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MEETING OF THE SUPREME COURT ADVISORY COMMITTEE

August 25, 2000

(MORNING SESSION)

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Taken before *D'Lois L. Jones*, Certified

Shorthand Reporter in Travis County for the State of Texas,
reported by machine shorthand method, on the 25th day of
August, 2000, between the hours of 9:00 o'clock a.m. and
12:35 o'clock p.m., at the Texas Law Center, 1414 Colorado,
Room 101, Austin, Texas 78701.

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INDEX OF VOTES

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

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1
2 CHAIRMAN BABCOCK: We'll go on the record,
3 and the first few things to talk about, we want to welcome
4 Frank Gilstrap, who is sitting over to my right, the one
5 who is the closest to the teacher. Although I see, as in
6 most classrooms, nobody wants to get close to the teacher
7 in the room. Frank's from Arlington, and this is his
8 first meeting with our committee, and we welcome Frank.
9 He's a fine lawyer who has done battle with me a number of
10 times, and it's great to have him on the committee.

11 Carrie says to tell you that some people
12 have pointed out an error in the expense reimbursement
13 form. Apparently the form says that you get 27 cents a
14 mile, and that has now been raised to 28 cents a mile. So
15 we're going to get new forms and get you that extra penny
16 per mile.

17 Dr. Richard Waites of the Wilmington
18 Institute is also here and he --

19 DR. WAITES: Good morning.

20 CHAIRMAN BABCOCK: -- has asked to speak
21 briefly when we get to the voir dire rule. I have been in
22 Chicago trying a case for the last couple of weeks, and I
23 have had to steel myself not to say "voir dire." I have
24 to say it "voir dire" so that they don't know where I'm
25 from.

1 And so the first order of business is for
2 Justice Hecht to report on what has become of the parental
3 notification rule amendments that we sent to the court
4 shortly after our last meeting.

5 JUSTICE HECHT: We have gotten a little more
6 feedback from some of the other people who were involved
7 in that process, particularly at the subcommittee, and --
8 over the summer, and we're going to take the rules up
9 probably in the next week or two, first part of September,
10 and put them out after that as soon as we can. We don't
11 anticipate any significant changes in what the committee
12 sent us, but I can't be sure.

13 CHAIRMAN BABCOCK: Great. Thank you. We
14 thought we were done with the recusal rule, but we may
15 never be done with the recusal rule. Senator Harris was
16 given a copy of the rule because we anticipate that the
17 Court, if it adopts our recommendation, would also repeal
18 the recusal statute that Senator Harris sponsored and
19 which passed in the last Legislature. The senator is
20 generally I think favorable to our work product. He has
21 three suggestions that are contained in the letter that is
22 found in Tab 1 of your materials right after our proposed
23 rule, and Richard and I have looked over it, and Richard
24 is going to report about what we think and then we will
25 discuss it briefly. I don't want to spend a lot of time

1 on this, but we will spend as much time as we need to.

2 MR. ORSINGER: Okay. We will refer to
3 Senator Harris' letter of July 12, 2000, that's in the
4 agenda, and his subparagraph (1) raises the question of
5 the tertiary motion to recuse. The last time that we
6 considered this that resulted in the present language,
7 there were many people on this committee that felt if you
8 were successful in recusing the first two judges and then
9 a third judge was assigned and you filed a motion to
10 recuse and lost, that you shouldn't be penalized because
11 your first two motions were legitimate.

12 However, Justice Harris in his meeting with
13 Chip and with Bob Pemberton and me said that his view was
14 that tertiary meant that you should have a shot at three
15 judges; and if the first two are bad, then you ought to
16 just accept the third one; and if you try to knock the
17 third one out, then if you fail, you should pay. So that
18 was really contra to the feeling of the committee. We
19 made a change to remove or to take the language "against a
20 judge" out of one part, but we left it in another; and
21 Senator Harris' letter notices this inconsistency and
22 suggests that we take "against the judge" out of the
23 language on (d) (4) (a), which is on page five of the
24 proposed rule.

25 My suggestion is that we take a vote on it

1 today; and if we decide to go the way we did before --
2 which is that if your first two motions are successful you
3 shouldn't pay on your third one. It's only your third
4 unsuccessful motion against the same judge where fees are
5 mandatory. Then let's take that position, and let's tell
6 Senator Harris that we appreciate his pointing out this
7 inconsistency and that we would like to resolve the
8 inconsistency by putting "against a judge" in both places,
9 which then would support the idea that you have to have
10 three unsuccessful motions against one judge before
11 sanctions are mandatory; but to say that we'll accept his
12 decision on that as the final word, and if he would prefer
13 consistency by taking "against the judge" out of both
14 places, we'll do it.

15 And the reason that I feel that this is
16 appropriate is because we are trying to use Supreme Court
17 rule-making authority to overturn his statute, and we
18 should only do that if we have his consent; and,
19 therefore, if we are able to persuade him to go with us
20 and we still have his consent, great; and if not, then I
21 think we ought to honor and respect the fact that he had
22 this statute passed.

23 CHAIRMAN BABCOCK: But we will inform the
24 Court of our view about this. So any discussion on this?

25 MS. SWEENEY: So, Richard, just so -- I'm

1 sorry. I came in on a short bus this morning. But just
2 to be sure I understand it, we have got the one proposal
3 is three strikes and if you fail on the third, no matter
4 how many judges are involved in the mix, you get
5 sanctioned; and the second one is three strikes and if you
6 fail on the third, only if it's against the same judge
7 three times.

8 MR. ORSINGER: Right.

9 MS. SWEENEY: And what we voted the last
10 time was the first thing I said and what Senator Harris'
11 proposal is the second thing I said?

12 MR. ORSINGER: I think it's the reverse.

13 CHAIRMAN BABCOCK: Reverse.

14 MS. SWEENEY: Okay.

15 MR. ORSINGER: We're trying to say that you
16 don't count in the case overall. You count against the
17 judge in particular. So with Senator Harris' proposal, by
18 saying "against a judge," taking it out, supports the idea
19 that if it's the third motion and you lose it, you pay,
20 even if you won the first two; but I think the feeling of
21 the committee last time was that we would prefer to say
22 that it has to be unsuccessful motions against the same
23 judge. So we ended up with a work product that was
24 supportive of our view in one area and supportive of his
25 view in another, and we need to reconcile the difference.

1 MS. SWEENEY: Thank you.

2 CHAIRMAN BABCOCK: Anybody have any other
3 comments on that?

4 MR. ORSINGER: Well, I would move then that
5 we put "against the judge" in both places and refer that
6 to Senator Harris with an explanation of our thinking and
7 then ask him whether he can abide by that as part of a
8 repeal of the statute; and if he can't, then I think we
9 should -- Chip, at that point we should what?

10 CHAIRMAN BABCOCK: We will put it the way he
11 wants it, but in the transmittal letter to the Court
12 advise the Court of our concern.

13 MR. ORSINGER: And then let them make the
14 decision of what to do ultimately?

15 CHAIRMAN BABCOCK: Yeah.

16 MR. ORSINGER: That's my motion. Well, Carl
17 has said we could make it even clearer by saying "against
18 the same judge." That would make it crystal clear. So I
19 will amend my motion and say "against the same judge," and
20 then there's no argument what we mean.

21 CHAIRMAN BABCOCK: Okay. Anybody second
22 that?

23 MR. HAMILTON: I second.

24 MR. LOWE: I second.

25 CHAIRMAN BABCOCK: Any more discussion? All

1 right. All in favor of that raise your hands. Anybody
2 against? Unanimous. Unanimous decision.

3 Okay. Let's go to Senator Harris' Item 2.

4 MR. ORSINGER: Item 2 says that 18b(6) is
5 not incorporated into the proposed rule, and as I
6 recollect, I did not read this, and Bill Dorsaneo may
7 refresh my memory, but I believe that (b)(6) was dropped
8 out of the so-called recodification draft that we took as
9 our starting work product, and that it was inadvertent.
10 It was not the result of a conscious decision. That
11 proviso essentially said if the judge has recusal grounds
12 because of a financial interest or someone they're
13 associated with having a financial interest or a fiduciary
14 relationship and the judge has committed substantial time
15 to the case already, the judge can cure the recusal ground
16 by divesting either the trustee position or divesting the
17 financial interest that would create a recusal ground. I
18 think that's legitimate. I don't think that we made a
19 conscious decision in the last round of committee meetings
20 to delete that, and so I would propose that we insert that
21 immediately after the waiver provision and immediately
22 before procedures, which would be on page three of the
23 rule and would be a new paragraph (d) as in dog. Bill, is
24 that correct that that was not a conscious effort to amend
25 the rule?

1 PROFESSOR DORSANEO: That's probably so.

2 MR. ORSINGER: I don't remember us deciding
3 to do that. And I don't know of any ground swell of
4 opinion that that's bad policy, if the judge has made a
5 substantial commitment and can divest the financial
6 interest to allow the judge to stay in the case. So I
7 would move that we make that change.

8 CHAIRMAN BABCOCK: Any second?

9 MR. HAMILTON: Second.

10 CHAIRMAN BABCOCK: Okay. Carl seconds it.
11 Any discussion on that? Elaine?

12 PROFESSOR CARLSON: No.

13 CHAIRMAN BABCOCK: You look like you almost
14 had your hand up.

15 PROFESSOR CARLSON: It's a great idea.

16 CHAIRMAN BABCOCK: Okay. No discussion.

17 All in favor raise your hand. Any opposed? Carries by
18 unanimous vote.

19 MR. ORSINGER: The second part of paragraph
20 (2) of Senator Harris' letter says that the reference to
21 (2)(f)(iii) is incorrect. It should be (2)(f)(ii). The
22 only place that I can find and that Carl can find a
23 reference to (2)(f)(iii) is in Footnote 6 on page one of
24 our proposed rule, and we believe that that is a correct
25 reference. That has to do with material witness, and we

1 believe that the 18b(2)(c) as well as (f)(iii) is a
2 correct reference, so it's just a question I guess of
3 reading, and so unless someone here can establish that
4 Carl and I are wrong in reading this, I would propose that
5 we say that we double-checked that cite and believe that
6 it's okay.

7 CHAIRMAN BABCOCK: Anybody opposed to that?
8 Will you make sure you double-check that, Richard?

9 MR. ORSINGER: I will. It will be triple
10 checking at this point, but yes.

11 CHAIRMAN BABCOCK: All right. The third
12 item.

13 MR. ORSINGER: The third item is they don't
14 like the -- there is a provision that requires that a
15 motion to recuse must be verified. It's on page three of
16 the rule, paragraph (d)(1), second to last line. A motion
17 to recuse must be verified and then it says, "An
18 unverified motion may be ignored." Admittedly not very
19 legalistic language, but we came up with that because
20 nobody was really happy with all the alternatives that we
21 came up with. Senator Harris has suggested "An unverified
22 motion is void," and the word "void" scares me a little
23 bit, or "An unverified motion shall not be ruled upon,"
24 and Carl had made another suggestion, which was what?

25 MR. HAMILTON: "Need not be considered."

1 MR. ORSINGER: "An unverified motion need
2 not be considered," which would permit the court to
3 consider it, but would not require them to consider it.
4 However, Chip had some cogent arguments on why all motions
5 should be verified. Do you want to --

6 CHAIRMAN BABCOCK: You want to hear them
7 now?

8 MR. ORSINGER: Yeah.

9 CHAIRMAN BABCOCK: Well, the requirement
10 that they be verified I think is a good one because to
11 question the integrity of the court should be made with
12 the utmost of seriousness, and for a pro se litigant or
13 for somebody who is trying to get some press and publicity
14 and therefore pressure on the court but doesn't want to
15 stand behind their motion by verifying it is something I
16 think to be discouraged. You can imagine the situation
17 where somebody might file an unverified motion filled with
18 things that are not accurate, half truths or distortions,
19 and perhaps the case is highly publicized, the press is
20 following it; and if there is a story in the newspaper,
21 the judge feels like he sort of has to get out, not
22 because there is anything in the motion that's even true,
23 but because all of these allegations that have been
24 swirling around him.

25 I think that Senator Harris has a good

1 thought, and my view would be that it should be "void."
2 If it's not verified, it ought to be void.

3 MR. ORSINGER: Well, in support of that
4 argument, there are circumstances in which even an
5 unverified motion might trigger procedural delays and the
6 requirement of self-recusal analysis and referral to a
7 presiding judge; and as a matter of policy if we don't
8 want to invoke that on a frivolous motion that may be
9 unsworn, then we ought to do more than say that it may be
10 denied or may be ignored, because there may be procedural
11 consequences even if it is ultimately denied. And so to
12 require it to be sworn means that somebody is going to
13 have to step up to the line and swear to it before the
14 procedure starts unfolding on disposing of it.

15 CHAIRMAN BABCOCK: Paula Sweeney had a
16 comment and then Scott Brister.

17 MS. SWEENEY: I'm fine with the idea. I
18 agree with you that it ought to be verified and have no
19 effect if it's not, but purely drafting, is "void" the
20 right word? Doesn't "void" apply to an action by a court
21 or through an order, and don't we want something like "of
22 no effect" or --

23 MR. ORSINGER: "Shall have no effect"?

24 MS. SWEENEY: Some such -- you know, some of
25 them legal words.

1 CHAIRMAN BABCOCK: Judge Brister.

2 HONORABLE SCOTT BRISTER: Yeah. I think I
3 picked "ignored," and I think it's a quote from the case
4 because the problem is, you know, once it's filed then the
5 rule says the mere filing stops everything on the case,
6 you have to refer it, and the judge may only -- you know,
7 there is a hundred cases. The judge may only do two
8 things, grant it or refer it; and so how do you say, if
9 it's void do I still have to refer it? You know, it's not
10 just that it's not going to be good or it's not going to
11 be granted. The idea was that it's not going to do all
12 the things the rule says the mere filing does, and I don't
13 have a problem with using something other than "ignored,"
14 but that's what we want. We want to consider it as if it
15 had maybe -- as if it had never been filed.

16 CHAIRMAN BABCOCK: Okay. Ralph.

17 MR. DUGGINS: Well, if we -- the previous
18 phrase says it must be verified. Isn't it just -- aren't
19 we stating the reverse? Why not just take the "may be
20 ignored" out?

21 HONORABLE SCOTT BRISTER: Because there are
22 cases that without that that's required -- there is some
23 split. There are a few courts that require you even if
24 it's unverified, even if it's the 20th time, even if it's
25 totally frivolous, the judge still must stop the trial,

1 which is what the litigant wanted by filing it in the
2 first place, stop the trial and refer it to the
3 administrative judge, get a ruling on it, even if we all
4 know it's going to be turned down; and the majority of
5 appellate courts have said, "No, you don't -- somebody who
6 is using the process to simply stop the thing and to be
7 obstreperous should not be successful in doing that".

8 CHAIRMAN BABCOCK: Bill Dorsaneo and then
9 Judge Rhea and then Buddy.

10 PROFESSOR DORSANEO: I hesitate to say
11 anything about this rule because it's taken so much time
12 and it's such a difficult and perhaps different subject
13 from other things that from time to time we've said should
14 be verified, should not be verified, etc. But, generally
15 speaking, the idea of verification is an idea that has
16 passed into oblivion. The idea of verifying things
17 generally, as if that is some sort of real safeguard
18 against miscast motions or misbehavior or abuse of the
19 process, that's just simply not the case.

20 What you do is you have a technical set of
21 requirements that are substituted for just a straight-up
22 consideration of the motion for what it says. If you say
23 it has to be verified, well, verification requires it be
24 done in a certain way. If it's not verified properly,
25 well, I guess it's not verified. It would be better, it

1 seems to me, if we're going to keep the general idea that
2 it should be verified, to treat it as -- you know, not as
3 if it's not filed, but to say that it's not considered,
4 need not be considered, and it has no effect on the case.

5 It would just be better to say that than to,
6 you know, make it disappear. It might well be very
7 meritorious, even though somebody doesn't know the
8 difference between an acknowledgement and a jurat, if that
9 makes any real difference anymore. You know, frankly the
10 idea that verification of it is going to make some large
11 difference, I don't really believe.

12 CHAIRMAN BABCOCK: Judge Rhea.

13 HONORABLE BILL RHEA: Well, I'd focus on the
14 existing language that says "may be ignored." It seems to
15 me that that leaves it entirely too loosey-goosey. It's
16 the same as not having that language at all, so if that
17 means the court can -- may not ignore as well, so that the
18 court can call it as it may be and the language seems to
19 me, therefore, not to be very effectual.

20 I'm really somewhat persuaded by this and by
21 Bill's argument. It seems to me that one of the most
22 common circumstances where these come up is pro se
23 litigants who are going to file a motion to recuse, most
24 of whom aren't going to know about verification. I don't
25 want to be in the business of building traps or more traps

1 for pro se litigants. It's a genuine issue that can be
2 dealt with quickly, and I don't want to lay that technical
3 trap.

4 CHAIRMAN BABCOCK: Buddy.

5 MR. LOWE: Chip, I know -- I think one of
6 the concerns or my concern is that somebody can just file
7 something. Your pleadings are protected under Livingston,
8 but if you swear to something then you are subject to
9 perjury, so somebody could just file something knowing
10 it's not good. The newspaper is going to pick it up.
11 Now, in Federal court, if you file something that doesn't
12 meet muster, they won't take it. I don't know that all of
13 our clerks, we need to put a duty on them to do that, but
14 I think something --

15 CHAIRMAN BABCOCK: Bonnie went across to
16 another meeting. She said we could not mention the word
17 "clerk" while she was out of the room.

18 MR. LOWE: Oh, well, I apologize. But if
19 there's some way that it could be sent back. Now, if it's
20 just a question and once it's pointed out, you know, then
21 it's considered not having been filed and has no effect, I
22 mean, the other side has to get it, then it wouldn't be of
23 public record because the news media, they come in, they
24 see these things. I just think that it's a serious matter
25 that shouldn't even be filed unless it's verified.

1 CHAIRMAN BABCOCK: Yeah. Well, I think Bill
2 is right. You don't want to create traps for people, but
3 I do agree with Judge Rhea that the language that we have
4 now looks like it's kind of squishy, it's discretionary.
5 You can rule on it, you don't have to rule on it, does it
6 trigger things, does it not? So I think something has to
7 be changed.

8 Frankly, I don't agree with Bill Dorsaneo
9 that verification doesn't matter anymore. Just taking
10 litigants, if there's something in the pleadings you can
11 hardly cross-examine them about it, but if they have sworn
12 to it or their lawyer has sworn to it, it adds in terms of
13 its dignity, and you can make something of it when it's
14 verified; and to me this is an area that is an attack on
15 the judiciary in one way or the other and that we just --
16 we have got to have it verified, and I don't think that's
17 open for discussion, and it seem to me the consequences of
18 not doing that ought to be severe. So who
19 else -- Elaine.

20 PROFESSOR CARLSON: What about the idea of
21 giving the proper word. In other words, strike that
22 sentence and it would become, "An unverified motion is
23 ineffective and may be struck by the court" or "may be
24 stricken." And at least the litigants know that, and I
25 think that might address Judge Brister's comments, that

1 it's of no effect and it doesn't have to be referred but
2 it's struck, and the litigants know that there is that
3 problem as opposed to just letting it be ineffective and
4 the litigants really not knowing what the problem is.

5 CHAIRMAN BABCOCK: Does an unverified motion
6 on file then trigger all these other things?

7 PROFESSOR CARLSON: It might, yeah, unless
8 we put in it's of no effect.

9 CHAIRMAN BABCOCK: Unless what?

10 PROFESSOR CARLSON: Unless we include some
11 language that suggests it's of no effect, but that leaves
12 the litigants without really knowing what the problem is
13 perhaps.

14 CHAIRMAN BABCOCK: Judge Rhea.

15 HONORABLE BILL RHEA: I like that proposal.
16 It seems to me it solves a lot of the problems, including
17 the one I expressed, at least at some level communicates
18 the nature of the problem. If the court acts to strike
19 it, it takes care of the problem about unintended effects
20 or suspensions being an effect. I support that.

21 CHAIRMAN BABCOCK: Okay. Skip.

22 MR. WATSON: I like it because Richard is
23 going to have to figure out whether to say "struck" or
24 "stricken."

25 CHAIRMAN BABCOCK: Good point. Judge

1 Peeples, did you have your hand up?

2 HONORABLE DAVID PEEPLES: I didn't.

3 CHAIRMAN BABCOCK: You want to say anything
4 anyway?

5 HONORABLE DAVID PEEPLES: Well, I think we
6 ought to require that they be sworn to, and the language I
7 had would be "An unverified motion has no effect and need
8 not be considered" or "may not be considered," something
9 like that.

10 CHAIRMAN BABCOCK: Bill.

11 PROFESSOR DORSANEO: I think that's the way
12 to do it. I mean, right now in terms of our current rules
13 on verification, it depends on what it is that's not
14 verified properly as to whether it's a nullity or whether
15 that's just a pleading defect that requires a special
16 exception. I mean, there's a great deal of complexity
17 involved in all of that. If it's a verified denial under
18 the so-called Usinger Hardware rule, it doesn't shift the
19 onus of proof that's in effect to null it. So it's a
20 circumstance where a defective verification vitiates the
21 contention that's verified.

22 If it's a matter of voidance that requires
23 verification, that's not very often, but Rule 93 has some
24 of those. The lack of a verification is just simply a
25 waivable pleading defect. In the context of motions,

1 motions for continuance that aren't verified don't just
2 disappear from view, but, generally speaking, it's not an
3 abuse of discretion for the trial judge not to grant an
4 unverified motion for continuance. So if we are going to
5 have this verification thing in there, we have to say, it
6 seems to me, what the effect is of it not being verified
7 because there is a great deal of complexity, too much
8 complexity in our jurisprudence; and that's really,
9 frankly, why I would like to see the verification be
10 thrown away because it's productive of that kind of
11 elaboration when you get into it further, and the case
12 law, by analogy is not going to be greatly helpful,
13 because it depends on this or that or that. So Judge
14 Peeples' language I think is probably adequate to say the
15 effect of not verifying it, which presumably would be the
16 same effect if it was verified improperly or if the
17 verification wasn't truly a verification.

18 CHAIRMAN BABCOCK: Anybody else? Are we
19 all -- do we have a consensus that the language that is
20 currently in there is probably too adversarial to stay?
21 Does everybody agree with that? Anybody disagree with
22 that?

23 Okay. I heard Elaine's language suggested,
24 and I heard Judge Peeples' suggestion. Anybody have a
25 preference or a third one? Buddy.

1 MR. LOWE: What if you put, "An unverified
2 motion shall result in the following. The judge should"
3 -- you know, and then it won't key the running of things.
4 It doesn't -- the judge doesn't have to consider it and
5 just state and list what effect it would have, just list
6 it by the numbers?

7 CHAIRMAN BABCOCK: Okay. How would you say
8 that?

9 MR. LOWE: "An unverified -- an unverified
10 motion will have the following effect" or I don't know.
11 Somebody can think of a better word than "effect," but
12 that's what it really means because it affects other
13 things. It affects what the judge has to do, whether he
14 has to rule, whether things are keyed to that; and number
15 one, that, you know, if the judge has no obligation to
16 rule or can order that it be returned or whatever you want
17 to put; and it doesn't key the provisions of such-and-such
18 that says it has to be referred and just list.

19 HONORABLE JAN PATTERSON: How about "need
20 not be considered for any purpose" rather than enumerate
21 each possibility that you might think of?

22 CHAIRMAN BABCOCK: Okay, Judge Patterson.
23 "Need not be considered for any purpose." That's very
24 similar to what Senator Harris suggested. He said, "An
25 unverified motion shall not be ruled upon" or "An

1 unverified motion is void." That was Senator Harris'.

2 HONORABLE SCOTT BRISTER: Don't you have to
3 say it doesn't have to be referred, it doesn't stop
4 anything? Because the rule says that somewhere else.

5 CHAIRMAN BABCOCK: Right. That's the
6 problem, the trigger.

7 MR. ORSINGER: Well, if you say "has no
8 effect," doesn't that mean that nothing happens? If it
9 has no effect, that means nothing happens? Isn't that
10 similar?

11 CHAIRMAN BABCOCK: Right. Mike.

12 MR. HATCHELL: I would say -- suggest that
13 we say what we mean. "An unverified motion has no effect
14 and does not invoke the procedures in this rule."

15 MR. LATTING: That will cut down on
16 attorneys fees in litigation if you're that clear about
17 it. Don't put that on the record.

18 CHAIRMAN BABCOCK: I'm just writing it down.

19 MR. ORSINGER: That also implies "not a
20 basis for sanctions either" if it has no effect.

21 CHAIRMAN BABCOCK: Yeah. Alex.

22 PROFESSOR ALBRIGHT: I have a friendly
23 amendment to Elaine's motion. I like it because, like she
24 said, it gives the litigants notice as to what the problem
25 is.

1 CHAIRMAN BABCOCK: Can you speak up? I'm
2 not getting all of it.

3 PROFESSOR ALBRIGHT: I like Elaine's
4 proposal because it gives the litigants notice of the
5 problem and tells them that it's not being considered, but
6 what if you said, "The judge against whom the motion is
7 filed may strike the motion"?

8 CHAIRMAN BABCOCK: Okay.

9 PROFESSOR ALBRIGHT: That way it makes it
10 clear that the judge doesn't have to refer it to somebody
11 else to strike it. This judge can go ahead and strike it.
12 It also solves the "struck" and "stricken" issue.

13 CHAIRMAN BABCOCK: So you would say, "An
14 unverified motion is subject to being stricken by the
15 judge against whom the motion is filed"?

16 PROFESSOR ALBRIGHT: Well, that is major
17 passive voice. The subject is "the judge against whom the
18 motion is filed may strike an unverified motion."

19 HONORABLE BILL RHEA: But then you're
20 introducing the iffiness again, the "may strike." You
21 ought to say "shall strike."

22 PROFESSOR ALBRIGHT: Yeah, and I don't feel
23 strongly one way or the other. I got the impression that
24 there was a feeling of this group that a judge could say,
25 "This is a good motion and I'm going to go ahead and

1 invoke all these procedures," but if you don't want to you
2 can say "must strike."

3 CHAIRMAN BABCOCK: Okay. Buddy.

4 MR. LOWE: One of the problems, you say a
5 lot of bad things about a judge and then here this judge
6 says, "Well, I don't like that. I'll strike it." I would
7 hate to see the judge -- you know, putting the pressure on
8 the judge to do that.

9 CHAIRMAN BABCOCK: Judge Brister, then Judge
10 Rhea.

11 HONORABLE SCOTT BRISTER: Not me.

12 CHAIRMAN BABCOCK: Did you have your hand
13 up? Judge Rhea.

14 HONORABLE BILL RHEA: Perhaps we ought to --
15 it seems to me there is some possible disagreement here.
16 Maybe we ought to take a vote on whether this should be a
17 mandatory striking or no effect or permissive with the
18 court.

19 CHAIRMAN BABCOCK: Yeah. I think that's a
20 -- Hatchell's language I think -- which I'll read again.
21 "An unverified motion has no effect and does not invoke
22 the procedures of this rule" would be good language for
23 the mandatory wing of this debate. Judge Brown.

24 HONORABLE HARVEY BROWN: Well, I don't see
25 any problem with making it mandatory because a judge can

1 always recuse himself or herself without saying why. So
2 even if I say I'm striking this, if I still want to recuse
3 myself I just sign a one sentence order saying I recuse
4 without telling anybody why.

5 CHAIRMAN BABCOCK: Good point. Good point.
6 Richard.

7 MR. ORSINGER: I don't think this change
8 we're considering is going to affect what I'm about to
9 say, but a lot of the affidavits that I've seen in
10 litigation are somewhat defective because they don't
11 establish personal knowledge or there is some information
12 and belief or whatever; and if a judge can just silently
13 ignore a motion to recuse because they don't think that
14 the affirmation is sufficient, then even one of us sitting
15 around the table who has done the best to file a good one
16 that's verified is getting no response from the judge and
17 not knowing why, and then you're talking about mandamus
18 and everything, and maybe it's just the fact that the
19 judge doesn't agree with some of the language in your
20 jurat or something. So I don't know. I would like to see
21 some action by the judge if he feels like it's not
22 verified so that I know that I can correct my affidavit.

23 CHAIRMAN BABCOCK: Well, you're talking now
24 about something that's different. We're talking here
25 about something that's just not verified at all. You're

1 talking about something that's defective for some other
2 reason.

3 MR. ORSINGER: "Not verified" to me means
4 it's not under oath, and so that means if it's on
5 information and belief, you read the summary judgment
6 cases and the TRO cases, that means it's not verified, so
7 --

8 CHAIRMAN BABCOCK: Well, let's take it one
9 problem at a time.

10 MR. ORSINGER: Well, anyway, my point is I
11 would like to see some reaction from the judge if the
12 judge is not going to take action because it's not
13 verified.

14 CHAIRMAN BABCOCK: Okay. Anybody else? I
15 think Judge Rhea has got a good thought, and maybe this
16 will direct us. Can we take a vote on whether or not
17 people think that it should be mandatory in some way,
18 either Hatchell's language or Senator Harris' language or
19 some other language, or it should be discretionary with
20 the court? They can consider unverified motions if they
21 want, subject to striking or notice or some concept that
22 we have. Is that a vote we're prepared to take, Judge
23 Peeples?

24 HONORABLE DAVID PEEPLES: I'm not sure
25 "mandatory" is the right word. I think what Mike Hatchell

1 is saying is automatic as opposed to mandatory. I mean,
2 Mike's is automatic, and Elaine's would take some judicial
3 action, so a default rule is really what we're talking
4 about, isn't it?

5 CHAIRMAN BABCOCK: Okay. Automatic versus
6 doing something. How many people -- is that okay? Can we
7 vote on that? How many people think it should be
8 automatic? All right. How many people think there should
9 be some action taken by the court?

10 By a vote of 18 to 6 the committee believes
11 that it should be automatic. So let's direct our efforts
12 then towards coming up with language that would be
13 automatic.

14 Okay. Sorry. It was 18 to 7. We had a
15 late vote from the Valley. Is there a Jeff Harper here,
16 by any chance? Nope.

17 Okay. So what about Hatchell's language,
18 "has no effect and does not invoke the procedures of this
19 rule"?

20 MR. LATTING: I have a question about that.

21 CHAIRMAN BABCOCK: Yeah, Joe.

22 MR. LATTING: If someone files an unverified
23 scurrilous motion, I guess most of us have seen scurrilous
24 paper. I mean really insulting. It seems like to me that
25 ought to subject someone to sanctions or some sort of

1 discipline that the court could impose.

2 CHAIRMAN BABCOCK: Isn't there a general
3 rule on that?

4 MR. LATTING: Well, but if we say that it
5 has no effect I'm just -- I raise that issue. That sounds
6 like it just doesn't exist, and if it has no effect, how
7 can it subject him to --

8 MR. ORSINGER: I have the same concern.

9 MR. LATTING: I mean, I have seen some
10 things that are offensive to me, deeply offensive, you
11 know, suggesting the judge is in the pocket of the lawyers
12 and all that kind of thing.

13 CHAIRMAN BABCOCK: Mike.

14 MR. HATCHELL: Take "has no effect" out. I
15 mean, I don't understand. If you were to file a pleading,
16 facially stating "no cause of action" over and over again,
17 surely you would be subject to sanctions under Chapter 10.
18 I don't see why it's a problem.

19 CHAIRMAN BABCOCK: I agree with that. Just
20 because your pleading is so bad that it doesn't have any
21 effect and doesn't invoke the procedures of the rule
22 doesn't mean you can escape the frivolous pleading
23 sanction. I don't see it as a problem, but, Judge Rhea,
24 maybe you do.

25 HONORABLE BILL RHEA: How about if we took

1 out "of no effect" and just said "does not invoke the
2 procedures of this rule."

3 CHAIRMAN BABCOCK: Well, because then you
4 get back into that discretionary thing. Well, okay, it
5 doesn't invoke the procedures of the rule, but maybe it's
6 out there to be ruled upon or acted upon. Buddy.

7 MR. LOWE: "Shall have no effect with regard
8 to recusal or disqualification."

9 CHAIRMAN BABCOCK: How about "may be
10 ignored"?

11 MR. ORSINGER: Chip, what you're saying is,
12 is that it's okay to exempt the sanction features of this
13 rule because we have general sanction features that would
14 still apply. Is that what you're proposing?

15 CHAIRMAN BABCOCK: Well, I say that. I
16 don't think that the sanction procedures of this are
17 exempted either.

18 MR. ORSINGER: Really?

19 CHAIRMAN BABCOCK: I mean, if I file an
20 unverified motion which is just -- has no effect and then
21 I file another one, and it doesn't have any effect either,
22 and then I file a third one, the sanction motion may come
23 into play.

24 MR. LATTING: And the effect is that it
25 triggers sanctions.

1 CHAIRMAN BABCOCK: Yeah.

2 MR. LATTING: Which is an effect, especially
3 if you're the one against whom it's triggered.

4 CHAIRMAN BABCOCK: Well, and the argument
5 would be when we say "the procedures of this rule," the
6 sanctions are part of the procedures of the rule, so...

7 MR. ORSINGER: You could add "except
8 sanctions."

9 CHAIRMAN BABCOCK: Right. Mike, what do you
10 think about that?

11 MR. HATCHELL: That's not a problem.

12 MR. LATTING: Chip, the reason I bring this
13 up is that the people against whom we would want to see
14 sanctions imposed are the kinds of people who would be
15 filing wacky motions, and I don't know. That's the only
16 reason I mentioned it.

17 CHAIRMAN BABCOCK: Okay. What if it says
18 "has no effect and does not invoke the procedures of this
19 rule, except for the sanctions provisions of this rule"?

20 MR. LATTING: That would be fine.

21 HONORABLE SCOTT BRISTER: It sure would be
22 shorter just to say "may be ignored."

23 CHAIRMAN BABCOCK: Would be.

24 PROFESSOR ALBRIGHT: But that's not
25 automatic.

1 CHAIRMAN BABCOCK: Yeah. "May be ignored"
2 is --

3 HONORABLE SCOTT BRISTER: "Shall be
4 ignored."

5 CHAIRMAN BABCOCK: "Shall be." Do we want
6 to get back to that?

7 MR. WATSON: Change "may" to "shall."

8 MR. ORSINGER: "Shall be ignored for
9 sanction purposes"?

10 HONORABLE DAVID PEEPLES: It's already nine
11 pages long. I don't think ten extra words is going to
12 hurt it.

13 CHAIRMAN BABCOCK: Well, I like the concept
14 that Mike has about the invoking the procedures of the
15 rule because once something lands on the docket then
16 there's an argument that all of the elaborate procedures
17 we have created here would come into place in some way,
18 and so I like Mike's thought that they don't if it's not
19 verified.

20 MR. HATCHELL: Well, to me "may be ignored"
21 doesn't solve that problem. May be ignored by who?

22 CHAIRMAN BABCOCK: That's right. "May be
23 ignored" doesn't solve it at all. That's why I like
24 Mike's language. Judge Brown.

25 HONORABLE HARVEY BROWN: This is a little

1 late, but I'm rethinking at least my position on the vote
2 about the automatic. We just had this case in the paper
3 recently where a judge was found to sexually harass a
4 litigant. What if that litigant filed a motion to recuse,
5 unverified? It seems to me it would be a good thing to
6 have that person at least get some type of ruling from a
7 court saying it's stricken, so at least they know what's
8 going on rather than just ignoring it.

9 Now, ignoring it is nice as a trial judge,
10 I'd have to admit. I'd rather not look the pro se in the
11 eye and say, "I'm striking your pleading." Then they want
12 to get into a debate with me, and I have had these filed
13 on the eve of trial where I just ignore them. So that's
14 kind of nice to have, but although it's more comfortable
15 as a trial judge to be able to do that, it just seems to
16 me that we do have an interest in justice if somebody has
17 a good motion, and I think that would be rare, but if they
18 did, it seems like they should be told it's being stricken
19 or denied or something.

20 CHAIRMAN BABCOCK: Well, but if there is
21 that rare case where there is a good motion, can't --
22 doesn't the trial judge have the authority to say, "Look,
23 you may have a good motion here, but it needs to be
24 verified. So go back and verify it."

25 HONORABLE HARVEY BROWN: Well, yeah, you

1 could, but going back to my hypothetical, I suppose a
2 judge if he's accused of sexual harassment is probably is
3 not going to suggest, "Oh, why don't you go verify it so
4 you can do it right?"

5 CHAIRMAN BABCOCK: Probably not going to
6 strike it either.

7 HONORABLE HARVEY BROWN: Oh, I would think
8 that the judge probably would strike it if the judge --
9 what's the judge going to grant it?

10 CHAIRMAN BABCOCK: No. Your hypothetical
11 bad judge is just trying to bury this thing, and he knows
12 if it's not verified it's not a good motion, so he just
13 leaves it in the file.

14 PROFESSOR ALBRIGHT: But, Chip, that is
15 exactly why it needs to have the order striking it to make
16 it no good. So then the judge either has to refer it to
17 another judge or strike it. It can't just be buried.

18 CHAIRMAN BABCOCK: Yeah, Buddy.

19 MR. LOWE: Well, we have so many things in
20 the rules that a pro se litigant doesn't understand. I
21 mean, you have to file request for admissions within 30
22 days. We can't educate and take care of every pro se
23 litigant, so why should we do it in a situation like this
24 when we don't in many other situations? Their lawsuits
25 can be dismissed. Why take such special care of a pro se

1 litigant? If we're going to, we have got a lot of other
2 areas we are going to have to cover.

3 CHAIRMAN BABCOCK: Alex.

4 PROFESSOR ALBRIGHT: Well, I think even if
5 this person is represented by a lawyer, if the judge --
6 let's take the situation Richard brought up where the
7 judge says, "I think this is defective, and I am
8 interpreting this rule to include defective as well as
9 absent verification, so I'm just going to ignore it." I'm
10 a lawyer, and I can't do anything to make that judge do
11 something with this motion, and, you know, there are some
12 judges out there, unfortunately, that might do something
13 like this; and I think we need to recognize it, and the
14 purpose of this rule is to get this stuff going and get
15 these judges off those cases.

16 CHAIRMAN BABCOCK: Okay. Judge Rhea.

17 HONORABLE BILL RHEA: I would join Judge
18 Brown in asking for a revote. I, frankly, misunderstood
19 the way the vote was going. I thought it was going to be
20 between automatic and permissive, discretionary act on the
21 part of a judge as opposed to what we had. I would have
22 voted for mandatory if I had really understood the vote.

23 CHAIRMAN BABCOCK: Anybody else want to have
24 a revote?

25 MR. LOWE: Vote again.

1 PROFESSOR ALBRIGHT: Sure.

2 MR. TIPPS: I lost, so I would like to have
3 a revote.

4 MR. LATTING: Well, I didn't vote the first
5 time, but the reason I didn't was because --

6 CHAIRMAN BABCOCK: Well, if you can't vote,
7 you can't complain.

8 MR. LATTING: Well, yes, I can. Who made up
9 that rule?

10 CHAIRMAN BABCOCK: MTV, as a matter of fact.

11 MR. LATTING: It concerns me that nothing
12 happens. I'm used to the idea that when something gets
13 filed something ought to happen, and as we've had -- well,
14 it ought to, I think. It bothers me that someone is
15 filing a motion to recuse a trial judge, and we're talking
16 about -- we're thinking about it from a meritless motion,
17 but what if it's a good motion that's just not
18 technically correct? It bothers me that a judge can --
19 that that just gets lost and nothing happens as a result
20 of it. It seems to me that it's not unreasonable to
21 require the judge and make it mandatory that he deny it or
22 strike it or whatever language, but that something happens
23 so you have got an event that occurs.

24 CHAIRMAN BABCOCK: Right. You're in the
25 automatic camp, but you say there ought to be something --

1 MR. LATTING: Yeah.

2 CHAIRMAN BABCOCK: -- coming out of the
3 court that makes it clear that this automatic thing has
4 happened?

5 MR. LATTING: Yes.

6 CHAIRMAN BABCOCK: Okay. Judge Rhea,
7 though, wants to revote on whether it ought to be
8 automatic or discretionary or permissive with the judge.

9 HONORABLE BILL RHEA: Well, that's not a
10 revote. I don't think that's the vote we took.

11 CHAIRMAN BABCOCK: What?

12 HONORABLE BILL RHEA: I mean, the vote we
13 took was automatic or requiring the judge to do something
14 affirmative, a strike. As opposed to -- we never did vote
15 on are we talking about a thing that must happen or are we
16 talking about a thing that may happen, a consequence that
17 may happen? We never did vote on that.

18 CHAIRMAN BABCOCK: Well, that's what I
19 thought we were voting on, so maybe since there is some
20 confusion we ought to vote again. Bill, the vote is
21 between automatic, whether or not there is some piece of
22 paper that flows from the court that says the automatic
23 thing has now happened, versus something that the trial
24 judge has discretion to do or not to do.

25 So, in other words, in Judge Brown's

1 hypothetical if the unverified but meritorious motion
2 comes to him then -- accusing him of sexual misconduct,
3 then he can rule on it or the procedures of the rule can
4 kick in.

5 HONORABLE BILL RHEA: Well, if that's what
6 we voted on, I'm okay with the vote then.

7 CHAIRMAN BABCOCK: Okay. That's what I
8 thought we were voting on, but if we didn't, we can vote
9 again. Judge Peeples.

10 HONORABLE DAVID PEEPLES: I agree that it
11 would be wrong for someone's motion to be ignored and they
12 never find out why. I don't think in the real world that
13 that's going to happen very often, but it might happen
14 some, okay; and if we can draft around it then I'm for it.
15 Now, but look at the bottom of page four in the last
16 paragraph, the italicized language. I just wonder if this
17 doesn't go a long way towards curing that problem, which I
18 think won't happen very often.

19 This says if you file something and the
20 recused at judge doesn't either grant it or refer it
21 quickly then you can pull rank, you know, go up to the
22 presiding judge. In other words, get it to somebody else
23 who's not personally offended by it? Now, does that help?

24 MR. ORSINGER: Well, he's going to have to
25 ignore it, too, isn't he or she?

1 HONORABLE DAVID PEEPLES: Well, I think
2 somebody is going to say, "Look, are you willing to verify
3 this?"

4 "Well, sure. You mean I've got to do that?
5 Yeah. Where do I sign it?" That's going to happen a lot
6 of the time. I mean, I think that the concern that we're
7 hearing expressed here is somebody doesn't know why his or
8 motion is being ignored, and I think most of the time
9 they're going to find out. They could find out by reading
10 the rule.

11 MS. SWEENEY: There's a concept.

12 HONORABLE DAVID PEEPLES: But if they don't
13 like it, there is some language here at the bottom of page
14 four that says if it's just languishing before the recused
15 at judge you can go to the presiding judge, who is a
16 different person. I'm just wondering if that doesn't as a
17 practical matter solve the problem that we're talking
18 about.

19 CHAIRMAN BABCOCK: You would get your
20 answer, but it would just be down the road and a different
21 judge be telling you.

22 MR. ORSINGER: Well, that's if they decide
23 to tell you because they are not required to tell you.

24 CHAIRMAN BABCOCK: Yeah. Okay. Well, Judge
25 Rhea, do you withdraw your demand for a recount?

1 HONORABLE BILL RHEA: Yes.

2 CHAIRMAN BABCOCK: Okay. So we got that
3 behind us, so now we're on automatic, with notice or
4 without notice. And how do people feel about that?
5 Wallace, have you got a thought about that?

6 MR. JEFFERSON: I agree with Judge Peeples.
7 I think people are going to know or are going to be told
8 that this motion is not verified. It's explicit in the
9 rules it has to be verified, and I don't think we ought to
10 forgive even pro se plaintiffs for that requirement, so I
11 would keep it that way.

12 CHAIRMAN BABCOCK: Judge Peeples.

13 HONORABLE DAVID PEEPLES: I do think we
14 ought to -- I don't know if we're finished with that. We
15 ought to deal with the problem that Richard raised, which
16 is improperly verified, defectively verified. I don't
17 think that ought to just be ignored. Now, if somebody
18 doesn't even swear to anything I would be --

19 CHAIRMAN BABCOCK: That's what we're talking
20 about.

21 HONORABLE DAVID PEEPLES: Well, I think
22 we're talking about --

23 CHAIRMAN BABCOCK: Let's solve that problem.

24 MR. LATTING: Well, we have language in the
25 summary judgment rule that we might borrow from, and we

1 have language in other statutes that talk about in -- what
2 do they call it? Oh, it's called improper verification,
3 and there has to be an opportunity and a refusal to cure.
4 That's the concept, that if there's some technical
5 impropriety it needs to be pointed out with an opportunity
6 to cure.

7 CHAIRMAN BABCOCK: And wouldn't the
8 adversary process cure that, though? I mean, wouldn't the
9 opponent of the recusal point that out, say, "Wait a
10 minute. This is not properly verified"?

11 MR. LATTING: Yeah. I don't have a strong
12 feeling about it, but there's a little difference in this
13 situation because here we have got a situation different
14 from the ordinary adversary process. Here we have got
15 somebody -- and we will have to assume that in a number of
16 cases it's a bona fide complaint that the judge ought not
17 to be in this case and is improperly sitting. So we have
18 that -- that kind of skews the adversary process,
19 particularly if you think there may be somebody who
20 doesn't have a lawyer involved. I don't know, just
21 something to think about.

22 CHAIRMAN BABCOCK: Okay. I don't have a
23 good sense of what we all feel collectively about whether
24 or not there ought to be some notice. Judge Peeples I
25 think is suggesting that there doesn't need to be notice

1 because of the provisions of (d)(3), which says, "Look, if
2 you don't hear then you can go on up to the next level,"
3 and presumably you will find out there; and in the
4 ordinary course of things the clerk will tell you or
5 somehow you will find out; but I don't have a sense of
6 what everybody else thinks about that.

7 MR. MEADOWS: Let me tell you what I think
8 about it. Of course, I was on the losing side of the
9 vote, and I simply just don't understand the significance
10 of having it be mandatory or automatic, but I can't
11 imagine that we would -- if the issue is you don't want an
12 unverified motion initiating these procedures, but you --
13 but it's fair to have them initiated if it is verified,
14 why wouldn't you let the person know that that's the fault
15 of it, that that's the failing of it, and so I think
16 notice is a fair thing to do because if the question is
17 "Will you verify it or will you not," they ought to have a
18 chance.

19 CHAIRMAN BABCOCK: Stephen.

20 MR. TIPPS: I also come from the losing side
21 of the vote, but I would propose that it say, "An
22 unverified motion may be summarily denied without referral
23 pursuant to the No. (3)" so that something has to happen,
24 but once that happens --

25 CHAIRMAN BABCOCK: When you put that "may"

1 in there now you are getting into the discretionary area.

2 MR. TIPPS: Well, I guess my argument would
3 be that if the trial judge doesn't want to refer it
4 because it is unverified then he ought to have to do
5 something, but all he has to do is summarily deny it.

6 CHAIRMAN BABCOCK: Okay.

7 MR. LOWE: Chip, not only what David says, I
8 mean, the lawyer on the other side, I'm not going to --
9 just because it's unverified I'm going to just say I don't
10 do anything. I'm going to say, "Whoa, judge, wait." If
11 you're going to file something and say "don't consider
12 it," I mean, you know, there are a lot of ways they are
13 going to get notice.

14 CHAIRMAN BABCOCK: Okay. Anybody else got
15 any thoughts? Well, we have some language that has been
16 proposed, and I'd say that's probably the without notice
17 wing, which is Mike Hatchell's "has no effect and does not
18 invoke the procedures of this rule except for the
19 sanctions procedures or provisions," which we probably
20 ought to spell out what they are. So that's one. How
21 would the with notice -- Stephen, you got some language?

22 MR. TIPPS: Yeah. My language would be "An
23 unverified motion may be summarily denied and need not be
24 referred pursuant to subdivision (d)(3)".

25 CHAIRMAN BABCOCK: Okay. Well, it's got to

1 be "shall be," doesn't it?

2 MR. TIPPS: Okay. "Shall be summarily
3 denied."

4 CHAIRMAN BABCOCK: And what was the next
5 paragraph?

6 MR. MEADOWS: Steve wants another vote on
7 it.

8 MR. TIPPS: "And not referred pursuant to
9 subdivision (d) (3)."

10 MR. MEADOWS: Let me just ask for
11 clarification, is there any reason for what we are talking
12 about other than to require a verified motion? I mean, is
13 there any purpose --

14 CHAIRMAN BABCOCK: Yes.

15 MR. MEADOWS: -- other than to make somebody
16 swear to it?

17 CHAIRMAN BABCOCK: There is a purpose
18 because if the requirement is that it's going to be
19 verified then we don't want unverified motions kicking off
20 all these other procedures.

21 MR. MEADOWS: Fair enough, but you agree
22 that a verified motion should kick off everything. So the
23 only difference is whether or not somebody swears to it.

24 CHAIRMAN BABCOCK: That's right. Well, a
25 verified motion kicks off some procedures. I mean, under

1 some circumstances it doesn't.

2 MR. MEADOWS: But we don't want to trick
3 people into not swearing to it if they're prepared to do
4 it.

5 CHAIRMAN BABCOCK: No.

6 MR. MEADOWS: So why wouldn't we give them
7 notice that that's the failing in the motion?

8 CHAIRMAN BABCOCK: Okay. Well, you're in
9 favor of Stephen's then.

10 MR. MEADOWS: I mean, I was in favor of it
11 even with the permissive on it.

12 MR. LOWE: Chip, one of the things, "shall
13 be denied," that's not automatic. I mean, that means
14 somebody has got -- they must do something. In other
15 words, "shall be denied by the judge," so the judge then
16 has to do something. It doesn't say that it's void. It's
17 just you follow up with the judge, so that's not
18 automatic.

19 CHAIRMAN BABCOCK: Okay. Well, if I
20 understand the language -- just a second, Carl. "Shall be
21 summarily denied and not referred pursuant to subdivision
22 (d) (3)." Did I read that correctly, Stephen?

23 MR. TIPPS: Yes.

24 CHAIRMAN BABCOCK: Yeah, Carl.

25 MR. HAMILTON: Why don't we just say that

1 the judge shall deny it for improper or nonverification
2 and return it to the movant?

3 CHAIRMAN BABCOCK: "An unverified motion
4 shall be denied and" --

5 MR. HAMILTON: "Shall be denied for reasons
6 of unverification or defective verification and returned
7 to the movant." Then he knows why he's done it wrong.

8 CHAIRMAN BABCOCK: The movant would get
9 notice of the order of the court in any event, wouldn't
10 they?

11 MR. ORSINGER: Yeah. And you can't take it
12 away from the district clerk because Bonnie's not here.

13 CHAIRMAN BABCOCK: Right. Yeah. We can't
14 mess with the district clerk.

15 MR. LATTING: We can clarify that, what Carl
16 said, by saying -- and I don't purport to quote the
17 language, but we could just say that the court shall deny
18 it and state that the reason is the improper verification,
19 stating that the --

20 CHAIRMAN BABCOCK: Okay. So you would amend
21 Stephen Tipps' language to say "shall be summarily
22 denied" and state the reason or something like that?

23 MR. LATTING: "Stating that the reason
24 therefor is improper verification" or words to that
25 effect.

1 CHAIRMAN BABCOCK: Okay.

2 MR. LATTING: That would cure my concern
3 that something happen and the person who filed it knows
4 what happened and why.

5 CHAIRMAN BABCOCK: Okay. Any other
6 comments? We'll probably need to work on the exact
7 language, but we have got the Hatchell/Tipps debate here.
8 Hatchell being it just doesn't have any effect and it's
9 just automatically out of there, doesn't invoke the
10 procedures of the rule; where Stephen says there's going
11 to be a denial, Joe says let's add something to say why
12 it's being denied, why it's being summarily denied; and
13 Stephen's provision says that it doesn't invoke the
14 procedures, the referral procedures of (d)(3) would not --
15 by its terms Stephen's proposal would not exempt the
16 sanctions part of it. So that's the debate.

17 Now let's see if we can get a vote on that.
18 How many people -- did everybody understand the two
19 competing proposals?

20 MR. HATCHELL: Chip, I think there is an
21 inconsistency between the so-called automatic camp and
22 notice.

23 CHAIRMAN BABCOCK: No, no, no. We are
24 talking about automatic. I can't just --

25 MR. HATCHELL: I like Joe's language. I

1 mean, so I would propose that.

2 CHAIRMAN BABCOCK: Okay. So you might vote
3 against your own proposal then.

4 MR. LOWE: No, no. It would add to it.

5 MR. HATCHELL: Yeah, right.

6 MR. LOWE: It would add to his proposal, the
7 notice provision.

8 MR. ORSINGER: Before I vote I would like to
9 know for sure that "summarily denied" does not preclude
10 sanctions.

11 MR. LATTING: I wouldn't think it would.

12 MR. ORSINGER: Because I like the sanctions
13 component of Mike's version and summary denial would mean
14 there is no hearing in which someone can present evidence
15 on their attorneys fees or something. I don't know
16 whether --

17 MR. LATTING: Just say "shall be denied."
18 What does "summarily" add? What does that add to it? It
19 just means we really mean it. That's all it means.

20 MR. ORSINGER: You can bring a motion for
21 sanctions after the denial.

22 CHAIRMAN BABCOCK: Okay. So you're -- Alex.

23 PROFESSOR ALBRIGHT: As long as we're
24 talking about angels on heads of pins, if you deny it
25 would it then count as one of your three that then count

1 against you; whereas if it gets stricken it wouldn't count
2 as one of your three?

3 CHAIRMAN BABCOCK: Yeah. I think Senator
4 Harris would say if you screw up and don't verify it, that
5 it would count. Paula.

6 MS. SWEENEY: I'm back to my void issue from
7 before. Right now we're saying a judge shall do
8 something, shall deny. Well, and it seems like an odd
9 question to posit, but it isn't in the real world. What
10 if the judge doesn't? You can't mandamus him. It's not a
11 ministerial obligation, or are we making it one? I agree
12 totally with the purpose and with the idea, but I don't
13 think that we can write it in such a way that we're
14 ordering judges to deny these. I think we need to go back
15 to making them void or having no effect ab initio or
16 something.

17 If you try to put in there the judge must X
18 then you get into this whole -- and what if the judge
19 says, "Oh, well, you know, it's not done right, and you
20 might be right. I'm inclined to grant it." Then the
21 other side is down here on this bad motion, and they are
22 filing mandamus motions to try and make the judge grant
23 it, so in terms of drafting I think we need to write it
24 another way.

25 CHAIRMAN BABCOCK: Does the "has no effect"

1 language solve your problem?

2 MS. SWEENEY: Yeah. It's closer.

3 CHAIRMAN BABCOCK: Because that kind of
4 sounds like "void." Okay.

5 MS. SWEENEY: We could say "does not exist"
6 and just take ourselves completely into Oz.

7 MR. TIPPS: How about "may be ignored"?

8 CHAIRMAN BABCOCK: Well, Hatchell says that
9 he is willing to accept the Tipps amendment to give
10 notice. So how would you give notice under your language?

11 MR. HATCHELL: Add another sentence that
12 says "the motion shall be immediately stricken by the
13 trial court with an order explaining the reason therefor."

14 CHAIRMAN BABCOCK: Steve, how does that
15 sound to you?

16 MR. HAMILTON: Skip, I wrote one out here.
17 Let me try this.

18 MR. TIPPS: I don't notice much difference,
19 because it still imposes upon the judge an obligation to
20 do something.

21 CHAIRMAN BABCOCK: Right.

22 MR. TIPPS: Which is why I liked "may" to
23 start with.

24 MR. MEADOWS: May I say something, Chip?

25 CHAIRMAN BABCOCK: Yes, you may.

1 MR. MEADOWS: On Paula's point, which is
2 ordinarily one I would agree with, in this context it
3 doesn't really matter, does it, because I have been in one
4 of these fights where the judge recused himself and the
5 lawyer on the other side was unhappy about it and tried to
6 undo it. It just can't be done.

7 I mean, judges, as Harvey said a moment ago,
8 they can recuse themselves any time they want to. So even
9 in the face of an unverified motion, if the judge wants
10 out of the case and feels that he or she shouldn't, there
11 is nothing that can be done on mandamus or otherwise to
12 undo that.

13 CHAIRMAN BABCOCK: No, that's clear.

14 MR. MEADOWS: So I don't think we need to
15 have this sort of void issue as much as we need to just
16 have some notice that to the unwary or perhaps even the
17 skilled lawyer who didn't -- who is not familiar with the
18 rule that if they want to verify it they can have their
19 motion for recusal considered.

20 CHAIRMAN BABCOCK: Yeah. It seems to me,
21 Bobby, that we're talking about the situation where the
22 judge does not want to recuse himself and will not recuse
23 himself and he or she has been attacked by an unverified
24 motion. It may be good and may be bad, probably bad, but
25 he's been attacked by an unverified motion.

1 MR. MEADOWS: And in Harris County you get a
2 postcard that says "motion stricken," "unverified motion
3 stricken."

4 CHAIRMAN BABCOCK: Yeah. That's right. So
5 now you've got notice.

6 MR. MEADOWS: Now you've got notice.

7 CHAIRMAN BABCOCK: But only, Bobby, if we
8 add this language that Mike just read. Carl then Judge
9 Brown.

10 MR. HAMILTON: What if we say, "A motion not
11 verified or properly verified shall be denied by a written
12 order stating the motion is denied," quote, "for improper
13 verification," close quotes.

14 CHAIRMAN BABCOCK: Well, it seems to me,
15 Carl, if you do that then you get into Richard's problem.
16 Now we're talking about the difference between not
17 verified at all and, you know, maybe there is some
18 technical problem with the motion.

19 MR. HAMILTON: That's right. It covers both
20 of them.

21 CHAIRMAN BABCOCK: Yeah. It seems to me
22 that maybe we're tackling a bigger problem than what we
23 were looking at. How does everybody feel about that?
24 Elaine.

25 PROFESSOR CARLSON: Mike, is your motion

1 only if there is a total lack of verification or a defect
2 of verification?

3 MR. HATCHELL: No. I'm assuming --

4 PROFESSOR CARLSON: A lack.

5 CHAIRMAN BABCOCK: It's the language that we
6 have in the -- we're leaving the words in the rule "an
7 unverified motion."

8 MR. HATCHELL: Right.

9 CHAIRMAN BABCOCK: And we're striking "may
10 be ignored." We're striking three words, and we're going
11 to pick up about 20. More than that, actually. What the
12 Hatchell/Tipps proposal is, "An unverified motion has no
13 effect and does not invoke the procedures of this rule,
14 except for the sanctions provisions of such," whatever the
15 section is, "The motion shall be immediately stricken by
16 order of the court, stating the reason therefor." That's
17 what's on the table. Judge Brown.

18 HONORABLE HARVEY BROWN: I do think we ought
19 to talk about notice, as I earlier argued, but I don't
20 think we should get into explaining all the reasons trial
21 judges make decisions. If we are going to start requiring
22 every ruling by judges to explain the reasons, we are
23 going to create disincentives for judges to do things.
24 Sometimes -- I do think you need to know a ruling. That's
25 why I don't think "ignored" is good, but I don't think we

1 should always have to go into full explanations.

2 CHAIRMAN BABCOCK: Alex.

3 PROFESSOR ALBRIGHT: This is a procedural
4 point. Have we gotten to the point that there is an
5 obvious split in the house and maybe we just submit the
6 split to the Court?

7 CHAIRMAN BABCOCK: Split in the house about
8 what?

9 PROFESSOR ALBRIGHT: Huh?

10 CHAIRMAN BABCOCK: About what?

11 PROFESSOR ALBRIGHT: I mean, it seems to me
12 that we have half of -- you know, a large group of people
13 saying we need to have notice and a large group of people
14 saying notice isn't necessary, a group of people saying it
15 should be optional, a group of people saying it should be
16 mandatory; and is that the sort of thing that the Supreme
17 Court needs us to have a ten to seven vote; or do we
18 submit the two options to the Court with the good reasons
19 for both?

20 CHAIRMAN BABCOCK: I don't think we're that
21 split, Alex.

22 PROFESSOR ALBRIGHT: All right.

23 CHAIRMAN BABCOCK: But maybe further
24 discussion will reveal.

25 PROFESSOR ALBRIGHT: I think what I'm trying

1 to do is call the question so we can move on.

2 CHAIRMAN BABCOCK: We need to move on
3 because there is another recusal issue that we have after
4 this one. But I take what you say, and I think we do need
5 to move on. Mike, the proposal was that Judge Brown said
6 we ought to strike the part of the sentence that says
7 "stating the reason therefor."

8 MR. HATCHELL: That's fine with me.

9 CHAIRMAN BABCOCK: How does everybody else
10 feel about that, just "stricken" so now you know you've
11 got some problem? Judge Rhea.

12 HONORABLE BILL RHEA: I totally agree with
13 him about that. I mean, all the judges in Dallas are a
14 little excised about the topic for tomorrow on the summary
15 judgment rule, so this is the same ilk, and I don't think
16 that would be a bad idea.

17 CHAIRMAN BABCOCK: And if the pro se
18 litigant gets an order saying it's been stricken, I mean,
19 they're going to ask why.

20 HONORABLE SCOTT BRISTER: They're going to
21 do that any -- they file this to stop things, and then
22 when things don't stop they stand up and they say, "Hey,
23 how come everything's not stopped?" I mean, that's why
24 they did it, and you say, "because you didn't verify it,
25 you nut." You know, and to do a bunch of writing orders

1 about this stuff is trying to write a rule for a handful
2 of people.

3 MR. LATTING: You're so Hamiltonian today.

4 HONORABLE SCOTT BRISTER: I mean, it's just
5 that's the way it really works. Now, we're not talking
6 about all the recusals that have some foundation, you
7 know, because people that can read and have a rule book
8 and a Bar license read and verify. It's not that big a
9 deal. We are talking about the ones who are clueless, and
10 I don't want to get into writing letters to clueless
11 people. It's a waste of time.

12 CHAIRMAN BABCOCK: Okay. We have the
13 Hatchell/Tipps language. "Has no effect." That solves
14 Paula's problem, which I agree is a serious problem
15 because of the voidable issue. "Does not invoke the
16 procedures of this rule." That solves the problem of
17 whether all the automatic stuff kicks in, "except for the
18 sanctions provisions of" -- whatever the provisions are.
19 That solves Orsinger's problem that we don't want to give
20 them a free ride when they file a bad motion.

21 "The motion shall be immediately stricken by
22 order of the court." That solves the notice problem that
23 everybody has been concerned about. So it sounds to me
24 like the Hatchell/Tipps compromise solves a lot of
25 problems. What problems are left that it doesn't solve?

1 Any?

2 HONORABLE DAVID PEEPLES: I don't see how
3 merely striking the motion tells them why the motion has
4 been disregarded and stricken.

5 CHAIRMAN BABCOCK: Well, that's right,
6 except that your colleagues from the other parts of the
7 state say there will be a revolt among the district judges
8 if they've got to say why.

9 HONORABLE BILL RHEA: Gives a pretty good
10 hint, though. Would you read that language, the
11 amalgamation?

12 CHAIRMAN BABCOCK: "The motion shall be
13 immediately stricken by order of the court," period. Is
14 that the one you're talking about or the whole thing?

15 HONORABLE BILL RHEA: The whole thing.

16 CHAIRMAN BABCOCK: Okay. "An unverified
17 motion" -- that's language we have in the rule. "An
18 unverified motion has no effect and does not invoke the
19 procedures of this rule, except for the sanctions
20 provisions of" -- whatever those --

21 MR. ORSINGER: (d) (11).

22 CHAIRMAN BABCOCK: "Of (d) (11)".

23 MR. ORSINGER: Parenthesis around (d).

24 CHAIRMAN BABCOCK: Okay. "Of (d) (11),"
25 period. "The motion shall be immediately stricken by

1 order of the court."

2 MS. GARCIA: Chip, is it understood that
3 that's the one bite of the apple already, once that gets
4 stricken?

5 CHAIRMAN BABCOCK: Well, I think they would
6 have to read (d)(11) to know that, but that's what we're
7 saying.

8 MS. GARCIA: Right.

9 CHAIRMAN BABCOCK: That's what we're saying
10 in that. All right. What other problems do we have with
11 this rule that this language doesn't -- with this
12 particular issue that this language doesn't cure?

13 MR. LATTING: I have one question.

14 CHAIRMAN BABCOCK: Joe.

15 MR. LATTING: What do the sanctions in
16 (b)(11) say?

17 CHAIRMAN BABCOCK: (d)(11), I think.

18 MR. LATTING: (d)(11).

19 CHAIRMAN BABCOCK: It's all the part about
20 --

21 MR. ORSINGER: It has to be solely for
22 purposes of delay and without sufficient cause.

23 CHAIRMAN BABCOCK: Actually, "solely" is out
24 now. "Brought for the purposes of delay."

25 MR. ORSINGER: Pardon me. "Solely" is out

1 now.

2 MR. LATTING: Well, the only thing I'm
3 thinking of is if somebody filed a real scurrilous motion.
4 Under the language that you have read it would have no
5 effect except it says explicitly that the sanctions in
6 this rule can be invoked, but I'm thinking about other
7 general sanctions the court has.

8 MR. LOWE: "Sanctions that may be applicable
9 under the rules."

10 MR. LATTING: Yeah. I don't think we should
11 limit it just to (d)(11).

12 CHAIRMAN BABCOCK: All right. Everybody
13 hear that? Anybody know what the other general applicable
14 sanction rule is?

15 MR. ORSINGER: Chapter 10 of the Civil
16 Practice and Remedies Code, and there is some
17 functionality under 9.

18 MR. LATTING: Why don't we just say other --
19 just say "sanctions" and don't describe it?

20 MR. ORSINGER: "Except for sanctions"?

21 CHAIRMAN BABCOCK: Okay.

22 MR. LATTING: "Applicable sanctions," yeah.
23 Just leave it at that.

24 CHAIRMAN BABCOCK: Okay.

25 MR. ORSINGER: I agree with that, too.

1 CHAIRMAN BABCOCK: Okay. So now it would
2 say "has no effect and does not invoke the procedures of
3 this rule, except for the sanction provision of section
4 (d)(11) of this rule and any other applicable sanctions
5 rules or statutes."

6 Okay. Any other problems with the language
7 that we've got? Elaine, you got a problem?

8 PROFESSOR CARLSON: No, but we might just
9 shorten it up and just say "provided the trial court
10 retains authority to enter appropriate sanctions," instead
11 of referring to all of them.

12 CHAIRMAN BABCOCK: "Retains the authority to
13 enter" --

14 PROFESSOR CARLSON: "Impose appropriate
15 sanctions."

16 CHAIRMAN BABCOCK: -- "appropriate
17 sanctions." Okay.

18 MS. SWEENEY: And so our legislative history
19 is clear, that means including the ones provided in this
20 rule and elsewhere in the statute?

21 PROFESSOR CARLSON: Right.

22 CHAIRMAN BABCOCK: Richard, you're the
23 sanctions guy. What do you think about that?

24 MR. ORSINGER: I can live with that.

25 CHAIRMAN BABCOCK: Okay. "Has no effect and

1 does not invoke the procedures of this rule, provided that
2 the trial court retains the authority to enter appropriate
3 sanctions," period. "The motion" -- I lost your language
4 there, Hatchell.

5 "The motion shall be immediately stricken by
6 order of the court." That's where we are now. Yeah,
7 Carl.

8 MR. HAMILTON: Well, I think that sort of
9 impliedly excludes the (d)(11) sanction because it says it
10 has no effect under this rule.

11 CHAIRMAN BABCOCK: What do you think about
12 that, Richard?

13 MR. ORSINGER: Well, when you say "provided
14 that they retain the authority to impose appropriate
15 sanctions" I think that's an exception to the broadly
16 stated no effect.

17 CHAIRMAN BABCOCK: It seems to me it would
18 be, but I don't know. Anybody else share that concern?
19 Judge Peeples?

20 HONORABLE DAVID PEEPLES: (Shakes head.)

21 CHAIRMAN BABCOCK: No?

22 HONORABLE DAVID PEEPLES: No.

23 CHAIRMAN BABCOCK: "Has no effect and does
24 not invoke the procedures of this rule, provided that the
25 trial court retain the authority to enter" --

1 MR. ORSINGER: I think we ought to use the
2 word "impose".

3 CHAIRMAN BABCOCK: Huh? "To impose"?

4 MR. ORSINGER: Yeah.

5 PROFESSOR ALBRIGHT: Chip, should that be
6 "but" instead of "provided that"?

7 MR. ORSINGER: Yes.

8 PROFESSOR ALBRIGHT: "But" or "except"?

9 CHAIRMAN BABCOCK: "But" or "except,"
10 "except that"?

11 PROFESSOR ALBRIGHT: I like "but" better.

12 CHAIRMAN BABCOCK: "But the trial court"?

13 MS. SWEENEY: Yeah.

14 CHAIRMAN BABCOCK: Okay. What if you said,
15 to make Carl's point clear, "impose appropriate sanctions
16 under this or any other rule or statute"?

17 MR. HAMILTON: That's better.

18 MR. ORSINGER: We're getting pretty close to
19 perfect now, I think.

20 CHAIRMAN BABCOCK: And then "The motion
21 shall be immediately stricken by order of the court."

22 Okay. Let's try this one more time. "An
23 unverified motion has no effect and does not invoke the
24 procedures of this rule, but the trial court retains the
25 authority to impose appropriate sanctions under this or

1 any other rule or statute. The motion shall be
2 immediately stricken by order of the court." Maybe we
3 should say "the unverified motion."

4 MR. ORSINGER: I would suggest that
5 "immediately" would go before "be" unless we have
6 grammarians in here that say to the contrary.

7 CHAIRMAN BABCOCK: "The unverified motion
8 shall immediately be stricken"?

9 MR. ORSINGER: I would think that
10 "immediately" goes before the "be."

11 CHAIRMAN BABCOCK: Any grammarians disagree
12 with that? I think the Court has got a grammarian on
13 retainer anyway.

14 PROFESSOR DORSANEO: Grammarians don't care
15 that much about --

16 MR. ORSINGER: And they are going to rewrite
17 this whole rule.

18 CHAIRMAN BABCOCK: Yeah. They're going to
19 rewrite it anyway. Okay. Here's what we're voting on
20 everybody. "An unverified motion has no effect and does
21 not invoke the procedures of this rule, but the trial
22 court retains the authority to impose appropriate
23 sanctions under this or any other rule or statute. The
24 unverified motion shall immediately be stricken by order
25 of the court."

1 All in favor of that rule raise your hand.

2 Okay. All opposed?

3 MS. SWEENEY: Only because I don't
4 understand why that last sentence is on there.

5 CHAIRMAN BABCOCK: What?

6 MS. SWEENEY: That last sentence seems to be
7 a residual appendage that should be stricken.

8 CHAIRMAN BABCOCK: Well, the last sentence
9 is the notice sentence. Okay. You want to reopen the --

10 MS. SWEENEY: We are right back to the same
11 problem of telling the court to immediately strike
12 something, and then what if the court doesn't immediately
13 strike it?

14 CHAIRMAN BABCOCK: Then there is no notice,
15 but that doesn't invalidate the first part of it. The
16 vote is 23 to 2, so I think it passes overwhelmingly.
17 Let's go onto something else. Yeah, Stephen.

18 MS. SWEENEY: All right.

19 MR. TIPPS: Quick grammatical question.
20 Given the fact that that's so long, I would suggest that
21 we put a period -- that we replace the semicolon with a
22 period.

23 CHAIRMAN BABCOCK: I do have a period after
24 "statute."

25 MR. TIPPS: Well, I would put a period after

1 -- I would say "a motion to recuse must be verified,"
2 period. "An unverified motion" -- dah-dah-dah-dah-dah,
3 but this, but that. But however you want to do it is
4 fine.

5 CHAIRMAN BABCOCK: Okay. Very good. Okay.
6 Let's go on to the -- we have still got another recusal
7 issue, I'm sad to say.

8 MR. ORSINGER: It's the following page. It's
9 a letter from Judge Hester dated August 11, 2000, and Carl
10 is going to address that. The letter was to Carl, from
11 Judge Hester to Carl.

12 MR. HAMILTON: Judge Hester is a little bit
13 upset about a situation in Hidalgo County that was like
14 this, and Judge Hecht maybe can correct me if I'm wrong on
15 this. He wrote a dissenting opinion in it, but apparently
16 what happened is Luke Soules and a bunch of lawyers had a
17 case in Hidalgo County in Judge Aparicio's court. They
18 filed a motion to recuse him, and the local administrative
19 judge, who was Judge Gonzalez, I think, at the time,
20 transferred the case on his own to his own court; and that
21 went up on a mandamus; and the mandamus was issued because
22 the local rules did not authorize Judge Gonzalez to take
23 the case unless Judge Aparicio asked him to take it.

24 So it went back down and then the judges got
25 together and amended the local rules to provide that the

1 local judge on his own could transfer the case even
2 without a request. So once they got amended, then they
3 went through the exercise again; and that went up on
4 mandamus; and the court of appeals denied it, and the
5 Supreme Court denied it; and Judge Hecht wrote a dissent
6 on it, pointing out that that sort of conduct violated not
7 only the Rules of Civil Procedure, but also the statute,
8 the Texas Government Code.

9 Judge Hester is very incensed about that.
10 He's the Fifth Administrative Judicial judge, and he has
11 suggested that we put into the rule a provision which
12 would go at the bottom of page four, which would say, "If
13 the motion complies with paragraph (d)(1), the presiding
14 judge of the administrative region shall either request
15 that the local administrative judge of the county where
16 the case is pending transfer the case to another court of
17 the county, shall hear the motion, or immediately assign
18 it to a judge to hear it."

19 We discussed this once before in the
20 committee, and I think that the consensus at that time --
21 and correct me if I'm wrong, David -- was that this was
22 maybe a local problem and the rest of the administrative
23 judges didn't have this problem. So we just sort of
24 didn't do anything about it. We didn't want to give or
25 take away the power of the local administrative judges.

1 This sort of is a little bit of a
2 compromise, I guess, because the administrative judge can
3 either ask the local judge to do it or he can do it
4 himself, so I guess he sort of has trump power over the
5 local rules and over the local judge; but anyhow, he's
6 requesting that this be done; and along this same line
7 apparently the arguments are being made to him that under
8 Rule 3a, the Rules of Civil Procedure, they only trump
9 local proposed rules. Why the word "proposed" is in that
10 rule I don't know, but 3a says that any proposed rules
11 have to be not antagonistic to the Rules of Civil
12 Procedure.

13 So apparently the argument has been made to
14 him that because of the word "proposed" in there, when you
15 have an existing rule that rule doesn't apply. There are
16 a couple of court of appeals cases, I think, that have
17 interpreted that sort of ignoring the word "proposed," but
18 anyhow, he'd like to see that changed.

19 CHAIRMAN BABCOCK: Yeah. Let's stay away
20 from 3a for now. We'll --

21 MR. HAMILTON: Well, that's part of the same
22 thing because --

23 CHAIRMAN BABCOCK: That's part of the
24 problem, yeah.

25 MR. HAMILTON: That's the argument that's

1 used to make the local rule trump the Rule of Civil
2 Procedure.

3 Yeah. I mean, he just wants "proposed"
4 taken out, but he would like to have the administrative
5 judge have the power to deal with a recusal motion and
6 either do it himself, assign another judge to do it, or
7 request the local administrative judge to assign it.

8 CHAIRMAN BABCOCK: Okay. Bill has got a
9 point.

10 PROFESSOR DORSANEO: This has to do with
11 that "proposed" word, and Justice Hecht may be better able
12 to tell us about this, but it seems to me that the word
13 "proposed" is in there because once upon a time the idea
14 was that there wouldn't be any local rules that hadn't
15 been studied and approved by the court, Supreme Court; and
16 that's a nice idea, except it has an unreality to it.

17 What happens is either that the local rules
18 don't get approved or they kind of just get approved, and
19 sometimes they will be inconsistent. So "proposed"
20 probably ought to come out of there in my view.

21 JUSTICE HECHT: Well, we do approve -- we do
22 approve them all; and, I mean, we go through the process.
23 Not all of them are approved because sometime we regard
24 them as inconsistent with the state rules, but sometimes
25 -- and I'm trying to think of an example and none exactly

1 comes to mind, but sometimes we do approve local rules
2 that are inconsistent with the state rules on either an
3 experimental basis or because the judges in a region feel
4 particularly strongly that this tweaking would be good for
5 them and we could wait and see how it works out, or it's
6 hard to know what the bounds of inconsistency are.

7 But there are a lot of local rules around
8 the state, particularly family cases come to mind, that
9 have lots of different requirements about what has to go
10 on in a family case because the lawyers in that -- and the
11 judges in that area where -- they like that procedure, and
12 so there are some inconsistencies in the local rules that
13 we intend at the time that we approve them to coexist with
14 the state rules.

15 PROFESSOR DORSANEO: But it is then true
16 that there are some inconsistencies that you don't see?

17 JUSTICE HECHT: A lot of that.

18 PROFESSOR DORSANEO: I mean, it's just not
19 going to be possible to evaluate them --

20 JUSTICE HECHT: Right.

21 PROFESSOR DORSANEO: -- in the abstract.

22 JUSTICE HECHT: Right.

23 PROFESSOR DORSANEO: But if they are
24 inconsistent, they should not override.

25 JUSTICE HECHT: Right.

1 CHAIRMAN BABCOCK: Could I ask a question,
2 Richard, before -- Carl, was Justice Hester reacting to
3 our proposed rule or was he reacting to current Rule 18a
4 and 18b?

5 MR. HAMILTON: He was reacting to our
6 proposal because we did not put that language in there,
7 and he -- I think early on maybe he had some discussion
8 with Judge Peeples about it, and he somehow got the
9 impression that it was going to be put in there and then
10 it didn't.

11 HONORABLE DAVID PEEPLES: I thought we had
12 taken care of it, and maybe I just remember it
13 incorrectly.

14 CHAIRMAN BABCOCK: We have this going to the
15 presiding judge of the administrative region, where the
16 existing rule has it going to the administrative district.
17 Is there a difference between those two terms?

18 HONORABLE DAVID PEEPLES: Where are you
19 reading from?

20 MR. ORSINGER: I think they renominated that
21 from -- to "region" from "administrative district" in the
22 statute; isn't that right, David? It used to be called
23 "administrative districts" and now they are called
24 "administrative regions"? That happened about ten years
25 ago or something like that?

1 CHAIRMAN BABCOCK: Well, where I'm reading
2 from is page four of our proposed rule under subsection
3 (3), referral.

4 HONORABLE DAVID PEEPLES: Well, the
5 difference between region and district doesn't make any
6 difference on this issue or any other issue I don't think.

7 MR. ORSINGER: He was comparing it to the
8 old rule --

9 HONORABLE DAVID PEEPLES: Yeah.

10 MR. ORSINGER: -- that was in the rule book,
11 and that says "district" because that's what they used to
12 be called.

13 CHAIRMAN BABCOCK: Yeah. Well, doesn't our
14 language -- I mean, I may not be reading it right, David,
15 but doesn't our language say that if the judge refuses to
16 recuse or disqualify, the judge must promptly refer the
17 motion to the presiding judge of the administrative
18 region?

19 HONORABLE DAVID PEEPLES: Yeah. It says
20 that. Can I try to clarify? Carl, my recollection of
21 what Judge Hester is concerned about, it boils down to
22 this. In a multi-judge county when a case is randomly
23 assigned to Judge A and there is a motion to recuse Judge
24 A, ordinarily, you know, you hear that and maybe assign
25 somebody else to replace that judge if he or she is

1 recused.

2 That happened in this case that you're
3 talking about, and the local administrative judge rather
4 than let an outsider assign a judge to that case, which
5 was a high profile case, he exercised his powers to simply
6 reassign the case to himself or to someone else that he
7 liked better. Now, on the first time it went up to the
8 appellate courts the Corpus Christi court of appeals said,
9 "You didn't have the authority to do that under your local
10 rules"; and they said, "Okay. We will change the local
11 rules," and they did.

12 And they did the same thing again and then
13 it went up and the Supreme Court said over a dissent the
14 local rules allowed him to do this, and there's nothing in
15 the Rules of Civil Procedure to prevent it. So this boils
16 down to an issue of whether when there's a case that is
17 randomly assigned to a certain judge and that person is
18 recused and another one is assigned to replace him or her,
19 whether the local judges can, in effect, say, "We're going
20 to reassign that case away from the assigned judge to one
21 of us." Isn't that a fair statement of it?

22 JUSTICE HECHT: Yeah.

23 MR. HAMILTON: Well, one of the things they
24 didn't do, too, is I don't think they ever referred to it
25 Judge Hester.

1 JUSTICE HECHT: Well, there were several
2 cases, and one was referred to Judge Hester, and he made
3 an assignment, as I recall, of a judge to hear the motion,
4 and the judge ruled and assigned it to a different judge,
5 but then there were pending motions that the judge against
6 whom they were directed had not even sent to Judge Hester,
7 but couldn't go forward with the case because the motion
8 had stopped the proceedings.

9 But in all of that -- I mean, I think the
10 general issue, like David says, is whether once this
11 procedure starts the local judges can either -- depending
12 on your view -- in Luke's view subvert it by transferring
13 the case among themselves and, therefore, mooting the
14 issue; or in the judge's view, take a more efficient
15 approach to solving the problem, which is if there's
16 something wrong with Judge B, just give it to Judge C.
17 Even though the motion has gone to the presiding judge and
18 is sitting there and has not been ruled on, and so, I
19 mean, the question is does this procedure stop what is the
20 ordinary procedure in counties with multiple districts
21 from transferring cases among themselves.

22 MR. ORSINGER: If the trial judge who's
23 being attacked voluntarily recuses then you're back to
24 your local judge and your local rules on reassignment. So
25 this is only going to avoid local politics if the original

1 judge refuses to recuse; isn't that right?

2 CHAIRMAN BABCOCK: Okay. Judge Rhea.

3 HONORABLE BILL RHEA: Well, I guess I'm
4 failing to understand how what we've proposed here affects
5 these issues.

6 CHAIRMAN BABCOCK: I was just sitting here
7 thinking the same thing. I mean, we're talking about
8 recusal and what happens if the judge doesn't do it. What
9 Judge Hester is talking about is when the recusal motion
10 is granted. That judge isn't going to hear anything more,
11 and then the question is who gets to assign the new judge,
12 which has got to be a part of a different rule or else
13 we've got to add a whole other section to this rule, don't
14 we?

15 MR. HAMILTON: Well, I don't remember,
16 maybe Judge Hecht does, but it seems to me like in those
17 cases I don't think the first judge recused himself, did
18 he?

19 JUSTICE HECHT: No. He didn't. I don't
20 recall that the first judge recused himself.

21 MR. HAMILTON: The first judge didn't recuse
22 himself. He just -- the local administrative judge just
23 took the case after the recusal motion was filed.

24 CHAIRMAN BABCOCK: Well, whether he recused
25 himself or not, he was not going to sit on the case

1 anymore. I mean, if some other judge took the case, then
2 that's tantamount to a recusal.

3 MR. ORSINGER: Well, as a practical matter,
4 this only happens if there is a recusal; and then the
5 question is if there is a recusal, is it the presiding
6 administrative district judge's power to appoint the
7 replacement or is it the local rules' judge power to
8 appoint the replacement; and Judge Hester's proposal would
9 give the administrative judge the power to decide to
10 appoint the replacement himself or to call on the local
11 presiding judge to appoint the replacement.

12 And so that means basically if the presiding
13 administrative judge is not confident with the replacement
14 process at the local level he will probably exercise the
15 right himself, but if he thinks it's going to be fair
16 random assignment or whatever, he can refer it back, but
17 this kind of inferentially overrides a local rule's right
18 to preempt the replacement.

19 HONORABLE DAVID PEEPLES: Yeah.

20 MR. ORSINGER: The way I see it.

21 JUSTICE HECHT: Because Judge Hester
22 appointed a judge out of county on the first motion and
23 then after that that's when the local transfer went on.

24 HONORABLE DAVID PEEPLES: Can I just say
25 some more, Chip?

1 CHAIRMAN BABCOCK: Yeah, Judge Peeples.

2 HONORABLE DAVID PEEPLES: Two or three
3 points. It was pointed out last time we discussed this,
4 and I think it's true, that this is a local problem. This
5 does not happen in every county or every district in
6 Texas. Okay. I think we just need to understand that,
7 but it does happen in some areas. I mean, that's just one
8 of the realities of life in Texas. There are areas where
9 things like this happen, and we just need to keep that in
10 mind as we decide what to do.

11 I think there is something unseemly about a
12 situation -- if it goes very far and there is a recusal
13 and the judge is recused and at some point the local
14 people don't like how that's happening and they just
15 decide to just oust the person with broader jurisdiction,
16 and say, "We're going to take care of this locally. Get
17 out of here." That's really what we're talking about
18 here. Do we want to deal with that situation, which is
19 not statewide but which is real in certain areas, by this
20 proposal that Judge Hester has given us? I just think
21 that's --

22 MR. LATTING: What do you say?

23 HONORABLE DAVID PEEPLES: -- what's
24 happening. Well, there's a part of me that says when
25 you've got real problems you ought to try to deal with

1 them, and there is a real problem here, and I think this
2 would help deal with it. But there's another part of me
3 that says, you know, if the case is randomly assigned to
4 Judge A and that person ought to be recused and is
5 recused, you know, if it had been randomly assigned to
6 Judge B who is not recusable, why can't it go to Judge B?

7 So I'm sort of of two minds on it, but I
8 think that in this situation it is better for justice if
9 we change this rule.

10 MR. ORSINGER: And, David, remember that
11 under the scenario that you're talking about curing, the
12 second assignment is not random. It's hand-picked.

13 HONORABLE DAVID PEEPLES: Yes, sir. It sure
14 is.

15 MR. ORSINGER: So that's not necessarily an
16 element of fairness in the replacement.

17 CHAIRMAN BABCOCK: And beware of the
18 doctrine of unintended consequences. That might not be a
19 good thing when you have all the power on one person who's
20 picking judges for controversial cases.

21 MR. WATSON: Judge Peeples is correct. In
22 the multi-county districts in which this occurs it is a
23 real problem, and what happens is -- and I mean, I know it
24 happens. The administrative judge who should be doing the
25 picking if the statewide rule is followed, typically, at

1 least in our area, will pick someone outside the county to
2 come in, somebody who is completely, completely
3 unassociated with the case; but it is not uncommon for a
4 judge while -- who is the subject of a motion to recuse,
5 while that motion is sitting there and he or she is
6 ostensibly doing nothing as the rule requires, to go
7 through the courthouse and to the local judge over the
8 county, not the administrative district, but the local
9 presiding judge over the county and to find someone who he
10 can swap the case with.

11 And, I've talked to some of those judges who
12 have come to be troubled by what they were told by judges
13 trolling the courthouse looking for someone to take it,
14 and I think it is a terrible problem and it looks
15 terrible. I don't know what's said in those
16 conversations, but I know they occur and I know it's taken
17 care of locally, and I agree with Judge Peeples. I
18 realize that this is not a Houston problem or it's not a
19 Dallas problem, but for those of us in the interim lands,
20 it's a problem.

21 CHAIRMAN BABCOCK: Buddy.

22 MR. LOWE: Isn't it true that without a
23 motion to disqualify or recuse judges can swap cases?
24 They can take care of that? So really what we're saying
25 is once a motion is filed then it seems to me that the

1 procedure that applies to everybody in the state ought to
2 have to apply in these counties, have the same procedure,
3 whatever it is. Now, as a practical matter there may be
4 phone calls and things, but there should be -- once that
5 motion is filed there should be a statewide procedure that
6 should be followed.

7 CHAIRMAN BABCOCK: Okay. Bill.

8 PROFESSOR DORSANEO: Well, I've heard people
9 say that "it" is a problem. I'm not altogether sure what
10 the "it" is.

11 HONORABLE DAVID PEEPLES: We're on the
12 record here, Bill, and I'm just not sure what I want to
13 say. There is a higher integrity level in different parts
14 of the state.

15 PROFESSOR DORSANEO: And your idea would be
16 that kind of a top down approach would provide more
17 integrity? I question that.

18 JUSTICE HECHT: Well, I think I can say it,
19 though, if David won't, that the regional judges are less
20 likely to be involved in issues that generate recusal
21 motions at a local level than the local administrative
22 judges, because he's in the mix no matter what. If it's
23 his colleague sitting down the hallway --

24 HONORABLE SCOTT BRISTER: He's a
25 gubernatorial appointment.

1 JUSTICE HECHT: I'm sorry?

2 HONORABLE SCOTT BRISTER: He's a
3 gubernatorial appointment. He's not elected.

4 JUSTICE HECHT: Well, there's that, but the
5 local administrative judge's colleague is sitting right
6 down the hall, the one who has a motion filed on him, and
7 the presiding judge is just one of 60 or 80 or 100 judges
8 in his region.

9 MR. HAMILTON: Chip?

10 CHAIRMAN BABCOCK: Carl.

11 MR. HAMILTON: There is one other thing that
12 needs to be pointed out here, and that is that under this
13 proposal the administrative -- well, what he says in his
14 letter, what Judge Hester says in his letter, is that some
15 of the regional presiding judges want their local
16 administrative judges to be able to transfer cases to
17 another court when the motion is filed so the motion
18 doesn't even have to be heard, doesn't even have to be
19 submitted to the presiding judge under this scenario.

20 So they are just doing it when it's filed,
21 and I guess I have a question as to whether or not that's
22 appropriate in this scheme of things.

23 MR. ORSINGER: But that's a later letter he
24 wrote of August 21st, and his proposal of August 11 would
25 not accomplish that.

1 MR. HAMILTON: Well, it's the same thing.

2 MR. ORSINGER: No.

3 MR. HAMILTON: He just took this language
4 and put it in here.

5 MR. ORSINGER: The language in his letter of
6 August 11 would only be triggered after recusal, and the
7 question is who can replace the recused judge? His letter
8 of August 21 wants -- is discussing local replacement upon
9 the mere filing, which we are not even considering here
10 today.

11 HONORABLE DAVID PEEPLES: Chip, as I
12 understand the language that Judge Hester has, what it
13 says when there's a motion to recuse, you know, that goes
14 to the -- if the person doesn't voluntarily recuse, it
15 goes to the regional presiding judge; and that person
16 under this amendment would say, "I want you-all to locally
17 come up with somebody else on this case or I'm going to
18 assign someone on this case"; and I think that most of the
19 time, you know, just if they're all fungible, you know,
20 find somebody else.

21 But this would give a person with a little
22 broader statewide jurisdiction and gubernatorial
23 appointment and who's not involved in the local situation
24 the discretion to say, "I think this is a case where I'm
25 just going to let you-all find someone else" or "This is a

1 case where I'm going to make that decision myself." Now,
2 I think that's a fair summary of what this would do, and I
3 think it would be a good amendment for us.

4 CHAIRMAN BABCOCK: You think it's a good
5 idea?

6 HONORABLE DAVID PEEPLES: I do.

7 CHAIRMAN BABCOCK: Wallace, you got an idea
8 about this?

9 MR. JEFFERSON: Well, I've practiced in some
10 of these areas; and I would say that unlike in many
11 places. the politics there is so strong that, you know,
12 you get the impression anyway, the sense, that one judge,
13 even though independently elected, may have some
14 allegiance that shouldn't have anything to do with the
15 case, but may want to do good work for a fellow colleague,
16 for a fellow judge down there.

17 And I also don't want to get into real
18 particulars here, but it's a true problem. You can walk
19 into the courtrooms down there, and you might know you
20 have a valid ground to recuse; but if you are of the
21 understanding that that judge might have an influence on
22 the next judge to hear the case, even if he decides to
23 voluntarily recuse, then you're going to be very leery of
24 filing that motion or be scared, you know, once it's filed
25 what happens.

1 So I think this is a good proposal. I think
2 at least it puts everything in the hands of, one, the
3 regional administrative judge; and we can -- if there's a
4 problem with that judge then complaints can be made and we
5 can look at the conduct of that judge, but to put it back
6 down into that political situation I think is not a good
7 idea. So I would support Judge Hester's proposal.

8 CHAIRMAN BABCOCK: Thank you. Cindy.

9 MS. GARCIA: As someone who practices in
10 that area, I don't think it changes things ultimately, but
11 I think it's at least a first start. It's an effort.
12 It's a message, a signal, that says that, you know, "This
13 is what we expect out of the court system," and we -- you
14 know, "We're going to look back at this issue again if
15 other things do come up." But I don't think ultimately
16 it's going to change things in some of those
17 jurisdictions.

18 It is a matter of politics, and what happens
19 if the next gubernatorial appointee happens to be part of
20 that group? Okay. You wind up in that same situation
21 again, even though it goes to that particular individual
22 who is part of whatever they want to call themselves for
23 that particular election period. So, I mean, those are my
24 comments on that.

25 JUSTICE HECHT: Power Rangers.

1 CHAIRMAN BABCOCK: Power Rangers. Richard.

2 MR. ORSINGER: I have been looking at Carl's
3 later letter, which I have not seen before, and it's
4 apparent from Judge Hester -- he actually sent his
5 proposed amendment to our existing rule, and his proposal
6 actually is that you would have the presiding
7 administrative judge could have the local judge reassign
8 it without any of the recusal process, and I did not
9 understand that from his previous letter.

10 CHAIRMAN BABCOCK: Say that again. I didn't
11 follow you.

12 MR. ORSINGER: Judge Hester's proposal,
13 which is in a later letter to Carl, is actually an
14 amendment to the current rule; and it appears to suggest
15 that the presiding administrative judge could ask the
16 local presiding judge to replace in lieu of the recusal
17 process. Do you interpret it that way?

18 MR. HAMILTON: That's what it says. Yes.

19 HONORABLE DAVID PEEPLES: But that's the
20 regional presiding judge's decision to do that or not do
21 it?

22 MR. ORSINGER: Yeah. So I misunderstood his
23 proposal. I thought he was only talking about picking the
24 replacement judge, but it's evident from the subsequent
25 draft that he means that you can completely blow off

1 recusal and have the administrative regional judge just
2 tell somebody, "Reassign it and get it out of here." So
3 I'm sorry about misstating it. I misunderstood what Judge
4 Hester wanted.

5 CHAIRMAN BABCOCK: Carl.

6 MR. HAMILTON: Well, you know, our rule
7 reads, and I suppose the old rule did, too, that if the
8 judge refuses to recuse or disqualify he must promptly
9 refer the motion to the presiding judge.

10 CHAIRMAN BABCOCK: Right.

11 MR. HAMILTON: So I guess I don't understand
12 why that doesn't solve the problem, but it didn't for some
13 reason.

14 CHAIRMAN BABCOCK: Well, it doesn't solve it
15 because they moot the issue. I mean, the judges --
16 whether you call it recusal or just there's a new judge in
17 town, I mean, it's because the issue is mooted. That's
18 the problem.

19 MR. ORSINGER: They referred the motion, but
20 in the meantime they reassigned it anyway.

21 CHAIRMAN BABCOCK: That's right. So there's
22 nothing for the administrative judge to rule on because
23 they've got a new judge in town. I mean, I don't know
24 anything about it, except that seems to me what's
25 happened. Is that right, Justice Hecht?

1 JUSTICE HECHT: Yeah. And, really, in
2 response to Cindy's comment earlier, it does do just a
3 little bit of good in that if the judge -- if the regional
4 judge thinks that there is a problem, he can go out of
5 county for an assigned judge, which the local
6 administrative judge can't do and probably wouldn't do
7 even if he could.

8 MR. ORSINGER: Well, this is an awesome
9 amount of authority to an administrative regional judge
10 who doesn't even have to consider the merits of the
11 recusal motion and can require the reassignment on a local
12 basis, and I'm not sure that I like putting that much
13 power in the hands of the administrative regional judge.
14 I'd rather that the standards for recusal or
15 disqualification be a matter of record in a hearing and
16 then be reviewable rather than just have a private
17 decision to reassign without a hearing.

18 CHAIRMAN BABCOCK: Yeah. We are writing a
19 statewide rule.

20 HONORABLE SCOTT BRISTER: Well, but if it's
21 ever granted, it's not reviewable.

22 CHAIRMAN BABCOCK: Yeah.

23 HONORABLE SCOTT BRISTER: There is no review
24 of a grant of recusal, whoever does it.

25 MR. ORSINGER: I don't know. I tell you,

1 there is something about due process that I like.

2 MS. SWEENEY: I want a bumper sticker that
3 says that.

4 CHAIRMAN BABCOCK: "There's something about
5 due process I like." Paula.

6 MR. LOWE: Your definition or mine.

7 MS. SWEENEY: There's a couple of different
8 concepts that are kind of being interchanged; and if the
9 issue is while a motion is pending the judge is going down
10 the hall, you know, talking up the case or whatever, I
11 mean, what you have there, I believe, is a violation of
12 the Judicial Code of Ethics, and they should be dealt with
13 that way as opposed to us going to this out of county to
14 find a different judge from someplace else.

15 As long as we still have judges elected by
16 the people in the county, they obviously want those
17 judges, have chosen those judges, and the electorate have
18 spoken; and to write a procedural rule that says, "We are
19 just going to take it out of county because we don't like
20 any of your judges" and we're all saying that a potential
21 kind of vague problem exists seems troubling to me; and I
22 have never come up against this in Dallas. I have never
23 even been in a recusal situation, so, you know, I may not
24 get the full concept.

25 But it seems like on the one hand you have

1 got a violation of judicial ethics if they are doing
2 things on the case when they ought not to be, which is a
3 whole -- which doesn't seem to be a good reason to be
4 taking cases away from the county in which they are filed
5 by people who live there and who have elected those
6 judges, and if I'm missing the concepts then tell me.

7 CHAIRMAN BABCOCK: No. You're not missing
8 it. That was Cindy's point that this is kind of one small
9 step to take to resolving the problem, but I think you're
10 probably right. One more comment from Buddy and then
11 we're going to break, and during the break and at lunch
12 I'm going to ask Richard and Carl and David Peeples, Judge
13 Peeples, to try to come up with some language that we can
14 talk about, but probably not today. We will probably
15 defer that to tomorrow because we need to get onto voir
16 dire, which was supposed to be taken up before now.
17 Buddy.

18 MR. LOWE: Chip, what would be wrong with
19 just something simply stating that once a motion to recuse
20 is filed the trial judges lose their power to transfer and
21 the rules, statewide rules and procedures, must be
22 followed with regard to the general rules on recusal; and
23 if our general rules don't take care of it then we need to
24 change that.

25 CHAIRMAN BABCOCK: Now, you and Cindy just

1 got onto this subcommittee. We will be in recess for 15
2 minutes.

3 (Recess from 10:52 a.m. to 11:03 a.m.)

4 CHAIRMAN BABCOCK: Okay, everybody. Let's
5 get going. All right. Everybody listen because we're
6 going to have a proposition restated.

7 MR. ORSINGER: Our commission to write
8 language has broken down because we really feel like
9 there's two issues here. The first is whether the
10 presiding administrative regional judge upon seeing a
11 motion to recuse that's been denied by the judge under
12 attack can avoid the recusal process and just direct the
13 local judge to reassign the case, the local administrative
14 judge to reassign the case. So that gives the presiding
15 regional administrative judge the right to cause a
16 replacement with no recusal process.

17 The other issue is if there is a recusal
18 process, should the presiding administrative judge pick
19 the replacement or not?

20 CHAIRMAN BABCOCK: Or have the power to pick
21 it.

22 MR. ORSINGER: Well, they do have the power
23 to pick the replacement here, but should they -- here we
24 require the presiding administrative judge to do the
25 replacement, and we could permit him to feed it back into

1 the locale to pick the replacement. Those are really two
2 different issues, and we have different views. I think
3 Carl and Buddy and I are of the view that -- well, and let
4 me say that there's the original problem, which is the use
5 of local rules to get around the recusal process without
6 the permission of the presiding administrative judge; and
7 I think that Buddy and Carl and I all agree that you
8 should not be able to use a local rule to get around the
9 recusal process, and we ought to say that this trumps --
10 the recusal process trumps local rules, and that probably
11 will be widely supported.

12 HONORABLE SCOTT BRISTER: Here, here.

13 CHAIRMAN BABCOCK: Okay.

14 MR. ORSINGER: And we can write that, if
15 that's what we want.

16 MR. LATTING: Use that language, "trumps."
17 Use that as a verb.

18 MR. ORSINGER: All right. Having done that,
19 then the question is, okay, you can't use a local rule to
20 trump the recusal process; but are we going to give the
21 presiding regional administrative judge the authority to
22 trump the recusal process; and I think David Peeples likes
23 that for reasons that he can well explain.

24 And I don't like that because if I'm
25 defending the recusal motion, if that decision is made

1 privately without me having the opportunity to appear in
2 court, I don't have the right to defend my current judge,
3 so that, if you will, the merits of the motion are being
4 decided by the regional judge on the basis of the motion
5 with no evidence and no opportunity of the opposing party
6 to be heard, which is why I said I don't think that's due
7 process for the other side.

8 CHAIRMAN BABCOCK: Okay. And that debate
9 we'll take up later.

10 MR. ORSINGER: Okay. And then the third one
11 is assuming there is a recusal in the normal process, are
12 we going to give the administrative regional judge the
13 power to stick it back to the locale for however they want
14 to handle it as opposed to requiring him or her to make
15 the replacement. That's probably not controversial. I
16 mean, the power to make that choice I don't have any
17 problem with.

18 CHAIRMAN BABCOCK: We are going to defer
19 that too, but you guys keep talking. You're defining the
20 issues. That's a great part of the process.

21 All right. So we are now moving down onto
22 voir dire, voir dire, voir dire, voir dire, however
23 stated; and I must say that I think this is obviously an
24 important topic, but the rhetoric that I have seen flying
25 across my desk about it seems out of proportion to either

1 side of the debate; but nevertheless, maybe I'm confused
2 on how big a deal this is.

3 Paula Sweeney is chair of the subcommittee
4 that has considered this, and there have been some
5 subcommittee votes and recommendations, and I'll let her
6 summarize those. I think it would be fair to say that the
7 subcommittee is not unanimous in its view, and I think
8 probably Judge Brister would have a point of view that
9 he'd want to get across to us for the debate.

10 So, Paula, why don't you run through where
11 you are and what you have considered and what your
12 recommendations are.

13 MS. SWEENEY: Thank you, Chip, I will, and
14 with your indulgence I will just sort of explain how we
15 got where we are. I will also preface this by saying that
16 I think that the rhetoric that you've seen comes from
17 people mostly not on our subcommittee and that our own
18 personal rhetoric has been pretty -- at least the written
19 rhetoric has been pretty nice. So I think we have worked
20 hard on something we disagree on, but I think that we have
21 done good work, and we have met quite a few times on this.

22 So that the group will know, those of us who
23 have been doing this are myself, Judge Peeples, Judge
24 Brister, Carlyle Chapman, Bill Edwards, Wendell Hall, Carl
25 Hamilton, Tommy Jacks, Judge McCown, Bob Meadows, and

1 Judge Rhea, have been the folks involved on the
2 subcommittee. The background on this, why this issue is
3 before us, comes from legislative activity during the last
4 session. Many of you-all will recall and you have in your
5 materials certain bills that were filed primarily from
6 legislators in the Metroplex, Senator Cain, Senator
7 Harris, and then Representative Dunnam had a proposal in
8 the House.

9 Primarily those proposals sprang from what
10 was felt to be abuse, abusive restriction of the voir dire
11 process by certain trial judges, primarily in the area of
12 unreasonable time limitations. We have district court
13 judges telling the parties, you know, this may be a 10
14 million-dollar or 100 million-dollar antitrust suit, but
15 you have 15 minutes to do voir dire. Knock yourself out.
16 And in that time it was complained vociferously by
17 litigants on both sides in all kinds of cases that you
18 can't get the parties identified and find out who knows
19 somebody, much less get into anything substantive.

20 So the gist of the bills that were filed
21 uniformly had to do with preventing unwarranted
22 restriction on the voir dire process. As those bills were
23 being debated in the Legislature and were coming up for
24 vote, without getting into an exhaustive procedural
25 background of what happened, but essentially what happened

1 is the Supreme Court, the Supreme Court justices, some of
2 the members of the Court, went to the Legislature and
3 said, "Hold on. You-all are back in rule making again.
4 This is an area controlling the trial of cases, the voir
5 dire process, and it's something that should be in our
6 purview to rule make, and we will write a rule if you-all
7 will pull these off the table," in effect. "This is
8 something that the Court needs to consider."

9 And as such then the Court sent the issue to
10 this committee, which then constituted the subcommittee
11 which has been discussing the issue. In meeting what you
12 have in your packet is you have about a five-page document
13 entitled -- it was sent before the May meeting. It's
14 entitled "Report of the Jury Rules Subcommittee Proposed
15 Voir Dire Rule, May 2000," and it says "final" up in the
16 upper left-hand corner. I would ask that you check. At
17 one point in the e-mailing and faxing process, some of
18 these were reformatted, and what you ought to have is a
19 cover sheet that has the title I just gave you and then
20 pages which I have cleverly left numbered No. 1, No. 2,
21 and No. 3.

22 On page number one you should have little
23 sub 1 and sub 2. Check, please, to be sure that on page
24 number two you have 3 through 8 because for some reason 8
25 was obliterated by a computer somewhere along the way; and

1 on number three you should have No. 9, 10 and 11. And I
2 e-mailed Carrie back that day, and that error was
3 addressed, and something else was transmitted out to
4 you-all, and there are also copies here. Somehow when
5 Carrie's computer got ahold of it it dropped off No. 8 and
6 No. 11.

7 So the first order of business is for
8 everybody to get the right pieces of paper in front of
9 them. Page number two, the one that says number two,
10 should have proposals 3 8 on a document
11 entitled "Report of the Jury Rules Subcommittee Proposed
12 Voir Dire Rules."

13 MR. TIPPS: And you think we have that?

14 MS. SWEENEY: You do have that, and it's in
15 all the materials that were e-mailed and posted on the
16 website that Carrie has been sending semihourly reports
17 saying, "Don't forgot to download and print."

18 PROFESSOR ALBRIGHT: This means what was
19 sent in the nice packet is not right.

20 MS. McNAMARA: Was it resent out there or
21 was it --

22 PROFESSOR ALBRIGHT: This was several months
23 ago that all that happened, right?

24 No. The packet that just came is wrong.

25 CHAIRMAN BABCOCK: Paula, do you have the

1 correct one?

2 MS. SWEENEY: I do.

3 CHAIRMAN BABCOCK: Carrie will go make
4 copies real quick.

5 HONORABLE SCOTT BRISTER: They're mostly the
6 same, but there's a little bit of difference, though.

7 MS. SWEENEY: Yeah, what's missing on
8 you-all's version is on page number two, No. 8 is missing
9 and on page number three for some reason No. 9 is missing;
10 and we think the computer at Jackson Walker had a brain
11 out.

12 MS. GAGNON: I probably had a brain out.

13 MS. SWEENEY: Well, no, it wasn't you.

14 PROFESSOR ALBRIGHT: If you're looking in
15 the packet that was sent recently it's page three has No.
16 8 missing.

17 MS. SWEENEY: Right. Right. Right.

18 HONORABLE SCOTT BRISTER: But most of it's
19 there.

20 MS. SWEENEY: Carrie is going to make us a
21 copy, and I wanted to be sure we all had the right stuff.

22 PROFESSOR ALBRIGHT: Can you read us 8 and
23 9?

24 MS. SWEENEY: Yeah. Sadly 8 and 9 are the
25 two longest ones, but I'll read them to you and then

1 you'll get them on paper. So it's clear, No. 8 says on
2 page number two, proposal No. 8 -- and bear in mind I
3 haven't told you-all whether these have been adopted or
4 not. You just need to know what the text is. I would not
5 try to write this down. It says, "The court may not
6 examine nor allow any party to examine a panelist for the
7 purpose of rehabilitation Once a clear statement
8 indicating inability or unwillingness to be fair and
9 impartial has been made by the panelist. If such bias or
10 prejudice is not clearly established, the court may
11 examine or shall allow any party to examine the panelist
12 for the purpose of clarification or reconsideration of a
13 previous answer given by that panelist." All right.
14 That's No. 8.

15 No. 9, which is on page number three or
16 proposal number three, that page, says, "A panelist's
17 general philosophical opinions and predispositions about a
18 cause of action, a defense, or the relief sought are not a
19 basis for challenge unless the panelist will be unable to
20 consider the facts of the particular case and make a
21 decision based on the credible evidence admitted at trial
22 and the law given in the court's charge."

23 Okay. So the gist of No. 8 has to do with
24 rehab of a panelist once they have said -- or continued
25 questioning of the panelist once they have said they can't

1 be fair and impartial; and No. 9 says that you can't
2 strike them based on philosophical opinions and
3 predispositions unless they say they can't consider the
4 facts.

5 MS. McNAMARA: That's actually there. It's
6 just not numbered as 9. It's labeled as part of 10.

7 MS. SWEENEY: Okay. All right. Is 8 there?
8 Is 8 part of 7?

9 HONORABLE DAVID PEEPLES: Oh, sure is. 8 is
10 in No. 7.

11 MS. SWEENEY: Okay. So they just -- the
12 numbers got deleted but the text stayed. Okay. Then
13 character yourself in on No. 7 after -- 7 should be
14 "Panelists may not be asked how much weight they would
15 give certain evidence," period.

16 MR. TIPPS: Okay. I think we got it.

17 MS. SWEENEY: Insert an 8.

18 MR. TIPPS: We're set.

19 MS. SWEENEY: Then on page three, No. 9
20 should end with the words "at trial and the law given in
21 the court's charge," period. Then there should be a 10.

22 MR. TIPPS: We have got it all.

23 MS. SWEENEY: All right. Someone go stop
24 Carrie from making 75 copies of that.

25 MR. YELENOSKY: Where is the copy room?

1 MS. SWEENEY: I don't know.

2 MS. McNAMARA: Downstairs, Pl.

3 MS. SWEENEY: All right. So now that we
4 have settled that everybody has the proposals and where
5 they are, what we did in the committee first was debate do
6 we need a rule, is this something that we should be
7 getting into in terms of rules, the Rules of Civil
8 Procedure saying, you know, anything about voir dire
9 because right now there is really not much of anything at
10 all. Should we have a rule, period.

11 And there was not any -- we don't agree on
12 that. Some folks think there should be. Some folks think
13 there should not be. I would suggest to you-all, however,
14 that that would not be a profitable debate for us to
15 engage in because I think just as a matter of course there
16 is going to have to be a rule given the procedural
17 history, unless we want the Legislature in this upcoming
18 session to write a rule, and I think all of us would
19 prefer that the Court write the Rules of Civil Procedure
20 as much as possible, so as just a matter of practicality
21 -- and Justice Hecht can tell us if we're wrong on that
22 and we should engage in that debate, but as a matter of
23 practicality, our sense was the Court said they are going
24 to write a rule, they want our guidance on what ought to
25 be in the rule, and, therefore, we should move past that

1 threshold.

2 JUSTICE HECHT: That's my sense of the
3 Court's view.

4 MS. SWEENEY: Then having gotten across that
5 threshold the discussion was, all right, if there's going
6 to be a rule, what should be in it? Proposal No. 1 which
7 you have was unanimous among our group that if there is to
8 be a rule, Items 1 and 2 listed on the page called number
9 one should be in it. Both of those items aim at effecting
10 the legislative intent of the proposals that were filed,
11 which is to remedy the unreasonable restriction of voir
12 dire by some trial courts; and the proposals provide that
13 attorneys for the parties have a right to a reasonable
14 time for voir dire.

15 That concept embodies -- that clause
16 embodies several concepts, primarily that it will be the
17 attorneys who do the voir dire, attorneys for the parties,
18 that there is a right, is the next keyword in my
19 recollection of it, and that the time shall be reasonable.
20 So those are the key elements of that clause.

21 The next clause is sort of the converse of
22 that or the correlary of that. "The judges may set
23 reasonable time limits on voir dire, but that such time
24 limits shall not unreasonably abridge the time for voir
25 dire." That part of the rule was something that we all

1 agreed that if there's going to be a rule, these things
2 need to be in it; and a big part of the subcommittee wants
3 to stop there and wants to stop there because, as you'll
4 see when we get to the other proposals, the distinction is
5 that these two proposals govern the time frame and the
6 ability to do voir dire, but don't talk at all about
7 content, how to do it, mechanics, anything else.

8 As we move into the next proposals, the
9 others are all content-based, which is something other
10 than what we perceive to be the legislative intent, what
11 some folks perceive to be the legislative intent. Those
12 who do want to go on -- and I'll let Judge Brister talk
13 about this, or I won't, but Chip will. Judge Brister will
14 address that the other principles listed beyond here
15 codify. They don't purport to change established case
16 law. They just talk about it and codify it in that it
17 would be better to have a unified rule than a disparate,
18 scattered body of law so that there is a more uniform
19 process for voir dire across the state.

20 To finish summarizing what's before you and
21 then I'll turn the table over, No. 2 is sort of the
22 intermediate stage of proposals, proposals that in
23 discussion many of us felt that some of these -- in fact,
24 most of these -- say what cases say, but they're
25 content-based; and so although they do say what the cases

1 say, the majority of the subcommittee didn't feel that
2 they ought to be in the rule. What they propose -- and
3 you can read them obviously for yourselves, but the court
4 shall permit the parties to state briefly the nature of
5 the case, relief requested, and to question the panelists
6 about qualifications, background, and experiences, and
7 again the concept of for a reasonable period of time.

8
9 No. 4, "that the court shall prevent any
10 examination that's unduly invasive, repetitive, or
11 argumentative." I think everyone here feels like the
12 court has that authority already and that that's a
13 codification of existing law. Questions concerning a
14 panelist's opinion about the law must be prefaced by a
15 substantially correct statement thereof."

16 No. 6, "A party may not inquire as to a
17 panelist's probable vote or attempt to commit a panelist
18 to a particular verdict or finding," and when we start
19 listing these, and we'll talk about them, but you can see
20 that much of what is here is the standard objecting and
21 arguing back and forth that goes back and forth in every
22 case. "You're trying to commit them." "No, I'm not," and
23 so on.

24 No. 7, "Panelists may not be asked how much
25 weight they would give to certain evidence." The example

1 there that was frequently given was, "I've only got a
2 chiropractor. He's got an orthopedic surgeon. How is
3 that going to affect you-all's deliberations?" In other
4 words, trying to get folks to weigh the testimony of
5 witnesses or to weigh the testimony in voir dire.

6 And then No. 8 that I read you-all earlier
7 has to do with rehabilitation. The concept there -- the
8 discussion there is that currently if a panelist says,
9 "No, I can't be fair and impartial under the case law,"
10 that's it. They can't be rehabilitated by anyone. There
11 is a sentiment that at least it should be okay to be able
12 to say, "Well, do you really mean that? Did you
13 understand the question," clarify what they're saying.

14 But this proposal, No. 8, doesn't go to
15 actually coming in and saying, "Well, you could do what I
16 tell you," which we'll get to in just a second, getting
17 into a more heavy-handed rehab.

18 Moving to No. 3, and these are the ones I
19 guess that I would say are the most hotly contested as we
20 go from proposal 1, which was unanimous, to proposal 2,
21 which was somewhat more general in agreement, and then
22 this one, which is very hotly contested.

23 No. 9, 10, and 11. The first one, No. 9,
24 which I read you-all earlier, essentially provides that a
25 panelist's general philosophical opinions and

1 predispositions don't form the basis for a strike or for a
2 challenge for cause unless they go on to say they wouldn't
3 consider the facts of the case and so on.

4 No. 10, "Panelists may not be disqualified
5 because of their reaction to statements about the evidence
6 that will presented." So a panelist's reaction to the
7 facts, if they say, "Well, under those facts I couldn't be
8 fair," would not form a basis for a challenge for cause;
9 and No. 11, "In determining a challenge for cause the
10 court shall consider the panelist's entire examination in
11 context after the parties have had a reasonable
12 opportunity to examine the panelist as to the ground of
13 the challenge." This has been called the judicial
14 rehabilitation or the rehabilitation rule. In shorthand
15 that if a panelist says, "No, I couldn't be fair," but at
16 some other point they had said, "Yes, I could be fair,"
17 then the court in deciding whether to strike them for
18 saying they couldn't be fair would be entitled essentially
19 to disregard that statement if the court had heard other
20 different statements at another time in the examination.

21 So essentially that's the work product
22 that's before you. Chip, I don't know how you want to go
23 from here. We've got a host of documents that have been
24 provided to the subcommittee and to this committee, sort
25 of on both sides of the issue. We have Dr. Waites here

1 who is a J.D./Ph.D. who has provided us two papers on the
2 science of voir dire from an academic scientific research
3 perspective. Judge Brister has provided a number of
4 articles, a lot of which come from the Jury Task Force's
5 work that then Justice Cornyn constituted several years
6 ago having to do with most of these issues on how we use
7 jurors' time and what we do with them, and I don't know
8 what you want to do now, Chip, if you want --

9 CHAIRMAN BABCOCK: Yeah. Let's -- I think I
10 need to ask Dr. Waites if he's got any time restrictions.
11 Are you trying to get out of here by noon or do --

12 DR. WAITES: No.

13 CHAIRMAN BABCOCK: -- you have any problems?
14 Okay. Well, we'll call on you for your presentation in a
15 second, if that's the case then. I think, Paula, it's
16 probably, unless you think otherwise, a good idea to go
17 down the list; and since you have a declining degree of
18 consensus in your subcommittee about these proposals,
19 let's see if we can knock them off and make sure that the
20 full committee has an idea about it. Judge Brown, did you
21 have something to say about this?

22 HONORABLE HARVEY BROWN: I would like to
23 talk briefly about the issue about whether we need a rule
24 at all, frankly, since the committee voted against it. My
25 understanding was that -- and I was involved a little bit

1 on some of the legislative debate about this, that it
2 wasn't quite as serious as "If you don't get a rule, we're
3 going to have a rule" sounds. Now, Justice Hecht would
4 know more about this than I would, but it was certainly
5 not my sense that we had to have a rule, particularly if
6 the lawyers across the state came out through this
7 committee and said, "We think things really are working
8 pretty well." And it does seem to me that there is some
9 tie-in between time limits in the rest of the rules,
10 because how much time you're going to give is somewhat a
11 function of what a lawyer is allowed to do. If a lawyer
12 is allowed to ask certain questions or go in so much into
13 the facts, that affects directly the time.

14 So I think that's a schism saying those two
15 are not related, is a false schism for how a judge has to
16 decide what is a reasonable amount of time; and to me
17 that's just either got to be all or none; and I think you
18 can argue both sides. There is good policy reasons I
19 think for all or none, but I think the hand-picking out
20 just the time without looking at content is a false
21 dichotomy.

22 CHAIRMAN BABCOCK: Justice Hecht, do you
23 have a sense of where the Court is in terms of whether it
24 definitely wants some sort of language from us on a rule
25 and not to come back to the Court and say, "Sorry, no

1 language. We don't think a rule is needed"?

2 JUSTICE HECHT: Well, I agree with Judge
3 Brown that it was not that direct. Nothing that occurred
4 in the last session was so direct as to say "Look at this
5 or else," but if I may take just a moment to say that the
6 last session, as I think everybody here knows, was not an
7 entirely happy one for the Court with respect to the
8 rules -- our rules authority; and whatever may be the
9 reasons for that, we have tried -- we have redoubled our
10 efforts, because they are not there for the first time,
11 but we have redoubled our efforts to make sure that the
12 Legislature understands and is comfortable with this
13 process and believes that it is addressing the concerns
14 that it has raised and not just blown them off; and that
15 was one component of the last session, was a feeling in
16 the Legislature that the Court was not listening to
17 legislative concerns about various areas; and it really
18 didn't matter the area. It was just that idea.

19 So we have tried to persuade -- though that
20 was not the case, and I believe we've gone a long way
21 towards doing that because of the meeting -- the interim
22 committee meetings that were held at the State Bar a
23 couple of months ago. Chip was there and several of you
24 were there. The relationships -- I hope I'm not too
25 optimistic in saying -- appear to be mended; and it helped

1 when Joe Jamail was there and said that this was probably
2 -- the Court's rule-making authority was probably the only
3 thing he and I were going to agree about in this lifetime.

4 But in any event, I think it's better, but I
5 do think it is not a helpful -- it will not be regarded as
6 a helpful response to the Legislature to say, "We've
7 looked at this problem and it doesn't exist." They are
8 just -- they are not generally amenable to that, and I
9 don't blame them, because Senator Cain wouldn't have put
10 the bill in the hopper in the first place if he didn't
11 think there was a problem.

12 So someone commented at an earlier meeting
13 that voir dire is one of the principal components of the
14 trial and yet there are hardly any rules in the book about
15 how it is to be conducted, so I think the Court -- it's
16 kind of like the recusal rule. I think the Court would
17 really like to see the best product that the committee can
18 come up with, even if it thinks that the system has been
19 working pretty well prior to now.

20 But I do -- I'm sensitive to the concerns
21 that while some of these elements that are more
22 controversial that Paula has described are supported by
23 case law, when you put them in a rule they take on a
24 prescriptive tone that can affect their usage, and I'm
25 sure the committee will be sensitive to that, but I do

1 think the Court needs to see something of a draft of the
2 rule.

3 MR. LATTING: Can you comment about how
4 detailed a draft or rule that needs to be?

5 JUSTICE HECHT: I don't think the Court has
6 a feeling on that. I mean, I don't -- I mean, we have not
7 discussed it other than to say that this rule, the summary
8 judgment rule, the other issues raised by the Legislature,
9 we need to discuss and respond constructively to.

10 MR. LATTING: Well, the reason I asked is
11 that one of the options open to us, if the committee
12 should choose it, unless you think it would offend the
13 process, would be to give you a short and generalized kind
14 of a rule as opposed to a more detailed and longer rule.

15 MS. SWEENEY: Can you speak up, Joe?

16 MR. LATTING: Oh, I'm sorry.

17 JUSTICE HECHT: Well, I don't disagree that
18 elements 1 and 2, to which the subcommittee agrees, do
19 pretty much address Senator Cain's concerns in the last
20 session; but, you know, while we're on the subject,
21 whether we should do some of the others I think the
22 committee ought to talk about.

23 CHAIRMAN BABCOCK: That's what we're going
24 to discuss. Judge Brister had his hand up before you did,
25 Buddy.

1 HONORABLE SCOTT BRISTER: Let me, if I can
2 kind of give some of the dissenting view on the
3 subcommittee. Paula has given a fair synopsis of our
4 discussions and what the issues are, but I want to explain
5 why I've sent all this stack of paper to you if I could
6 just for about ten minutes.

7 First, the -- contrary to some of the
8 letters you may have gotten, this is not -- all I'm
9 backing or suggesting or moving is the adoption of the
10 Jury Task Force proposal. That's towards the front of the
11 packet that was sent to you. There's a long, oh, 20 or 30
12 pages, numbered at the bottom, double-spaced from the Jury
13 Task Force report. And if you look on page 149 of that
14 you'll see a proposed voir dire rule that was recommended
15 by the Jury Task Force; and the reason I proposed that in
16 the subcommittee and will propose it here, twofold; number
17 one, having served on several task forces, I have vowed I
18 ain't serving on any more ever again if nothing is going
19 to happen with them, if nobody is going to look at it.

20 I mean, this was a task force of, I don't
21 know, 70 or 80 people, had several meetings chaired by
22 Frank Newton, a lot of hours put in by a lot of people to
23 draft up a proposal that then if the purpose is just to,
24 you know, store it in archive somewhere, you know, why
25 serve on them anymore.

1 So I think we ought to consider the Jury
2 Task Force because a lot of -- second reason is because
3 it's unlike this group, which is we're all on one side of
4 the Bar when voir dire happens. The task force was not.
5 The task force had public members, and they're all on the
6 other side of the Bar, and the problem is there's more of
7 them than there are of us. And what can happen is like
8 happened in California where there was no voir dire rule.
9 California has the longest voir dire in the nation. The
10 jurors got mad about it, the public, and they passed a
11 constitutional amendment through their wonderful
12 initiative and referendum system, that said, "Nope, the
13 judge may ban voir dire completely by the attorneys and
14 settle cases." There are more of them than us, and they
15 look at voir dire.

16 My experience has been that on our side of
17 the Bar more voir dire is always better, the more the
18 better. I think everybody understands that if we take a
19 vote of the public that is not going to be their idea of
20 what we need. If you ask the public in a poll, "Do we
21 need more voir dire," that's going to come out different
22 from a vote of those on our side of the poll, and I think
23 we need to be sensitive to that. Yes, we know more about
24 it than they do, we do it more often than they do, but
25 there are more of them than there are of us, and so that's

1 why I think we ought to look at the Jury Task Force.

2 Now, the other materials I sent you, back
3 toward the back, if you would -- it's impossible to say
4 where this is probably, but it looks like about two-thirds
5 of the way through there are, oh, seven or eight pages
6 with some various articles in italics and some notations.
7 Starts with one called, "Studies on the Effectiveness of
8 Voir Dire." It's back after my articles. I'd say it's --
9 actually, it's more like three-fourths or five-sixths of
10 the way toward the end. If you get to Dr. Waites' paper,
11 you've gone too far. It's right before that.

12 All right. And let me just explain what
13 these are. There have been studies on the effectiveness
14 of voir dire. I will let Dr. Waites address that more. I
15 only included them because there was some suggestion
16 that -- there had been some suggestion not just in the
17 materials but a couple of CLE courses that I have been
18 misrepresenting what the social science literature says on
19 these, and there are tons of studies on voir dire in the
20 social science literature, not the law reviews; and so I
21 have given you exact quotes from those materials. You can
22 draw your own conclusions.

23 But after about the fifth page of that then
24 there's a couple of pages, "Call for Voir Dire Reform,"
25 that I want to just mention, because again, being lawyers,

1 mostly I think the -- probably prevailing viewpoint of
2 most lawyers is "What's wrong? If it ain't broke, don't
3 fix it"; and I want us to be aware that there is a lot of
4 people out there with various proposals of various
5 extremism that would fix perceived problems with voir dire
6 and jury selection. The Judicial Conference Advisory
7 Committee is the first one here listed, quoted as
8 "Sections directing the unwarranted invasions of privacy
9 into religious preferences, political views, reading,
10 recreational, television habits." It argues that those
11 shouldn't be inquired into for reasons of privacy.

12 The next two from Thomas Munsterman, who is
13 the National Center for State Courts' primary jury person,
14 talks about that it's the wide variation. It's the most
15 variable portion in trial. Some states, some
16 jurisdictions, it's very short; others it goes on for
17 days. Stephen Adler's proposal to eliminate peremptory
18 challenges so that everybody gets a chance to serve on the
19 jury. Akeal Amar, who's the Yale Law School
20 constitutional law professor argued that "excuses for
21 cause should be exactly the same as they are for judges,"
22 that the same way that a judge -- if you're related,
23 you're off the case; but if it's just you happen to be
24 more or less conservative or liberal, that's not a good
25 ground for getting rid of a judge and it shouldn't be for

1 a juror.

2 It has several more there from the ABA
3 Journal, from Michael Saks, who's a leading social
4 scientist looking at these.

5 Now, contrast those calls with the page that
6 should be right before that, which is the statements on
7 importance of uses of voir dire. John O'Quinn, Terry
8 Tottenham, Jim Perdue, Mithoff. I would have tried to --
9 but I didn't want to include anybody in the room to put
10 you on the spot, but it appears clear from those quotes
11 everybody agrees this is the most important part of the
12 trial.

13 And so the reason I think we should strongly
14 consider adopting a more substantive voir dire rule like
15 the one in the Jury Task Force is it seems odd to me to
16 have the most important part of the trial, one that is
17 included in every jury trial, and there is no rule on it.
18 We have rules on all sorts of picayune, minuscule -- it
19 would be like saying, "Well, yes, we know we are going to
20 have interrogatories in every trial, but let's not have a
21 rule on it. Let's just leave it to the discretion of the
22 judge."

23 This is the most important part of the
24 trial, going to millions of dollars and hours are focused
25 on, one in which there is a wide variation from one part

1 of the state to the other, from one county to the next,
2 from one courtroom across the hall to the next, a wide
3 variation and what everybody considers is the most
4 important part of the trial, thus, the most important part
5 of reaching justice, and it seems to me it's untenable to
6 say, therefore, we shouldn't have a rule on it, it should
7 just be the judge's discretion.

8 Now, I think the main -- in our subcommittee
9 the main concern was the obvious one, yeah, but if you
10 pass a rule, I'm more concerned about what some judges may
11 use that rule to do; and addressing just a couple of those
12 briefly, back up a few pages before that is the original
13 letter in 1940 from our predecessors, the first committee,
14 advisory committee that transmitted rules to the Supreme
15 Court in September of 1940, looks like this; and on the
16 second page of that, right-hand column, let me just point
17 out a few things.

18 The first full paragraph I was amused to
19 note the paragraph that starts "In a short time," and they
20 state down in the middle, "We haven't had time to study
21 such complex subjects as citation by publication." It
22 just made my heart yearn for a simpler day when the more
23 complex issue addressed by this committee was citation by
24 publication; but the next paragraph, they go on to say,
25 "With more time, we've got some more things to do, which

1 looks at in bringing about uniformity and simplicity"; and
2 it seems to me that's what the rules ought to be.

3 There are -- I'm not a person that believes
4 that every time there is some thing that some judge
5 somewhere does wrong we need a rule to correct that judge.
6 We've got 700 rules already, and there does need to be
7 some limit to them, but in the general -- if the general
8 idea of having rules is to not -- you're never going to
9 get exact uniformity. As long as personalities are
10 involved, there is going to be differences from courtroom
11 to courtroom; but to some degree, and certainly on the
12 major items, we ought to have some degree of uniformity
13 from one court to the next, because if it's the most
14 important part of the trial, justice shouldn't be buried.

15 Justice to the extent we can -- I understand
16 the personalities involved and vagaries and chance and
17 things like that. You ought to try to make sure justice
18 is more uniform rather than less, and so that on something
19 as important as selecting the jury we ought to try to move
20 towards uniformity, understanding no jury panels are ever
21 going to be the same, but to just leave it to the
22 discretion of trial judges with no rule is not uniform,
23 and nor is it simple.

24 You tell people -- you know, what are the
25 rules of voir dire? You can find everything, with one

1 possible exception I'll get to in a second, in the Jury
2 Task Force proposal and the cases; but you've got to go
3 find them in the cases; and if you are a new lawyer and
4 don't happen to know about Compton vs. Henry 40 years ago
5 then you don't know the leading case on voir dire, and you
6 don't -- unless a lot of times when they just say "bias or
7 prejudice" you have to read the cases to see what do they
8 mean by it, what does that mean? Is leaning bias or
9 prejudice and those kinds of things, and without -- so it
10 seems to me part of -- you know, at some point when you
11 have an issue that is in every trial of significant
12 importance, it is important not just to tell people "Go
13 somewhere in the thousand volumes of Southwest 2nd and now
14 the 20 volumes of Southwest 3rd and find out how to do
15 it." We ought to simplify things for attorneys to put
16 them in one place.

17 On the next page, it's interesting, they
18 point out on the second full paragraph, "We realize the
19 proposed rules will not satisfy everyone," but I think
20 it's important that the rule be a moderate one because of
21 the political climate, etc., etc. I don't think we should
22 do anything more than -- with one arguable exception, do
23 anything more than codify what's been existing law for
24 decades; and this will not -- the people who want -- I'm
25 not among those who want -- you know, the people who want

1 no voir dire or judge voir dire are going to be
2 disappointed people with this rule. I think that's fine.
3 People who want unlimited voir dire, three hours of voir
4 dire for every car wreck case, I think that's fine that
5 they be disappointed with the rule. We are not going to
6 be able to satisfy everybody, but I think with this
7 committee we could reach some consensus about what are the
8 rules.

9 The last paragraph there, it's interesting,
10 addresses the problem of "but some judge is going to
11 misuse this thing, this rule." A rule for them will be a
12 weapon rather than a constraint, and they were concerned
13 about this here, too; and they said, "We understand that
14 some judges aren't going to follow these new rules." I
15 mean, you know, new Civil Procedure Rules, were brand new
16 in 1940; and they said, "We understand that" -- you know,
17 "That's what we have appellate courts for."

18 And the appellate courts and the Supreme
19 Court have assured us that if people abuse these rules, if
20 a trial judge here or there abuses this rule, it's going
21 to have to be reviewed; but you will have a rule which
22 provides a mechanism for review for the appellate courts
23 to say, "That is not the liberal construction. That's not
24 the purpose behind this rule and that's beyond the pale."

25 Just two more things and then I'll pass.

1 Right after that in your materials is the Federal case
2 Brandborg. This was one of the jurors who has been thrown
3 in jail. You'll see on the second page of that from -- I
4 guess it's page 354 of the Federal supplement, the list of
5 questions. This was a juror in Denton County on a capital
6 murder case who said, "I'm not answering the following
7 questions," and there's a list there on the left. "What's
8 your family income? What's your religious preference?
9 What's your political party? Are you a liberal,
10 conservative, or moderate? What television shows?"

11 Notice, now, many of these are privileged
12 matters. They are matters you could not ask a witness
13 about because they are protected by rule or statute as
14 privileged. Magazines and newspapers, clubs, what clubs
15 you're a member of. Since NAACP vs. Alabama you have a
16 constitutional right not to answer that. No voluntary
17 organization has to say who their members are. And on
18 down, "Are you taking medication? Are you a member of the
19 National Rifle Association?" I'm assured by prosecution
20 throughout the state this is standard questions on all
21 capital murder cases, right today.

22 You go on on the next page this lady -- here
23 is part of the problem with voir dire and why, again, I
24 think we need a rule. On 355, first column, about halfway
25 down, "Petitioner refused to answer." The judge leans on

1 her, asks the attorneys what to do, and gets the following
2 help. "The state opined that in his two years of practice
3 he had always done what the court instructed him and felt
4 the petitioner's refusal was an insult to the court."

5 The defense attorney jumps on the bandwagon
6 and says, "If the court tells her to do it, she should
7 suffer the consequences," so with the encouragement of
8 counsel from both sides who want these questions answered,
9 the lady is sentenced to three days in jail and a
10 200-dollar fine. Appeals by writ of habius to the Court
11 of Criminal Appeals. Denied 7-1. Only one judge had any
12 interest in thinking there might be a violation. One
13 other judge said he would at least hear arguments. Seven
14 said, "No deal," and she finally is let out of jail by the
15 Federal magistrate.

16 It's interesting to look on the pages you
17 can read through, lets her out of jail citing no Texas
18 case, no Texas statute, no Texas rule, citing only the 1st
19 and 14th Amendments to the Constitution, and this is part
20 of the problem if there's no rule. Then the boundaries
21 become only the Constitution; and, you know, speaking as
22 one of those conservative Republicans, it's hard to find
23 voir dire mentioned in the first 14 Amendments.

24 MR. TIPPS: Send us a number.

25 HONORABLE SCOTT BRISTER: It is. And the

1 problem, of course, with that is, you know, from our
2 perhaps biased point of view is when it becomes a
3 constitutional case then the law tends toward being
4 whatever five members out of nine say the Constitution is.
5 It puts very, very loosey-goosey restraints on what are
6 the restraints, if anything, because there is nothing you
7 can -- specific you can point to. There is no one who is
8 going to object. The two sides are egging the judge on to
9 throw this lady in jail if she doesn't answer; and it
10 makes this issue -- without a rule, it just makes all of
11 these issues constitutional ones, which is -- makes it
12 very difficult for a trial judge to know what to apply
13 and, in my view, also contributes to lack of uniformity
14 because the Constitution doesn't explicitly say anything
15 about it. It's going to mean one thing in one court and
16 jurisdiction and one in the other.

17 Last thing I want to point out, next, right
18 after the Federal case is a one-page excerpt from Goode
19 vs. Shoukfeh, Texas Supreme Court, '97. Various issues in
20 the case, med mal case, bottom line is the court -- this
21 guy says, "Well, I might have -- I have a little bias,"
22 and the court -- the trial judge lets the guy stay on the
23 jury; and the Court says, as the court of appeals had,
24 "Well, you know, the trial judge was there and could look
25 this guy in the eye and tell whether he was really biased

1 or not biased," so -- which is just the usual. It's
2 discretionary. The trial judge can do what you want.

3 But what's interesting to me is why were we
4 thinking of striking this guy; and you look down into the
5 notes and you find out why; and the guy says, "Both sides
6 I feel are pretty even. I'll have to admit, though, the
7 other side," which is the defense side, the doctor being
8 sued, "because the way it was explained, as far as just
9 the whole explanation of blood clotting, what happened,
10 I'm leaning a little more towards the doctor's side."

11 You can't tell from the opinion or the court
12 of appeals opinion, but apparently what this was, this guy
13 went in for a routine knee operation and died. The
14 plaintiff's case obviously was you shouldn't die from a
15 routine knee operation. Defense case was some people do
16 because you throw clots and add emboli, during especially
17 leg surgery. Obviously both sides have explained this
18 because he knows -- somebody has explained to them about
19 blood clotting, and "I'm leaning a little more toward the
20 doctor's side" and the -- I guess it's the plaintiff's
21 attorney questioning him, by "You have -- you might have a
22 little bit of leaning as we talk, a slight bias at this
23 point?" He says at this time "yes."

24 He says, "Does that mean I'm starting off a
25 little behind," plaintiff's attorney. He says, "Only

1 reason is just because of the explanation, it's just
2 simply because I understood it a little better. As time
3 goes on I might understand your side just as well." So --
4 I like this part, "So it's just a small bias?"

5 "Yes." And the case stands for the
6 proposition, I suppose, that a small bias is okay, but a
7 large bias -- but what I want to say is why are we about
8 to strike this guy? Why does nobody, neither attorney,
9 the trial judge, the court of appeals, or the Texas
10 Supreme Court say, "Why is this guy biased?" All he is
11 saying is, "You've told me what you think you're going to
12 prove. You've told me what you think you're going to
13 prove, and yours seems to make a little more sense."
14 Shouldn't somebody say, "That is not bias." That is not a
15 strike for cause.

16 That's simply saying -- if the plaintiff
17 says, "Ladies and gentlemen, the doctor was drunk and cut
18 off the wrong leg," should the doctor's lawyer be able to
19 ask, "How many people think we're going to start a little
20 behind because our doctor was drunk and cut off the wrong
21 leg" and exclude them all because they have a large bias
22 against doctors being drunk and cutting off the wrong leg?
23 Is that the kind of jury we want, people that think that's
24 -- that have no opinion one way or another about that?

25 We have to have a rule where somebody thinks

1 -- and this is the controversial part of the new rule.
2 Somebody needs to say this is -- "Time out. You want to
3 tell everybody about what your case is about, that's fine,
4 but you may not then exclude them because they said,
5 'Based on just what you've told me, your side seems to
6 make more sense,'" and nobody up through the Texas Supreme
7 Court is even asking that question. This is not bias, and
8 I think we need -- there needs to be some uniformity and
9 some instruction on that issue. So that's why I included
10 all the stuff here.

11 CHAIRMAN BABCOCK: Thanks, Judge. Bill
12 Dorsaneo, you've got a general comment?

13 PROFESSOR DORSANEO: Well, I think I
14 followed all of that, but the question that I would have,
15 I think we're all sensitive to the fact that people spend
16 a lot of time on task forces and they don't want it just
17 to be filed somewhere and have it not be seriously
18 considered and evaluated. The question I would have,
19 Judge Brister, is can the task force report and
20 recommendations be discussed in the context of the
21 committee's list of nine things? If not --

22 HONORABLE SCOTT BRISTER: Yes.

23 PROFESSOR DORSANEO: You think yes. All
24 right. And second point, November of 1993 you all will
25 remember we spent two days listening to reports of four

1 task forces and then the work through the next four years
2 was basically built -- you know, built on that. You know,
3 do we need to listen to some sort of a report from the
4 task force in order to be able to engage in the discussion
5 in the context of the subcommittee draft, or is that just
6 not necessary?

7 And what I'm trying to get to is what
8 procedure would give due consideration to the task force's
9 ideas and that would take, you know, a plausible amount of
10 time and not be, you know, an unprofitable exercise.

11 MS. SWEENEY: If I might, I think that's
12 already been done; and the proposals that are here, the
13 subcommittee did consider the materials that are included
14 here from the task force, and the 3 8 and
15 9 through 11 parts reflect those concepts that were
16 considered. So it has been distilled somewhat, and it has
17 been considered by the subcommittee. The task force
18 materials are, in essence, before us in the proposals that
19 you have.

20 PROFESSOR DORSANEO: There was one subject
21 that Judge Brister mentioned at the end, and I don't know
22 whether this was task force or personal conscientious
23 view, that didn't appear to be in the list of -- and that
24 is the question of, you know, trying to talk about what's
25 bias or prejudice.

1 HONORABLE SCOTT BRISTER: No, that's 9, 10,
2 and 11, I think.

3 PROFESSOR DORSANEO: All right. Okay.

4 MS. SWEENEY: I think so, and possibly 8.

5 HONORABLE SCOTT BRISTER: Possibly 8.

6 PROFESSOR DORSANEO: If you can discuss what
7 you want to discuss in the context of the committee
8 report, why don't we just view the committee report?

9 MS. SWEENEY: I think what you're concerned
10 about in terms of not wasting the task force's work and
11 having that information, I think is all fairly on the
12 table in the subcommittee's report.

13 HONORABLE SCOTT BRISTER: And I just brought
14 up the task force just because this is not a one-man
15 crusade. This is a proposal that they made, and that's
16 the issues involved in the subcommittee report.

17 CHAIRMAN BABCOCK: Yeah. We're not going to
18 ignore an important resource like the task force report
19 just like we didn't ignore the task force on the recusal
20 rule. It's there to help us, to inform us, and we have a
21 member of the task force who can articulate very
22 eloquently what the concerns were of that group, and we
23 have a written report to check him to make sure he's
24 telling us the right thing, so we're we're going to look
25 at the task force report. Buddy.

1 MR. LOWE: Chip, one thing I would be
2 interested in knowing, this came about because of the
3 proposed legislation. Okay. It's my understanding what
4 gave rise to that was somebody said a judge wouldn't give
5 them but five minutes for voir dire. Okay. Now, that's
6 unreasonable of a court, and the Babcock case held that
7 you have a constitutional right to voir dire and so forth.
8 So, okay, if we have a simple rule, that answers that.
9 Okay.

10 Then the next question is whether Judge
11 Brister is right that now is the time to get a detailed
12 rule. The problem I have with that is voir dire is
13 important, but so is the trial. We don't have a rule now.
14 I had a case, we had 140 witnesses, and the judge made us
15 tell a day before who was going to be testifying then.
16 There's no rule on that. It's fair to do that, lets
17 people get prepared and you don't have to bring two
18 courtrooms full of boxes in one courtroom, but you can't
19 write a rule on that. You can't write a rule on what
20 makes a juror biased. How can you say, "Yes, I can say
21 he's not biased just because he doesn't like a drunk
22 doctor," but how can you define that? How can you place
23 your finger on it? I don't believe you can; and it has to
24 be done, as it has been done for years, by the court.

25 Just like our Constitution. It doesn't say

1 what is due process, this or that. It has to evolve over
2 a period of time, and I think there has been a pretty
3 clear definition of what you can do and can't do on voir
4 dire, and I would leave it at that.

5 MR. LATTING: I have a question, Chip.

6 CHAIRMAN BABCOCK: Yeah.

7 MR. LATTING: Scott, did I understand you
8 correctly that what you were proposing was that we pass
9 the rule as stated on page 149?

10 HONORABLE SCOTT BRISTER: Well, the issues
11 are broken down -- I think the task force proposal is
12 short. I would be concerned about a three-page voir dire
13 rule because it's a pain in the neck and it's hard to --
14 you know, the longer it gets, the more grounds for
15 arguments you get. The task force's is very short and,
16 with one possible exception, limited to what's, my view,
17 unarguable law for the last 50 years. But the issues, the
18 subcommittee report breaks those down into individual
19 digestible items if you want to consider them that way.
20 That's the only difference between the two.

21 MR. LATTING: Well, if it were up to you,
22 with the one exception you're talking about, I guess it
23 has to do with bias; is that right?

24 HONORABLE SCOTT BRISTER: It's the question
25 of when can you basically tell the jury, "Here are our

1 facts" and ask them who they are going to vote for.

2 MR. LATTING: Other than that, would you be
3 -- or do you advocate the rule that's set forth on 149?

4 HONORABLE SCOTT BRISTER: Sure. Sure.

5 CHAIRMAN BABCOCK: Steve Susman.

6 MR. SUSMAN: Buddy, what's wrong with it?

7 MR. LOWE: With that rule?

8 MR. SUSMAN: Specifically what's wrong with
9 it?

10 MR. LOWE: I'm not addressing specifically.
11 I can't --

12 MR. SUSMAN: Well, why don't you try it?

13 MR. LOWE: What?

14 MR. SUSMAN: What's wrong with specifically
15 telling us what do you find wrong with it?

16 MR. LOWE: No, I'm addressing -- there was
17 quite a lengthy discussion about all the other elements.
18 I'm not addressing just him. I'm addressing all the
19 remarks that were made heretofore, and there were others
20 that had like ten elements. There was a discussion about
21 biased and what is biased. I'm saying you can't define
22 that. I've made no attack on this rule as drawn.

23 MR. SUSMAN: And this rule as drawn seems to
24 me to be so general, why couldn't we all readily say,
25 "It's great"?

1 MR. LOWE: We may can.

2 MR. SUSMAN: Huh?

3 MR. LOWE: We may can. I have made no
4 attack on that.

5 MR. SUSMAN: Well, why don't we begin with
6 this rule? I mean, this seems like such an acceptable
7 thing.

8 MR. LATTING: Is there any opposition to
9 this rule?

10 MR. SUSMAN: Yeah. That's what I -- who has
11 any opposition to this rule?

12 MS. SWEENEY: Just so you'll know, that is
13 where we began, and what's before this committee is this
14 rule parsed out into subparts for discussion. If you'll
15 compare them, they are very similar; and the language that
16 is, for instance, in sections 3 8 and 9
17 through 11, 3 8 in particular, we worked
18 through to try and actually put it into concepts.

19 MR. SUSMAN: Am I to understand that your
20 various proposals in here, No. 1 and No. 2, is there
21 anything added that's not in this rule, or have you just
22 broken down the task force rule?

23 MS. SWEENEY: I'd say that No. 1 and 2 of
24 our proposal are stronger, particularly 1, in emphasizing
25 that the parties -- that the lawyers for the parties have

1 maybe even, you know, at least a quarter of us I think
2 served on that task force. So I don't think it's as
3 though it is some institutional body, and I also hasten to
4 add that many of the recommendations that were made in
5 that have been made or are being made or are being
6 examined in various forms. So I don't think there is
7 anything about this that's the Bible, and I think that the
8 committee has examined that part, so I'd like to proceed
9 as they recommend we proceed.

10 MS. SWEENEY: And to give you a really
11 specific example, No. 4 on the committee's report,
12 rehabilitation is not existing law, it's not what the case
13 law is in Texas. It does permit heavy-handed rehab by the
14 judge after a panelist says, "Yeah, I'm biased. I
15 couldn't be fair."

16 "Well, little lady, if I tell you the law,
17 would you follow my instructions? Now, you could do that,
18 couldn't you?" It would permit that kind of thing to
19 happen. And to most of us, that is, A, not the law; B,
20 ought not to be the law; and, C, ought not to be in the
21 rule. So if you're asking me if there are things that
22 aren't existing law, in my opinion, yes, there are, and
23 that was a part of where our discussions went.

24 CHAIRMAN BABCOCK: Bill Dorsaneo.

25 PROFESSOR DORSANEO: Mr. Chairman, I don't

1 really care what piece of paper we use to talk about these
2 things, other than ordinary deference that we would give
3 to a subcommittee of this committee. I'm capable of
4 putting my fingers on these two pages and go back and
5 forth. Why don't we get started and talk about the
6 specific items?

7 CHAIRMAN BABCOCK: You know, you're smarter
8 than the rest of us. We'll take a couple more comments,
9 Judge Brown and then Buddy, and then we will get started.

10 HONORABLE HARVEY BROWN: Well, two things.
11 One, I don't agree with Paula. I think there is case law
12 which goes the other way. There is black letter law that
13 says no rehabilitation, but if you look at all the cases,
14 there's also trying to find what rehabilitation is.
15 Clearly judges leading jurors to say, "Yes, I can follow
16 your instruction" is prohibited, but asking clarification
17 is not prohibited. There are cases that say, "What do you
18 mean by that," and judges are permitted to ask broad
19 open-ended questions like that, which I think is what this
20 is trying to get to; but more importantly, I think you
21 create a perception sometimes by the way you write a rule.

22 When you write a rule with eleven subparts
23 it creates the perception, boy, did they get in there and
24 change voir dire, and I think that's part of what this
25 committee needs to be concerned with, frankly, is what's

1 going to be the perception; and I think the way at least
2 this proposed rule is laid out, it doesn't look radical.
3 It's kind of Steve's initial reaction, "So what? This all
4 looks like the law." Whereas the other way makes it look
5 radical, and I think that's something that we should avoid
6 and something the Court should avoid.

7 MS. SWEENEY: And this is not -- the
8 subcommittee report is not a proposed 11-part rule. That
9 is absolutely contrary to what -- I obviously didn't say
10 that.

11 CHAIRMAN BABCOCK: Yeah, we'll get into that
12 in a minute.

13 MS. SWEENEY: But I want to be clear, Chip,
14 the subcommittee is not proposing an 11-part rule, the
15 majority does not want an 11-part rule, and, in fact,
16 nobody is proposing this as a final rule. These are
17 concepts that if this committee wants included in a rule
18 then we can write them in. The idea was to discuss the
19 concepts, not format.

20 CHAIRMAN BABCOCK: We will take three more
21 comments. Buddy and then Alex and then Bobby.

22 MR. LOWE: Paula, number one, this only had
23 two elements listed. Were there many people on your
24 committee who wanted to stop just there?

25 MS. SWEENEY: Yes.

1 MR. LOWE: All right. And that's my
2 question. I see nothing wrong with that, and I see that
3 as opposed to the other one that Judge Brister proposes
4 and --

5 HONORABLE SCOTT BRISTER: Well, it was four
6 to two. It wasn't a huge -- we didn't have to hold this
7 at the Astrodome or anything.

8 MR. LOWE: No. No.

9 HONORABLE SCOTT BRISTER: Actually, it was
10 three to three the first committee meeting and then two
11 people switched, and it was four to two.

12 MR. LOWE: You mean everybody doesn't --

13 HONORABLE SCOTT BRISTER: We have a
14 difference of opinion how much authority we should read
15 into the subcommittee's vote, but no question, the
16 subcommittee, they won 4-2 on that view, but --

17 CHAIRMAN BABCOCK: Okay. Alex, what do you
18 have to say?

19 PROFESSOR ALBRIGHT: When I read this I
20 thought exactly what Paula said, that this is not a
21 proposed rule that she has put out here, and I want to
22 commend and thank Paula because what I see is that she has
23 set out the issues in a very organized fashion, in a way
24 that would facilitate discussion, and I'm disappointed
25 that we're not using her matrix to get to these issues.

1 CHAIRMAN BABCOCK: Yeah. I agree. I agree
2 with you, Alex. Bobby.

3 MR. MEADOWS: In terms of this issue of
4 context and the way we might proceed, I would throw my
5 voice in with Alex in terms of views of -- I was on the
6 subcommittee, too, and I agree that this is not a rule.
7 It's an 11-point discussion or itemization, but it's not a
8 rule. It seems that we can discuss this -- these ideas
9 and the way they are presented in context of the Jury Task
10 Force, but to somewhat respond to Steve, I mean, through
11 item 6 I think you'll find every single item almost in the
12 same language in the proposed rules.

13 It's when you get to 7, 8, 9, 10, and 11
14 that you get into amplification of ideas or sort of a
15 deeper expression of a point that may or may not be in the
16 rule; but, so working with this 11-point outline makes
17 sense to me. It should be done in the context of the task
18 force report, which I think is very good and has kind of
19 pros and cons. It's very helpful in terms of identifying
20 the issues, but most everything in the rule is in this
21 11-point document, and it really only gets controversial
22 in my view when you hit about item 7 and move on.

23 CHAIRMAN BABCOCK: Yeah. The normal way we
24 proceed is that we take the work product of our
25 subcommittees and deal with what they have presented to

1 us. Unless somebody thinks there is a reason why we
2 should abandon that in this instance, what I would say we
3 should do is go through them 1 through 11 and discuss
4 them; and if we have agreement of this committee then
5 we'll write that, perhaps borrowing the language from the
6 task force that has comparable language or maybe expanding
7 or contracting that as we see fit, but in terms of
8 discussion -- and Judge Brister, tell me if --

9 HONORABLE SCOTT BRISTER: That's fine with
10 me.

11 CHAIRMAN BABCOCK: That's okay with you.
12 Then we'll just go down 1 through 11 and discuss it.
13 Before we do that and before we break for lunch, Paula, if
14 it's all right with you, being respectful of Dr. Waites'
15 time, since we have somewhat of an overview of the task
16 force and some of the literature, perhaps we could ask Dr.
17 Waites to give us ten minutes or so just before we break
18 for lunch. We'll have lunch for 45 minutes and then we
19 will get into discussing items 1 through 11.

20 MS. SWEENEY: That's a good idea.

21 CHAIRMAN BABCOCK: Is that okay with you?
22 Paula is nodding her head.

23 MS. SWEENEY: I said, "Yes, that's a good
24 idea."

25 CHAIRMAN BABCOCK: Okay. Dr. Waites, if you

1 want to give us your view of this.

2 DR. WAITES: Yes, thank you. Good morning.
3 I have come to know many of you personally over the last
4 20 years of my practice in Texas, and I admire and
5 appreciate all of the work you're doing on this great
6 committee. You know, one of the wonderful things about
7 being a lawyer is that you may disagree with somebody, but
8 you will defend their right to the death to say it. So I
9 really admire all of your discussion, and I really
10 appreciate the spirit in which you're talking about these
11 things.

12 My perspective on the things that you're
13 talking about in voir dire is a little bit unique. You
14 can tell from my vitae that I'm a board certified civil
15 trial lawyer and a psychologist; but, you know, I tell
16 people often that, like many of you, my parents sent me
17 out to get the best education I could get, but they forgot
18 to tell me where to stop.

19 But my perspective on this is a little bit
20 different. I learn something new every day, just like you
21 do, and my learning about courtrooms and judges and juries
22 and lawyers started when I was about 11 years old. I have
23 a very close family friend who has just recently retired,
24 a state district judge in Georgia, who invited me to come
25 to his courtroom when I was in a civics project once, and

1 I just became totally fascinated with that process, and
2 ever since then I just knew that I wanted to be a lawyer.

3 Some of the things he told me I think you
4 can relate to. I recall one day that I was having lunch
5 with he and his wife, who was his secretary, and he said,
6 "You know, the only good reason to be a lawyer is if you
7 want to help people, and if you don't want to help people,
8 you're not going to be a very good lawyer." And then I
9 asked him what it was like to be a judge; and he says,
10 "Well, you know, the courts are there for people, not the
11 other way around, and that's how I run my courtroom," and
12 so my perspective on all this I think was pretty much set
13 early on; and as I went through my education, like many of
14 you, going through law school you read every book you
15 could get your hands on on trial advocacy to try to be the
16 best trial lawyer you could be.

17 And, you know, we get totally excited about
18 the possibility of creating those powerful arguments in a
19 case, and that advocacy I think is what makes us so
20 successful, but in my field and in my life I'm also
21 trained as a scientist, and my perspective on a lot of
22 things is a little bit different because to me scientific
23 methodology helps you to organize your thinking in a way
24 that helps to discover things that you wouldn't ordinarily
25 think about and to find new truths about the way life is

1 and the way people behave that you wouldn't ordinarily
2 know about in just your own life experience.

3 The scientific community in the United
4 States, as you know, is very rigorous, and it's no
5 different when it comes to those people who study
6 courtroom psychology. It's a very small community. There
7 are only seven graduate schools that teach the application
8 of psychology in the courtroom, but all of the people who
9 teach in those institutions are some of the best
10 scientists in social psychology and courtroom psychology
11 that there are, and they are very protective of their
12 research.

13 You probably have seen references in some of
14 the research that we have cited in your materials here
15 from Steve Penrod, who is one of the finest professors of
16 law and psychology at the University of Nebraska, and Neil
17 Vidmar, who is in Colorado. Reid Hastier is at Colorado.
18 Gary Morgan is in Florida. Some of the people that have
19 studied juries and juror psychology have an awful lot to
20 add to this discussion because they're methods really are
21 pretty much unsayable.

22 The scientific standards that they use in
23 their research are set down by the American Psychological
24 Association, and every year they are coming up with new
25 and more sophisticated ways to help us understand how

1 jurors think about the evidence and the things that we
2 tell them in the courtroom and how that leads to their
3 verdicts.

4 So what I thought I would like do is to --
5 and the reason I'm telling you all of this is because when
6 I first became aware that you were talking about these
7 subjects, I thought that it was -- it would be helpful to
8 you to have this kind of information, because I know from
9 your perspective what you're talking about here is so
10 important. Whether you're for more restrictive voir dire
11 or not more restrictive voir dire is really up to you, but
12 there are millions of Texans who are going to be subjected
13 to whatever you do decide, and it's going to affect their
14 lives, and really that's what the Supreme Court is most
15 concerned about.

16 So what I thought I would do very briefly is
17 to kind of give you a little sense of what the science has
18 told us about the effects of jury selection and
19 eliminating the juror bias over time. For those of you
20 who have a copy of my second research paper, there is a
21 little table in it that talks about the factors that we
22 use. But for those of you who don't have it, I did this
23 chart for you that may sort of help us organize our
24 discussion a little bit.

25 Some of you may remember back to the 1960's.

1 At that point, really, juror psychology and courtroom
2 psychology in the courtroom was just beginning, but there
3 was a study that came out of the University of California
4 that really frightened a lot of people in the legal
5 community. Mr. Broeder, who is I believe a professor of
6 law at the University of California, published a study in
7 1965 after they had interviewed hundreds of jurors who had
8 been in jury trials, and jurors -- and they were asking
9 jurors if they felt that they were biased during the
10 proceedings, and many of the jurors openly admitted that
11 they were absolutely biased and prejudiced about the
12 things that they were sitting through the trial on, but
13 nobody ever asked them in voir dire if they had any biases
14 or prejudices about the specific issues in the case.

15 And then in the 1970's you may remember some
16 of the anti-Vietnam War demonstrators were going to trial
17 on criminal charges, and the feeling in our country was
18 that these people were domestic terrorists, and it was
19 going to be very difficult for them to get a fair trial
20 anywhere. The government, as a matter of fact, was
21 actually looking for the most conservative venues they
22 could find, and the first trial, the Berrigan case, was
23 actually filed in Harrisburg, Pennsylvania. In an article
24 that I've cited in my research papers you can read for
25 yourself, but what was interesting was the defense lawyers

1 in that case decided to hire some social scientists to
2 help study the attitudes of local people from Harrisburg
3 who may be from the same jury pool of those that would be
4 sitting in the case, and they developed ideal juror
5 profiles. They developed what we now know to be the sort
6 of standard trial preparation using social science
7 techniques that we commonly use now in our trials here in
8 the year 2000, but at that time they were unique and they
9 were different.

10 But what was fascinating was -- and, you
11 know, as trial lawyers I think we are sort of programmed
12 to win, you know, according to the rules, legally, but our
13 job is to win; and the lawyers in those cases began
14 winning acquittals of those criminal defendants in that
15 environment, and it was very noteworthy, a lot of very
16 famous trial lawyers that we have here in the state of
17 Texas and in other states began using social science at
18 that point.

19 But the question that arose was how
20 effective is it really to do jury selection and ask jurors
21 questions about themselves. The social scientists at that
22 time in the late Seventies and early Eighties only studied
23 the things that courts were actually allowing lawyers to
24 ask about, those being a juror's demographics and their
25 general values and beliefs. The social scientists were

1 very interested in whether that would reveal bias or not.
2 They have found, unfortunately, that there are very few --
3 there were some relationships, but, actually, for the most
4 part there were very few relationships between a juror's
5 demographics and their bias or what I call inappropriate
6 bias in a case.

7 In the mid-Eighties, those of you who came
8 out of law school about the time I did in the
9 mid-Eighties, and Professor Dorsaneo I think will recall
10 this very vividly, trial advocacy teachers began teaching
11 trial lawyers to ask more case-specific questions; and we
12 began to ask the judges if we could ask jurors more
13 specific questions about the issues in the case, because
14 in the 1960's and 70's for the most part, and in many
15 courts even today, judges really don't let you talk about
16 the case itself.

17 And as time has gone on, as you know from
18 your history, you know, we do ask jurors more about their
19 attitudes about issues in the case, not to the point of
20 asking them to commit to any particular fact, but we just
21 need to know if they are biased. And since 1984, I guess
22 it was, the first -- and maybe '82, the first important
23 study was Gary Moran's study out of Florida where they
24 studied tort reform attitudes and other specific attitudes
25 on very salient political and social issues to see if they

1 were going to have some relationship to verdicts; and what
2 they found was that there were very significant
3 relationships of often a very predictive nature about how
4 are jurors going to vote based upon their case-relevant or
5 case-specific attitudes and their case-relevant life
6 experiences.

7 Let me give you an example of the
8 differences. If I were to ask you, for example, "How do
9 you feel about doctors?" that's a question about your
10 general values. You may say, "Oh, I like doctors. I
11 think doctors are wonderful. They add a lot to our
12 society and most of them have a good heart."

13 Well, what if I asked you, "How do you feel
14 about doctors who perform abortions?" That gets more to
15 maybe the issues in the case, and maybe your attitude
16 about those things may be very different. So what the
17 social scientists have been trying to add to this mix is
18 trying to understand what part of voir dire and jury
19 selection is really effective in determining whether a
20 juror is inappropriately biased or not; and, of course,
21 the most recent research -- and I'll close with this. The
22 most recent research that we have been able to do actually
23 helps us to use a matrix, scientific methodology, to study
24 the relationship between juror attitudes, how they view
25 the evidence, and then how that may affect their verdicts;

1 and I think over the next five or ten years we will be
2 able to find some very interesting things coming out of
3 that research.

4 But to summarize all of this, it seems to
5 us, at least in the scientific community, that if you want
6 to find out if jurors are biased about specific issues in
7 a case, you have to ask them. You cannot infer from the
8 demographics or from their general values whether they are
9 biased about specific issues in the case, and so specific
10 questions are very helpful, but we've also found that
11 jurors are not always truthful with you in voir dire and
12 sometimes -- I see many of you nodding your heads. The
13 research is that roughly one-third of jurors intentionally
14 don't tell you the whole truth in voir dire. We don't
15 dwell on that too much because, frankly, it's just human
16 nature not to want to tell you things that are politically
17 incorrect in front of a courtroom full of jurors and a
18 judge and a guy with a gun and flags and all these other
19 intimidating things. So what we have found is that
20 written questionnaires are a more private way for jurors
21 to give you answers to those important questions.

22 So I don't really have anything else to add
23 to your conversation today, unless you have questions for
24 me, but I wanted you to have this information, and I
25 appreciate your time listening and considering it.

1 CHAIRMAN BABCOCK: Dr. Waites, before you
2 sit down, let me ask you a question. Judge Brister cites
3 a case and talks about how some questions about
4 affiliations with associations, voting records, views on
5 abortion, may invade areas of privacy that if you were a
6 witness or even a party you wouldn't be required to
7 reveal; and yet it seems that some of what your paper
8 advocated and what you're talking about factors, you would
9 say that all of those things are very relevant to how
10 somebody is going to vote.

11 How do you relate that tension between
12 people's almost constitutional right to privacy, or at
13 least common law right to privacy, with getting what you
14 would say is a fair and impartial jury?

15 DR. WAITES: Well, I feel like there are
16 very fine lawyers here who can discuss the legal issues on
17 that; but from a psychological perspective, what happens
18 to jurors is for the most part they don't mind telling you
19 what their attitudes and opinions are. There are a few
20 people because of their personality traits may get
21 defensive about that, but for the most part people don't
22 mind your asking about their attitudes and opinions.

23 I'm recalling as we're speaking about this a
24 case I was working on in Charleston, South Carolina, where
25 the court had a standardized questionnaire that went

1 beyond the short form, which I understand is one of the
2 things that's being considered in the courts here in
3 Texas. The problem with that is that those short forms by
4 definition are general, and so you may get more than just
5 demographics. You may get some general values and
6 beliefs, but it's still not going to tell you anything
7 that would tell you whether a jury is actually biased or
8 not. I'm not sure if I addressed all that you asked.

9 CHAIRMAN BABCOCK: Well, I think you did.
10 Yeah. Steve.

11 MR. YELENOSKY: Well, I just had a question.
12 I think, Chip, you referred to questions that might be
13 asked of a party or witness as being out of bounds either
14 as a privilege or a privacy, and I think Judge Brister
15 referred to that, too, and I guess I'm wondering if that's
16 the correct way to characterize them. I mean, they may be
17 irrelevant, but is there really a protection that's based
18 on privilege or privacy?

19 I mean, you don't get to ask a juror -- I
20 mean, you don't get to ask a witness what flavor ice cream
21 they like, not because it's private or privileged but
22 because it's irrelevant, and aren't these other questions
23 either permissible or impermissible to ask a witness
24 merely on the grounds of relevance, not because of -- not
25 on the grounds of privacy or privilege?

1 DR. WAITES: I am not aware of any law or
2 any rule in any state that I have worked in that addresses
3 that particular issue of privacy for jurors. On the other
4 hand, I think that a court has the obligation to be as
5 sensitive to jurors as they can be, and, you know, written
6 questionnaires, if they are handled responsibly could be
7 an awfully great way to avoid any problems with privacy
8 issues as well as just being respectful to jurors.

9 MR. YELENOSKY: No, I understand that. I
10 just wanted to question what I was hearing as a premise,
11 which is that there would be some objection,
12 constitutional protection, based on privacy or privilege
13 if these questions were asked of a witness or a party. I
14 doubt that.

15 CHAIRMAN BABCOCK: Well, I mean, you've got
16 the NAACP --

17 HONORABLE SCOTT BRISTER: Private
18 association, no question about it. "Are you a member of
19 the NAACP or not?"

20 MR. YELENOSKY: Well, that's one.

21 HONORABLE SCOTT BRISTER: And the difference
22 is, too, remember, there is plenty of criminals who would
23 confess to what they had been doing if they didn't have a
24 lawyer sitting right beside them saying, "Shut up. We
25 object."

1 MR. YELENOSKY: Well, sure.

2 HONORABLE SCOTT BRISTER: If you started the
3 questionnaire by saying, "By the way, you have a
4 constitutional right not to answer anything that you don't
5 want to answer in this questionnaire," you get a less
6 helpful questionnaire answer because the people have been
7 advised of their rights. These are just lay people. They
8 don't know about NAACP versus --

9 MR. YELENOSKY: But what is the right there?
10 I mean, with the criminal defendant obviously there's the
11 right to be protected because you're talking about
12 self-incrimination, but in the context of a juror, I don't
13 see that. But you said affiliation was a case, and there
14 may be other case law I'm unaware of, but the list of
15 questions in the case that you cited, you know, was like
16 "What TV shows do you watch," was one of them. That's
17 clearly -- you know, people would consider -- maybe would
18 consider that private, but I don't know of any law that
19 says that was private, and there were a number of other
20 questions in there that I would characterize the same way.

21 CHAIRMAN BABCOCK: Steve Susman had a
22 comment.

23 MR. SUSMAN: Well, I mean, it doesn't seem
24 to me that there's any harm to ask the question, and if
25 they give you the answer, great. If they don't give you

1 the answer, they shouldn't be put in jail for not giving
2 you the answer; and so the next question is, well, does
3 the judge have to inform them initially, "You have the
4 right to remain silent on the following?" Frankly, I
5 don't see much harm in that, but I think most people will
6 answer the question anyway, and I think those that don't
7 it tells you a hell of a lot about them. So, you know, I
8 don't see what the big argument is.

9 CHAIRMAN BABCOCK: Buddy.

10 MR. LOWE: Chip, a lot of these questions
11 are asked on questionnaires, and the judges in Beaumont,
12 when you do that, they tell you that you cannot give that
13 to somebody else other than use it in that case and it
14 must all be destroyed, you know, after the case is over.
15 So it's not that you're just giving that information to
16 everybody and you lose -- if that's something that's
17 relevant then by becoming a juror or perspective juror you
18 might lose certain rights. I don't know that you have a
19 right to say, "I eat ice cream." I mean, I don't know
20 that that's protected.

21 CHAIRMAN BABCOCK: Alex.

22 PROFESSOR ALBRIGHT: I have a legal
23 question, constitutional law question. I know that the
24 NAACP cannot be forced to disclose its member list.

25 MR. YELENOSKY: Right.

1 PROFESSOR ALBRIGHT: But is there a
2 constitutional case that says a juror cannot be compelled
3 to disclose relevant affiliations when it's relevant to
4 whether they are a fair juror or not? I think that's a
5 different case.

6 MS. SWEENEY: And there's not. That I know
7 of there's no case that says -- I mean, if you have got a
8 person of color that is a party to the case, I think if
9 you have got members of the panel that are members of the
10 KKK, you need to be able to find that out. There's a
11 whole lot of things that go into how you go about doing
12 that, but there is no privilege. There is no case that I
13 know that says you can't ask that.

14 And "How did you vote in the last election?"
15 is totally different from the example that was given on
16 party affiliation. That's on the internet. If you voted
17 in a primary, I can look up anybody in this room by name
18 and find out what primary you voted in. So, you know, if
19 it's a constitutionally protected secret privilege, we're
20 -- that horse already left the barn.

21 CHAIRMAN BABCOCK: Dr. Waites has one more
22 comment and then we're going to break for lunch.

23 DR. WAITES: Yeah, I just have one other
24 thing I wanted to add, because I think that one of the
25 things that really struck me as being absolutely true that

1 Judge Brister has raised in his arguments on these issues
2 is that sometimes trial lawyers act, in my view,
3 inappropriately from a trial advocacy standpoint. Their
4 questions don't seem to be designed to get anywhere. They
5 don't seem to have any purpose when it comes to any of
6 this, and it doesn't seem to have any purpose as
7 persuading the jury panel, but I think that the answer
8 there lies more in better trial advocacy, training and the
9 practice, than in trying to restrict a very fluid process,
10 because jury selection is probably the most
11 people-intensive process or phase of a trial.

12 CHAIRMAN BABCOCK: Okay. Thank you very
13 much, Dr. Waites, for coming and talking to us, and we
14 will be in recess until 1:15.

15 (A recess was taken at 12:36 p.m., after
16 which the meeting continued as reflected in
17 the next volume.)

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CERTIFICATION OF THE MEETING OF
THE SUPREME COURT ADVISORY COMMITTEE

* * * * *

I, D'LOIS L. JONES, Certified Shorthand
Reporter, State of Texas, hereby certify that I reported the
above meeting of the Supreme Court Advisory Committee on the
25th day of August, 2000, Morning Session, and the same was
thereafter reduced to computer transcription by me.

I further certify that the costs for my services
in the matter are \$ 963.50.

Charged to: Jackson Walker, L.L.P.

Given under my hand and seal of office on this
the 7th day of September, 2000.

ANNA RENKEN & ASSOCIATES
1702 West 30th Street
Austin, Texas 78703
(512)323-0626

D'Lois L. Jones
D'LOIS L. JONES, CSR
Certification No. 4546
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