask, that are asked by the jurors, I mean, we make it part of the record, the objections to them and my rulings. So that is part of the record, so it could be a point in appeal, but nobody's ever actually raised that particular issue as a point of appeal in the appeals that have been taken in any case I've tried.

Some of the concerns that lawyers have is does it -- and you might have, is does it increase the time of a trial, but I've had a two-week, you know, wrongful death case, and maybe it increased it by two hours, and I've been trying to keep track of that so it's

more than anecdotal, but it's probably increased it by about two hours, and most lawyers feel that it probably decreased the time in the deliberative process. The lawyers enjoy it. Jeff, have you -- you've tried a case in front of me? No?

MR. BOYD: I don't think so.

HONORABLE ORLINDA NARANJO: I was thinking that you might have. They like it because it got -- right away it gives them an opportunity to see what the jury is thinking, so they're thinking about that. Judge.

MR. MEADOWS: No, I'm not a judge.

HONORABLE ORLINDA NARANJO: Oh, okay. I just saw the "honorable" on this side.

MR. MEADOWS: But I'm grateful to you for saying that. If I could just ask a question about this.

HONORABLE ORLINDA NARANJO: Yes.

MR. MEADOWS: I can certainly see that jurors would like it. I mean, they might even like to comment on the behavior of the lawyers, too, but given the discretion that you apply to the questions and which ones are allowed and the manner in which the question is explored with the witness, do you worry that or is there any concern about that being construed as a comment on the weight of the evidence, because unless you allow all questions then you're applying somewhat of a filter to it,

and then does that raise a question in your mind about whether or not it constitutes a comment?

HONORABLE ORLINDA NARANJO: I don't believe it does because it's like what I do is address the question just like -- and apply the Rules of Evidence to it and allow the attorneys to make legal objections and not, "Well, I really don't like that question." Well, what's the legal objection? And so it would be the same filter that I would have when the lawyers making -- asking the questions, and I tell the jurors that it's not, you know -- it's not -- if I don't ask the question it's because the Rules of Evidence don't allow me to ask the question. Stephen.

HONORABLE STEPHEN YELENOSKY: Yeah. Do you -- would a potential fix for that and have you considered reading the question outside the presence of the jury and asking either or all the lawyers if any of them wish to ask that question, and then if so, go through and rule on it, and if it's permitted let that lawyer ask it?

HONORABLE ORLINDA NARANJO: Well, then I'd be afraid -- I'm kind of thinking that it -- I look at it as the procedure is better if it comes from the court, but you're thinking that might address the --

HONORABLE STEPHEN YELENOSKY: Well, because

-- yes.

HONORABLE ORLINDA NARANJO: -- the issue raised here.

HONORABLE STEPHEN YELENOSKY: Yes.

CHAIRMAN BABCOCK: Richard, do you have a question of the judge?

MR. MUNZINGER: Judge, after you've read the juror's question to the witness, do you permit the trial lawyers to then further examine the witness on the question and answer?

HONORABLE ORLINDA NARANJO: Yes, I do. Limited to the scope of the question and answer, so we don't open up -- you know, this doesn't give the lawyers another opportunity to go down and open up another area that they hadn't -- that they forgot to cross on or examine on. It's just limited to the scope of the question and the answer.

MR. MUNZINGER: And as a practical matter if a lawyer had asked in substance the same question, do you read the juror's question, notwithstanding that the same inquiry had been made by trial counsel?

HONORABLE ORLINDA NARANJO: Well, you know, sometimes. You know, if it's -- if we've beat that horse to death, I'm probably not going to allow it, but if it's, well, Judge, maybe -- you know, if the lawyers say, you

know, "It doesn't matter to us, Judge, you can ask the question," I probably will ask it.

CHAIRMAN BABCOCK: Judge, do you have a view on the destruction of notes, of juror notes that we have before us? As I formulated the question, there are three options: One, to retain all the -- pick up all the notes and make them a part of the court record, although allowing a juror who wanted to take a copy home with him to take a copy home with them. We'll call that the Benton/Munzinger option, or option two, collecting all the notes at the end of the trial and destroying them because they fulfilled their purpose and we want to avoid controversy, named after Justice Jennings; or the third approach, destroying anything that's left behind, but allowing the jurors to take them home with them to do with them what they will, which I'll call the Judge Christopher approach.

HONORABLE ORLINDA NARANJO: I actually like Justice Jennings' because that's basically what I do, and part of it is I think if we made it part of the record then we are, you know, delving into their deliberative process, and, you know, jurors might be writing a note on what that witness did on some -- you know, again, they're determining the credibility of the witness and they're looking at that witness just like we do, as the judges do,

in determining the credibility of the witness, how did they react when they responded to that question, you know, and they might have written a note by that. Isn't that actually going into their mental processes? And so I would be concerned about that, so I probably concur with Justice Jennings on that.

CHAIRMAN BABCOCK: Okay. Any other questions of Judge Naranjo?

HONORABLE ORLINDA NARANJO: I get so many questions about the procedure allowing jurors to ask questions that, you know, I'd be real curious to see if the judges here, if they allow it. I know, Stephen, you do?

HONORABLE STEPHEN YELENOSKY: Well, I am experimenting with it. So far what I've done is not as far as what I was even suggesting to you, and that is just that in one trial with the consent of the lawyers, I didn't do it after every witness, just before a break from when we would send the jury out I would ask them if they had any written questions, we would collect them, and then while the jury was out I would simply read the questions to the lawyers and say, "Do with this information what you will," wouldn't rule on it then or anything, and it was in essence feedback from the jury to the lawyers. The lawyers could then based on that, say, "Oh, they don't

understand what 'proximate' means. They think it's 'approximate,' therefore, I will ask a question about that," and they will ask the question, and like any other question in trial there may be an objection during the trial, but that took me out of it, and it didn't take any -- didn't add any time to the trial, and it allowed them to feel that they were involved.

I do think the biggest benefit of that was the jurors feeling like they had an outlet for any frustration that they had, and the benefit to the system of justice is that they stay more attentive because they feel more engaged, but I haven't gone to do what you do yet, not saying that I wouldn't, but I haven't tried it.

HONORABLE ORLINDA NARANJO: And that's exactly right. The jurors are more attentive, and that's a great big -- that's a benefit right there. They're attentive to the evidence, they're attentive to the witnesses, and they feel like they're engaged, they're participating in the process, and one of my concerns with Judge Yelenosky is that does the -- do the jurors then feel like they asked the question but they didn't get the answer, if their questions aren't being asked, at least some of them. They already know that some aren't going to be asked, but if none of them are being asked then they may not feel like, well, what was the purpose of asking

those questions.

CHAIRMAN BABCOCK: Judge Christopher.

HONORABLE TRACY CHRISTOPHER: I've done it twice with the agreement of parties. One time was fine, and the second time I thought was a disaster, although the lawyers enjoyed the process.

CHAIRMAN BABCOCK: Enjoyed it in the sense of being amused or --

HONORABLE TRACY CHRISTOPHER: They just thought it was fascinating, and I thought we were potentially putting all sorts of error into the record, and it made me very uncomfortable, and what I wanted to ask you was in my particular case I had one juror that just, you know, asked question after question after question after question and was -- seemed totally out of control. Since I have been doing the research on it I think perhaps if I had given a stronger instruction to the juror that it can only be if you're unclear about what the witness just testified to, it would have perhaps focused her onto the correct issues, but, you know, she would be jumping five witnesses ahead, she would be jumping three witnesses back, and it made it a very difficult process.

HONORABLE ORLINDA NARANJO: You know, I have had that issue come up, and you may have one just like that that might be the presiding juror when you go back

there, the foreperson, because, you know, they're asking all the questions, but normally that allows when we're going through the questions, the lawyers usually would say, "Judge, we're going to cover that with another witness," so, okay, you know, already that juror is kind of looking ahead, so we wouldn't ask that question.

So it really to me because there is the control that you have by reviewing the questions with the lawyers and many times the lawyer would say, "Well, Judge, we purposely" -- both lawyers would say, "We purposely didn't go into that area because of X," then we're not going to go into that area if it means we're going to add another two hours to the case and, you know, if the attorneys both agree on that then we're not going to go into an area that purposely we kept out.

CHAIRMAN BABCOCK: Judge Benton.

HONORABLE LEVI BENTON: Present company excused, my favorite Texas Supreme Court justice is Jane Bland, and I want to quote -- I want to quote my favorite --

HONORABLE NATHAN HECHT: It's easy if you only sat on one case.

HONORABLE LEVI BENTON: I want to quote my favorite justice and then I want to ask a question. "...the objective of jury selection proceedings is to

determine representation on a governmental body," a petit jury is a governmental body, and permitting jurors to ask questions, it seems to me you are engaging in having a governmental body aid one advocate or the other or both, and I'm a little uncomfortable with that. Your thoughts about what I just said.

HONORABLE ORLINDA NARANJO: Well, the lawyers may feel that sometimes you do see a bias towards one party or not, but usually it works both ways, and ultimately are we not trying to get at the truth?

HONORABLE LEVI BENTON: Well, yeah, we are, but it's not unusual to see advocates who are not equally talented.

HONORABLE ORLINDA NARANJO: Excuse me just a second. Allergies are killing me. I'm sure some of you are suffering from them as well.

HONORABLE LEVI BENTON: You know, we have advocates who walk in who don't have equal capabilities, and while the government -- the process of trial is to get to the truth, private citizens, private citizens have a right to select their own counsel, and, you know, and no matter our objective of getting to the truth, it still is the government helping one side or the other when you have the lawyer juror asking the questions.

HONORABLE ORLINDA NARANJO: Well, you know,

when -- Stephen, were you going to say something?

HONORABLE STEPHEN YELENOSKY: I didn't want to interrupt you. I did want to respond to it, but go ahead.

HONORABLE ORLINDA NARANJO: Oh, you go ahead.

HONORABLE STEPHEN YELENOSKY: Well, does that mean I'm taking a side as a judge when I ask a question on the bench trial?

HONORABLE LEVI BENTON: That's the same question.

MR. MEADOWS: You're the fact-finder, though.

HONORABLE STEPHEN YELENOSKY: Well, what's the jury?

MR. MEADOWS: I know, but isn't that the point? That's Levi's point.

CHAIRMAN BABCOCK: Speak up, Bobby. We can't hear you.

MR. MEADOWS: Well, there's a difference between the roles in a jury trial and your role in a bench trial, in my judgment.

HONORABLE STEPHEN YELENOSKY: Well, sure, but when I'm asking a factual question in a bench trial I'm asking it as the fact-finder. The jury asks a

question, and they're asking it as a fact-finder. What you're saying is that a juror may improperly step out of their role and we don't really expect judges to do that and start asking questions that are biased or intend to point out some fallacy in the case, and I can see that potential problem. It could also happen with the judge. It's just that judges are trained hopefully not to do that and understand their role, and then I don't know what Judge Naranjo is going to say, but that problem is also taken care of by an approach that merely reads to the lawyers what the question is, offers them up to do what they want with it, because at that point it's adopted or not by the lawyer to ask. The other thing I guess you could do is say, "That question is clearly an advocate's question, not an inquiry, and as the judge I'm not going to ask it."

MR. GARCIA: Well, one juror could influence another juror by the question. Your question doesn't influence you. You already are who you are, and you already have your thought process, but one juror could clearly impact another juror's view by the questions.

HONORABLE STEPHEN YELENOSKY: Well, but if the question --

HONORABLE ORLINDA NARANJO: Well, but that same -- I'm sorry. That same deliberative process is

going to occur in the jury room.

MR. GARCIA: Right.

HONORABLE ORLINDA NARANJO: They're going to be talking about that, and so why not address that question if we can, if the Rules of Evidence allow it, allow that question to be asked, and the lawyers are allowed to assert any objection that they would besides "I don't like the question," then what we're doing is addressing the question that the jury has as the evidence is coming in. The -- let's see, I lost my train of thought, I'm sorry. But that would be my only point on that and to address the concern here.

CHAIRMAN BABCOCK: We're going to continue this discussion after our morning break, but before we take our morning break, I think we have fully discussed the issue of destruction of the notes, so I'd like to get a sense of the committee by vote. Jeff.

MR. BOYD: We have, but could I suggest that there ought to be a fourth alternative, and that is --

CHAIRMAN BABCOCK: Yeah, you have waived the right to -- no, go ahead.

MR. BOYD: And that is that -- I mean, I'm looking around at these experienced and wise judges who disagree with each other, and I think it's because you have different juries, different cases, and I wonder if

the rule -- a better alternative would be for the rule to lay some fundamental standard of achieving justice and then leave it expressly to the discretion of the trial judge. It may create satellite litigation, but it sounds like any option will, and it will provide for some real life factual situations that will allow this law to develop over time.

CHAIRMAN BABCOCK: So we've got four options now. The Bunton/Munzinger option, the Jennings option, the Christopher option, and the Boyd option. So --

HONORABLE TRACY CHRISTOPHER: What's Bunton/Munzinger again?

HONORABLE LEVI BENTON: You mean Benton/Munzinger?

CHAIRMAN BABCOCK: Benton/Munzinger.

HONORABLE TRACY CHRISTOPHER: What's Benton/Munzinger again? Put them part of the record, make them part of the record?

CHAIRMAN BABCOCK: I'll explain it all in a minute. We'll vote for your favorite and then we'll vote again for the top two. Everybody understand that?

PROFESSOR CARLSON: May I say something?

CHAIRMAN BABCOCK: Yeah, Elaine.

PROFESSOR CARLSON: Do all of the options assume that evidence Rule 606 would provide, and 327, that

jurors' notes are inadmissible?

CHAIRMAN BABCOCK: No, it would not be tied to an --

PROFESSOR CARLSON: Okay.

CHAIRMAN BABCOCK: -- amendment to 606.

PROFESSOR CARLSON: Okay.

CHAIRMAN BABCOCK: All right. The Bunton/Munzinger, as I understand it, is that the jury notes would be retained by the court, although a copy could be provided to the juror who wants to take it home with them, and retained by the court to be used any way anybody wanted to use it. That's number one.

Number two, the Jennings approach, is that the notes have fulfilled their purpose, they are all collected at the end of the trial, and they're destroyed.

Option three, the Judge Christopher approach, is that the notes that are left behind are destroyed, but any juror who wants to take their notes with them can take them home with them and do what they want, destroy them, give them to the plaintiff's lawyer or the defense lawyer or whatever.

Option No. 4, the Boyd approach, is the trial judge has discretion to do any one of one through three above.

MS. CORTELL: I'm sorry, but can I ask for

reconsideration of Elaine's suggestion? I mean, because my vote changes depending upon whether it is exempted from further consideration as part of the appellate process.

CHAIRMAN BABCOCK: That's going to have to be an imponderable for now. Yeah, Harvey.

HONORABLE HARVEY BROWN: I thought that was really part and parcel of that --

HONORABLE STEPHEN YELENOSKY: Yeah, it is.

HONORABLE HARVEY BROWN: -- third point. I don't know that you can really segregate.

HONORABLE STEPHEN YELENOSKY: The third one doesn't work without that.

CHAIRMAN BABCOCK: Why doesn't the third work without that?

HONORABLE STEPHEN YELENOSKY: Well, because I'd say you have to destroy them if you're not going to have a rule that makes them inadmissible, but I'm against destroying them.

CHAIRMAN BABCOCK: Do you think they're inadmissible now?

HONORABLE STEPHEN YELENOSKY: Yeah.

CHAIRMAN BABCOCK: Okay. So then we don't have to worry --

HONORABLE HARVEY BROWN: The rule doesn't say that.

PROFESSOR DORSANEO: I don't.

HONORABLE TRACY CHRISTOPHER: I told you there's one appellate case going up on this point right now where the trial judge kept the notes in camera.

CHAIRMAN BABCOCK: 606 is what it is, so if you-all think it says they're inadmissible then they're inadmissible. If you think that the rule doesn't say that then you think it doesn't say that, and that may influence your vote however you vote. So --

HONORABLE STEPHEN YELENOSKY: All right. So we vote based on the current rules.

CHAIRMAN BABCOCK: We're going to vote based on the current rule. We're not going to try to get into that for this vote.

HONORABLE TRACY CHRISTOPHER: But if more -- I think this is an unfair vote, because if more people are okay with letting people take their notes home as long as it's clearly spelled out that they can't be part of jury misconduct, that should be the result.

CHAIRMAN BABCOCK: Which you think it is. You think 606 does that, right?

HONORABLE TRACY CHRISTOPHER: Well, I haven't briefed that issue, and I'm not ready to rule on that point.

CHAIRMAN BABCOCK: That's why we can't take

a vote based on whatever anybody thinks about 606.

HONORABLE TRACY CHRISTOPHER: But my idea was we could change those rules to clearly spell that out.

CHAIRMAN BABCOCK: Okay. Well, we'll talk about that after the break.

HONORABLE DAVID PEEPLES: Why can't Judge Christopher specify what goes with her proposal?

CHAIRMAN BABCOCK: I knew I shouldn't have named these options.

HONORABLE DAVID PEEPLES: Really.

CHAIRMAN BABCOCK: Yeah, okay. That's a fair point.

HONORABLE DAVID PEEPLES: She ought to be able to define her proposal, shouldn't she?

CHAIRMAN BABCOCK: All right. Judge Christopher's proposal then is that they're destroyed -- whatever notes are left behind are destroyed. Whatever notes the jurors want to take with them for whatever they want to do with them, they can do it, but Justice Hecht will agree that 606 means --

HONORABLE TRACY CHRISTOPHER: No. No. Let's specifically revise 606 and 327 to include jury note-takings not being admissible.

CHAIRMAN BABCOCK: Okay. Either 606 as currently written or to be revised by this committee will

say that the notes are inadmissible. So that's option three, the Christopher approach. Is that okay?

HONORABLE TRACY CHRISTOPHER: (Nods head.)

HONORABLE TERRY JENNINGS: See, under my plan you don't have to do any other tinkering.

HONORABLE STEPHEN YELENOSKY: That's like the lawyer who says, "If you rule this way the trial will be three days shorter."

CHAIRMAN BABCOCK: Okay. So everybody in -- we're going to take two votes now. Everybody in favor of Option No. 1, the Benton/Munzinger approach, raise your hand. Benton, are you going to vote for your own --

HONORABLE LEVI BENTON: Actually, no, I'm in the Christopher camp. I've always been in the Christopher camp.

CHAIRMAN BABCOCK: Everybody who is in favor of the Jennings approach?

PROFESSOR ALBRIGHT: The what approach?

HONORABLE TRACY CHRISTOPHER: Destroyed, Jennings.

CHAIRMAN BABCOCK: Jennings approach, destroy them all at the end.

All right. Everybody in favor of the Christopher approach.

And everybody in favor of the Boyd approach.

Let the record reflect that Boyd is in favor of the Boyd approach. Oh, and Tommy Jacks.

MR. GILSTRAP: I don't think you need a runoff.

CHAIRMAN BABCOCK: Okay. The top two vote-getters are the Jennings approach with 7 and the Christopher approach with 24. Benton/Munzinger having gone down to defeat with three votes and Boyd pulling up the rear with two votes. So we'll have a vote off here.

MR. GILSTRAP: Chip, you don't need a runoff. I think you've got a majority.

CHAIRMAN BABCOCK: We do have a majority, but, yeah, Judge Benton.

HONORABLE LEVI BENTON: The Munzinger approach is not at all distinguishable from the Christopher approach.

HONORABLE TOM GRAY: Yes, it is, because on the Munzinger you don't have the related rule connection.

MR. MUNZINGER: In fact, I agreed with Judge Christopher. He misstated what I believed, but I was not going to take everybody's time. It wasn't worth it.

CHAIRMAN BABCOCK: Any of the 12 people who voted for other than Jennings or Christopher want to switch over to Jennings? No, I think we probably should add Justice Hecht, so that's a weighted vote.

HONORABLE NATHAN HECHT: No, I was saying good-bye to Judge Naranjo.

CHAIRMAN BABCOCK: Oh, okay. Let's just do this just for my own amusement then.

HONORABLE LEVI BENTON: It's a Christopher/Munzinger/Benton approach.

CHAIRMAN BABCOCK: Boy, talk about a bandwagon. Everybody in favor of the Jennings approach now. And everybody -- well, that's only eight votes, so one person switched, so the Christopher approach is the overwhelming favorite of our group, and we'll take a break.

(Recess from 10:45 a.m. to 11:03 a.m.)

CHAIRMAN BABCOCK: All right. We're back on the record. Justice Hecht, we can't start without you. Buddy, let him go. All right. Slowly coming back to the ship here. We sort of started a discussion on juror questions before the break, and rather than just wade back into it completely, Judge Christopher, do you have any guiding comments you want to make about that issue?

HONORABLE TRACY CHRISTOPHER: Yes, if I can. As I've put in the summary, a lot of people are now sort of supporting the idea of juror questions, except for the trial judges for the most part, who still think it's a very bad idea. A few trial judges, about 10 percent,

currently allow juror questions, so I had 92 that did not and 10 that did. Again, I think that's probably slightly underrepresented because I know there are -- for example, the Travis County judge who just spoke, I don't think she replied to my survey, and I think there are others, for example, in Harris County that allow juror questioning.

What I found was very interesting about it, and it's raised some of the issues that have already been discussed, is what happens to the advocacy role when you allow juror questions and does it skew the adversarial process with the allowing juror questions. Most people agree to the same format of allowing jury questions if we wanted to go that way. The juror puts the questions in writing, the lawyers and the judge review them outside the presence of the jury with an opportunity to object, and then the judge asks the questions. A few judges also did it the way Stephen suggested, which is to just if the lawyers wanted to incorporate those questions into their questioning, they could. So pretty much the format is there if we like the concept of how to do it.

There are a lot of other states that have pattern jury charge type instructions for juror questioning, little forms that you give the jurors. They actually have a note pad that says "juror question," which contains the instruction on it, and that way they have a

nice record of the question, the ruling, and what happened for appellate purposes. What I actually thought was interesting was the National Center for State Court report that said that juror questions are most useful in complex cases and that the jury should be instructed to ask questions to clarify a witness' testimony, if the testimony was confusing or complicated; and as I indicated anecdotally with my two experiences with it, I think if I had given that sort of an instruction, a specific instruction to the jury that those were the type of questions we were looking for, you know, a question specifically about what the person just testified to, was there something in it that you were confused about or didn't understand, terminology, technology, that we focus the juror on the type of question to ask, I think the dangers inherent in juror questioning lessen.

I included Federal case law on the point where all the circuit courts conclude that in a particular case it is permissible to ask jurors questions, and pretty much in the Federal case law it appears to be limited to complicated cases. I cited one case out of the Second Circuit, *U.S. V. Ajmal*, where the Second Circuit held that the trial judge abused his discretion in allowing juror questions in a routine drug case, so the Second Circuit thought that the juror questioning process should be

reserved for more complicated cases.

Texas case law, we have a Court of Criminal Appeals opinion that says it's per se harmful error to allow jurors to question witnesses, and we've got two court of appeals decisions that have concluded that juror questions with appropriate safeguards are permissible, and it's the same sort of safeguards that we've already discussed, question in writing, opportunity to object outside the presence of the juror, then allowing follow-up questions after the question is asked. So if we want to allow the process, I think there is a format that people have been using that's in place.

My recommendation was, you know, full discussion of the issue, maybe obtain names of lawyers who have participated in the trials. We've talked to a few judges that have done it. There are more. We might want to talk to more judges that have actually done the process and have a little more long-term history of any potential problems with it. Then the other things that I thought was should the rule be discretionary with the court? I certainly think that we should start out that way, because it is a pretty bold step for most lawyers and most judges. Should it be at the request of either side, only with agreement of both sides, and then the idea that jurors should be instructed that the questions should only be

asked if the testimony needed to be clarified.

I got a lot of comments from the judges about the pros and cons of the process, and the cons that they all mentioned are ones that we've talked about already. That it could help one side, the side that has the burden of proof, it could create error, lawyers should be the ones in charge of their case presentation, it causes the jurors to become advocates, it could lead to juror discussion before hearing all the evidence, possible delay of the trial. You do learn what the jurors are thinking, but it could be that they're thinking about inadmissible things, and, you know, what do you do with that.

So those -- the criticisms of the process that some people have already started to talk about are also what the judges feel are the dangers inherent in the process, but I think perhaps that it might be useful with appropriate instructions in a complicated case. I kind of like exploring that idea myself, rather than just an everyday you have to allow it situation.

CHAIRMAN BABCOCK: Okay. Discussion about this? Tommy.

MR. JACKS: Sorry?

CHAIRMAN BABCOCK: Got a comment?

MR. JACKS: No.

CHAIRMAN BABCOCK: Okay. Jeff.

MR. BOYD: I have to leave for another meeting, so I'll just lay it out now.

CHAIRMAN BABCOCK: Is this an option or an observation?

MR. BOYD: Yeah, I was going to say the fourth suggestion should be to leave it to the discretion of the trial judge, which is really what I'll suggest in the end, but because I'm not sure how you distinguish what's a complicated case and what's a simple case except for the trial judge making that distinction in the context of what's happening.

I tried a simple case where the plaintiff alleged he was injured by a stack of pallets that fell on his leg, and it was a six-day jury trial in San Antonio, and when it was all over one of the juror's asked me, "What's a pallet?" Neither of us ever thought about the fact that we would have to show them pictures of what a pallet is. Had that written question been submitted on the first day of trial after jury selection, both -- I mean, that's an example of where even in a simple case it sure would have helped to have that process.

CHAIRMAN BABCOCK: Okay. Orsinger. There is a record set at this committee, by the way. We went through a whole topic in the morning without Orsinger

making a single comment.

MR. ORSINGER: I made notes here.

MR. SCHENKKAN: I'll vouch for it. He was working on this.

CHAIRMAN BABCOCK: Is that right, you've got notes?

MR. ORSINGER: There were already too many points of view.

CHAIRMAN BABCOCK: They will be destroyed at the end of this meeting. Frank.

MR. GILSTRAP: Well, on this question of discretion, I think there's two issues on discretion. I mean, first of all, are we going to give the judge discretion whether to allow the procedure? In other words, you know, are we going to say to the judge you can allow it, but you don't have to; and secondly, if we decide -- if the judge does it, what kind of discretion is he going to have over whether or not to ask the question? I mean, are you going to review that just like any lawyer's question? You know, it was a material -- it was a relevant question, he should have been allowed to ask it. I don't know.

And then what kind of -- you know, what kind of discretion? Are they going to have absolute discretion, or are we going to -- is it going to be

unfettered, or are we going to review it in some way? It seems to me those are some things we might want to think about because I guess -- or is anybody saying there should be no discretion, we should do this in every case. I don't think so.

HONORABLE STEPHEN YELENOSKY: The Legislature, at least the interim committee.

HONORABLE TRACY CHRISTOPHER: Right. The Senate Bill 1300 was silent on the issue, but the most recent Senate Jurisprudence interim report recommended allowing juror questions during civil trials, and I'm not sure they really meant this the way they wrote it, but perhaps they did, "By permitting anonymous written questions before deliberations. Counsel would object outside the presence of the jury and the witnesses. After ruling judge would recall the jury and witnesses." So I kind of got the idea that they were thinking about doing it at the end of trial right before deliberations from the way it's written as opposed to on a witness by witness basis.

CHAIRMAN BABCOCK: Okay. Yeah, Nina.

MS. CORTELL: I just have a question. Maybe I should understand this by now. What is behind the movement of a juror's bill of rights, right to counsel and escort, ask questions? What's -- I'm just trying to

understand what's the philosophy. I mean, is it to further the judicial process? Is it to empower jurors? Or I don't know.

HONORABLE TRACY CHRISTOPHER: I'm not sure. I've got a copy of the ABA American Jury Project that was put out, or at least this copy is 2005, where the juror bill of rights seems to have been established, but it's certainly something that's been percolating before that as a way to enhance juror satisfaction with trials, perhaps increase juror turnout for trials, perhaps increase trials. You can see this if you want.

CHAIRMAN BABCOCK: Okay. Justice Jennings.

HONORABLE TERRY JENNINGS: Well, as proposed it seems like there has to be some kind of discretion on the part of the trial court involved, because, you know, if a plaintiff is presenting their case in the first week of trial and they present an expert and then three weeks later the defense presents its case and they present an expert, let's say these experts have flown in from across the country and after the second expert testifies then the jurors want to ask the first expert some questions. You know, that party is going to have to fly that expert witness back in. I mean, there's got to be some room for discretion here, you know, what to allow and what not to allow, even though the juror may have a great question for

that first witness it's like, you know --

CHAIRMAN BABCOCK: Yeah, Carl.

MR. HAMILTON: I think we've gotten along many years without jurors asking questions, and it has a lot of problems with it, and if they don't understand something, they can ask to have the testimony reread to them, so I just think it creates more problems than it solves.

CHAIRMAN BABCOCK: Okay.

MR. PERDUE: Can I ask the judge to --

CHAIRMAN BABCOCK: Jim.

MR. PERDUE: I don't have it in writing, to hear what the Federal court, that admonitory, or was it an instruction on when it's appropriate to do it or when it's appropriate to ask a question?

HONORABLE TRACY CHRISTOPHER: Oh, the Federal courts believe that you should allow juror questions when the case was complex and to avoid the routine use of questions in trials. The -- even the Second Circuit that said that the trial judge abused his discretion says that the practice of allowing juror questioning of witnesses is "well-entrenched in the common law and in American jurisprudence," apparently not in Texas, but everywhere else it is well-entrenched, but it's permissible within a judge's discretion, but they should

be neutral questions, the juror should not turn into an inquisitor, to an advocate.

I guess it gives -- I didn't actually write down the specific instructions from the Federal cases, but I could get those for you. I guess at some point perhaps the judge has to shut it down if they think that a juror is becoming too much of an inquisitor or an advocate in the process.

CHAIRMAN BABCOCK: Do you agree with the Second Circuit that this is well-entrenched?

HONORABLE TRACY CHRISTOPHER: Well, apparently in Federal courts, because all of the circuit courts surveyed, First, Eighth, Fourth, Fifth, Sixth, and Second, all say that it's permissible in Federal trials.

CHAIRMAN BABCOCK: Well, haven't they really found there's no reversible error?

HONORABLE TRACY CHRISTOPHER: Some of them it's been no reversible error, but they all said it was okay where the questions were bland, designed to clarify testimony, reserved for exceptional cases, not routine. Like I said, I didn't do a full scale research on all the ramifications in the Federal courts.

CHAIRMAN BABCOCK: Okay. Judge Yelenosky.

HONORABLE TRACY CHRISTOPHER: I just picked the highlights of the Federal cases.

HONORABLE STEPHEN YELENOSKY: Well, since there seems to be, for whatever reason, interest, the Legislature has and maybe popular interest in this, I guess I would break it into two parts; and one is if anything is going to be mandatory, should it be the opportunity to submit questions to the judge. That's one part of it, and the second part would be whether anything is mandatory from that point on.

The first part being mandatory is less troublesome because all that then happens is the jurors are writing down what's in their head, not showing it to any other juror, presenting it to the judge, and from there it may or may not ever get read. The lawyers will hear it, but no other juror will hear it. It won't be asked unless whatever the discretion involved is exercised to allow it.

So if something has to be mandatory I could live with I've got to accept written questions from the jury. The other part presents all the problems that everybody has discussed about making it mandatory. The question of whether complex or not, I think it would be fine if in a judge's handbook the advice to a judge was don't use this except in complex cases, blah-blah-blah, but to make that the law, I agree with Jeff, who's now gone, so I can rephrase what he said however I want

without being corrected, is just -- just opens satellite litigation over whether that case was complex or not, and even if it wasn't, there could be good reason for allowing questions for the benefit of the case and just from the perspective of keeping the jurors engaged in a short, boring case.

So I'm really against any law that would restrict the judge as to when he or she could use it based on the alleged complexity of the case, if it's going to be discretionary, and I oppose making it compulsory that the judge do anything in particular with questions submitted, but maybe that's not a way we can slice this into.

CHAIRMAN BABCOCK: Judge Christopher.

HONORABLE TRACY CHRISTOPHER: One of the judges that did do it sent me -- I can't remember whether it was his or her -- his or her rules on what instruction they gave the jury, and I thought these were pretty good rules if we wanted to incorporate that, since Jim asked about what sort of instructions they got. The rules are, "The sole purpose of juror questions is to clarify the testimony, not to comment on it or express any opinion about it. If your question does not seek clarification of the testimony of the witness, it will not be asked. Please reserve your questions only for important points. Jurors are to remember that they are not advocates and

must remain neutral. Fact-finders, your questions are subject to the same rules as apply to the questions of the attorneys, and if they violate these rules, they will not be asked. Jurors are to draw no inference if a question is not asked. It is no reflection on either the juror or the question. Jurors are not to weigh the answers to their questions more heavily than other evidence in the case."

CHAIRMAN BABCOCK: Yeah, Harvey.

HONORABLE HARVEY BROWN: I gave a similar instruction for about two or three years and allowed juror questions, and I also added something about the juror who wanted to ask tons of questions, basically saying no one juror should be asking too many questions and taking over the process, and I probably only got about four or five questions in all the trials. So I did it in a way that somewhat discouraged it unless it was important, whereas here one of the judges today basically almost encouraged it. To me there's a big difference. If you encourage it you're more likely to have questions that are more like advocate questions, whereas if you discourage it you're more likely to get the question like Jeff had that was a simple obvious question that none of the lawyers thought about. So to me the devil may be in the details.

CHAIRMAN BABCOCK: Yeah, Judge Peeples.

HONORABLE DAVID PEEPLES: Two or three points. I would be strongly against ever requiring judges to tell jurors at the beginning that they can ask questions. I'm in favor of letting sleeping dogs lie. I mean, I have never had jurors come to me after a case saying, "Gosh, I wish I could have asked questions," and in all the cases I've tried I've had either one or two instances of questions, and they'll tell the bailiff or something, you know, "Can I talk to the judge?" And the juror would say, "I'd like to ask a question," and I think what I did was talk to the lawyers, and we agreed to say "Wait until the end of the witness' testimony and do it in writing."

And so I would strongly urge that if we allow it, and I think I'm in favor of allowing it, I'd let the judge have the discretion to raise the subject if the judge wants to, which Judge Naranjo apparently does. I would never do that, but if the jurors raise the subject, then I'd give the judge a lot of discretion on how to handle it, but I think, you know, the important points, I would think, would be, yes, you can do it, but it's got to be in writing, wait until the end of the witness' testimony, and I will screen it for admissibility. In other words, take the heat off the lawyers. You don't want some lawyer to have to be basically objecting to a

juror's question and the jury know that, so I would say, "I'll screen them for admissibility," and I think that is enough of a procedure that they would have to go through that it wouldn't happen very often.

MR. MEADOWS: Judge Peeples, how would you allow after that process the question to be put to the witness?

HONORABLE DAVID PEEPLES: Well, I think you can ask it.

MR. MEADOWS: You, the court, would read the question to the witness?

HONORABLE DAVID PEEPLES: Well, I think there would be very few questions that I would want to read verbatim unless you've got a very articulate juror. I would talk to the lawyers about it and would come up with some agreed way of doing it, and a lot of times -- the times I've seen it done, which is, like I said, once or twice, one of the lawyers said, "You know what, I forgot to cover that," and the other lawyer said "fine."

MR. MEADOWS: But that's a concern I have, and it may be what we're being asked to do is to examine how this can be done in the best way, but I really do worry about this, allowing this, and how it might distort the adversarial process, because just to take that example, if a lawyer then says, "Well, I'll ask that

question," then that lawyer has responded very directly to a juror's concern and interest in the case, and that lawyer and the witness that's answering the question perhaps in some ways has an elevated -- will have an effect on that juror and certainly in responding to that question in a way that perhaps somewhat, you know, as I say, distorts the contests, the presentation skills that are going on absent that interference or involvement by the jury.

So is this -- you know, I don't really know how I come down on it, other than to worry about what this -- how it will work and what it might do to the process that we know, which has basically two adversaries doing the very best job, which is often not equal, and that resulting in an outcome that is heard and filtered and decided by the jury. So allowing the jurors to involve themselves in that and ask questions that may be, you know, points of advocacy or just in terms of directing what happens with the evidence and the presentations, I think is something that we ought to be concerned about.

CHAIRMAN BABCOCK: Judge Benton.

HONORABLE LEVI BENTON: I'm glad that David piped up because David's probably one of the few who's presided over both civil and criminal cases, and I wonder what your thoughts are, David, about the use of -- or

permitting the jury to ask questions in a criminal proceeding where the adversarial process, as Bobby has already expressed, is affected and you risk the victim or the accused being outraged by something that comes from what is essentially a government actor aside from the prosecutor.

CHAIRMAN BABCOCK: Buddy.

MR. LOW: I would wonder how you would handle -- what if a juror is kind of forgetful like me, and they don't think about it until three or four witnesses later, and then they say, "Well, I want to know such and such." I mean, do you really call that witness back or what if he's an expert and he's gone, he's been excused by the court or something? Do you just limit it to as a witness testifies, then say "if you have any questions about his testimony"?

MR. MEADOWS: And can I just kind of key off of something Buddy just said? Suppose you've got competing experts dealing with a hotly contested point, and the first expert comes and goes and then the second expert is on the stand and the question comes up and then it's that lawyer and that expert that gets to respond to that issue with -- you know, in a way that, you know, that's isolated from the prior testimony and prior examination and presentation of the case that went before.

So all of the sudden something that becomes important in the trial is addressed by a witness that might -- where there might be a point of disagreement with an earlier witness.

HONORABLE TERRY JENNINGS: And it's not always going to be experts. I mean, you can have, you know, one witness testify to something and another witness testify to something else. There's going to need to be a reconciliation between the two, and that's when the question -- a quite legitimate, probably, you know, on point question, is going to arise in a juror's head when that other witness is already gone.

MR. LOW: Right.

CHAIRMAN BABCOCK: Okay. Jim.

MR. PERDUE: Anecdotally, at least in Harris County for the past -- I don't know that I've tried a medical malpractice case where the judge didn't allow questions. I mean, it's been allowed in -- Judge Brown did it, Judge Baker. I haven't tried one with Judge Benton. It's been allowed in every one, and the procedure is -- the construction was almost identical to what Judge Christopher just read, and I would say we've averaged maybe four questions a trial, and it has not created a lot of -- and they're complicated medical questions, and you'll usually -- they come up after my expert and after

the defendant's expert, and the jury is told the questions are for this witness. So I've never encountered the situation where they have a -- you know, I've got to bring somebody back from D.C.

CHAIRMAN BABCOCK: Yeah.

MR. PERDUE: I've never encountered that, and interestingly, it is in the last -- the first time it was done, the court asked it, but I would say in the last four I've done it was left to the discretion of the lawyers to ask the question, and we handled it. And maybe, Bobby, I asked it better than the other guy would or the court would, but, you know, we thought -- and the judge just allowed us that if we thought it was something that needed to be put to our witness, we could take it on and do it; and the whole goal is comprehension; and so if you've got a jury who doesn't know what a pallet is, the lawyers made a mistake, but, you know, it has worked it seems in that type of technical situation where we're -- you know, we're trying to convey some pretty scientific information on medicine, and it hasn't been overwhelming. I mean --

HONORABLE STEPHEN YELENOSKY: What kind of questions have you got?

MR. PERDUE: -- that's just anecdotal experience.

HONORABLE STEPHEN YELENOSKY: Do you remember the kind of questions you've got?

MR. PERDUE: "Exactly what is the sedimentation rate?"

"He said that the blood pressure was such and such at this time. Does he have a theory why?" You know, just pretty basic kind of factual opinion testimony on the medicine stuff.

MR. MEADOWS: But just on this point, because I get it, and I see the value in it, and the pallet example is very enticing because you certainly don't want a jury deciding a case like that who doesn't understand what a pallet is, but that seems to me somewhat the role of the lawyers to be able to present the case in a way that's comprehensible to a jury, and that's no knock, because all of us can skip over that that we think is so self-evident, but all of us are trying to figure out each and every minute of every day of trial what it is the jurors want to hear and what would be useful to them and to be -- and to actually have one of them communicate that to you and have that lawyer -- have one of the lawyers be able to respond to it seems to me to be a bit of a distortion of the whole process, because we're both competing in terms of the skill of your presentation, the effort, you know, the benefit of facts.

MR. PERDUE: See, I see the persuasion point you're making, but at least in practice, to me it's been a comprehension element. Of course, I lost three, and I won a couple, so I don't know. If the thought is, is that you as a lawyer take on their question and get in the box next to them, I see that as your point, but at least in the limited numbers of questions that we've gotten and them being just purely of a comprehension nature, on the ground the way it's worked hasn't impacted that kind of concern.

CHAIRMAN BABCOCK: Okay. Richard Munzinger, sir.

MR. MUNZINGER: At the present we don't have a rule where the judge advises the jury that you may ask a question and if you're going to do so, you have to do it in writing and all, and we have this regular routine that we go through. So if you're going to adopt a rule now where the judge tells the jury that, in my judgment it's going to trigger a lot more questions, and instead of you having the experience of having four cases, it's going to -- you're going to get a lot of questions in a lot of cases and maybe in every case, and it raises the problem of does the judge solicit jury questions from every witness, and in determining if the answer to that question is, no, just important witnesses, is the judge's decision as to who is an important witness some kind of a comment

on the weight? Is it -- has it caused a problem here? Is it suggestive to the jury of something?

You know, obviously it seems to me if you encourage these questions are going to increase the time of trial because each time you have to wait for the juror to get his or her question written and you're going to have to in each and every trial give them a means of writing the question down and communicating it to the judge and taking the time to do so, and then there's a recess while the judge reads the question, determines whether it is or isn't relevant, admissible, et cetera, and then the lawyers argue about it, and then you have to write the rule to make certain that once the question is answered everybody knows what the procedure is, do you allow the lawyers to go back into the subject matter of the question.

So it's one thing to relate our experiences as trial lawyers around the state in a system that doesn't have a rule, which by its effect encourages this activity, but once you adopt this rule you're going to encourage the activity and change trials, in my opinion, and I don't know that you will be necessarily changing trials for the better. You may be and you may not be, but I do think you're going to encourage this and have some experiences and new areas where you're treading a brand new ground and

you may have some reversible points or other points that complicate trials, which are already complicated obviously.

CHAIRMAN BABCOCK: Yeah, Buddy.

MR. LOW: I've always heard that curiosity killed the cat, and if I had a question I asked and they wouldn't answer, I'd get back there, and I'd say, "I asked such and such. Wonder what the answer is, what are they hiding?" You know, how do you handle that? I guess by instructing them "don't speculate" or something like that. Maybe it could be handled by instruction, but it would make me as a juror --

HONORABLE STEPHEN YELENOSKY: Buddy, I can't hear you. I'm sorry. Can you speak up?

MR. LOW: No, I mean if I ask a question and it's not answered, we get back, I'd say, "You know, I wanted to know the answer to such and such. Well, they didn't answer my question. Well, what is the answer," and they're speculating on something that they're not even supposed to be thinking about. I mean, would they become more curious, and maybe you could handle it by telling them "Don't speculate on answers to questions that aren't answered" or something. Maybe it could be handled, but I would become very curious and ask the other jurors, "Well, I asked this question. Why wouldn't they answer it?"

CHAIRMAN BABCOCK: Yeah. Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: Well, just to respond to that, I mean, there are tons of things that we tell jurors basically "Don't look behind the black curtain."

"We're sending you out right now." You know, "We had to take care of some stuff this morning." They get quite used to not knowing what's going on and understanding that that's the deal, so I'm not particularly worried about that.

MR. LOW: But it's different. I had nothing to do with that, and now you're asking me to ask a question, and I ask it, and you tell me, "Well, no, we're not going to answer that." So it's different than the stuff you say we have going on, got nothing to do with that.

HONORABLE STEPHEN YELENOSKY: It is a little bit different.

MR. LOW: It becomes --

HONORABLE STEPHEN YELENOSKY: But I think the big picture issue that I think Jim alluded to is -- and maybe the public and the Legislature are most interested in is when it's just informational questions, and to the extent we can figure out a system that allows at least and provides the procedure for a judge doing a

good job to merely answer information -- or get informational questions answered for the jury, then I don't think that's a bad thing.

Moreover, if it ends up something that gets mandated in some way, we should write the procedure rather than somebody else writing the procedure.

MR. PERDUE: And I will say that when it's done, the trial judges that I've had do it have given a very good instruction of saying, "If your question is not asked, it is my -- it has been my decision," and they -- they've done a very good job of that exact concern of --

MR. LOW: I know, but do they go and say don't --

MR. PERDUE: It's the court's decision on whether your question gets asked or not and so that the parties aren't penalized.

MR. LOW: I'm not talking about penalizing the parties. I'm talking about them engaging with the other jurors about testimony they shouldn't or things they shouldn't deal with.

HONORABLE TERRY JENNINGS: How often are questions rejected?

CHAIRMAN BABCOCK: Anybody know that?

HONORABLE TERRY JENNINGS: Are most of the questions pertinent and on point and they're asked, or are

most of them rejected or --

HONORABLE STEPHEN YELENOSKY: I've only done it once, so --

HONORABLE TRACY CHRISTOPHER: I've only done it twice, and one was good, and one was bad, and a lot of rejected questions.

HONORABLE STEPHEN YELENOSKY: In my case the most questions and the worst questions were asked by the only lawyer on the jury.

HONORABLE SCOTT BRISTER: Good thing you didn't have a judge on the jury.

MR. PERDUE: Well, and I had a nurse, and she asked a ton of questions, and she was going to cross-examine the defendant doctor on her own, but it ended up that I think that just if I took the universe I would say that easily three quarters of the questions end up getting asked.

CHAIRMAN BABCOCK: What options do we have here? Do we -- since everybody is reluctant to sponsor except for Boyd, who's left. Boyd's thought was to give it to the discretion of the judge. I suppose another option is to recommend to the Court that it be prohibited altogether, and then the third option is that it be mandatory, which may be suggested by the statute. Okay, Alex.

PROFESSOR ALBRIGHT: How about making it discretionary, but putting a proposed instruction in 226a so that if somebody wants to do it then they have some guidance on an instruction?

CHAIRMAN BABCOCK: With rules or guidelines or something, something in --

PROFESSOR ALBRIGHT: An optional instruction.

CHAIRMAN BABCOCK: Judge Christopher, then Judge Yelenosky.

HONORABLE TRACY CHRISTOPHER: I think it ought to be in 265 rather than 226a, because that's, you know, order of proceedings on trial by jury that kind of goes through who asks questions when, and if we're going to say, you know, "This is the time." Because I really didn't like the way the Senate Jurisprudence Committee sort of made it at the end of the whole case. I mean, that just struck me as weird that they had written it that way. Maybe they didn't really mean it that way, but logically it needs to be after each witness, and logically it should be after each side has questioned the witness, would be the spot for juror questions. So --

CHAIRMAN BABCOCK: Okay.

HONORABLE TRACY CHRISTOPHER: You know, I would put it there, but I would --

PROFESSOR ALBRIGHT: I defer to Judge Christopher on that.

CHAIRMAN BABCOCK: Judge Yelenosky, then Justice Jennings.

HONORABLE STEPHEN YELENOSKY: Well, I still think that we should draft something that I guess is a rule that allows it and provides some guidance, and I guess I'd like that guidance to be pretty broad because I would hope that the judge would have the discretion to do it in the various ways that we've discussed it's been done, unless we decide that one is clearly unacceptable, be it allowing the lawyer to ask the question or be it allowing the judge to ask the question. That may be something we want to decide.

But otherwise, for example, due to the additional time that would be added in doing it after each witness, I didn't do it that way. I just took questions at the normal breaks, and obviously that had the downside that the witness might be gone, but it still had some upside to it, and so I would want the guidance not to preclude that.

CHAIRMAN BABCOCK: Okay.

HONORABLE TERRY JENNINGS: Could we or should we include a provision that the trial court's exercise of its discretion in either allowing a question

or denying a question shall not be grounds for reversal on appeal?

MR. ORSINGER: No.

HONORABLE TERRY JENNINGS: I just put that question out there.

CHAIRMAN BABCOCK: And what would be behind that policy?

HONORABLE TERRY JENNINGS: Well, if the idea is to encourage, I don't know, aspirationally or, you know, the asking of such questions that the trial court in its discretion can deny a question, and by denying a question that won't ever be reversible error.

MR. GILSTRAP: Unfettered discretion.

HONORABLE TERRY JENNINGS: Right.

CHAIRMAN BABCOCK: But what if it permits the question? Would that be a basis for appeal?

HONORABLE TERRY JENNINGS: I mean, you could have different variations.

CHAIRMAN BABCOCK: Carl had his hand up. Then Judge Peeples, and then Richard.

MR. HAMILTON: Well, I just wondered about, you know, we have rules of burden of proof and things, and what if a lawyer that has the burden of proof on some point fails to put on evidence, and the judge knows it, and some juror asks a question that raises that issue?

What's the judge going to do, going to disclose that at that point to tell the lawyer --

CHAIRMAN BABCOCK: It depends on how much he likes the lawyer.

MR. HAMILTON: -- "You forgot to put that in evidence." You know, you could have situations like that where the whole trial could be changed by one question.

CHAIRMAN BABCOCK: Judge Peeples.

HONORABLE DAVID PEEPLES: Well, I was going to say in response to what Justice Jennings said on reversible error, if the question is going to be asked and one lawyer doesn't like it, he objects; and if the question is not going to be asked and you want it asked, you can make a bill. It's already in the rules. We can handle that part of it.

CHAIRMAN BABCOCK: Richard Munzinger.

MR. MUNZINGER: One of the voting options this committee would have would be to do nothing; is that not correct?

CHAIRMAN BABCOCK: Inaction is always one of our options. It's not our preference, but --

MR. MUNZINGER: As distinct from adopting a rule, which will have the effect of encouraging the process --

CHAIRMAN BABCOCK: Right.

MR. MUNZINGER: -- to do nothing and allow judges to continue to act at their discretion, letting the record be the record, letting the lawyers do what they can do or can't do on appeal with the decisions of the trial court, more or less if it ain't broke don't fix it, and that could be an option, which would be my preference.

CHAIRMAN BABCOCK: Let the lab rats run around for a little longer, huh?

MR. MUNZINGER: Yeah.

CHAIRMAN BABCOCK: Justice Bland, then Bobby.

HONORABLE JANE BLAND: I agree with Richard's approach or the banning it approach, because I think that although lots of my colleagues are big believers in how this enhances the jury process to allow jurors to ask questions, there's a real problem with having jurors take on any kind of investigative role in our system where the fact-finder is distinct or the decision-maker is distinct from the evidence presenter; and, you know, unlike a lot of commissions that we have, administrative commissions in Texas, that where they are sort of both the prosecutor and the decision-maker, or France where, you know, the decision-makers often conduct investigations, jurors and judges are supposed to be separate from that; and while I'm in favor, I think, of

every other measure that we have out here to assist the jury in its deliberative process, I don't want to go so far as to encourage them to become investigators into the facts of the case; and I'm afraid that if we pass a rule, like Richard, that we'll start erring more toward that end when we really ought to be only using this sparingly and only to clarify the most basic, you know, definitions that are used in the case or something like that.

CHAIRMAN BABCOCK: Bobby.

MR. MEADOWS: So is the vote whether or not we're going to elevate the status of a jury in Federal district court to that of a Federal district court judge that can ask questions of the witnesses?

MR. SCHENKKAN: Yeah, but without lifetime tenure.

MR. MEADOWS: Exactly. Yeah, they get to do it for a day. Is this decision made today, because, I mean, I'd like --

CHAIRMAN BABCOCK: We are the deciders.

MR. MEADOWS: We are, I know that, but when, because our term is up. We don't have -- we don't have --

CHAIRMAN BABCOCK: We only have a few more days on our term.

MR. MEADOWS: We don't have a subcommittee report, we don't have a recommendation.

CHAIRMAN BABCOCK: Yeah, we do.

MR. MEADOWS: We do?

CHAIRMAN BABCOCK: Tracy's got a report.

HONORABLE TRACY CHRISTOPHER: No, no, no, no.

MR. MEADOWS: Tracy's done this by herself, which is laudable, to tell you the truth.

HONORABLE TRACY CHRISTOPHER: And it was a lot of work, and I'm ready to give it to a subcommittee, which is why I suggested the rule number, and we have a subcommittee that actually covers that rule number.

CHAIRMAN BABCOCK: Amazing.

MR. MEADOWS: Anyway, I just was seeking clarification on that in terms of this is the day that we decide or we're going to study this a little bit more or we're going to have a recommendation for more.

CHAIRMAN BABCOCK: I'll defer to Justice Hecht on this, but there was a concern that since Senator Wentworth and the Legislature are very interested in these issues that there be some expression from us and then from the Court about what direction we thought this should go. So in a sense, yeah; is that right, Judge?

HONORABLE NATHAN HECHT: Yes. I mean, I appreciate the difficulty here, but the issue has been around a long time, and I think it's important today to at

least get some sense of where we are, given what we've got.

MR. MEADOWS: Can I -- and this is just a request of the Chair. Could we vote on whether or not we want it, and then if we don't then participate in a vote on what we should do? In other words, if -- it may be that I would be opposed to allowing it, but if it's going to be allowed how should that be allowed.

CHAIRMAN BABCOCK: Yeah. Okay.

HONORABLE TRACY CHRISTOPHER: Could we also just have a vote on silence, as opposed to a vote discouraging it?

CHAIRMAN BABCOCK: Yeah. Yeah.

HONORABLE STEPHEN YELENOSKY: Well, but apparently there's question about the status quo because if you would vote against allowing it, that implies that it's not allowed now, which means a bunch of us judges are violating the law.

HONORABLE JANE BLAND: No.

HONORABLE STEPHEN YELENOSKY: So are you proposing a rule that disallows it?

HONORABLE JANE BLAND: No.

HONORABLE TRACY CHRISTOPHER: I mean, there's case law in Texas now saying it's okay in civil cases.

CHAIRMAN BABCOCK: Right.

HONORABLE STEPHEN YELENOSKY: So then we would either be silent with accepting that, or maybe somebody does want to propose a rule that essentially would reverse that.

CHAIRMAN BABCOCK: Yeah, I think prohibition is one option. Justice Gray.

HONORABLE TOM GRAY: Chip, I just tried to set out a schematic that maybe will help you. First question, do we need a rule that addresses jury questions, yes or no? Regardless of the vote on that, if we have a rule, should it be mandatory to allow or discretionary to allow? Third question, regardless of how you voted on the previous two, should the rule under any version specify the procedure, if used, leave it to -- or leave it to the discretion of the trial court; and then you could get down to what I've generally identified as four subissues, when to submit by the juror, when to ask the question, excuse me, who to ask the question, and then should we include, for example, instruction not to speculate and an instruction that would discourage and/or focus the guidance of the jury in the nature of the questions they should be asking.

CHAIRMAN BABCOCK: You left one out, didn't you?

HONORABLE TOM GRAY: I probably did.

CHAIRMAN BABCOCK: Prohibition.

MR. GILSTRAP: Prohibition, yeah.

CHAIRMAN BABCOCK: Prohibition would be one.

MR. HAMILTON: No question.

HONORABLE TOM GRAY: Well, that would actually be the first question, do we need a rule that addresses jury questions.

CHAIRMAN BABCOCK: No, it's a little different. The status quo is different from prohibition in my mind.

MR. WATSON: Right.

HONORABLE TOM GRAY: Okay. Then under the second one, if we have a rule, should it be mandatory to allow, discretionary to allow, or prohibited?

CHAIRMAN BABCOCK: Yeah. Yeah, Buddy.

MR. LOW: Chip, don't you think that our vote to, quote, do nothing, wouldn't be a vote to do. We would need to go to the Legislature and tell them, "Look, it's allowed now, there's case law that allows it," and so forth, because if we just say we're doing nothing, they're going to think then they need to pass a rule.

CHAIRMAN BABCOCK: To do something. Yeah, I think --

MR. LOW: We need a predicate to that, not

just do nothing, and say, "Look, it's allowed, the judges are doing it, it's working, and for that reason we don't need a specific rule."

CHAIRMAN BABCOCK: Yeah. Judge Benton.

HONORABLE LEVI BENTON: Well, Buddy's statement reminds me that in the summer of '07 David Peeples chaired a committee that recommended to the Court that the Court should ask the Legislature to essentially stay out of the rule-making business related to juries and the Court -- I don't know that the Court has necessarily responded to that, because really we need the Legislature just to stay out -- just like they stepped out of the Rule of Evidence-making business for the most part in the rules and they have conceded Rules of Civil Procedure to the Court, matters related to jury administration and what happens with the jurors from the time they're summoned to the time they're excused ought to be something that they just stay out of, and the Court really needs to encourage them to do that.

HONORABLE DAVID PEEPLES: I don't accept his rephrasing of what we --

CHAIRMAN BABCOCK: It looked to me like he was quoting directly, I don't know.

HONORABLE LEVI BENTON: Page four of the report.

CHAIRMAN BABCOCK: Page four of the report. Alex.

PROFESSOR ALBRIGHT: In the State Bar Court Administration Task Force report --

CHAIRMAN BABCOCK: Yeah.

PROFESSOR ALBRIGHT: -- there's a recommendation to have the Supreme Court pass rules, and one of them is for jury questioning. We did not get it all into -- I mean, I think there was a general sense that this was a good idea, that people wanted it, and I think the main point we were thinking of is that the Supreme Court needs to make the rule, and so it's not recommending that the Legislature pass a law. So I think that's going to the Legislature, so I think it would be good if we had a statement that we considered it and thought it was a good idea or a bad idea. If we're going to say it's a bad idea, I think we need to make that known. I agree with that.

CHAIRMAN BABCOCK: Yeah. Yeah, and I think that's a great point in combination with Buddy's that if you say "do nothing" then that doesn't sound right. What you're really saying is if you vote for this first thing it's the status quo, which is doing something. It may not be doing as much as people want or it may be doing too much, but

it's --

PROFESSOR ALBRIGHT: And making a statement to the Legislature that it was a considered decision to leave it like it is.

CHAIRMAN BABCOCK: Yeah. Buddy.

MR. LOW: You might ask Richard his experience about telling the Legislature about rules and what they ought to do.

CHAIRMAN BABCOCK: Yeah, that was the old days, but Richard, you want to expound on that?

MR. ORSINGER: No, all I want to say is the Legislature probably has ultimate rule-making authority. They've delegated that to the Supreme Court, and I have been on this committee for over a decade. There was a time when they tried to pass specific rules that would give you the procedures and how they would be accomplished and what the deadlines were, and that was awful, and somehow we've -- they have gotten into a place where they just adopt a policy and they tell the Supreme Court to enact a rule to make it work, and that's -- they're never going to relinquish their control over rule-making authority, and I think we're in the best place we can be, which is that if they feel strongly about a policy, pass the policy, and let the Supreme Court figure out how to implement it in terms of litigation.

Now then, I also raised my hand because I wanted to comment that I see that the American -- the Texas Chapter of the American Board of Trial Advocates board of directors has endorsed question making in the -- jurors asking questions, but they want that to be in the sound discretion of the trial judge. I kind of feel like that's where we are now, but the rules don't say that, and the Legislature may not realize that, and so I would favor the idea that we explicitly say that trial judges have discretion to do it, they're not required and they're not prohibited, and then the Legislature will understand that it's discretionary.

And I would further suggest that we come up with a proposal on safeguards to be sure that if it's done, it's done in a way that will not alter the litigants' rights and will preserve every option to appeal, not to take away the right to appellate review. If we do that, my feeling is the Legislature will probably be satisfied with that, but if they do force it on us, that it's mandatory, at least we have a procedure in place that they can look at rather than risking the possibility that they may decide to dictate the procedure to us. I don't know that we necessarily should encourage that the procedure be in the rule now, but I think as a subcommittee or somebody ought to have a procedure in

writing so that Senator Wentworth and others can see how it would work if it were to be done.

CHAIRMAN BABCOCK: Yeah, Judge Lawrence.

HONORABLE TOM LAWRENCE: I'm not sure how this is all going to work in the JP courts, because you're talking about amending 226a, which are the jury instructions, and Rule 534 says that JPs can't charge the jury, so we can't give a jury charge, but somehow I'd like to extend at least the note-taking to the JP courts in some mechanism. The questioning would be very helpful in JP court because when you've got pro ses on both sides often in jury trials, it's not unusual for the plaintiff to rest their case without putting on one shred of testimony or evidence about what the damages are; and so the jury, I get questions from the jury when they retire, "Well, what are the damages?" or "How much is the plaintiff asking for?" And, of course, the answer is, "Well, you make your decision based on the evidence."

So it would be helpful in JP court to have some mechanism for the jurors to be able to ask questions where the parties just forget to talk about something.

CHAIRMAN BABCOCK: Okay. Yeah, Bill.

PROFESSOR DORSANEO: I'd just put the note-taking information in the rule that says that you don't charge the jury, but you do do this.

HONORABLE TOM LAWRENCE: Well, yeah, and I thought about that, and that would be good, "except that the judge may do this and this with the jury."

CHAIRMAN BABCOCK: Yeah, Hugh Rice.

MR. KELLY: It seems to me that what they're getting at and most people who are interested in this, the distinction between present law and what's being proposed is that you tell the jury at the beginning of the trial that they can ask questions at the same time you tell them they can take notes; and as Richard says, if you phrase that question wrong, you're going to find a lot of silly questions; but the real idea is do we tell the jury that very -- on important definitional points, words you don't understand, however we define it, but the gist of it is do you tell the jury they can ask questions during the trial.

CHAIRMAN BABCOCK: Let's -- yeah.

HONORABLE NATHAN HECHT: Let me ask one more question. For Judge Yelenosky or those who have asked questions, has there been a case where you proposed at the outset or at some point early on that you're going to let the jury ask questions and one of the lawyers objected and said, carte blanche, "I don't want the jury asking questions," and you said, "That's okay I'm going to do it anyway"?

HONORABLE STEPHEN YELENOSKY: No. They

usually are like Judge Naranjo said. They have a heart attack, and they're scared and running around the room screaming because it's something they hadn't anticipated, and, of course, they don't want that, but one time they did agree to do it the way I did it, which was very minimalistic, minimalist.

HONORABLE TRACY CHRISTOPHER: I decided I would ask the jurors -- or the lawyers if they would agree to it. In the two cases I did it the lawyers had agreed to it. I know Judge Baker, Judge Jamison, Judge Wooldridge, Judge Wood, they don't require the agreement of the lawyers.

HONORABLE STEPHEN YELENOSKY: And Judge Naranjo doesn't, and Judge Dietz does not, I'm pretty sure.

MS PETERSON: That touches actually on something that's in the 1997 Supreme Court of Texas Jury Task Force final report, because there is a section about questions by jurors to the witnesses, and the recommendation was not to allow it, but if it's allowed there is some sample language in here. In terms of the recommendation not to allow it, there's a proposed rule in here, for what it's worth, that says, "Unless agreed to by all the parties and the court the jurors shall not be permitted to submit questions to the witnesses, whether

directly or through the court." So that's in here, for what it's worth.

CHAIRMAN BABCOCK: Great. Great. How about if we vote right before lunch here because we've got to go in just a minute? I mean, we have to recess for lunch in just a minute. How many people think we ought to keep the status quo, just the situation that's going on now?

HONORABLE STEPHEN YELENOSKY: The Orsinger status quo, which is a rule that states the status quo?

CHAIRMAN BABCOCK: There's no rule.

HONORABLE STEPHEN YELENOSKY: No rule.

CHAIRMAN BABCOCK: Just the status quo. Jane, you're in favor of that?

HONORABLE JANE BLAND: (Nods head.)

CHAIRMAN BABCOCK: Okay. All right. Everybody who's in favor of that raise your hand, status quo. Raise it high.

Okay. Everybody against the status quo?

HONORABLE STEPHEN YELENOSKY: You rebels.

CHAIRMAN BABCOCK: There are only five in favor of the status quo. So the next vote on the grid here, the Gray grid, would be mandatory or discretionary or prohibited. Is that the three?

HONORABLE TOM GRAY: It would probably be best to ask just first do we allow it or prohibit it,

simple either it's allowed or prohibited, and then if it's allowed go to the next question, mandatory or discretionary.

CHAIRMAN BABCOCK: Gotcha. Okay. Everybody that thinks we should allow it, raise your hand.

Everybody that thinks that it should be prohibited, raise your hand. Okay. The allows win by 28 to 4.

Okay. Now, on the allows, should it be mandatory or discretionary, and everybody in favor of mandatory.

HONORABLE DAVID PEEPLES: Meaning the judge has to tell them you can do this or upon request has to allow it, or what do you mean by mandatory?

PROFESSOR HOFFMAN: We could make them ask questions.

HONORABLE TRACY CHRISTOPHER: Has to tell them that they can.

MR. KELLY: You tell them at the outset.

CHAIRMAN BABCOCK: In every case you tell them, "Hey, you can ask questions." All right.

MR. MEADOWS: You can take notes, you can ask questions.

CHAIRMAN BABCOCK: Take notes, ask questions, but let's keep notes out of this.

MR. MEADOWS: Can everybody vote on this or just those that --

CHAIRMAN BABCOCK: Yeah, everybody can vote on this.

MR. HAMILTON: What's the alternative?

CHAIRMAN BABCOCK: Discretionary.

MR. HAMILTON: Oh, discretionary.

MR. LOW: It's discretionary with the judge.

CHAIRMAN BABCOCK: So, mandatory, everybody in favor of mandatory, raise your hand.

Okay. And discretionary. Well, everybody else. So Hugh Rice Kelly has got the one vote for mandatory, and there's about 30 votes for discretionary, and so then if it's discretionary, should we get into what the instructions ought to be and what that ought to look like? And so let's do that after lunch.

(Recess from 12:03 p.m. to 1:06 p.m.)

CHAIRMAN BABCOCK: Okay, guys, we're back on the record. Here's the issue. The issue is now that we're going to allow it and we're going to give some discretion, what sort of help or guidance do we give the trial court in exercising that discretion?

So, Judge Christopher, you've got something you've pulled from the Fazzino know case. We have distributed some information that was in the Supreme Court

Jury Task Force report of 11 years ago, and any other suggestions would be welcome.

HONORABLE TRACY CHRISTOPHER: Well, I mean, I have pages and pages and pages of sample jury questions and instructions that I didn't -- you know, because I didn't think we wanted to be drafting in a committee as a whole.

CHAIRMAN BABCOCK: Right.

HONORABLE TRACY CHRISTOPHER: So I'll be glad to give that to whoever the drafting committee is.

CHAIRMAN BABCOCK: Who is the drafting committee?

HONORABLE TRACY CHRISTOPHER: Not a committee of one.

CHAIRMAN BABCOCK: Sometimes that's more effective.

HONORABLE TRACY CHRISTOPHER: Yeah, well, no thank you. I'd be glad to help. I have my plate full right now. I'm not going to be able to get anything out by January or February when we next meet.

CHAIRMAN BABCOCK: All right. Is there a subcommittee that's working on this, or is it just you?

HONORABLE TRACY CHRISTOPHER: It's just been me. Only me.

(Applause)

CHAIRMAN BABCOCK: Very well done. Well, this would normally go -- and this is so appropriate because Elaine's not here. It would normally go to her subcommittee, which consists currently of Judge Peeples as vice-chair or co-chair, Chandler, Dawson, Hamilton, Jacks, Meadows, Riney, and Sullivan. So is that a good place for it to go, David?

HONORABLE DAVID PEEPLES: Can I have Tracy Christopher on the committee?

CHAIRMAN BABCOCK: Certainly.

HONORABLE TRACY CHRISTOPHER: I'd be glad to help on the committee. I just can't do it by myself.

CHAIRMAN BABCOCK: Yeah. Okay. Well, anticipating that some or all of those people will still -- will be reappointed to the advisory committee and further anticipating that the group will be substantially the same, we'll pitch that to that group for the next time. Bobby.

MR. MEADOWS: I just think it's a great idea.

CHAIRMAN BABCOCK: Okay.

MR. MEADOWS: I mean, to study that a little bit more and come back.

CHAIRMAN BABCOCK: Well, since you're on the subcommittee, then you can be part of that process. Okay.

What -- do we want to go to interim summation argument?

HONORABLE TRACY CHRISTOPHER: Okay.

CHAIRMAN BABCOCK: All right. Tell us about that.

MR. MEADOWS: I just want to say right up front I'm for this one.

HONORABLE TRACY CHRISTOPHER: This is the sort of thing that I can't imagine any lawyer voting against, but let's talk about it before the lawyer vote wins. Senate Bill 13 called for interim summations after opening and before closing, and I wanted you-all to concentrate on the use of the word "summation," which according to Black's Law Dictionary is equivalent to closing argument.

The State Bar Court Administration Task Force recommended interim statements by counsel. "Statement" is more generally used in connection with opening statement, a preview of the evidence. Texas-ABOTA was good with "summation," and the trial judges that I surveyed -- and I might have skewed the process by asking about "interim argument" rather than "statements," although "argument" sort of tracks the bill language in 1300. Let's see. 13 judges have done it at one point or another and 90 have not, and the ones that have done it have done it in a long trial or where there was a big

break during the evidence. For example, one of the judges during the time that we were off for Hurricane Ike, when her trial came back, allowed the lawyers to summarize what had gone on before. Yes.

HONORABLE NATHAN HECHT: Could you distinguish between argumentative and nonargumentative to the extent that --

HONORABLE TRACY CHRISTOPHER: Yes.

HONORABLE NATHAN HECHT: -- they can be distinguished when any lawyer is talking?

HONORABLE TRACY CHRISTOPHER: The trial judges that have done it, it was intended to be a nonargumentative summary, okay, so not a preview, but a summary. Then I asked the judges when they thought it might be useful. Many thought it would never be useful. Many, many thought it would never be useful. A large chunk thought in their own practice they would never see a case that was long enough where it was going to be useful. They thought it might be useful where there were distinct phases of the trial, but they were afraid that it would be confusing to the jury, it would cause the jurors to start to reach conclusions in the evidence before we got to the end of all of the evidence. That was one of the main cons to it.

They really thought it would be better if

you had discrete issues and essentially discrete charges to the jury, so you would actually try the case in phases and not just the bifurcated punitive damages aspect, is what most of them thought. A couple of the judges had actually discussed with lawyers the idea of a preview of the evidence, rather than a summation of the evidence, in long trials, so that at the beginning of the week you might say, "Okay, this is what we're about to do this week, and that's what this witness is going to show and this witness," et cetera, just to give the jury a road map as the case went along versus getting into the argumentative/nonargumentative nature of a summary of the evidence.

I didn't survey the other states on the issue. Manual for Complex Litigation recommends interim statements in complex cases. That manual only had one case that cited to it in the manual, which was out of Maryland, and it was an interesting case because the trial court allowed interim summaries, but the summaries became argumentative, leading to frequent mistrial motions. At one point the trial judge punished one side and said "no more summaries" because they were getting too argumentative. Ultimately there was no error because the court reversed the punitive damages finding, and apparently the nature of the summations all went to sort

of inflaming the jury sort of argument.

In the Texas case law, there is a Texarkana court of appeals where they said there is no right to interim argument in criminal cases, but that the error was harmless, and I was unable to find any civil case on point. Let's see, and the ABA and the National Center for State Courts didn't address this one.

So I think first we would have to discuss whether we wanted it to -- if we like the idea of it. Then we would have to discuss the distinction between "statement" and "argument" and just what would be the purpose of allowing this. I think people thought it got further complicated due to the nature of our jury charge practice where we don't generally get the charge all ready to go until five minutes before closing arguments, that if you start doing summaries in between when you're not really sure what the closing questions are going to be, that you could run into problems.

So do we want it, should it be "statement" or "argument," should we include criteria for granting it, discretionary with the judge, requested by either side or both sides. Those would be the issues.

CHAIRMAN BABCOCK: "Statement" or "argument," when or under what circumstances?

HONORABLE TRACY CHRISTOPHER: Right.

CHAIRMAN BABCOCK: What was the third?

HONORABLE TRACY CHRISTOPHER: Discretionary with the court, at the request of either side, agreement of both sides.

CHAIRMAN BABCOCK: Okay. Okay. What do people think about it? Buddy.

MR. LOW: Chip, Hugh and I had -- you remember EGSI?

MR. KELLY: Oh, yeah.

MR. LOW: All right. We had a case that lasted four months, and it involved environmental issues. It involved antitrust, and I can't remember, something else. So the judge said, "How are you-all going to keep the jury focused?" I said, "Okay, what we plan to do," Hugh and my clients, "We're going to prove antitrust violation first, and when we get through, I want to tell them, you know, 'I've proved it' and argue the case just like, you know, that was it, and then I'd tell them I'm going to this," and, you know, and kind of give them an outline.

Well, the judge -- and this has happened to me before -- didn't always follow my suggestions.

CHAIRMAN BABCOCK: Once before.

MR. LOW: But so the judge decided that we would have interim argument any time we wanted, and the

argument is limited only to what you could argue if you were arguing a case to a jury in closing argument. If a witness is on the stand and you say, "Judge, I want two minutes interim argument" -- no, no, that's -- well, it happened. And so, say, "Okay, that witness is not telling the truth, because you heard this other witness say such and such and that," and the secretary kept up with the time, so you've got to manage your time. So you had interim argument and you got so many minutes in that four months of interim argument.

HONORABLE TERRY JENNINGS: No wonder it was four months long.

MR. LOW: No, the interim argument wasn't that much. We had -- well, at any rate, it was a fairly complicated case.

CHAIRMAN BABCOCK: By the way, this sounds like the answer to me.

MR. LOW: No, I'm not --

HONORABLE JAN PATTERSON: I'm just trying to figure out whether he's speaking in favor or against it.

MR. WADE: Are you for it or against it?

MR. LOW: Well, I won that case, so maybe I would be for it. I have no opinion. I just wanted to tell you about how one did operate and what the judge finally did, and that was -- that was it. You better save

some of your time, and we were limited only to what we could argue if we were arguing the case. You can comment on the evidence, you can tell them what you're going to prove, or what you had proved, and that's --

CHAIRMAN BABCOCK: And nobody pretended it was just a summation of the evidence. It was argument.

MR. LOW: He called it -- Judge Parker called it interim argument, and he told the jury, he said, "Now, these lawyers are going to get up here, and they can comment, interim argument. You should not make your decision until this case is over, all of it," and, you know, he instructed them pretty fully on that, and it worked in that case. It kept --

CHAIRMAN BABCOCK: Is this Federal court?

MR. LOW: It was Federal court.

CHAIRMAN BABCOCK: Bob Parker?

MR. LOW: Uh-huh. So for what it's worth, that comment, I don't make any recommendation. I just tell you that's what happened there.

CHAIRMAN BABCOCK: Nina.

MS. CORTELL: Similarly, we had a several week case in Dallas. It really wasn't that complicated. It was a usurpation corporate opportunity case. Judge David Evans allowed basically closing argument every Friday. We were plaintiff on that case. Our concern

really, frankly, was that it unfairly allowed the defense to argue its, you know, position early, but it was still a plaintiff verdict at the end of the day. So I don't know if it really made much of a difference in our case, but it definitely --

CHAIRMAN BABCOCK: Did either of you ask the jurors afterwards how they liked it?

MR. LOW: They were so happy to get out they didn't stick around for questions.

MS. CORTELL: I don't recall. They probably responded.

CHAIRMAN BABCOCK: Yeah. Okay. Richard Orsinger, you had a hand up.

MR. ORSINGER: As long as we're thinking outside the box here, I'm actually more attracted to interim opening statements than I am to interim summations. If there were a rule like this that I would use in my trial practice, it would probably be before an expert witness was going to testify, and I would explain to the jury what the witness was going to testify and what evidence had been received that he would be relying on, and you could put some of the technical stuff in context for the jury. If you try to do that at the opening of the case, they're not going to get any value out of it because they don't know what any of the evidence is, they don't

know why you're calling a certain expert.

MR. LOW: Yeah.

MR. ORSINGER: But to me, to me, I would be more attracted, if I was designing a legal system, to a looking forward introduction by the lawyer of what to expect by the witness and why it's important than an after the fact argument on who you should believe and what you shouldn't believe.

MR. LOW: Much of our time was that, because we had different experts and we would say, "This man's qualified to do this and here is what we think he will" -- you know, what you'll believe.

MR. ORSINGER: So it was prospective. Sometimes it --

MR. LOW: Yeah. You could use it. It just --

CHAIRMAN BABCOCK: Anything you wanted.

MR. LOW: However you want to, I mean, but you had to -- and it could be that it favored, you know, -- you've got to save some time to the defendant, and also then the defendant can get up and give their argument before they've even put on their case. You just manage your own time. I mean, there are other ways of doing it, I understand. I can only tell you about what I saw.

CHAIRMAN BABCOCK: And both of you, in the

instance where you talked about it prospectively were you worried about, you know, tipping off the witness that was coming up about all the traps that you'd laid for him?

MR. LOW: Well, we talked about our witness, what our witness was going to do. We didn't --

MR. ORSINGER: The guy who's going to cross-examine would probably only tell the jury what the cross-examination is after the witness has finished the direct, if at all. I mean, you may not want the witness to know what you're --

CHAIRMAN BABCOCK: Right.

MR. ORSINGER: -- going to do to him in cross.

CHAIRMAN BABCOCK: That's my point.

MR. ORSINGER: It's mainly going to be an advantage on direct. If you have a complicated trial with an expert witness whose testimony is complicated, you know, sometimes the lawyer can explain to the jury what the witness is going to say, and they can understand better than listening to the witness. Sometimes witnesses are into this really technical stuff, and I wonder how much the jury really understands what they're saying.

MR. LOW: But that's what we did. We would conclude. Now, this environmental man went into all kinds of studies and told them "We don't understand all that,

but what we're going to believe, this would not affect the environment." You know, we could do this and we could prove that, and so we laid the groundwork. Robert Bourk read our briefs, and he said it was the most unusual case. He thought it was unusual, interim arguments.

MR. ORSINGER: That's not a compliment, Buddy.

MR. LOW: Well, I didn't say it was a compliment.

MR. ORSINGER: Unusual is what you say when they don't want to hurt your feelings.

MR. LOW: Now, now. Are you a Robert Bourk man?

CHAIRMAN BABCOCK: Justice Gray, and then Ralph.

HONORABLE TOM GRAY: We've got some experience with this in Texas in the criminal field, and to some extent we're handicapped by not having an active criminal practitioner here, but in the criminal practice you can reserve your opening statement until you start your case, and lawyers do that as a strategy to -- the state's presented their case, and now the defense gets to go, and they get to start with their opening statement.

And so there is some experience out there with that, and I actually see it most often when the

defense counsel foregoes it to begin with and then decides he's not going to put on any defense, that he thinks he's covered it, and so the defense never does its opening statement, and appellate counsel raises it as ineffective assistance of counsel by not having had an opening statement, but it can be a tool that is very strategic, and -- but it is clearly opening statement and not argument.

CHAIRMAN BABCOCK: You remember the Cullen Davis murder prosecutions? I believe that in one or both of those they let Racehorse Haynes and Jack Strickland both do interim argument during the case.

MR. GILSTRAP: Those were probably nonadversarial.

CHAIRMAN BABCOCK: Huh?

MR. GILSTRAP: Those were probably nonadversarial.

CHAIRMAN BABCOCK: I'm thinking maybe they were adversarial. Just a hunch. Ralph.

MR. DUGGINS: Well, I was just going to comment that Buddy said he wasn't sure whether that process worked, and I think you got a one billion-dollar judgment against Santa Fe, didn't you, excluding the settlements from the rest of the railroads?

MR. KELLY: That was after Tremble. It

wasn't all that big.

MR. LOW: That was incidental to justice being served.

CHAIRMAN BABCOCK: Did you have anything else, Ralph?

MR. DUGGINS: No.

CHAIRMAN BABCOCK: That's a good comment, though. Okay. Anybody else have any thoughts about this? Bobby, that never happened to you, I take it?

MR. MEADOWS: No, it has.

CHAIRMAN BABCOCK: Oh, it has.

MR. MEADOWS: I've had two trials where it was allowed, and, you know, it's a -- I just wonder in the context of what we're discussing, because obviously the opportunity to speak to the jury is welcomed by any trial lawyer any time you can do it, and so it's tempting to want to entertain the idea of a rule like this, but is it to -- if it's for the benefit of the jury, which I guess is the point of this, our consideration of it, you know, I think something more along the lines of what Richard's talking about, nonadvocative statements, more of a presentation of what you are attempting to do with what's coming up next is probably more useful to the jury than trying to win them over on what's occurred so far.

The judge lost patience with it in our case

because the lawyers did -- this was a case I tried in Mississippi, and the lawyers, you know, probably on both sides just took advantage of the opportunity.

CHAIRMAN BABCOCK: Yeah. Anybody else? Jim, you ever had this happen to you?

MR. PERDUE: I haven't personally. I've seen it done.

CHAIRMAN BABCOCK: How did you like it?

MR. PERDUE: I get the sense of both Richard and Buddy. I've seen it done argumentatively, and I've seen it done as summation or as kind of a "This is what you're getting ready to hear," and if you're going for comprehension, I'd tend to agree with Richard, that the idea is -- it's doing it more as a forecasting rather than a retrospective argument serves that goal, but it's the question of what you are trying to achieve.

CHAIRMAN BABCOCK: Yeah. Richard Munzinger, and then Judge Christopher.

MR. MUNZINGER: Why don't we just do away with witnesses and let the lawyers tell us what the witnesses are going to say?

Just let the witness testify. I never knew a lawyer that tried a lawsuit that didn't take advantage of an opportunity to persuade or get an advantage. How are you going to say to a guy, "Stand up and be objective

and tell nothing but the truth now about what you're going to prove through this next witness or this week"?

I've never met a good lawyer that didn't take advantage of it, and so the other side stands up now, and what's he going to do? Is he going to object to it? Are you going to sit around and wait for four days until your cross-examination begins and then say, "Now, I'm going to show this is a liar" and get held in contempt? It's a silly thing to do. Try your cases like you have since the common law days. It's worked pretty well.

CHAIRMAN BABCOCK: Judge Christopher.

HONORABLE TRACY CHRISTOPHER: Well, I think some of the other trial judge complaints about the concept was that it would confuse the jury in terms of evidence versus argument since you'd be infusing argument through the whole trial. Right now when it's only at the beginning, it's only at the end, it's easy to separate the two ideas that the evidence is in the middle, but if you've got the lawyer standing up making argument all through the trial then they start to lose the distinction between what's the evidence and what the argument is, and there was also similar comments that lawyers argue their case by the way they question the witnesses all through the trial and that --

MR. MEADOWS: Speaking objections.

HONORABLE TRACY CHRISTOPHER: And that perhaps if what we really are worried about is that the jury can't remember this big volume of evidence because it's a long case or it's complicated, that note-taking would help the jurors or perhaps relaxing a little bit our rules on demonstrative evidence and summaries, because I have seen that done in long trials, and I was in a case as a lawyer where we had a long trial where we had a picture of the witness and a little summary statement of what the witness testified to that everybody agreed to so that you had that kind of evidence to help them remember all of the testimony of the trial.

MR. MEADOWS: Maybe you could combine this point with the juror question point and just let jurors ask the lawyers some questions during the middle of the trial.

CHAIRMAN BABCOCK: And they would make a statement as opposed to an argument in response.

MR. KELLY: That would be very fair.

CHAIRMAN BABCOCK: That would be totally objective and fair.

HONORABLE LEVI BENTON: I've seen it done in a case I tried from April of '06 to August of '06, and we had a break over the Fourth of July, and I think it's helpful because the jurors, though taking notes, don't

have a chance to really sit there and go back through their notes coming back. We don't let them take their notes home during the -- until the verdict is returned, and so I think it's helpful to let -- whether you call it interim statements or interim statements and argument or interim argument, I'm comfortable either way.

I think it's helpful to give the court the discretion to permit it and encourage it. I don't think you ought to have a rule that requires the court to deny a litigant's right to do that because one side or the other objects. I think it, you know, just you've got to aid the fact finder in understanding where they are in long cases.

CHAIRMAN BABCOCK: Okay.

MR. LOW: Chip, one thing we also did, I assume Tracy's case is one where they summarized after they had testified. We had to give the judge -- we had a notebook, had a picture of each witness, and then the jurors each had one, and they can make notes about, you know, that witness and what he testified to, so we used that in connection therewith. That was done.

CHAIRMAN BABCOCK: Uh-huh. On the subject of is it a statement or is it an argument, is it looking back, is it looking forward, what are we -- any comments about that? Got anything else about that?

MR. LOW: I mean, as far as if I were making

a recommendation, I would allow the judge to do it at his discretion in cases that lasted -- in lengthy cases at his discretion.

CHAIRMAN BABCOCK: You would even make it discretionary whether he would allow it to be an argument versus a statement or a summary?

MR. LOW: Oh, no, I'm sorry. I'm commenting on interim argument, whether you allow any kind of argument, no matter what you call it or not.

CHAIRMAN BABCOCK: Yeah. I think it's -- I think you can get -- it seems to me like you can get into a lot of debate at the trial if the rule says "summary" or "statement" and then the lawyer either intentionally or not pushes it into the argument phase and then you start having, you know, "Objection, your Honor, he's arguing, he's not summarizing."

MR. LOW: You get --

MR. ORSINGER: Then you get --

THE REPORTER: Whoa, whoa, one at a time.

MR. ORSINGER: Oh, excuse me.

MR. LOW: You get specific, like "Well, so-and-so is lying, said that," as distinguished from arguing, "Well, we have proved this, this, that, and we're going to prove this, this, that." If you limit it to that, there's less confrontation.

CHAIRMAN BABCOCK: Yeah. Hayes, in one second, but when you say, "I've proved this, this, and this," you say, "I've proved this through this witness. You recall Mr. Smith said such and such; and the consequence of that, ladies and gentlemen, is this and such, and so when you take that and then combine it over here with Mr. Jones, who said this, this clearly demonstrates, ladies and gentlemen, that such and such happened."

MR. LOW: I'm distinguishing that from --

CHAIRMAN BABCOCK: Is that a summary or is that an argument?

MR. LOW: No, I'm distinguishing that from getting up and saying, "Wait a minute, this man's lying. Right here." Stop during, you know, the testimony.

MR. MUNZINGER: They're both argument. You just made a jury argument.

CHAIRMAN BABCOCK: Yeah, right. I was intending to.

MR. MUNZINGER: You just made a jury argument, but you dressed it up in a tuxedo.

CHAIRMAN BABCOCK: Yeah. Well, a tuxedo or a nice suit, anyways. Hayes.

MR. FULLER: It seems that looking forward in a statement sense or in an interim opening statement

sense would be less subject to argument because we've all been taught and we all know that we're not going to say we're going to prove something that we don't know is actually going to be proved. So, you know, you're going to be very cautious about what you say that witness is going to testify to. I think the downside to that is it puts the -- your opponent at a disadvantage because you even less know what you're going to be able to do with that witness, so, you know --

CHAIRMAN BABCOCK: And you may not want to say.

MR. FULLER: And you may not want to say, exactly. Looking back, I think you're probably going to just invite interim argument as to what the witness just said, and I don't -- it seems awkward.

CHAIRMAN BABCOCK: Frank.

MR. GILSTRAP: How practical is it to try to control the lawyers? I mean, the judges would know a lot better than I would, but if you say, you know, this is only going to be prospective, it's going to be a statement, not a summation, and, you know, will the lawyers do it? Can you control them? Can you stop them if they stray from your instructions?

HONORABLE TRACY CHRISTOPHER: It's much easier if it was prospective obviously because you can

clearly hear when someone is making an opening statement that, in fact, they're arguing, because you're not there yet.

CHAIRMAN BABCOCK: Some judges even call it "opening argument."

HONORABLE TRACY CHRISTOPHER: Right.

CHAIRMAN BABCOCK: "Now we'll hear opening argument."

HONORABLE TRACY CHRISTOPHER: But I think it would be difficult in any hotly contested case because lawyers love to argue.

CHAIRMAN BABCOCK: I've never had this happen in any of my cases, but I can think of all the lengthy cases that I've had, I cannot think of a litigation opponent who wouldn't have been up there arguing the heck out of the thing, and then I would have responded, and it would have just been an argument. I mean, no matter what you dress it up and call it. Yeah, Lonny and -- yeah.

PROFESSOR HOFFMAN: I would be in favor of doing nothing.

CHAIRMAN BABCOCK: Doing what?

PROFESSOR HOFFMAN: Nothing.

CHAIRMAN BABCOCK: Nothing.

PROFESSOR HOFFMAN: It sounds like we've got

lots of experimentation going on, and sounds like it's working all right, and that sounds pretty good to me.

CHAIRMAN BABCOCK: Okay. Hayes.

MR. FULLER: I was going to agree. I would say, but if we're going to do something like this, if there's a need to refresh after a long break, to refresh the jury on where they've been, you know, it's probably, number one, best coming from the court and then you've got the comment on the weight issue; and if it's going to come from the court, about the only real workable way that I can see is if you were -- in Federal court, many times both -- well, all parties will have submitted a detailed pretrial order that they've each said their say and the judge has issued an order basically saying, "Here's the neutral comment, you know, on what this case is about and what each witness is anticipated to talk about in terms of the subject matter."

You know, that would be the source, but, boy, that's -- I think that's really complex, but, you know, if you've got a detailed pretrial order, and you probably would in a case that's going to be that complex, you know, if the judge needs to refresh the jury's -- you know, on where they've been, refer back to the order, and "We're this far along," you know, and you can bring them up; but I'd leave it -- if you're going to do it, I'd

leave it with the court. I'd leave it discretionary with the court, and I'd basically restrict the court to where the pretrial order was, because that's the only way I can think of to avoid a comment.

CHAIRMAN BABCOCK: Yeah. Justice Jennings.

HONORABLE TERRY JENNINGS: You know, Rule 265, you know, "The party upon whom rests the burden of proof on the whole case shall state to the jury briefly the nature of his claim or defense and what said party expects to prove and the relief sought," and, you know, this would be just more -- it's redundancy is what it is.

I mean, if you can't make a good opening statement and tell the jury what your claim is and what you want and how you're going to get there and then you can't make that in a good summation to the jury at the end of the trial, none of this other stuff is going to help you at all. I mean, if you can't set forth a clear opening statement and then make a clear, concise argument to the jury as to why you're entitled to your relief or why your defense prevails, you know, it's already covered. You've got that chance as an advocate. This is just redundancy, and all it will do is create more problems because, as you said, you're going to argue everything you can, you're going to raise all kinds of objections, and you may be building in error where there was no error

before.

CHAIRMAN BABCOCK: Judge Benton.

HONORABLE LEVI BENTON: I guess I dissent. Otherwise, reviewing courts would never grant rehearing and grant arguments again, and I mean, there are circumstances, Terry, where you just need to remind -- I mean, imagine yourself sitting in a jury box from April to August, and then you take a week break for the Fourth of July. You didn't want to be there in the first place. While you had the break you certainly didn't want to spend your time thinking about all the evidence you've already heard, and you don't want to take -- you don't want to take the time on your own to go through your notes, and sitting there as a juror or judge at the beginning of the trial, the opening statements were long enough as they were, and so now you're suggesting we ought to make them longer because we're never going to get another chance.

HONORABLE TERRY JENNINGS: No, not at all. I think you ought to be able to make your case specifically to the jury and say, "Here's what I want, here's why I'm entitled to it," and if you can't do that in an effective opening statement and then you can't do it in a good summation to the jury at the end of the trial, which is where you should be reminding the jury of what they heard and why it's important, then no one is going to

be able to help you as an advocate.

HONORABLE LEVI BENTON: Okay.

CHAIRMAN BABCOCK: Judge Christopher.

HONORABLE TRACY CHRISTOPHER: Well, I like -- was it Hayes that was talking about the pretrial conference? Yeah. I like that idea, and so I'm looking back at Rule 166, and it might be the sort of place where we could put in the advisability of various forms to help the jury remember the evidence in a long trial, long or complex trial, such as interim statement or interim argument, summaries of the testimony of the witnesses, and that way it wouldn't be mandatory, and it would be something that would be discussed at the pretrial conference as a potential way of improving juror comprehension of the trial.

CHAIRMAN BABCOCK: Would the trial have to be lengthy and complex or just lengthy?

HONORABLE TRACY CHRISTOPHER: Well, I mean, we can work on the phrasing of how we wanted to put something like that in here; but I think that might be a good place to put it rather than putting it back into our open and close rules or anything like that; and that way we would address the issue, again, understanding that Senator Wentworth, at least, in Senate Bill 1300 thought this was a good idea; and that way we would have a place

to address it if we wanted to go that way.

CHAIRMAN BABCOCK: Yeah. Bobby.

MR. MEADOWS: The -- in terms of how it could be used as a -- and why it might be beneficial to the jury, the time that I was involved with it that I thought it had some beneficial value, although I do think it became less important as the trial went on, is not so much a case that has length, although that would be a consideration, but it's a lengthy trial that has significant interruptions, and that -- in this particular case in Federal court, the case would be tried for a period of couple weeks and there would be a couple or three weeks off and you would reconvene, so you had these intervals where the -- you were not in session.

So when we reconvened the court thought it would be useful to -- everybody to reposition, and so I think that is at least something that we ought to consider indicating to the trial courts if we're going to make it discretionary, that there are these circumstances where it might be useful, and I think length is one, but particularly a trial that has significant interruptions.

CHAIRMAN BABCOCK: Okay. Richard.

MR. MUNZINGER: Why would a judge, other than a Federal judge, allow a trial to be interrupted for three or four weeks? That's the judge's problem. That's

not the jury's problem or the lawyer's problem. That's the judge's problem. Unless I don't know anything about being a trial judge, the trial judges can tell me, can you schedule a trial for six or seven weeks without expecting an interruption? The only people that do that are Federal judges.

MR. MEADOWS: There you have it.

HONORABLE LEVI BENTON: Well, there is Hidalgo County and Cameron County, and I'll rest there.

MR. LOW: Yeah.

CHAIRMAN BABCOCK: Richard, and then Justice Gray.

MR. ORSINGER: I like Judge Christopher's suggestion about placement because I can envision -- if this becomes a useful tool, I could envision it being used even in a bench trial. Of course, I do a lot of bench trials, too, and sometimes they're very complicated; and sometimes they're in front of a judge that doesn't have any particular experience to the law we're arguing or the industry information we're putting on; and if it's in the pretrial conference rule, you might even see this procedure used with advocates with the trial judge, which I think should be encouraged if it's considered to be helpful to the judge, by the judge.

CHAIRMAN BABCOCK: Justice Gray, and then

Buddy.

HONORABLE TOM GRAY: I was just going to point out that Buddy pointed out to me after my earlier comments that even in civil cases under Rule 265 you can waive your oral argument -- or, excuse me, opening statement until you start your case, so that's already an option in civil cases. It is in the rule now, and so whatever we do, if it is added to the rules, we'll need to --

CHAIRMAN BABCOCK: Does anybody do that? Does any defendant waive their opening statement?

MR. LOW: I've done it a number of times.

HONORABLE STEPHEN YELENOSKY: Just this week I had one.

MR. LOW: I have.

MR. ORSINGER: I've done it before.

HONORABLE STEPHEN YELENOSKY: But they were pro se.

MR. MEADOWS: See, it's the only place in the trial where the defendant can have the last word, if you make the opening statement at the beginning of the case. I can't imagine --

CHAIRMAN BABCOCK: No, I can't either.

MR. MEADOWS: -- a length of any case that you would waive it.

CHAIRMAN BABCOCK: Buddy's done it.

MR. LOW: No, I was just going to -- Richard misspoke that that can only happen in Federal court, because I know a judge, and if it's his birthday, you're going to have a two-week recess, and he's not a Federal judge, and he might call it the judge's problem, but it becomes a lawyer's problem when he does it.

MR. ORSINGER: I've had two long jury trials over the Christmas holiday, and in both instances we took off either the entire week or most of the week, and then you're hit by New Year's the following -- if you have New Year's on a Wednesday or a Thursday, so even if the judge is not being a poor manager, it can be a problem.

CHAIRMAN BABCOCK: Carl.

MR. HAMILTON: Yeah, the court in Starr County sits in three counties, so if you start a trial in Starr County he only has one week for trials, and if you don't get through that week, then you have to wait until he comes back from the other two counties the next month and do your second week and the third month you do your third week.

MR. MUNZINGER: But you're writing a rule that applies to the state. The exceptions that are being stated here are exceptions that are judge's problems. They're not problems that are endemic throughout the state

in trials day-in and day-out. So you're proposing to write a rule that's going to suggest to people that we start doing this in cases that shouldn't be the problem, because they are capable of being managed by the judges. I don't mean to be disrespectful to a judge, but who sets a six-week trial two weeks before Christmas? Why would you do such a thing?

HONORABLE TRACY CHRISTOPHER: Okay. You set a two-week trial two weeks before Christmas and then at the end of 10 days you realize it's a four-week trial, and then you're stuck.

CHAIRMAN BABCOCK: You're not saying that lawyers have told you -- given you a shorter estimate --

HONORABLE TRACY CHRISTOPHER: That's right, and they do it all the time.

HONORABLE STEPHEN YELENOSKY: It depends on whether they're giving you an estimate or a guaranty.

MR. ORSINGER: Well, the problem is the lawyers. Let's work on the lawyers.

MR. LOW: Our rules have to fit all the cases, not just the routine one like Richard and I ordinarily try. We've got the extraordinary, and discretionary can fit both.

CHAIRMAN BABCOCK: You only try extraordinary cases, Buddy.

MR. LOW: I try to make them extraordinary.

CHAIRMAN BABCOCK: Now we're talking.

HONORABLE STEPHEN YELENOSKY: Apparently extraordinarily long.

MR. GILSTRAP: Well, you know, I think everybody thinks that -- or the consensus I'm hearing is that, you know, probably this is okay now, and the question is whether or not to put it in the rules and encourage it. So -- and to head off maybe Senate Bill 1300 because -- which seems to do that. I like Judge Christopher and Richard's idea of putting it in 166. It's just an item in there, whether to permit interim summations, and that's one of the things you can consider in the pretrial order. If a lawyer wants to bring it to the judge's attention, he can point to it. "Here it is, Judge." And it seems to me that's all the suggestion you need. It's clearly discretionary if you put it that way, so just sneak it in there, and we've dealt with it, and we allow the process to continue to evolve, because it appears to be evolving.

CHAIRMAN BABCOCK: Bill.

PROFESSOR DORSANEO: How much use is made of Rule 166?

MR. GILSTRAP: That's the point.

PROFESSOR DORSANEO: It's my understanding

in some counties it's just something we copied from the Federal rule book. Isn't that right?

MR. LOW: No.

CHAIRMAN BABCOCK: My experience is it's not used very much, but --

PROFESSOR DORSANEO: In Nueces County it's been used for a long time, so-called docket control order, docket conferences, but in North Texas I'm not familiar with it being used at all.

MR. LOW: I haven't tried --

PROFESSOR DORSANEO: There are A few exceptions. Some individual district judges monkey-see/monkey-do the Federal approach.

MR. GILSTRAP: Plenty of judges have scheduling orders.

PROFESSOR DORSANEO: Yeah, well, they're not -- that's not this state.

HONORABLE JANE BLAND: I resemble that remark about monkeys.

PROFESSOR DORSANEO: Oh, I didn't mean to put it that way.

HONORABLE JANE BLAND: Yes, you did.

CHAIRMAN BABCOCK: Okay. Is there a --

PROFESSOR DORSANEO: Poor choice of words.

CHAIRMAN BABCOCK: Is there any consensus or

any thought that we should -- we should advise the Court that this should be prohibited, should never be allowed under any circumstances? Is there any thought about that? Justice Jennings.

HONORABLE TERRY JENNINGS: Well, my concern about what Frank said, I mean, the rule is pretty specific now, Rule 265, in a jury trial and only talks about jury trials, of course, is the order of proceedings; and then you get to make an opening statement and then present your evidence; and the other side can make their opening statement either, you know, after the first party makes their opening statement or they can wait and then they present their evidence. The rule's pretty specific now, and I think under the rule if someone objects to an interim statement at this time under 265, they're entitled to prohibit an interim statement of this kind. That's the way I read the rule now, so I don't think you can just tinker with the other rule without that having some effect on this rule. If a party objects to it, they ought to be able to rely on the rules as they're written and get a ruling saying, okay, no, no interim statement if somebody objects to it.

CHAIRMAN BABCOCK: That's a good point. Bill.

HONORABLE TERRY JENNINGS: That's the only

caveat.

PROFESSOR DORSANEO: First thing, I think Rule 262 makes the order of trial, and 265 would apply to bench trials as well, although that might be debatable as to how those two things fit together.

HONORABLE TERRY JENNINGS: I'm less concerned about it in a bench trial because, you know, a judge may ask the parties to give them an informal summary. "Okay, where are we again on this case?" Whereas with a jury the chance for more mischief is greater.

PROFESSOR DORSANEO: I would think that the trial judge ought to be able to permit this to be done, particularly in the case of trials, as Bobby says, that are interrupted. It just doesn't make any sense not to kind of start over. It's like when you have a class, you haven't quite finished the case, frequently you come back and say, "Let's start over." You don't try to pick up in the middle where it doesn't make any sense.

HONORABLE STEPHEN YELENOSKY: 265 allows it for good cause.

PROFESSOR DORSANEO: Yeah, anything for good cause, yeah, whatever that is.

CHAIRMAN BABCOCK: Structurally you would want to amend, is what you're saying, Justice Jennings,

265, although you may also want to throw it into 166 as a kind of a here's another thing can you think about?

HONORABLE TERRY JENNINGS: Well, actually, I'm against it.

CHAIRMAN BABCOCK: Okay.

HONORABLE TERRY JENNINGS: Surprise.

CHAIRMAN BABCOCK: But if you were for it --

HONORABLE TERRY JENNINGS: I think you have to tinker with both.

MR. FULLER: Well, unless you limit it to the court. I mean, I don't think there's anything in there that says the court can't tell everybody where they are.

MR. MUNZINGER: Rule 265 now allows the court for good cause stated, "The trial of cases before a jury shall proceed in the following order unless the court should for good cause stated in the record otherwise direct." So as written Rule 265 contemplates perhaps that a judge could state the good cause and say, "We're going to do it this way in this case."

CHAIRMAN BABCOCK: And the judge would say, "Hey, this is a lengthy case, it's complex, and, you know, it's boring, so boring I can't stay awake, and so I want to get a little argument every so often."

MS. BARON: Chip, just to make sure I

understand, it would seem to me that if the parties agreed, you're there, and then only if one party disagrees under the rule the judge would have to find good cause; is that correct?

CHAIRMAN BABCOCK: Sound goods to me, but you're the appellate lawyer.

MR. LOW: But would the judge have to do it even if they --

MR. ORSINGER: No.

MR. LOW: If they agree to it and the judge doesn't want it, if it's not in his discretion then they're not there. So you still --

MS. BARON: Well, my question is does the rule preclude parties from agreeing to this, and I would think it wouldn't, but other people seem to think differently.

HONORABLE STEPHEN YELENOSKY: If they agreed, how have they preserved any error if there isn't?

MS. BARON: Right. Exactly.

HONORABLE TERRY JENNINGS: Well, I'm looking at 265, and in regard to good cause, isn't that talking more about situations where you might want to put a witness on out of order or something like that? I don't think in -- I may be mistaken, but I don't think when Rule 265 was, you know, first written it was contemplated this

idea of an interim statement. I think it was more along the lines of, well, you know, I've got a witness over here, and can we put them on out of order so that that witness can take off on vacation or something.

MR. MUNZINGER: I think you're correct, because no one ever wanted people to interrupt trials with jury arguments and lawyers making jury arguments in the middle of the trial until recently. And again, I am being drug into the present screaming and kicking. I don't like being in the present, but the rule does say "unless for good cause stated."

I agree with you it wasn't there, and I also agree with you if you plug it into 166 without addressing 265, you've got a built in argument and a problem within the two rules that I wouldn't want to be responsible for. If you're going to do this, do it above board, tell people how to do it, and do it, but I don't know that you're doing anybody any favors anywhere because I don't think you're going to make trials any more quicker, any more efficient. I think you're writing a rule for the extraordinary circumstance that in this room there's very little experience with and very little need for, in this room.

Of all the trial lawyers, judges, trial judges, and appellate judges in this room, how many of us

have, if pressed, would raise your hand and say this is really something important we needed? We're doing it because Senate Bill 1300 has broached the subject for whatever reason, and that may be their job. It's ours to keep reason and order in the judicial system.

HONORABLE TERRY JENNINGS: Here, here.

MR. WADE: Here, here.

MR. ORSINGER: I'd like to point out that we're assuming that this is going to be between witnesses, but the rule doesn't say that, so we could probably just get to the point where we might interrupt the witness in the middle of the testimony and say, "That's a lie."

MR. MUNZINGER: Well, that's what Buddy did in his trial in --

MR. LOW: No, see, I never called anybody a liar. He forgot how to tell the truth. But anyhow, the judge, that was the judge. Our idea was that we were going to divide the trial so that we -- in order to keep up, not with the jury, but for us to keep up what we're doing, we weren't going to put in an environmental witness over here on the antitrust and so forth. We were going to try in stages and then we would get up and say, "Okay, now, we've finished that, and here's what we want you to focus on," kind of, but it didn't end up that way, so when the judge draws the rules, we abided by them. I mean, to

our advantage as best we could.

CHAIRMAN BABCOCK: Richard.

MR. MUNZINGER: And I understood you to say that. When Chip was making his little presentation a moment ago about the lawyer saying, "I called Mr. Smith and I have established fact X," what lawyer who is on the other side would say that -- would admit that fact X was established? In fact, a witness has testified to fact X, but fact X hasn't been established. So immediately this guy either has to stand up and object and say, "Wait a minute, judge, he overstated the case," or he's got to say, "He didn't establish fact X, and I'm going to call witness Z who will prove that that's not true."

And here you are, you're doing everything in the middle of a trial that you should have done in closing argument, and your trials are lasting forever and ever. The juries, who apparently don't understand anything today if you listen to some people, are sitting there wondering what in the dickens is going on. It doesn't make sense for us to write a rule to cure a problem that doesn't exist.

MR. LOW: But, see, that did happen. Somebody would get up and say that and you would flash and say, "Wait a minute, judge."

MR. MUNZINGER: Sure.

MR. LOW: Flash a document on the screen.

MR. MUNZINGER: Of course.

MR. LOW: We were saving time, because we were making objections the day before, and you couldn't object to any testimony. You had to make your objections and follow the schedule. We had a magistrate ruling on evidence objections. It was an unusual trial.

MR. MEADOWS: There were no contemporaneous objections with testimony?

MR. LOW: Very, very few. I mean, it wasn't just -- it had to be something special, because the judge let us know that he expected us to, you know, preview what we were going to do the next day, the witnesses, and what objections. I mean, if somebody just got up and said something just out of the blue you could jump up, but all documents and everything were already ruled on and what the witness could testify to, and we did that with one group of lawyers and then we would try it before the jury the next day.

CHAIRMAN BABCOCK: Bill.

MR. WADE: I think the -- and I'm speaking here for the Texas Chapter of ABOTA. The way we talked about this thing would be a very limited application where you had some expert witnesses who had very complex testimony and you summarized their testimony. It didn't

have anything to do with argument and interrupting regular testimony with argument. It had to do with a very limited application to very complex testimony.

CHAIRMAN BABCOCK: Carl, and then Judge Benton.

MR. HAMILTON: Well, I was just going to point out that 265 gives the trial judge the discretion to alter the order of what happens, but it doesn't say he can add such things as interim argument.

HONORABLE STEPHEN YELENOSKY: Well, 269 is an issue, too, because it says, "After the evidence is concluded and the charge is read, the parties may argue."

HONORABLE LEVI BENTON: Richard, I really disagree with you.

THE REPORTER: Speak up, please.

HONORABLE LEVI BENTON: The problem really -- there is a problem that really does exist today. There are some cases in courts that are managed very efficiently that are of such a duration that you need to help people, and I would -- I mean, Skip and Michael have been through the record I referred to earlier. I suspect they've read that record a hundred times, you know.

MR. WATSON: No, I can't quite get through all of it. I'm still on my first time.

HONORABLE LEVI BENTON: You know, if things

were always so simple, the First Court would never have need to grant somebody's motion to extend the number of pages for a brief. Things aren't always cut and dry and simple. The problem exists. We can pretend it doesn't exist and ignore it, but I just think you're not living in the present if you conclude the problem doesn't exist.

MR. MUNZINGER: I know that the problem exists, and I know that there are lengthy trials. My personal experience is that in Federal court the Federal judges have been under such pressure from the Speedy Trial Act and the publication of national statistics that allows people to compare their dockets that they become overly concerned with their docket, and that's why you have a trial that starts here, goes two weeks, recesses for three while they try three criminal cases, and comes back and does something else. That is a distortion of their judicial system, in my opinion.

I mean no disrespect to them or anybody else. I don't like the system. I think it's ignorant, but I live with it. You have -- we have cases that last a long time. I agree with that. But to allow lawyers to stand up, for -- this idea here, "We're going to tell you what the expert says," and the lawyer stands up and he tells you what the expert says. That's not the expert's testimony, and I can't imagine of a case -- and I've tried

a few cases with experts, economists, doctors, you name it. I've had lots of different kinds of experts. It all boils down to who the jury believes and how the expert articulates his opinion.

So the lawyer is going to stand up and characterize this opinion in the way most beneficial to his case, and the expert may or may not say what the lawyer wants him to say, and you get into a fight over that. Lucius Bunton used to make us stand up and read -- he wouldn't let the expert testify. The lawyers read -- were to read summaries of what the expert would say, and you had a 10-minute rule that you could -- you couldn't take more than 10 minutes for an expert, regardless of the case.

HONORABLE LEVI BENTON: Are you talking about Scott Brister or Lucius Bunton?

MR. MUNZINGER: Lucius Bunton. I didn't try a case in front of Judge Brister.

HONORABLE LEVI BENTON: I was just joking. He's not even here to --

MR. MUNZINGER: Here's my point. Are you going to decide the case on the facts? Select your expert. We've all -- if you've tried a lawsuit you figure out that you've got to have a doctor who can talk -- and I don't mean this disparagingly -- but who can talk to high

school graduates. You've got to explain physics to someone like me. I don't know anything about physics. I don't know anything about the interworkings of the kidney, but if I'm going to teach it to high school graduates, I have to have an expert who can do it in this way, and I as a trial lawyer have to work with him and select him to let him do it in that way, to the extent that it can be done, but to have a lawyer stand up -- here's a very fine plaintiff's lawyer. You think he's going to read an objective view of his witness's testimony? He'll craft and work for two weeks on every word in that statement, but every one of them is going to be a selling point if he's any worth his salt. Look at him, he's smiling. He agrees with me, ladies and gentlemen of the jury. Now, that's what would happen.

CHAIRMAN BABCOCK: Wipe that smile off your face.

MR. MUNZINGER: But that's my point, and again, the trial, I've lived in the real world, but the trial is -- you're not solving anything. You're causing a problem for something that happens so rarely.

HONORABLE LEVI BENTON: Okay, just one point.

MR. LOW: Well, then why let them give closing argument? They've heard the testimony.

HONORABLE LEVI BENTON: I agree with you there ought to be rare occasion for the need for these interim summations, but there are trial court judges that unless they have clear and express authority to do something aren't going to let you do it. And so since we recognize there is a need for it on some rare occasion, we ought to give the trial court judge the clear express authority to permit it.

CHAIRMAN BABCOCK: Skip.

MR. WATSON: Well, I'm not sure we do need to give the express authority to do it. I think that in the rare case that we're talking about, it's evident from what people have been saying in this room, that a creative trial judge will say, "Perhaps we need this." If that's not said, again, in the extraordinarily rare case where it's needed, the counsel will bring it up. There's not going to be a problem with it of needing authority if both sides agree that this would be a good idea and the judge picks it up.

I just -- I personally think we're making too big a deal of this. I think this is one where it truly is not broke and doesn't need to be fixed and that that's the message that should be delivered to the Senate, that our consensus here is, is that in the truly rare case where it would be helpful, it's probably going to happen

anyway and it can be done in a way in which there is no error to be appealed on. I think that's it. We end it there and go on.

CHAIRMAN BABCOCK: How many people, other than Richard, who I think has made his views known, agree with Skip on that?

MR. GILSTRAP: Wait, wait. Agree that we just don't do anything or we let the -- we say something, that nothing needs to be done?

CHAIRMAN BABCOCK: The latter.

MR. WATSON: That we communicate that nothing needs to be done.

CHAIRMAN BABCOCK: Yeah, the latter. How many people agree with that?

MR. WATSON: I can't agree with myself.

CHAIRMAN BABCOCK: How many people disagree with that?

HONORABLE STEPHEN YELENOSKY: If you disagree with yourself you get two votes.

CHAIRMAN BABCOCK: And Munzinger's vote is weighted, and we know which way. Well, that vote is 26 to 6 in favor of what Skip just said, that we give our expression to the Court -- we're not going to tell the Legislature anything, but that it's our thought that the Court should tell the Legislature that it's working just

fine right now. Justice Bland.

HONORABLE JANE BLAND: Along that line, though, could you find out how many people would be receptive to including it as an item to consider in the Rule 166a pretrial order, which has the benefit of showing some action on the issue rather than do nothing, but it puts the onus on the lawyers and everybody involved to determine what it means if we include -- whether or not to include interim deliberations?

CHAIRMAN BABCOCK: Sure. Bobby, you want to say something?

HONORABLE JANE BLAND: Or interim argument.

MR. MEADOWS: Yeah, it might be worthwhile to establish that all of us that voted along with Skip that we don't need to do anything now agree on what that means, because in my view, that vote was cast because I believe that parties can agree to do it and the judge can allow it for good cause, and so that is the state of play right now.

CHAIRMAN BABCOCK: Yeah. On -- yeah, Richard.

MR. ORSINGER: I think that it's fine for us to have this opinion, but I think realistically Senate Bill 1300 specifically allowed this. Senator Wentworth is a well-placed, highly influential senator; and the interim

report between last session and this session has allowing lawyers to periodically summarize testimony for the jury as one of their action items; and I think we are diluting ourselves to think that by saying we don't like it that we are in any way affecting the decision of whether it gets implemented; and I would encourage all of us, even if we don't like it, to do something like what Judge Christopher suggested, which is put it in Rule 166 where perhaps a well-placed senator or someone on the Senate Jurisprudence Committee might say, "Well, this is enough for us to use as a kind of trial balloon, let's see how it works, and let's look at it in three sessions again," or something like that.

MS. PETERSON: The way I read this report, that was an item in their interim charge, but they're not recommending action on it right now. It looks like the recommendation is limited to juror questions and note-taking.

CHAIRMAN BABCOCK: Yeah, I was about to make that same point. I don't think the interim charge recommends that.

MR. LOW: Wasn't it in the bill?

MS. PETERSON: It was in the bill last session.

MR. LOW: That's what I mean. Unless

somebody recommends it, it wouldn't be in the bill that they presented, and so we're going to see the same thing.

CHAIRMAN BABCOCK: Well, you know, maybe, maybe not. But because if the Court takes our recommendation, fairly strongly expressed, it might tell Senator Wentworth or anybody else that, at least our view, the Court's view, is to leave it alone for now, but the Court may not feel that way.

MR. LOW: Did the Court express its opinion when the bill came out?

HONORABLE NATHAN HECHT: I don't think so.

MR. LOW: I assumed you had.

CHAIRMAN BABCOCK: Nina.

MS. CORTELL: Do we want to address the second issue that if there were something in the rules what the parameters would be, so at least we have that said, kind of diminishing any harm that's foreseen by permitting it?

CHAIRMAN BABCOCK: Yeah, I would think -- I would propose taking up Justice Bland's thought first, and then we can go from there if that's all right. Lonny.

PROFESSOR HOFFMAN: So we have -- two different comments. On Richard's point and kind of maybe underlining what I think just happened, I would say that it affirms my sometimes failing faith in human race that a

room full of lawyers, contrary to what we thought was going to happen, voted resoundingly against adding some express authority.

CHAIRMAN BABCOCK: It's a wacky world.

PROFESSOR HOFFMAN: Boy, you know, so, you know, again, the Court can do what it wants to do, but we should underline that comment on the weight of the evidence there.

As to, you know, whether we should do more, that does strike me as a remarkable attempt at seizing victory from the jaws of defeat. That was an enormously lopsided vote. I would think the normal course ought to be if the Legislature does, in fact, decide to include it and make that policy choice, I have a feeling they may give us a chance to go back to it, which it seems to be their normal practice anyway. I would vote for saying move on.

CHAIRMAN BABCOCK: Yeah, and, by the way, I meant to say this earlier, but either we or the Legislature or both have come a long way because I think there is a very nice working relationship with the Legislature now where they do leave the rule-making to the Court and express their policy preferences. Judge Christopher.

HONORABLE TRACY CHRISTOPHER: Well, I mean,

Alex is going to get into this report, but if the Legislature is going to act on this report, one of the things in the report is to allow this procedure.

PROFESSOR ALBRIGHT: Well, except the report says the Supreme Court should do it, and again, I don't think -- this committee did not carefully consider all those things. I think they thought that they were -- the group that was considering this thought they were, you know, rubber-stamping previous jury studies that felt that this was a good thing. I mean, my thought is I'm surprised that it wasn't in the Legislature's report, because it seems like this is something that comes up all the time, and I tend to think it would be good to just put it in 166 and put it to rest, because otherwise it's going to keep coming up all the time.

CHAIRMAN BABCOCK: Yeah. Kennon.

MS. PETERSON: It might be worth noting that the House Judiciary Committee met last week, and it's not clear at this point what they will recommend, so it could be different from what the Senate Jurisprudence Committee recommended and in that vein may include this issue, so --

CHAIRMAN BABCOCK: Which brings us right around -- a nice segue by Professor Albright -- to voting on whether or not we should include something in Rule 166, even though Professor Hoffman notes that maybe that's

snatching defeat from the jaws of victory, but anyway, how many people think we should put something about the advisability of having statements or arguments or whatever you call it periodically throughout the trial, raise your hand, everybody that's in favor of that.

Everybody against? The againsts have it by 16 to 13, the Chair not voting, so fairly close, but more people than not think that that should not be included in 166. So having exhausted this topic, why don't we go on to --

HONORABLE DAVID PEEPLES: Chip, do we want to express our opinion on whether -- on the distinction between summations about the past and statements about what's getting ready to happen? I mean, our discussion this afternoon has solidified my initial thought that I am a lot more comfortable with statements about what's getting ready to happen than I am about summations about the past, which are going to be argumentative.

CHAIRMAN BABCOCK: Yeah.

HONORABLE DAVID PEEPLES: I don't know if that's something we want to express our opinions on or not.

CHAIRMAN BABCOCK: Justice Hecht, is that something you want to hear about?

HONORABLE NATHAN HECHT: I think we've

covered it pretty thoroughly.

CHAIRMAN BABCOCK: Okay.

HONORABLE NATHAN HECHT: Margaret Bennett is here.

CHAIRMAN BABCOCK: I saw Margaret. Where is she? There she is.

HONORABLE NATHAN HECHT: Maybe we should take up Rule 12 out of order. We've just got a last piece left.

CHAIRMAN BABCOCK: Does 265 allow this?

MS. PETERSON: Good cause.

HONORABLE NATHAN HECHT: It's really for information, and I don't think it will take very long.

CHAIRMAN BABCOCK: Yeah. Absolutely. So you have the floor.

HONORABLE NATHAN HECHT: Let me just by way of introductions say that Rule of Judicial Administration 12 has to do with the production of judicial records from courts and related bodies. Judicial records are everything other than adjudicative records. It would be like administrative materials, rules materials, things that have to do with the administration of the courts versus their decisions in cases, and we just have some changes that I wanted you to know about.

This committee has not been intimately

involved in this rule. It was written about, what, 10 years ago, Margaret? And but it's kind of the -- it's kind of an open records rule for the judiciary, and basically you can request a records keeper for records, and the process is gone through where they look at the request and see what might fit, what might not, and then the -- there's an appeals process that goes to the regional presiding judges, and so these amendments to Rule 12 are ways to make that process smoother, and because this is a group of experts on process, I thought you should know these changes, even though, as I say, this is not something that the committee has had a big hand in in the past, but I wanted Margaret to go over them with you this afternoon.

CHAIRMAN BABCOCK: Great.

MS. BENNETT: Hi, I'm Margaret Bennett. I'm the general counsel for the Office of Court Administration, and for the last, oh, 10 years, ever since Rule 12 went into effect, I've served as the staff attorney for the regional presiding judges when they write their opinions; and the Office of Court Administration also acts as the clerk to receive the Rule 12 appeals. So we are very aware of the issues in Rule 12, and one of the things that has become clear to me over the last 10 years is that many, many judges and clerks, primarily in justice

of the peace courts, think that -- I think I'm sitting in your chair, Judge Peeples. I'm speaking for you anyway. This is Pam's chair.

MS. BARON: Please.

MS. BENNETT: It's become clear to me that many judges and clerks think that if something is -- if records or the disclosure of records are not covered by the Public Information Act and they're not covered by Rule 12, they don't have to give them to the requester, and this is a real problem when people, primarily criminal defendants or criminals, are asking to see their own case records, and case records are not covered by the Public Information Act, and they're not covered by Rule 12, and so these people are told, "No, we don't have to give that to you, because it's not covered by Rule 12 and it's not covered by the Public Information Act."

So if the Supreme Court were to enact this amendment to Rule 12.3 to clearly say that just because it's not covered by Rule 12, doesn't mean they don't have to give the records to people who are requesting them, that would be the icing on the cake of my legal career. I feel very passionate about this one in particular.

HONORABLE STEPHEN YELENOSKY: Excuse me.

MS. BENNETT: Yes.

HONORABLE STEPHEN YELENOSKY: What do you

mean by case records, what the clerk has?

MS. BENNETT: Yes.

HONORABLE STEPHEN YELENOSKY: And so the request would be made of the clerk and the clerk denies it?

MS. BENNETT: Nanny-nanny-boo-boo, we do not have to give them to you because case records are not covered by Rule 12 and they're not covered by the Public Information Act.

HONORABLE STEPHEN YELENOSKY: And the person is there in person asking to see it or is writing in?

MS. BENNETT: Either way.

HONORABLE STEPHEN YELENOSKY: Bonnie? Where's Bonnie? Does that happen?

MS. WOLBRUECK: I didn't know it.

MS. BENNETT: Usually it doesn't happen in district court or county court. Those are more sophisticated clerks as a rule, but it happens all the time in JP court and in -- sometimes in municipal court as well. So all this -- really what we're after is saying that this rule doesn't apply to records or information to which access is controlled or required by, and it adds the Constitution or court decisions, but what we're really after is this comment, to have the Supreme Court say that you can still be required to disclose information, even if

it's not in Rule 12, so --

HONORABLE STEPHEN YELENOSKY: But, well, my concern is if that's the problem, aren't we opening a huge door of ambiguity to fix a simple problem, which is to tell clerks to allow people to see public records because if you just say, well, just because it's not under 12, you might get it, that just emboldens all the people who are asking for stuff that they're not entitled to.

MS. BENNETT: But --

MR. GARCIA: What would that be, what other categories?

MS. BENNETT: -- who's going to tell them? The United States Supreme Court told them in the Nixon case, but, you know, that's --

HONORABLE STEPHEN YELENOSKY: Well, I don't know. Well, in any event, if that's the only problem, then why don't we address that problem rather than saying this?

MR. ORSINGER: Can I ask a question?

MS. BENNETT: Yes.

MR. ORSINGER: This would apply to criminal cases as well as civil cases?

MS. BENNETT: Yes. Rule 12 doesn't apply to any case -- any case records. Rule 12 applies to what you would think of as administrative records, like contracts,

if a court -- if a judge or a judicial agency entered into a contract and someone wanted to see the contract, they would request of the judge, "I want to see all your contracts to buy office furniture." That's what Rule 12 was really -- that's the kind of records that Rule 12 covers, because in the definition of what is a judicial record covered by Rule 12, it says -- let's see, Rule 12.2, says that "Judicial record means a record made or maintained by or for a court or judicial agency in its regular course of business, but not pertaining to its adjudicative function, regardless of whether that function relates to a specific case." So the way the presiding judges have interpreted that is that case records pertain to a court's adjudicative function, so Rule 12 by definition does not apply to case records. Those are not judicial records. They are records of the judiciary, but they are not judicial records.

HONORABLE TOM GRAY: Margaret, that next sentence, it really helped put the icing on the point that you just made. It says, "A record of any nature created, produced, or filed in connection with any matter that is or has been before a court is not a judicial record." And that's what takes all of the case-specific records out, whether it's pleadings, or in our case, briefs, memorandum within the court, whatever is related to a case, and it

doesn't have to relate to a specific case. That's what takes it out of Rule 12.

HONORABLE STEPHEN YELENOSKY: Well, but if the problem is people who don't really understand this, and apparently maybe there are some clerks who don't, how does this resolve it? And for the people who perhaps pro se think everything is a constitutional issue, what that may mean to them is, "Well, under Rule 12 it's not a judicial record, but I sure have a constitutional right to have the judge's notes on my case." I mean, I don't see where it helps.

CHAIRMAN BABCOCK: Well, it seems to me that maybe it's a problem of the wording. The cases that are cited here, *Nixon vs. Warner* and *Express-News vs. MacRae*, are two very well-known cases that deal with the common law right of access, which was recognized in this state in the 1800s and came over from England, and there's case law all over the country about it, and that says that with respect to judicial records on a case there is a common law right of access. It has been argued from time to time, including in the *Nixon vs. Warner* case that there is on top of that a First Amendment right, not only to give expression to freedom of speech and freedom of press, but also under the petition clause to the First Amendment that there is a constitutional right of access.

That was rejected in Nixon, but in *Richmond Newspapers vs. Commonwealth of Richmond* the court said, yes, there is a First Amendment right under certain circumstances, never applying it yet to records. So on what Margaret's trying to do, it seems to me that the language would be better said under your subpart (6), "the common law" rather than "court decisions." Court decisions are the common law, but it's called the common law right of access, and similarly in the comment, rule -- "may be required to be disclosed under other law, including constitutional or common law" because, again, it's called the common law right to access. But if the --

MS. BENNETT: Under including, "under constitutional law or common law."

CHAIRMAN BABCOCK: Right. Richard.

MR. ORSINGER: A couple of -- three questions, actually. The two cited cases have to do with case-specific information, not with court administrative information; is that right? And we're citing those cases as authority for court administrative information?

CHAIRMAN BABCOCK: Nixon, as I recall, did not have to do with any court documents at all. It was a common law right of access to --

MR. ORSINGER: To government records.

CHAIRMAN BABCOCK: To government records.

MR. ORSINGER: Okay. Another question. Does the Texas Open Records Act apply to these kind of --

MS. BENNETT: No, the Open Records Act has a specific provision that it does not apply to, quote, "records of the judiciary." Rule 12 applies to one subset of records of the judiciary. It applies to judicial records, which by definition do not include case records.

So Public Information Act doesn't apply to case records or Rule 12 judicial records. Rule 12 only applies to judicial records, but this amendment that we're requesting under Rule 12.3 says, "This rule does not apply to," and then we're listing all these things that Rule 12 does not apply to, so that's why we wanted to say the rule does not apply to records or information to which access is controlled or required by any of these things, including Rule 76a, the Constitution, or the common law.

MR. ORSINGER: You're seeing this rule as a limitation on these otherwise broad access, so what you're trying to do is limit an exception?

CHAIRMAN BABCOCK: No.

MR. ORSINGER: Is Rule 12 a narrowing of what the law would otherwise be?

CHAIRMAN BABCOCK: Judge Christopher.

MR. MUNZINGER: It's been read that way is her point.

HONORABLE TRACY CHRISTOPHER: I'm confused. Does this law then -- this amendment then require the judges to produce case records?

MS. BENNETT: No.

HONORABLE TRACY CHRISTOPHER: Well, then why is it in here?

MS. BENNETT: Because --

HONORABLE TRACY CHRISTOPHER: I mean, I'm confused about what it's supposed to be doing.

MS. BENNETT: Well, in JP court the judges are the -- no, it does not. What we really want is something to point to when people call the Office of Court Administration and say, "I want to get case records and the clerk won't let me have them," and all we can do is say, you know, "That's not a Rule 12 matter. It's not a Public Information Act matter." You're just -- you know, you're on your own, and it would be really nice to be able to point to a statement from the Supreme Court, and Rule 76a only applies to civil cases. So it would be nice to have a statement that just because it's not covered by Rule 12 or the Public Information Act or Rule 76a doesn't mean that it doesn't have to be disclosed, that there may be other law requiring its disclosure.

CHAIRMAN BABCOCK: If Munzinger wants to go down to the clerk's office and look at State V. Smith

because he's a curious fellow and he just wants to see it, and the court clerk says, "Sorry, Mr. Munzinger, you're not an attorney in that case, you're not a party to the case, and so I'm not going to let you see it," and he complains to Margaret, and Margaret would like to be able to say to the clerk, "Look, you dummy," present company excepted, "there is a common law right of access. You can't use Rule 12 as a basis for denying Munzinger access to that file. We say so clearly here, and the common law right of access in our view requires you to give it to him, and so give it to him and let's not worry about it."

Munzinger.

MR. MUNZINGER: I think her experience is the experience that many of us have had with the Public Information Act, formerly known as the Open Records Act. The statute itself says -- and generally it says this. I don't mean to be specific. There is a presumption of openness. We're the citizens. It's our dadgum government. We're supposed to be able to read what we want, and you're only supposed to keep secret from the people that own the place and run the place special matters, and what's happening is, is that clerks read this, and there, "You can't look at that."

"Why?"

"Well, you can't look at that."

MS. BENNETT: "Because it's not in Rule 12."

MR. MUNZINGER: And she's trying to go along -- this amendment, and I believe this is what you're trying to do, is to make it clear to clerks you've got to let the citizens look at documents. It's their documents, and it stops her phone from ringing because clerks don't want people to look at their papers.

CHAIRMAN BABCOCK: Bill, then Judge Yelenosky.

PROFESSOR DORSANEO: Well, I assume, since I don't have the Government Code available here, although I guess we could have pulled it up, that the Rules of Judicial Administration apply to all of the courts you're concerned about. I'm not sure that that's so myself, and that ought to be checked.

HONORABLE TRACY CHRISTOPHER: And if the purpose of this is not to make the court suddenly produce the records, why is it here?

PROFESSOR DORSANEO: I have a little bit more.

HONORABLE TRACY CHRISTOPHER: Sorry.

PROFESSOR DORSANEO: And my next point would be instead of trying to do this kind of by indirection, why don't you just propose a rule that says that judicial case records are, you know, open to the public and make it

a rule instead of, you know, explaining to somebody, "Well, yeah, this actually means that they are," although it doesn't say that. It just says that what the Constitution is an exception to the rules' current bad language with the odd definition of "judicial records" as not including most of them.

CHAIRMAN BABCOCK: Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: Yeah, I mean, Bonnie, help me out here, is there not a rule somewhere or a statute somewhere that says you have to allow people to see court records? Because if not, all my trouble with 76a is wasted because you aren't letting them see it anyway, so I mean, if there isn't --

MS. WOLBRUECK: It's common law access.

MS. PETERSON: There's a Rule 76, may inspect papers, Texas Rule of Civil Procedure.

HONORABLE STEPHEN YELENOSKY: Okay.

MS. PETERSON: And that says "each attorney at law practicing in any court," so that -- and I would read the rest, except really what's important is it refers to an attorney, and I think the issue that you're trying to address is nonattorneys coming in.

MS. BENNETT: And not --

HONORABLE STEPHEN YELENOSKY: Well, then maybe --

MS. BENNETT: -- necessarily civil cases.

HONORABLE STEPHEN YELENOSKY: -- we need a 76 double (a) or something, because the issue is access to court records that I've always thought were statutorily and by rule open and by Constitution open, and if so, don't put it in 12, because it seems to imply that there may be constitutional rights to things that there probably aren't constitutional rights to, like judge's notes, because it doesn't really explain it, it cites a case, when we could explain it quite clearly, I think as Bill Dorsaneo and Judge Christopher are saying, by a rule that says, "Any member of the public has a right to access the public records of any court, whether held by the clerk or the justice of the peace," if that's who has custody.

CHAIRMAN BABCOCK: Justice Bland.

HONORABLE JANE BLAND: Well, I think there's plenty of case law that has -- where clerks have been mandamused for not allowing access or not sending out notice of things that they're supposed to send out notice for, and that's the appropriate remedy. You know, the clerk isn't allowing access, and there's case law that says that, and there's case law on the criminal side that says that.

PROFESSOR DORSANEO: But people who need the information don't have time to be going and getting a

lawyer and winning a case. Just show them a rule.

HONORABLE JANE BLAND: But they also don't look at the Rule of Judicial Administration either, so --

CHAIRMAN BABCOCK: It's not -- Margaret described the problem as being clerks relying on Rule 12 to deny access. Is that the problem or did I mistake that?

MS. BENNETT: Yes. Yes. They say, "Because it's not compelled by the Public Information Act and it's not compelled by Rule 12, I don't have to give it."

CHAIRMAN BABCOCK: And this is a supposed fix to that problem. Richard.

MR. ORSINGER: I'm confused and I'm concerned --

CHAIRMAN BABCOCK: That's normal.

MR. ORSINGER: -- that our debate is mixing up case records with judicial records, which are not case records. The request is for us to somehow bolster the argument that judicial records, which are basically government functioning records, are available; and a lot of our debate is walking over here under Rule 76 and Rule 76a; and, you know, family law cases are excluded from 76a; and the Probate Code specifically permits probate judges to close certain proceedings to the public, which I myself have been involved with a mandamus on that, and

that extends apparently to the paper work in the San Antonio Court of Appeals, and I think we ought to keep these arguments distinct.

The public policy of not letting a member of the public see a contract involving a court is different from sealing files, and so I -- if we're going to launch into a banning or establishing some kind of common law or constitutional right to seek case files, I'd like to have that on the docket to talk about with some opportunity to prepare for it. In other words, I don't like our debate slopping over and saying let's just make all case records open because there's a constitutional right to having case records.

PROFESSOR DORSANEO: Why not?

MR. ORSINGER: Because I don't think we're -- we don't have enough time the rest of the day or even the rest of our tenure as a committee to solve that last one. There's lots of arguments. Yes, the U.S. Supreme Court has talked about public access to criminal trials, but they haven't really extended that to civil trials, and the Texas Supreme Court has ruled on orders that would keep lawyers from talking about litigation in Texas, but the standard is to protect the right to a fair trial. We could go on for weeks about that. We have a simple request here to change administrative rule so that clerks

don't misunderstand it, and all I'm saying is, is that I wish we would quit debating whether all civil case files ought to be subject to production, which involves a lot of statutes and involves a lot of constitutional law, and that's what I'm complaining about.

CHAIRMAN BABCOCK: Carl.

MR. HAMILTON: I can understand about the sealing or not having access to sealed records and certain confidential records, but why is Rule 12.2(d), why was it originally written to exclude other court records from the definition of a judicial record?

HONORABLE STEPHEN YELENOSKY: Because they -- because they do have an independent basis of access, I would think, that you don't have to go through this procedure.

MR. ORSINGER: Well, these were adopted after 76a was adopted, weren't -- this rule?

MS. BENNETT: Yes.

MR. ORSINGER: So 76a had already been a long, drawn out, painful process that everyone finally moved beyond, and so I would assume that these administrative rules were patching around 76a.

MS. BENNETT: And I have to answer a question Judge Yelenosky asked earlier when he said a simple way of looking at Rule 12 is that for the most part

it does not even apply to clerks, it applies to judges and records of a judge in the judge's chambers, but where, to use your phrasing, it slops over into the clerk's arena is really in JP court, because there they don't -- they don't have elected clerks, you know, who are a separate office from the judge. It's all one in the same thing.

HONORABLE STEPHEN YELENOSKY: Well, why isn't the easy fix in Rule 76? If "each attorney at law may inspect the papers and records relating to any suit or any other matter in which he may be interested," isn't that also true of a member of the public, subject to statutes that seal things and orders that seal things? So why don't we just change it to "any person may inspect"?

CHAIRMAN BABCOCK: I think there's -- as a supplement to Rule 76, a citizen has a common law right of access to judicial records, and I don't think there's any controversy about that in this state.

PROFESSOR DORSANEO: Richard does.

CHAIRMAN BABCOCK: So I don't think that's necessarily a problem, but I don't know that that would particularly fix the problem that Margaret is talking about, even if we were to do what you say.

HONORABLE STEPHEN YELENOSKY: Why wouldn't it?

CHAIRMAN BABCOCK: Because as I understand

Margaret's argument or Margaret's concern, she's saying that the clerks are reading Rule 12 in a way that the Court didn't intend it to be read, which is as authority for denying citizens the right to see court records.

HONORABLE STEPHEN YELENOSKY: Well, that could be cross-referenced. In 12 you can say, "Court records, see Rule 76," which will then say, "anybody may inspect." It keeps it simple.

CHAIRMAN BABCOCK: You could do it that way, except that that wouldn't apply to criminal, but your point is well-taken. It could be done a different way.

HONORABLE STEPHEN YELENOSKY: Well, and not just that it could be. I mean, I think we judges over here are feeling very strongly that judicial records is something distinct to us that's addressed by 12. It doesn't have anything to do with what's down in the clerk's office, and to put them in the same rule just messes the whole thing up.

MS. PETERSON: Well, that -- oh, I'm sorry.

CHAIRMAN BABCOCK: Sorry, Kennon.

MS. PETERSON: I was just going to reiterate that where this would be, it's talking about what Rule 12 does not apply to, and so this is about the scope of Rule 12. It's not pulling those into Rule 12. It's just making it clearer what the -- I guess for lack of a better

word -- exemptions from the rule are.

MR. GILSTRAP: It's also giving them a comment that's saying, you know, the exemption isn't what it seems to say. I mean, that's the problem. They want the comment so they can tell the clerk, "No, you've got to give it to them. Look at the comment. It's not covered by Rule 12."

The problem with Rule 76, if you extend that to anybody, is it still only talks about records of a case in which you have an interest, I believe, and so you would have to say, "Any person can inspect the records of any case."

CHAIRMAN BABCOCK: You're not right about that on 76a, but because anybody can --

HONORABLE STEPHEN YELENOSKY: Well, it depends on how you read "may have interest." I read that very broadly to mean if he wants or she wants to, but if you're saying they have to demonstrate to the clerk that the attorney has some connection with the case, that is not happening now. The clerks don't do that, and members of the public aren't asked when they go to the district clerk's office, "Why do you want to see it?"

MR. GILSTRAP: Because they have a common law right and most clerks follow it.

HONORABLE STEPHEN YELENOSKY: And why can't

the rule just reflect the common law right so that, Margaret, when people call, she can say, "Tell the clerk to look at Rule 76. That applies to the clerk's records."

CHAIRMAN BABCOCK: Bill.

MS. BENNETT: But that applies in civil cases. Most of these people -- doesn't it? Don't the rules of civil --

MR. ORSINGER: Yes.

HONORABLE STEPHEN YELENOSKY: Well, okay, then you do something parallel on the criminal side. I don't know.

MR. ORSINGER: There's a statute over there. We don't have rules of criminal procedure.

CHAIRMAN BABCOCK: That's right. Bill.

PROFESSOR DORSANEO: I'd say do all of the things that are necessary, change 76, recommend a change to whatever the criminal procedure alternative is, do something special for the JP courts so we don't have Tom Lawrence saying, "I'm not sure whether this rule travels to the JP rules."

HONORABLE NATHAN HECHT: Exactly.

PROFESSOR DORSANEO: Put it in all of the places and just get it -- it's not a hard thing to do.

HONORABLE NATHAN HECHT: Right. Gotcha.

CHAIRMAN BABCOCK: I think the concern that

I'm hearing from the judges is that the judges are worried that this language will present a special right of access beyond what exists today, and that's not my read of it, but --

HONORABLE TRACY CHRISTOPHER: No, it seems to make us responsible for producing case files. Yes. Because when you put that comment, you know, it's not saying, "Go back to the clerk who's got them." I mean, it's implying that somehow they're in our files now, they're our records now.

CHAIRMAN BABCOCK: "This rule does not apply to records or information to which access is controlled or required by," let's just go down to the proposed amendment, No. (6), "court decisions."

HONORABLE STEPHEN YELENOSKY: Well, go down to No. (5).

HONORABLE JANE BLAND: It's the comment. The rule doesn't -- I mean, I don't think there is any big substantive change to change provision of law to the Constitution or court decisions or common law or whatever you want to -- I mean, if you want to describe provision of law differently, it's the comment that talks about "may be required to be disclosed under other law."

PROFESSOR DORSANEO: Yeah, take that out.

MS. BENNETT: What if we just took out the

comment and just made it --

CHAIRMAN BABCOCK: Well, hang on for a second. There is no case that I'm aware of that requires a judge to -- either common law or constitutional that requires a judge to release the court records. The common law right of access goes to the custodian. The custodian is the clerk, and so all the case law that exists applies to the clerk.

HONORABLE TRACY CHRISTOPHER: But that's why it's confusing that it's in a Rule of Judicial Administration referring to our records.

CHAIRMAN BABCOCK: Yeah, I hear what you're saying.

HONORABLE STEPHEN YELENOSKY: And the concern is not apparently district clerks or county clerks or judges or attorneys. It's perhaps JP clerks or maybe JPs who are not attorneys and pro se litigants who sometimes do read these rules and either just putting (5) and (6) in or putting (5) and (6) in with a comment just directs them to law that is not going to answer their question directly that we certainly can answer directly and we should answer directly in the right place.

CHAIRMAN BABCOCK: Yeah, your concern is that it's going to mislead these pro se prisoners, or whoever they may be, into thinking that they have more

rights than they really do.

HONORABLE STEPHEN YELENOSKY: Well, yeah, and I certainly want to respect every right that they have, but this because it says -- for one thing it says, "This rule does not apply to," and that's so broad that sort of negates the rest of the rule with respect to anything the Constitution applies to. So the first argument is, "Wait, I've got a constitutional argument, don't put Rule 12 in my way, and here's my constitutional argument for all these things."

CHAIRMAN BABCOCK: Prisoners make those arguments from time to time, but they're rarely successful.

HONORABLE STEPHEN YELENOSKY: They do, but that's not -- if she wants some authoritative language to point to that is clear for clerks and pro se litigants then some version of what I'm suggesting for a rewording of 76 and whatever the counterpart would be for the criminal seems to me to be the fix.

CHAIRMAN BABCOCK: Richard Munzinger.

MR. MUNZINGER: I'm hopelessly confused.

CHAIRMAN BABCOCK: You and Orsinger.

MR. MUNZINGER: The case of Munzinger versus Orsinger is a case that was filed in San Antonio for defamation. It has a plaintiff's original petition,

answer, discovery, orders, et cetera. That case file in the possession of the district clerk of the district courts of San Antonio, Texas, is not subject to Rule 12, true or false?

HONORABLE STEPHEN YELENOSKY: True. True.

MS. BENNETT: True.

MR. MUNZINGER: A document in Judge Christopher's office, she's the -- Judge Peeples' office in San Antonio relating to his administration of his court is a judicial record as defined by Rule 12 and is the subject of Rule 12.

MS. BENNETT: True. It may be exempt under Rule 12.5 for some reason, but it is under Rule 12.

MR. MUNZINGER: I understand. My point in asking these questions is that so much of our discussion, as Richard Orsinger has pointed out, is being devoted to case files, and they are not covered by Rule 12. We're getting into an argument -- we're mixing apples and oranges. Rule 12 defines in Rule 12.2(d), a record -- it defines "judicial record" and it says "not pertaining to adjudicative function." So we've got that part of it straightened out, do you agree?

MS. BENNETT: Yes.

MR. MUNZINGER: So if Judge Peeples has a file that pertains to the number of cases he tried last

year, the number of judgments entered for plaintiff, whatever it is, the file that he has, it's a record of judicial administration so to speak. That is covered by Rule 12. Do you agree?

MS. BENNETT: Yes.

MR. MUNZINGER: Okay. So all this discussion about whether I can go in and look at the case of Buddy versus Carl has nothing to do with Rule 12.

MR. ORSINGER: Right.

MS. BENNETT: True.

HONORABLE STEPHEN YELENOSKY: But she wants something that clearly says that.

MS. BENNETT: I want something that says just because it's not covered by Rule 12 -- I want a statement from the Supreme Court saying just because it's not covered by Rule 12 doesn't mean it's not covered by other law.

PROFESSOR DORSANEO: Like the Constitution.

HONORABLE NATHAN HECHT: So I think --

MS. BENNETT: Or Rule 76a or Rules of Evidence or anything else that's already in the language.

MR. GILSTRAP: Or the common law.

CHAIRMAN BABCOCK: Justice Hecht.

HONORABLE NATHAN HECHT: And I think we have the committee's various points on this, and I'm sorry to

have interrupted the --

CHAIRMAN BABCOCK: The court reporter will read the statement of Justice Hecht, "This will not be complicated."

HONORABLE NATHAN HECHT: Yeah. But I take that -- I mean, I think we have those points in mind. Maybe we could go through the rest of it.

MS. BENNETT: Okay. I don't know --

HONORABLE NATHAN HECHT: Which are good points.

MS. BENNETT: -- if Justice Hecht wants me to go through every -- most of it is clean up or clarification. The other meat on the bones of the proposals are really to enable a mailbox rule similar to Rules 5, and is it 21a? Yes.

CHAIRMAN BABCOCK: Margaret, where are you? What rule?

MS. BENNETT: I just covered the whole rest of them.

CHAIRMAN BABCOCK: Oh, you did.

MR. ORSINGER: 12.8 is included in what she just said.

MS. BENNETT: Yes. Okay. I don't know how you want me to proceed. You want me just to go item by item? Because I can do that, too.

CHAIRMAN BABCOCK: How long do you have?

MS. BENNETT: Rule 12.4, the current language says, "Judicial records other than those covered by Rules 12.3 and 12.5," but that's kind of a misuse of the language because 12.3 has the exclusions and 12.5 has the exemptions, so we're just clarifying that we're not talking about things that are covered by those provisions. We're talking about things that are excluded by or exempted by those provisions.

MR. ORSINGER: It's no wonder the JPs are confused. This is incredibly confusing.

CHAIRMAN BABCOCK: Before you go on, Margaret, Jeff Boyd had a comment.

MR. BOYD: Because that proposed amendment raises the issue that I think may answer the first issue, and that is does 12.3 describe anything that constitutes a judicial record as defined in 12.2(d)? 12.3(a) talks about records that are -- access to which is controlled by a court rule -- let me pull up the full part of it here, (b), or court rule or PIA, Public Information Act, and then 12.3(b) describes information governed by the Public Information Act; (c), information related to an arrest or a search warrant or supporting affidavit; (d), in general, anyone other than a judge, elected official. So do any of those categories include anything that would qualify as a

judicial record as that term is defined in 12.2?

HONORABLE NATHAN HECHT: Well, they're not supposed to.

MR. BOYD: That's right. I don't think they do and here's --

HONORABLE NATHAN HECHT: The reason that you have 2, 3, and 5 is 2 tries to say, "Here's what it covers," but just in case you're confused, it doesn't cover 3 and 5 is exempt.

MR. BOYD: So the proposed amendment in 12.4(a) to say that judicial records other than those excluded by 12.3 really isn't appropriate because 12.3 doesn't exclude any judicial records for the scope of the rule. It just points out that the things listed in 12.3 are not judicial records, which gets back to if you're going to amend 12.3 maybe what you need to say is under the title "Applicability," "Nothing in this rule applies to any records other than judicial records as defined above, nor should this rule be construed as prohibiting access to anything other than judicial records as defined above." Because 12.3 doesn't exclude judicial records from the scope of the rule.

HONORABLE NATHAN HECHT: Gotcha.

CHAIRMAN BABCOCK: Okay. Thanks. Any other comments on 12.3?

HONORABLE STEPHEN YELENOSKY: Well, just overall it seems to me we've gotten into a situation where the big issue -- and the tail's wagging the dog here. Judicial records are not what people are usually looking for. They were looking for court files, and we're suggesting that the way that people know they have access to court files is by looking in the rules that have to do with this smaller thing, which are judicial records, and surprising to me, we don't already have something clearly addressing the big thing other than 76 as it reads now, and so that's why it's awkward. You're going to the -- you're going to the tail to find out what the dog is, and that's the comment, and that sends you to case law, not to a clear statement.

CHAIRMAN BABCOCK: Okay. Anything else on 12.4?

MS. BENNETT: 12.4(b), the way the rule reads now it gives something and takes something away in the same sentence. We just wanted to remove the words "exempt under this rule or," so that it was clear that a records custodian could still provide a judicial record that was exempt under the rule if he wants to, unless that document is confidential under other law.

In other words, if somebody asks for a judge's e-mail, a certain e-mail that he wrote to

somebody, if that's exempt he doesn't have to give it to them, but if he wants to give it to them he can, because the rest of the rule prohibits him from -- the way the rule is written now, it would prohibit a judge from disclosing information that is exempt, and the exemptions are to protect the judge, and if he wants to give them the document he should be able to do this.

MR. ORSINGER: But this says the records custodian can waive the exemption that the judge enjoys, doesn't it?

MS. BENNETT: The judge is the records custodian.

MR. ORSINGER: So that's why we call them the records custodian instead of judge. Is there a definition that says that?

MS. PETERSON: There's a records custodian definition in 12.2(e).

CHAIRMAN BABCOCK: What about the comment, Margaret? You want to talk about that?

MS. BENNETT: Yes. The comment just says on 12.4(b), would say -- because the prior version of Rule 12.4(b) could be interrupted to simultaneously grant and prohibit voluntary disclosure of records exempt from disclosure under Rule 12.5, the phrase "or exempt under this rule is removed to clarify that the rule permits

voluntary disclosure under any of the exemptions of Rule 12.5 except the one related to confidential records."

CHAIRMAN BABCOCK: Okay. All right. Any comments on this 12.4(b) or the comment thereto?

PROFESSOR DORSANEO: I've got a question.

CHAIRMAN BABCOCK: Yeah, Bill.

PROFESSOR DORSANEO: What is this last sentence trying to accomplish? "Information voluntarily disclosed must be made available to any person who requests it."

MR. ORSINGER: If you give it to one, you must give to it all.

PROFESSOR DORSANEO: Well, that's a very odd way to say it.

MS. BENNETT: I didn't draft it.

PROFESSOR DORSANEO: I don't think -- I know you didn't, but I don't think that the sentence is necessary.

MR. WATSON: Justice Hecht drafted it.

PROFESSOR DORSANEO: Well, whoever did it, it wasn't the best day.

HONORABLE NATHAN HECHT: I think I wrote that, actually.

MS. BENNETT: I don't think you did, Judge Hecht. I know who wrote it, and she's not here.

MR. ORSINGER: She, huh. That narrows it down.

(Multiple simultaneous speakers.)

THE REPORTER: I'm sorry, I didn't hear any of that.

CHAIRMAN BABCOCK: Hang on. One at a time. Jeff, what were you going to say?

MR. BOYD: There's a similar provision in the Public Information Act that says if you make information available to one member of the public you have to make it available to all members of the public, so you make a good point. If you underline the word "any" here, that might come closer to saying what it means, "information voluntarily disclosed must be available to any person who requests it," but, yeah, it is a confusing way to say it.

MS. BENNETT: If you give it to the *Dallas Morning News* you've got to give it to the *Houston Chronicle*.

PROFESSOR DORSANEO: I'd say "all persons" rather than "any person."

MS. BENNETT: The next one is an exemption for -- usually it will be a judge's personal e-mail address. That's pretty self-explanatory.

CHAIRMAN BABCOCK: Any comments on that?

MR. DUGGINS: What about a cell number? Would that be included?

MS. BENNETT: If it's a personal telephone number, that's already excluded.

CHAIRMAN BABCOCK: Probably broad enough to cover that. All right. Any other comments on that?

Okay, next.

MS. BENNETT: 12.8 and 12.9, the changes to these rules are primarily to enable a mailbox rule, and we based it on Rules 5 and 21a, but we tweaked it a little to try where possible to put the burden of certifying service on the records custodian, who we feel will usually be more sophisticated than the records requester, who will usually be a layman without much sophistication.

So Rule 12.8(c)(4), the -- if the records custodian is going to be denying access then they already have to do (1) through (3), and now they're going to have to put a statement of the date and means that they gave notice of denial to the requester, because there are time deadlines in Rule 12, and we at OCA have no means at this point of determining whether people are complying with the time deadlines because there's no certificates of service or anything like that.

MR. ORSINGER: Can I make a suggestion?

MS. BENNETT: Yes.

MR. ORSINGER: Where it says "or by e-mail to the e-mail address provided by a requester who agrees to e-mail notification," consider the possibility of just cutting through all that protocol and just saying "to the e-mail address" -- "to the e-mail address." I don't know what I'm trying to say, where the request is made by e-mail, the notice can be given by responsive e-mail rather than having to have an agreement can we send it to you.

I'm reading this as saying you have to have an agreement with the person making an inquiry that you can respond by e-mail, and it seems to me that it would be sensible if you get the request by e-mail you should send the response by e-mail without requesting permission to send the response.

CHAIRMAN BABCOCK: Well, there might be a reason, Richard. I mean, if I've told them I can get service by e-mail then I'm looking for it, whereas if I'm not looking for it, it could get lost in all the stuff that you get in e-mail.

MR. ORSINGER: What do you do when somebody sends you an e-mail and it doesn't give you a mailing address? You have to e-mail them back and ask them for a mailing address or ask them for permission to respond by e-mail, even though you've just responded by e-mail?

MS. BENNETT: That's what we have to do.

MR. ORSINGER: I'm saying that what you should automatically assume, if they contact you by e-mail they consent to receiving notice by e-mail, and if they don't get the e-mail, they'll send you another e-mail, and that means something happened the first time, but this idea that you've got to get the person's permission to respond by e-mail I'm saying is unnecessary and confusing.

CHAIRMAN BABCOCK: Okay. Justice Gray.

HONORABLE TOM GRAY: I was actually going to make the same comment that Richard made, and it takes me back over to the definition of the request, and it has to be in writing, and we at our court have made the practice of if it comes in a request in an e-mail, we will respond to it or attempt to respond to it, but what Richard just identified is a problem that we have run into where we get the request by e-mail, there is no physical address at which you could send any of this information and respond.

And, of course, I'm concerned about the deadline by which I have to respond, and I may not have a physical address to send it to, and so I like Richard's fix for that of if the request is by e-mail, admittedly I'm not sure that qualifies as a request in writing, but we have treated it as that. If the request can be received by e-mail and if I am bound to respond to an

e-mail request then I would like the ability to be able to respond to that e-mail address, because that may be all I have.

MS. BENNETT: We wanted to be certain that the records custodian has the choice. You know what I mean, that if you want to respond by e-mail you can, but we didn't want to have to have you go PDF a bunch of hard copy documents if it's easier for you to copy them. In other words, we want you to have -- to be able to choose what method is easiest for you.

CHAIRMAN BABCOCK: Bill Dorsaneo.

PROFESSOR DORSANEO: And these are just little itty bitty things, but we might as well do them. In that (d), method of providing notice, I would say change the "shall" in the last -- follow the A, B, C convention, change "shall" in the first line to "must" and then down here later when we use another "shall," say instead of "shall be," you know, "providing notice by mail is complete on deposit of the notice." I think maybe copying Rules of Procedure language that we should have changed long ago to A, B, C convention is we don't use "shall" ever. We use "must," "may," or "will" or "is."

HONORABLE NATHAN HECHT: Gotcha.

MR. BOYD: Chip?

CHAIRMAN BABCOCK: Yeah, Jeff.

MR. BOYD: One other small one is you're adding this subparagraph (4) to subparagraph (c) that says "The certificate should certify the date and means of providing notice." That's the same as "method" and then you use the word "method of providing notice" in subparagraph (d). Maybe you ought to change "means" to the word "method."

MS. BENNETT: Okay.

PROFESSOR DORSANEO: There's another "shall" in the last sentence, too.

MS. PETERSON: Yeah, I think that was picked up from the rule of civil procedure.

CHAIRMAN BABCOCK: Okay. Great. What else? All right, next.

MS. BENNETT: We've had this happen many times where the judicial -- the records custodian simply never responds, so how do you calculate, you know, when the right to appeal begins, so this is just saying if a person requests a judicial record, doesn't receive a response within 30 days, then the request is deemed to have been denied.

HONORABLE TOM GRAY: Margaret, does that conflict with the 12.8(b), time to deny, in that if I do not respond by the 14th day it is presumed that access is granted, is the way I interpreted?

MS. BENNETT: I was trying to allow for -- two weeks for true snail mail or, you know, Pony Express, or whatever. The custodian has 14 days.

HONORABLE TOM GRAY: Well, my concern is that -- this is the way I had interpreted the rule. If I didn't provide a response by the 14th day then the requesting party is entitled to view the document. I've waived my right to assert any exemption under Rule 12. Therefore, if it is deemed denied, on the 30th day if I don't answer at all, have I suddenly gained the ability after the 30th day to assert an exemption? Or is that just a triggering date for the appellate process? Have I --

MS. BENNETT: It was meant strictly as a trigger date --

HONORABLE TOM GRAY: Okay.

MS. BENNETT: -- that if you haven't got an answer in 30 days then you can take it to the presiding judges.

CHAIRMAN BABCOCK: Justice Bland.

HONORABLE JANE BLAND: Would it be possible to think about changing the trigger date to be the trigger date of the custodian of records sending a response instead of the person who requesting it receiving a response because --

MS. BENNETT: But he never sends a response. That's the problem. This is the judge who ignores the request and never responds at all.

HONORABLE JANE BLAND: Right. So say something like if the judge ignores -- I mean, if the judge doesn't send a response by within 14 days or 30 days, but the problem is that the judge could easily send the response, send it to the place that the requester indicated was the place to send it, and then the requester will say, "Well, I never got it." I mean, you know, 99 percent of the time everybody is acting in good faith, but sometimes with these requests --

MS. BENNETT: If a judge were to tell us, "I did send that," I mean, there's -- I don't think there's any way the presiding judges wouldn't believe it.

HONORABLE JANE BLAND: But this rule doesn't have anything to do with whether or not the judge or the person that's responding to the request sent it. It's all based on whether or not the person who doesn't -- the person to receive it says "I did not receive it."

MS. BENNETT: And I guess the reason for that is that that's the person who files the appeal, who is -- who wants to file the appeal, and they don't know -- if they never get a request they don't know whether they can file their appeal or not, because there's nothing

saying that it's deemed denied.

HONORABLE JANE BLAND: I'm thinking about this in the context of deed restriction cases, our constructive denials are pretty harsh because, you know, something gets sent, but it doesn't get -- but somebody else says, "I didn't receive it" and they look at this and say, "Oh, I didn't receive it, I go up the chain," and to me it would be -- sometimes it's unclear where the stuff is supposed to be sent, as you pointed out, the difference between an e-mail address and a physical address, and the clerk of the court responds by e-mail and then the person says, "Well, I never received a response." You know, "My e-mail server was down. You did not send me the records by snail mail like you should have." I don't know, it just seems like this is leaving a lot of ambiguity.

HONORABLE NATHAN HECHT: Okay.

CHAIRMAN BABCOCK: Justice Gray.

HONORABLE TOM GRAY: Another issue in the date on calculation of that, Margaret, is going to be under the time to deny and the ability to get an extension, because our 30 days constructive denial runs from the date of the request. Then the -- it could expire if the requesting party had granted an extension, if I read this correctly. Because even if the -- if we don't automatically extend the constructive denial date when the

requesting party has agreed to an extension of the date for a response, because we're still pegging our 30 days from the date it's requested.

MS. BENNETT: Okay.

HONORABLE TOM GRAY: But I definitely understand the need to trigger the time by which to file or consider it denied because their time for filing the appeal is calculated from that date.

CHAIRMAN BABCOCK: Justice Bland.

HONORABLE JANE BLAND: Couldn't you do something like if the responding party has not responded on the date that the request was due, it's deemed denied?

HONORABLE NATHAN HECHT: Yeah, we can fix it. Got it.

HONORABLE JANE BLAND: Or has not sent the response.

MS. BENNETT: Except you've got mailbox rules at both ends, and so that's why I was trying to calculate it from the day they actually sent their request because there's a certain number of days for the judge to receive it and then once he receives it to send an answer in a certain number of days, to receive it on that end, too, so --

MS. PETERSON: I think, if I'm not mistaken, you're getting to the time for filing your petition and

how currently in the rule it says, "The petition must be filed not later than 30 days after the date that the petitioner receives notice of a denial of access to the judicial records," so I think that's why this was triggered on the date of receipt instead of the date of sending. I don't know if that fully answers your question, but perhaps it helps to explain the logic behind the drafting.

MS. BENNETT: Uh-huh.

CHAIRMAN BABCOCK: Okay. Any other comments on this? All right. Want to move on to 12.9?

MS. BENNETT: The petition for review, this is talking about the appeal and what it must contain. It has to include a copy of the request and the notice of denial, if provided. It must include a certificate of the date and means of sending the petition of review -- for review to OCA, and then the other change is the method of filing. Again, we wanted to specify the acceptable methods of filing the appeal, and we wanted to include e-mail if the administrative director of OCA has established and published an e-mail address, a specific e-mail address for Rule 12 matters.

We don't want it to be to Carl's individual business e-mail address. We wanted it to go to a Rule 12 address, so various people at OCA can double-check each

other, and then the time for filing, again, we're trying to enable a mailbox rule, 30 days after the date that the records custodian provides notice of the denial of access or 30 days after the request is deemed denied under Rule 12.8(e).

CHAIRMAN BABCOCK: Justice -- did somebody have their hand up? No.

MS. BENNETT: That concludes my brief presentation.

HONORABLE STEPHEN YELENOSKY: I hope somebody prepared you for this committee.

CHAIRMAN BABCOCK: Justice Gray.

HONORABLE TOM GRAY: Just as a matter of personal privilege, if I might, for those of you-all who don't know or haven't worked with Margaret before, being on the Council of Chiefs I worked with her since actually before 2003 when I became chief. She has been an enormous resource to that group. She has served the state very well in her capacity, and regrettably for us, she is retiring at the end of this year, and I wanted to go on the record of really thanking you for your service to the State and to the OCA, and OCA has been a godsend to the judiciary of keeping us technologically on sort of the cutting edge, and Margaret has been there to guide us as we go along, so thank you very much, Margaret.

(Applause)

CHAIRMAN BABCOCK: Thank you, Margaret, you're probably ready to go have a cocktail after this gauntlet of fire. Dee Dee, can you hang on for another five minutes?

THE REPORTER: Sure.

CHAIRMAN BABCOCK: I want to skip over to Item 7 just really briefly because Bill I know has got to go, and Ralph Duggins is going to make a very short report, because, as I understand, the proposed amendments to Rules 296 through 329b has not gone -- despite it being on the docket for some period of time has not gone through the subcommittee review that it needs to, and so, Ralph, why don't you tell us briefly so Dee Dee doesn't -- her hand doesn't fall off.

MR. DUGGINS: In the back of the room, that second brown banker's box there are these spiral bound copies of an effort to list the current rules and then some proposed new rules. The spiral bound version is only slightly different from what Angie published, but it does have a few changes that were good ones suggested by Elaine, who had -- who took -- who found the time to look at at least the early -- excuse me, the first 15 or so of these, but as Chip said, unfortunately, neither subcommittee, one of which Elaine heads with the cover

Rules 296 to 299, or the subcommittee that Sarah chairs for Rules 300 through 330, has had a chance to look through these; and there are significant changes proposed.

Nina has done a great job of working on 301 through 305; but I'm sure you're all going to have questions and suggestions about what's here; and I think Bill suggested, and I agree with it, that it would probably be a better use of our time to let either these two subcommittees or a special committee that Chip would name to come from these two groups spend at least a day trying to refine a product before we just throw it up for a free for all here. I'm happy to do whatever you want, and I throw it to Nina to throw her two cents in.

CHAIRMAN BABCOCK: Nina, do you have any comments?

MS. CORTELL: Well, a couple of things. Let me explain that a lot of these come from the suggested recodification that Bill had worked on, what, about 10 years ago I guess?

CHAIRMAN BABCOCK: 20.

PROFESSOR DORSANEO: Yes, the advisory committee recommended adoption of many of these changes in July of 1996.

MS. CORTELL: Right. And a number -- it definitely would have to be worked through, but we thought

that conceptually there are a lot of ideas here we certainly should revisit. If we had the time and energy, I do think there are three or four things that it would be useful to vet with the group to see if you have the stomach to actually go into some of this area, because to spend a lot of time at the subcommittee level if the committee as a whole isn't interested in going in that direction may not make a lot of sense. In other words, we may be digging up a lot of issues that people really don't want to vet, so I don't know if we have time this afternoon, but if we did, I think that -- I mean, nothing's quick with our great committee, but there would be a few things I think that we could vet.

CHAIRMAN BABCOCK: Okay. We're not going to do it before a break, and that means Bill will not be able to be with us, am I right?

PROFESSOR DORSANEO: Yeah, but it's not necessary that I be here.

CHAIRMAN BABCOCK: Okay. And in fairness to the jury procedure issues, which do have to take precedence over this, I think what we'll do if it's all right with everybody is we will take a break right now, come back from that break, and go back into the jury procedure issues, and we're getting to the end of that, and if we have time today to go over those few things

we'll do that. If not, we'll take that up tomorrow. Okay.

MS. CORTELL: That's fine.

CHAIRMAN BABCOCK: So let's be in recess. Thanks for going for 2 hours and 20 minutes, Dee Dee. That was nice of you.

(Recess from 3:18 p.m. to 3:38 p.m.)

CHAIRMAN BABCOCK: All right. Judge Christopher, if we could go back to where we left off on the jury procedure issues, that would be terrific.

HONORABLE TRACY CHRISTOPHER: Okay, we're at page 10 of the report on jury innovations, and it's the last discussion, juror discussions about evidence before deliberations. Senate Bill 1300 called for it. The PJC Oversight did not recommend it. We've briefly discussed this issue before and did not recommend this, did not recommend changing the current rule. State Bar committee, no discussions. Texas-ABOTA does not support it. I didn't survey the trial judges on this point because I didn't realize it was back in the letter request.

The ABA actually recommends it. The National Center for State Court recommend -- reports that the innovation has been extensively studied since Arizona started the practice in 1995, and I've got the book here if you want to look at any of the studies. They claim

that the studies indicate that it does not cause any prejudgment of the case, but they also showed that the innovation is best for longer, complex cases. There seemed to be no advantage in shorter trials.

Of the states that I surveyed, only Indiana allowed early discussions. The rest followed Texas' procedure, no discussions until deliberation time. So, as best I can tell, although I haven't surveyed everywhere, it looks like Arizona and Indiana are sort of pushing the envelope, with the ABA also supporting this.

We already talked about *Golden Eagle Archery vs. Jackson* and the problems that might occur if we did allow interim discussions. We would have to definitely clear that up if we wanted to change the rule. I wasn't sure whether we wanted to discuss it anymore. We have had some small discussion of it before. No one seemed interested in changing the rule, but it is one of the four things that Senator Wentworth's bill encompassed.

CHAIRMAN BABCOCK: Skip Watson has now become a huge proponent of this, so I'll let him talk about it.

MR. WATSON: Excuse me?

CHAIRMAN BABCOCK: I've found that when you call on somebody they always get into the game quickly.

MR. GILSTRAP: Always come up with an

argument.

CHAIRMAN BABCOCK: Yeah, that's right. Yeah, Richard Orsinger. I knew I could count on somebody.

MR. ORSINGER: This one I'm actually upset about. Let me ask Judge Christopher, in these other states do they allow the jurors to sit around the room and talk together, or they allow them to talk off at launch with three or four?

HONORABLE TRACY CHRISTOPHER: No, it's supposed to be -- the two of them say all 12 jurors have to be together. It doesn't say whether they could do it at lunch, but just all 12 of you have to be together before you can discuss it and you have to keep an open mind.

MR. ORSINGER: Well, several things about this I don't like very much. I don't like the fact that these deliberations will occur before the charge has been read to the jury, and to the extent that we think the charge is important, and we do delude ourselves into thinking the charge is important, having them deliberate before they get the charge in my view kind of eviscerates the idea that you should deliberate after you get the charge. What's the point in having a charge if they're going to arrive at their decisions before they know what it is?

Also, studies of the way that people make decisions indicate that if you make up your mind too early in the fact-gathering process it can actually influence what data you receive and the way you analyze it; and people who are professional evaluators, like mental health professionals and physicians who have to diagnose, have to constantly fight against the inclination to arrive at a conclusion too early because social science studies and medical science studies establish that if they make up their mind too early they will miss important information.

And they design tests about this where they have a group of diagnosticians, they'll feed them standardized information in a certain sequence, and they'll put some data up in one group, and they'll put that same data later on in another group, and they look and see how the placement of the data influence the decision, and there are whole books on this, and I think it's widely accepted that if you make a decision too early in the process it will cause you to ignore information that's inconsistent with your preliminary opinion and to overweight information that's consistent with it.

Now, let's take the individual juror. If the individual juror has only their own opinions, then, of course, they will be dealing with the degree to which those opinions influence what they hear, but if they talk

to people and those opinions are reconfirmed too early in the data gathering process then it can cause them to be more close-minded about listening to the subsequent evidence. Or if someone is an outlier, someone who might be in the group of three against the group of nine in the first vote when they deliberate, they might be discouraged from continuing to envision that outcome as they're listening, and it might cause them to close their mind to a possibility that would naturally be open to if they hadn't heard six or seven or eight or nine people disagree with them, and if they're not a strong individual, then they may be intimidated into joining the mainstream before all the evidence is heard.

I can't -- I'm so imbued with these studies because of my Daubert work with mental health professional experts and stuff that I just can't escape -- I can't think of a single possible good thing about asking juries to try to make up their mind before they hear all the evidence, and I can think of lots reasons why this violates public policy, so I like the way we do it now. We make everybody listen to everything before they start influencing each other on what their opinions ought to be.

CHAIRMAN BABCOCK: Yeah, and just to supplement what Richard said, there are also studies that say not only are jurors who make up their minds early

likely to ignore certain evidence, they will view evidence through a prism of their own decision-making. In other words, if they decided to rule for the plaintiff, everything that they see they'll look at it in a light most favorable to the plaintiff. Even though they're not ignoring, they're just reinterpreting, looking through rose-colored glasses, so that's a supplement to what you just said. Yeah, Justice Jennings.

HONORABLE TERRY JENNINGS: I'm just wondering, does that same logic apply to note-taking, because if somebody has a bias in the case, they're hearing what they want to hear and they're reinforcing that through their note-taking and possibly influencing other jurors as well.

CHAIRMAN BABCOCK: Objection, asked and answered.

MR. ORSINGER: Each individual is going to have their own preconceptions as well as their own early decisions, and there's nothing we can do to change that because people are people, but what we can do is we can keep juror No. 4, who is a strong-willed and articulate juror, from influencing jurors No. 5 and 7 to kind of close their mind to what they would otherwise be open to, or if you find out that there's nine people that are against you and three that are on your side, maybe you

give up too early before you've had a chance to hear everything.

So to me it's not -- you can't keep a person from making up their own mind too early, but the dynamic of allowing a jury to start deliberating before they hear all the evidence is calculated to make some jurors cause other jurors to close their minds to possibilities.

CHAIRMAN BABCOCK: Justice Patterson.

HONORABLE JAN PATTERSON: I think an interesting thing also happens in a jury, having served on a couple of juries, jurors tend to remind one another that we cannot deliberate during this process, and they act as a check on that early decision-making or acceleration, and that reinforces the concept of hearing all the evidence and deciding at the appropriate time.

So I'm sure it does happen, perhaps, as this suggests, that perhaps jurors do talk, but my experience has uniformly been that there's always someone -- and it wasn't always me -- who would chastise or remind people that they couldn't discuss the evidence. And so I think it performs a -- an important role of the information given from the judge, that is you may not deliberate until the end, and it formalizes that within the jury. So it gives them important information to act on, and it's really one of the most formative aspects of juries, I

think, that they remind one another what the proper thing to do is and when it happens, and they're very strong about it.

CHAIRMAN BABCOCK: Okay. Yeah, Skip.

MR. WATSON: I agree with everything that's just been said, but I want to focus on the first thing that Richard said, because I just think it's terribly important, and I think it's not being addressed in anything that I'm reading or hearing today. That is that the role of the judge as the law-giver through the charge is just simply being ignored by this type of request or suggestion. If the juries are going to be talking and deciding what weight to give evidence or what has been proven or what has been disproven without the court having narrowed their consideration down to the factors or the elements that they are actually to decide under the law that controls the case then the jury just climbed onto the bench and put on the robe. They have become law-giver and fact-finder.

They've got to be constrained by instructions from the court that "This is what you're deciding, nothing else, and when you're deciding this these terms that you're deciding are defined as follows, and you are to consider these factors and none other when you are deciding those things." And it disturbs me

greatly that something like this would be brought forward without realizing -- and I know it's the Legislature doing it, but still it bothers me, without realizing what really is happening here, and that is that the jury is being told to start making your decisions without reference to guiding principles of law.

In short, they will get a broad form charge in the end, but they will have formed their decisions based on something other than what that charge says. I think the charge probably won't be specific enough in its instructions, but still, they will have already formed their decisions based on what they think the law should be, what they think the guiding factors should be.

If this were to be done, the only way that the system could continue to function in this dual mode of court as law-giver, jury as fact-finder, under the law would be for the court to charge the jury at the get-go and say, "This is what you are going to be deciding. Filter your view of the evidence through what I'm telling you right now, and you are to listen to me, not to the lawyers in what this means." And this view that I'm trying to articulate is what colors my view of everything from interim summation and everything else, that all of that needs to occur after the court has asserted absolute control over the parameters of the decision-making

process. Otherwise, I -- we can call it broad form, but we have gone to a general charge. Decide who you want to win and check that box, and I don't think I'm overstating that. The judge just stepped out of the courtroom. I'm sorry, but I feel very strongly about that.

MR. LOW: Chip?

CHAIRMAN BABCOCK: See, I knew you did.

MR. LOW: Let me ask a question. The states that did that, didn't they -- that's what I'm assuming, they would instruct the jury, "Now, we're going to allow you to do this, but these are instructions you're going to be going by as you deliberate." Did they instruct them before or do you know?

HONORABLE TRACY CHRISTOPHER: I don't know. There are some states that give the jury essentially the charge at the beginning of the case.

MR. LOW: Yeah. That's what I --

HONORABLE TRACY CHRISTOPHER: But I'm not sure if Arizona is one of them or not.

MR. LOW: I would assume no court would allow them to deliberate without proper instructions. I'm not for it, but I might not be as strongly against it as Richard.

CHAIRMAN BABCOCK: Carl.

MR. HAMILTON: The House bill really doesn't

say "deliberate." It just says "discuss the evidence," and I don't know whether they're making a distinction there between just discussing the evidence and deliberating. They're really not deliberating at that point if they're just talking about the evidence.

CHAIRMAN BABCOCK: Yeah. Okay. Yeah, Jim. Elaine. Whoever.

MR. PERDUE: Well, I -- the bill that came out in '07, as I understood it, at least the study, the concept was making the experience better, and you can argue maybe on note-taking or questioning. It seems to me that all of those are designed at least in theory to improve comprehension.

CHAIRMAN BABCOCK: Right.

MR. PERDUE: To improve understanding and comprehension, and I think the interim argument arguably goes for that. I don't see how this serves that policy concept of comprehension or retention in allowing them to bring in the concept of group dynamics and discussions of the evidence while the case is going on. Because they're making up their minds as they go, but once you bring in a 12-person dynamic in the way that you're assessing the evidence and the same social science would say once somebody verbalizes their thought of the evidence, then it's theirs, they own it. You'll never be able to change

it, and I think from a plaintiff's lawyer's perspective I'm supposed to love this because I'm always winning my case two days in. It's only when it starts going bad for me about a week in when the defense starts bringing their witnesses, but I still just out of principle, this makes no sense. I don't see this as bringing the goal of comprehension to bear, and it has a lot of problems in an overall concept of fairness.

CHAIRMAN BABCOCK: Elaine.

PROFESSOR CARLSON: I was just pointing.

CHAIRMAN BABCOCK: Oh, you were just pointing at him. Okay. Anybody want to speak in favor of this? Should we take a vote now? Would it be unanimous?

MR. ORSINGER: How about a devil's advocate?

CHAIRMAN BABCOCK: Well, yeah, you.

HONORABLE TRACY CHRISTOPHER: I can read you what the National Center thinks the advantages are, but I'm not sure I agree with them.

MR. LOW: What does the ABA think the advantages are?

HONORABLE TRACY CHRISTOPHER: They don't actually give advantages and disadvantages in their paper, and I didn't actually read the whole -- if there is a whole transcript I didn't read it. The National Center for State Court thinks that "juror discussions about

evidence can improve juror comprehension by permitting jurors to sift through and mentally organize the evidence into a coherent picture during trial, may improve juror recollection of evidence and testimony by emphasizing and clarifying important points during the trial, may increase juror satisfaction by permitting an outlet for jurors to express their impressions of the case, may promote greater cohesion among the jurors, reducing the amount of time needed for deliberations. Jurors find it difficult to adhere to the admonitions about not discussing the evidence. Permission to engage in such discussions bridges the gap between the court's admonitions and jurors' activities."

MR. ORSINGER: To me that's a list of reasons why you shouldn't have this rule. Every single thing she just said is a reason why you shouldn't have this rule.

CHAIRMAN BABCOCK: Buddy.

MR. LOW: If you file a -- I can understand how they recommend this because there are 12 of us and some testimony is going to escape, and if we could all get together, Tracy would say, "Well, he said this, but remember, he told you he was here."

"That's right, he wasn't. He couldn't have seen that. Okay." And so you evaluate the testimony. I

mean, theoretically I can see a plus, but as a practicality I'm against it. But you could point out something so that each one of you would see, but jurors are like anyone else. They're going to argue their belief to somebody else, so it won't operate.

CHAIRMAN BABCOCK: Is there anybody here that's in favor of this? There are 33 people here, so I assume we're all against it, the Chair not voting.

MR. ORSINGER: Some may not be here.

CHAIRMAN BABCOCK: Okay. That will give a fairly clear expression of our feelings about that. Judge Lawrence has asked if we could go to the Item 6 on the agenda, which is small claims court rule and the TRCP. Does anybody have an objection to that, specifically Professor Albright or Judge Christopher? Is that okay if we hop over the next item?

HONORABLE TRACY CHRISTOPHER: Well, I don't know how many people are not going to be here tomorrow, but we -- the oversight committee has brought forth, as requested, a definition of "bias" and "prejudice," which I expect will be very controversial, and to the extent we have more people talking about it today the better. So that's my only hope to jump in line or stay on the current same agenda.

CHAIRMAN BABCOCK: I hear what you're

saying. Why don't we -- Judge Lawrence, your thing is not going to take very long, why don't we try maybe a half an hour of bias, and see if we get through then and then we'll get to your topic if that's all right. Okay. So you've still got the floor, Judge.

HONORABLE TRACY CHRISTOPHER: Okay. My memo dated November 17th is in my capacity as chair of the oversight committee, and we continue -- we, the oversight committee, continue to believe that it would be a mistake to try and define "bias" and "prejudice" in Rule 226a. However, the advisory committee suggested that we go back and try to make a definition anyway. So we have done so, and we've had many, many, many hours of discussions about what we have come up with, understanding that there will be many more hours of discussion afterwards.

What I have basically set out is the Government Code where the Government Code says, "A person is disqualified if he has a bias or prejudice in favor of or against a party in the case." Then back in 1963, and perhaps earlier, but at least in that case, *Compton V. Henry*, the Court held that "Bias or prejudice is extended to the subject matter of the suit and not just the parties," and they defined "bias," as you can see on the memo. "Bias in its usual meaning is an inclination toward one side of an issue rather than to the other, but to

disqualify it must appear that the state of mind of the juror leads to the natural inference that he will not or did not act with impartiality."

Normally when the pattern jury charge tries to make instructions to the jury, they stick as closely as possible to the language of the Supreme Court opinions because they figure if we're quoting Supreme Court law we can't be wrong on the law. However, that definition of bias in our opinion is so convoluted as to be unuseful, not useful, to the jury panel in terms of what it means to be biased. First of all, we struggled with inclination, which is a leaning, but we have Supreme Court cases that say leaning is not enough.

Then we struggled with the idea of impartiality, a word that the jury panel almost always thinks has the opposite meaning, almost always. Finally, the definition requires that it appear to someone, either the judge or the public, that the juror will not act with impartiality, so we just really felt that the language of the Supreme Court opinions about bias was not workable. So we have come up with a definition that is taken from the experience of the lawyers and the judges as to how we normally talk to jurors in voir dire about whether or not they're biased or prejudiced.

So when -- we were pretty much all in

agreement with prejudice, which is the second half of our definition, "A juror is prejudiced if a juror has prejudged a party or the case and will not follow the law and will not decide the case based only on the evidence." Now, a few people said it's not correct to put in "and will not follow the law or will not decide the case based only on the evidence," but we think that that's a natural subset of prejudging a party or the case.

What we did with bias is we talked about the idea that a juror is biased if a juror's prior experience, thoughts, or beliefs are so strong that a juror cannot follow the law provided by the court or if a juror cannot decide the case based solely on the evidence seen and heard in court, and what usually happens in voir dire is a juror will bring something up in their background that raises a question to everyone that perhaps they can't be fair in the case, and so the lawyers will say, "Can you be fair in the case?" And they'll say, "Oh, I'll try to." And then you push them a little bit more, and usually in common vernacular we ask the juror, "Can you be fair? Can you follow the law? Can you decide the case based on the evidence and set aside your biases and prejudices?"

So we use the word "can" and "cannot" to indicate that, gee, the juror might want to do it because they want to be a fair person, but because they have these

strong feelings or inclinations or personal experiences, they just can't do it. They want to do it, but they can't. Prejudice, on the other hand, are people who just say, "Nope, not going to do it. I won't do it. I will not do it." So that's how we distinguish between the two. Bias is a little softer, you'd like to do it but you can't because of your own experiences, and prejudice is it doesn't matter, we've prejudged the case, we won't do it.

So, as I said, we have not followed the language of case law. We have used what we considered to be sort of the vernacular and what happens in the voir dire process, in giving this definition. One of the minority on our group felt that if we adopted a definition like this that we should have a comment to 226a to indicate to the lawyers and the judge that this definition is not an attempt to change the law on disqualification, but -- and so that's why we have this comment in there with respect to it. But the idea was to give a little bit of understanding to the jurors on what we meant by bias or what we meant by prejudice.

CHAIRMAN BABCOCK: Great. Let's pounce on it. Judge Peeples.

HONORABLE DAVID PEEPLES: Tracy, I want to explore this. I'm thinking maybe we make a mistake when we try to define words and then ask jurors if they fit the

definition. I find it makes much more sense to explain what fairness is, and let me illustrate by talking about a criminal case I tried. It was a sex abuse of a little girl case, and a woman wanted to approach the bench, and she said, "I just don't know if I can be fair. I'm against sexual abuse of children," and I said, "So am I, but I don't know if he did this. Can you decide whether he did this based upon the evidence in this court?"

"Oh, sure, I can do that." She didn't understand what fairness meant, and I think people are not -- we're having enough trouble with it. I don't think people are going to understand bias and prejudice, jurors; and so I think the route we might want to take is to have some model explanations that judges can give that try to let people know what's a fair juror and what, you know, a juror that's out of bounds would be; and basically what I do is I say, "You've got to be able to follow the law that I tell you and you've got to be able to decide this case based upon the evidence in this courtroom, and in doing that, you get to decide who you believe and who you don't believe and you get to decide what's important to you and what's not important, the credibility and weight, and basically if you can do that, decide this case based upon the evidence in the court that you think is credible and important, you're a fair juror."

And that does a lot of good, but I think the other way, which is to define these terms and basically do it in a definitional way, I think is not going to get the job done.

CHAIRMAN BABCOCK: I saw Judge Yelenosky first, so --

HONORABLE STEPHEN YELENOSKY: I actually think somebody was before me down here.

CHAIRMAN BABCOCK: Frank down here before you? Okay, Frank. Judge Yelenosky yields to you.

MR. GILSTRAP: Thank you. Judge Peeples, you know, came to the same place as the definition. If you can decide it based on the evidence, you're not biased or you're not prejudiced, but that's not right. I mean, you know, certainly the jurors can include common sense and, you know, everybody knows that left-handed people are not trustworthy, that's why they're left-handed, and so, you know, and I heard the evidence and I don't believe the left-handed person. You know, I decided based on the evidence.

I mean, this definition, I mean, certainly you need to carve that out as somehow if you tell them you decide it based on the evidence you've solved your problem. You haven't. I don't think you can define these words other than telling people that prejudice means

prejudge, because some of them may not know that. I think that's about as far as you can go.

CHAIRMAN BABCOCK: Okay. Back to Judge Yelenosky, then Justice Bland.

HONORABLE STEPHEN YELENOSKY: Well, I think that what goes on in voir dire is that the lawyers and the judge try to figure out if the person should be disqualified based on our understanding of the law. To do that the juror does not have to understand the law. We do not have to define this for the jurors. It isn't necessary to ask a juror, "Do you have a prejudice" in order to determine if they have a prejudice. In fact, that's probably not a very good way of going about it.

So why try to define it for them as opposed to the judge and the lawyers hopefully understanding what it means, and like Judge Peeples said, disabusing someone of a misunderstanding of what might disqualify them when they think that it would, however the lawyers or the judge want to phrase it, because the point is defined out if they actually have a bias or prejudice; and that is determined independently of a definition of the term, it seems to me, unless you're saying the only way you can find out is to ask someone if they have it. I think you can say generally we're inquiring into bias or prejudice which are this kind of thing, but I wouldn't try to

define it in writing.

CHAIRMAN BABCOCK: Justice Bland.

HONORABLE JANE BLAND: I like the definition that the oversight committee is proposing because I think it's a good introduction to the jury about these comments, and I think our directive was to them to come up with some sort of definition, and the Supreme Court's definition is obscure and incomprehensible, so I don't think it would be helpful at all and --

HONORABLE TRACY CHRISTOPHER: But it's been repeated.

HONORABLE NATHAN HECHT: By the best judge on the --

HONORABLE TRACY CHRISTOPHER: That was the point.

HONORABLE JANE BLAND: It's obscure and incomprehensible, I admit it. I would have written it differently had I known that it was ever going to be discussed again. So, you know, and Judge Yelenosky was saying, well, the lawyers get this concept, but Judge Peeples is saying, well, we need to have more information, you know, some model examples; and to me this strikes a good compromise because it gives the jury an introduction to these concepts and then allows the lawyers to explain further during voir dire what they mean and to develop the

kinds of examples that Judge Peeples was talking about with his criminal case with the jurors and kind of deciding who to pick and who not to pick and who to challenge and those kind of things. It leaves most of the work to the lawyers, but it gives an idea, a sign post of where we're going with this.

CHAIRMAN BABCOCK: Skip.

MR. WATSON: I think it's a great effort. I don't think it goes far enough in one respect. The repeated phrase, the second phrase in both instances, both definitions, of "will not decide the case based only on the evidence," I think I know where that's going, but obviously the jury's not -- or shouldn't get the case unless there's disputed evidence, and my concern is not whether they go outside of the evidence. My concern is whether their bias or prejudice causes them to weigh the evidence or judge credibility in a nonneutral fashion.

In other words, as I've heard it explained by several good judges at the bench when somebody approaches on this question of saying "I think I'm" -- you know, "may be biased," it's, you know, basically two questions are asked, one that goes to weight and one that goes to credibility; and I would like to see something like this in a definition if we use it. First, "Will you require more or less evidence to prove a disputed fact

from one side or the other because of your belief? Are you going to require more or less to prove it?" Second, "Are you going to tend to believe one side over the other based on your beliefs?" Credibility.

Just saying "decide it on the evidence," that communicates something to us, but even to us I don't think it communicates enough, and I need to know are -- is there a thumb on the scale when they weigh the evidence, because there is going to be evidence there, and they're going to decide the case on the evidence. I just care about whether the scale starts out level.

Second, I care very much about whether my witness gets the same credibility as another witness would, all things being equal, that that doesn't happen because of somebody's beliefs coming in.

CHAIRMAN BABCOCK: The best juror articulation I heard of what Skip just said was I was representing a small weekly newspaper in -- the *Azle News Advertiser* in Fort Worth, and this juror came up and said, "I don't know, I don't like newspapers," and the judge said, "Yeah, but can you be fair?" He said, "Oh, I can be fair." And I said, "Well, wait a minute, what about the weight of the evidence here?" I said, "How many newspaper witnesses would it take to overcome one of the plaintiff's witnesses?" He said, "Oh, that's easy. It would take two

newspaper witnesses to overcome one plaintiff witness," so the judge excused him.

MR. MUNZINGER: As I understand, the definition is written for inclusion in the jury charge Rule 226; is that correct?

HONORABLE TRACY CHRISTOPHER: Right. 226a.

MR. MUNZINGER: But we've imported from the statute regarding juror qualification a definition of bias or prejudice, and we're struggling now to make this definition useful in the jury charge, and it seems to me that we're confusing the process of jury selection with the process of instructing the jury in its deliberations.

HONORABLE TRACY CHRISTOPHER: Oh, no, no, no. This is the instruction before we begin voir dire.

MR. MUNZINGER: Okay.

HONORABLE TRACY CHRISTOPHER: It's 226a, subset (1), which is before voir dire begins.

MR. MUNZINGER: And what would you do with that portion of the charge that says, "Do not let bias, prejudice, or sympathy play any part in your deliberation."

HONORABLE TRACY CHRISTOPHER: Keeping it exactly the same.

MR. MUNZINGER: It leaves it alone?

HONORABLE TRACY CHRISTOPHER: Right. Sorry.

CHAIRMAN BABCOCK: Never mind. Yeah, Ralph, then Richard.

MR. DUGGINS: If you're going to use this, use a definition, I think the first line, "prior experiences, thoughts, or beliefs" are too narrow and need to be broadened, and I like "state of mind," even though you-all don't like the Compton definition the Court gave. I think that that is broad enough to include a number of things that aren't prior experiences, thoughts, or beliefs, and I also think that it's a -- the sentence, "A juror is prejudiced if the juror has prejudged a party or the case," ought to be expanded to subject matter. It's too narrow, and I'm not saying we use or don't use the definition. I'm just suggesting those be considered on this particular definition.

CHAIRMAN BABCOCK: Orsinger.

MR. ORSINGER: It seems to me that what we're doing here is taking words that we as lawyers use with each other to describe when a juror is disqualified, and we're trying to explain that to the jury.

HONORABLE STEPHEN YELENOSKY: That's my point.

MR. ORSINGER: And I'm not understanding why we're trying to do that. I mean, I might go home tonight and ponder the distinction here between bias and

prejudice. It's the opposite of what I've always thought my whole life, but I think it has a lot of philosophical sophistication to it, but I don't think we should be telling jurors that this is what the Supreme Court of 1963 thought the difference was between bias and prejudice and, you know, for whatever it's worth and then move on through a bunch of other things that the jury won't understand. Why wouldn't we just tell each other that this is the standard for bias and prejudice and then let them do the voir dire to show if someone is, and I promise you, if you ask a panel "Is there anybody on this panel that's biased or prejudiced," they won't raise their hands, because people don't like to think of themselves as being biased or prejudiced.

So if you tell them, "This is what we're looking for, we're looking for if you admit that you're this or you admit that you're that," you're suppressing the usefulness of voir dire as a way to determine if people are biased or prejudiced by telling them what they have to deny in order to stay on the jury, or the ones who want off, you're telling them what they have to say to get off, so then you have to bring in another array.

HONORABLE STEPHEN YELENOSKY: Amazingly, we have the Yelenosky/Orsinger position.

CHAIRMAN BABCOCK: Uh-oh. Buddy, then

Richard.

MR. LOW: Yeah, but no matter how you define it, you're not going to get somebody to tell you he's biased or prejudiced. You can define it in terms of angels, they're not going to do that. So we're looking to see and we make determination, the court makes determination, whether they're biased or prejudiced under the rules -- I mean, recently changed a little bit, the Court, as to when a person is disqualified. You can rehabilitate a little now, so it's a question of the court and the lawyers, and no matter how you define it and then you say, "Well, now, here's what it is. Are you biased or prejudiced?"

"Not me." I don't see getting anywhere

MR. MUNZINGER: Am I correct that in the present jury instructions prior to voir dire examination of the attorneys there is no definition of bias and prejudice?

HONORABLE TRACY CHRISTOPHER: That's correct. There is no definition. And we originally did not put a definition in. The small scale juror comprehension study that we commissioned indicated that jurors did not understand what bias and prejudice was. Two or three meetings ago this group voted to have us come up with a definition of "bias" and "prejudice."

HONORABLE STEPHEN YELENOSKY: I didn't vote for that.

HONORABLE TRACY CHRISTOPHER: And we've brought it back.

CHAIRMAN BABCOCK: And we reserve the right to change our mind.

HONORABLE TRACY CHRISTOPHER: We still would just like to leave it alone.

CHAIRMAN BABCOCK: Justice Bland.

HONORABLE JANE BLAND: Well, the old version of the rule did not have these terms defined, but it used the terms. You know, it said, "We're not trying to meddle in your personal affairs, but we're trying to select a fair and impartial jury, free from any bias or prejudice in this particular case," and I think that's meaningless gobbly goop to somebody who has just walked into a courtroom.

HONORABLE STEPHEN YELENOSKY: Well, we can take that out. We don't have to even refer to that anyway.

MR. ORSINGER: Do you think this --

HONORABLE STEPHEN YELENOSKY: Number one, it's not true because we have peremptory strikes, and they have nothing to do with fairness. So if we were going to tell them the truth, it wouldn't say that anyway, so maybe

we need to rephrase that, because all that is there for is to explain why we are meddling in their personal affairs. If we want to say that, because somehow that makes them feel better, we can say it without saying "bias" and "prejudice."

CHAIRMAN BABCOCK: Yeah, Judge Patterson.

HONORABLE JAN PATTERSON: I would like to speak in favor of the definition. I think it's a good one. I think what it does is allow jurors to have a conversation about this, and it sanctions that conversation and makes it possible. What is bias or prejudice really depends upon the context anyway. Appellate judges don't understand what it means, and it's all dependent upon what the context is. We're giving them a context here, and all it does is allow for them to express themselves, and I think this would encourage them, so I agree with Judge Bland. I like the definition.

CHAIRMAN BABCOCK: Jeff, did you have your hand up?

MR. BOYD: I did. I mean, it seems to me there has to be a definition of what bias and prejudice are, because that's the standard by which a judge is going to decide whether to strike the juror. So whether you tell the jury that definition or not there must be a definition.

HONORABLE STEPHEN YELENOSKY: But that has nothing to do with 226a.

MR. BOYD: Well, it does. I'm about to get there, because first there has to be a definition. So we all know, the lawyers and the judge know what we're looking for. Here are people who have a bias or prejudice, whatever they're defined to be; and in my experience at least, when you're picking a jury, one of the things you're doing is trying to admit -- to get certain ones to admit that they are biased or prejudiced because you want those jurors stricken, whether it's because you've seen something on their jury questionnaire or whatever, you realize that.

So inevitably you end up in this conversation with the juror where you're asking them, "Well, in light of this experience you've had," and then you've got to ask the question, whether the question is worded in terms of the Supreme Court definition or this one, "in light of this experience you've had," and it's often -- I mean, if you're up against Lisa Blue it's asked in the cross-examination style, "Isn't it true that your beliefs and thoughts are so strong that you wouldn't be able to follow the law" or whatever that standard is. So the questions are still going to be using that standard, whether the juror has been told what the standard is or

not. The questions are still going to be using it. It seems to me, though, that you can't really talk about that without using the words --

HONORABLE STEPHEN YELENOSKY: Sure, you can.

MR. BOYD: -- "bias" or "prejudice."

HONORABLE STEPHEN YELENOSKY: You surely can. You can, and the problem with speaking about it is no matter what instruction you give them, I, as a judge under the recent Supreme Court ruling about judging whether, you know, sincerely people have these beliefs and I'm the only one who sees what really is going on and can understand maybe what that juror's level of comprehension is better being there, if I have a question about it, I'm not going to go just on the magic words "bias" and "prejudice" anyway. I'm going to have to dig deeper than that, and lawyers, maybe they want to use that and maybe they don't, but why have the court read to them a definition of something that is not necessary for anything that they have to do?

MR. MEADOWS: I think it's useful because it -- whoever it was that made the point that it sets the stage for the dialogue. You have to have some reason to be talking to the venire about their personal feelings about things and whether or not they might have, you know, views that prejudge what they're going to be asked to

decide if they sit on the jury, and I think having it come from the court in terms of the importance of impartiality and fairness and so forth allows for that conversation to take place, and there has to be some way to do it, whether it's this language or some -- I mean, I agree with you, some lawyers may -- I mean, the issue is going to be determined in the challenge by the court, but there has to be a way for the lawyer to explore that with, you know, the person on the venire that they're interested in, and it strikes me that we have to set that up in a way that's permissible.

CHAIRMAN BABCOCK: Nina, then Jeff.

MS. CORTELL: This is probably going to be controversial because we are -- we have long used the phrase "based only on the evidence," but this is just anecdotal. My husband, a doctor, is being voir dired, and it's a med mal case, and he said the question was, "Are you going to decide this only on the evidence," and he said, "I couldn't answer that question yes, because there's no way I can separate, you know, the knowledge I have coming in," and so I don't know if this would be at all entertained, but consider whether to take out the word "only," if you're going to have a definition.

CHAIRMAN BABCOCK: Richard Munzinger, then Jeff. Sorry, I missed you.

MR. MUNZINGER: To all of your great relief, that I would just point out that Buddy, for example, has tried cases for how many years, Buddy, 50? 46.

HONORABLE JAN PATTERSON: You told me 75, Buddy.

MR. MUNZINGER: I've tried cases for 43 years using the existing language.

MR. LOW: You're almost up with me.

MR. MUNZINGER: I have done my best, and with some success, in ferreting out from a jury panel those persons whose experiences, attitudes, et cetera, have made them unacceptable to me as a juror. I have done that without a definition of bias or prejudice. I work in a jurisdiction where most of my jurors have a high school education only. It is very rare I have a jury in which there is a person who has a college degree. I have tried all kinds of cases, capital murder cases, I have tried civil cases, lengthy ones, short ones, complex, easy. I have never had any difficulty in articulating to a jury the need to be fair and that you may come to this courtroom with your attitudes and your life experiences, but what you may not do is violate your oath to be fair to people, and that's why we're talking to you, and I didn't need a definition, and I congratulate you on the effort to define bias and prejudice, but even in my jurisdiction

with the educational level -- and, by the way, my jurisdiction is essentially 90 percent Mexican-American, many people English is a second language to them. None of them have any difficulty understanding bias and prejudice and answering questions honestly to allow qualified attorneys to seek out their attitudes.

And again, it appears as if I'm opposed to every change, and I'm really not, but I just wonder to myself why would I import into a jury instruction this concept of bias and prejudice, which is the work of smart lawyers who have worked as hard as they know how to come up with a couple of sentences that articulate something so basic to our system, and they cannot do it in a way that makes it understandable to people. That's what lawyers are for in the voir dire examination of the jury, and they can ask questions and ferret this out, and then the judge takes the standard of the Supreme Court and makes a ruling based in his or her judgment as to whether this person is beyond hope, but there is -- in my humble opinion there is no reason to import a definition of bias or prejudice.

If you just tell bias -- everybody knows what bias is and everybody knows what prejudice is. We've lived with it all of our lives, all of us have suffered from it and lived with it. We all know what it is, and they do, too.

HONORABLE JANE BLAND: But nobody is beyond hope.

MR. MUNZINGER: From the standpoint of changing their minds about an attitude, I for one would have a very, very difficult time in being fair to someone who had a record of drug pushing, for example, and if I were on a jury panel and someone said, "Could you be fair to this guy even though the evidence is going to show he's got two or three convictions of selling cocaine?" I would be the first one to say, "No, I'm beyond hope. I can't be fair to the son of a gun. I hope you kill him."

HONORABLE JANE BLAND: My hope, Richard.

CHAIRMAN BABCOCK: Jeff Boyd, Buddy, then Richard.

MR. BOYD: We all know what bias and prejudice are in ordinary terms, but we don't all know what they are as a legal standard for deciding whether a juror is disqualified, and that is the standard that controls that key decision that the trial judge has to make and the appellate courts will review based on. So, in fact, I would always say, "Look, to begin with, everybody is biased and prejudiced to some extent on some issues, so don't be afraid to hear the word 'bias' or 'prejudice' here. You need to understand when we're talking about that word here, we're talking about this

legal" -- I would ask the judge to give them that definition, even though it's not in this rule, because that's the standard.

So, yes, we all know what it is, but we're all talking about the legal definition that matters in this context, and to me it's like, you know, we're -- we're talking about a squirrel, but we're not allowed to say "squirrel," so every time you talk about it you say it's a little brown furry animal with big tail that climbs trees. I mean, if the judge is going to work off a particular definition, I don't see any harm in telling the jury, "This is what we're talking about" and then let the juror say based on -- now, just because a juror says -- and that's what the Court has said, just because a juror says, "Yes, I'm biased" doesn't mean they're legally biased under the definition, which is all the more reason why jurors ought to know what we're talking about.

CHAIRMAN BABCOCK: Buddy.

MR. LOW: Chip, in your situation, take this definition, that person would have said, "Yes, I'll follow, I'll decide the case on the evidence," and not ask it's going to take two witnesses to one to do it, and under the law as instructed, that person wouldn't be biased. So what Richard -- I endorse totally. That makes 93 years of experience between us. That's all.

CHAIRMAN BABCOCK: Anybody been practice in seven years so we can get to a full century?

MR. LOW: Yeah, a new point of view.

CHAIRMAN BABCOCK: Richard.

MR. ORSINGER: You know, I bet if we turned our pieces of paper over and were each asked to write down the difference between bias and prejudice, Judge Christopher is the only one that would get it right here today among us. Now, we're going to have a panel of 42 people that have been brought in, and it's hard enough just to get them to sit in numerical order, and then we're going to throw 15 paragraphs of stuff at them real quickly, including the distinction between bias and prejudice based on a 1963 articulation of the way the world works, and we're expecting this to improve the jury selection process. I just don't get it.

CHAIRMAN BABCOCK: Was that a good shout out for Judge Christopher or a bad shout out?

HONORABLE TRACY CHRISTOPHER: I'm not sure.

MR. ORSINGER: She did a fabulous job of drafting this distinction, which I don't think -- I mean, we could talk about it. Like I said, let's take the test. I'll bet you that nobody could pass it here but her.

CHAIRMAN BABCOCK: There will be no test taking here, by the way.

MR. MEADOWS: Whether we settle on the actual words used by Judge Christopher or not, which I appreciate the effort and agree with you that it would be hard to do better, the reason that I'm attracted to the idea is because I agree with Richard and others who have said that all of us have a notion about bias and prejudice, and it's very unbecoming, and the reason for this definition or this attempt at a definition is to change that, you know, that understanding of it, so it's a permissible thing to talk about in the context of how you decide a case where bias and prejudice means something very different.

It's fact-specific, it's case-specific, and I just think you have to have a way to relax the impact of that -- those terms in trying to get to whether or not people on the venire can serve on the jury, and there has to be a court sponsored way to have that dialogue.

CHAIRMAN BABCOCK: Kennon, did you have something to say?

MS. PETERSON: Well, I'm just wondering is it the basic definition or is it the extent of bias or prejudice that we're focusing on, because we're not really changing what bias or prejudice means, and I think people in everyday language, "Well, I may be biased, but" -- I think people understand what it means to be biased, but

it's really you can't be biased to the extent that you wouldn't be able to decide the case impartially. I know using a different word there that people would understand would be better, but I guess I'm just a little confused as to whether we need to be talking about the actual definition or the extent of bias or prejudice.

CHAIRMAN BABCOCK: Okay. Justice Yelenosky.

HONORABLE STEPHEN YELENOSKY: Well, I think I said this last time. We're trying to define the two words because they're in the current 226a. They don't have to be in there at all. We're creating a problem by using words that everybody agrees don't mean what everybody understands them to mean, so why do we even have to use the words at all in 226a? If we don't use the words, we don't have to go about worrying about how to define them. All we need to tell the jury is that we're here and we're getting into your information because we need to pick a fair jury.

The words "bias" and "prejudice" don't have to be used. They may be used, but if a lawyer chooses to use them it's at his or her peril to explain what they mean. The only person that really needs to know what they mean is the judge, so we're creating a problem by using the words. There's nothing that says we have to give those words to the jury.

CHAIRMAN BABCOCK: Jim.

MR. PERDUE: To follow up on that, the rule change and the admonitory instruction would not change the substantive question of whether you established cause. We can't change that by rule --

HONORABLE STEPHEN YELENOSKY: Right.

MR. PERDUE: -- and so the judge gets to make that legal determination. It seems to me that the only purpose for this is to create a uniform practice in the state on an issue that is done differently by different trial advocates and by different trial judges in the way they handle the issue, and I hope I can practice 43 years, but I get away from the term "bias" and "prejudice" as quick as possible, even though it's in the charge, and that's your role as advocate on both sides.

MR. LOW: Right.

MR. PERDUE: And so I understand that the charge was given, and philosophically I think I like the definition, but I think that you're trying to create a uniformity, whereas present practice is it's the lawyer's job to see if they can get to the legal standard, whereas this is just essentially trying to make -- it's the Harris County practice, to make it statewide as far as the definition, but it can't change the legal standard.

CHAIRMAN BABCOCK: Yeah, Judge Peeples.

HONORABLE DAVID PEEPLES: The instructions to jurors use "bias" and "prejudice" two times. The first time is when you're talking to the whole panel, and we use four words that jurors don't understand or everybody has a different understanding of. "We're trying to select fair and impartial jurors who are free from any bias or prejudice in this particular case." And then --

HONORABLE STEPHEN YELENOSKY: And I would stop at "jurors."

HONORABLE DAVID PEEPLES: When you're charging the jury, instruction number one, when you're reading the charge to the jury, "Do not let bias, prejudice, or sympathy play any part in the deliberation." We can't take that one out.

HONORABLE STEPHEN YELENOSKY: But it means something different there or they wouldn't be on the jury.

HONORABLE DAVID PEEPLES: Well, I don't know.

MR. BOYD: No.

HONORABLE DAVID PEEPLES: And the statute uses it, too. And that's what Jim was saying.

MR. PERDUE: But it's my job as an advocate, I mean, that first admonitory -- that first instruction in the jury charge is the first one I deal with in closing argument, and the idea of finding people who are impartial

during voir dire is one of the early things that I get into in voir dire. That's just your role as an advocate. The legal standard is -- I have had disagreements with a lot of judges as to whether I've proven somebody up for cause or not.

CHAIRMAN BABCOCK: Yeah, Jeff.

MR. BOYD: It doesn't mean something different there, and, in fact, when you get to closing argument that's when you say, "Now, you remember all that talk we had in voir dire about you can't be biased or prejudice, that's what the judge is reminding you of. Now, you all promised us that you wouldn't have any bias or prejudice. You still can't have any as you go forward in deliberating." So it's the same standard, and I think it's good that it's in both places because it allows you to come back and remind them of their duty. There have been times I've said, "You may not like my client," I mean, based on what, you know, happened during the trial, I have the real strong sense they don't like my client, but that's not a bias or a prejudice under the legal definition. The court gave you the definition, you just have to treat them, you know, as the definition states, even if you don't like them.

HONORABLE STEPHEN YELENOSKY: Well, I agree with that to some extent, but when you put the definition

in strict words like this it really can't be because a person is biased or prejudiced from prior experiences, those things don't change. Maybe you're saying don't act on a prejudice or bias, but literally it can't be the same, and why create that problem, and if you need a definition of bias and prejudice for the charge then put it there.

CHAIRMAN BABCOCK: Okay. Anybody else? All right. Judge Christopher, do you want to put your definition to a vote?

HONORABLE TRACY CHRISTOPHER: Well, I actually thought -- maybe it was just the more naysayers talking today. It actually seems like more people are in favor of no definition, and which, of course, was the original report from my committee, no definition.

CHAIRMAN BABCOCK: No, that's not true.

HONORABLE TRACY CHRISTOPHER: Yes, it was.

MR. ORSINGER: Are we entitled to change our minds?

HONORABLE STEPHEN YELENOSKY: Yes, it was.

MR. GILSTRAP: Well, we asked them to come back with a definition. They've put it out there. Now we've got to decide do we want a definition and then we decide do we want this definition.

HONORABLE TRACY CHRISTOPHER: And if you

don't want this one, some other committee is coming up with it.

CHAIRMAN BABCOCK: I think we're at the end of the road on this thing. So, Judge Christopher, would you be in favor of having a vote as to no definition versus definition and then a second vote on this definition?

HONORABLE TRACY CHRISTOPHER: That's fine. However you want to do it is fine with me.

CHAIRMAN BABCOCK: Well, then why don't we do that, because that will be fun? Will everybody who is in favor of having a definition raise your hand?

Everybody who is opposed to having a definition? Okay. So the naysayers have 19 votes and the want-a-definition guys have 6, and if we're going to have a definition, how many people are in favor of this one, raise your hand?

MR. ORSINGER: Does anyone that votes "no," are they at risk of having to write replacement?

CHAIRMAN BABCOCK: Yeah. All right. And those who will quit the practice of law if this definition passes, raise your hand.

Okay. So if we're going to have a definition, Justice Hecht, this is it by a wide margin on this committee; and, Judge Christopher, thanks to you and

your subcommittee very, very much for working on this. It's not easy, we know.

All right. We've got a few minutes, and so, Judge Lawrence, let's take advantage of your time and get into this issue.

HONORABLE TOM LAWRENCE: Well, this is really Kennon's item. I think she got a letter from a doctor in Dallas who had been involved in a small claims court case, which he believed to be one where you don't have the Rules of Evidence and Procedure, and he ended up getting ruled against because of a technicality in both JP court and on appeal in county court, and he wrote a letter to both the JP and the county court judge and a couple to the Court talking about this and pointing out that although the Rules of Evidence are very clear that the Rules of Evidence don't apply in small claims court, he can't find anything after doing a lot of research that talks about the Rules of Procedure not applying in small claims court, and he thinks that it's ambiguous, and he would like to see something done about that. Did I state that fairly?

MS. PETERSON: I think that's accurate, and one of the things Judge Lawrence and I discussed is that there is a Court Administration Task Force recommendation to repeal Chapter 28 of the Texas Government Code, and

that is the chapter dealing with small claims courts. The rest of that recommendation would be to authorize the Supreme Court to promulgate new rules for justice courts to exercise jurisdiction over small claims, and I wanted to share that with the committee so that the committee would be aware that this might be resolved legislatively, but this is kind of gray area, and there isn't a clear answer about the extent to which the Rules of Civil Procedure apply in small claims courts.

And clearly, as evidenced by all the letters, Dr. Ellis feels strongly about this and could confront $60,000 in attorney's fees as a result of his experience and not following technicalities and getting his case dismissed, and so I thought it worthy of bringing to the committee.

HONORABLE TOM LAWRENCE: So if the Court Administration Task Force, which is adopted by the State Bar, presumably Senator Duncan is going to incorporate all of that into a bill again this time. If that passes then the Small Claims Court Act will be repealed, the Supreme Court would be charged with promulgating these rules, and we wouldn't have to do anything at this point, if we just want to wait and let that play itself out. Alternative would be if we try to do something about this now, but, of course, the Legislature promulgated the Small Claims Act,

so I don't know if the Court would be in a position or would want to promulgate Rules of Procedure for the legislative act. I don't know how that -- if that's something you would want to do anyway or would you just want to wait and let the legislation run its course.

CHAIRMAN BABCOCK: Anybody have any thoughts on that?

MR. ORSINGER: How many issues do we have to decide, just whether the rules ought to or ought not to apply? Is it a single issue?

MS. PETERSON: That's really the biggest issue, but the, I guess, nuances are many because if you decide that the rules do apply then you have to answer the extent to which they apply; and right now there is a provision in the Rules of Civil Procedure for JP courts; and, if I understand what you, Judge Lawrence, said correctly, there's a lot of confusion in JP courts now about the extent to which Rules of Civil Procedure applicable to district and county courts apply there. So it's a long way of saying it's not a simple solution, but right now the small claims courts appear to kind of be hanging out there in the sense that parties don't really know which rules they should follow and which ones they don't have to follow.

MR. ORSINGER: But we could very simply have

a discussion and a showing on whether the Rules of Procedure ought to apply in small claims court, and if we say "no" then we're finished. If we say "yes" then we have another meeting.

CHAIRMAN BABCOCK: Pretty complicated issue either way, but I wasn't quite clear on one thing Judge Lawrence said. Judge Lawrence, are you saying that you think the Court under the current law lacks rule-making authority over the small claims courts?

HONORABLE TOM LAWRENCE: Well, I'm not the one to say that one way or the other. I'm raising the question. The Legislature promulgated the Small Claims Court Act. Other than the Supreme Court saying that the Rules of Evidence don't apply, I don't know to what extent the Supreme Court can promulgate rules for small claims court. I don't know the answer to that.

CHAIRMAN BABCOCK: Well, put a different way, why wouldn't the Court be able to promulgate rules for small claims court? I mean, just because the Legislature establishes the court system, that doesn't mean the Supreme Court doesn't necessarily have jurisdiction to regulate the rules of conduct there, does it?

HONORABLE TOM LAWRENCE: Well, let me give you a couple of instances. There's a case out of the

Beaumont court of appeals back in 1993 that talked about one specific rule of procedure that said that that rule of procedure, which happened to be 574(a) -- that's a justice court, it doesn't apply to small claims court, and that's the only case I've found where any court really talked about whether or not the Rules of Procedure apply.

There is a court of appeals that took up a small claims court on appeal before the Supreme Court rule in *Sulton V. Matthews*, you can't do that, that said that you could have a judgment NOV in small claims court.

CHAIRMAN BABCOCK: You could not?

HONORABLE TOM LAWRENCE: Could.

CHAIRMAN BABCOCK: Could.

HONORABLE TOM LAWRENCE: You could. Of course, that was a court of appeals decision, and they weren't even supposed to be reaching that. You have three different instances in the Small Claims Court Act, Chapter 28 of the Government Code, where they refer to a Rule of Civil Procedure, and that's for the citation, motion to transfer venue, and appeal; and it basically says you apply the rules in justice court for this. There are no other references to the Rules of Procedure anywhere in Chapter 28.

There are some differences. It's pretty clear 28.033, Government Code, says no formal pleading,

the proceeding is to be informal, discovery only as permitted by the judge. The JP develops the facts of the case, summons witnesses, can question witnesses. There are a number of differences. There are seven specific differences. For example, citation, private process servers cannot serve citation in small claims court where they can in justice court, so there are a number of things that are written into Chapter 28 that would be at variance with the Rules of Procedure.

It's not just a simple matter of saying the rules apply. It's a lot more complicated than that, and I think whatever we do, the last thing we want to do is to do anything to take away the informality and the quick decision-making process of a small claims court proceeding. We had 52,000 small claims court cases filed in calendar year 2007, probably be up this year. Total civil suits in JP court with evictions, small claims in justice court, almost 450,000, and it's going to be up this year, so a lot of cases. Small claims is a relatively small percentage of that, but it's important. When you've got a nonattorney judge and pro ses on each side, imposing the Rules of Civil Procedure is problematic, to say the least.

CHAIRMAN BABCOCK: Frank, and then Hugh Rice.

MR. GILSTRAP: Well, you know, having read Dr. Ellis' letter I don't think his problem is in the Rules of Procedure.

HONORABLE STEPHEN YELENOSKY: It was evidence.

MR. GILSTRAP: It was the Rules of Evidence. Here's what he said. He said, "The other attorney" -- "the attorney argued that since I did not present my evidence to the court according to the Rules of Evidence, none of it could be considered, and since no evidence was offered my case was frivolous and the Rules of Civil Procedure dictated that he must include attorney's fees."

Well, the problem was they didn't allow him to offer evidence, and, you know, as I understand small claims court is -- and I think most people have the impression, maybe I'm wrong, is like TV court, only they have a courteous judge, and you --

HONORABLE JAN PATTERSON: On television.

MR. GILSTRAP: "Here's what happened, and here's why they owe me the money." The other person says the same thing and the judge rules. Is that how it works?

HONORABLE TOM LAWRENCE: Well, that's kind of a simplification, but yeah, that's in a nutshell.

MR. GILSTRAP: And he did that and the judge -- the judge said, "No, you didn't put on any evidence."

I mean, that's the problem here. The problem is not with the Rules of Procedure.

HONORABLE STEPHEN YELENOSKY: Well, and it isn't a problem because the rules say they don't use the Rules of Evidence. The only problem is the judge did.

MR. GILSTRAP: Yeah. I mean, his case -- if this is true, a terrible injustice was done to him, but the problem is not the system. The problem was the JP messed up.

MS. PETERSON: And the way he articulated it on the phone, just to give additional context, is that it was the Rules of Civil Procedure and the Rules of Evidence, so I guess we don't know really in the end whether it was just the Rules of Evidence or both, but assuming it were an issue with the Rules of Civil Procedure, I don't see a clear answer anywhere.

MR. GILSTRAP: I mean, maybe it needs to be addressed. Maybe we need to address that, but --

CHAIRMAN BABCOCK: Hugh Rice.

MR. KELLY: I think we need to follow the recommendation of the State Bar's Special Court Administration Task Force. They absolutely -- and others have mentioned this. They absolutely endorse abolishing the small claims procedure completely legislatively and asking Justice Hecht to direct this committee and others

to come up with a nice, unified set of procedures that govern every case managed by a JP, and I'm sure they mean to do that, is to apply simplified procedures to all JP cases.

Right now we have a crazy procedure, which they say -- it says, "It's confusing, it requires justices of the peace to constantly change hats," and they've got one set of rules if they've got the JP hat on and they've got another set of rules if they've got the small claims hat on, and it's nuts, and we're wasting our time trying to make sense of it when what you really need to do is go back to square one and do something sensible, and I'll bet you that -- I'll lay odds that the Legislature will abolish that, and so we shouldn't spend any time trying to fix something that's so crippled it's never going to survive.

CHAIRMAN BABCOCK: Okay. Justice Gray.

HONORABLE TOM GRAY: Having been a user of the small claims court, not -- and I specifically when I went into the JP court I wanted to make sure I was getting the small claims court petition papers, not the JP trial court papers, and I did that specifically to avoid -- even as being a lawyer and by that time actually had been elected as a judge. I wanted to specifically avoid the complexities of complying with the Rules of Procedure and

the Rules of Evidence. I wanted to go in and tell my story on the repair of a truck and see if the judge understood what I was complaining about and see if I left with any money, and I think all we need to do to fix this doctor's problem is something that should have been done a long time ago, and it's add this sentence to Rule 2, which is the scope of the Rules of Civil Procedure. "These rules do not apply to small claims in justice court," and that fixes the problem until the Legislature does something else, if they do it.

CHAIRMAN BABCOCK: Justice Gaultney.

HONORABLE DAVID GAULTNEY: Am I correct that the same procedure applies in county court once it's appealed there?

HONORABLE TOM LAWRENCE: Supposed to.

HONORABLE DAVID GAULTNEY: In other words, the small claims statute I think says that when you appeal, you get a de novo trial, the same process that happened in small claims court happens on appeal, but I think the whole purpose for the Small Claims Act when it was first enacted, a hundred dollars was what was involved as opposed to whatever it is now, was that you would have an informal quick process for resolving issues without a lawyer. And I think if we impose the requirements of the Rules of Civil Procedure into that process, you know, I

think you're defeating the purpose.

CHAIRMAN BABCOCK: How do you like Justice Gray's solution?

HONORABLE DAVID GAULTNEY: Well, my only question was what about the next step?

HONORABLE TOM GRAY: Well, I think Judge Lawrence is right that the chapter in the small claims statute provides that that procedure goes up with it, and it's still the same.

HONORABLE DAVID GAULTNEY: So the amendment to Rule 2 would say, "Small claims in JP court or on appeal?"

HONORABLE TOM LAWRENCE: I guess you would have to add -- I'll defer to Judge Lawrence on that.

HONORABLE TOM LAWRENCE: Well, it is supposed to be tried the same way, but I can tell you anecdotally that that doesn't always happen. There are some county courts that apply Rules of Procedure and Rules of Evidence, and they're really not supposed to.

What I would prefer to see happen is let the legislation run its course and see if the Legislature acts on this. If they do, then what would happen is they would authorize or ask the Supreme Court to promulgate rules and task force could be appointed, JPs and others brought in, and come up with a product and then come back to this

committee with something, and then I think we could resolve the problem.

If the legislation doesn't take care of this, then I would -- if the Court wants to do it, I would love to see the Court promulgate some few rules for small claims court because there are an awful lot of unanswered questions. You don't know, for example -- and what that does is you have inconsistent rulings across the state because nobody really knows what rules you're supposed to use.

Somebody asks for motion for summary judgment. Well, can you do that in small claims court? That's a rule of procedure thing. Some judges will grant it on a small claims. Others will say, "No, Rules of Evidence don't apply we don't believe; therefore, you can't get it," so there are a number of things that could be cleared up that would make the administration of those cases a lot better, but I would suggest for now we just let legislation take its course and see what happens.

CHAIRMAN BABCOCK: Jeff, did you have a comment?

MR. BOYD: No, I think we're past it.

CHAIRMAN BABCOCK: Buddy.

MR. LOW: No, I just agree. I agree with what he said.

CHAIRMAN BABCOCK: Okay. Is everybody comfortable with waiting to see what the Legislature does, or do we want to vote on Justice Gray's proposal?

HONORABLE TOM GRAY: That's 4,000 litigants per month going through the system that we could give clarity to.

CHAIRMAN BABCOCK: So you would call for a vote on your proposal?

HONORABLE TOM GRAY: No, I would ask you to call for a vote on my proposal.

MR. ORSINGER: I'll second his motion, if that matters.

CHAIRMAN BABCOCK: You will make a motion which Orsinger seconded, which I will call. Everybody that is in favor of Justice Gray's proposal to amend Rule 2, raise your hand.

All those opposed? So by a vote of 24 to 3, the Chair not voting, Justice Gray's motion, seconded by Orsinger, is passed, and that will be our recommendation to the Court.

And so we will be back tomorrow at 9:00. As many of you as can come back, please do so because we still have some 226a issues to talk about as well as all the other exciting action items on our agenda, so we'll see you then. We're in recess. Thank you.

(Meeting recessed at 5:01 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 21st day of November, 2008, Friday Session, and the same was thereafter reduced to computer transcription by me.

I further certify that the costs for my services in the matter are $ 1900.00 .

Charged to: The Supreme Court of Texas.

Given under my hand and seal of office on this the 9th day of December, 2008.

D'Lois L. Jones

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