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MEETING OF THE SUPREME COURT ADVISORY COMMITTEE

April 9, 2010

(FRIDAY SESSION)

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[COPY]

Taken before *D'Lois L. Jones*, Certified
Shorthand Reporter in Travis County for the State of
Texas, reported by machine shorthand method, on the 9th
day of April, 2010, between the hours of 9:00 a.m. and
5:11 p.m., at the Texas Association of Broadcasters, 502
East 11th Street, Suite 200, Austin, Texas 78701.

1 **INDEX OF VOTES**

2
3 Votes taken by the Supreme Court Advisory Committee during
4 this session are reflected on the following pages:

4 Vote on Page

5

6 Rule 300 19790
7 Rule 297 19838
8 Rule 296 19876
9 Rule 296 19877
10 Rule 296 19939

11

12

13 **Documents referenced in this session**

14 10-07 Proposed amendments to Rules 296-329 (4-8-10 revision)

15 10-08 Proposed rule requiring notice to AG

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

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

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

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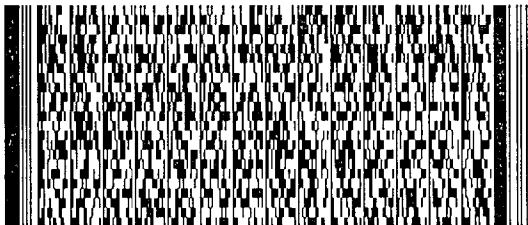


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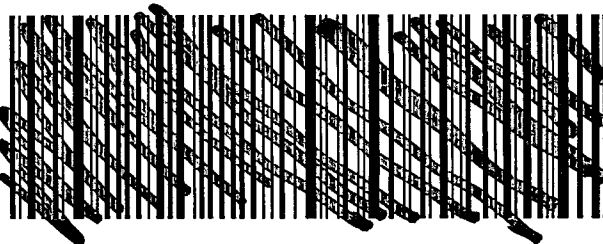
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1 rules, because they will be submitted to a referendum at
2 some point, and that may take through the fall, with the
3 referendum then probably during the president's election
4 the next year, but that's all sort of tentative, and this
5 is a major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

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

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

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

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

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

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

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

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

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

25 HONORABLE NATHAN HECHT: Yes.

1 HONORABLE DAVID PEEPLES: Send it to you?

2 HONORABLE NATHAN HECHT: Yes, send it to us.

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

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

8 HONORABLE DAVID PEEPLES: Okay, thanks.

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

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

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

16 HONORABLE TRACY CHRISTOPHER: We can't hear
17 you.

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

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

1 all I know about.

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

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

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

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

11 MS. SENNEFF: Yes.

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

21 MR. LOW: Wait a minute.

22 HONORABLE DAVID PEEPLES: It speaks for
23 itself.

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

1 discussed in detail?

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

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

7 HONORABLE DAVID PEEPLES: Well, the previous
8 300, I'd have to look at it, but it doesn't even approach
9 this. We just used that number. It says basically, "The
10 Court shall issue a final judgment."

11 MR. LOW: Right.

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

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

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

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

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

18 MR. GILSTRAP: Everybody reads *Payne*.

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

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

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

7 MR. LOW: Richard.

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

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

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

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

20 MR. LOW: Anybody else have -- Carl?

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

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

3 MR. GILSTRAP: That's what Lehmann does.

4 HONORABLE STEPHEN YELENOSKY: It does by
5 stating it.

6 MR. LOW: Go ahead.

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

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

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

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

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

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

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

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

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

1 combination with other earlier judgments and orders."

2 That's intended to deal with that.

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

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

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

1 are underlying questions that are not clear.

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

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

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

5 CHAIRMAN BABCOCK: Bill.

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

10 MR. MUNZINGER: Say it again.

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

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

16 PROFESSOR DORSANEO: Yeah.

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

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

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

1 this affect that, Richard?

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

5 MR. LOW: Oh, okay.

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

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

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

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

8 MR. LOW: All right. Tracy.

9 HONORABLE TRACY CHRISTOPHER: I agree it
10 would be good to have it in a rule. Everyone in this
11 committee knows of the case of Lehmann, but I would guess
12 50 percent of the practitioners if you asked them -- trial
13 practitioners, if you asked them what that case was they
14 would have no idea what it is.

15 PROFESSOR DORSANEO: That's generous.

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

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

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

6 HONORABLE TERRY JENNINGS: A new rule?

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

12 HONORABLE NATHAN HECHT: Okay.

13 MR. LOW: Thank you very much.

14 HONORABLE NATHAN HECHT: Yes, Bill.

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

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

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

1 party all the relief to which he may be entitled either in
2 law or in equity"; and it's the idea that the judgment is
3 supposed to be in writing, you know, or in a series of
4 writings, rather than just be orally rendered from the
5 bench; and I would like to see that added into this rule
6 300 so that it's a little more than Lehmann and finality;
7 but it's a rule that says what -- at least in general
8 terms what a judgment is supposed to do.

9 HONORABLE NATHAN HECHT: Tom.

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

25 HONORABLE NATHAN HECHT: Frank.

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

4 PROFESSOR DORSANEO: Yes.

5 PROFESSOR CARLSON: Res judicata.

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

8 HONORABLE NATHAN HECHT: Richard.

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

25 I mean, just this morning when I was coming

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

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

1 judgment, whether that be oral or in writing.

2 HONORABLE NATHAN HECHT: Jan.

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

8 HONORABLE NATHAN HECHT: Yes, Terry.

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

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

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

25 PROFESSOR DORSANEO: You never get it final.

1 HONORABLE TERRY JENNINGS: Right.

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

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

16 HONORABLE NATHAN HECHT: Lonny.

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

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

14 HONORABLE NATHAN HECHT: Bill.

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

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

25 PROFESSOR CARLSON: Justice Jennings, I

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

11 HONORABLE TERRY JENNINGS: That makes sense.

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

15 PROFESSOR CARLSON: Now it does.

16 HONORABLE NATHAN HECHT: Yeah. You've got a
17 judgment whether you like it or not. Of course, where the
18 150 days starts is -- begs the question, so --

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

22 HONORABLE NATHAN HECHT: Frank.

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

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

11 HONORABLE NATHAN HECHT: Alex Albright.

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

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

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

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

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

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

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

10 HONORABLE NATHAN HECHT: Bill.

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

24 PROFESSOR ALBRIGHT: Default judgments.

25 PROFESSOR DORSANEO: Default judgments,

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

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

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

25 PROFESSOR DORSANEO: Yeah. But I would add

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

13 HONORABLE NATHAN HECHT: Richard, then
14 Roger.

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

1 timetable and the plenary power timetable.

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

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

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

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

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

15 HONORABLE NATHAN HECHT: Judge Yelenosky.

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

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

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

5 HONORABLE STEPHEN YELENOSKY: Okay.

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

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

16 MR. ORSINGER: It's ineffective.

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

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

25 HONORABLE TRACY CHRISTOPHER: Well, what

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

2 MR. ORSINGER: Our property is divided.

3 HONORABLE TRACY CHRISTOPHER: Can they get
4 married?

5 MR. ORSINGER: Yes.

6 HONORABLE STEPHEN YELENOSKY: Why,
7 because --

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

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

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

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

20 MR. ORSINGER: Yes, it has been divided.

21 HONORABLE STEPHEN YELENOSKY: What proves
22 that?

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

25 HONORABLE STEPHEN YELENOSKY: Yeah, I see a

1 problem.

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

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

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

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

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

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

1 what. It's just a question --

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

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

9 MR. MUNZINGER: I understand that you --

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

13 MR. MUNZINGER: It's insufficient --

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

16 HONORABLE NATHAN HECHT: One at a time.

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

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

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

1 things up.

2 HONORABLE NATHAN HECHT: Judge Christopher.

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

9 MR. ORSINGER: Right.

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

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

19 PROFESSOR ALBRIGHT: That's right.

20 HONORABLE NATHAN HECHT: Justice Jennings.

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

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

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

15 HONORABLE NATHAN HECHT: Alex.

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

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

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

16 PROFESSOR ALBRIGHT: Right.

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

22 HONORABLE NATHAN HECHT: Frank.

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

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

6 HONORABLE NATHAN HECHT: Professor Dorsaneo.

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

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

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

20 HONORABLE NATHAN HECHT: Richard.

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

25 PROFESSOR DORSANEO: Forever.

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

14 HONORABLE NATHAN HECHT: Chief Justice Gray.

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

25 I had jotted down a partial fix in

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

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

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

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

5 HONORABLE TOM GRAY: Obviously.

6 HONORABLE NATHAN HECHT: Yes, Gene.

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

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

17 MR. STORIE: Okay.

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

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

23 HONORABLE NATHAN HECHT: Yes, Bill.

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

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

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

8 HONORABLE NATHAN HECHT: Yes, Elaine.

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

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

3 MR. GILSTRAP: No one reads it.

4 HONORABLE NATHAN HECHT: Bill Dorsaneo.

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

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

14 HONORABLE NATHAN HECHT: Yes, Judge Peeples.

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

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

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

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

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

1 that was the idea.

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

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

7 MR. ORSINGER: Okay.

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

13 MR. ORSINGER: Okay.

14 HONORABLE NATHAN HECHT: Yes, Bill.

15 PROFESSOR DORSANEO: Well, to maybe move it
16 along I'm going to move that we eliminate (b) from Rule
17 300 and have either existing rules of 300 and part of 301
18 or a separate rule to deal with the requisites of a
19 judgment and what a judgment is supposed to look like. I
20 guess I'm influenced by Frank Gilstrap's suggestion and
21 Justice Gray's point on it, and I make it a motion so we
22 can get down the road rather than arguing about what
23 rendition means or doesn't.

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

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

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

8 HONORABLE TERRY JENNINGS: Well, 301 --

9 HONORABLE NATHAN HECHT: Judge Jennings.

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

25 PROFESSOR DORSANEO: But it's kind of like

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

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

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

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

5 PROFESSOR DORSANEO: That's fine.

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

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

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

20 MR. DUGGINS: Okay. Fair enough.

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

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

25 HONORABLE NATHAN HECHT: All right.

1 PROFESSOR CARLSON: All right.

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

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

7 HONORABLE NATHAN HECHT: All right.

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

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

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

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

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

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

25 HONORABLE NATHAN HECHT: Alex Albright.

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

4 PROFESSOR DORSANEO: No.

5 PROFESSOR CARLSON: No.

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

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

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

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

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

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

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

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

5 PROFESSOR ALBRIGHT: It comes up every --
6 yeah.

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

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

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

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

22 PROFESSOR CARLSON: That's our current
23 practice --

24 PROFESSOR ALBRIGHT: Yes.

25 PROFESSOR CARLSON: -- as I understand.

1 HONORABLE NATHAN HECHT: Bill Dorsaneo.

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

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

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

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

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

24 PROFESSOR CARLSON: You're absolutely right.

25 MR. GILSTRAP: And sometimes the court can

1 make the findings later.

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

10 HONORABLE NATHAN HECHT: Nina.

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

14 PROFESSOR ALBRIGHT: Oh, that's right.

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

16 PROFESSOR ALBRIGHT: Yeah. Yeah.

17 PROFESSOR DORSANEO: That's Elaine's fault.

18 Years ago you wanted to have a basis for the longer
19 appellate timetable and request for findings and
20 conclusions to simplify things.

21 PROFESSOR CARLSON: I still do.

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

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

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

4 HONORABLE NATHAN HECHT: Other comments --

5 PROFESSOR ALBRIGHT: So they have to --

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

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

20 HONORABLE NATHAN HECHT: All right. Next
21 idea?

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

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

14 HONORABLE NATHAN HECHT: Comments? Chief
15 Justice Gray.

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

1 reminder is a very good provision in this context.

2 HONORABLE NATHAN HECHT: Bill Dorsaneo.

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

11 HONORABLE NATHAN HECHT: Roger.

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

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

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

19 HONORABLE NATHAN HECHT: Justice Jennings.

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

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

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

7 PROFESSOR CARLSON: No.

8 HONORABLE NATHAN HECHT: So after we've
9 discussed it at some prior meetings, which none of us
10 remembers, but we did, and so now the recommendation is
11 297 without the reminder, so perhaps we should find out
12 what the committee thinks about that before we vote.
13 Justice Gray.

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

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

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

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

4 HONORABLE NATHAN HECHT: All right. Justice
5 Patterson.

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

19 HONORABLE NATHAN HECHT: Justice
20 Christopher.

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

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

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

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

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

18 HONORABLE TRACY CHRISTOPHER: That was my
19 next request.

20 HONORABLE JAN PATTERSON: Okay.

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

25 HONORABLE JAN PATTERSON: Well, isn't that

1 the practice?

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

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

25 HONORABLE NATHAN HECHT: R. H.

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

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

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

17 Opposed? 25 to 2.

18 HONORABLE TERRY JENNINGS: The appellate
19 judges.

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

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

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

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

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

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

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

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

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

5 HONORABLE NATHAN HECHT: 296.

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

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

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

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

11 HONORABLE NATHAN HECHT: Bill Dorsaneo.

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

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

4 PROFESSOR CARLSON: Yes.

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

7 PROFESSOR CARLSON: And just right.

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

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

15 HONORABLE NATHAN HECHT: Chief Justice Gray.

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

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

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

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

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

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

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

25 HONORABLE TERRY JENNINGS: Well, you

1 attack --

2 HONORABLE NATHAN HECHT: Justice Jennings.

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

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

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

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

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

9 HONORABLE NATHAN HECHT: Nina.

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

17 HONORABLE NATHAN HECHT: Bill Dorsaneo.

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

1 HONORABLE NATHAN HECHT: Judge Christopher.

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

13 HONORABLE NATHAN HECHT: Bill Dorsaneo.

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

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

7 HONORABLE NATHAN HECHT: Frank Gilstrap.

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

16 HONORABLE NATHAN HECHT: Jim Perdue.

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

21 HONORABLE NATHAN HECHT: Elaine?

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

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

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

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

8 HONORABLE TRACY CHRISTOPHER: Yes.

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

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

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

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

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

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

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

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

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

14 HONORABLE NATHAN HECHT: Alex Albright.

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

22 HONORABLE NATHAN HECHT: R. H.

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

1 damages to the" --

2 HONORABLE STEPHEN YELENOSKY: Right,
3 causation is in there.

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

8 HONORABLE NATHAN HECHT: Judge Peeples.

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

15 PROFESSOR DORSANEO: It will.

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

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

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

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

20 HONORABLE NATHAN HECHT: Lamont.

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

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

7 HONORABLE NATHAN HECHT: Bill Dorsaneo.

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

1 cause?" That would be broad form.

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

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

10 PROFESSOR DORSANEO: Yeah.

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

16 PROFESSOR DORSANEO: Why?

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

25 HONORABLE NATHAN HECHT: Judge Yelenosky,

1 then Nina.

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

23 HONORABLE NATHAN HECHT: Nina Cortell.

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

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

15 HONORABLE NATHAN HECHT: Justice Gaultney.

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

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

8 HONORABLE NATHAN HECHT: Justice Patterson.

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

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

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

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

13 HONORABLE SARAH DUNCAN: Yes.

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

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

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

16 HONORABLE NATHAN HECHT: All right. Judge
17 Christopher.

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

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

6 HONORABLE NATHAN HECHT: Nina.

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

15 HONORABLE NATHAN HECHT: Chief Justice Gray.

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

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

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

7 HONORABLE NATHAN HECHT: Justice Jennings.

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

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

1 HONORABLE NATHAN HECHT: Chief Justice Gray.

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

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

24 HONORABLE NATHAN HECHT: Richard Orsinger.

25 MR. ORSINGER: I prefer the third option,

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

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

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

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

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

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

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

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

25 MR. ORSINGER: Can I respond?

1 HONORABLE NATHAN HECHT: Yes.

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

25 HONORABLE JAN PATTERSON: Sometimes people

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

2 PROFESSOR DORSANEO: Frequently.

3 HONORABLE NATHAN HECHT: Judge Christopher.

4 HONORABLE TRACY CHRISTOPHER: I just don't
5 see the reason why we require -- why we would require the
6 judge to be more specific than the jury. So, for example,
7 the plaintiff puts on evidence of \$10,000 in medical
8 bills, and the jury comes back with \$5,000 in medical
9 bills, and then on appeal basically the court of appeals
10 says, "The jury is the sole judge of the credibility of
11 the witnesses and the weight it's given the testimony and
12 they had the right to cut those medical bills down to
13 5,000 if they wanted to basically because, you know, well,
14 they might not have thought that, you know, they didn't
15 need nine months of physical therapy." So why as a judge
16 would I have to specifically say, okay, well, there were
17 \$10,000 presented, but I'm rejecting this because of this
18 and I'm rejecting this because of that and I'm rejecting
19 this because of that to come up with my \$5,000? Why are
20 you entitled to more information from me than you are from
21 the 12 jurors?

22 HONORABLE NATHAN HECHT: Gene.

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

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

5 HONORABLE NATHAN HECHT: Justice Jennings.

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

17 HONORABLE NATHAN HECHT: Jim Perdue.

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

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

4 HONORABLE NATHAN HECHT: Richard.

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

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

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

1 specific, is to go broad form.

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

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

10 HONORABLE NATHAN HECHT: Sarah Duncan.

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

13 HONORABLE NATHAN HECHT: Yes.

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

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

23 HONORABLE NATHAN HECHT: Yes.

24 MR. ORSINGER: -- prefatory, too?

25 HONORABLE NATHAN HECHT: Yes.

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

16 HONORABLE NATHAN HECHT: Justice Patterson.

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

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

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

17 HONORABLE JAN PATTERSON: I agree with that.

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

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

5 HONORABLE NATHAN HECHT: Richard.

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

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

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

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

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

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

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

18 PROFESSOR DORSANEO: Could I ask a question?

19 HONORABLE NATHAN HECHT: Yes.

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

22 HONORABLE NATHAN HECHT: Yes.

23 PROFESSOR DORSANEO: -- part of that?

24 HONORABLE NATHAN HECHT: Yes.

25 PROFESSOR DORSANEO: Meaning "must"?

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

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

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

9 HONORABLE JAN PATTERSON: Judge? Judge?
10 Judge?

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

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

15 HONORABLE JAN PATTERSON: Yes.

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

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

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

25 MR. HAMILTON: "Should"?

1 HONORABLE NATHAN HECHT: "Should"?

2 HONORABLE TRACY CHRISTOPHER: Is this like
3 an alternative --

4 HONORABLE NATHAN HECHT: Yeah.

5 HONORABLE TRACY CHRISTOPHER: -- to "shall"?

6 HONORABLE NATHAN HECHT: Yeah.

7 MS. BARON: Can I make a suggestion?

8 HONORABLE NATHAN HECHT: Yes.

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

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

15 PROFESSOR CARLSON: We only need one.

16 HONORABLE NATHAN HECHT: 14-12.

17 MR. JEFFERSON: Now we know.

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

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

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

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

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

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

7 HONORABLE NATHAN HECHT: Yes.

8 HONORABLE JAN PATTERSON: Okay.

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

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

12 HONORABLE NATHAN HECHT: Yes.

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

15 HONORABLE NATHAN HECHT: We are.

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

17 PROFESSOR CARLSON: All right. Rule 297 and
18 298 we've really covered. Those deal primarily with the
19 time frame, unless anyone has a suggestion for inclusion.
20 I think they're substantially the same as our current
21 practice, but the time frames have changed.

22 MR. ORSINGER: Elaine?

23 PROFESSOR CARLSON: Yes, sir.

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

1 not apply to (b) --

2 PROFESSOR CARLSON: Yes.

3 MR. ORSINGER: -- or did I misunderstood?

4 PROFESSOR CARLSON: It would. It would.

5 MR. ORSINGER: Okay.

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

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

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

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

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

20 MR. GILSTRAP: Okay.

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

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

1 additional amended findings," okay. All right.

2 MR. LOW: Satisfied? Okay. Anybody else?

3 All in favor? Bill.

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

11 MR. LOW: Elaine, what --

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

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

17 PROFESSOR CARLSON: Of the same rule or --

18 PROFESSOR DORSANEO: Yeah, same rule.

19 PROFESSOR CARLSON: Okay.

20 MR. LOW: What do you think, Elaine?

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

23 MR. LOW: Okay. Any other suggestions?

24 Okay. What do you have next, Elaine?

25 PROFESSOR CARLSON: All right. The

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

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

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

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

25 PROFESSOR DORSANEO: Sounds like a winner to

1 me.

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

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

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

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

12 MS. CORTELL: Right.

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

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

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

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

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

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

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

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

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

9 PROFESSOR DORSANEO: No.

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

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

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

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

20 PROFESSOR CARLSON: "Has."

21 MR. LOW: "Has been," yeah.

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

25 MR. HAMILTON: Okay.

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

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

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

7 MR. DUGGINS: They're refused.

8 MR. ORSINGER: No.

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

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

19 MR. LOW: Bill.

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

25 PROFESSOR CARLSON: We can put that in.

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

3 PROFESSOR CARLSON: We can put that in.

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

6 MR. LOW: Elaine, you agree to that?

7 PROFESSOR CARLSON: Yeah.

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

12 PROFESSOR CARLSON: Okay.

13 MR. LOW: I believe Steve had his.

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

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

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

1 MR. LOW: No, I just --

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

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

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

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

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

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

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

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

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

1 MR. LOW: Okay.

2 PROFESSOR DORSANEO: Most of them.

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

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

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

18 PROFESSOR CARLSON: You're talking about
19 discretionary findings.

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

23 PROFESSOR CARLSON: Going to a ground.

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

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

5 PROFESSOR CARLSON: Okay.

6 MR. LOW: All right. Frank.

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

11 MR. LOW: Trial, yeah.

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

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

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

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

5 HONORABLE TERRY JENNINGS: Right.

6 PROFESSOR CARLSON: Conventional trial on
7 the merits.

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

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

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

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

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

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

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

15 PROFESSOR DORSANEO: How about "claim"?

16 HONORABLE TERRY JENNINGS: I like "ground."

17 MR. LOW: All right. Elaine.

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

21 MR. LOW: Give Elaine time to consider that.

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

1 PROFESSOR DORSANEO: Huh-uh.

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

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

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

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

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

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

18 HONORABLE TERRY JENNINGS: That's
19 appealable.

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

23 PROFESSOR CARLSON: Right.

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

1 rather than a jury --

2 MR. LOW: Right.

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

9 PROFESSOR CARLSON: Right.

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

15 MR. LOW: Elaine, we --

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

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

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

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

1 what is the conscious thinking about specifying factually
2 sufficient?

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

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

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

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

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

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

14 PROFESSOR DORSANEO: Okay.

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

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

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

3 MR. ORSINGER: Well, is the standard --

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

7 MR. ORSINGER: Is there --

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

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

17 PROFESSOR CARLSON: Yes.

18 PROFESSOR DORSANEO: No, not exactly.

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

22 PROFESSOR DORSANEO: Right.

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

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

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

10 MR. ORSINGER: Okay.

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

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

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

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

7 MR. LOW: Right.

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

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

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

3 HONORABLE TERRY JENNINGS: I withdraw my
4 comments, too.

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

8 MR. LOW: All right. Bill.

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

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

14 PROFESSOR DORSANEO: No, it was on purpose.

15 MR. ORSINGER: Okay.

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

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

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

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

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

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

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

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

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

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

12 HONORABLE TOM GRAY: Okay.

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

1 there.

2 Now, this is obviously a big quibble because
3 what I want to do is move a sentence from Rule 298 into
4 299 because I'm more confident that I will be able to find
5 it next time I don't know where it is if it's in 299.

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

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

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

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

18 PROFESSOR DORSANEO: Okay.

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

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

23 MR. LOW: I understand.

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

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

3 MR. LOW: Elaine.

4 PROFESSOR CARLSON: I'll work on that.

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

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

12 PROFESSOR CARLSON: Oh, yes.

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

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

18 PROFESSOR CARLSON: I will.

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

20 MR. HAMILTON: This word "additional" --

21 MR. LOW: In what rule?

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

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

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

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

7 MR. LOW: Just a minute.

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

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

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

20 MR. LOW: Right.

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

24 MR. LOW: Right.

25 PROFESSOR CARLSON: And that's why I think

1 we had the word "additional" in there.

2 MR. LOW: All right, Richard.

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

6 MR. LOW: Right.

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

25 PROFESSOR CARLSON: What's the sense of the

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

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

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

18 MR. LOW: What are you suggesting?

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

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

25 HONORABLE TRACY CHRISTOPHER: Right.

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

3 HONORABLE STEPHEN YELENOSKY: Right.

4 HONORABLE TRACY CHRISTOPHER: Right.

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

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

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

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

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

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

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

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

10 PROFESSOR CARLSON: Not if you request it.

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

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

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

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

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

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

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

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

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

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

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

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

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

24 MR. LOW: All right, Bill.

25 PROFESSOR DORSANEO: Well, looking at it

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

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

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

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

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

1 saying?

2 PROFESSOR CARLSON: Yeah, I do.

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

4 MR. PERDUE: You said "requested"?

5 PROFESSOR DORSANEO: Uh-huh.

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

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

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

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

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

23 MR. LOW: No. Tracy.

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

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

4 MR. LOW: Elaine, you have that?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

22 HONORABLE TRACY CHRISTOPHER: 299.1 or
23 299.2. I don't know, just somewhere.

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

1 PROFESSOR CARLSON: That was not part of our
2 proposal.

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

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

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

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

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

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

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

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

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

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

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

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

1 avoid a second letter.

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

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

12 MR. LOW: Ralph.

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

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

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

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

15 MR. LOW: Anybody else? Terry.

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

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

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

5 MR. LOW: Yeah.

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

9 HONORABLE TERRY JENNINGS: Right.

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

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

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

25 HONORABLE SARAH DUNCAN: I think what Judge

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

4 HONORABLE TRACY CHRISTOPHER: In five
5 percent of the cases that you will automatically get
6 somebody to send in one and then you'll wake up on the
7 50th day and say, "Oh, gosh, winner, please send me
8 something in."

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

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

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

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

16 HONORABLE TRACY CHRISTOPHER: Right.

17 MR. FULLER: Why would they not --

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

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

25 MR. LOW: All right. Elaine.

1 PROFESSOR CARLSON: I just wanted to respond
2 to Justice Christopher's suggestion. Currently under Rule
3 166 the court may as a pretrial matter request the parties
4 to make proposed findings of fact and conclusions of law.
5 I don't know if that's done regularly, but I would think
6 that would be helpful to the trial judge. I always looked
7 at this as a system where the trial judge is protected by
8 the result of presumed -- or presumed findings or omitted
9 grounds, that the litigants may not give you much to work
10 with to begin with, and they don't have to, but you get a
11 targeted request by the -- or you should -- by a litigant
12 from which you've made some findings but not all on a
13 ground or on which you've made no findings on any element.
14 The rules then require that you get the specified
15 additional or amended finding, so I guess I'm -- I guess
16 I'm not sure why that isn't working.

17 MR. LOW: Steve.

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

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

3 PROFESSOR DORSANEO: Uh-huh.

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

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

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

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

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

23 HONORABLE STEPHEN YELENOSKY: Right.

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

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

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

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

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

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

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

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

24 MR. LOW: Don't be negative.

25 PROFESSOR CARLSON: And please correct me --

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

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

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

15 PROFESSOR ALBRIGHT: What happens if you
16 don't?

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

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

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

1 HONORABLE TRACY CHRISTOPHER: -- draft
2 something.

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

5 CHAIRMAN BABCOCK: Okay.

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

13 CHAIRMAN BABCOCK: Richard Orsinger.

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

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

4 CHAIRMAN BABCOCK: Bill, then Justice --

5 HONORABLE TOM GRAY: Gray.

6 CHAIRMAN BABCOCK: -- Patterson, and then
7 Gray.

8 HONORABLE TOM GRAY: Oh, Patterson.

9 HONORABLE JAN PATTERSON: It's not always
10 Gray.

11 CHAIRMAN BABCOCK: Bill.

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

23 CHAIRMAN BABCOCK: Justice Patterson.

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

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

6 CHAIRMAN BABCOCK: Justice Gray.

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

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

25 CHAIRMAN BABCOCK: Jeff, still have a

1 comment?

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

9 HONORABLE TRACY CHRISTOPHER: You appeal.

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

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

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

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

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

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

19 MR. ORSINGER: Okay.

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

25 PROFESSOR CARLSON: Yes. Once a timely

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

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

7 MR. HAMILTON: You mean automatically?

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

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

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

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

17 HONORABLE TRACY CHRISTOPHER: Yeah.

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

20 HONORABLE TRACY CHRISTOPHER: Right.

21 CHAIRMAN BABCOCK: Okay.

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

1 case with no findings and conclusions.

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

4 PROFESSOR ALBRIGHT: Well, I mean --

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

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

14 PROFESSOR ALBRIGHT: Now what?

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

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

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

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

1 CHAIRMAN BABCOCK: Okay.

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

5 HONORABLE TERRY JENNINGS: Figure out the
6 consequences.

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

9 CHAIRMAN BABCOCK: Nina, then Bill.

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

15 CHAIRMAN BABCOCK: Bill.

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

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

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

24 CHAIRMAN BABCOCK: Okay. Roger.

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

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

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

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

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

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

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

1 law being prepared.

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

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

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

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

17 MR. ORSINGER: I can answer that.

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

21 HONORABLE TRACY CHRISTOPHER: Time and
22 money.

23 CHAIRMAN BABCOCK: Yes. Richard.

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

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

4 CHAIRMAN BABCOCK: Right.

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

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

25 CHAIRMAN BABCOCK: Is that Draconian enough

1 for you, Roger?

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

6 CHAIRMAN BABCOCK: Her former court.

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

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

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

14 CHAIRMAN BABCOCK: Lamont.

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

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

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

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

5 CHAIRMAN BABCOCK: Justice Jennings.

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

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

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

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

11 PROFESSOR CARLSON: Sure.

12 CHAIRMAN BABCOCK: This is the third
13 reading.

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

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

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

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

1 Judge Christopher.

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

4 CHAIRMAN BABCOCK: Hayes.

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

9 MR. STORIE: Right.

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

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

14 CHAIRMAN BABCOCK: Yeah, Richard Munzinger.

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

1 produce timely requested findings of fact and conclusions
2 of law.

3 CHAIRMAN BABCOCK: Nina.

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

12 CHAIRMAN BABCOCK: Okay, Hayes.

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

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

24 CHAIRMAN BABCOCK: Jeff, then Frank.

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

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

10 CHAIRMAN BABCOCK: Frank.

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

19 CHAIRMAN BABCOCK: Okay. Nina.

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

22 CHAIRMAN BABCOCK: Okay.

23 MR. FULLER: That's kind of --

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

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

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

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

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

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

23 CHAIRMAN BABCOCK: Okay. Yeah, Carl.

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

1 having the judge orally put it on the record?

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

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

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

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

21 CHAIRMAN BABCOCK: Justice Patterson.

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

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

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

17 CHAIRMAN BABCOCK: Justice Gaultney.

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

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

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

9 CHAIRMAN BABCOCK: Bill. Dorsaneo.

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

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

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

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

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

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

20 MR. ORSINGER: No.

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

23 MR. ORSINGER: Right.

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

1 CHAIRMAN BABCOCK: Richard Munzinger.

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

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

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

22 HONORABLE TRACY CHRISTOPHER: Uh-huh.

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

25 PROFESSOR DORSANEO: If the pretrial order

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

3 HONORABLE TRACY CHRISTOPHER: Time, money.

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

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

12 PROFESSOR DORSANEO: So you just give up.

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

20 PROFESSOR DORSANEO: Joe Estes would say --

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

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

8 CHAIRMAN BABCOCK: Okay. Elaine.

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

17 MR. ORSINGER: Yes.

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

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

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

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

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

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

1 presumed findings."

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

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

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

15 MR. ORSINGER: That's not been my
16 experience, but I've been, you know --

17 CHAIRMAN BABCOCK: Alex.

18 PROFESSOR ALBRIGHT: The way I remember it
19 -- and it's been a while since I've looked at it, but the
20 way I remember it is that if there is only one issue in
21 the case --

22 PROFESSOR CARLSON: Right.

23 PROFESSOR ALBRIGHT: -- then you still
24 presume that the judge found against you on that issue and
25 then you feel like they don't have to send it back for

1 findings, but once you've asked for findings you have a
2 right to findings if you have more than one issue, so then
3 that's when you get this abatement or remand to get
4 findings.

5 MR. ORSINGER: But, see, the problem the
6 appellant has, you have a dilemma, which Roger talked
7 about. If you go to the court of appeals on a motion and
8 say, "Hey, I shouldn't have to brief six alternate
9 theories of recovery in 50 pages. We ought to find out
10 from the trial judge which one they believed." If the
11 court of appeals abates, that's great, but if they don't
12 abate, you have to make a choice of whether you want to
13 submit a brief that's premised on it was reversible error,
14 not to give me findings or whether you want to go ahead
15 and brief your case to win it on the merits. I always
16 brief my case to win it on the merits, even if my first
17 point of error is it was reversible error not to give me
18 finding. Is that the way you do it, Roger?

19 MR. HUGHES: Yes. I have had to do it that
20 way, and the problem is you get to the end of the road and
21 the court may see, "Well, we really don't need findings of
22 fact now because, you know, you've fully briefed all of
23 the issues that would attack every theory that could
24 possibly support the judgment, so why do we need findings
25 of fact now? Let's just get to the merits of your

1 objections." And, you know, my response to that is "Well,
2 maybe the trial judge agreed with me on theory C and D and
3 we don't need to deal with theory C and D; and, well, once
4 again, that's like I said. Sometimes I don't find out the
5 answer to the problem until I get the opinion.

6 CHAIRMAN BABCOCK: Jeff.

7 MR. BOYD: I just wonder, since the rule
8 says, "The judge shall file findings," is there any case
9 law on mandamus and whether a court of appeals has ever
10 mandamused a judge to file them?

11 CHAIRMAN BABCOCK: Anybody know?

12 MR. ORSINGER: I don't think there is any
13 case law on it.

14 MS. BARON: No.

15 MR. ORSINGER: And as a practical matter,
16 whenever I've tried to do it over the many years it's been
17 by motion, because I already have jurisdiction in the
18 trial court, and it's -- the motion is derivative of the
19 jurisdiction that already exists. Where mandamus is
20 natural is where there's no appellate jurisdiction
21 existing and you need to create original jurisdiction, but
22 maybe mandamus would work, but then a lot of people don't
23 want to pay to have a mandamus over one little teenie
24 procedural step before they start spending all the money
25 on writing the briefs.

1 CHAIRMAN BABCOCK: Didn't we have a
2 discussion many years ago about whether or not upon
3 request a trial judge would have to state the basis for a
4 grant of a summary judgment?

5 MR. HAMILTON: Yeah, we did.

6 MR. ORSINGER: I would bet that we did
7 debate that, and this is the same argument, you know,
8 basically.

9 CHAIRMAN BABCOCK: Yeah.

10 MR. ORSINGER: If you have four different
11 grounds in the summary judgment motion and the summary
12 judgment is granted, you have to brief all four of them.

13 CHAIRMAN BABCOCK: Right. I mean, it was
14 the exact same debate, because the argument was, look, if
15 there's a summary judgment on five grounds and the judge
16 grants the summary judgment then the appellant has got to
17 brief all five grounds, but there should be a mechanism
18 where the losing party can request and say, "Hey, which
19 grounds did you grant them on?" And the trial judge would
20 then say, "Oh, I did it on one, two, and five," and that
21 way you wouldn't have to brief three and four.

22 HONORABLE TERRY JENNINGS: Or they always
23 say all five.

24 CHAIRMAN BABCOCK: What's that?

25 HONORABLE TERRY JENNINGS: Or they would

1 always say all five.

2 CHAIRMAN BABCOCK: Yeah. Presumably,
3 that's -- but, I mean, some judges might say, "No, I
4 really didn't like No. 3 very well." So --

5 MR. ORSINGER: In the summary judgment
6 context the policy is clearer than it is on a final trial,
7 but if you just grant the summary judgment, and let's say
8 we know that only grounds two -- one and two were upheld
9 by the trial court and grounds three, four, and five were
10 really rejected. We know that, but it's not in writing.

11 CHAIRMAN BABCOCK: How do we know that?

12 MR. ORSINGER: Well, I'm trying to set my
13 argument up. So let's call it a hypothetical.

14 CHAIRMAN BABCOCK: So osmosis we know that.

15 MR. ORSINGER: So just imagine that -- well,
16 without saying that, let's say there are five grounds, and
17 the motion is granted, but if they had been forced to
18 specify they would have specified grounds one and two.
19 The appellate court can say, "Well, the summary judgment
20 was wrong on grounds one and two, but it was okay on
21 ground four, so no reversible error."

22 CHAIRMAN BABCOCK: Right.

23 MR. ORSINGER: If you force the trial judge
24 to say, "I denied it on grounds three and four and five
25 and granted it on one and two," does the appellate court

1 then have the right to say, "Well, one and two, which you
2 actually did rely on, are wrong. We wipe them out, but
3 we're going to go ahead and overturn your rejection of
4 ground No. 3," because in truth, all we're trying to do is
5 correct error. We're not -- I mean, theoretically we're
6 not here to pick winners and losers. We're trying to
7 correct errors.

8 CHAIRMAN BABCOCK: Wouldn't the appellee
9 have to cross-appeal under your hypothetical?

10 MR. ORSINGER: Yes. And so --

11 CHAIRMAN BABCOCK: And then the court could
12 do that.

13 MR. ORSINGER: In fact, I think the Supreme
14 Court has even discussed this in cases, but I know we
15 discussed it on this committee. Yes, it does make the
16 appellant's job easier to overturn a summary judgment if
17 you know which grounds they were granted on, but the
18 appellate court's job is to reverse bad judgments, not
19 just to reverse wrongly reasoned judgments that happen to
20 be correct, and so you would think on summary judgment you
21 would want the appellate court to be looking at all the
22 grounds, even the ones that weren't granted, which I think
23 the Supreme Court has ruled that, but it's been a long
24 time.

25 HONORABLE NATHAN HECHT: I'm thinking

1 Delaney against City of Houston, or it might have been the
2 other way around, but we said that you could do it,
3 although the court of appeals might not want to do it
4 because they might rather have the trial judge look at it
5 first. Just depending on the size of the record, the
6 trial judge might decide for prudential reasons, you know,
7 summary judgment shouldn't be granted, it's just too
8 complex, I can't really tell for sure. You know, there
9 might be a lot of reasons why a trial judge might not
10 grant the motion, and if he just said, "I didn't reach
11 it," you might send it back to him to reconsider or her.
12 But you could.

13 MR. ORSINGER: I think the policies are
14 similar but more obscure in a final judgment because if
15 you have alternate theories of recovery and it's ruled one
16 way but for a reason not relied on by the trial court,
17 that was the correct judgment. Do we want to reverse it
18 and send it back down even though it could be justified on
19 an independent ground that was unsuccessful but the
20 appellate court finds would have been sufficient to
21 support the judgment? It's a more obscure argument, but
22 it's the same argument.

23 CHAIRMAN BABCOCK: Right. Okay. We got any
24 more votes to take?

25 PROFESSOR CARLSON: No, I'm done.

1 CHAIRMAN BABCOCK: No?

2 PROFESSOR CARLSON: Thank you, everybody,
3 for your comments. I will read the transcript and work on
4 a rewrite.

5 CHAIRMAN BABCOCK: Okay. Great.

6 HONORABLE JAN PATTERSON: Do we have in
7 there sufficiently that we ought to provide varieties of
8 ways to give findings of fact, including oral, and
9 consider the Federal rule. Is that --

10 PROFESSOR CARLSON: I can do that.

11 HONORABLE JAN PATTERSON: It just seems to
12 me that we shouldn't have side litigation over findings of
13 fact, that it is something that's helpful to the appellate
14 courts, it should be facilitated. However, it should be
15 done, whether it's oral and brief, and in some cases you
16 only need three to five findings of fact perhaps, but it
17 seems to me that we ought to be in the position of
18 facilitating this process in some way. That's my only
19 concern. I'm not sure which direction we're headed.

20 CHAIRMAN BABCOCK: Well, it seems to me that
21 the Court would want to know any kind of improvements
22 which -- and that might or might not be an improvement,
23 but I'm always worried about that myself in Federal court
24 when a judge sits up there and reads some stuff into the
25 record, because I worry that they missed things, and

1 there's some things that they should find and they haven't
2 found yet.

3 HONORABLE JAN PATTERSON: That's true, but
4 if the only option is to not have them or to have side
5 litigation over them once it goes up, I wonder whether
6 that's not a better alternative; and I know that we have
7 moved this way on the criminal side, that there is case
8 law that if findings were not made that -- and they were
9 requested, that we should have them and that they're sent
10 back, and that there is some allowance of oral; but I
11 just -- I think it might -- I think we deal with such a
12 variety of cases from small to large in state court that
13 we need some flexibility and that we shouldn't have a hard
14 and fast rule in all cases in all parts of the state. I
15 just don't see how that could work in this area.

16 CHAIRMAN BABCOCK: Carl.

17 MR. HAMILTON: We oftentimes say we're going
18 to try something before the court because we don't want to
19 go through the process of jury selection, the jury charge,
20 which is often very complicated, but if we're going to
21 just substitute the trial court for the jury then arguably
22 we would submit to the trial court the same jury charge we
23 would submit to the jury and just let the trial judge
24 answer it, but we don't want to have to go into all of
25 that. We want to let the trial judge shorthand all of

1 this and not have to deal with jury charges and complex
2 questions, so he ought to be able just to dictate
3 something on the record and say, "Here's what I find and
4 here's who I rule for," and that ought to be the basis for
5 his ruling, and I think that the oral dictation into the
6 record is what we ought to do.

7 CHAIRMAN BABCOCK: Anybody feel that the
8 oral dictation into the record idea is a bad idea?
9 Anybody want to speak to the con side of that? Richard.

10 HONORABLE JAN PATTERSON: I think you're
11 asking a leading question, Chip.

12 CHAIRMAN BABCOCK: I am, but I'm trying to
13 speed up the discussion.

14 MR. MUNZINGER: All the presumptions on
15 appeal and all the presumptions of law that come to my
16 mind right now are that the court -- the law is interested
17 in finality of judgments, and given the many different
18 kinds of cases and the great commands placed upon our
19 trial bench, the likelihood that a trial judge would
20 dictate all the necessary findings in a correct form in a
21 complicated case is slim, I think, and you might be
22 creating problems with finality of judgments and creating
23 points on appeal to require them to do that.

24 Federal judges, recall, they have the
25 majesty of divinity behind them and, B, have all that

1 money and all those law clerks that let them do all this
2 research and all this stuff before they get to trial. Our
3 judges don't. They just -- Monday they handle a criminal
4 case, Tuesday it's a divorce, Wednesday it's an auto
5 accident, Thursday it's an anti-trust case; and that's not
6 fair to trial judges, in my opinion.

7 CHAIRMAN BABCOCK: Bill.

8 PROFESSOR DORSANEO: Well, I agree with what
9 Richard said. That's the downside, that they won't do it
10 in an -- they don't want to do it because it won't be done
11 well, so put the burden on the lawyers to do the
12 paperwork.

13 CHAIRMAN BABCOCK: Yeah. Judge Christopher.
14 Judge Christopher.

15 HONORABLE TRACY CHRISTOPHER: Well, I do
16 think that there's a -- everyone here generally deals with
17 big cases, and if a judge asks them to do proposed
18 findings of fact and conclusions of law, they do it, but
19 when we're talking about a rule -- and you know, maybe we
20 could go back to our tracks. You know, in a track one
21 case or a track two case we can do oral, findings of fact
22 and conclusions of law. In a, you know, track three it
23 needs to be written. Just so that you have, you know, in
24 a simple case you don't get bogged down with this who's
25 going to draft the findings of fact, the extra time and

1 money involved, when they're generally not really that
2 necessary. You know, I could -- at the end of a trial I
3 could say, you know, "I found in favor of the plaintiff on
4 this breach of contract. I found against the plaintiff on
5 the fraud claim, and I find damages of \$30,000," and, you
6 know, that should be enough.

7 CHAIRMAN BABCOCK: Gene.

8 MR. STORIE: I agree with those comments. I
9 think the problem would come if the oral findings were
10 exclusive in some way, because I've certainly had bench
11 trials where the judge said, "Okay, I'm ruling for you and
12 in your" -- you know, "I'll ask you to propose or prepare
13 findings" or something like that, but in any event the
14 judges say, "Well, these are my findings, and someone can
15 submit more or possibly amend them, too." But if it's
16 exclusive and the judge has to say it all right then,
17 that's bad, but the good point about making oral findings
18 is that gives the judge a chance to say right then and
19 there while everything is fresh what the judge really had
20 in mind so that three weeks or four weeks later when
21 somebody has got to draft actual findings they'll know the
22 direction they should be taking.

23 CHAIRMAN BABCOCK: Judge Peeples.

24 HONORABLE DAVID PEEPLES: Gene said a lot of
25 what I wanted to say. I could go with oral findings if,

1 number one, there are presumed findings to fill in the
2 gaps that support the judgment and, second, if written
3 findings later can negate the oral findings. I think we
4 would want both of those.

5 CHAIRMAN BABCOCK: Carl.

6 MR. HAMILTON: You could always provide that
7 the -- after the judge says what the findings are the
8 lawyers could also ask at that time for additional
9 findings orally, and if the judge wanted to agree to them
10 they could so that it all gets done orally.

11 CHAIRMAN BABCOCK: Richard.

12 MR. ORSINGER: An advantage to this process
13 is that it's actually the judge's findings, because in
14 most of the cases that I'm experienced with it's really
15 the winner's findings that the judge just countersigns.
16 So if you're going to get it from the bench at the
17 conclusion of the hearing when the evidence is fresh,
18 those will -- that will actually be the thinking of the
19 judge, and so that could be a really important policy
20 reason to allow it, because if you just do it the way
21 we're doing it now it very seldom reflects the true views
22 of the judge. It's just the views of the victor who wants
23 to do everything they can to sustain their victory.

24 CHAIRMAN BABCOCK: Okay. Justice Gaultney.

25 HONORABLE DAVID GAULTNEY: I have some

1 concerns that have already been expressed about oral
2 findings. I'm not opposed to them, but I think that if
3 we're going to permit it we ought to make it clear that
4 that's, in fact -- the judge ought to have some guidance
5 in terms of making it clear on the record that that's
6 exactly the exercise that he or she is engaged in at the
7 time as opposed to simply thinking out loud.

8 CHAIRMAN BABCOCK: Yeah. Well, it's --
9 yeah, Buddy. Sorry.

10 MR. LOW: Well, one thing, if we want to
11 tell or reveal, the same thing would be revealed in a jury
12 trial that the rules require the court to prepare the
13 charge. That's not the way it happens. The court has a
14 charge conference. If you want findings of fact and
15 conclusions of law, why couldn't the judge just have a
16 findings of fact and conclusions of law, and you submit
17 like you do your charges? And then you're going to be
18 there and you're going to submit what you think they are,
19 and the court can review them just like he does the charge
20 to a jury.

21 CHAIRMAN BABCOCK: Well, it sounds like
22 there's some significant support for the oral findings, at
23 least to allow some flexibility on that, so I guess,
24 Elaine, as you're going back over this, you might -- you
25 and your subcommittee might look at that.

1 PROFESSOR CARLSON: I just have three final
2 words.

3 CHAIRMAN BABCOCK: Three final words, okay.

4 PROFESSOR CARLSON: Groundhog Day.

5 CHAIRMAN BABCOCK: Groundhog Day.

6 PROFESSOR CARLSON: Back to the drawing
7 board.

8 HONORABLE JAN PATTERSON: Or is that
9 hyphenated? How many words is that?

10 CHAIRMAN BABCOCK: Justice Hecht has asked
11 us to skip forward to item six, which is Orsinger, just as
12 item four is, so he won't feel slighted since he gets to
13 talk either way, and that is the notice to the Attorney
14 General when the constitutionality of a statute,
15 ordinance, or franchise is challenged in litigation; and I
16 wondered if the exclusion of a rule of court was
17 intentional on the theory that perhaps this committee
18 would never, nor would the Court, sanction an
19 unconstitutional rule.

20 MR. ORSINGER: I didn't understand your
21 question, Chip.

22 CHAIRMAN BABCOCK: The proposed rules
23 requiring notice to the Attorney General when the
24 constitutionality of a statute, ordinance, or franchise --

25 MR. ORSINGER: Oh, you're talking about

1 constitutionality of a rule?

2 CHAIRMAN BABCOCK: Yeah.

3 MR. ORSINGER: So this is a quest of who
4 guards the guards and who judges the judges?

5 CHAIRMAN BABCOCK: Well, it just occurred to
6 me.

7 MR. ORSINGER: Well, I would suspect that
8 the Attorney General doesn't want to have to defend the
9 constitutionality of our rules.

10 CHAIRMAN BABCOCK: Why not? Somebody's got
11 to do it.

12 MR. ORSINGER: Well, we're lucky to have
13 with us today the Solicitor General of the State of Texas,
14 James Ho, in the back of the room here. I'll introduce
15 him to everyone. You can ask him if he wants to add that
16 to his plate.

17 CHAIRMAN BABCOCK: Don't put him on the
18 spot, but he can hop up any time he wants.

19 MR. ORSINGER: Unfortunately James is going
20 to have to leave fairly soon, so the Attorney General's
21 office has a policy not to comment on pending legislation;
22 and they have, therefore, concluded not to comment on
23 specific rule efforts, but they do have desires. They
24 have pressures on the office. They have resources that
25 are limited, and so James is here to answer any questions.

1 I wish we had a little bit more time to lay the groundwork
2 so that the questions might come to the floor, but if he
3 has to leave in about 10 minutes I'm thinking that any of
4 you who have views about these issues or who have read
5 this packet and would like to ask any questions about the
6 practicality of the practice in Texas today or how a
7 possible change might impact the Attorney General's
8 office, if you have those ideas already, can you let it be
9 known now and we'll have James address it? If not then
10 I'll go forward with my introduction.

11 CHAIRMAN BABCOCK: Well, maybe since James
12 has agreed to come, maybe he would have some comments or
13 things he would like to say to us. So here's your shot.

14 MR. HO: I will just make one brief comment,
15 which is I don't want to pressure the committee for time.
16 I will stay as long as I can. I just needed to hit the
17 road, frankly, to vote, to vote in Dallas County. I will
18 take as much time as the committee sees fit.

19 CHAIRMAN BABCOCK: Well, as you can see, we
20 can talk forever about things, so --

21 MR. HO: Just don't deprive me of my right
22 to vote, that's all I ask.

23 CHAIRMAN BABCOCK: Okay.

24 MR. ORSINGER: I'm hoping in the run up to
25 the meeting that this packet of information made it out to

1 you, April 9th, proposed rule regarding the notice of the
2 Attorney General. Did people receive that by e-mail,
3 anyone by e-mail? Okay. Got it by e-mail, so that means
4 it got distributed. There are copies over there. This is
5 just broken down to try to streamline our discussion. The
6 information in here is, first of all, what are the issues
7 we are considering. That's Roman numeral I. Roman
8 numeral II -- and by the way, James, this packet is in
9 writing in the folders on the desk if you want them.

10 Roman numeral II is the actual Civil
11 Practice and Remedies Code provision that's current law
12 that requires notice to the AG. Roman numeral III are
13 cases interpreting the current Civil Practice and Remedies
14 Code provision. Roman IV is the Federal statute that's
15 the equivalent to the state statute. Roman V is the
16 Federal rule, which implements the Federal statute and
17 which is a model for one version of the rule the
18 subcommittee is proposing. Roman VI is a student note
19 written back in 1951 about the Federal rule when it was
20 adopted. Roman VII are comments from the Texas Solicitor
21 General in the form of James' e-mails back and forth about
22 different concerns the AG had or proposals they would make
23 about our proposed rules. Roman VIII is a proposed rule
24 to adopt here in Texas that's patterned after the Federal
25 Rule 5.1 but with a lot of deletions to reflect our

1 narrower scope, and then Roman IX is kind of a streamlined
2 version of the rule that's just made up. It's not
3 patterned after 5.1 at all.

4 On page two of the packet there's actually,
5 believe it or not, a *Law Review* article that discusses
6 this whole issue at the Federal level about the giving of
7 notice when the constitutionality of statutes is being
8 challenged, and this professor has proposed five matters
9 of policy in making these decisions. You have to decide
10 when notice is required, who provides notice, who receives
11 notice, what happens if notice is not given, and what are
12 the consequences if you broaden or narrow the notice
13 requirements. The professor just said to broaden, but in
14 one of our instances here we actually -- there's some
15 desire to narrow the notice requirement to less than what
16 the Civil Practice and Remedies Code suggests.

17 Roman II is Civil Practice & Remedies Code
18 section 37.006. It's part of the uniform Declaratory
19 Judgment Act. It only applies to declaratory judgments.
20 Subdivision (a) says join everybody that has an interest
21 that would affect the declaration, and subdivision (b) is
22 the notice requirement here in Texas. If the proceeding
23 involves the validity of a municipal ordinance, franchise,
24 then you must make the municipality a party to the
25 proceeding. If a statute, ordinance, or franchise is

1 attacked as unconstitutional, the Attorney General must be
2 served with a copy of the proceeding and is entitled to be
3 heard.

4 So that subdivision (b) there is the one
5 operative statute we have to reference when we're
6 designing a rule if we decide to adopt a rule; but
7 understand that this last three words or four words that
8 the Attorney General is entitled to be heard is also a
9 kind of a standing rule; and it's kind of an intervention
10 rule, because it implies that the AG has standing to
11 participate in or be heard in private litigation that
12 impacts constitutionality of statutes or ordinances or
13 franchises; and it, likewise, at least insinuates that
14 they can intervene in the proceeding and become a named
15 party; and they do that a lot when there's a judgment that
16 requires them to intervene for appellate purposes, but
17 sometimes I understand -- and, James, maybe I can throw
18 you a question. Does the AG's office sometimes
19 participate before judgment once you receive notice of
20 unconstitutionality?

21 MR. HO: Absolutely, and, in fact, one way
22 to frame this question is to look at the Federal rule and
23 to ask whether we want a similar rule in Texas. Under
24 Federal rules, as you note in this package, we already
25 have this notice and right to intervene, and the best

1 example is a recent example where we were in Marshall,
2 Texas, in Federal district court intervening on behalf of
3 a state statute that was being attacked as
4 unconstitutional in a purely private litigation. We got
5 notice pursuant to the Federal rule, and we did, in fact,
6 exercise our discretion to intervene. So it works already
7 in Federal law, been in Federal law for sometime. I think
8 the question before the committee is do you want a similar
9 regime in Texas law?

10 MR. ORSINGER: Okay. Let's move onto some
11 of the cases interpreting this Civil Practice and Remedies
12 Code provision, and we have to have this in context when
13 we discuss some of our policy issues. The first case
14 cited here is McPherson. It's a memo pending out of
15 Amarillo court of appeals, but if you look in the
16 paragraph at the bottom of the page, up about five lines,
17 six lines, "We conclude the trial court was without
18 jurisdiction." What happened was they failed to give
19 notice, this litigant did, to the Attorney General
20 regarding a declaratory judgment that an ordinance was
21 unconstitutional, and that court held that the failure to
22 give notice to the AG was jurisdictional, not reversible,
23 but jurisdictional.

24 And if then you go over to the next page
25 you'll see the commissioners court of Harris County case

1 out of the 14th District, and you look down at the last
2 paragraph on that case, last sentence, "We hold that the
3 requirement in section 11 of the Uniform Declaratory
4 Judgments Act" -- which is identical to our section 37.006
5 -- "We hold that the requirement is mandatory and that
6 failure to notify the Attorney General of the pendency of
7 an action under the act in which the constitutional
8 validity of a statute, ordinance, or franchise is
9 challenged deprives the trial court of jurisdiction to
10 proceed." So when we go back and ask what are the
11 consequences for the failure to notice, which is one of
12 the five proposed policy considerations proposed on page
13 one, we already have case law indicating that it's
14 jurisdictional if you fail to notice the AG.

15 The next case, *Gutierrez vs. Trevino*, if
16 you'll look at the bottom of page -- pardon me, go to page
17 five and look at footnote 6. This court, which was San
18 Antonio, said in footnote 6, "This court has previously
19 held service on the Attorney General is required even when
20 a constitutional challenge is not brought under the
21 Declaratory Judgment Act. Other courts have determined no
22 service on the Attorney General is necessary when the
23 constitutional challenge arises in the context of a
24 nondeclaratory judgment proceeding," and I asked James by
25 e-mail if there are situations in which he sometimes

1 receives notice of nondeclaratory judgment claims of
2 unconstitutionality and sometimes where he finds out later
3 on that it was litigated outside of the context and would
4 have liked to have known that it was being litigated, even
5 though it wasn't a dec action, and, James, what is your
6 view on that?

7 MR. HO: It's definitely -- as you said,
8 it's episodic. On occasion people will do it even though
9 they're not technically required to, but it is by no means
10 a universal practice, far from that.

11 MR. ORSINGER: And what is your preference
12 since the statute, the only statute we have on point, only
13 applies to the declaratory judgment actions and some
14 courts have said nonetheless notice is required in non-dec
15 actions, others have said, no, it's only required in dec
16 actions? If we had the ability to write a rule that
17 applied only to dec actions or to any civil actions, would
18 you have a preference that we expand it to include any
19 civil actions?

20 MR. HO: I think what I would say is it
21 would help our office to know what issues are out there
22 and then to be able to exercise our discretion to jump in
23 where it seems appropriate. It would be helpful to know
24 what's out there, and as in the Federal rule, if we had a
25 state rule counterpart I think that would improve our

1 ability to serve people's interests.

2 MR. ORSINGER: Okay. So that's going to be
3 one question that we need to discuss, is whether we want
4 to expand the scope of the statute so that the notice
5 requirement applies to any civil litigation governed by
6 the Rules of Civil Procedure and not just dec actions.
7 And I don't know, frankly, that we can do anything about
8 the consequence of not giving notice to the Attorney
9 General. If it's jurisdictional then possibly a rule
10 can't change that. I don't know. That might be a point
11 for us to consider, but if these courts have already
12 decided that the failure to comply with the statute is
13 jurisdictional, can we in our rule overrule those cases
14 and provide for some other sanction besides a dismissal of
15 the case?

16 CHAIRMAN BABCOCK: What's the basis for
17 saying -- what is their rationale proclaiming that it's
18 jurisdictional? Is it something found in the Declaratory
19 Judgment Act? Is it something in the Constitution? Is it
20 something in the way the courts are created?

21 MR. ORSINGER: Chip, I don't really know
22 where the -- whether the first court that so held that had
23 a rationale. I didn't read back far enough to find out
24 what was the first court that said it and whether they
25 justified it. The courts that have been writing on it

1 more recently seem to just be quoting earlier cases that
2 say that it's jurisdictional.

3 CHAIRMAN BABCOCK: Gene maybe has the
4 answer.

5 MR. STORIE: I'm going to take a guess
6 anyway; and, Jim, just be close enough to bang me in the
7 head if I say something dumb; but I know the rule used to
8 be that statutory actions, you had to strictly comply with
9 the statute; and there's a whole bunch of law on that. So
10 my guess, and it's purely a guess, is that it might relate
11 to that; and my follow-up guess would be not sure you'd
12 get the same answer today after cases like Juvite
13 Petroleum and all that stuff.

14 CHAIRMAN BABCOCK: Pam.

15 MS. BARON: Well, the Legislature after the
16 Dubai case, which said all preconditions to a suit against
17 the government that used to be jurisdictional or aren't
18 jurisdictional under Dubai are now jurisdictional. So if
19 this is considered a precondition to suit it would be a
20 jurisdictional requirement under the statute.

21 MR. ORSINGER: Well, you know, it would make
22 more sense if you were going -- if you're required to join
23 a municipality and you don't, that makes a lot of sense
24 that it's jurisdictional, but if you're just suing
25 somebody else and they're trying to invoke a statute that

1 you think is unconstitutional, it doesn't necessarily
2 follow that you don't have jurisdiction by failing to tell
3 the AG in case they decided to get in the middle of your
4 private fight.

5 MS. BARON: I agree with that, but there is
6 a statute in the Government Code now, and I guess the
7 question is what does it mean and would it encompass this
8 as a precondition to suit that's jurisdictionally
9 required.

10 CHAIRMAN BABCOCK: Preconditioned to suit
11 against the government, though.

12 MS. BARON: Right.

13 CHAIRMAN BABCOCK: And so the classic cases
14 he's talking about, the government would not be a
15 necessary party and would not be a party.

16 MS. BARON: Right.

17 CHAIRMAN BABCOCK: Yeah, Justice Patterson.

18 HONORABLE JAN PATTERSON: I think the
19 exceptions have now arisen to that statute, and so it's
20 not quite as clear I think as it was after Dubai, and I
21 wonder whether the U.S.A.A. case also speaks to that in
22 some respect.

23 MS. BARON: No, it does not. Doesn't.

24 MR. ORSINGER: If we're going to consider it
25 to be subject to the rule -- if we're going to consider it

1 to be subject to the rule, I guess we have to ask do we
2 want to say that you have to reverse and dismiss, or would
3 we allow the Attorney General to come in like they
4 sometimes do on appeal? I mean, the real issue here is
5 whether -- how do you be sure that the Attorney General
6 knows that the constitutionality of a statute is at stake?
7 If you tell the trial judge, "You can't grant a judgment,"
8 that will solve the problem because the plaintiff won't
9 get what they want unless they give the AG notice, but
10 then if it's the defendant that's raised
11 unconstitutionality, they don't want a judgment. So, you
12 know, what is their big drive to give the notice to the
13 AG?

14 CHAIRMAN BABCOCK: Does it matter if the
15 attack is facial versus as applied?

16 MR. ORSINGER: No, it really doesn't.

17 CHAIRMAN BABCOCK: Or should it?

18 MR. ORSINGER: You know, I don't think it
19 should. I mean, if the statute is unconstitutional, that
20 has an impact on everybody in Texas at least through stare
21 decisis.

22 CHAIRMAN BABCOCK: Not if it's as an applied
23 application.

24 MR. ORSINGER: Well, for all people who are
25 similarly situated, aren't they bound by the stare

1 decisis?

2 CHAIRMAN BABCOCK: Well, it certainly would
3 have precedential effect, but it's rare that two
4 situations are exactly alike.

5 MR. ORSINGER: Well, I mean, if every
6 professor at a public university in Texas is
7 unconstitutionally impacted by a certain provision, their
8 situations may be similar enough that stare decisis would
9 affect it, but to me the question here is do we want to
10 ensure that the lawyer representing the State of Texas has
11 the opportunity to intervene and argue where their view of
12 the public policy on the enforceability of the statute
13 warrants government involvement in private litigation, and
14 we know that the government is not itself bound by the
15 result of the private lawsuit by any doctrine of res
16 judicata or collateral estoppel, but it does issue a
17 precedent that has some stare decisis effect that may
18 influence subsequent decisions or subsequent trial judges.

19 So this is an option that the state Attorney
20 General has to decide is this important enough that we
21 care, and I've seen some of their correspondence. They
22 say, "We think that the rights of the parties" -- pardon
23 me, "We think that the issues will be adequately explored
24 or defended by the parties, and we choose not to
25 intervene," and other situations they do intervene, and

1 the question here is, you know, when and how often and
2 what punishment?

3 CHAIRMAN BABCOCK: Okay. Justice Gray.

4 HONORABLE TOM GRAY: I note in one of the
5 cases y'all were talking about what was the basis for this
6 and whether or not they discuss it. On page seven of your
7 memo, line one, two, three, four, five -- eighth line down
8 in talking about jurisdiction it was, as I suspected, the
9 discussion of indispensable parties; and the service on
10 the AG to bring -- to at least bring them in was
11 considered obtaining service on indispensable parties, so
12 that's why they construed it as jurisdictional. And that
13 general concept of indispensable parties, although still
14 having some breadth in the law has been severely trimmed
15 over the --

16 MR. ORSINGER: Justice Gray, that would
17 imply that the State of Texas is an indispensable party to
18 every lawsuit that raises the constitutionality of a
19 statute, wouldn't it?

20 HONORABLE TOM GRAY: Arguably.

21 MR. ORSINGER: Surely that's overbroad.
22 Surely the state ought to have the right to intervene if
23 they wish, but they shouldn't have to be joined in every
24 lawsuit that raises unconstitutionality.

25 HONORABLE TOM GRAY: Well, the way the

1 statute is worded, however, may limit that, Richard, and
2 the statute says they are served with a copy of the
3 proceeding and "is entitled to be heard." By service of a
4 copy of the proceeding they are probably at least arguably
5 made a party to the proceeding and they have the standing.
6 Whether or not they choose to exercise it is their choice.

7 CHAIRMAN BABCOCK: Jeff.

8 MR. BOYD: I think the question of whether
9 the state must be joined when the statute is challenged is
10 actually one that's unresolved in the case law and pending
11 in the court now in at least one case that I know of, but
12 in getting back to sort of the prefatory issue about
13 whether we can pass a rule that -- I mean, if the courts
14 have said this is jurisdictional, this requirement is
15 jurisdictional, I agree we can't pass a rule that says,
16 no, it's not.

17 On the other hand, the converse is true,
18 which is if we add to this rule, so, for example, we say
19 you -- if we add to this statute by passing a rule that
20 says you also must give notice if it's not a declaratory
21 judgment action, for example, we can't make it
22 jurisdictional by rule. In other words, I don't know how
23 to enforce a requirement of our rule that goes beyond the
24 requirement of this statute.

25 HONORABLE NATHAN HECHT: Well, the Federal

1 rules say the trial court can't render a judgment -- a
2 final judgment holding the statute unconstitutional unless
3 the Attorney General has been given notice, so if --

4 MR. BOYD: Does that make it jurisdictional?

5 HONORABLE NATHAN HECHT: Well, that's -- as
6 the U. S. Supreme Court has said, the word
7 "jurisdictional" has many too many meanings, and so I
8 don't know the answer to that, nor can I tell from these
9 cases exactly what they're saying, but I think by
10 providing that the trial judge can't go forward, which is
11 surely something that the rules could do, you've sort of
12 preempted the issue. That's the remedy, and if the judge
13 --

14 MR. BOYD: It's reversible, if not
15 jurisdictional.

16 HONORABLE NATHAN HECHT: Yeah. And then if
17 the judge went forward, you just send it back, and the
18 Federal Rules Enabling Act is certainly no broader than
19 the state Rules Enabling Act. So --

20 MR. ORSINGER: Chip?

21 CHAIRMAN BABCOCK: Yes, sir.

22 MR. ORSINGER: I would like to call
23 attention to the *Willard vs. Davis* case out of the Fort
24 Worth court of appeals, which is on page eight, the first
25 full paragraph there is one of these anomalous situations

1 that's in the case law where neither party pled
2 unconstitutionality but the trial judge nonetheless ruled
3 based on unconstitutionality, and the question was whether
4 the failure to give notice to the Attorney General somehow
5 made that a problem on appeal, and what the Fort Worth
6 court of appeals said is that if nobody pled
7 unconstitutionality there was no duty triggered to give
8 notice to the AG, and when the trial judge ruled that a
9 statute was unconstitutional it was not a problem because
10 the notice provision was not triggered by someone putting
11 it in a pleading or a motion or a motion for summary
12 judgment or as a response to a motion for summary
13 judgment.

14 So I know that's kind of odd and we don't
15 have to accept that as a correct statement of the law, but
16 they say, "When neither party challenges the
17 constitutionality of a statute, ordinance, or franchise,
18 neither party is required to serve the AG with a copy of
19 the pleadings, and the failure to serve the AG will not
20 deprive a trial court of jurisdiction."

21 HONORABLE TOM GRAY: Richard, just to
22 clarify the record, I think that's *Scurlock Permian vs.*
23 *Brazos County* as opposed to the *Willard vs. Davis* case.

24 MR. ORSINGER: Oh, well, then I have
25 misstated that.

1 HONORABLE TOM GRAY: I mean, you spoke
2 correctly as to what the holding of the court was.

3 MR. ORSINGER: Yes. It's on page seven.
4 I'm sorry. It was the Houston First District. Thank you
5 for pointing that out. I didn't mean to lead us in error.

6 CHAIRMAN BABCOCK: Intentionally anyway.

7 MR. ORSINGER: Same thing, only First Court
8 of Appeals.

9 CHAIRMAN BABCOCK: It would be -- it would
10 be interesting to me to know whether the Federal Rule 5.1
11 that Justice Hecht just read deals with facial attacks on
12 state or Federal statutes as opposed to applied attacks,
13 because the way the language is drafted it sounds like
14 it's referring to a facial attack; that is, the court's
15 going to say that this statute is unconstitutional on its
16 face and, therefore, should not be -- cannot be enforced
17 consistent with the -- consistent with the constitution,
18 as opposed to two private litigants are involved and the
19 court says, "Well, as applied to the plaintiff here, it
20 can't constitutionally be applied, but it's not
21 unconstitutional on its face"; and so, therefore, the
22 judge has not determined or entered a final judgment
23 holding the statute unconstitutional, only the application
24 of the statute, which makes a difference on a whole bunch
25 of things. It would make a difference to me on

1 jurisdiction. It would make a difference on how -- and
2 how serious the issue is with respect to notice to the
3 Attorney General and the consequences of failure to give
4 notice.

5 HONORABLE NATHAN HECHT: I was -- I don't
6 remember if the Federal committee discussed that issue.
7 We probably did in amending 5.1, but there's a lot of
8 scholarship, of course, of what's facial and what's as
9 applied.

10 CHAIRMAN BABCOCK: I know. And the Court's
11 been -- Supreme Court's been quite interested in that.

12 HONORABLE NATHAN HECHT: Yes, and it's sort
13 of a difficult line to discern, and I suspect that's why
14 the -- neither the Federal rule nor the comment to it
15 makes reference to it. So I don't -- I agree with you it
16 obviously affects the calculus, but I don't think -- I
17 think the Federal rule is intentionally broad.

18 CHAIRMAN BABCOCK: So you think the -- you
19 would read the Federal rule to -- it says "may not enter a
20 final judgment holding the statute unconstitutional," and
21 I can see and I can think of cases where the court -- the
22 trial court has said the statute is not unconstitutional,
23 but the application of the statute to this set of facts
24 would be unconstitutional and, therefore, can't be
25 applied. That's different.

1 HONORABLE NATHAN HECHT: It is, and I think
2 there's a question in the rule. I think the thinking was
3 it's broad.

4 MR. LOW: Chip, wouldn't there be a third
5 situation where you say the state -- they're saying it's
6 unconstitutional, you would say, "Well, it does not
7 apply."

8 CHAIRMAN BABCOCK: Not applicable law.

9 MR. LOW: Not applicable, and then the other
10 where you're saying that in this particular case we're
11 limited, it would be unconstitutional to apply it here,
12 and then the third where you say it's just
13 unconstitutional across the board.

14 CHAIRMAN BABCOCK: On its face, right.

15 MR. LOW: Yeah.

16 CHAIRMAN BABCOCK: Right. Gene.

17 MR. STORIE: Well, I have had several
18 varieties of experience with this, so I would say for one
19 thing I don't read the notice as requiring or suggesting
20 intervention because the Attorney General can also show up
21 and has shown up in the capacity of amicus. In fact, we
22 had a case that Justice Jennings wrote on where I filed
23 one for the agency. You also will see pleadings, for
24 example, let's say the statute would be unconstitutional
25 if construed in the manner suggested by, say, the taxing

1 authority, and so whether that's really as applied or on
2 the face I'm not sure, because I guess it depends on how
3 the Court ultimately construes the intent of the
4 Legislature.

5 So you get several variations on the theme,
6 and I do absolutely think that a broader notice provision
7 is better because, again, using the property tax cases as
8 an example, we would sometimes hear about those and get a
9 chance to show up; but if the taxpayer says "Well, I'm not
10 paying because it's unconstitutional" then that doesn't
11 necessarily raise the declaratory judgment claim, but
12 sometimes we would get notice of that, sometimes not, but
13 purely on a sort of capricious basis of who the counsel
14 were; or if they just did say that, in fact, it should be
15 declared unconstitutional then we would. So I do think
16 the broader approach is better to have the Attorney
17 General say what the Attorney General thinks about the law
18 when the constitution is in question.

19 CHAIRMAN BABCOCK: Yeah. I think, of
20 course, we're all worried about our own personal
21 experiences. When we challenged the advertising rules in
22 Federal court we did give notice to the Attorney General,
23 maybe some other people, too, and the Attorney General
24 chose not to get into the fight, but let's say we hadn't,
25 either because the lawyers for the plaintiffs were dumb or

1 overlooked it or something. It seems somewhat Draconian
2 if a Federal judge goes to all the trouble to try the
3 case, write a 50-page opinion, and then all of the sudden
4 you say, no, he didn't have any jurisdiction because
5 somebody forgot to give notice. Yeah, Buddy.

6 MR. LOW: Also you don't know until you've
7 tried the case. The notice has to be given before. You
8 don't know whether the judge is going to say on its face,
9 you know, factually doesn't apply or what.

10 CHAIRMAN BABCOCK: Yeah, but you can plead
11 that way.

12 MR. LOW: You can plead, but the Attorney
13 General, if they're given notice then they can determine
14 whether they -- in their judgment they think it's what it
15 is.

16 CHAIRMAN BABCOCK: Right. And a judge, some
17 Federal judges, can go beyond the pleadings --

18 MR. LOW: Yeah, that's right. That's right.

19 CHAIRMAN BABCOCK: -- and say, "I know
20 you've only made an as-applied attack, but I'm looking at
21 it, and it's facially" --

22 MR. LOW: They very well can. As long as
23 it's in there it can be raised in any capacity during the
24 trial.

25 HONORABLE NATHAN HECHT: Let me ask --

1 CHAIRMAN BABCOCK: Justice Hecht.

2 HONORABLE NATHAN HECHT: Could I ask Jim one
3 question? Would the Attorney General ever intervene in
4 state court to argue that a state statute was
5 unconstitutional?

6 MR. HO: I don't want to say never. That
7 would be obviously not frequent, but if you're asking
8 situations where one of the parties calls a statute
9 unconstitutional and we're asked to weigh in or we're
10 given the opportunity to weigh in, certainly that's
11 definitely an option. It would not be our traditional,
12 customary function. Frankly, often what would happen is
13 if we felt uncomfortable, we might just not intervene at
14 all, but it's possible.

15 HONORABLE NATHAN HECHT: It is not a
16 confinement of the Attorney General's office to defend the
17 statute. If he thinks it violates, for example, the U.
18 S. Constitution, he can take that position in state court.

19 MR. HO: If you're asking whether we
20 consider ourselves to have the discretion to take any
21 number of these positions, yes, I think we would assert
22 that discretion.

23 CHAIRMAN BABCOCK: Yeah, Lonny.

24 PROFESSOR HOFFMAN: I guess my comments --
25 two. First is I'm sort of reminded of another statute

1 about notice which arises in a different context, not
2 about challenging constitutionality but on the Federal
3 side, the Federal Class Action Fairness Act has a
4 provision that requires in any proposed settlement that
5 you have to give notice to both Federal and state
6 officials, but there are specific provisions that are in
7 that statute that talk about the consequences of failure,
8 have to do everything with you don't have -- the class
9 members don't have to -- they're not bound by the
10 settlement. In other words, the effects are written into
11 the statute.

12 So my first comment is that this statute,
13 the Federal -- the state one -- by the way, also the
14 Federal one -- when it talks about constitutionality, it
15 doesn't speak about the consequences of failure to give
16 notice. That said, it leads to my second point, which is
17 if there are court decisions that are out there telling us
18 that that's a constitutional -- I mean, that's a
19 jurisdictional issue, are there any precedents where this
20 body would make a recommendation for a rule change that
21 could potentially be broader than the statute? That would
22 seem to be kind of ultra vires for us, I would think,
23 because you have the possibility of us, you know, making a
24 rule that could potentially trump that interpretation, so
25 I would think that that would be something we would be

1 loathe to do.

2 HONORABLE NATHAN HECHT: Well, I don't think
3 of a specific case, but if the statute doesn't specify the
4 consequences, the rule certainly could, and --

5 PROFESSOR HOFFMAN: Even in the face of
6 judicial opinions saying that we read the statute to have
7 this effect?

8 HONORABLE NATHAN HECHT: I think even in the
9 face of that.

10 PROFESSOR HOFFMAN: Okay.

11 CHAIRMAN BABCOCK: Roger.

12 MR. HUGHES: Well, two things. I agree. I
13 don't think a proposed rule ought to get into the business
14 of advising the Court or deciding what the effect of
15 failure ought to be other than what was proposed in the
16 rule, you can't enter a judgment until it's granted. I
17 think it would be better off for the courts to work that
18 out on a case-by-case basis. What I did want to speak to
19 was I looked at the proposed rule, and it creates an
20 exemption that the rule doesn't apply if the state of
21 Texas, one of its agencies, or one of its officers or
22 employees is involved in the suit. I assume that's sort
23 of a presumption that when you're suing one of Texas' own
24 they'll tell the Attorney General.

25 I think that might be looked at, part of the

1 rule might be looked at, because, for example, if it would
2 apply to any low level officer and employee; and I think
3 it might be wiser that if we're going to create an
4 exemption it ought to be as tight as possible and
5 restricted to cases in which either the Attorney General
6 is already representing somebody, the State of Texas or a
7 state level agency; and the reason we get into this, I
8 know in 1983 cases we have -- there are real -- Federal
9 civil rights cases, there are real fist fights over when
10 you're suing the state or not, because there's an 11th
11 Amendment problem and certain other issues. So you'll
12 find scads and scads of cases trying to decide, well, is
13 this particular department or agency an arm of the State
14 of Texas or not, et cetera, et cetera, and they get into
15 all these classifications. So I think if -- if the
16 purpose of creating an exemption is simply not to require
17 a useless act, we ought to draw it as narrowly as possible
18 rather than as broadly as possible.

19 CHAIRMAN BABCOCK: Which would be different
20 than the Federal, what Justice Hecht just said was the
21 objective of the Federal rule.

22 MR. HUGHES: Well, I'm saying if we create
23 an exemption saying, "In the following cases the rule
24 doesn't apply," it ought to be more restrictive --

25 CHAIRMAN BABCOCK: Okay, I'm sorry.

1 MR. HUGHES: -- so that we're sure, rather
2 than broader and creating situations where because you're
3 suing the janitor the state has, he didn't tell the AG.

4 CHAIRMAN BABCOCK: Yeah, I'm with you.
5 Bill, and then Ralph, and then --

6 PROFESSOR DORSANEO: In response to Lonny's
7 question, I thought whenever the Texas Supreme Court makes
8 a rule that's the equivalent of every other kind of
9 decision that the Court makes and has the same effect as a
10 court decision, so there wouldn't be any impediment to
11 eliminating lower courts' interpretations.

12 CHAIRMAN BABCOCK: Okay. Ralph.

13 MR. DUGGINS: What was the origin of
14 proposed 58.3(d), the rule Roger was just commenting on?

15 MR. ORSINGER: You're on page 16?

16 MR. DUGGINS: Page 17, the very last
17 paragraph.

18 MR. ORSINGER: Well, Frank Gilstrap is the
19 one who --

20 MR. GILSTRAP: Which one, (d)?

21 MR. DUGGINS: (d) as in dog.

22 MR. GILSTRAP: That was the exemption.
23 That's based on the exemption in Federal Rule 5.1, which
24 the idea is if the Attorney General is already in the case
25 then you don't need to give him notice.

1 MR. DUGGINS: But what happens when you -- I
2 understand as to the Attorney General being in the case,
3 but what happens if it's a suit against an agency or an
4 agency official which has its own legal department that
5 handles matters and may or may not communicate that to the
6 AG?

7 MR. GILSTRAP: I think that boils down to a
8 practical question of whether or not the Attorney General
9 would get notice in that case. You know, we had the
10 comment that we ought to draw the exemption as narrowly as
11 possible. Frankly, I don't see any harm in leaving the
12 exemption out as long as the courts take the commonsense
13 approach that if the Attorney General is already in the
14 lawsuit --

15 CHAIRMAN BABCOCK: Probably got notice.

16 MR. GILSTRAP: -- that then he probably has
17 notice.

18 HONORABLE NATHAN HECHT: It looks to me like
19 -- Frank, is this right, you took 5.1(a)(1) --

20 MR. GILSTRAP: Yes.

21 HONORABLE NATHAN HECHT: -- and just moved
22 it down to here?

23 MR. GILSTRAP: That's right. That's right.

24 MR. DUGGINS: Well, does that -- James, is
25 that an issue where you sometimes have an agency legal

1 department handling a matter and your office doesn't hear
2 about it?

3 MR. HO: There are some agencies that have
4 their own representation either formally -- like Child
5 Protective Services, for example, generally has their own
6 litigation departments. Other agencies we generally
7 defend, but there may be episodic situations where they'll
8 want outside counsel, but I agree with Justice Hecht. I
9 think this language you-all took from 5.1, I read that
10 provision as trying to faithfully copy 5.1.

11 MR. DUGGINS: But do you think that -- would
12 you prefer that it not have the exclusion for agencies and
13 agency officers in light of the fact that you do have
14 agencies with independent law departments? If you had a
15 preference, which would it be on that?

16 HONORABLE JAN PATTERSON: Like state
17 universities.

18 MR. HO: Like?

19 HONORABLE JAN PATTERSON: State
20 universities.

21 MR. HO: We actually represent -- unless
22 there are exceptions I'm not aware of, we actually
23 represent universities in most cases, with the occasional
24 outside counsel arrangements, but I think to answer your
25 question, I don't have -- I can't think of any strong

1 reasons one way or the other. I think our default
2 position was 5.1 seems to have worked pretty well on the
3 Federal side, although obviously the Federal 5.1 applies
4 in states, so we've had experience ourselves living under
5 5.1 in Federal court, and so I guess as sort of a
6 prudential move, copying 5.1 as closely as possible seemed
7 like one kind of safe approach, but to answer your
8 question, I'm not sure a lot turns on this aspect. I'd
9 have to think about it more before I could answer.

10 MR. DUGGINS: One other question. Somebody
11 said earlier that they may read this proposed rule as
12 mandating that the AG become a party. You're not seeking
13 that, are you?

14 MR. HO: No. In fact, quite the contrary.
15 We want the discretion. It would be a huge taxpayer
16 resource issue if we would be forced to participate. One
17 regime of giving us the opportunity I think is something
18 that might prove helpful.

19 MR. DUGGINS: I just want to be sure about
20 that. For those in the room that used to do energy
21 practice, at one point they ruled that the department --
22 the temporary emergency court of appeals ruled that the
23 Department of Energy had to be a party to every case
24 seeking overcharges, and it just killed the Department of
25 Energy, and so they had to change the rule.

1 MR. HO: That would seem unfortunate. To us
2 I think the two core elements of 5.1 are the notice so
3 that, you know, the opportunity to know that
4 constitutional attack is taking place either by plaintiff
5 or defendant and then, two, the accompanying opportunity
6 to intervene at our discretion. Those are the two core
7 elements we saw in 5.1.

8 CHAIRMAN BABCOCK: Justice Gaultney.

9 HONORABLE DAVID GAULTNEY: Frank, if the
10 premise of the rule is to not apply if the Attorney
11 General is already in the case, can the exception just say
12 that; that is, doesn't apply if the Attorney General is
13 already counsel?

14 MR. GILSTRAP: If the Attorney General
15 already represents a party.

16 HONORABLE DAVID GAULTNEY: Yeah, represents
17 the state, one of the agencies.

18 MR. GILSTRAP: I kind of like that. I'm a
19 little leery of simply getting rid of the exemption
20 because there's these cases out there where the courts say
21 it's jurisdictional if you don't give notice, and they're
22 obviously lusting to get rid of the constitutional claim
23 anyway, and I'm a little suspicious of that approach, so I
24 think that would be the best approach. It doesn't apply
25 if the Attorney General is already in the case.

1 HONORABLE TOM GRAY: Would you include "or
2 has already been provided notice of the proceeding"?

3 MR. GILSTRAP: I don't know.

4 CHAIRMAN BABCOCK: Richard Munzinger.

5 MR. MUNZINGER: I don't sue the state often,
6 but some years ago I did, and as I recall, briefing an
7 issue I couldn't join the division of the state. I had to
8 sue the director of that particular department, so the
9 suit is styled Munzinger versus director of whatever it
10 is. How does that fit in the language of this rule? Is
11 there some rule that makes the director of that department
12 notify the Attorney General? If there isn't, have you met
13 your policy reasons by a rule that doesn't require notice
14 to the Attorney General when the suit is against an
15 officer or an employee, but the state is not a party?
16 They aren't a party. The party is Joe Schmoe, the
17 director of whatever it was I sued, and that seems to me
18 to be a problem.

19 I know in that case the Attorney General got
20 involved, but I don't know their rules, didn't know their
21 rules, and frankly didn't care about their rules. I just
22 wanted to get jurisdiction over them to do what I had to
23 do, but I do think that's a problem if you sue the
24 officer, and he is the formal party. You haven't served
25 the Attorney General. You haven't given notice to the

1 state. The state is not a party, but that department is
2 implicated by the judgment, as would the state be if the
3 claim were that some action of that department or what
4 have you was unconstitutional.

5 MR. LOW: But did you sue him in his
6 individual capacity as well as in his official capacity?

7 MR. MUNZINGER: I don't recall how I sued
8 him, Buddy. I just know that the Austin court of appeals
9 held I had jurisdiction over him, and I don't -- I'm
10 sorry, it's years ago, and I just don't --

11 MR. LOW: No, I mean, if you sue them in
12 their official capacity you're coming closer to --

13 MR. MUNZINGER: It's clear I sued him in his
14 official capacity, but whether or not -- the statute may
15 have required I send something to the AG. I just don't
16 recall, but I do recall there is this distinction between
17 suing a department of the state and suing the individual.
18 You have to sue the officer who's in charge of the agency
19 to get jurisdiction over the agency, or you had to then.

20 CHAIRMAN BABCOCK: Jim.

21 MR. PERDUE: I was just going to make an
22 observation, Chip, on what you raised on 5.1 and now what
23 would be this 53 is whether this is a facial challenge --

24 CHAIRMAN BABCOCK: Yeah.

25 MR. PERDUE: -- which makes a lot of sense,

1 because if the idea is that every piece of private
2 litigation that raises a constitutional question in a
3 pleading now has to get a letter of some sort to get a
4 rule -- I will just tell you from personal jury practice
5 right now every medical malpractice case that is filed has
6 either in a pleading or in a response some issue in the
7 case regarding the statute and whether it's
8 constitutional, whether it be open courts and almost -- in
9 every personal injury case that I can think of that has
10 got punitive damage claims in it, there is usually a
11 defense in the answer that will be a claim that exemplary
12 damages are violation, you know, on due process right; and
13 if you're -- I don't know that you're trying to capture
14 that, that every single personal injury case with a
15 paragraph either in a pleading or in a response that
16 raises, you know, "Due process is violated by plaintiff's
17 claims of exemplary damages" or plaintiff says that the
18 statutory requirement for an expert report of 120 days
19 violation of the court's rule requires that the Attorney
20 General gets a full copy of the pleading, because it's
21 just -- that's really just an issue between the two
22 parties, as I see it, not a facial attack to the statute
23 itself. So that would be a whole lot of filing into your
24 office, it seems to me.

25 HONORABLE STEPHEN YELENOSKY: You mean a

1 facial attack or a declaration?

2 MR. PERDUE: Not even -- I don't think it
3 raises a declaration. I think it kind of raises an
4 affirmative defense or as an issue, but we've already got
5 an opinion on whether the expert report requirement is
6 constitutional that -- I don't know that raised a
7 jurisdictional question of whether it was or wasn't
8 because the Attorney General got notice or not. So, I
9 mean, there are constitutional challenges obviously in
10 effect which the Attorney General has been given notice
11 of, but when you've got, you know, Joe Schmoe vs. Swift
12 Trucking and there's an issue about due process if you get
13 exemplary damages, I don't know that you're really trying
14 to propose a procedure where there has to be a cover
15 letter and that petition sent to the AG every single time.

16 CHAIRMAN BABCOCK: Yeah, there is hardly an
17 answer in a case where there's punitive damages alleged
18 that doesn't say something about the constitutionality of
19 punitive damages if in this case it gets above, you know,
20 really, one to one what is people are saying now.

21 MR. PERDUE: One to one. Yeah.

22 CHAIRMAN BABCOCK: Yeah. But Jeff, and then
23 Tom, and then Frank.

24 MR. BOYD: I think what would help us kind
25 of vet through this issue is if we read the *City of El*

1 *Paso vs. Heinrich* decision that the Court issued last year
2 because it addresses in part what Richard -- I mean, Frank
3 raised because, I mean, there's three really kinds of
4 cases here. One is what we just talked about, private
5 party versus private party; and usually in defense of some
6 claim the party says, "Well, that statute you're suing
7 under is unconstitutional." Then there are cases and what
8 Heinrich dealt with is clarifying what is an ultra vires
9 claim, what is a claim against a state officer or state
10 official -- it was Richard who was saying that -- a state
11 official where you claimed that that official is not
12 acting as required by the law that governs that official.

13 So the purpose of the suit is to require the
14 state official to comply with the requirements of the law;
15 and what the Court said in Heinrich was clarified that,
16 yes, in that kind of case, an ultra vires case, you must
17 sue only the state official, you can't sue the state
18 agency because it's sovereign immunity; but a footnote in
19 that case said but if you are suing under the Declaratory
20 Judgment Act, under 37.006, to attack the validity of the
21 statute on which the official is acting then the
22 governmental entity must be made a party; and so, I mean,
23 there's a lot of details that come into play here that
24 create a variety of scenarios that is what's, I think,
25 making it difficult to figure out how to come up with one

1 rule that addresses all the different scenarios.

2 CHAIRMAN BABCOCK: Tom.

3 MR. RINEY: I was just going to say an
4 affirmative defense attacking punitive damages as
5 unconstitutional probably isn't covered by this rule
6 because you're not specifically attacking
7 constitutionality of the statute, you're attacking the
8 process. But Jim's absolutely right on how frequently --
9 I would just say generally tort reform statutes are having
10 constitutional challenges, and I think the language of
11 this is broad enough to invoke it, and that's a lot.
12 That's a lot of cases.

13 MR. PERDUE: That's a lot of --

14 CHAIRMAN BABCOCK: That's a lot of stuff,
15 yeah. Frank.

16 MR. GILSTRAP: I agree that the language
17 clearly captures those cases. I mean, the proposed Rule
18 5.1 says, "A party that files a pleading questioning the
19 constitutionality of a Texas statute." The same thing on
20 the next page, "A party who files a pleading or motion or
21 response that alleges that a Texas statute, ordinance, or
22 franchise is unconstitutional"; and even if you go back to
23 the Declaratory Judgments Act, 36.006(b), on page two, "In
24 any proceeding that involves the validity of" -- excuse
25 me, second sentence. "If the statute, ordinance, or

1 franchise is alleged to be unconstitutional the Attorney
2 General of the state must be served with notice." I mean,
3 if you're going to exempt out private litigation, we need
4 to have some -- and I think that we need to have some
5 express language, and I think the Attorney General
6 probably wants to get notice in those cases. That's what
7 I'm sensing here.

8 CHAIRMAN BABCOCK: Yeah, Ralph.

9 MR. DUGGINS: As written, this is limited to
10 the constitutionality of a statute. James, I note in your
11 e-mail to Richard you suggest we -- this committee should
12 consider challenges to agency rules and regulations?

13 MR. HO: If I was unclear, I'll try to --

14 MR. DUGGINS: No, I'm not suggesting you
15 were. That was your --

16 MR. HO: We were suggesting that obviously
17 so the committee can consider it or --

18 MR. DUGGINS: And I think we should consider
19 that while we're looking at it.

20 CHAIRMAN BABCOCK: Okay. Roger.

21 MR. HUGHES: I realize the force of what
22 everyone is saying about the length and breadth of where
23 constitutional issues are popping up, either as, you know,
24 a defense or, you know, a repost by plaintiffs in personal
25 injury suits and tort reform, but once again, I go back to

1 I see this as a notice rule. I think we can leave it up
2 to the Attorney General or the Solicitor General to decide
3 on a policy basis whether they want to get involved in
4 these cases as amicus or leave them alone and wait until
5 they percolate up into the system.

6 As a suggestion, a corollary might be to
7 enact a similar rule in TRAP so that if a case is going to
8 be presented to one of the courts of appeal or Supreme
9 Court, the Attorney General will be similarly notified
10 because, number one, while a ruling by, you know, a judge
11 in Willacy County or someplace might not carry a great
12 deal of weight at one point, certainly an opinion from the
13 court of appeals might be -- might be something that the
14 Attorney General's office might want to get involved in,
15 so that they can monitor issues and watch them. So that
16 would be another suggestion.

17 CHAIRMAN BABCOCK: Okay. Yeah, Richard
18 Munzinger.

19 MR. MUNZINGER: My memory is that there is a
20 provision in the Texas Trust Code or the Property Code --
21 and I'm sure y'all could tell me if I'm right -- that the
22 Attorney General is required to be notified in litigation
23 involving trusts.

24 PROFESSOR DORSANEO: Charitable trusts.

25 MR. MUNZINGER: And they're never made --

1 they may become parties or not become parties, but you
2 have to give them notice and then if they choose they want
3 to come in and fight over it or your interpretation of
4 trust bothers them or what have you, they're entitled to
5 come in, and that's essentially every trust, isn't it?

6 MR. BOYD: Charitable.

7 MR. HO: Yeah, charitable.

8 MR. MUNZINGER: I understand, but, I mean,
9 there's a whole bunch of charitable trusts.

10 CHAIRMAN BABCOCK: All right. Last comment
11 before we break for our afternoon session and let Jim go
12 vote in Dallas. Judge Yelenosky.

13 HONORABLE STEPHEN YELENOSKY: I apologize
14 for missing the beginning, but in whispering to Tracy it
15 sounds like this hasn't been covered. As long as we're
16 doing a notice provision and the consequence is not
17 jurisdictional, no harm done, but if it's jurisdictional
18 then we need to be very, very careful.

19 CHAIRMAN BABCOCK: That's what I was trying
20 to say earlier.

21 HONORABLE STEPHEN YELENOSKY: Maybe I missed
22 that.

23 CHAIRMAN BABCOCK: All right, one final
24 final. Nina.

25 MS. CORTELL: If I could just ask one

1 question of Jim, because I do think Jim Perdue's point is
2 well-taken, and that is there are thousands and thousands
3 of suits that will if you look at it very broadly bring
4 into question the constitutionality of a statute,
5 particularly as applied, as opposed to a direct attack
6 against a statute facially; but if the Attorney General's
7 office wants that notice, I would say fine, so to me it's
8 a question of what the office wants.

9 MR. HO: Sure. Well, I think there are two
10 values that we're trying to -- that's why I think there
11 may be actually a way to accommodate everybody's concerns,
12 and on the one hand, you know, at the end of the day the
13 more information the Attorney General's office has, the
14 more we can make wise decisions in terms of litigation.
15 On the flip side, yes, absolutely we don't want to
16 overburden lawyers or litigants. No question of that. I
17 think the rule as has been drafted includes an electronic
18 notification option, which I hope and expect to keep the
19 burdens on litigants to a minimum, particularly for those
20 who have these sort of frequent recurrences. It would be
21 a matter of telling your secretary, you know, "Do the
22 standard e-mail," if you will, you know, so please let me
23 know if we should discuss or if that's not sufficient, but
24 it seems like there may be ways to make this really
25 nonburdensome for the parties.

1 MS. CORTELL: From your perspective, from
2 the Office of Attorney General's perspective, you're not
3 -- you still would prefer the more expansive notice. In
4 other words, the presumption is you would prefer notice
5 and then you-all make the decision whether to get
6 involved.

7 MR. HO: Right. Especially when it comes to
8 statutes, that's something where the more information we
9 have about what's going on in the courts --

10 HONORABLE STEPHEN YELENOSKY: Do you have a
11 position on the jurisdiction question?

12 MR. HO: I don't think we do.

13 CHAIRMAN BABCOCK: Jim, do you have an
14 electronic address established for this purpose at this
15 time?

16 MR. HO: We certainly can. That is very
17 easily done.

18 CHAIRMAN BABCOCK: Yeah. Okay.

19 MR. HO: I think the rule as drafted
20 contemplates that we would.

21 MR. ORSINGER: The version of the rule on
22 page 18 has electronic notice.

23 CHAIRMAN BABCOCK: Yeah, I know. Yeah.

24 MR. ORSINGER: The version on 17 doesn't,
25 but we can put it there.

1 CHAIRMAN BABCOCK: Okay. Jeff, final final
2 final.

3 MR. BOYD: Does the AG also desire that when
4 it is a municipal franchise or ordinance that's being
5 challenged as unconstitutional? Does it matter to you?

6 MR. HO: It seems like it would make most
7 sense to limit it to state statutes. That addresses your
8 point and also addresses the earlier discussion about
9 rules. Our, obviously, biggest responsibility is state
10 legislative actions.

11 CHAIRMAN BABCOCK: Okay, great. Let's take
12 our afternoon break. Jim, thanks so much for staying.
13 You're welcome to stay longer, but not if you're going to
14 get to Dallas on time.

15 (Recess from 3:15 p.m. to 3:46 p.m.)

16 CHAIRMAN BABCOCK: All right, Richard, what
17 else do you want to say about this rule?

18 MR. ORSINGER: Well, one thing that we
19 haven't mentioned so far is that the Federal rule requires
20 the Federal court -- and so does the statute, I might add
21 -- requires the Federal court to give notice to the
22 affected Attorney General as well, which I think anyone
23 who thinks about the state practice knows that that's
24 impractical because they don't have the staff; and of the
25 3,000 cases on the typical district judge's docket, unless

1 somebody calls it to their attention, they wouldn't even
2 know if the pleadings raised constitutionality; and here
3 they are, you know, ruling on a summary judgment or
4 something, and they have no idea.

5 CHAIRMAN BABCOCK: Yeah.

6 MR. ORSINGER: During the break we had some
7 discussion that it's probably impractical to perpetuate
8 the idea that this notice is jurisdictional. Among other
9 things, if it's truly jurisdiction, the judgment would be
10 subject to collateral attack; and so that means that if
11 you didn't like your judgment you could come in two or
12 three years later, rifle through the file, find out that
13 there was no notice to AG, and then, voila, it's a void
14 judgment. So it's probably never going to be upheld at
15 the gift of the Supreme Court, and we should probably not
16 assume a constraint. I mean, here I am talking like I
17 have some sort of influence over the law, but Justice
18 Hecht might.

19 CHAIRMAN BABCOCK: Richard, you are an
20 architect of Texas law.

21 MR. ORSINGER: I would --

22 CHAIRMAN BABCOCK: You and Gilstrap, the two
23 of you.

24 MR. ORSINGER: This might be an
25 inappropriate thing to do, but, Justice Hecht, should we

1 assume for purposes of discussion that it will not
2 ultimately be found to be jurisdictional?

3 HONORABLE NATHAN HECHT: Well, the -- it
4 would never be designed to be jurisdictional. I mean, the
5 Court would never write a rule like this thinking that it
6 was going to be -- have any jurisdictional consequences.

7 MR. ORSINGER: Okay. So I think that we
8 could be just brave and --

9 CHAIRMAN BABCOCK: Wait a sec, he didn't
10 finish.

11 MR. ORSINGER: Oh, sorry.

12 HONORABLE NATHAN HECHT: Now, what the
13 Legislature might do, we said -- I thought we reached a
14 very reasonable decision in Lautzenheiser and said, you
15 know, as long as the people know what's going on, the
16 government is not prejudiced by the lack of notice, and
17 the plaintiff should keep his judgment; but the
18 Legislature came along and said you're suing the
19 government, you've got to play hopscotch, you've got to do
20 it all just right if it's a prerequisite to suit. Well,
21 that's fine, but I mean, surely everyone can tell since
22 Dubai that this court is very dubious about anything that
23 has any of the classic characteristics of summary judgment
24 jurisdiction, which two predominant ones are you can raise
25 it at any time and you can attack the judgment after it's

1 become otherwise final.

2 So, you know, there are just lots -- there
3 are things that that has to be true for, if the judge
4 didn't have any power to act, wasn't subject matter
5 jurisdiction; but for other things the Court does -- this
6 court does not -- and for 20 years the Court has not
7 wanted to see things be jurisdictional because the
8 consequences are just too great, so I think that would be
9 the Court's attitude about any rule that it proposed.

10 MR. ORSINGER: Okay. If you look on page
11 16, this is Jim Ho's e-mail from some inquiries I made,
12 and number three, paragraph three, he indicated that in
13 their view "unconstitutional" meant whether it's under the
14 Texas or U. S. Constitution; and in paragraph four he
15 said they would be interested in knowing not only about
16 constitution challenges on state statutes, but also agency
17 rules or regulations, which would be broader than the
18 Civil Practice and Remedies Code. And there is, of
19 course, a fundamental issue on page two about whether
20 the -- whether this should apply to all proceedings or
21 just to declaratory judgment actions; and, as you
22 remember, the courts of appeals differ on that.

23 Paragraph (a) of 37.006, "When declaratory
24 relief is sought," paragraph (b), "in any proceeding that
25 involve it is validity of," so you could see how you could

1 argue that either way. Even though it's in the
2 declaratory judgment statute, (b) seems to be quite broad.
3 I think that if we write a rule we should respect the
4 desire of the Attorney General's office, as I think we
5 understand it, that they would like to know if the statute
6 is being challenged, whether it's a declaration that's
7 sought or not; and that kind of ties in a little bit,
8 Chip, with your facial attack versus your as applied,
9 because a facial attack probably will be broad as a
10 declaratory judgment; but as applied is probably going to
11 be a defense or the basis for a tort claim or something
12 that's unique to the individual. So at any rate, Jim
13 didn't seem --

14 CHAIRMAN BABCOCK: It's a little bit a
15 matter of pleading, too, so you don't want a rule that
16 people can plead around, or at least you might not want a
17 rule that people can plead around. Ralph.

18 MR. DUGGINS: And for that reason I would
19 urge that we change the draft rule where it says "drawing
20 into question" and use "questioning," which I think is --
21 that's the Federal rule and broader to take into account
22 your circumstances.

23 CHAIRMAN BABCOCK: But it would be
24 interesting to hear what Jim has to say about, you know,
25 every med mal case that is attacking the statute as

1 applied to the facts of that case, and is that going to be
2 a big problem to give notice, Jim?

3 MR. ORSINGER: Jim is gone.

4 HONORABLE NATHAN HECHT: Jim Perdue.

5 CHAIRMAN BABCOCK: Jim Perdue.

6 MR. ORSINGER: Perdue, oh.

7 HONORABLE STEPHEN YELENOSKY: He's just
8 wearing glasses. He looks different.

9 MR. PERDUE: Yeah. I was trying to find the
10 language again because it's -- I mean, if you practice med
11 mal law, you're real used to jumping through procedural
12 hoops that sound pretty arcane, so the idea that you'd
13 just have one more out there probably isn't going to be
14 that big a deal, but, you know, Jim was talking about a
15 specific e-mail device. I mean, Tom knows as well. I
16 mean, this comes up on both sides. "Identify the statute
17 that is claimed to be unconstitutional together with a
18 copy of the paper challenging it." I just -- I mean, as
19 long as -- if that is truly what they're trying to
20 capture, that is, private litigation between two private
21 parties who have just one paragraph amongst a bunch in
22 a -- in an answer or in a pleading, you know, it's not a
23 big deal to .pdf it and send it to whatever site they
24 want, I guess. I mean, as long as it's -- the language --
25 the answer about jurisdictional has got my comfort level a

1 lot higher on the pro forma of the idea.

2 CHAIRMAN BABCOCK: Yeah. Yeah. I bet that
3 helps. I'm sorry, Richard, I didn't mean to interrupt.

4 MR. ORSINGER: That's all right. Maybe the
5 last thing is to just call everyone's attention to the
6 rule on page 18, which is written more in the style of the
7 Texas Rules of Procedure and doesn't purport to mimic the
8 Federal rule at all, but it has essentially the same
9 concepts. It's a little more elaborate. It says
10 "pleading motion, response, brief, or other paper," and
11 that "other paper" is meant to mean anything that might be
12 filed, and it's still limited to statute, ordinance, and
13 franchise. It could be broadened to include rules or
14 regulations by a state agency, and it provides for notice
15 either by certified mail or e-mail, and the notice is a
16 letter with the style of the case and identifying the
17 target of the constitutional attack, together with a copy
18 of the paper, and I think I talked to Jim about that.

19 They probably will use the letter to decide
20 whether to bother to read the pleading. I could be wrong,
21 but if it's a fairly unique application that isn't going
22 to have widespread effect on the people of Texas or
23 whatever, they might not even bother to process the whole
24 document. I don't know whether that's true or not, but he
25 did desire to have a kind of a cover sheet or a letter

1 that they could read that would tell them what was at
2 issue and then back that up with a copy of the summary
3 judgment motion or the pleading or the response or
4 whatever, and so that's just thrown out.

5 Also, there's a difference in placement.
6 The last rule on page 18 is 47a is -- Carl, can I borrow
7 your Rules of Procedure for just a second? I'm sorry.

8 MR. HAMILTON: Yeah.

9 MR. ORSINGER: Rule 47 is the rule that
10 governs claims for relief, which seemed to me to be a
11 natural place to put this. Rule 57, where Frank's located
12 the proposed rule on 17, is the rule for special act or
13 law, and it's right before pleading conditions precedent
14 as a condition to recovery. So there is some issue here
15 about exactly where would you put it and whether we want
16 to follow the Federal format or whether we want to do more
17 of a state format.

18 CHAIRMAN BABCOCK: Yeah, Ralph.

19 MR. DUGGINS: Well, since Mr. Ho is the one
20 who raised it, and I have to agree with it, I would urge
21 that we expand the proposed Rule 53(a) to include an --
22 state agency rule, other regulation, which you would have
23 to add to that. In the caption you could say, "A statute,
24 rule, or regulation," and then in proposed (a) after the
25 word "statute" insert "or state agency rule or

1 regulation." And I think "rule or regulation" would
2 follow after the word "statute" in (a)(1) and also in
3 (2)(b), as in boy, after the word "statute."

4 CHAIRMAN BABCOCK: Justice Hecht.

5 MR. DUGGINS: And I also --

6 CHAIRMAN BABCOCK: Sorry.

7 MR. DUGGINS: One last suggestion, on (d),
8 as in dog, I would strike "one of its agencies through
9 capacity" and just have it read, "This rule shall not
10 apply if the State of Texas is a party."

11 CHAIRMAN BABCOCK: Okay. Justice Hecht.

12 HONORABLE NATHAN HECHT: I wanted to add one
13 other thing in response to Jim Perdue's comment, too, and
14 that was something else that we talked about at the break,
15 which is I wonder whether something should not be added to
16 (c) or some other provision like (c) in the proposed rule
17 on 17 that would make clear that the private party cannot
18 take advantage of the failure to follow this rule, so
19 that, for example, if the plaintiff in a med mal case
20 claims that some provision of Chapter 74 is
21 unconstitutional, but he doesn't give notice to the
22 Attorney General, and he gets a big judgment and the
23 defendant appeals and then one of the appellate points is
24 that he never gave notice to the Attorney General of his
25 claim, there's not going to be any consequence to that.

1 The only person this is supposed to benefit is the
2 Attorney General, not any private party, and so if -- the
3 private party cannot take advantage of any failure to give
4 the notice provided. This is purely to preserve the
5 state's interest in the state's own courts.

6 CHAIRMAN BABCOCK: Frank, and then Richard,
7 and then Carl.

8 MR. GILSTRAP: I would agree with Justice
9 Hecht. I don't think -- I mean, there are cases that have
10 been cited in Richard's workup where the courts of appeal
11 have said that there is a challenge -- there is a private
12 challenge to a state statute, notice was not given,
13 plaintiff loses, and I don't think we can just think that
14 ultimately that's going to be rejected when it gets to the
15 Supreme Court. You know, there are 14 courts of appeals,
16 and I think between then and now I think some of them will
17 seize on these cases, and I think we do need something in
18 the rule akin to the Federal rule which says that there's
19 a requirement, but there's no penalty, or there's a
20 requirement, and the other side can't prevail on the
21 fact -- based on the fact you didn't give notice to the
22 Attorney General.

23 One other thing on the question of notice to
24 state agencies, there was an e-mail from Pete Schenkkan,
25 and I can't lay my hands on it --

1 CHAIRMAN BABCOCK: I've got it right here.

2 MR. GILSTRAP: Okay. Where he says there's
3 something in the administrative code that requires that,
4 and we just need to be mindful of that.

5 CHAIRMAN BABCOCK: Richard.

6 MR. MUNZINGER: Is the word "agency" a word
7 of art to distinguish it, for example, from a bureau, a
8 division, a commission, a board, or what have you?

9 CHAIRMAN BABCOCK: Sarah says yes.

10 HONORABLE SARAH DUNCAN: It's been
11 interpreted by the Attorney General and in some instances
12 the Legislature, but like it includes courts, even though
13 they're an independent --

14 MR. MUNZINGER: That's my point. We want to
15 be careful about the use of the word "agency" that we're
16 using the correct word.

17 MR. ORSINGER: I have an alternative
18 suggestion that may skirt that, which is "This rule shall
19 not apply if the Attorney General of the State of Texas is
20 already representing a party." Isn't the Attorney General
21 going to be a lawyer in the case and not a defendant in
22 the case, and whether you've sued the state or sued
23 somebody that's an employee of the state, the AG will be
24 representing them. So why don't we just say if the
25 Attorney General is not already representing -- "This rule

1 shall not apply if the Attorney General of the State of
2 Texas is already representing a party to the lawsuit," and
3 then that eliminates all these distinctions.

4 MR. GILSTRAP: Otherwise you have to give
5 notice.

6 CHAIRMAN BABCOCK: Carl.

7 MR. HAMILTON: If the Attorney General does
8 not get notice, can the Attorney General attack the
9 judgment collaterally somewhere or another on the grounds
10 of jurisdiction?

11 HONORABLE NATHAN HECHT: Well, I don't think
12 there should be any possibility of a collateral attack by
13 anybody; but I do think if on appeal there is a
14 constitutional issue and the Attorney General didn't get
15 notice of it in the trial court, that the court of appeals
16 ought to have the flexibility to either allow the
17 intervention in the appeal and consider the AG's argument
18 or, if necessary, which would wouldn't ordinarily be but
19 for some odd reason it was, abate the appeal and let the
20 trial judge hear anything the Attorney General want to
21 present and then proceed with the appeal; but, again, the
22 Attorney General doesn't have any interest that I know of
23 in trying to set aside judgments. Its only interest is in
24 being sure that the state's views on the constitutionality
25 of statutes is represented, is heard by people that are

1 going to decide it and not just the private parties.

2 CHAIRMAN BABCOCK: Yeah. Richard, and then
3 Justice Gray.

4 MR. ORSINGER: Couple more points. Under
5 the Federal statute on page 11 there is an actual
6 timetable, and it specifically gives the AG in the Federal
7 system the right to intervene within 60 days, and it says,
8 "Before the time to intervene expires the court may reject
9 the constitutional challenge, but may not enter a final
10 judgment holding the statute unconstitutional." So in the
11 Federal side they give the U. S. or state AG 60 days
12 after notice to intervene, and they give them an absolute
13 king's X on any adverse ruling during that period of time.
14 We're not discussing or proposing that.

15 I can tell you in my private conversation
16 with James, by the way, my approach to this was let's let
17 interventions be governed by the intervention rule and
18 let's not have a specific intervention clause for the
19 Attorney General. He would actually like to see this rule
20 give the Attorney General a right to intervene.

21 MR. GILSTRAP: So they couldn't be thrown
22 out for good cause. The court couldn't kick them out.

23 MR. ORSINGER: Yes, that's what the Federal
24 statute does. It gives them an express right to
25 intervene, and while the AG's office is not taking an

1 official position on anything, in private discussions it
2 appears they would be happy if they had a clear right to
3 intervene when unconstitutionality is an issue. That was
4 two things we hadn't discussed, and then on Pete
5 Schenkkan's e-mail -- and Pete has some experience in
6 administrative areas. He said the Uniform Declaratory
7 Judgment language -- Uniform Declaratory Act language in
8 the Civil Practice and Remedies Code does not cover
9 constitutional challenges to the validity of statewide
10 agency rules, and then he points out that James Ho in his
11 e-mail says the committee may wish to consider -- Pete
12 says, "I recommend that our rule not cover them. A
13 separate declaratory judgment statute, Government Code
14 2001.038, authorizes a declaratory judgment action to
15 determine the validity or applicability of a statewide
16 agency rule. Rule validity challenges can include
17 constitutional validity challenges as well as challenges
18 as to whether the rule is authorized by statute and
19 consistent with statutory substance requirements and
20 challenges to whether the rule was adopted in compliance
21 with the procedural rule-making requirements of the
22 Government Code.

23 "Under Government Code 2001.038 the state
24 agency must be made a party to the action, a state
25 agency," he says, "is always represented by the AG unless

1 the AG or state statute specifically authorizes other
2 representation." That is good enough for notice purposes.
3 So what Pete is saying is that there is a Government Code
4 provision about attacks on state agency regulations that
5 requires that the state agency be made a party and that
6 we, therefore, don't need to handle that problem in this
7 rule.

8 MR. DUGGINS: But he's mistaken when he says
9 that every state agency uses the AG. Parks & Wildlife,
10 for example, has its own legal staff and we sometimes do,
11 and sometimes don't use the AG.

12 HONORABLE STEPHEN YELENOSKY: But those are
13 all in Travis County and they're -- AG has always
14 represented them. I mean, the AG or in-house counsel is
15 always there.

16 MR. ORSINGER: But he says "unless there is
17 a specific statute that authorizes other representation."

18 HONORABLE STEPHEN YELENOSKY: Well, the
19 point is it's -- it doesn't need -- I think his point is
20 it doesn't need to be addressed by this rule, isn't it?

21 MR. ORSINGER: That was his point, and so
22 then the question becomes if the lawyer for the agency is
23 defending the agency's regulations, do we need to tell the
24 AG that an agency is defending its own regulations, or can
25 we let the agency defend its own regulations?

1 CHAIRMAN BABCOCK: Justice Patterson.

2 HONORABLE JAN PATTERSON: I agree with Pete
3 that they will be advised by their own counsel in some
4 form. That was why I asked Jim while ago about the other
5 agencies or institutions because, for example, the state
6 universities very often have their own staffs handle
7 litigation, but presumably they will notify the AG, and I
8 agree with Pete that they will be parties and that we
9 should not extend this to that -- that it's unnecessary to
10 extend it to the rules.

11 CHAIRMAN BABCOCK: Okay. Yeah, Gene.

12 MR. STORIE: My question, and I don't know
13 the answer, is whether a constitutional challenge to a
14 rule would come up in the course of purely private
15 litigation the way a statute might. I mean, it seems kind
16 of unusual to me because it seems like you would also have
17 some sort of exhaustion of administrative remedies issue
18 in that instance, but I really don't know.

19 HONORABLE JAN PATTERSON: I can't envision
20 one.

21 MR. STORIE: I can't think of one.

22 CHAIRMAN BABCOCK: Judge Yelenosky.

23 MR. PERDUE: Isn't it dispositive, I mean, a
24 facial dispositive resolution of it? Well, I mean, there
25 was a challenge that the -- for example, the expert report

1 120 days requirement was unconstitutional, which was
2 rejected and found that it was. The AG's office was not
3 involved in that case, you know.

4 MR. STORIE: But that's a statutory
5 requirement.

6 HONORABLE STEPHEN YELENOSKY: Yeah, he's
7 talking about --

8 MR. PERDUE: Oh, I'm sorry.

9 HONORABLE STEPHEN YELENOSKY: He's just
10 talking about rules, and on rules if our rule is not going
11 to address agency rules then why are we concerned about
12 the issue of whether it's in-house counsel or the AG who
13 is notified, because our rule isn't going to require or
14 address notification of constitutional challenges to
15 rules?

16 MR. DUGGINS: I don't think that's been
17 decided, has it?

18 CHAIRMAN BABCOCK: No.

19 HONORABLE STEPHEN YELENOSKY: Well, okay.
20 Well, then I want to make the point that we don't need to
21 address it like -- as Pete said, because it's taken care
22 of in the Government Code, isn't it, Justice Patterson?

23 HONORABLE JAN PATTERSON: I think it is, and
24 also, I was trying to think back through any possible
25 litigation where the AG would not be involved, and I think

1 even among private parties on the off chance that it might
2 involve a rule, one of those parties is going to notify
3 the AG, and they're going to --

4 HONORABLE STEPHEN YELENOSKY: Well, you're
5 certainly --

6 HONORABLE JAN PATTERSON: There's going to
7 be an incentive there, and so even in that instance -- I
8 do have this concern that the AG be consulted on these
9 because sometimes it is unsettling because you don't have
10 all the real parties in front of you, and you wonder
11 whether all of the sides are getting adequately
12 represented, but in the case of rules I cannot think of an
13 instance.

14 HONORABLE STEPHEN YELENOSKY: And there's no
15 way you would get a declaration under, what is it,
16 2001.038, because, one, it would be mandatory venue in
17 Travis County; and, I mean, we deal with that stuff all
18 the time. We're never going to do that without having the
19 AG in there from the beginning, no matter what the parties
20 think.

21 CHAIRMAN BABCOCK: Jeff, did you have your
22 hand up?

23 MR. BOYD: I'll pass for now. Thanks.

24 CHAIRMAN BABCOCK: Justice Gray.

25 HONORABLE TOM GRAY: I guess to address

1 several of the comments, the intervention, I think that
2 it's well-served to make it clear that the AG can
3 intervene and is not subject to being stricken at the
4 trial court's discretion. They talked about the
5 constitutionality being both the Federal and the state in
6 Mr. Ho's memo, and I think that that needs to be expressly
7 stated in the rule, that it is both the Federal and the
8 state constitutionality being addressed, because some
9 parties when they read that they're going to think only
10 about the Texas Constitution or only about the Federal
11 Constitution. So I think it would be well-served, and,
12 frankly, I like the format and the structure of
13 utilizing -- breaking it out into individual paragraphs
14 and subparagraphs as is done in the -- on page 17 rather
15 than where it's all run together on page 18. It's just
16 easier to comprehend and kind of get your mind around each
17 of the concepts individually.

18 And as far as the last discussion on the
19 whether or not to notify the AG on some of the challenges,
20 I think the agency rules or agency regulations should be
21 included in the rule and that the AG -- even if the agency
22 has already been notified and a party and everything, AG
23 still ought to get notice because his comment was we would
24 rather get the notice and choose not to participate than
25 not have the notice and not have the opportunity to make

1 that decision at all.

2 CHAIRMAN BABCOCK: All right. Jeff, now
3 you're revitalized.

4 MR. BOYD: So what will this rule do other
5 than perhaps require notice in a non-UDGA case? What will
6 this rule do that 37.006 and 2001.038 don't already do?
7 And that's my concern with the rule, is I'm not sure it's
8 going to require anything other than what the statutes
9 already require.

10 CHAIRMAN BABCOCK: Judge Yelenosky, and then
11 Frank.

12 HONORABLE STEPHEN YELENOSKY: Yeah. Yes,
13 and James' -- James Ho isn't here anymore, but during the
14 break I was saying if -- do they really want notification
15 on things, number one, that they're already going to be
16 represented on routinely without exception, 2001.038, do
17 they want notification in all of these things because at
18 some point it's sort of like the discovery response that
19 says, "Oh, you want that stuff? Here's the warehouse."
20 They're not going to be able to find the trees for the
21 forest if they're getting notification on all this stuff,
22 so I guess I would put the question back to him, as long
23 as we're not talking about jurisdiction, as I said, they
24 want notice, fine, but do they really want all of those
25 notices.

1 CHAIRMAN BABCOCK: I think Bill and Jim had
2 their hand up before you, Frank. Sorry. Bill.

3 PROFESSOR DORSANEO: I want to go back to
4 the intervention idea. Is this a -- what kind of
5 intervention is it? I mean, do you get the full party
6 status, or do you have your rights as an intervenor
7 limited to the extent that you can participate in the
8 proceeding insofar as it involves a question of
9 constitutionality only? What does this Federal statute
10 mean when it says the Attorney General can -- may
11 intervene? I don't think we want somebody from the
12 Attorney General's office, you know, examining all of the
13 witnesses on other issues and, you know, getting involved
14 in the case the same way of a party, a real party would be
15 inclined to do. It looks like it's an intermediate kind
16 of thing, or ought to be, rather than a standard
17 intervention, and if that's so -- or if it ought to be so,
18 something ought to be said about that if we're going to go
19 intervention rather than "entitled to be heard."

20 CHAIRMAN BABCOCK: Jim.

21 MR. PERDUE: Actually, I can address that,
22 but the first thing I wanted to observe to the
23 subcommittee was I kind of like the belts and suspenders
24 concept, and the title of your proposed 47a says -- 47a
25 says "Notice," and the first sentence makes it clear that

1 it is a notice rule as opposed to the proposed 53a, which
2 does not read purely as a notice rule. It doesn't -- the
3 first sentence doesn't talk about -- it says "a party
4 shall," as opposed to "the notice shall be given." 47
5 reads more consistent, it seems to me, with a
6 nonjurisdictional notice rule than 53. I don't know where
7 you put it, and I don't know that the structure of 53a is
8 not completely workable, but it seems like the title of
9 47a and the first sentence of 47a is more consistent with
10 the discussion.

11 I actually had the U. S. government
12 intervene under this 2403 for the limited purposes of the
13 constitutionality of a provision, and it was -- it was
14 purely a briefing question. They did not get involved in
15 the evidence whatsoever. It was -- we had -- they
16 intervened as a party for the constitutional issue.
17 Because they were a nonparty, they came in, they fully
18 briefed it. They were able to argue it. They actually
19 participated in the appeal on the issue, but it was a
20 purely legal issue. Now, I don't know that -- that was
21 just the practice of it. I don't know if there was
22 anything in a rule that would allow them to do more, but
23 they never sought to do more, so the practice under the
24 rule was let's tee the legal issue up and let them come in
25 for that purpose.

1 CHAIRMAN BABCOCK: Frank.

2 MR. GILSTRAP: Apparently, I think, pretty
3 much the whole proposal is up for discussion. I just want
4 to call everyone's attention to one more item, and this
5 has to do with the intervention. On page 17, part -- the
6 third paragraph from the bottom, when we drew this, we
7 were -- the approach we took was, well, the Attorney
8 General didn't have to have the right to intervene, he
9 already has the right to intervene subject to being
10 stricken. Now, since then the idea has been raised that,
11 well, maybe he can't be stricken, and that's a different
12 thing. So we didn't give the Attorney General a right to
13 intervene, but what we did do, excuse me, in the last
14 paragraph -- excuse me, third paragraph from the bottom,
15 (b), that's the one. We said the court could not enter a
16 final judgment until 60 days after the Attorney General
17 had been given notice, giving him the opportunity to
18 intervene.

19 Now, having said that, I'm not sure that
20 there may not be some circumstances under which the court
21 might need the power to go ahead and declare a statute
22 unconstitutional right away. I could think maybe in the
23 face of an election or something like that, so maybe the
24 hard and fast 60-day rule isn't a good idea, but that was
25 the approach we took.

1 PROFESSOR DORSANEO: Well --

2 CHAIRMAN BABCOCK: Richard Munzinger, and
3 then Bill. Then Nina.

4 MR. MUNZINGER: Does the Attorney General
5 intervene in his own name, or is it the state that
6 intervenes? If I intervene in a case as a party I'm bound
7 by the judgment if I remain in the case, and does it raise
8 problems if the Attorney General intervenes as to if the
9 state intervenes? I don't know the answer to the
10 question.

11 HONORABLE NATHAN HECHT: It's complicated,
12 very complicated.

13 MR. MUNZINGER: That's why I raise it.

14 HONORABLE NATHAN HECHT: And the short
15 answer is that the Attorney General, being a
16 constitutional officer in Texas, is not congruent with the
17 state and not just the state's lawyer. He can also take
18 independent positions, and we wrote on this about 20 years
19 ago, but more than that, it's hard to say, but that's why
20 I asked Jim earlier if they would ever take the position
21 that a statute was unconstitutional. He said they might,
22 but it would be -- obviously the way the rule is written
23 it presumes that he won't, but he's always showing up to
24 defend the statute, but I think the real answer in Texas
25 at least is that he could take the opposite position if he

1 wanted to. So he is a different -- he is different from
2 the state.

3 CHAIRMAN BABCOCK: Bill.

4 PROFESSOR DORSANEO: I would prefer that
5 proposed Rule 53 have specific language talking about the
6 Attorney General's ability to intervene for the limited
7 purpose, blah, blah, blah, rather than saying that this is
8 like every other kind of an intervention under Rule 60 and
9 61.

10 CHAIRMAN BABCOCK: Gene, then Richard.

11 MR. STORIE: It is complicated, and during
12 my 20 plus years of practice at the AG's office we would
13 sometimes intervene. We would sometimes show up as amici.
14 We would sometimes get involved at district court level.
15 We would sometimes be very equivocal about whether a
16 statute was unconstitutional because we might have
17 litigation spurred by one of our opinions that concluded
18 that the statute was probably unconstitutional, so there
19 really is a very broad landscape of possibilities on that;
20 and my idea -- which I haven't personally talked to Jim
21 about it, my idea would be this is just a way to have
22 notice to give the AG a chance to come in and talk about
23 statutes where the constitutionality is raised.

24 So, for instance, if there are a whole bunch
25 of suits that raise a particular issue, most likely

1 someone knows about that, but that clearly would be, you
2 know, a factor in the AG deciding whether to weigh in; and
3 sometimes you'll get stuff just like any of you could
4 imagine where some guy says the whole damn tax code is
5 unconstitutional. Well, fine, so, you know, maybe I'm not
6 going to spend a lot of time on that; but if I see it's
7 popped up in three or four district circuits around and
8 there's possibly even a case pending about the scope of
9 property tax issue, maybe I want to show up as an amicus
10 or maybe we want to get involved as parties, I don't know.
11 So that's kind of my overview of things.

12 CHAIRMAN BABCOCK: Okay, Richard.

13 MR. ORSINGER: Two points. Under that Rule
14 53a, paragraph (b), it only stays the entry of a final
15 judgment. It doesn't stay the entry of a temporary
16 injunction, and I discussed that with James, and he was --
17 he was not -- had no interest in this rule attempting to
18 interfere with temporary injunctions. I'm not saying that
19 we shouldn't consider it, but this is just a final
20 judgment rule, not a temporary injunction rule.

21 On Bill's point about what is your degree of
22 intervention and what will your participation be, on page
23 10 the Federal statute provides that the U. S. or the
24 state is allowed to intervene for presentation of evidence
25 if evidence is otherwise admissible and for argument on

1 the question of unconstitutionality. So the U. S.
2 Congress gives the Texas AG the right, it appears, to
3 present evidence if evidence is being taken. I don't know
4 whether we want to be that specific.

5 I myself like just the regular old
6 intervention rule, but if we're going to say that they
7 have a right to intervene and we're going to try to define
8 what that intervention is, we better have some serious
9 discussions here. Are we going to preclude the AG from
10 ever calling a witness? Is it going to be discretionary
11 with the trial judge whether they can call a witness? You
12 know, if we're going to try to get real specific on what
13 their intervention is, we're taking the discretion away
14 from the trial judge, and we should be very careful about
15 what we do.

16 MR. DUGGINS: But, Richard, I mean, isn't
17 53a silent on intervention by design?

18 MR. ORSINGER: No, I don't know. Frank, you
19 designed it, but there's been a lot of talk here about
20 having a specific intervention right.

21 MR. GILSTRAP: Yeah, it was, because we were
22 not contemplating at the time we drew it that the Attorney
23 General would want a right to intervene as a matter of
24 right and not be thrown out. We thought that it was
25 enough that the Attorney General could intervene like

1 anyone else, subject to the right of being stricken for
2 good cause.

3 MR. ORSINGER: But, see, James has made it
4 clear in his e-mails and conversation that they would
5 actually like a right to intervene just like in the
6 Federal court system and that they can't just be told to
7 leave. So then the question is if they have a right to
8 intervene, does that mean they have a right to
9 cross-examine every witness and attend every deposition
10 and take their own depositions, or do they just show up
11 and argue or what?

12 CHAIRMAN BABCOCK: What would be the good
13 cause to strike their intervention under the current rule?

14 MR. GILSTRAP: Already waited too late.

15 HONORABLE STEPHEN YELENOSKY: Yeah.

16 MR. GILSTRAP: Case has been tried, that
17 type of thing, you know, and there's still no final
18 judgment.

19 HONORABLE STEPHEN YELENOSKY: Yeah.

20 CHAIRMAN BABCOCK: Okay. Anything else?

21 MR. GILSTRAP: That's all I can think of.

22 CHAIRMAN BABCOCK: I mean, that -- you're
23 saying if you make it as a matter of right then you're
24 saying that after all the things have happened, after
25 you've tried it and, you know, you have a matter of right

1 to intervene.

2 MR. GILSTRAP: That's what they want.

3 CHAIRMAN BABCOCK: Roger.

4 MR. HUGHES: Well, I for one am not for
5 cabining or restricting the right of intervention. I
6 mean -- I mean, I don't think we should by rule limit the
7 Attorney General's office to whether they can present
8 evidence, et cetera, number one. Supposedly the whole
9 purpose to giving the state notice is so they can come in
10 and protect the statute, and I'm not sure we should get
11 into the business by rule of limiting what methods are
12 available to the Attorney General.

13 The second is I'm not particularly worried
14 that the Attorney General is going to decide to become its
15 own version of the Lone Ranger going around in these
16 lawsuits and doing right as it sees fit. They have a
17 budget like everybody else. I think they will be
18 economical and limit their activities to what's necessary
19 rather than just sort of take an interest in getting
20 involved.

21 CHAIRMAN BABCOCK: Judge Yelenosky, then --
22 Nina, did I skip you?

23 MS. CORTELL: That's okay.

24 CHAIRMAN BABCOCK: No, no, no. Judge
25 Yelenosky, sit down. Nina.

1 HONORABLE STEPHEN YELENOSKY: All right.
2 Well, I mean, this issue is sort of there now. We had
3 another district judge -- and it involves family law as
4 well -- render judgment for a divorce from the bench to a
5 same sex couple, and the AG moved to intervene afterwards,
6 and the intervention was denied, and so is what we're
7 proposing something that would dictate a different result
8 there, allow that same result?

9 MR. BOYD: There was no challenge to the
10 validity of a statute.

11 HONORABLE STEPHEN YELENOSKY: Well, that's
12 what I think the judge who ruled that way thought in part,
13 but the AG obviously thought they were entitled to
14 intervene and may be taking it higher, so --

15 CHAIRMAN BABCOCK: Nina, then Richard, then
16 Sarah.

17 MS. CORTELL: Sort of related to that point
18 maybe, the way I read it anyway, I like the language in
19 the proposed Rule 47a versus the 53a or whatever it is.
20 The language that says this all comes into play when you
21 have somebody alleging that a statute is unconstitutional.
22 I far prefer that language to "bringing into question" or
23 "questioning," with all due respect to the Federal
24 scriveners. That just is a little bit broader and a
25 little bit more ambiguous to me, so I prefer the language

1 that we proposed there. I do think if we provide a right
2 of intervention we can't go with the current title in 47a.
3 I mean, it has to be a broader title, maybe one such as in
4 53; and I, for the reasons stated by Roger and others,
5 would be inclined to agree that the Attorney General have
6 a right to intervene and that we leave it to the
7 discretion of the trial court as to the parameters of that
8 intervention. It doesn't seem -- it doesn't make sense to
9 me that we go to all this trouble to give notice without a
10 corollary right to intervene.

11 CHAIRMAN BABCOCK: You know, while you're
12 talking about the difference in that language between 53a
13 and 47a --

14 MS. CORTELL: Right.

15 CHAIRMAN BABCOCK: -- I think 47a can be
16 read to apply only to facial challenges, whereas 53a could
17 be more easily read to apply to -- as applied challenges,
18 and it doesn't matter, but we might want to be clear
19 whether we want to capture only facial or facial and as
20 applied, because there's ambiguity in both of them,
21 although I think the -- as you say, the 47a is more
22 narrow, more limited; and 53a, which is modeled on the
23 Federal rule, I think is intentionally, as Justice Hecht
24 said, broad. So Justice Hecht.

25 HONORABLE NATHAN HECHT: And the "drawing

1 into question" language, the author was the Congress, and
2 the Federal rules writers didn't think that we had any
3 discretion to deviate from the language chosen by the
4 Congress.

5 CHAIRMAN BABCOCK: But we do.

6 HONORABLE NATHAN HECHT: We do.

7 CHAIRMAN BABCOCK: All right. Richard, and
8 then Sarah.

9 MS. CORTELL: Chip, if I could just --

10 CHAIRMAN BABCOCK: Sorry, Nina. She wasn't
11 done.

12 MS. CORTELL: To your point I would just be
13 more specific, and I would say whether the challenge be
14 facial or as applied or something like that.

15 CHAIRMAN BABCOCK: Yeah, you could easily
16 say if as a matter of policy you wanted to --

17 MS. CORTELL: Right.

18 CHAIRMAN BABCOCK: -- that "a statute,
19 ordinance, or franchise is unconstitutional either on its
20 face or as applied."

21 MS. CORTELL: Right.

22 CHAIRMAN BABCOCK: If you want it to be the
23 broadest.

24 MS. CORTELL: Right.

25 CHAIRMAN BABCOCK: Richard. Sorry.

1 MR. MUNZINGER: On the question of
2 intervention, we have a rule that says you may intervene
3 subject to being stricken for cause, which would apply to
4 the Attorney General's intervention as a party.

5 CHAIRMAN BABCOCK: Right.

6 MR. MUNZINGER: Declaratory judgment action
7 statute says that the Attorney General is entitled to be
8 heard, which no doubt, I would assume, means they knew the
9 difference between saying someone is entitled to be heard
10 and someone can intervene, and it would seem to me that
11 that is a nice distinction to draw for a rule that we
12 might write, he's entitled to be heard, which would not
13 prejudice his right to intervene should he choose to do
14 so.

15 CHAIRMAN BABCOCK: Great point. Sarah.

16 HONORABLE SARAH DUNCAN: Nothing.

17 CHAIRMAN BABCOCK: No, okay. Who else had
18 their hand up? Justice Gray.

19 HONORABLE TOM GRAY: In the discussion of
20 facial versus as applied, I don't think we're intending
21 to; but we may be inadvertently changing some common law
22 in that my recollection is that you can raise a facial
23 challenge for the first time on appeal. You cannot raise
24 a facial -- as applied challenge for the first time on
25 appeal; and what we seem to be saying here, particularly

1 if we make it where it is a facial challenge, you have to
2 send notice, that could be in effect a preservation
3 requirement as well. I mean, in effect it is a
4 preservation requirement, and may change some common law
5 that we're not really thinking about changing
6 specifically.

7 CHAIRMAN BABCOCK: Yeah, that's why I said
8 to Richard earlier you may want to worry about somebody
9 pleading around your notice requirement.

10 HONORABLE TOM GRAY: Well, and which raises
11 the question of the -- in the way that 47a states it, it
12 uses the term "alleges." The problem there is that
13 actually mean it that way in a pleading, alleging in a
14 pleading, the term that I thought was -- kind of fit
15 better than what the apparently Congress wrote was just
16 "challenging" the constitutionality, a broader term
17 wouldn't be limited to, you know, alleging that a statute
18 was unconstitutional.

19 CHAIRMAN BABCOCK: Judge Yelenosky.

20 HONORABLE STEPHEN YELENOSKY: Well, I would
21 suspect that the AG wants notice of as-applied challenges,
22 too, as I was recently tutored by the Third Court when it
23 reversed me. Facial unconstitutionality is typically
24 reserved for First Amendment type of unconstitutionality.
25 When I reversed -- or rather I held that a statute was

1 unconstitutional because it provided -- it didn't provide
2 basically a hearing, it went straight from the
3 administrative agency to the court and then was on a
4 substantial evidence review, I said that was facially
5 unconstitutional. The Third Court reversed and said that
6 because you could imagine a paper review in some
7 instances, there was at least that instance in which it
8 could operate constitutionally, and therefore, it can only
9 be an as-applied challenge. So to say only facial
10 challenges would take away notice regarding lots of things
11 that the AG is probably interested in.

12 CHAIRMAN BABCOCK: Gene.

13 MR. STORIE: Yeah, I hope I'm not repeating,
14 but I've seen at least one instance where the person
15 deliberately pled it was only as applied in order to try
16 to prevent the AG from getting involved in the case.
17 So --

18 CHAIRMAN BABCOCK: Yeah. That was exactly
19 what I said, you want to be careful not to have a rule
20 that somebody can plead around for tactical reasons.
21 Yeah, Jim. Oh, Nina.

22 MS. CORTELL: No, sorry.

23 CHAIRMAN BABCOCK: Oh, you're just
24 scratching?

25 MS. CORTELL: Just scratching.

1 CHAIRMAN BABCOCK: Okay. Anybody else?

2 MR. ORSINGER: Well, since we're down here
3 to the smaller issues, we're tacitly ignoring the
4 directive in the statute regarding ordinances and
5 franchises, and it was obvious that -- on page two,
6 37.006(b). It was obvious that James Ho was not that
7 excited about getting notices on attacks on ordinances and
8 franchises, and we are -- our two versions of the rule and
9 our conversation is kind of neglecting that part of the
10 statute. Of course, the obligation is still there because
11 it's a statutory obligation, we're just not implementing
12 it in the rules. So let's just be aware of the fact that
13 we're requiring a rule-based notice for some kinds of
14 things that are in the statute and not others.

15 CHAIRMAN BABCOCK: Okay. Why are we
16 eliminating that?

17 MR. ORSINGER: Well, nobody seems to
18 really --

19 MR. GILSTRAP: They're too much trouble, and
20 we don't know what "ordinances and franchises" means. I
21 mean, an ordinance is a municipal ordinance.

22 CHAIRMAN BABCOCK: We know what that means,
23 don't we?

24 MR. GILSTRAP: I think that's what it's
25 talking about. What's a franchise? It says "a municipal

1 franchise"? Is that like a cab company?

2 CHAIRMAN BABCOCK: Cable company.

3 MR. GILSTRAP: Yeah, but they're not talking
4 about state franchises like corporate charters. See, it's
5 just not very clear, and that's kind of why we're shying
6 away from it.

7 CHAIRMAN BABCOCK: Okay. R. H., does that
8 trouble you?

9 MR. WALLACE: (Shakes head.)

10 CHAIRMAN BABCOCK: Scratching your chin?
11 Okay. Anything else? Yeah, Carl.

12 MR. HAMILTON: I just think it's a bad idea
13 if we write a rule that purportedly is supposed to be
14 implementing a statute and we leave something out like the
15 franchises and the ordinances. That's going to send the
16 wrong signal to lawyers. I think they're going to say,
17 well, under the rule we don't have to give notice, but
18 under the statute they do, so there's a conflict there.

19 CHAIRMAN BABCOCK: Well, to cure Frank's
20 problem why don't we say "Municipal ordinance or
21 franchise," paren, "whatever that means."

22 (Laughter)

23 MR. ORSINGER: We could put in a comment and
24 refer to the statute. Those who are industrious will look
25 the statute up and see it.

1 CHAIRMAN BABCOCK: That's an idea.

2 MR. GILSTRAP: And then you have kind of the
3 whole area of, well, there are other local governmental
4 entities that don't pass ordinances but do have enactments
5 that have the force of law, such as a school board,
6 policies. You know, are we not going to give notice
7 there? And those are challenged frequently, by the way.

8 CHAIRMAN BABCOCK: Okay. Yeah --

9 MR. LOW: A lot of the violation of agency
10 rules or regulation or ordinances can be involved without
11 the city or state being involved. For instance, evidence
12 of violating agency rules is evidence of negligence just
13 between private parties, or violating an ordinance is
14 evidence. The train doesn't blow its whistle like an
15 ordinance says, and railroad comes in and said the
16 ordinance is unconstitutional. So there can be other
17 attacks that the city or agency won't be directly involved
18 in, but if they don't necessarily want to see an opinion
19 that says this ordinance is unconstitutional.

20 CHAIRMAN BABCOCK: Tom.

21 MR. RINEY: I was just going to say if
22 someone is attacking the constitutionality of a cable TV
23 franchise locally, chances are the cable TV company is
24 going to let someone know locally to get them involved.
25 Same thing with a municipal ordinance. It's easier for me

1 to imagine that in some remote county in Texas the
2 Attorney General doesn't find out that a state statute is
3 being challenged than it is on a local basis with a
4 municipal ordinance or franchise. So I think that the
5 policy there could justify being different, and how do you
6 write it in there? Who do they notify? How do you take
7 care of the school boards? We can't solve everything in a
8 rule, and I think the way that we have it, which doesn't
9 specifically address municipal ordinance and franchise,
10 may just be the best we can do.

11 CHAIRMAN BABCOCK: Okay. Is the plan,
12 Richard, to take this discussion and try to meld our
13 comments into a -- some version of 53a and 47a, or what's
14 the plan going forward?

15 MR. ORSINGER: I don't think there was any
16 support for 47a other than the title and the use of the
17 word "allegation."

18 HONORABLE STEPHEN YELENOSKY: To title
19 another proposed rule or the Texas --

20 MR. ORSINGER: I think we ought to work with
21 53a, which is an amendment or a modification to the
22 Federal rule, and then we ought to probably fold in some
23 of these terms. We haven't taken votes on anything, but
24 there does seem to be some consensus or consensi or
25 whatever you call it.

1 CHAIRMAN BABCOCK: Consensi?

2 MR. ORSINGER: And bring them back here next
3 time for a clean look at the rule.

4 CHAIRMAN BABCOCK: Yeah.

5 MR. ORSINGER: On the other hand, if we've
6 used up all the time that's available for this topic, we
7 can just go draft one and submit it rather than bringing
8 it back for further discussion.

9 CHAIRMAN BABCOCK: Well, I don't know if
10 I've got an opinion on that. Justice Hecht, do you?

11 HONORABLE NATHAN HECHT: I don't yet. The
12 Attorney General asked us to take a look at this last
13 year, and we've had some other business of importance, and
14 I think they recognize that, but I don't know if there is
15 any urgency about it or not, and if not, we should just
16 follow our usual procedures, and if there is, I'll let you
17 know.

18 MR. ORSINGER: Then I would say let's draft
19 a new version that kind of reflects some of these views,
20 maybe have an alternative clause or two to put on the
21 table and bring back a clean version and take a shot at it
22 again, take shots at it again.

23 CHAIRMAN BABCOCK: Okay. Anybody object to
24 that? Let's do that then. All right. It's -- we've got
25 20 minutes to go, we've got two items. The next one is

1 recusal and then we have juror questions during
2 deliberations.

3 MS. CORTELL: We still have some from item 3
4 left over.

5 CHAIRMAN BABCOCK: Oh, we didn't finish 3,
6 sorry. Okay. Well, let's go back to that one then,
7 sorry.

8 MR. DUGGINS: Chip, that will definitely
9 carry over, if you care to adjust it.

10 CHAIRMAN BABCOCK: If I what?

11 MR. DUGGINS: If you care to adjust the
12 agenda, those discussions of new 301, 2, 3, and 4 will
13 definitely run over to tomorrow.

14 HONORABLE JAN PATTERSON: That means we can
15 cover recusal. I'm just kidding.

16 CHAIRMAN BABCOCK: In the 20 minutes
17 remaining we can cover recusal.

18 HONORABLE JAN PATTERSON: No, I'm just
19 kidding.

20 CHAIRMAN BABCOCK: Oh, okay. Well, then
21 let's go back to our third agenda item and pick up where
22 we left off, which is where?

23 MR. DUGGINS: 301.

24 MS. CORTELL: 301.

25 MR. DUGGINS: Which is Bill.

1 PROFESSOR DORSANEO: Okay. Well, 301 was
2 discussed for about a hundred or so pages at the last
3 meeting, and it's -- it had been redrafted to take into
4 account the discussion, which I read again yesterday or
5 the day before yesterday, and I've got a greater
6 appreciation of what the discussion was about than I had
7 the first time I read it, so there are some things that
8 won't be in this Rule 301 that I'm going to mention, but
9 probably before we do 301 -- and this also comes from the
10 review. It would be good to look at proposed Rule 304 on
11 page 18 because it's difficult to talk about plenary power
12 in the context of Rule 301 without knowing what the
13 plenary power rule that will replace 329b or part of 329b
14 says, and it's really pretty simple, and it's not that
15 much different. It's a little different.

16 In terms of duration, 304(b) on page 18 of
17 our draft indicates that the plenary power expires 30 days
18 after the judgment is signed, but it lasts for 105 days
19 after the judgment is signed if a party timely files a
20 motion for new trial, motion to modify, motion to
21 reinstate after dismissal for want of prosecution. It
22 actually says "until the earlier of the expiration of 30
23 days after the motion is overruled or 105 days after the
24 judgment is signed," so we don't have a 75-day overruling
25 by operation of law in this plenary power rule, which

1 maybe it was always necessary. We have overruling it, and
2 maybe it should say "by order" in the plenary power rule,
3 "or 105 days after the judgment is signed," and then you
4 have exceptions where there -- you don't need plenary
5 power, including "file findings of fact and conclusions of
6 law if a timely request has been filed." It just says you
7 don't need to have plenary power.

8 HONORABLE STEPHEN YELENOSKY: Right. Okay.

9 PROFESSOR DORSANEO: Right. So if you just
10 do that, that's an exception. That's like correcting a
11 clerical error. So that's the plenary power rule, and it
12 takes me back to Rule 301, and there are actually two
13 versions of Rule 301. The first one is more faithful to
14 the draft that we discussed last time. The second one is
15 more faithful to -- modified by me in trying to come up
16 with a good Rule 301, drafted at the meeting last time by
17 Justice Hecht to try to deal with some of the things -- to
18 deal with some of the things that we addressed, but with
19 Justice Hecht's permission I'd like to start with -- at
20 least start with the 301 draft that was discussed at the
21 meeting last time.

22 The first thing that was changed from the
23 earlier draft was to make it clear that we're talking in
24 this 301 about prejudgment motions and post-judgment
25 motions, so there is a division by subdivision. The first

1 subdivision articulates the prejudgment motions, and the
2 subdivision (b) is post-judgment motions, and that I think
3 dispels some of the complexity or by having a more
4 detailed organization makes things a little plainer.

5 The motion for judgment on the verdict draft
6 that was presented at the last meeting had as an
7 alternative in the second sentence for when the motion for
8 judgment on the verdict is overruled by operation of law,
9 which is a new concept. At the last meeting it was "as to
10 any requested relief not granted by a final judgment under
11 Rule 300" and then there was an alternative, "or on the
12 date when the court's plenary power expires under Rule
13 304." Now, at the last meeting I said that the committee
14 thought that the first alternative, "as to any requested
15 relief not granted by a final judgment under Rule 300,"
16 was the better alternative, because it's -- it's much
17 earlier than the expiration of plenary power, and maybe
18 the expiration of plenary power is just too late in the
19 process.

20 After reading the transcript, I now think at
21 the very least that the issue is still alive as to whether
22 it should be when the date the final judgment is signed or
23 the date when the court's plenary power expires under Rule
24 304, and that's because of a fairly complicated discussion
25 that we had. Justice Bland wanted the -- wanted all of

1 these motions prejudgment and post-judgment to be
2 overruled by operation of law on the expiration of 75 days
3 after the judgment was signed, including the prejudgment
4 ones, and there was pretty substantial sentiment for that,
5 and then Judge Evans said, well, but that won't really be
6 true under the plenary power rule unless there's a motion
7 for new trial, because you'll never get to 75 days, you'll
8 run out of plenary power on the 30th day. So I'm thinking
9 it can't be 75 days because you'll run out of time unless
10 there's a motion for new trial. It's got to be either
11 when the judgment is signed -- or when the final judgment
12 is signed as in the current draft, Rule 301 on page nine,
13 or when plenary power expires.

14 Now, I don't know whether that would be
15 acceptable to Justice Bland. I was going to ask her that,
16 and her concept is it all ought to be -- it all ought to
17 be at the same time, right, and that kind of makes it more
18 at the same time, huh? But it's a different time. All
19 right. It's a different time. It's not just 75 days, and
20 so that issue is still a live issue. I don't know whether
21 we want to debate it in the 20 minutes here, but it's a
22 live issue for (a)(1) and (a)(2). If we've gotten past
23 the point, which I think we have at the last meeting, that
24 these motions ought to be overruled by operation of law at
25 some point, what point? And I thought we got through that

1 last time, but reading the -- all of the discussion and
2 what people wanted, it became crystallized in my mind that
3 those choices are still two legitimate choices. Huh? And
4 that's something to be decided.

5 Now, this draft on prejudgment motions has a
6 new paragraph (a)(3), "A party must submit a proposed form
7 of judgment with a motion for judgment." That was in
8 another part of this rule, but it seemed to me that --
9 that it's best placed in a separate paragraph under
10 subdivision (a), prejudgment motions, that there is what
11 you want a proposed form of judgment with some motion for
12 judgment either on the verdict or notwithstanding the
13 verdict or to disregard a jury finding. That doesn't have
14 to be there, but it seemed to me to be a good place for it
15 rather than leaving it in some larger paragraph later. So
16 that goes -- and I'll -- I could keep talking, or we could
17 stop talking and everybody else talk, or whatever you
18 prefer, Mr. Chairman.

19 CHAIRMAN BABCOCK: Why don't we see if there
20 are any comments on what you've been talking about so far?
21 If not, you can keep talking. So all in favor of
22 listening to Bill talk more.

23 MR. ORSINGER: Well, can I -- I'd like to
24 ask a question.

25 CHAIRMAN BABCOCK: Richard.

1 MR. ORSINGER: Is there going to be a
2 separate rule that talks about directed verdicts still?

3 PROFESSOR DORSANEO: Well, I don't -- I
4 think the answer to that is yes. We didn't -- we didn't
5 plan to repeal the directed verdict rule, which, frankly,
6 could stand some work. I mean, it's not in this draft,
7 but --

8 MR. ORSINGER: I have a concern that I may
9 as well state now that this rule as rewritten seems to me
10 to contemplate the use of these motions only in jury
11 trials, but these motions are also used in nonjury trials,
12 and in particular the motion to modify judgment may be the
13 only way to preserve error to certain rulings that occur
14 in a nonjury trial, and so I think that we should be
15 sensitive to that fact. You're going to hear from me as
16 this discussion progresses unless we take it up next time
17 when I won't be here. I'm a little bit concerned that the
18 use of some of these motions in nonjury trials is
19 different from its use in jury trials, and I don't want to
20 overturn that practice.

21 PROFESSOR DORSANEO: So do you think we need
22 to put in the -- in this rule the directed or instructed
23 verdict rule or some successor to it?

24 MR. ORSINGER: It makes perfect sense to me
25 if you're going to gather your prejudgment motions

1 together --

2 PROFESSOR DORSANEO: Yeah.

3 MR. ORSINGER: -- that you ought to put in a
4 motion for directed verdict, which does affect -- it is a
5 prejudgment motion that does affect the judgment, but if
6 you do that you should also mention a motion for judgment,
7 because if you don't have a jury and the plaintiff rests
8 in a nonjury trial, you don't move for a directed verdict.
9 You move for a judgment.

10 PROFESSOR DORSANEO: Uh-huh.

11 MR. ORSINGER: And so I don't mind coming
12 back or e-mailing you some language that might make sense
13 for nonjury. I just think that we ought to be sensitive
14 to the nonjury application of this rule.

15 PROFESSOR DORSANEO: I think those are good
16 points, and maybe in the prejudgment motions we should
17 have, you know, motion for judgment in a nonjury case.

18 MR. ORSINGER: And a motion for directed
19 verdict in a jury case.

20 PROFESSOR DORSANEO: Motion for directed
21 verdict, but not a motion for summary judgment.

22 MR. ORSINGER: No.

23 PROFESSOR DORSANEO: Okay. Make the
24 dividing line along those lines. I think those are good
25 suggestions.

1 CHAIRMAN BABCOCK: Roger.

2 MR. HUGHES: I was just voting for the
3 professor to keep speaking.

4 CHAIRMAN BABCOCK: Okay. Frank.

5 MR. GILSTRAP: The purpose of having these
6 motions overruled by operation of law is to preserve error
7 without requiring the court to make a ruling.

8 PROFESSOR DORSANEO: Yes.

9 MR. GILSTRAP: And that's the only purpose,
10 and so the only need is that they be overruled by
11 operation of law at some point. For uniformity Justice
12 Bland proposed 75 days. Justice Evans pointed out, well,
13 sometimes you don't reach 75 days. We just need a date.
14 Well, we know that the court is going to lose plenary
15 power at some point, so why don't we make them all
16 overruled by operation of law when the court loses plenary
17 power because at that point the court can't grant them
18 anymore, and that solves that problem. It's simple, it's
19 one date.

20 PROFESSOR DORSANEO: Well, I'm -- as you can
21 tell from my comments, I'm kind of leaning in that
22 direction, otherwise I wouldn't have made such a big deal
23 out of it.

24 MR. GILSTRAP: Well, I agree.

25 MR. ORSINGER: Well, I might comment on the

1 motion for -- any time you're moving for what the judgment
2 should say rather than moving to set the judgment aside,
3 the existing case law is that if you make a motion for a
4 judgment and a judgment that's contrary to that gets
5 signed, it was implicitly overruled; and that makes
6 logical sense to me; and there's lots of history for that;
7 and I would hate to lose the case law that says you
8 preserved your error, although maybe it doesn't matter if
9 you preserved it the other way by operation of law; but if
10 I move for X and the judge signs Y, he's implicitly --
11 she's implicitly overruling X.

12 CHAIRMAN BABCOCK: Okay.

13 MR. ORSINGER: So I kind of like this idea
14 that your motions on what the judgment should look like
15 are defacto ruled on when the judgment is signed. Whether
16 it's where you've got a separate order or not, the
17 judgment speaks for itself.

18 PROFESSOR DORSANEO: The motion for judgment
19 makes good sense to put in here. The directed verdict one
20 is a little harder for me because of the context in which
21 -- how those things happen. You know, they're done
22 sometimes -- sometimes by a written pleading, but perhaps
23 not.

24 CHAIRMAN BABCOCK: Okay. Any other comments
25 about the proposed 301(a)? You want to talk a little bit

1 about 301(b), Bill?

2 PROFESSOR DORSANEO: Yes. And, Richard, I
3 would be glad to receive your e-mail --

4 MR. ORSINGER: Okay.

5 PROFESSOR DORSANEO: -- draft suggestions.
6 Okay. Post-judgment motions, I put motions for new trial
7 first and the term "ordinary motion for new trial" perhaps
8 is not a good idea. I put it in there as an adjective in
9 front of "motion for new trial" to distinguish the
10 ordinary motion for new trial from the motion for new
11 trial on judgment following citation by publication, and I
12 don't really think "ordinary" is necessary, but it's at
13 least for our discussion purposes helpful to understand,
14 you know, what I'm talking about.

15 Now, the primary rule in our package here
16 for motions for new trial, as those of you know who were
17 here last time is Rule 302, which provides a lot of
18 information about the grounds for motions for new trial
19 and how the new trial practice operates, and all this rule
20 is doing with respect to the motion for new trial is
21 indicating how it operates from a timetable standpoint,
22 and otherwise the manner in which the ordinary motion for
23 new trial is determined to a small extent.

24 Now, the timetable is the same generally as
25 329b, but as we talked about last time, there is several

1 significant -- and the time before that, too, there are
2 several significant changes. The first change in the
3 first paragraph on nine is the addition of the wording
4 "regardless of whether a prior motion for new trial has
5 been overruled." 329b in a case decided by the Supreme
6 Court make it plain that if a motion for new trial has
7 been overruled then you can't amend the overruled motion
8 simply because it's not permissible to do that under the
9 language of the rule, which is the way the rule is
10 interpreted. So one big change -- and I don't think this
11 is controversial anymore -- is that "one or more amended
12 motions may be filed without leave within 30 days,
13 regardless of whether a prior motion for new trial has
14 been overruled."

15 The next paragraph is added as a result of
16 some discussion that we had about whether trial judges
17 actually get to see these motions or whether they, as
18 we've discussed earlier, just kind of find their way into
19 some file that's really not the court's file, and I think
20 Harvey Brown suggested after we had a discussion that we
21 use the same kind of language that's in Rule 296,
22 discussed earlier, about the clerk having the obligation
23 to call the motion to the attention of the judge, and the
24 idea there, as I understand it, is that that language
25 could be shown to the clerk and the clerk will behave, or

1 maybe behave or behave more than happens now, and that
2 that was kind of an okay fix.

3 Now, I put this fix only in post-judgment
4 motions. I didn't put it in prejudgment motions, and I
5 don't know whether it needs to go in prejudgment motions,
6 too, but I wanted to point out that I didn't put it in
7 prejudgment motions. Then I added a sentence, "but the
8 failure of the clerk to do so does not affect the
9 preservation of complaints made in the motion." Now,
10 that's not exactly the language that Chief Justice Gray
11 suggested or the language that Justice Duncan suggested,
12 but I thought it was good enough, but it might not be. I
13 thought that it was satisfactory in my own humble opinion,
14 and that's new material in this draft. Again, I restrict
15 it to the post-judgment motion context.

16 "The overruled by operation of law within 75
17 days after final judgment is signed, if not determined,"
18 you know, "earlier by signed written order" is the same
19 taken from 329b, and then again at the end there is a big
20 change that takes the law back to what I thought it was
21 some years back, that the court has discretion to consider
22 and rule on a motion that's not filed within 30 days,
23 discretion to consider and rule on, but also discretion
24 not to. Again, in my experience you could get trial
25 judges to do that most of the time so that the complaint

1 could be preserved for appellate review, and then there's
2 the sentence, "The trial court's substantive ruling on the
3 merits of such a late-filed motion is subject to review on
4 appeal," and what I intend for that to mean is that if the
5 trial judge ruled on it, it's subject to review on appeal.
6 Excuse my phone, where is it? I'm sorry, I'm in trouble
7 now, but I'll have to wait.

8 The -- so that's the motion for new trial
9 provision. And the biggest change in that is the clerk
10 must immediately call such a motion to the attention of
11 the judge.

12 The motion to modify is put second because
13 instead of repeating everything, as in the prior draft,
14 instead of repeating the second unnumbered -- the second
15 unnumbered paragraph in (b)(1), the third, the fourth, and
16 the fifth unnumbered paragraph in (b)(1), I wanted to be
17 more economical, so I added the second paragraph in
18 (b)(2), "A motion to modify a judgment must be filed
19 within the time" -- and maybe "within the manner" --
20 "prescribed by subdivision (b)(1) of this rule for an
21 ordinary motion for new trial." That's the way current
22 329b handles the timetable and procedure between motions
23 to modify and motions for a new trial, and I thought -- I
24 tried to do it a variety of different ways, and that's the
25 best I could do to not be redundant, and I thought it was

1 clear enough. If people think it should be repeated, it
2 can be repeated, changing the words "motion for new trial"
3 to "motion to modify."

4 HONORABLE JAN PATTERSON: Bill, is the
5 motion to be -- to call it to the attention of the judge
6 by the clerk, is that addressing the notion of
7 presentment?

8 PROFESSOR DORSANEO: Yes. If I'm
9 understanding your question, that's -- that's -- it's kind
10 of in lieu of a party's presentment. That's the
11 presentment by the clerk, as I understand it, as a
12 mechanism for judges to maybe have a better shot at seeing
13 these things that are filed that are overruled by
14 operation of law, at least post-judgment ones. Was that
15 helpful? Was that answer helpful or no?

16 HONORABLE JAN PATTERSON: Yes.

17 CHAIRMAN BABCOCK: Carl.

18 MR. HAMILTON: On the motion for new trial,
19 why did we change "shall be filed within 30 days" to "may
20 be filed within 30 days"?

21 PROFESSOR DORSANEO: You know, I went -- I
22 changed that the other day back to "must," okay, but the
23 idea is that it -- is the last paragraph cuts you more
24 slack. "As long as the trial court retains plenary power
25 the trial court has discretion to consider and rule on an

1 amended motion for new trial." Okay. Maybe it should say
2 "must." Right, Carl?

3 MR. HAMILTON: I think so.

4 PROFESSOR DORSANEO: I thought that --

5 MR. GILSTRAP: Except that you don't file
6 one.

7 PROFESSOR DORSANEO: -- the "as long as the
8 trial court retains plenary power" paragraph was kind of a
9 getting a little more discretion, but I wouldn't -- I
10 don't have trouble having it say "must."

11 MR. GILSTRAP: The reason you say "may" is
12 because you don't have to file one. This way it sounds
13 like you've got to file a motion for new trial, you must
14 file it.

15 CHAIRMAN BABCOCK: Jeff, and then Sarah.

16 MR. BOYD: I was going to say the same
17 thing, is that language, either "may" or "must," has to
18 apply to either, whether or not you file or whether or not
19 if you file you file within 30 days. If you write it
20 either way it's confusing unless you add language like "An
21 ordinary motion for new trial, if filed, must be filed
22 within 30 days," but if you just say "may" then it sounds
23 like, well, if you want to file it you can do it within 30
24 days, but you don't have to. If you say "must," it sounds
25 like you have to file one.

1 CHAIRMAN BABCOCK: Sarah.

2 HONORABLE SARAH DUNCAN: I think that was my
3 point in it saying "may," is that you don't have to file a
4 motion for new trial within 30 days after the judgment is
5 signed. It may be that only some things are preserved if
6 they're filed with -- if the motion is filed within 30
7 days. It's certainly that the trial court doesn't have to
8 rule on it if it's not filed within 30 days, but even
9 under current practice it doesn't have to be filed -- a
10 motion for new trial doesn't have to be filed within 30
11 days. So it seems a bit odd to tell people it must be
12 filed within 30 days when in truth it doesn't have to be.

13 MR. BOYD: But then why have this sentence
14 in there at all?

15 HONORABLE SARAH DUNCAN: Well --

16 PROFESSOR DORSANEO: Well, what does 329b
17 say?

18 MS. CORTELL: 329b(a) says --

19 MR. HAMILTON: Says "shall be filed."

20 MS. CORTELL: -- "a motion for new trial, if
21 filed, shall be filed prior to or within 30 days after the
22 judgment or other order complained of is signed."

23 PROFESSOR DORSANEO: Why don't we do that --

24 MS. CORTELL: Yeah.

25 PROFESSOR DORSANEO: -- or take the "shall"

1 -- make "shall" "must, if filed." I think that's a good
2 suggestion.

3 MR. BOYD: Well, but Judge Duncan is saying
4 that, actually, it doesn't have to be filed within 30
5 days.

6 HONORABLE SARAH DUNCAN: It's whether the
7 trial court has to rule on it. Right, I can file it. As
8 long as the trial court has plenary power I can file a
9 motion for new trial. The judge may not have to rule on
10 it or consider it because it wasn't filed within the
11 30-day period, but I can file it, and the trial court has
12 discretion to grant it.

13 PROFESSOR DORSANEO: Yeah.

14 MR. ORSINGER: Does it preserve error,
15 Sarah, if you file it late?

16 HONORABLE SARAH DUNCAN: I think not,
17 because they don't have to rule on it.

18 CHAIRMAN BABCOCK: Carl.

19 MR. ORSINGER: It's overruled by operation
20 of law.

21 HONORABLE SARAH DUNCAN: No, it's --

22 MR. HAMILTON: The paragraph on plenary
23 power says the trial court has discretion to consider and
24 rule on an amended motion for new trial, and it doesn't
25 say it has that power on the --

1 HONORABLE SARAH DUNCAN: That overrules
2 Brookshire.

3 PROFESSOR DORSANEO: There could be plenary
4 power if there was a motion to modify, but not a motion
5 for new trial. There could be another motion that would
6 extend plenary power.

7 HONORABLE SARAH DUNCAN: This is one of the
8 first lessons my mentor, Dr. Hatchell, taught me 20 years
9 ago, is that just because the rule says it has to be filed
10 in 30 days, that only goes to whether it's going to be
11 preserved error, whether it's going to -- judge is going
12 to have to either rule on it or it's going to be overruled
13 by operation of law, but that doesn't mean you can't just
14 file one because you want a new trial, and the trial judge
15 has plenary power, and there's nothing anybody can do
16 about that at least until --

17 CHAIRMAN BABCOCK: Recent.

18 HONORABLE SARAH DUNCAN: -- the last few
19 months.

20 MR. BOYD: But if -- okay, then how long
21 does plenary power last if no post-judgment motion of any
22 kind is filed?

23 HONORABLE SARAH DUNCAN: 30 days.

24 PROFESSOR DORSANEO: 30 days.

25 CHAIRMAN BABCOCK: 30 days.

1 MR. BOYD: So then you must do it within 30
2 days if no other motion extending plenary power has been
3 filed.

4 HONORABLE SARAH DUNCAN: If you want to
5 extend plenary power, but if plenary power has already
6 been extended by somebody else or something else --

7 MR. BOYD: Okay. So if nothing else has
8 extended plenary power then a motion for new trial must be
9 filed within 30 days if you're going to file it.

10 HONORABLE SARAH DUNCAN: If you want to file
11 one.

12 MR. BOYD: So that's the distinction is if
13 there's more plenary power then it's not "must," it's
14 "may."

15 PROFESSOR DORSANEO: Well, the question is
16 how much of that do you want to write down --

17 MR. BOYD: Right.

18 PROFESSOR DORSANEO: -- in this little
19 sentence.

20 CHAIRMAN BABCOCK: David Jackson.

21 MR. JACKSON: Bonnie is sitting here telling
22 me I need to point something out.

23 CHAIRMAN BABCOCK: That she's tired.

24 MR. JACKSON: The clerk --

25 CHAIRMAN BABCOCK: Yeah, we're over our time

1 limit, so let's recess till tomorrow at 9:00.

2 MR. JACKSON: Well, do I not get to say
3 this?

4 CHAIRMAN BABCOCK: What?

5 MR. JACKSON: Do I not get to say this?

6 CHAIRMAN BABCOCK: Yeah, say it.

7 MR. JACKSON: Okay.

8 CHAIRMAN BABCOCK: I thought you were trying
9 to help her out.

10 MR. JACKSON: No, I can feel her whispering
11 in my ear. "The clerk must immediately call such a motion
12 to the attention of the judge." Different courthouses,
13 that feels a little strange the way that's worded. Why
14 not just say, "The clerk must notify the judge of such a
15 motion," because they have different procedures for
16 sending stuff --

17 CHAIRMAN BABCOCK: Oh, okay. I'm sorry.

18 HONORABLE JAN PATTERSON: Yes.

19 MR. JACKSON: -- and calling it to the
20 attention of the judge just sounds like something that --

21 HONORABLE JAN PATTERSON: Yes.

22 CHAIRMAN BABCOCK: You said "Bonnie." I
23 thought you were saying "Holly."

24 MR. JACKSON: No, I said "Bonnie."

25 PROFESSOR DORSANEO: Bonnie.

1 MR. ORSINGER: The ghost of our former
2 district clerk.

3 CHAIRMAN BABCOCK: The ghost of our former
4 district clerk. Okay. Now we're in recess. Thanks,
5 David.

6 (Meeting recessed at 5:11 p.m.)
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2 **REPORTER'S CERTIFICATION**
3 MEETING OF THE
4 SUPREME COURT ADVISORY COMMITTEE

5 * * * * *

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7
8 I, D'LOIS L. JONES, Certified Shorthand
9 Reporter, State of Texas, hereby certify that I reported
10 the above meeting of the Supreme Court Advisory Committee
11 on the 9th day of April, 2010, and the same was thereafter
12 reduced to computer transcription by me.

13 I further certify that the costs for my
14 services in the matter are \$ 2,040.00 .

15 Charged to: The Supreme Court of Texas.

16 Given under my hand and seal of office on
17 this the 27th day of April, 2010.

18

19

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