****

HEARING OF THE SUPREME COURT

ADVISORY COMMITTEE

****

Taken before Anna L. Renken, a Certified Shorthand Reporter in Travis County for the State of Texas, on the 25th day of January, 2002, between the hours of 1:10 p.m. and 4:52 p.m. at the Texas Law Center, 1414 Colorado, Austin, Texas 78701.

CHAIRMAN BABCOCK: Okay. Shall we get back to it? And by my reckoning, Bill, we are at 13.1 which you said was going to be a snap, a breeze. We'll get through in three minutes.

JUSTICE NATHAN HECHT: Let me before Bill starts, somebody a couple of the people asked me during the break about raising points that we've already talked about before; and I don't want to incur the wrath of the chair or anybody else by extending the meeting any longer than we need to; but anybody who wants to make a point that they want the Court to take another look at, now is the time to do it. So --

CHAIRMAN BABCOCK: Yes. And the chair is a freedom of information kind of guy. So anybody who wants to say anything is fine with me. Okay. Bill, do you want to take us to 13.1?

PROFESSOR DORSANEO: I'll introduce the subject anyway. The Court is not inclined to change the Rule substantively. Our proposal or recommendation was to change it to say in effect "On request the official court reporter

or court recorder must attend court and make a full record of the proceedings." The current rule says that "The reporter must attend court sessions and make a full record of proceedings unless excused by agreement of the parties." And in effect that's what the Court has provided; but it's moved "unless excused by agreement of the parties" to the beginning of the paragraph. And as I understand it that's the clarification. Am I right, Justice Hecht?

JUSTICE NATHAN HECHT: Yes. Judge Womack pointed out at a meeting at which this was discussed whatever you think of the substance of 13.1(a), putting the modifying clause at the end of it makes it ambiguous because you can't tell if it modifies both of the preceding clauses or just the closest one. Does "unless excused by agreement of the parties" if it's at the end, does it modify both "attend" and "make" or only "make"? And the sense of the committee was whatever else you thought about the rule, it meant both of them, so it should be moved up front; but then that doesn't touch on the substantive issue.

PROFESSOR DORSANEO: I think the substantive issue is, well, what happens if this doesn't happen? And I don't believe we have a procedural rule in the appellate rules that exactly covers that question. 36.6 that we'll get to in a little bit covers inaccuracies or loss or destroyed or inaudible parts of a reporter's or recorder's record; but it doesn't talk about a hearing that was not reported.

Now I'm not completely sure what the law would be on that; but I hope that it would be that it wouldn't be an automatic reversal. It might be an automatic reversal; but I would hope that the law would evolve into it being an automatic reversal only if it was a significant hearing or some sort of an important matter. I'm talking about hearings that need to be, that are evidenciary hearings anyway; and then it's conceivable that the law would change to say that if you didn't insist on your rights, that your rights would be impaired at least in cases that didn't involve default judgment.

So to me the issue is the next issue; and

I think I'd ask Scott McCown to talk further about that, because it was his recommendation to change 13.1 in the way that I think we recommended it to be changed.

HONORABLE F. SCOTT MCCOWN: Well, I think we have to take two steps back in history, not just one, because this comment in brackets where it says "The court is not inclined to change the rule substantively; the statewide practice should be that a reporter is to be present unless excused," if that comes from the Court, I think it's a misstatement of the law, because what happened was that traditionally the Rule was if you wanted a record, you had to request it. And there was actually a supra request that if you wanted voir dire recorded, you had to make a supra request. And so when 13.1 was first amended it was to knock out the requirement for a supra request for voir dire.

PROFESSOR DORSANEO: Or for jury argument.

HONORABLE F. SCOTT MCCOWN: Or jury argument. And but the way it was written it didn't just knock out the requirement for a

supra request. It appeared to reverse the presumption; and the Rule appeared then to become that there will always be a record unless you say there won't be one. And the Court of Criminal Appeals came out with an opinion to that effect; but at the time that this change was adopted, and we can go back and look at the transcript because I pulled it out, when I wrote my letter to the committee, we were promised that "Oh, no. This only changes the rule to eliminate the supra request."

That's a long way then to get to what the rule ought to be; but I just want to point out that I don't agree that the Supreme Court, that this committee has ever suggested or that the Supreme Court intended to change what the law was, which is you have to request a record to get one.

I think the only thing that this committee ever did and that the Supreme Court ever intended was to eliminate the supra request for voir dire and jury argument; but other people could take a different view of that, but that's just historical.

So then the question is, well, what should the rule be? And here this is where a trial judge is going to have a completely different view of things than an appellate judge. Probably I would estimate that a good 80 percent of my business is done without a court reporter there or maybe more; and I'll give you a simple example. The uncontested docket, people come in to get a divorce for the uncontested docket, and they get, we just do divorce after divorce after divorce. No record is made. And if my court reporter says you know, "I've got to run up to the dentist," I say "Fine. Go." He's gone. If somebody rolled in, I couldn't do business, because if the court reporter weren't there, for me to get their agreement I guess I could get it in writing; but it becomes a procedural, it becomes a lot of extra procedural work in every hearing to secure people's agreement that we won't create a record as opposed to simply saying if you want a record, you've got to ask for it. Most business is done without a record.

PROFESSOR DORSANEO: What about a tacit

agreement?

HONORABLE F. SCOTT MCCOWN: Well, but then you get all kind of enforcement questions. And if you don't have a record, how do you prove there was a tacit agreement?

MR. WATSON: Can't you just do it with a docket entry, "the parties agreed no court reporter needed, case heard"?

HONORABLE F. SCOTT MCCOWN: Well, a docket entry is not an order; and if I could do things --

MR. WATSON: It doesn't say an order. It just says by agreement. You have a record that is presumed accurate that there's been an agreement if the judge says there's been an agreement.

HONORABLE F. SCOTT MCCOWN: Well, I don't know if we would want a rule that says if the judge says there's been an agreement, then there's an agreement. I could wrap up a lot of things if that were the case.

(Laughter.)

HONORABLE F. SCOTT MCCOWN: I mean, I think we would have to have some kind of form that the parties at least checked off and

signed. And so then what I'm doing is I'm having a new procedural hurdle. If I'm not going to do something with a reporter, I've got to get a form checked off and signed; and then I guess I've got to file it in the record. And we've just created a -- I mean, it's hard for me to paint a picture; but we just have hundreds and hundreds of hearings without a record.

CHAIRMAN BABCOCK: Frank Gilstrap wanted to say something.

MR. GILSTRAP: We're all proceeding as though we're writing on a clean slate here; and we're not, and there is some history here that we need to be mindful of, and you'll see why. The point we're debating is whether the rule will say "upon request" or "unless excused." I mean, those are the two different approaches.

The original court reporter statute which was codified in 52.046 of the Government Code says "upon request." And that was the language that was carried forward into Rule 11(a)(1) in 1986, I believe. It said "when requested."

Now then in 1997 that was changed and the new language was, the current language was put in which says "unless excused" in 13.1(a). Now the committee proposed going back to the old language; and the Supreme Court says "No, we want to keep the new language." That's where we are. The problem is there is a case from the 1st Court called Polasek against State which says that the new language, by adopting the new language the Court of Criminal Appeals exceeded its rulemaking power, and that reasoning would also transfer over to the Supreme Court.

Now no one knows what the Court of Criminal -- that's the case we talked about when we talked about the en banc court. No one knows what the Court of Criminal Appeals is going to do with that or even if they're going to address it; but it's there, and I just I'm a little troubled with going on down the road without at least being aware that what we do may not make any difference.

HONORABLE F. SCOTT MCCOWN: But let me just add one thing to what Frank said to kind of dovetail my comments and his. When the

change was made in '97 and we went from "upon request" to "unless excused" what we were told, and we can go back and pull the transcript, was we weren't changing the rule. It was just to get rid of the supra request for voir dire and jury argument. And what I said was "Wait a minute. This in English this does more than that. Please let's don't do it." And everyone said "Oh, no, no, no. That's all it means. We promise you that's all it means."

CHAIRMAN BABCOCK: You got tricked.

HONORABLE F. SCOTT MCCOWN: And so we've got that in the transcript. And now in 2002 I'm being told "Well, that's not all it meant. It meant something different." And so maybe they don't have the authority to do it, your point about the case; but what I'm saying is whether they have the authority or not it ought to be upon request, that that's the way it works in reality and that that is the way it needs to work.

MR. GILSTRAP: You're saying it was never -- they never intended to change it really?

HONORABLE F. SCOTT MCCOWN: Right.

CHAIRMAN BABCOCK: Nina had her hand up, Buddy, and then you.

MR. LOW: Sure.

MS. CORTELL: I think for all of the reasons Judge McCown expresses I do like the currently proposed language from the committee; but I will say this, and I'm sure this would not ever be true of any judge here: We did have a judge in Dallas that you could request all day long and you didn't get your court reporter. And the wording proposed by the Court seems to reverse the presumption; and although that same judge, if he were on the bench, could still cause a problem, I suppose, it might be a little bit better in that scenario to have this presumption reversed as proposed by the Court.

HONORABLE F. SCOTT MCCOWN: Can I point out something about that?

CHAIRMAN BABCOCK: If Buddy will yield to you.

MR. LOW: Yes. Go ahead.

HONORABLE F. SCOTT MCCOWN: The rogue judge problem is identical under either rule.

MS. CORTELL: I understand it has that problem.

HONORABLE F. SCOTT MCCOWN: And that's really important to recognize, because you might think I want to solve the rogue judge problem; but if you come in under the "upon request" and say "I want a record," and the judge says "I won't give you one," what are you to do? The only thing you can do is to file something with the clerk that says "The judge wouldn't give me a record."

If you come in and say "I am refusing to agree," and the judge says "Thank you for your agreement," and you say "No. I'm refusing," and he says "Thank you for your agreement to waive the record," what can you do? File something with the clerk that says you didn't agree. So the rogue judge problem is identical under either burden.

MS. CORTELL: I'm not sure it's quite identical. I think it creates a slightly different presumption under the proposed wording. I don't disagree that there is still a fundamental issue; but I think it's slightly better under the Court's proposed wording.

CHAIRMAN BABCOCK: Buddy. Wait a minute. Hold it. You got trumped by Justice Hecht.

MR. LOW: All right.

JUSTICE NATHAN HECHT: I don't recall the committee's discussions about it, although I know there were some; but the Court at least in its internal discussions last time thought this was changing the rule. Again, that still doesn't answer the question if that's a good change or not; but we did talk about the concern that has been expressed by some lawyers particularly when they get out of county and they request a court reporter and they think the court reporter is coming in the room, and because that's what automatically happens when in their home county. And about halfway through the hearing they look around, and nobody is taking the record, and they find that you to have to ask twice in this particular county or you have to ask nicely or there has to be some additional requirement.

So the problem wasn't the rogue judge so much. The problem was that the Court discussed, and a number of the members are gone now that were there, but the concern that

a lawyer would be expecting that he had jumped through the hoops only to look around and find that it wasn't good enough. That was the concern.

CHAIRMAN BABCOCK: Buddy.

MR. LOW: I don't see the difference. Say his you take it either way. Scott's girl is gone to the dentist.

PROFESSOR DORSANEO: Guy.

MR. LOW: I go in and say "Okay. I requested it right before the hearing." When do you have to request it? I request it then. I mean, what is it going to be? Are you going to say when the request must be made? I mean, that says "upon request." That means sometime before the hearing. So what difference is it going to make whether? So the best way for her to go to the dentist is call all the people coming in and say "Are you-all going to need a court reporter? Will you agree to excuse?" Because otherwise she can't go. They come down there, and they say "I request a court reporter." And then what do you do?

HONORABLE F. SCOTT MCCOWN: That's what

you have to do.

MR. LOW: That for me is just a difference that doesn't make a difference.

CHAIRMAN BABCOCK: Bill and then Justice Patterson.

PROFESSOR DORSANEO: Again, by making the Court's change, and maybe that's reinstating the current language that contains this problem, we create other problems. I mean, sitting hear listening to people talk it does in fact say "attend sessions and make a full record of the proceedings." That would include nonevidenciary hearings or whatever else goes on. I don't see much how that has any particular point to it unless you just want to keep people honest in a way that may be beyond necessity. The request procedure in my part of the world is fairly well understood is you make a request at the time.

MR. LOW: Right.

PROFESSOR DORSANEO: That that's good enough. Maybe that shouldn't be good enough; but that is good enough. If you don't in Dallas county request the preparation, as I understand it, and the Courts can correct me

if I'm wrong, if you don't request the court reporter to take down the voir dire examination or the jury argument, you still don't get it because they are doing it the way they did it before. And I think the request procedure just makes a good deal more sense because you need the reporter some of the time and not all of the time; and when you need it you make a request, and if the court reporter is at the dentist, well, maybe you should have been a little more prepared to make the Court aware that you were going to need a reporter beforehand, or maybe you just come back, because you come back a lot anyway.

CHAIRMAN BABCOCK: Judge Patterson.

JUSTICE JAN P. PATTERSON: Well, let me suggest, and I say this not just to show Judge McCown that appellate judges can be sympathetic and understanding of the trial judge; but I do think that there is a virtue of the request because it then puts the burden if something is off of the record, that a record has to be made. Very often the request for the record is not on the record. Therefore, if something is not reported, at

the conclusion of the proceeding unless somebody makes a record of that, it's okay. Whereas there's the opposite burden with "unless excused." Everything has to be on the record.

I'm not making that very clear; but we're seeing several records recently where either the court reporter can't hear the objections or can't hear the colloquy of the lawyers at the bench; and this shifts the burden of making the record on that. And although I can't quite make it as clear as I'd like, I do think that it's very important to make it upon request. Otherwise it makes for a lot of mischief with the record.

And I think that the other aspect of it is that I do worry that regardless of what the rule is, the practice in the trial courts is "upon request" and has continued to be that regardless of the change in the law.

CHAIRMAN BABCOCK: Judge McCown, then Skip.

HONORABLE F. SCOTT MCCOWN: I think Buddy makes a good point about the dentist example; but what the real problem is from a trial

judge's point of view is that, you know, my court reporter, no court reporter can sit for six hours a day day in, day out across the life of a judge. I mean, I'm on the bench more than my court reporter is taking notes. And court reporters are off working on a record, doing whatever court reporters do. I'm in court with a huge motion docket. If a motion, if a party in that motion docket needs a record, they ask for a record, the bailiff goes and gets the court reporter, I bring him in. I get a record, and the court reporter disappears again.

If you were going to implement the present rule, the excuse deal, how does that work? What that means is the court reporter has to be in there and he has to be getting the agreement to excuse him on each little hearing; and so he's in and out, in and out, in and out, which is just a burden to the court reporter and a burden to me. And you know, as a practical matter I think it's going to stay upon request because that's the way the world is going to work; and I think the rule ought to reflect that reality. Because

and when you say "unless excused" how are you going to do it unless you either get it on the record or you get it in writing, which is just a pain?

CHAIRMAN BABCOCK: Skip, then Buddy, then Judge Peeples.

MR. WATSON: I know there's a huge variation in the way district judges run their courtrooms, and the judges in this room this wouldn't apply to; but the thing that I found hopeful from, and you know, and I mean that. The thing that I found hopeful from the Court's position on this was that as a practical effect it would mean there would be a reporter in the courthouse. Our problem is that if we go over, one is taking Fifi to the groomer. Another one is off somewhere else at the dentist or something else. It's not a matter of running somebody into the courtroom to take something down. It's a matter of finding a court reporter. And this would appear to simply set up a situation where the court reporter would be expected to be there. I know that sounds pejorative; but it's a problem in some places that you folks

obviously don't relate to because you've never experienced it.

PROFESSOR DORSANEO: Well, I have; and you bring your own.

MR. WATSON: Well, that's the problem is that we're down to that in some places.

CHAIRMAN BABCOCK: Buddy.

MR. LOW: Most courts, they just have the hearings, the ones I'm involved in; and they'll say "Do you want a court reporter?" Otherwise when you change the burden the other way then you give rise to the legal effect I have a right to a court reporter. What is the effect of being deprived of that? If a record you can't get it, it's not your fault. It's reversed. So then we're getting into a different thing; and the practical matter is it operates just the way we've always operated. On hearings, voir dire and things like that they ask "Do you want a court reporter?" And if you want one bad enough and there is not one there, you just have to wait until one comes along. And many courts have a roving reporter and they can get one; but when you change the burden to give somebody a right

rather than a right to request you change a whole bunch of things, and I think you open a new body of potential wrong.

CHAIRMAN BABCOCK: Judge Peeples.

HONORABLE DAVID PEEPLES: I'm going to second everything that Scott Mccown has said so far and just make two points. My experience has been most of the time the court reporter, what he or she is doing is working on records when they're not in court; and I think every appellate judge and lawyer in this room ought to want the court reporters getting their records out instead of having to traipse back and forth to the courtroom.

And then second I agree with Scott that most, that an awful lot of what we do except for trials is off the record, and so the default rule ought to conform with that, which is you ought to ask for it when you want it, not have to agree that you don't want it, because most of the time with the exception of trials on the merits it's off the record.

CHAIRMAN BABCOCK: Okay. I think unless somebody else wants to add something, I think we've pretty fully aired this issue out. Why

don't we take a vote and the vote being how many people want to recommend to the Supreme Court that they reconsider and keep the language of the Rule 13.1(a) as we originally recommended it to them? Yes, Ralph.

MR. DUGGINS: Before you take a vote, can I ask a question?

CHAIRMAN BABCOCK: Sure.

MR. DUGGINS: Would it be possible to change the committee's language to instead of putting the burden on the court reporter to say that the trial judge must require the court reporter to do it on request to strengthen it?

CHAIRMAN BABCOCK: How would that work, Ralph?

MR. DUGGINS: Under 13.1 it would just say "The trial court" --

HONORABLE F. SCOTT MCCOWN: Well, --

MR. DUGGINS: Just let me finish.

HONORABLE F. SCOTT MCCOWN: Okay.

MR. DUGGINS: "The trial court when a party to the case requests." This isn't good language; but when that happens "must require the official court reporter or substitute

court reporter to attend court sessions and make a full record of proceedings."

CHAIRMAN BABCOCK: Scott.

HONORABLE F. SCOTT MCCOWN: This is kind of a subtle reason why you wouldn't want to do that; but I think an important philosophical reason: The trial judge appoints the official court reporter; but does not control the official court reporter and does not give the official court reporter orders like "Leave that out of the record" or "Put that in the record" or "Can you change a few words here or there?" And so the rules direct the court reporter because that's who is responsible. They're an independent professional, and they're not really, shouldn't be subject to the orders of the trial Court with regard to their duties. And if what you're thinking about is Skip's problem, --

MR. DUGGINS: It is.

HONORABLE F. SCOTT MCCOWN: -- Skip's problem can't be solved. And that wouldn't solve it either, because the judge appoints the court reporter; and if the judge is unhappy with them, the judge disciplines them

or fires them if they're not there. If the judge is happy with them, they do what they want. And the present if you went with the "unless excused," you come over, and if the court reporter is off taking Fifi to the groomer and you won't sign the agreement to not have a record, the judge is going to say to you "Come back another day." You're not going to make the judge somehow control their court reporter by how you write this rule. You know, and I just -- this is a small point I guess to many of us; but to me it's a big point, and I just think the rule ought to conform to reality.

CHAIRMAN BABCOCK: Yes, Buddy.

MR. LOW: Could I say just one thing? Some point was raised by Justice Hecht and others about how you prove that you requested a court reporter. And the answer to that is very simple: Writing on the yellow pad the style of the case "I hereby request a reporter," have the clerk stamp it and file it, date it, and there it is. It would be a simple matter. So that could be the answer. That's not a problem.

CHAIRMAN BABCOCK: Yes. Let's get back to Ralph's friendly amendment in a minute. But as we originally proposed it how many people want to in light of this discussion continue to recommend to the Court that it consider the language of 13.1(a) as originally proposed? Everybody who does so raise their hand. Everybody opposed? By a vote of 17 to 3 the committee suggests that the Court consider this discussion and further consider keeping the rule the way it was originally proposed. Bill.

PROFESSOR DORSANEO: I know this point was made; but I don't remember us in connection with our recommendation pointing out in a report or otherwise that Section 52.046 of the Government Code does say "On request the official reporter shall attend all sessions of the court." I don't remember us advising the Court of the existence of that statutory provision.

JUSTICE NATHAN HECHT: Well, the Court has been aware of it. The statute was passed in Article 2324 that was passed in 1975, the "upon request" part; and it was the passage

of that statute in 1975 that led the Court to adopt Rule 376(b) in the first place, because we never had a rule on it before. And the rule, the 1977 rule was not the same as the existing statute and never has been since. For example, the statute doesn't refer to voir dire; but nobody suggests that you can't have a court reporter for voir dire at least if you request one even though the statute does not provide for it.

So the Court at least in the old, old debates, I think you were on the committee back then.

PROFESSOR DORSANEO: Yes. I remember all that.

JUSTICE NATHAN HECHT: Chief Justice Pope, then Justice Pope was of the view that you ought to have a court reporter on name changes and everything else and didn't see what was wrong with that.

HONORABLE F. SCOTT MCCOWN: And he was an appellate judge, not a trial judge.

JUSTICE NATHAN HECHT: And the trial judge --

PROFESSOR DORSANEO: He'd been a trial

judge for many, many years.

JUSTICE NATHAN HECHT: -- on the committee, Judge Myers of Austin took the opposite view.

HONORABLE DAVID PEEPLES: Did Judge Pope also want records filed on time?

JUSTICE NATHAN HECHT: Yes.

HONORABLE DAVID PEEPLE: And the court reporter is busy doing stuff like that.

JUSTICE NATHAN HECHT: And let's see.

HONORABLE F. SCOTT MCCOWN: And I'll tell you this: We have a whole lot more hearings on a daily basis now than when Judge Pope was opining on that.

JUSTICE NATHAN HECHT: The trial judge stated his view that if a party did not request a reporter and consequently lost a point on appeal, quote, "That's tough."

(Laughter.)

CHAIRMAN BABCOCK: Ralph, do you want to talk any further about your thoughts?

MR. DUGGINS: Just following up on what Skip said, I do think there are certain areas where it's not as big a problem today as it was a few years ago where judges, some judges

did try to stay off the record; and you'd be halfway through something and "Could we please go on the record?" "Let's go on. Let me hear his argument." And then you'd go back on the record, and the other side would not say the same thing. And so I was just trying to suggest if there was a way to put a little more teeth into it, we might think about it. It's not critical. I do think that and voted for the committee language over the Court's proposal.

CHAIRMAN BABCOCK: Okay. Richard.

MR. ORSINGER: I'm wondering why this is in the Rules of Appellate Procedure and not the Rules of Trial Procedure.

CHAIRMAN BABCOCK: I wondered that myself.

PROFESSOR DORSANEO: It's because the Court of Criminal Appeals did not have trial court rulemaking powers and because it was in the Rules of Appellate Procedure before, and 376(a) and (b) dealt with the duties of the court function areas. But the main reason why it's not in the trial rules is probably because when the unified rules were

promulgated the Court of Criminal Appeals' rulemaking power was limited to appellate matters; and I think that's still the case now.

MR. ORSINGER: Well, then I would propose that we put a duplicate of this in the trial procedure rules, because the Court of Criminal Appeals still has no jurisdiction over trial procedures in criminal cases, no rulemaking powers.

JUSTICE NATHAN HECHT: This was in -- old Rule 376(b) was in the appellate section of the Rules of Procedure.

PROFESSOR DORSANEO: 376 was without a letter was the statement of facts rule.

JUSTICE NATHAN HECHT: Yes.

MR. ORSINGER: One of the things we tried to do when we codified the Rules of Civil Procedure which have not been processed yet by the Court was we tried to gather together the things that were important to the court reporters and put them in one section and the things that are important to the people, the district clerks in one section and the people serving process in one section and the

lawyers. And in keeping with that logic that we should put the rules that relate to your job in one area I think that we ought to seriously consider duplicating this in the trial rules.

PROFESSOR DORSANEO: I think it is in the recodification draft.

MR. ORSINGER: Okay.

PROFESSOR DORSANEO: And if anybody is suggesting that we ought to go and revise all of the Civil Procedure Rules to make then up to speed and all of that, well, I think that would be a different note, enumeration of the recodification draft, because I could mention a great many rules here and will resist the temptation.

CHAIRMAN BABCOCK: Frank Gilstrap.

MR. GILSTRAP: Now let me say this: You don't give the Court of Criminal Appeals power over trial proceedings by putting the rule in the appellate rules and saying that it's an appellate rule. I mean, it seems to me if they don't have power over trial proceedings, I don't see how they can pass a rule regarding court reporters in the trial court. So maybe

we want to leave that alone.

PROFESSOR DORSANEO: Well, they don't see that as a problem.

MR. GILSTRAP: Okay.

CHAIRMAN BABCOCK: Okay. Moving right along to 18.1, the Court would make the change as recommended. Any problem with the comment, Bill? The comment looks pretty straight forward to me.

PROFESSOR DORSANEO: 18.1?

CHAIRMAN BABCOCK: Yes.

PROFESSOR DORSANEO: Yes.

CHAIRMAN BABCOCK: Okay. Let's move along to 26.1 then. The Court is not inclined to make the change. What is going on here, Bill?

PROFESSOR DORSANEO: Well, to make a long story not quite as long as it could be, we decided and recommended to the Court some time back that one of the ways to get on an extended appellate track, which I'll resist criticizing, is to make a request for findings of fact and conclusions of law in lieu of or, well, really in lieu of a motion for new trial or some other mechanism that had previously

been a way to get from a 30-day track to a 90-day track.

The idea was that in bench trials you wouldn't move for a new trial as often as in jury trials; but you would make a request for findings of facts and conclusions of law, and therefore the request should give you the extended time table in nonjury cases just as a motion for new trial would in jury cases.

Then we had some Supreme Court cases that came down that said that your request for findings won't work unless findings were proper, and findings are not proper in cases where there is nothing to find because it's a summary judgment proceeding or whatever. So what was done to simplify the burden of getting to the longer appellate track got more complicated along the way, and it led some of us to think that the first move was a bad move to begin with because now you're told that you can get on the extended track by requesting findings, but that only works some of the time.

If the request is improper, then it doesn't work. The subcommittee of this

committee discussed this matter. Well, there weren't a great many of us who sat around and discussed it; but we discussed it and basically concluded that this was one of those, you know, logical but unfortunate traps for people who haven't kept up with this development, and we recommended to this committee and this committee recommended that we just simply say that you get this longer track if you request findings even if that's stupid. And --

MS. BARON: Can I interject one thing?

PROFESSOR DORSANEO: You certainly may.

MS. BARON: Doesn't this make findings, the request for findings different than any other post judgment motion that extends the appellate deadline? Like if you file a motion for new trial and it's stupid, it doesn't matter?

PROFESSOR DORSANEO: Right. A skeleton motion for new trial that has no purpose other than getting on a longer track is just fine. Okay. If the judgment is contrary to law and the judgment is contrary to facts, to get to the longer track, that's just fine; but for

findings it's got to be the appropriate type of proceeding. And that's the subject of a -- what's the name of the case, Elaine?

PROFESSOR CARLSON: IKB.

PROFESSOR DORSANEO: IKB. That's the subject of the Supreme Court's opinion on IKB which goes through and discusses all of this at some considerable length.

PROFESSOR CARLSON: But then en banc and motion to modify is also --

PROFESSOR DORSANEO: Well, that's also another thing to talk about at some other time. But the committee I think would. Any appellate lawyers think that this isn't a trap? I mean, people practicing in this area I don't think believe that it's a good idea to trap people who should know better.

CHAIRMAN BABCOCK: Does anybody else want to talk about it? Richard.

MR. ORSINGER: Not the only area where the unwary can be trapped, because requests for findings unlike the other procedures that give you the extended appellate timetable doesn't give you the extended plenary power. And this is an area. Those of us who do

family law deal with this a lot; and we're not likely to be confused. But those who deal with jury trial appeals and summary judgment appeals and that occasionally get one of these are likely to get confused; and I think it does represent a trap.

My personal preference, and I know that this is not before the committee, is to -- is not to have these magic incantations that cause these things. We ought to just allow someone to request the extended deadline, and if they do, they get it; and if they don't, they don't get it, and we won't worry about any of this. But since we don't have anything that simple, it seems to me like we ought to protect the people who wander into this area occasionally from their own lack of familiarity with these procedures, because we make a statement in the rule, but then we have exceptions in the case law that are not reflected on the face of the rule.

PROFESSOR DORSANEO: It is in the rule, I think, Richard, isn't it?

MR. ORSINGER: Oh, it is?

PROFESSOR DORSANEO: It is.

MR. ORSINGER: Excuse me.

PROFESSOR DORSANEO: But the rule doesn't explain what it means. You know, it doesn't say that this will work some of the time.

MR. ORSINGER: It's not as treacherous as it used to be; but still you basically have to read a lot of case law to know when that works and when it doesn't work. And so I always give everybody advice, always file a motion for new trial under all circumstances even if you don't want one; but that's not a very good way to practice law.

CHAIRMAN BABCOCK: What about the Court's point that the current rule does not appear to cause problems?

MR. ORSINGER: Oh, I don't agree with that.

PROFESSOR DORSANEO: I guess they haven't been trying to get on the extended timetable.

HONORABLE F. SCOTT MCCOWN: Well, they wouldn't know, would they, because if you ask for a -- if you filed a request that wasn't proper and you didn't know it, you would have blown your time. So would they ever see it?

JUSTICE NATHAN HECHT: Surely you get an

opinion from the Court of Appeals especially for wrong jurisdiction.

HONORABLE F. SCOTT MCCOWN: Right.

MS. BARON: They're all unpublished.

CHAIRMAN BABCOCK: They're all unpublished.

MR. ORSINGER: That's right.

HONORABLE F. SCOTT MCCOWN: But how would the Supreme Court be cognizant of how many times that has ever happened in the Court of Appeals?

MR. ORSINGER: Because you won't get an opinion; and you probably, I mean, it would be stupid to appeal that if you didn't perfect. Occasionally they have. It may not make its way to the Supreme Court. These people may just die by the side of the highway.

CHAIRMAN BABCOCK: Judge Brister.

JUSTICE SCOTT A. BRISTER: Has the Court written on findings and conclusions on plea to the jurisdiction? This is in my view the white elephant of our rules. This plea to this jurisdiction is the main, one of the main motions being filed these days. The Supreme Court has been real clear that the rules that

apply to it depends on the circumstances. If it's like a summary judgment, then it's like a summary judgment. But if it's like a special exception, it's like special exceptions. But if it's more like special appearance, then it's more like a special appearance. There's no rule. There is no mention in the rules. And does that mean findings and conclusions apply to that? It depends. And if that's so, then you really don't know whether it's proper or not proper yet.

I'll reserve for another day my fight about whether we should have a plea to the jurisdiction. Apparently the city attorneys around the state think it is the "only" motion. I don't know who is training them, but that it is the only motion that needs to be filed. Since it can be used for anything why not call it a plea to the jurisdiction. That way you can never be in violation of the rules since there are none.

PROFESSOR DORSANEO: I think they teach that at Baylor.

JUSTICE NATHAN HECHT: It was never as popular until the legislature gave them

interlocutory right of appeal.

JUSTICE SCOTT A. BRISTER: Right.

JUSTICE NATHAN HECHT: Then it got to be real popular.

JUSTICE SCOTT A. BRISTER: But that could be a real trap on this if we decide "No. What you-all were talking about was more like a motion for summary judgment plea to the jurisdiction, not really like a special appearance plea."

CHAIRMAN BABCOCK: Good point. Elaine.

PROFESSOR CARLSON: I'd echo Bill's sentiment. I'm of the mind that if the IKB language stays in the rule, for that occasional appellate practitioner I think it is problematic; and I'd rather just not have findings of fact as an extending mechanism if we're going to keep the IKB complexity.

CHAIRMAN BABCOCK: Does anybody else have anything? Well, why don't we -- yes, Scott.

HONORABLE F. SCOTT MCCOWN: How many times are findings of fact, is a request made when there is no motion for new trial or motion to modify the judgment? Because it is -- and plea to the jurisdiction was exactly

what I had in mind. It is sometimes even for the skilled practitioner problematic whether the findings are appropriate or not. And why not just take findings out all together? Because how many times would you ever be requesting findings that you wouldn't have a motion for new trial or a motion to modify? Or put it another way, where you couldn't. You can always ask for a new trial. So if you want a triggering mechanism, why not just trigger it on new trial or motion to modify and take findings out?

There is something -- what would be the word -- esthetically unpleasing about saying we're going to give you extra time even if you do something that you're not supposed to do. I mean, it is an odd way to write rules. So not that there is anything about these rules that are esthetically pleasing. But why not just jettison?

CHAIRMAN BABCOCK: Okay. Yes, Nina.

MS. CORTELL: I think there may be occasions where you're going to request findings and not move for new trial; but I do agree with Judge McCown on this. I think I

would just put closed period after the world "law" where you don't have that caveat, because you don't put that caveat on anything else. I agree with that; but you keep it in as a triggering event. That would be my vote.

CHAIRMAN BABCOCK: Yes. Buddy Low.

MR. LOW: A really dumb question, let me ask you one. If I understand, the Court is saying not change the way it is. And I come down to the last part, the next to the last sentence, well, the last part, the last two lines, "could properly be considered by the appellate court." What is it that is not required by the rules and not even proper that can't properly be considered by the Court? In other words, they've got to consider that. It was filed. What are they talking about?

PROFESSOR DORSANEO: Finding. The trial doesn't make a finding of fact in a summary judgment case. That is not part of anything.

MR. LOW: Okay. Well, they can don't consider it; but they have to consider that it was made, but consider that was wrong, in other words, wrong in doing it. I just --

JUSTICE ANN CRAWFORD MCCLURE: Well, I always used to routinely file a request for findings in a summary judgment case, because if I could persuade a trial Court he ought to make findings, then that would indicate to me that there was a material fact issue so that summary judgment was improper. You know, realistically you can utilize that to your advantage in the appellate court if they'll make findings.

MR. LOW: So you're considering it then?

JUSTICE ANN CRAWFORD MCCLURE: Yes.

MR. LOW: That's what I'm saying. I mean, "consider." I consider a lot of things; but I don't really think seriously about doing them.

(Laughter.)

PROFESSOR DORSANEO: That really, that language in the current rule comes from IKB; and IKB is what you need to read in order to learn what properly may be considered by the appellate court. And it's too long to put IKB in here. It would be, oh, about that long (indicating).

CHAIRMAN BABCOCK: Judge McCown and then

Pam.

HONORABLE F. SCOTT MCCOWN: Well, I might take it out all together. But if you're going to leave it in, would it go down better if we said instead of "a request" just said "any request for findings of fact and conclusions of law" period and add a comment, and in the comment we said "any request whether valid or invalid triggers this 90-day extension."

MR. LOW: I can understand that.

PROFESSOR DORSANEO: IKB is dead.

MR. ORSINGER: You better kill it, because if you just say, put a period where Nina suggested, you haven't killed IKB. So we either need to kill it explicitly in the rule, kill it in the comment, or override it in case law.

PROFESSOR DORSANEO: We kill Panterra later in the comment.

HONORABLE F. SCOTT MCCOWN: In the comment that I just suggested wouldn't that kill it?

MR. ORSINGER: It would be not as good as putting it in the rule; but better than not having it in the comment or the rule

definitely.

CHAIRMAN BABCOCK: Pam.

MS. BARON: Just as a little bit of history, some of these changes had their genesis in the appellate section's appellate rules committee when I was chair. And that committee did feel strongly that maybe we shouldn't have two tracks at all, which is Richard's point, or if we do, it shouldn't be so hard or tricky to get from one track to the other. And the idea was to eliminate any chance of confusion if you filed something after the judgment would give you the 90 days so that you wouldn't get into the Court of Appeals and discover for the first time you didn't have an appeal at all, which is what we're really trying to avoid.

HONORABLE F. SCOTT MCCOWN: It's too harsh a remedy. I mean, it's too harsh a result for too small a sin.

MS. BARON: That's right.

CHAIRMAN BABCOCK: Okay. Let's -- we have got to finish these today. So let's -- I think we've had a full discussion about this. How many people want to tell the Court that

they should look at this again and that we still recommend what we did before? Everybody raise your hand that believes that. How many are opposed to that?

JUSTICE SCOTT A. BRISTER: Well, I'm for that dropping of the findings and conclusions extension period.

PROFESSOR CARLSON: Me too.

MR. LOW: Me too.

JUSTICE SCOTT A. BRISTER: So I'm not -- I would either be in the group that just voted or the other one; but not in the one that leaves it sometimes yes, sometimes no.

CHAIRMAN BABCOCK: Okay. The vote we just took was 15 to nothing, just so the record is clear. Now Elaine or Judge Brister, do you want to frame what the next vote is on?

PROFESSOR CARLSON: Yes. Vote on whether or not we should retain findings of fact as an extending mechanism.

JUSTICE SCOTT A. BRISTER: What are they -- you-all help me, appellate practitioners. Motion to modify, motion for new trial. What else?

HONORABLE F. SCOTT MCCOWN: Motion to reinstate.

PROFESSOR DORSANEO: Right.

JUSTICE SCOTT A. BRISTER: Those are the things that ask me to do something to the judgment. Findings and conclusions frankly never change my mind about a judgment. I mean, my mind was made up when I entered the judgment. I just asked one of the parties to write down some good reasons for it.

PROFESSOR DORSANEO: You're helping me on a later issue here.

HONORABLE F. SCOTT MCCOWN: I mean, why should findings extend the time?

CHAIRMAN BABCOCK: Okay. Richard.

MR. ORSINGER: The context of that --

PROFESSOR DORSANEO: I told you why. That was why, because it's a substitute for a motion for new trial in a bench tried case according to what this committee thought some years back.

MR. ORSINGER: The basis of this step was at the time we all understood that you did not have to preserve evidenciary challenge on a nonjury trial judgment by filing either a

motion for new trial or by filing a motion to modify; and therefore a lot of nonjury trial practitioners didn't file them. They knew they lost. They'd fought over the entry of the judgment. The judgment was adverse. They request their findings, and they move on down the road.

And so it's not second nature to nonjury trial lawyers to file a motion for new trial or a motion to modify. And I think it's in that context that we decided, well, the nonjury trial lawyers who are going to appeal are going to request findings even if they don't file a motion for new trial or a motion to modify; and this kept them from having to file motions that really are a waste of time anyway because many more than just Judge Brister usually won't change their mind after they've handed down the judgment that they thought about before they handed it down. And we'll get to in a minute, because there is an effort to require preservation at the trial level; and if we do require the filing of a motion for new trial or a motion for JNOV even though there is no V to OV, we're going to

cure this problem anyway. But I hope we don't go there. I hope we don't require that.

And I have mixed feelings. I think probably more people are harmed by the confusion than if we said it always worked or it never worked. And I kind of agree with that sentiment; and even though I feel like those aren't, the nonjury lawyers fought long and hard to get recognition for this I'm not sure more people aren't getting harmed by it.

CHAIRMAN BABCOCK: Nina.

MS. CORTELL: I think that I've probably had every arcane experience known to mankind or something. But there are times where you might want to see how the findings are going to look before you would want to file your notice of appeal which might trigger your opposing counsel's right to appellate attorney's fees once you file that notice of appeal. So that may be a rare case; but those cases are out there where you want to see how the finding process works first. But I certainly agree with the sentiment that certainty is the most important thing, that there not be any confusion about whether the

timetable extends or not.

HONORABLE F. SCOTT MCCOWN: Could I suggest?

CHAIRMAN BABCOCK: Yes.

HONORABLE F. SCOTT MCCOWN: Maybe we should advise the Court that while it may not appear to them to have caused problems, that we think below them where they may not see it does cause problems, and that we recommend they accept the change; but if they're not going to accept the change, then we recommend alternatively that they eliminate it.

JUSTICE NATHAN HECHT: Well, --

HONORABLE F. SCOTT MCCOWN: And give them a choice.

JUSTICE NATHAN HECHT: -- just so I'll be clear, does anybody know of a case in the last five years where this has been a problem? Have you heard about or had anybody complain to you?

PROFESSOR DORSANEO: Justice Hecht, I know I've read cases in the last five years where this has turned out to be a problem.

JUSTICE NATHAN HECHT: I don't think we know of one since IKB.

PROFESSOR DORSANEO: I'm sure my answer would be "yes."

MR. ORSINGER: But you're not going to read a Court of Appeals opinion on this because it's going to be an order on a motion to dismiss, or it's going to be a show cause notice issued by the Court of Appeals without a motion.

JUSTICE NATHAN HECHT: Maybe that's true. But I was just wondering we keep saying this is a problem that causes confusion. So if we don't read about it, how do we know that it exists?

HONORABLE F. SCOTT MCCOWN: Well, I don't know about whether people have lost their appellate time; but I do know that I will get requests for findings of fact and conclusions of law in many cases where there are no findings of fact and conclusions of law owed, and that there is a confusion in the trial bar about when you get it and when you don't. I know that for sure.

CHAIRMAN BABCOCK: But does anybody get any cases where somebody has lost their rights, their appellate rights because of the

confusion that we've been discussing?

MR. ORSINGER: Recently is what the judge. Because historically, yes.

CHAIRMAN BABCOCK: In the last five years, in the last five hears.

HONORABLE F. SCOTT MCCOWN: Why don't we ask the clerks of the --

MR. ORSINGER: Courts of Appeals.

HONORABLE F. SCOTT MCCOWN: -- Courts of Appeals to do a survey for us to tell us.

JUSTICE SCOTT A. BRISTER: Well, the other question is, you know, are you having to file your notice of appeal early out of an abundance of caution because you don't know whether you're extended for sure by this request or not?

CHAIRMAN BABCOCK: Does anybody know of an instance where that has happened?

MR. ORSINGER: Well, the simple fix, which is what I always say when I lecture on this, is that you file a motion for new trial even if you don't want a new trial. And so I think a lot of people do that just out of a sense of precaution. It's kind of like preserving here on a charge. You both tender

and object unless you're really brave. And I feel like on this you file a motion for new trial because just to be clear. I mean, some obviously if you have a contested trial, your findings are okay; but if you have some kind of hearing short of a hearing that you just lost, you are in a limbo.

CHAIRMAN BABCOCK: Okay. Elaine, sort of seconded by Judge McCown, said that we ought to vote on whether or not if the Court is not going to go with the language that was suggested when we sent 26.1 up to them, we should vote on whether or not to just eliminate findings of fact as a triggering event all together. Is that?

PROFESSOR CARLSON: Yes. I would accept Judge McCown's suggestion that they -- the alternative, either they are effective in all cases or they're not effective.

CHAIRMAN BABCOCK: Yes. Okay. So how many people are in favor of that? Raise your hand.

MS. BARON: What is "that"? Could you restate that?

CHAIRMAN BABCOCK: Elaine, say it again

real loud.

PROFESSOR CARLSON: Yes. The proposal is to advise the Supreme Court that the sentiment of this committee is either to make findings of fact effective in all cases when they're timely requested to extend the appellate deadline or alternatively never.

CHAIRMAN BABCOCK: Hatchell wants to say something.

MR. HATCHELL: Can I just make one comment?

CHAIRMAN BABCOCK: Yes.

MR. HATCHELL: The tenor of the discussion seems to be there is no reason for the extended time period if you request findings and conclusions. If you'll add up all the days that can be accumulated under Rules 296 through 298 for filing, requesting additional findings or giving notice of late findings or requesting additional findings, you will exceed the time period for filing a record in an appellate court. And that was the reason we went to this in the first place.

Now the 1997 Rules of Appellate Procedure

make supplementation of records much, much easier; but there is not -- it's not -- we didn't go to this without reason.

HONORABLE F. SCOTT MCCOWN: Well, and we would be saying that our first preference would be that they adopt the proposed change.

MR. EDWARDS: When does the appellate timetable run if you file a request for findings of fact and conclusions of law?

MR. LOW: In a nonjury case probably.

MR. ORSINGER: Well, you need to state it differently. Your deadline for perfecting an appeal is 30 days after judgment is signed unless something is filed that makes it 90 days after the judgment is signed. The question is is a request for findings of fact one of the things that makes the perfection event due in 90 days?

CHAIRMAN BABCOCK: Okay. Let's -- Elaine, state what we're voting on one more time real loud so Pam can hear you.

PROFESSOR CARLSON: The proposal is either -- Pam, the proposal is to either eliminate a request for findings of fact totally as an extending mechanism for

perfecting the appeal or to make in all cases when a timely request for findings is filed as an extending mechanism, in other words, clarity.

MS. BARON: Right.

CHAIRMAN BABCOCK: Does everybody understand that?

MR. HAMILTON: Does it have to have this language in there about even if it's improperly?

PROFESSOR CARLSON: No.

HONORABLE F. SCOTT MCCOWN: That's the whole key.

PROFESSOR DORSANEO: It has got to be in the comment, though. It has to be in the comment.

MR. ORSINGER: Yes. But she's making a conceptual statement here, not the exact words of the rule. It's basically either give us one that works all the time or take it away and it never works.

CHAIRMAN BABCOCK: We're talking concept here, not language. All right. Everybody in favor of that raise your hand. Everybody against? By a vote of 21 to 4 that passes.

Okay. Let's move on to 29.5. The Court would make the change. The comment, Bill, any issues with respect to the comment?

PROFESSOR DORSANEO: No. We -- let's see. What about the comment? What do you think about it? I don't have any problem. Do any of the appellate lawyers or anybody else have any problem with that? This is just to make the rule and the statute in harmony.

CHAIRMAN BABCOCK: Well, there may be one trick here. "While an appeal from an interlocutory order is pending, the trial court retains jurisdiction of the case and may make further orders, including one dissolving the order appealed from, and if permitted by law, may proceed with a trial on the merits."

What about in a liable case where the motion for summary judgment has been denied and there's a pending appeal? While the case is pending on appeal can the trial judge dissolve the order denying the summary judgment and proceed to trial?

PROFESSOR DORSANEO: You're focusing on the first part that we never made any effort to even think about that. Right?

CHAIRMAN BABCOCK: Yes. It just struck me under the rubric of freedom of information.

PROFESSOR DORSANEO: Move to table. I mean, I'm not trying to be facetious here. We never talked about any of that. That might be a significant thing to study.

CHAIRMAN BABCOCK: Okay. I guess we're on the comment. And so while we're on the comment anything about the comment, Bill?

PROFESSOR DORSANEO: I don't have a problem with the comment.

CHAIRMAN BABCOCK: Anybody else?

PROFESSOR DORSANEO: He caused the debate.

CHAIRMAN BABCOCK: What was my hypothetical?

JUSTICE NATHAN HECHT: Yes. What was your hypothetical again?

CHAIRMAN BABCOCK: My hypothetical was in a liable case the defendant moves for summary judgment. The motion is denied. There's an interlocutory appeal taken. It's a media defendant.

COURT REPORTER: I can't hear you. I'm

sorry. I can't hear you.

CHAIRMAN BABCOCK: In a media liable case the defendant has moved for summary judgment. The motion has been denied. The interlocutory appeal is taken to the Court of Appeals. While it's pending the trial judge dissolves the order denying the motion for summary judgment and proceeds to trial. Can that happen?

JUSTICE NATHAN HECHT: That can happen.

CHAIRMAN BABCOCK: Pam.

MS. BARON: Chip, it can happen as long as the trial Court is not interfering with the jurisdiction of the appellate Court; but there are other procedures available when a trial Court refuses to rule on a summary judgment motion in a media case which is to proceed by mandamus and obtain a ruling because the trial Court is required to rule on the summary judgment --

CHAIRMAN BABCOCK: Right.

MS. BARON: -- before proceeding to trial.

CHAIRMAN BABCOCK: HBO vs. Wood.

MS. BARON: Right. So I think there are

corrections for that. It just may not be under this rule.

CHAIRMAN BABCOCK: Sorry. It just struck me. Anybody else? Okay. Let's move on to 33.1.

PROFESSOR DORSANEO: This is what we've already started talking about. As I understand it for a long period of time, 60 years at least, it has been the belief of appellate lawyers in part because of what the rules that deal with the making of findings of fact say will happen that you didn't need and don't need to challenge the legal or factual sufficiency of the evidence to support a finding that was made by the trial judge in the trial court in order to make that challenge on appeal.

The appellate rules said that until they were revised in 1997. This committee recommended to the Court that the appellate rules continue to say that when the 1997 revisions or what became the 1997 revisions were promulgated. Instead of doing that the Court made a comment to existing Rule 33 which cryptically says, at least it's cryptic to

me, "Former Rule 52(d) regarding motions for new trial is omitted as unnecessary." And Richard and I read that and were looking at each other and saying "Well, why is that unnecessary and what does that mean?" Okay.

And I think what I've been teaching and saying is that it's less clear than it was a few years ago; but you don't have to make that kind of a procedural challenge in the trial court in order to challenge a finding on appeal. And what we wanted to do at the subcommittee of this committee's level and the entire committee was to make it clear that what was done in the first round of the appellate rules is what we meant to do and that's a good idea.

As a practical matter if you look at the trial court rules on findings, it doesn't ever say "in them" anything about objecting to a finding on the basis of the factual, legal or factual sufficiency of the evidence. It doesn't say that anywhere in the trial rules. And aside from that what would be the point, okay, that I'm going to make, register an objection to each and every one of the trial

judge's findings of fact and the trial judge is going to take, you know, no action on that? It's just a step to go through, an exercise. Well, say "But you could request an additional or an amended finding." And that is provided for in the trial court rules. Say "Well, I'm supposed to request an additional finding that's opposite of the finding that the judge made."

Well, I know what the reaction of most judges would be to that. That strikes me as an exercise. I don't think the trial judges want this opportunity to reconsider what they found the first time around; and I don't think it's helpful to the entire process to put this step in. And I think I'm speaking for the appellate subcommittee about all of this. We really think that this provision is a good idea because it clarifies the law in a way that makes sense from a practice standpoint as well as just for its own sake.

CHAIRMAN BABCOCK: Okay.

JUSTICE NATHAN HECHT: To give you the benefit of a little bit of our discussion, this problem as nearly as I can tell has it's

genesis in Rule 324 which is one of the few rules that was amended before it even became effective, and it was amended in this very respect. And Rule 324 originally said that essentially you had to have a motion for new trial in every case in order to appeal. And then they said, well, they came back in and amended it and said, well, not in certain instances, and one was nonjury, any case tried without a jury.

Then by '97 we got around to thinking that a motion for new trial we had too many of them and they were too pointless and we shouldn't have to have them in all cases, so we rewrote the rule to say not that a motion for new trial is required in all cases except, but that a motion for new trial shall not be required unless except to complain about these things.

And the rule over time has kind of morphed into a preservation of error rule, which if that's what the original writers meant, is not clear from anything that still exists. Rather it's very pointedly not just a preservation of error; but you've got to file

a motion for new trial just mechanically for whatever reason.

And then we come. Of course in 52(a) and this committee has talked about the difficulty between old Rule 52 and Rule 324 and whether people will read 324 and think they've done all they need to do to preserve error because it doesn't say final motion for new trial, so that's the end of that. And then they get over to Rule 52 or now Rule 33.1, and they say, they see "Oh, well, maybe I was supposed to do more than 324 requires to preserve error."

So the concern on our Court basically boils down to this: Should there be just a standard, general rule that without exceptions that you can't raise a point in the Court of Appeals unless you brought it to the trial court's attention and gave the judge a chance to rule on it, or and whether a nonjury trial, whether summary judgment, whatever it was, or are there so -- are there some things that are so ingrained in our practice because we've been doing them that way for so long that no lawyer really expects to call to a trial

judge's attention what has every appearance of being a deliberate decision of the trial court to do what exactly he did? And so it's one thing to say "Judge, I don't think you should do this" and he rules against you. It's another thing to say "Are you really sure" and get another ruling to go to the Court of Appeals.

So I guess the question the Court is struggling with is how broad should the idea be that you have to preserve the point even in a nonjury, in a case tried without a jury in order to raise it on appeal?

CHAIRMAN BABCOCK: Mike.

MR. HATCHELL: Justice Hecht I think is correct on the historical development of this; but another historical fact was that we also became concerned about the length of time it was taking for a number of appeals to get processed, which is one reason we went to this. So that now we have a system where there is a tremendous pragmatic problem how you would implement a requirement that you would raise factual sufficiency complaints to a trial Court finding when under the very

rules that we have the trial Court doesn't have to make a finding until 60 days after the judgment is rendered if you add up all of the time period, jet the only mechanism we have for preserving those you have to file within 30 days. So if we go to this procedure of permitting or requiring that objection in the trial court, we're going to have to provide a mechanism where it can be filed when the court actually makes a finding.

CHAIRMAN BABCOCK: Bill.

PROFESSOR DORSANEO: A tiny, tiny bit, I don't know if it's even that important, extra history is that Rule 52 was a rule that came from the Court of Criminal Appeals side of the unified appellate rules project. As it exists now in Rule 33 it makes a cross-reference back to the trial court rules; but the original genesis of the Rule 52 problem, if you can call it a problem, about having to raise everything and get a ruling on it is that Carl Dally, Judge Dally was the one who was very interested in having such a rule because they didn't have that rule for criminal cases.

So when 52 was drafted I must say as a

coreporter I was paying attention; but I wasn't paying the same kind of attention that I should have paid to the way Rule 52 was worded. 33 is considerably different from 52; and it tries to and does do a lot better job in referring to the Rules of Procedure and embracing all the rest of it. I don't know if it's in perfect form; but that adds to the history of how things got in the shape that they've gotten in. That's really all I had to add.

CHAIRMAN BABCOCK: Judge McCown.

HONORABLE F. SCOTT MCCOWN: Well, if I understand the discussion, subdivision (d), the change here is being proposed for clarity sake about the present law; but it is the present law. And what the Court is asking is should there be a different rule. And I guess as a trial judge when you're talking about a bench trial I have no doubt about what the parties are saying with regard to the factual and legal sufficiency of the evidence to support the findings that are leading to my judgment. I don't think the trial judges feel that we are sandbagged or that we need to be

told in a motion for new trial something so that we can correct our own error first. We know what we have done. We know what, how they think it's in error; and we are ready to go.

To the extent that you want a trial judge to rethink the process the request for findings of fact and conclusions of law force the trial judge to do that because they have to sign something that they think is going to hold together. Whether they write it themselves or whether they sign what a party proposes or whether they edit it and do cut and paste they have to sign a request that they think is going to sustain their judgment.

So I don't think we need it in terms of fairness to the trial judge. I don't think it serves the interest of efficiency because I don't think it would result in the change of any judgments that then wouldn't have to be reviewed on appeal. To the contrary it would seem just to add cost and time that we wouldn't want at the trial level.

CHAIRMAN BABCOCK: Frank.

MR. GILSTRAP: I'm a little puzzled at how we got to the point that 33(a)(1) got to be, is now becoming an inflexible rule that we have to really be concerned about creating exceptions to. I mean, there are simply some actions that you shouldn't have to take in the trial court because it doesn't make any sense to take them in the trial court. One of them is asking the trial, the fact find, the trial judge to review his own factual determinations. He's already made them.

This gets right into the subject of Richard's e-mail that I think he spoke quite well on it. Also, as Richard pointed out, there is really no vehicle for doing this. The feds have something like a judgment as a matter of law, something like that, although I'm not sure it applies in nonjury cases. We don't. As Richard said, you have got to file a motion for JNOV, and there is, you know, there is no verdict. So I'm not troubled by keeping the old rule. What was the problem?

CHAIRMAN BABCOCK: Buddy.

MR. LOW: Chip, the result is going to be what is going to happen is lawyers are going

to say "The following is not supported by the evidence: Findings of fact 1 through 432." And say "Conclusions of law 1 through 60" period. And you're not going to give the trial judge any information. He's already looked them over; and that would preserve it. How is that going to help the trial judge?

CHAIRMAN BABCOCK: Yes, Skip.

MR. WATSON: I think Mike put it to bed. I mean, the only mechanism for filing that kind of thing expired 30 days before the first findings came out.

MR. HATCHELL: Not necessarily.

PROFESSOR CARLSON: It could.

MR. HATCHELL: But it could. 40 days is very realistic.

MR. WATSON: I mean, the point is that we are going to have to revamp the whole timing of post verdict motions to create a post verdict motion that will necessarily occur after all of the findings and the amended findings have been made. And to me we're going to a whole lot of trouble to fix a nonproblem. I mean, every trial judge in here is agreeing that they don't want to have to go

through that. They've made their decision. They don't want to have to revisit it. "Uphold or bust me based on the first decision I made."

CHAIRMAN BABCOCK: Richard.

MR. ORSINGER: I agree in principal with all these comments. There is a couple of other oddities. If you look from the standpoint of the party who is seeking the relief and assume that they lose in a nonjury trial, the procedures are even more incomprehensible to them because when the evidence closes they probably are going to have to move for a judgment as a matter of law and then in the alternative move for judgments on a preponderance of the evidence and then have both of those overruled. And I suppose that that would be sufficient; but in a family law case that's not very workable because you're going to win some issues and lose some issues. And so what do you move for a judgment for?

Let's say I'm in a divorce case and we're going to have a property division that's going to be a just and right division. Well, until

the judge hands down a ruling I don't know what I won and what I lost on. So what do I move for judgment on? Do I move for judgment that all my evidence be believed and none of their evidence be believed? There are so many contentions in a multi-issue case like that you can't do it. The only time you can actually break the judgment down so that you can grab onto certain things and complain about them is when you actually have your findings.

Let's say you've requested some findings and the judge refuses to give them to you. Do you have to come back and object that the judge failed to give you a finding you requested? If they make a finding you don't like, then I guess you could file an objection to the finding. But this is after you have already suffered an adverse judgment which was presented over your opposition which was against your whole trial position. So this is like maybe the third or fourth time you've told the judge that you don't like what they did. And by then it's probably too late realistically for anything to happen because

the judge at that late a date isn't going to go back and revisit the underlying adjudication.

The defending party that at when you if you're trying to make a no evidence preservation, on the defense side you can do it when the plaintiff rests; but if you put on evidence in your side of the case, you waive that motion for instructed verdict, so you have to renew it at the end of the case when the evidence closes. In a nonjury trial under the Quantel Business Systems case, 761 S.W. 2d, 302, a motion for judgment at the close, when the plaintiff rests or at the close of the evidence in a nonjury trial is not really a no evidence motion. It could be a no evidence motion; but it may also just be a motion to the Court to decide that they're not convinced by a preponderance of the evidence and therefore the plaintiff loses. Most of those motions are going to be oral, "Your Honor, I move for judgment. The plaintiff has rested. I move for judgment." "Granted." And we're not going to know whether that was a no evidence ruling or

whether the judge just said "Hey, I'm the fact finder. The plaintiff has, quote, 'given their best shot.' I'm not convinced on a preponderance of the evidence, so I'm going to vote for the defendant." So in that situation even if with a motion for judgment when the plaintiff rests that you win we still don't know whether it was on a legal sufficiency ground or whether it was just the judge wasn't persuaded beyond a preponderance of the evidence or on a preponderance of the evidence.

The procedural quagmire here is going to be very complicated in an area that our previous committee debate has already proven is very complicated. And if you allow preservation to become enmeshed in the findings of fact process, then it's truly going to be complex. And the truth is in a jury trial if you want to complain about the evidence, you should file a motion of some kind, because the trial judge will not have ruled on the evidence in a jury trial unless somebody files a motion complaining about the evidence. So you should say "The evidence is

factually insufficient. I want a new trial. The evidence is legally insufficient. I want you to disregard the jury verdict," or "I want to object to this jury question going to the jury at all."

But in a bench trial the rendition is a ruling. You do have a ruling from the judge on the evidence. And so we don't really have that compulsion to come back and get a second ruling or possibly even a third ruling from a person who has already given you the ruling. So I'll pass.

CHAIRMAN DORSANEO: Bill.

PROFESSOR DORSANEO: Well, to be fair I think you could read the findings rules to say that when you request an additional or amended finding that you could be required to ask for, ask the trial judge to change the finding from it was broad daylight to it was in the middle of the night. That seems totally pointless to me; but that would avoid this difficulty of moving for new trial or for judgment NOV long after the time is past, et cetera.

I don't think that anybody ever contemplated who structured the current rules

that you would need to make those kinds of challenges to fact findings and get determinations of them because it just doesn't seem to make a lot of sense. So it is a clarification; and it's a good clarification. If the rule, if the practice becomes otherwise, do you know what the main effect is going to be? It's that I'm going to win some cases more easily than I should. That's what is going to happen, because somebody is not going to do this and they're going to get caught. And I'll probably be embarrassed winning on that basis; but I'll take it.

HONORABLE F. SCOTT MCCOWN: It sounds like we have heated agreement. I'd call the question.

JUSTICE NATHAN HECHT: I'm noticing a trend.

CHAIRMAN BABCOCK: We are kind of proud of our rules, aren't we?

JUSTICE NATHAN HECHT: Well, however hard they were to recommend in the first place they're a lot easier to reconsider.

CHAIRMAN BABCOCK: How many people? I agree with your view, Scott. How many people

are in favor of recommending to the Court that they consider again the rule that we proposed? Everybody raise your hand. Anybody opposed? By a vote of 20 to nothing.

HONORABLE F. SCOTT MCCOWN: And I think it's important that we also communicate to the Court our sense that even if they didn't want to make this clarification, we wouldn't advise them to go in the other direction because to me what the Court is suggesting is asking us not only should -- is it possible that maybe we shouldn't make this clarification, but should we head in the other direction. And I think we're giving them our sense that we shouldn't.

CHAIRMAN BABCOCK: Richard.

MR. ORSINGER: I'd like to discuss the exact wording of our proposal. I'm troubled by the one, two, third line about "the evidence was legally or factually insufficient to support a finding of fact or that a finding of fact was established as a matter of law."

PROFESSOR DORSANEO: Richard, that's your language --

MR. ORSINGER: I know that.

PROFESSOR DORSANEO: -- from nineteen whatever. That's exactly your language. I'll find the memo.

MR. ORSINGER: I am older and wiser.

(Laughter.)

PROFESSOR CARLSON: We'll take one out of two.

(Laughter.)

MR. ORSINGER: Ordinarily if you didn't persuade the Court, you're not going to have a finding that was supported by the overwhelming weight of the evidence or that was against. What is going to happen is the trial judge is going to refuse to give you the finding you want. So what we really need to say is that a requested finding was established as a matter of law or was supported by the overwhelming weight of evidence.

PROFESSOR DORSANEO: I don't want to get into it.

HONORABLE F. SCOTT MCCOWN: No.

MR. ORSINGER: No. I think it's very importance, because --

HONORABLE F. SCOTT MCCOWN: No. I think it's just the exact opposite. The judge has

signed a judgment. All of the implied findings necessary to support the judgment are going to then be presumed. And so what we're saying is that you don't have to file any kind of post judgment motion to say that those presumed findings are legally or factually insufficient to support the judgment that the judge has signed. It's not the findings that you want that you're complaining about. It's the findings that he has made, though generally speaking they are always going to be implied. Sometimes they may be express written findings.

MR. ORSINGER: That's only true if no one requests findings and none are given, because if you request findings and you have them, there are no implied findings unless it's an omitted issue on a cluster.

HONORABLE F. SCOTT MCCOWN: Right.

MR. ORSINGER: If you do pin the judge down to findings, their judgment rises or falls on the findings they sign.

HONORABLE F. SCOTT MCCOWN: Well, but that doesn't make any difference. My point is still the same. You either have implied

findings or you have express findings. And what we're saying is that the losing party doesn't have to file any kind of post judgment motion that says that those implied or express findings are legally or factually insufficient to complain about.

MR. ORSINGER: But see, I disagree with the premise. Often when you are the party with the burden of proof in a nonjury trial the result of the fact finding process is not that you have a negative finding; but that the trial judge refuses to sign your affirmative finding. So our rule is talking about that you establish a finding as a matter of law or that the great weight or preponderance of the evidence supported the finding, and yet that finding is not in the record. All that's in the record is a requested finding that never got granted it. It doesn't usually even get denied. What you do is you make the request for a finding; and then by the time you get to the Court of Appeals it was never granted, so you argue that the trial judge was wrong.

So what I'm saying is we're talking about that a finding was established as a matter of

law; and in reality that finding isn't in the record. All that's in the record is a requested finding.

PROFESSOR DORSANEO: I'm thinking "finding" and "requested finding" are sufficiently synonymous that it would work for me. You want to add the word "requested" before "finding." I don't think it's necessary to be that --

MR. ORSINGER: What about the second clause then that a finding that the trial judge never found was against the overwhelming weight of the evidence? What do you do when you don't have a finding? What has happened is the trial judge won't give you the finding you want to support your judgment.

HONORABLE F. SCOTT MCCOWN: No. No. As a technical matter, Richard, I don't think that's right, because in a bench trial the only thing you would ever be talking about was a finding made by the trial judge that was against the overwhelming weight of the evidence. You would never I think be talking about a finding that wasn't made that was supported by the overwhelming weight of the

evidence.

MR. ORSINGER: I find myself doing the latter more than the former. I find myself trying to get a trial Court reversed for refusing to give me the finding I want than I do trying to overturn a negative finding.

HONORABLE F. SCOTT MCCOWN: Well, but don't --

MR. ORSINGER: The judge doesn't ordinarily say "I find the opposite of your proposition."

HONORABLE F. SCOTT MCCOWN: Okay. Okay. Here is why that's I think wrong and why this overwhelming weight of the evidence probably doesn't even apply at a bench trial. All you get if a finding, if a jury verdict is against the overwhelming weight of the evidence is a new trial; and you get them twice. And if the jury then still has that, you're out. In a bench trial I don't think we have any procedure where you get a new trial if the finding is against the overwhelming weight of the evidence. We don't have that procedure.

MR. ORSINGER: You do in the appellate court.

HONORABLE F. SCOTT MCCOWN: No, you don't.

MR. ORSINGER: Yes, you do. Yes, you do. On the appellate court if you establish a proposition as a matter of law, you get a reversal and a rendition; and if the great weight of the evidence supports a finding, then but then you get a remand from the Court of Appeals back to the trial court.

HONORABLE F. SCOTT MCCOWN: No, you don't. No. There is no such thing. You don't get -- in a bench trial you do not get a remand for the trial judge to try it again because it would be pointless.

MR. ORSINGER: Every divorce case I have ever reversed has been a remand for a new trial. You know, you can't --

HONORABLE F. SCOTT MCCOWN: On what ground?

JUSTICE SCOTT A. BRISTER: Just and right.

MR. ORSINGER: Well, I mean, the proposition, Scott, you're saying is that if there is more than a scintilla of evidence to support the trial Court's judgment, in a

nonjury trial the Court of Appeals must affirm; and that is wrong. If you have more than a scintilla of evidence, but it's not sufficient evidence or if the burden is on you and it's overwhelming weight, the appellate court can't render. They can only remand.

HONORABLE F. SCOTT MCCOWN: And if they remand, what happens?

MR. ORSINGER: You come back to the trial judge for a new trial just like --

HONORABLE F. SCOTT MCCOWN: And if he gives you the same result you got the first time, what happens?

MR. ORSINGER: The same thing that happens if you try it to a second jury and you lose to a second jury.

HONORABLE F. SCOTT MCCOWN: But the difference is it's a different jury. It's the same judge.

MR. ORSINGER: Well, you say it's the same judge. In San Antonio it's a different judge every time you go to trial.

HONORABLE F. SCOTT MCCOWN: Well, --

CHAIRMAN BABCOCK: That's true in Travis County too. We need to --

HONORABLE F. SCOTT MCCOWN:

I don't think that's the law.

CHAIRMAN BABCOCK: I mean, as fascinating really as this is, --

MR. ORSINGER: Well, I mean, we're writing a rule here. I'm sorry. For those who actually handle nonjury appeals we're going to have a little trouble with this language. Now the rest of us maybe don't care.

CHAIRMAN BABCOCK: No. Everybody does care; but I think that we've got the issue fleshed out enough so the Court is going to have to grapple with it. You and Scott disagree about this. That is pretty apparent. I mean, we can talk about this some more.

MR. ORSINGER: Well, I think Bill is changing his position on at least part of this.

CHAIRMAN BABCOCK: Bill.

PROFESSOR DORSANEO: I don't want at this late stage of the game necessarily suggest changes in this language. I do think it might be clearer if it said that "a requested

finding was established as a matter of law"; and it might be better to say "or was supported by the overwhelming weight of the evidence."

I don't think that it's all together clear under the case law from the beginning of time on this subject as to, you know, when the trial judge has a duty to make a finding. There are cases that say the trial judge has a duty to make findings that are established as a matter of law. The trial judge is not like the jury in a bench trial case. The trial judge is supposed to make findings as a matter of law or as a matter of fact. That would suggest the trial judge has a duty to make findings this way or that way regardless of what the burdens are or all the rest of the way things are in jury practice.

I don't think we'll ever -- I don't think we'll be able to resolve all of that, if we could ever resolve it, by a meeting here today. I'm sufficiently persuaded by Richard's comments that it doesn't make complete sense to talk about a finding being against the overwhelming weight of the

evidence when it's a situation where the trial judge, you know, hasn't made a finding and the argument on appeal is that the judge should have found that as a matter of fact, okay, if not as a matter of law because the overwhelming weight of the evidence points that way.

I believe McGire versus Schulman would suggest that that kind of argument is available in a bench tried case; but I think it's a hard area.

HONORABLE F. SCOTT MCCOWN: Well, but whether it's available or not the judge has made a finding either implied or express written; and I don't think you want to tinker with this language by putting in a request for a finding, because the point is right now you don't have to request findings. You can go up on the judgment itself and whatever implied findings there are. And what we're trying to say, what we're trying to do is clarify that to preserve error you don't have to do anything. And if we say "request," then we have narrowed the clarification. Does that then mean I have to request?

MR. ORSINGER: Well, you better, everybody better pay attention to this, because I win cases on this ground. If you have a claim and you failed to request or get a favorable finding, you have waived it. And so when you are talking about all error is preserved even if you do nothing, that is true as to the sufficiency of the evidence; but I can show you a number of cases where if you failed to request and the judge doesn't give you a finding favorable to your contention, you have waived it.

And furthermore, Scott, I'm serious about this. You shouldn't be talking about implied findings in a case where there are any express findings. The implied findings only apply when there are no findings requested and given.

HONORABLE F. SCOTT MCCOWN: I haven't been talking about that.

MR. ORSINGER: Well, you --

HONORABLE F. SCOTT MCCOWN: I said you're going to have either one or the other. There is no judgment that goes up that doesn't have either implied findings to support it or

express findings.

MR. ORSINGER: I agree with that.

HONORABLE F. SCOTT MCCOWN: All right.

CHAIRMAN BABCOCK: Well, Bill and Richard, Scott, do you -- do you-all want to go back and send this back to subcommittee and come up with some more next time?

HONORABLE F. SCOTT MCCOWN: No.

PROFESSOR DORSANEO: I don't think it's imperative to change this language after listening on all of this discussion, change the language that we proposed to the Court to begin with.

CHAIRMAN BABCOCK: Subparagraph (d)?

PROFESSOR DORSANEO: Yes. I think we might be able to come up with better language, different language that might look better on a different day; but I'm happy with this language as a tremendous improvement. If we could go with "minor" rather than "parties," we can certainly do this.

MR. HATCHELL: Well, there's considerably more heat than this justifies; but Richard from a technical standpoint is correct.

PROFESSOR DORSANEO: Scott's response,

though, is not bad. It's not a bad response.

MR. HATCHELL: There are two problems, as Richard says. And findings can be different because you can get findings on nonultimate issues. Let's say if you had a negligence case, and the judge found the defendant is not negligent. You don't get that in a jury trial case. You get, "Yes, he was negligent" or, "no, I'm not convinced by a preponderance of the evidence." So if you're the plaintiff appealing in that case, what you want to find is you want to challenge the failure to find negligence is against the weight and preponderance of the evidence.

So this language is deficient because it should say "A party desiring to complain on appeal in a nonjury case that the evidence was legally or factually sufficient to support a finding of fact or a trial court's failure to find a fact"; and then it should say that a finding, not a finding of fact was established, but that "an ultimate fact was established as a matter of law."

MR. WATSON: That was my thinking of just knock out "finding of" and just say that "a

finding was established as a matter of law" would solve Richard's problem.

MR. HATCHELL: No. It's an "ultimate fact."

MR. WATSON: I mean, a fact was established.

CHAIRMAN BABCOCK: Buddy.

MR. LOW: Richard, as a practical matter, I mean, don't you find in some of your cases the judge doesn't make findings on certain elements you would want him to? In other words, and so therefore that hadn't been presented to him; but you're going to present it to him by saying that don't they request findings from each side and then you request findings of fact. And if he has found the other and incorporated any of yours, hasn't that been ruled on and then doesn't that preserve the error?

MR. ORSINGER: Not really. What happens is somebody will file a generic request for findings of fact and not specify any of them; and then the judge will ask the lawyer who prevailed to draft them. And if it's me, I'm going to draft them in such a way that you

waive all of your claims if you don't come back on a request for amended or additional findings.

MR. LOW: But when you're on the other side and you lose don't you also even though he asked them, don't you make requests for findings?

MR. ORSINGER: The loser is the one who does make the request for findings; but the convention is and the forms indicate that you make a generic request for findings. Now some judges may have, I mean, some lawyers may have 54 requests that they file the first time; but ordinarily lawyers just request findings and conclusions. Then when they come down you're on a very short fuse to try to amend some or try to get some additional ones, which if you have an artful lawyer on the other side, he'll have given you or she'll have given you a set of findings that waive some of your best arguments.

MR. LOW: What I'm saying is something that is established as a matter of law, say, that he doesn't incorporate, the other side kind of ignores, and he enters a judgment.

Then that hasn't really been considered maybe.

MR. ORSINGER: Well, you know, arguably it's the lack of a finding of fact is irrelevant on something established as a matter of law. I mean, maybe we ought to sit around and have a discussion about that. But you don't need a finding to make your case if you establish it as a matter of law in my view.

MR. LOW: But you don't lose your point. You don't lose your complaint if you don't raise it? You don't waive it?

MR. ORSINGER: Under the law as I interpret it right now you don't have to take any steps to preserve legal or factual sufficiency right now. If we go this route, then -- and I like this language that we've got. I just think it's illogical when applied to the actual procedures is all I'm saying.

CHAIRMAN BABCOCK: Frank had his hand up.

MR. GILSTRAP: Richard, are you talking about the cases that are kind of the judge made analogy to Rule 279? I've got three

theories: A, B and C. And the Court simply doesn't make a finding with regard to theory A. Unless I request it, I've waived it. Is that what you're talking about?

MR. ORSINGER: Yes. But in family law it's more complex than that, because one side of a family law case may have a dozen different affirmative claims any one of which they could win by. And so if you draft your findings properly, the other side is going to be waiving four or five or six affirmative claims; and they're not necessarily different ways to get to the same dollars.

MR. GILSTRAP: But by changing that you would also change the analogy to Rule 279. If I don't request it, I waive it under the current rules. And now under what you're proposing if I don't request it, I don't waive it.

MR. ORSINGER: No. I don't think this rule affects the fact that you waive it if you don't get at least one element of your claim included in a finding.

HONORABLE F. SCOTT MCCOWN: Can I make a suggestion?

MR. GILSTRAP: You're not proposing to change that?

MR. ORSINGER: I don't want to change that.

MR. GILSTRAP: Okay.

HONORABLE F. SCOTT MCCOWN: Could I make a suggestion?

CHAIRMAN BABCOCK: You may make one.

HONORABLE F. SCOTT MCCOWN: Okay. All right. What if we just said "A party desiring to complain on appeal in a nonjury case of the legal or factual sufficiency of the evidence or of the inadequacy or excessiveness of the damages is not required to present the complaint in the trial court to preserve it for appellate review," and take out all of the language that we cannot agree on the technical meaning of.

PROFESSOR DORSANEO: I think that will work fine. I've heard about three or four proposals that would work fine. Right now I think that would work just fine.

HONORABLE F. SCOTT MCCOWN: Okay. And does that qualify me for the Nobel Peace prize?

(Laughter.)

CHAIRMAN BABCOCK: No. I think you're still in the running with Justice McClure and her subcommittee. Bill, what about taking Scott's and maybe massaging the language tonight and then later in the morning?

PROFESSOR DORSANEO: I think his language is fine. I think Mike's language was fine. This may be a simple --

HONORABLE F. SCOTT MCCOWN: But rather than get into all, because I'm not sure I agreed with what Mike said; and he doesn't agree with what I said. And it seems to me we can take all of the technicality out.

PROFESSOR DORSANEO: You've already won.

CHAIRMAN BABCOCK: Can we before we take a break it looks like there are only minor disagreements on 34.6?

PROFESSOR DORSANEO: I was going to ask Justice Hecht to sponsor that one, if that's all right, if that's fair.

CHAIRMAN BABCOCK: 34.6.

PROFESSOR DORSANEO: I didn't identify anything but unimportant changes myself.

JUSTICE NATHAN HECHT: Nothing but

editing.

CHAIRMAN BABCOCK: Okay. So just editing. So you don't particularly need us to debate that one?

JUSTICE NATHAN HECHT: No.

PROFESSOR DORSANEO: I would like everybody, as I said, I would like everybody to look at it to be certain that that is so, because we're far from perfect creatures.

CHAIRMAN BABCOCK: Okay. Well, with that admission why don't we take our afternoon break for just 10 minutes; and then when we come back I guess we need to talk about Rule 38.

(Recess 2:56 to 3:15 p.m.)

CHAIRMAN BABCOCK: Okay. Do you want to get going? Come on, Buddy. Okay. We're back on the record. If our co-chair will join us. Just waiting for you, Buddy.

MR. LOW: Oh.

CHAIRMAN BABCOCK: All right. We're on to Rule 38, Requisites of Briefs. And this, Justice Hecht, as I understand it is something that the Court has drafted, or?

JUSTICE NATHAN HECHT: Not drafted. But

we talked about this in the '97 changes. And that is if you have an appeal with multiple parties who may or may not be aligned -- it's worse if they're not -- then how do you set up the briefing? Who is the appellant? Who is the appellee, cross-appellees? What do you do? And I don't recollect all of the discussion; but as I recall now the thought was "Well, we'll just if you appeal, you're an appellant, and if you don't, you're an appellee. And then all the appellants get to file to briefs, and all of the appellees get to respond, and all the appellants get to reply. Then in our court that's also the rule. And then of course we have the petition procedure that precedes any requested briefing in the case.

And our view of our own practice is that the petition procedure works well, and we wouldn't want to change that because it's just better for people that don't like what happened to all tell us why individually or however they want to get together and the other people to respond than for us to sort it out.

But it doesn't work so well on briefing. And what our Court has been doing is when we request briefs we don't direct that certain people file together. Certainly we encourage that when that happens; but when it doesn't happen then you have whole packages of papers, and you can't tell exactly who is responding to whom, and it gets fairly complicated.

So we want to change our rule over toward the end of 55.1 to say "in appropriate cases, the Court may realign parties and direct that parties file consolidated briefs." And that's not so difficult for us. We'll just do that on an ad hoc basis and work it out with the parties. It doesn't happen in that many cases.

But query: Do the practitioners and the judges in the Courts of Appeals like the way the current practice is operating, or would they rather have the federal rule which is reprinted in the chart on page eight which says the first guy there is the appellant, and if it's a tie, the plaintiff who is the first guy there. And then everybody else is an appellee or cross-appellant or whomever; and

then that sets up the briefing.

Or I suppose the third alternative would be to do something like we have which is set up some procedure either by request or something that the Court could say "Now this is the way we're going to set up the briefing in this case. You five people are going to be appellants, and you eight people are going to reply, and you four are going to reply together, and the other four are going to reply together, and then the other group." Or do we want to change, do we want the federal rule, or do we want something even different from both of those?

And we don't -- the Court doesn't have a recommendation about this. But there is some virtue in having the federal procedure and the state procedure alike if it doesn't, if nobody cares one way or the other. But on the other hand, if things are working well now, then we're not trying to upset the apple cart. We're just asking do the practitioners and the Court of Appeals have a view on this?

CHAIRMAN BABCOCK: Bill.

PROFESSOR DORSANEO: I think -- does

anybody know the 5th Circuit rule? There is a local rule elaborating on that that basically says they can readjust who is the appellant and appellee for argument purposes. Is that right, Nina?

MS. CORTELL: No. I think it stays the same for argument.

PROFESSOR DORSANEO: Maybe I'm wrong. My recollection is that there is some flexibility there making the plaintiff be the one who opens and closes the argument. It may be the plaintiff, maybe not necessarily. Buddy, what should we do? Do you want to hear us go through it now?

JUSTICE NATHAN HECHT: Well, if nobody is interested, then --

PROFESSOR DORSANEO: We discussed it at the subcommittee level; and I thought we had a recommendation on it. Did we have a recommendation to the subcommittee as a whole and they didn't want to go with it, or did we make a recommendation to this committee and we got nowhere? I don't remember. It got derailed somewhere along the away.

MR. GILSTRAP: I can recall. Chief

Justice Cayce expressed some concern about it, and I think we said that we would look at it; but it never went any further than that, but he certainly did express concern over the parallel briefing tracks in that subcommittee meeting.

CHAIRMAN BABCOCK: Ralph.

MR. DUGGINS: I like the idea of giving the Court of Appeals the similar flexibility allowing the court at least judgment to realign or adjust the briefing. I don't see any reason why they shouldn't.

CHAIRMAN BABCOCK: Richard.

MR. ORSINGER: Well, it's a more difficult proposition for them because they won't have 15-page petitions to figure out who shot who and all that. So if you have a multi-party case and you have cross claims and various complaints about the verdict and what have you, someone I suppose is going to have to call the Court of Appeals' attention to it by motion.

MR. DUGGINS: I agree.

MR. ORSINGER: And then say "We think you ought to align four of these together so they

won't get to file 200 pages of briefing against our 50."

PROFESSOR DORSANEO: More for the argument I'll go first, try to be first to get the right to open and close even though I really -- even though we really won.

MR. ORSINGER: Okay. I think we were talking about the briefing rule here; and you're talking about who gets to go first with oral argument.

MR. LOW: Our judges in Beaumont had the same concern that Justice Hect had until unless you have some kind of rule like the federal court is just filing. Then how do you determine how to line up the parties at that time unless you have something?

And secondly, they questioned why not provide that the briefing schedule may be modified by the appellate court on its own or on motion of a party? In other words, modify the schedule. The court can just do that. That's their suggestion.

MS. BARON: Chip, I think we've got three separate issues, and maybe we need to break them out. The first is the problem when,

well, take a simple two-party case where both sides appeal, and then they're each required to file an opening brief on the same time to bring their points and oftentimes a cross appeal. It's really very derivative of the actual appeal. So you're doing a lot of repetition there. Then they each file response briefs and they each file reply briefs, so you've doubled the number of briefs. That's one issue, which is whether or not the cross-appellant can save the cross points for a response brief instead of having to bring them in an initial brief.

The second is the consolidation issue when you've got multiple parties and whether there should be some limitation on the amount of pages when the parties are aligned; and the third becomes just deciding who is appellant and who is appellee in that situation. So those are three different issues; and we're kind of confusing them, and maybe we need to break them out.

CHAIRMAN BABCOCK: Okay. Nina, did you have something?

MS. CORTELL: Well, on a straight up

two-party appeal, cross appeal I'm very much an advocate of the federal system over the state system because the current state rule, although you can go to the Court of Appeals and get a scheduling order and fix the problem, if you had a rule that was more fashioned like the federal rule, you could avoid that mess and all that trouble to tell you the truth.

There is one thing I'm a little cold on. I wish I had looked at it. But under the federal rule I would caution. My remembrance is that the initial appellant ends up with more words. There is a bit of a discrepancy there, I think. Of course, they have a word limit instead of a page limit. But as I recall if you're the initial one to file, you end up with about 7000 more words I think than the second one. But so I would just say before we wholesale go to the federal system we ought to look at that; and that's probably something we would want to correct.

MR. YELENOSKY: I think they count syllables.

(Laughter.)

CHAIRMAN BABCOCK: Judge Brister, do you have any thoughts about this?

JUSTICE SCOTT A. BRISTER: Pretty rarely.

CHAIRMAN BABCOCK: Justice Hardberger.

JUSTICE PHIL HARDBERGER: It really hasn't been much of a problem in our court. It doesn't come up very often.

CHAIRMAN BABCOCK: Justice Patterson?

JUSTICE JAN P. PATTERSON: I don't see it as a problem; but I like the federal system too.

CHAIRMAN BABCOCK: Well, what is the sense? Should we? Obviously Pam has identified the three issues all of which are going to require a lot of thought and discussion. Should we ask the subcommittee to underail it with all deference to Judge Cayce and get back at it?

PROFESSOR DORSANEO: He wants to.

MS. BARON: He wanted to do it.

MR. GILSTRAP: He wanted to change it.

CHAIRMAN BABCOCK: He wanted to do it?

MR. GILSTRAP: He wants to change it, yes.

MR. BARON: Well, I think what he told me is that at the Fort Worth Court of Appeals they enter scheduling orders when there are more than one appellant and designate them. Don't they do -- isn't that what he said, Bill? Do you remember?

PROFESSOR DORSANEO: Yes.

MS. BARON: To avoid having six briefs instead of three briefs is what it comes down to.

PROFESSOR DORSANEO: Justice Hecht, what is likely to happen is that the appellate lawyers will like to do something along these lines. I mean, frankly that was what was recommended way back when. The current process as I recall it is something that was a result of not being exactly confident that we could figure out how to make the federal system work in our context. So I think if we go back and study it, we'll be able to work out the pages, and we'll be able to work out the fairness issues.

And, you know, like right now what can happen is if somebody files, if there are two appellants, and then there is a, you know, a

reply by one of the the appellants to the appellee's brief, I mean, under the 90 pages people can kind of inadvertently run out of pages and run out of pages when they don't know that they're going to run out of pages, which every system can have problems. We could make it easier for people to know what it is that they're going to do by going to something more like the federal rule.

CHAIRMAN BABCOCK: Judge Patterson and then Buddy.

JUSTICE JAN P. PATTERSON: I was just going to say that except for the duplication aspect of it that Pam spoke to, I do think it's an appellate lawyer's concern more than an appellate judge's concern so that they know how to brief and that the argument order flows from that so that they're not strategizing in the middle of briefing. And what typically happens is that they show up and raise the issue and it's resolved very fast at the time of oral argument and maybe not to everybody's satisfaction because it hadn't been thought through; but I think it is more of a lawyer's concern than a judge's concern.

CHAIRMAN BABCOCK: Buddy Low and then Frank.

MR. GILSTRAP: It's worse than that.

CHAIRMAN BABCOCK: Go ahead, Buddy.

MR. GILSTRAP: I'm sorry.

CHAIRMAN BABCOCK: Buddy had his hand up first.

MR. GILSTRAP: Sorry.

MR. LOW: I think there's a fourth element. When I read the rule it says "on motion" talking about time for filing briefs; and it doesn't say that the schedule may be modified on the Court's own motion or initiative. And that was one of the questions, that it doesn't expressly authorize that. So I think that is another issue. It says "on motion may extend time for filing briefs." And would you say "just only on motion" or "the Court may on its own on motion"? That's one of the things the Beaumont court was concerned with. That's all.

CHAIRMAN BABCOCK: Frank.

MR. GILSTRAP: I just think it can get worse than that if especially the parties are

not cooperating; and sometimes they don't. I've seen scenarios where you've got multiple parties. They're on separate tracks. And then they're filing motion to extend, and they're strategizing about "Well, I don't want my brief seen before that." And it's kind of it's like a train wreck. And I really think we do need to do something about it; and it seems to me let the subcommittee try to come up with something, because I don't think the current system is satisfactory.

CHAIRMAN BABCOCK: Justice Hardberger.

JUSTICE PHIL HARDBERGER: I was just going to bring to the subcommittee's attention that Justice Cayce did write a letter on the subject to this committee. It's probably been six months or so ago; but it's around.

CHAIRMAN BABCOCK: Okay. Well, it seems to me like we've got a pretty strong consensus to send it back to the subcommittee. So let's do that; and then hopefully we can report on it in March. Richard.

MR. ORSINGER: Chip, I'm kind of curious. I don't have any problem with this from being an appellate lawyer's standpoint.

I'm wondering if are the appellate judges having trouble reading a multiplicity of briefs? Is that really the issue here?

CHAIRMAN BABCOCK: We ran around the horn with who was here; and it didn't sound like it was too big a problem.

MR. ORSINGER: Well, I wonder what -- I'm a little unclear on what the problem is we're trying to fix. I can see how there is a theoretical problem. I don't seem to have that problem in my appellate practice; and I'm wondering what is the problem we're fixing. Do you know what the problem is we're fixing?

PROFESSOR DORSANEO: Well, I don't guess the problem with who gets to go open and conclude the argument is a problem because that gets resolved; and nobody has exactly a presumption of being the appellant. Right? So that does get resolved. I may want to argue that we're the appellant, we're the first appellant, et cetera; but the argument allocation can get worked out under the current rules.

Where I think is the problem I think both -- which I don't think is necessarily

cured in the federal rules because of their page limitations, is that if you're getting an appellant's brief, you're the appellant and you're getting the appellant's brief and you're filing a response to that, you might not be cognizant of the fact that you're using up your pages. And if you use a lot of pages, when you want to file your reply to the appellee's brief you don't have any left. In other words, I think lawyers who are not as familiar with our system may end up running out of, misusing their 90 pages. Maybe that's just a lawyer's problem; but I think it's kind of inherent in the way the briefing structure is set up where you have too many briefs to file I guess is what I'm saying. I don't see these as huge problems, Richard; but I see them as little workaday problems that people have.

CHAIRMAN BABCOCK: Okay. Let's move on to 38.6. The Court is going to make the recommended change. The comment appears straight forward to me, Bill. Do you agree?

PROFESSOR DORSANEO: Yes.

CHAIRMAN BABCOCK: Then let's go to

41.2. This was hotly debated as I recall. And I take it that the Court wants further discussion on it, Justice Hecht?

JUSTICE NATHAN HECHT: Well, if anyone has anything to add.

JUSTICE SCOTT A. BRISTER: It doesn't look like it.

MR. GILSTRAP: I think the debate is over.

JUSTICE NATHAN HECHT: I think we understand this one.

JUSTICE SCOTT S. BRISTER: Maybe this is just a Houston problem; but we just had, we have got one right now, two identical cases. Judge Wittig who stepped down in September was on the panel of the first one; and we had an identical one come up while that one was on rehearing. We consolidate them. The vote is five to five on Judge Wittig's case. Does Judge Wittig vote on the second one? He wasn't on the panel when the second one was argued; but now that they're consolidated did he participate in argument of "the case"? Maybe it's just something about having nine judges that causes this to be a problem; but

this is twice a year on our most important cases a deal where visiting judges are deciding matters. And that's visiting judges are just a controversial and problematical thing in Houston. But if it's just our problem, we'll just suffer in silence.

CHAIRMAN BABCOCK: Well, it's not just Houston; but I think everybody kind of chatted about this last time. So what about 42.1, Dismissal; Settlement? Are these just stylistic changes, or?

JUSTICE NATHAN HECHT: They're intended to just be stylistic. Bill, disagree?

PROFESSOR DORSANEO: Well, no, I don't disagree. I had some question about 42.1(a)(1). That seems to actually more or less mirror what was proposed in the left-hand column of 42.1(a)(1)(B). But I want to just talk about this for a second, this Motion of Appellant. "In accordance with a motion of appellant, the court may dismiss the appeal or affirm the appealed judgment or order," this next part, "unless such disposition would prevent a party from seeking relief to which it would otherwise be entitled."

Now I don't have any great problem with that, and we don't want to prevent people from seeking relief that they're entitled to, and that's kind of a truism; but it's relief from the judgment. The other person who would be prevented if there was a dismissal or affirmance would be somebody who is also an appellant. Right? Wouldn't that other person be somebody who had sought an alteration of the judgment? Isn't that right? So how could that person be prevented? How could there be this situation arise I guess is what I'm saying? And my bottom line point is that I think that language could be improved upon, although I'm not in a position to say what it should exactly say.

JUSTICE NATHAN HECHT: Well, it is from the committee recommendation.

PROFESSOR DORSANEO: Uh-huh (yes).

JUSTICE NATHAN HECHT: And to the existing rule, so...

PROFESSOR DORSANEO: It may well be good enough; but when I read it here this morning it puzzled me as to "what is that about" other than the general concept that you shouldn't be

able to dismiss or give an affirmance if somebody's rights are messed with.

MS. BARON: If you file a motion for sanctions for frivolous appeal would be an example.

PROFESSOR DORSANEO: Okay.

CHAIRMAN BABCOCK: Buddy.

MR. LOW: We had a comment on a comment. The last sentence says "does not permit appellate court to order a new trial merely on the agreement of the parties, absent reversible error" --

COURT REPORTER: I'm sorry, Buddy. Could you please speak up just a little more?

MR. LOW: Okay. Fine. It says "The rule does not permit an appellate court to order a new trial merely on the agreement of the parties absent reversible error, or to vacate a trial court's judgment absent reversible error or a settlement." And they wondered why not? If the parties agree to a new trial, why not allow it?

JUSTICE NATHAN HECHT: Because the trial judge shouldn't have to try the case again, and the public shouldn't have to put up with

it just because the parties agree. I mean, if I were a trial judge and two parties came back is said "Well, judge we agreed you can do this all over again and it's only going to take six weeks," I would be --

MR. LOW: You wouldn't like that.

JUSTICE NATHAN HECHT: -- I would be pretty irritated. "What was wrong with the last trial?" "Well, nothing. We just decided we'd like to do it again."

MR. LOW: They're not suggesting that. They're merely asking why.

CHAIRMAN BABCOCK: That's a pretty good reason.

MR. LOW: It sounded like he gave a pretty good argument to me.

(Laughter.)

CHAIRMAN BABCOCK: Okay. What else? Anything on this rule?

MR. ORSINGER: Could I clarify that if the parties agree to amend the trial court's judgment, that's going to be honored by the appellate court. Right? It's just requiring a new trial?

JUSTICE NATHAN HECHT: Yes.

MS. BARON: I think we have basic concepts that you don't reverse judgments without error or unless they become moot and should be vacated.

MR. ORSINGER: We have got to be careful with the use of the word "reverse" because if you really are changing it by agreement, you're really reversing it. What you're not doing is you're not remanding it for a new trial. I think that's the complaint that I heard Justice Hecht said. But if you want to reverse and dismiss, reverse and cut the judgment in half, reverse and triple the judgment, you can do that. You just can't make him try it again.

JUSTICE NATHAN HECHT: Right

MS. BARON: But that's effectuating an agreement of the parties. It's not...

JUSTICE NATHAN HECHT: And the other side of it is we don't want the Courts of Appeals to do what we sometimes do to them.

MR. ORSINGER: Remand for reconsideration.

JUSTICE NATHAN HECHT: Is to sometimes vacate the judgment and send it back because

we feel like the law has changed and people need to think about it again.

PROFESSOR DORSANEO: I actually think that the Panterra case has been disavowed by the San Antonio Court in an opinion perhaps authored by Justice Duncan, so maybe we want to --

JUSTICE NATHAN HECHT: Cite that.

PROFESSOR DORSANEO: -- cite that.

MR. EDWARDS: That last sentence in that comment, I don't understand. Why do you have that?

PROFESSOR DORSANEO: Because otherwise somebody won't know that by reading (B).

MR. EDWARDS: Won't know what?

PROFESSOR DORSANEO: That's that what it says, that that's what (B) says.

MR. EDWARDS: Well, if I've got a deal with the other side to try the case again, it really doesn't make any difference what the appellate court does. We just make an agreement that I'm going to file the case again, they're not going to raise limitations, we're not going to raise res judicata, and we go on back and try it again, end of story, I

mean, if I have that kind of an agreement.

CHAIRMAN BABCOCK: There are ways around it.

MR. ORSINGER: That's pretty radical.

CHAIRMAN BABCOCK: There are ways around it.

MR. ORSINGER: How much does it cost to get somebody to do things like that?

MR. EDWARDS: It's just verbiage to me, because if I can get that kind of, if there is some reason that the other party and I want to do it, I don't think that anybody is going to stop us, because we can do that kind of an agreement, file the case.

MR. LOW: Agree that limitations won't --

MR. EDWARDS: Limitations doesn't apply. What happened in the Court of Appeals doesn't apply. Whatever happened doesn't matter. We're going to try it again.

CHAIRMAN BABCOCK: Okay. Let's go to Voluntary Remittitur, 46.5.

JUSTICE NATHAN HECHT: The only changes are intended to be editorial.

PROFESSOR DORSANEO: I think that that's all they are.

CHAIRMAN BABCOCK: Okay. Well, then moving right along, Rule 47. As I understand it the only controversy here is about citations to things that were formerly uncitable to.

JUSTICE NATHAN HECHT: Let me tell you there were five changes that we made in your recommendation. One is in Rule 47.2 at line 20 in the column we changed "whether it must be designated" to "whether it will be designated" to make it parallel with the preceding clause, "whether the opinion will be signed and whether it will be designated." We didn't think it made much sense without that parallelism. A small change.

Secondly, in 47.4, line 17 on page 13 we took out "Presumption for" in the title just because the Court felt like that was too strong. It's fine for the rule to say what it is; but we don't want to -- this is new. This is a new move we're making; and we want people to kind of work through it without being pushed too far one way or the other. So there is that change.

The text of the recommendation on page 13

at line 36, that sentence was moved up into the main part of the rule just because we, the rules, the style of the rules is not to have hanging sentences off of itemizations. So we have a list of things; and then you don't go back to the main paragraph. You try to put it all up before. So I think that's just stylistic.

And I guess the only other change. Oh, no.

MR. GRIESEL: (Indicating).

JUSTICE NATHAN HECHT: Right. I'm sorry. On Rule 47.3, page 12, line 25 we changed the title to "Distribution of Opinions" instead of "Publication," because we don't want to get into symantics here. They're already public in the sense that anybody can get them upon request. A bunch of them are being published in various senses of the word, so we're really talking about distribution; and we don't want to say as in the proposal, "All opinions of the court of appeals must be made available to the public," because that's already being done. It sounds like we're doing something new; and we're not

doing anything new. So we changed that to "All opinions of the courts of appeals must be made available to public reporting services"; and that is new.

And then the last one is 47.7 as to which the court is divided; and the issue is whether to let formerly unpublished opinions be cited for whatever value the court wants to give them, be cited, but deny them precedential value in the rule or not be cited and not have precedential value, as the rule currently is.

CHAIRMAN BABCOCK: Okay. So that would be what we evolved down to discuss I would think unless somebody has something about the other ones. Richard.

MR. ORSINGER: Justice Hecht, on Section 47.3 where the rule now will only require that opinions be made available to reporting services you're just going to assume that the courts will voluntarily make them available to individual members of the public who write or present themselves in the clerk's office; but you're not really requiring them anywhere to make them available to members of the public.

JUSTICE NATHAN HECHT: Maybe we should

say "or public" and "must be made available."

CHAIRMAN BABCOCK: I think that would clarify things, because that states what the existing practice is.

JUSTICE NATHAN HECHT: We don't want to change that.

MR. ORSINGER: I doubt anyone would try to infer that they have no obligation to give it to an individual; but this is the rule that tells them what they must do.

JUSTICE NATHAN HECHT: Yes.

CHAIRMAN BABCOCK: Judge McCown had his hand up, Buddy. Maybe he has taken it down again.

HONORABLE F. SCOTT MCCOWN: I was going to say the same thing as Richard.

CHAIRMAN BABCOCK: Okay.

HONORABLE F. SCOTT MCCOWN: Because the express mention of one thing is the implied exclusion of another; and I could see some clerk saying "Go get it from some public reporting service because that's who we have to give it to."

CHAIRMAN BABCOCK: Okay. Now Buddy and then Ralph.

MR. LOW: Is there anything in here that addresses the precedential value of memorandum opinions? I didn't see anything. And if there isn't, where does that leave us with regard to that? Is it going to be are they just in limbo?

CHAIRMAN BABCOCK: There was this little article that I wrote in the "Houston Lawyer." There was discussion at one of our meetings where it was said that the designation of an opinion as a memorandum opinion is a signal that the Court thought the precedential value was slight.

MR. LOW: Okay. Well, it just leaves -- but some people are going to argue that a memorandum opinion now is like the old unpublished, took it's place; and therefore you can't cite it, can you cite it? Does that need to be addressed? It's the first time we've had something like this.

CHAIRMAN BABCOCK: You're going to be able to cite it.

MR. LOW: Well, it doesn't say that.

CHAIRMAN BABCOCK: Well, it takes out the prohibition against citing it.

MR. LOW: Well, no. Unpublished -- I'm sorry. Not unpublished. Memorandum opinions.

CHAIRMAN BABCOCK: There is no prohibition against cite citing memorandum opinions.

MR. LOW: I know. But does it say that they may be cited for whatever precential, you know, whatever value of the Court? Because people are going to consider that they have no value or is just prohibited since the old unpublished opinions.

MR. DUGGINS: That's option 3.

CHAIRMAN BABCOCK: No, no, no. That's --

MR. LOW: No. That has to do with --

CHAIRMAN BABCOCK: 47.7 is dealing with old DNP opinions. What Buddy is talking about is future.

MR. LOW: I mean, I just think that there ought to be maybe some comment or something letting the lawyers know, because this is something new. It's a new thing. And how do they treat it?

CHAIRMAN BABCOCK: Well, memorandum

opinions are not a new thing. We've always had them.

MR. LOW: Not memorandums. Well, memorandum opinions are not new, are new here.

CHAIRMAN BABCOCK: No. They're not new. They've been around for a long time.

MR. LOW: Where are they cited in the rule?

CHAIRMAN BABCOCK: In Rule 47.

MR. LOW: Already?

CHAIRMAN BABCOCK: Yes. And you can cite them.

MR. LOW: If they're here then, I have nothing else.

CHAIRMAN BABCOCK: Richard.

MR. ORSINGER: I think that the memorandum opinion is not supposed to be a substitute for a Do Not Publish opinion.

CHAIRMAN BABCOCK: Absolutely not.

MR. ORSINGER: And I feel like the memorandum opinion is going to be self regulating because truly memorandum opinions are just going to say that the propositions are resolved by statute so and so or Supreme

Court ruling so and so; and they're going to be fairly useless as precedent because they won't have all the elaborate discussion of how the laws apply to the facts and distinguishing from other cases.

So I think first of all, we shouldn't make the connection that Buddy said a lot of people might make, which is memorandum is equivalent somehow to unpublished. And secondly, I think the court of appeals judges will make these memorandum opinions shorter and less useful, and they therefore won't be as citable because they won't help.

CHAIRMAN BABCOCK: Okay. I agree with Richard. Ralph.

MR. DUGGINS: On the comment since you made the clarification about "to the public" should we insert there in the third line of the comment "be made available not only to the public, but also the public reporting services"? I don't know whether any change is required; but it would point out that refers to the public reporting services and the public.

CHAIRMAN BABCOCK: How would you put

that, Ralph?

MR. DUGGINS: The third line where it says "be made available" --

CHAIRMAN BABCOCK: Right.

MR. DUGGINS: -- I would insert "not only to the public, but also public reporting." It just makes it consistent.

PROFESSOR DORSANEO: I would say "members of the public" to get a better sense that somebody is, you know, that you're individually entitled to go ask for one of these as opposed to the public in some generic sense.

CHAIRMAN BABCOCK: "Not only to members of the public, but also to public reporting services." How does everybody feel about that?

HONORABLE F. SCOTT MCCOWN: I would just say "the public."

CHAIRMAN BABCOCK: You don't like "members of"?

HONORABLE F. SCOT MCCOWN: It's just unnecessary verbiage.

MR. ORSINGER: I don't think you need "not only" either. Couldn't you just say

"to the public and to public reporting services"?

CHAIRMAN BABCOCK: Well, but Justice Hecht makes the point that the Court is sensitive to the fact that we're not changing that.

MR. ORSINGER: I know that. But by taking it out you remove the only instructions they have to make them available to individuals. I mean, the problem with taking out something --

CHAIRMAN BABCOCK: We're just talking about a comment now.

MR. ORSINGER: I know. I think there should be some parallelism between the rule and the comment to get back to the original point. The wording that Judge Hecht put in is a little bit different than what you're talking about.

CHAIRMAN BABCOCK: Right. He said the opinions are public, and --

MR. ORSINGER: Which you can infer from that then someone can request a copy.

CHAIRMAN BABCOCK: Yes.

MR. ORSINGER: I support Ralph. The

comment ought to be parallel to the new language in the rule.

CHAIRMAN BABCOCK: That's what Ralph was trying to do.

MR. ORSINGER: Yes. But his language was a little bit different.

CHAIRMAN BABCOCK: What would you suggest, Richard?

MR. ORSINGER: Whatever the judge wrote down on the rule I think we ought to parallel in the comment. I didn't get the exact wording.

JUSTICE NATHAN HECHT: "All opinions of the court of appeals are open to the public and must be made available."

MR. ORSINGER: Okay.

MR. HAMILTON: Does that mean that the clerk's office has to give someone a copy if they want one or just let them see it? Is there any charge for the copy?

JUSTICE NATHAN HECHT: I think they have to charge for it due to statute.

MR. ORSINGER: Do we have any problem saying "all opinions" when we know that the opinions relating to the bypass litigation are

not? Are we okay? The exception overrides the general statement?

CHAIRMAN BABCOCK: I think the exception has to override it.

MR. ORSINGER: Okay.

CHAIRMAN BABCOCK: That's clear enough on the record. Bill.

PROFESSOR DORSANEO: It says "to public reporting." I guess that means to all of them. "All" kind of gets to be -- now I look at the extra copies thing on a court of appeals opinion. It's getting longer and longer and more people in this business. You mean just as long as it gets?

JUSTICE NATHAN HECHT: Yes. It means if somebody wants it, then you have got to let them have it on a regular basis, not just come to the counter and we'll let you make a copy; but if Westlaw and LEXIS and ABC New Case Reporting Service says "We want to see these opinions every week," we say "Okay. Here they are."

CHAIRMAN BABCOCK: What else? Nina.

MS. CORTELL: I reluctantly bring this up; but I have a concern about memorandum

opinions and whether we're allowing the court of appeals to basically bury cases under memorandum opinions and preventing them from receiving Texas Supreme Court review just by giving them the memorandum opinion name and treatment, because in essence they're forecasting to the Texas Supreme Court that the Court should not hear the case. I don't know if there is anything, no easy answer to that; but it's a concern that I've got.

CHAIRMAN BABCOCK: They've got a pretty explicit standard about when it should be and when it shouldn't be. Yes, Bill.

PROFESSOR DORSANEO: I think that can happen. But I've been watching some of these opinions that haven't been published; and like I guess it was the Texarkana court's opinion in Hossey vs. Glassner where the memorandum opinion would look like, wouldn't say very much and would cite Formosa Plastics. And when the Supreme Court reads that they say "That's not Formosa Plastics. Formosa Plastics is about something else all together."

So I'm not so completely sure that it

would be so opaque that they wouldn't be able to see it. I mean, if they put in a memorandum opinion this is clear under this statute or under this case, and you and I would read that, we would say "You're out of your mind," that it wouldn't be easy to see. Maybe you can do that in some cases that are totally ambiguous like a personal jurisdiction case; but...

JUSTICE NATHAN HECHT: I think most of us are worried that this change will evolve or could evolve more into the system that the 5th Circuit uses that has been fairly widely criticized, which is you really can't tell anything from the circuit's opinion. We don't think it's built in to the change; and we come down thinking that we should start here, and if it evolves that direction, we should head it off at some point in the future, because we do think that the parties are entitled to a decent explanation of the resolution of the appeal.

We do think that we have one pressure point on our courts that does not exist in the federal circuits which is that the justices

have to answer to the public periodically; and some of the justices on some of the courts of appeals tell me that they think this could be an issue, an election issue, that they didn't get good enough explanations. And so they're worried about it the other way. Maybe we should say a whole lot more than we really need no because we don't want to get criticized. And so I guess while we worried about it we come down thinking we should start here and see what happens.

CHAIRMAN BABCOCK: Yes, Buddy.

MR. LOW: I don't see any comments. This is an extensive change; and generally when we make changes to rules there is some comment. I mean, we comment on all kind of things. Is there a comment to this rule --

CHAIRMAN BABCOCK: There's a comment on page 15.

MR. LOW: -- that I didn't see? I overlooked.

CHAIRMAN BABCOCK: Yes. We just made a proposed revision to that comment, Buddy.

MR. LOW: Oh, I see at the top. I'm sorry. Okay.

CHAIRMAN BABCOCK: What else? Well, the Court is interested in what we think about 47.7, so let's talk about that for a second.

MR. EDWARDS: On 47.4 before we pass it up?

CHAIRMAN BABCOCK: Yes. Go ahead.

MR. EDWARDS: In the two sentences there it says "An opinion may not be designated as a memorandum if the author of a concurrence or dissent opposes it." And the next one says "must be designated a memorandum -- it must be designated as a memorandum unless it does any one of the following:" Is there a conflict there of some kind?

CHAIRMAN BABCOCK: I remember the discussion; and the discussion was that the opinion ought to be designated memorandum under these circumstances, but if anybody disagreed that those circumstances existed, they get to trump the other two members of the panel.

MR. ORSINGER: Could you take the previous sentence and put it after the operative sentence and say "However an opinion may not be designated if the author of a

concurrence or dissent"? And that makes it kind of an exception to.

JUSTICE NATHAN HECHT: We don't want to put it after the list just for stylistic purposes.

MR. ORSINGER: We don't?

JUSTICE NATHAN HECHT: We avoided that for a lot of other reasons throughout the rules. What we could, what could be said, "An opinion may not be designated a memorandum opinion if the author of a concurrence or dissent opposes that designation. Otherwise an opinion" --

PROFESSOR DORSANEO: Yes. Otherwise it would be fine. That's exactly what I was going to say.

CHAIRMAN BABCOCK: Okay. That's a good catch, Bill. Thanks. 47.7, the options are what we recommended, which was "Opinions not designated for publication by the court of appeals under prior rules have no precedential value, but may be cited." And then the Court has suggested two additional options. One is continuing the rule as it was, and you just you can't cite it as authority either to court

or counsel, or alternatively at the other end of the spectrum "Opinions not designated by prior rules may be cited" without any comment about their precedential effect.

So what does everybody thing about that? Bill had his hand up first by a hair and then Carl.

PROFESSOR DORSANEO: I don't like the last one for sure. It seems to me that something has precedential value or it doesn't; and to me that means that a trial court has to follow it --

CHAIRMAN BABCOCK: Yes.

PROFESSOR DORSANEO: -- if it has precedential value and a court of appeals needs to consider it unless it's a Supreme Court opinion. Then the Supreme Court has to -- then the court of appeals has to follow it. Say that it may be --

CHAIRMAN BABCOCK: You don't get into that problem with the Supreme Court.

PROFESSOR DORSANEO: Huh?

CHAIRMAN BABCOCK: You don't get into that problem with the Supreme Court because their stuff is all published.

PROFESSOR DORSANEO: Right. "May be cited for whatever presential value a court may give it," I don't see how that makes sense. "May be cited for whatever persuasive value a court may give it," you know, that's a better concept. I think that the word "precedential" sometimes is being used here in a nontechnical sense to mean persuasive; and I would prefer to say that these things have no precedential value, but may be cited implicitly or expressly for whatever persuasive value the court may give it. That makes sense to me as a good halfway house that is considerably better than you can't talk about that, although you can cite the writings of Walt Disney if you wanted to.

CHAIRMAN BABCOCK: Yes. That's -- in fact that -- you may not recall it; but that's the point that you made in your initial report to this committee, that you can cite a Supreme Court that is a trial court of New York or a treatise by Joe Blow at the University of Debuque; but you can't cite Texas cases. That doesn't make sense. Judge McCown.

HONORABLE F. SCOTT MCCOWN: Well, I think

it's helpful to remember how we got into this, which is we got into this because the federal circuit said that it was unconstitutional not to take unpublished opinions as precedent. And when you stop and think about what all these old, unpublished opinions are or at least I should say what they're supposed to be they're supposed to be in cases where they're just applying settle law and they're not making new law. And while we have, all of us have some anecdotes or some personal experiences where we think unpublished opinions have been mislabeled, the truth is I don't think there are very many unpublished opinions that are out of step with what they were supposed to be, just the application of settle law. There may be some.

And what I would suggest is we just go with the third alternative and let the law develop. If we just say --

CHAIRMAN BABCOCK: What's the third alternative, Scott?

HONORABLE F. SCOTT MCCOWN: 47.7, the second one of the Court, "Opinions not designated for publication under prior rules

may be cited" period; and then let people cite them and let the Courts sort out what that means. I don't think it's going to come up very many times where there's an unpublished opinion that is being cited as precedent where we would say it shouldn't be. Or if there is, that's really no different than a published opinion that in fact is out of step with governing Supreme Court precedent.

And this problem is even less acute in, say, Texas state courts than it would be in federal courts when court of appeals precedent means so little anyway. If it's not my court of appeals, then there is a good question about whether it's precedent or not. As a practical matter it probably isn't. It's probably just persuasive anyway. I don't think this is a real problem. I would just go with the third alternative and let the law develop.

CHAIRMAN BABCOCK: Bill.

MR. EDWARDS: I remember some discussion that some of the courts of appeals on unpublished opinions don't give them to anybody and that therefore, for example, they

wouldn't be on LEXIS or Westlaw. Somebody from that particular circuit that had the case might have a copy of it in his hip pocket, cites it as precedent. The other side hasn't got it. You know, how do they get a hold of it?

HONORABLE F. SCOTT MCCOWN: Well, they've got it now if you've cited it.

MR. EDWARDS: No. All they've done is cited the case and the date that it came out and the court number. How do you get a copy of it?

MR. ORSINGER: From the court of appeals clerk's office now that you know the case.

MR. EDWARDS: Huh?

MR. ORSINGER: You have to contact the court of appeals.

MR. EDWARDS: Exactly. That's the point I'm making.

CHAIRMAN BABCOCK: Hang on, guys. Frank.

MR. GILSTRAP: But that's not the problem. The problem, and if you recall, we went over this. The problem is all the old stuff that's buried that may be there that maybe you can use and you don't know how to

find it, and the fact is that the people that are going to have it are going to be the DA's Office or Baker, Botts or somebody that assembles those things over time.

And, you know, it seems to me if we kind of have a cutoff date and say "Okay. Now we have a new rule; let's start with this new set of opinions we can cite," it solves a lot of problems.

CHAIRMAN BABCOCK: Carl.

MR. HAMILTON: These opinions were written in light of the rule that they were not going to be cited and if indeed they're not supposed to be making any new law.

CHAIRMAN BABCOCK: I just really disagree with Judge McCown on that. I know of many, many DNP opinions. Remember 85 percent of the DNP, 85 percent of all opinions last year were not published; and in Dallas 97 percent of them were not published. So you cannot tell me they're not making new law. And I know of cases. I've got three in my hands that were cases of first impression, were 15-page, 30-page opinions, well reasoned on issues unique to Texas jurisprudence, and they were

decided by the court in my favor, and so I want to be able to cite them.

(Laughter.)

MR. EDWARDS: Where I was coming down was is there any way you can limit the ability to cite them to their public availability?

CHAIRMAN BABCOCK: Yes, Bill. I checked. Judge Brister said at one of our meetings that not all of the opinions of the courts of appeals, the unpublished opinions are available on-line. I checked. I did a check yesterday. Right, Deborah? All 14 of our district courts of appeals unpublished opinions are now on-line.

MR. EDWARDS: From the beginning?

CHAIRMAN BABCOCK: No.

MR. EDWARDS: That's what I'm saying.

CHAIRMAN BABCOCK: From a period of time.

MR. EDWARDS: And what I'm suggesting is that maybe we allow citation of those unpublished opinions which are on-line.

CHAIRMAN BABCOCK: Well, here is my thinking about that. I know I've heard the criticism, you know, the frat house rule, that

the frat has all the old exams, you know, that if belong to the fraternity, then you get access to this stuff. I'm in a pretty big firm. We don't have a whole file cabinet full of unpublished opinions; and I don't know any big firm that does. And if there is a case -- John, maybe Thompson, Knight does.

MR. MARTIN: Luke Ashley and Scott Smiley have never disclosed that to me.

MR. ORSINGER: It's a trade secret, John.

CHAIRMAN BABCOCK: It's a trade secret. But if there is a case where the stakes are so high that somebody, some young associate is going to go out to the Eastland Court of Appeals and go rooting for unpublished opinions, the stakes are going to be high for both sides and they're both going to be doing it. So I think that's a little bit of a red herring. Yes, Paula.

MS. SWEENEY: I don't agree with your last analysis, Chip. I think you're not taking into account the imbalance that frequently exists between parties where one is a large, wealthy entity and has access to a

bunch of young associates that may come down to Eastland and root around in the files, and the other is a solo practitioner who can't go, doesn't have anyone to send, but does have on-line access.

And I agree. I mean, I don't know why we're afraid to use the term on-line; but if it's in the public domain on-line and accessible to everybody with more or less equal resources, that's fair. If it's not, you know, some firm that's been around for 80 years is going to have old stuff available to it that is just flat not available to somebody that's been five years out of law school in a solo shop. And we have to take that into account or we create an inequitable situation that can't be rectified reasonably by the litigants.

CHAIRMAN BABCOCK: Justice Patterson.

JUSTICE JAN P. PATTERSON: I agree with you, Chip, on the point that there are Do Not Publish opinions that make new law; and I think that perhaps judges are not always the ones who can make those calls, and very often litigants see the subtleties or the new law

aspect much more readily than the judges.

I think the imbalance also works both ways, because very often the cases, sometimes the cases that look the simplest that may involve landlord/tenant or small consumer type cases we may assume that it's not making new law; but it may be in fact just that little niche area that has not be written on before. And so really the imbalance works both ways because sometimes it's those cases that form the interstices and that we assume are not new law, but in fact they may be significant and may be written on.

The point that Ann McNamara made last time was a powerful one to me and kind of has shifted my viewpoint on this to some extent; and that is that people have relied upon a body of law and should be able to rely upon a body of law. And I think that that is very persuasive with me; but I also feel that really only the Taliban can say you can't use wisdom, knowledge, information, opinions as persuasive. I think we shouldn't be in that business and whatever is helpful useful, wise information, we should have available to us,

and we should be able to cite as persuasive, but perhaps not as precedential value.

MS. SWEENEY: I think if the Taliban is for it, we have to all be against it. Whatever you said I vote for.

(Laughter.)

CHAIRMAN BABCOCK: Stephen.

MR. YELENOSKY: I agree with Judge Patterson. I think we may have talked about this before. There are opinions that judges don't think are important which may be important to a Legal Services attorney, for example, because they don't get written on very much. And for that reason I wouldn't want to preclude us from using those.

I did want to ask when people talk about not having access are they concerned that they won't have a copy of? I heard somebody say it would be hard to even get a copy of the very opinion that has been cited by the other side. And that might call for some requirement that Do Not Publish opinions be provided at least; but that doesn't I guess solve the problem of a litigant who wants to find the other unpublished opinion from that

court that contradicts the opinion that is brought forward. And I don't know how to fix that problem; but I guess I'd rather not fix it by saying you can't point to a case that, as Judge McCown points out, some of us think constitutionally you should be able to point to.

CHAIRMAN BABCOCK: Judge McCown.

HONORABLE F. SCOTT MCCOWN: Well, I mean, no judge is going to accept as precedent a case number. You're going to have to have the opinion in the court for the judge to read; and if you've got it for the judge to read, then both sides can read it. And so I'm not sure what this imbalance is about. If you bring it to the courtroom, it will be there to argue about.

I'm going to change and accept Chip's version of the facts; but argue my same conclusion, which is if there are opinions out there, if there are opinions out there that say important and persuasive things, how can we have a rule that says we're not going to read those or consider those or we're not going to be bound by persuasive reasoning? It

just seems to me that if it exists, it should be cited and the court should consider it, and that this notion about the difference in precedent and persuasion is truly theoretical with little practical difference, because we're talking about court of appeals opinions, not Supreme Court opinions. And if a judge -- it's a rare case where a judge finds a court of appeals opinion on all fours with no distinction that is precedent, but totally unpersuasive that he can't distinguish his own case on or say that's from some other court of appeals, not mine.

And the last point that Judge Patterson raised that you are entitled to rely upon a body of law, the whole point behind unpublished opinions is that they are part of the body of law. And so if Baker, Botts has a long institutional memory with an unpublished opinion in its file that says that its client can do what its clients did, and its client does it, and its client gets sued, then that client should be able to produce for the court that unpublished opinion. And so I just think we can't, that you can't keep this genie in

the bottle.

CHAIRMAN BABCOCK: I was sent a letter by an appellate practitioner who was arguing in favor of being able to cite nonpublished opinions. He says, he points out a case from Dallas, one of the 97 percent that wasn't published, and says "It is the only case where a Texas appellate court construes Delaware law on whether a plaintiff may bring a claim based on the diminution of the value of his stock individually or whether the claim belongs to the corporation and may be brought only as a derivative action. It's on point authority to a dispute in a case in which we are presently involved and would be very helpful to the court even if it was presented only as persuasive authority." Carl.

MR. HAMILTON: 47.7 now says you can't cite them and it has no precedential value. Why did the court and why did this committee recommend that originally, and now we're all of a sudden going to say how we're going to change that and say now you can cite them?

CHAIRMAN BABCOCK: Well, we said, our recommendation, Carl, was that it would not

have precedential value; but you could cite it. That was our recomendation.

MR. HAMILTON: No. I'm talking about the existing rule.

MR. ORSINGER: He was challenging the entire concept of publishing DNPs. Do you want to get into that?

CHAIRMAN BABCOCK: No.

MR. HAMILTON: I'm not challenging that. I'm just saying that the prior rule says you can't cite and they have no value.

CHAIRMAN BABCOCK: Right.

MR. HAMILTON: Now we're coming along, and we're just saying we're not going to have any more unpublished opinions.

CHAIRMAN BABCOCK: Right.

MR. HAMILTON: Now we're going to change the rule and say now you can go ahead and cite all of those. They may or may not have precedential value.

CHAIRMAN BABCOCK: Right. That's what we recommended. And the Court is divided on that and has posited three different options: One, the option that we sent to them and suggested, and then two alternatives, one, leave the rule

as it is, you can't cite them; and the second one is to drop the language about precedential, have no precedential value, but you can cite them.

MR. HAMILTON: I understand all that. I'm just saying why was the rule like it was originally?

MR. GILSTRAP: Why did they have unpublished opinions to begin with? Is that what you're asking?

MR. HAMILTON: No. No. Why could you not cite them? Why did they not have any value originally and that was in the rules?

JUSTICE NATHAN HECHT: Well, Buddy and Bill.

MR. LOW: Back in the old days you couldn't find them. You couldn't authenticate them. There was no way. And so therefore they just -- it's different now. They're there. They're available and so forth; but in the old day maybe before your time you couldn't even get them. Somebody I don't know how they'd get them. Somebody would find one; and they'd said "Where did you get that?" "I don't know."

MR. MEADOWS: The thinking was different too, wasn't it?

MR. LOW: Yes.

MR. MEADOWS: I mean, the view that really controlled that decision I thought was based on a belief that they didn't contain, they didn't represent the Court's best work, and it was just processing the case, and the Court didn't want any reliance on that opinion. And I think that there is a better, a different view, not a better view at the time.

MR. YELENOSKY: Buddy, thank God we have somebody that was here in the old days.

MR. LOW: Oh, yes. Just ask me.

CHAIRMAN BABCOCK: Richard.

MR. ORSINGER: I think that the answer to this question is self proving. The whole reason we changed this rule is because some courts of appeals were DNPing things that should have been published. Now if they had never done that, then we would have had no urgency really to publish.

Now some courts of appeals DNP things that were cases of first impression, that

disagree with other courts of appeals or whatever. And so now we're trying to decide "Well, they should have been published, and someone wants to cite them now because they really do have something to add to the precedent and to the reasoning. And should we allow them to?"

To me the question answers itself. If it's an opinion that shouldn't have been published, it will have no value in reasoning or precedent that doesn't exist in a published opinion. If it should have been published initially, then we need it because there is nothing else like it. And so if you go with the third option that it may be cited, only the ones that should have been published are going to get cited. The ones that never should have been published won't be cited because they won't add anything. So to me the question answers itself.

CHAIRMAN BABCOCK: It's kind of a marketplace idea.

HONORABLE F. SCOTT MCCOWN: Could I add one thing to that?

CHAIRMAN BABCOCK: Yes.

HONORABLE F. SCOTT MCCOWN: Because I thought Richard's analysis was very cogent. And let me point out just one other additional thought because it goes to something Paula said. If I'm the guy who is underresourced and you go out and find a published opinion that is persuasive and in point and it convinces the trial judge and in fact it was the right thing to do, you can't really claim that any injustice has been done.

MR. GILSTRAP: I'm sorry. If you're on the other side, you can doggone sure claim an injustice has been done.

HONORABLE F. SCOTT MCCOWN: Well, okay, let met back. Let me back up and talk about it as a judge and not a lawyer. If there is an unpublished opinion which is right as known to God and it convinces the trial judge to do what is right as known to God, the loser has no real complaint.

MR. ORSINGER: Can we substitute a majority of the Supreme Court for known to God?

(Laughter.)

HONORABLE F. SCOTT MCCOWN: What we are

talking about, what we are assuming -- this is important. What we are assuming is that there is an unpublished opinion that is in point and that is wrong as known to God, but would be binding precedent and would force the trial judge to do what is wrong. I just think that is just not going to happen and it's not worth worrying about. If it rarely happens, the good of citing all these things and just getting it out on the table, the intellectual honesty of that is far, far greater.

CHAIRMAN BABCOCK: Frank and then Buddy and then Nina.

MR. GILSTRAP: If we allow citation of past unpublished opinions, there is going to be one law firm in Harris County that is going to have ready access to all of the old unpublished criminal opinions, and that's the Harris County DA's Office, and they're going to be able to assemble them certainly rapidly whereas the individual criminal lawyers will not. And I promise you they will cite them in their favor without regard as to whether they're right and known to God; and the stuff that they don't like they won't cite. That's

really how it's going to happen.

JUSTICE JAN P. PATTERSON: All of that law has been overruled by the Court of Criminal Appeals within the last year, so...

(Laughter.)

MR. LOW: There is rule that says you can't cite unpublished opinions in the trial court. What rule says that?

MR. ORSINGER: This appellate rule.

CHAIRMAN BABCOCK: This appellate rule.

MR. ORSINGER: This appellate rule is the one.

MR. LOW: It won't give the effect; but there are cases where it would be very important. And not only the case you're talking about. We had a case out of Dallas where the question was whether an arbitrator who had been given a donation when he was a judge, that disqualified him at that point. That was our point. We moved for the Dallas court to publish it so we could cite it. They wouldn't do it. We asked the Supreme Court to make them publish it, and they wouldn't do it. So what do we cite? The Law Review articles and something from Alaska Law Review

and all that when there is an opinion by three judges that answered that question. Now the court wouldn't have to follow it; but they ought to not go in ignorance that it happened.

CHAIRMAN BABCOCK: Yes. Suppose you're in Dallas County and you've got a case where Judge O'Bard is on the panel, and the issue is under Deleware law whether a plaintiff may bring a claim based on the diminution of the value of his stock, and there's a case out of the Louisiana Supreme Court that addresses that question, and that's about the only thing around other than maybe some Deleware cases. So you cite the Louisiana opinion; but you're prohibited from citing this Texas case which Judge O'Bard wrote. It doesn't make any sense to me.

MR. LOW: The same thing; and I go back to the old days.

CHAIRMAN BABCOCK: Alex.

PROFESSOR ALBRIGHT: Could you do something that you can cite --

CHAIRMAN BABCOCK: Can you speak up?

PROFESSOR ALBRIGHT: Could you do

something that you can cite any opinion that is available on on-line services or something like that? Doesn't Westlaw and LEXIS have all the Dallas ones, these 97 percent of the Dallas cases?

CHAIRMAN BABCOCK: Yes. What I just said, we did a search yesterday; and it looks like all 14 courts of appeals, their DNP opinions are on-line as of some date. I don't know what date that is.

PROFESSOR ALBRIGHT: But if you just said if they're available on-line. You would have to define "on-line." It wouldn't be free on the internet because most of of it is LEXIS and Westlaw; but then you've solved your problem of access and you prevent people from coming in and digging through their cases.

But I mean, the problem that we all have is we do a Westlaw search and up pops 15 cases; and only two can be cited. So it's that we do have access to all of these opinions that we can't use. It's not so much that we're worried about these that nobody knows about. It's that we can't use these that we do know about.

CHAIRMAN BABCOCK: Justice Hecht.

JUSTICE NATHAN HECHT: I don't know the details; but I think West dumps off the unpublished opinions at some point. I don't think they carry them forever. So even though Dallas has been doing this for years and years and so have other court of appeals, I don't think they are all still available. After a year or six months or something it looks to me like they disappear; and whether there is some old archive that Westlaw has, I don't know the answer to that.

CHAIRMAN BABCOCK: That was a '96 opinion.

JUSTICE NATHAN HECHT: That's what you got off of it?

CHAIRMAN BABCOCK: Yes.

JUSTICE NATHAN HECHT: Well, then maybe so. That's good.

PROFESSOR ALBRIGHT: That's something we can find out.

HONORABLE F. SCOTT MCCOWN: Well, and their practice might change depending on what the rule is. I mean, and with the constant technological advances it's easy to keep them

instead of dump them off. In the old days dumping them off might have made more technological sense.

CHAIRMAN BABCOCK: I'd rather be the dog than the tail on this thing. I'd rather they react to us than us react to them. Yes, Ralph.

MR. DUGGINS: I think the access issue is far more theoretical than practical. We have got a situation just like yours where the case, this particular tort issue had never been addressed except in one unpublished opinion in a different court of appeals. We found it on-line in Westlaw; but we can't cite it, and it's in the court of appeals right now. And I think we should be able to cite it if someone has addressed this specific issue. You don't have to accept it. So I think we should go with the one Richard is talking about, the same recommendation we made earlier, that you can cite it, and the court can determine whether or not it will follow it or reject it.

CHAIRMAN BABCOCK: Nina had her hand up and then you, Richard.

MS. CORTELL: I think there is something we have to acknowledge. There is a lot of gameplaying that's going on now in the court anyway in courts; and that is everybody understands you can't cite, so you find other ways to hint to the court.

And at a CLE in Dallas a very good advocate who happens to be in this room was stated to us as having done it very well by saying that this very issue had been addressed by two other courts of appeals, and that he was not free to cite the two other court of appeals; but he was sure that the court would want to look at the jurisprudence of these other courts to see what they were doing in this area. And I say that with full admiration for this advocate; and but the point is people are finding ways every day to get around the rules. We might as well figure on a rule that people can actually comply with and that gives deference to these other authorities.

CHAIRMAN BABCOCK: By the way, I don't know if this happened after we had our last discussion; but there was a lawyer in the

9th Circuit who cited an unpublished opinion and got brought up on ethics charges before the 9th Circuit because they cited an unpublished opinion; and their defense was "Hey, the 8th Circuit said this rule of yours is unconstitutional." And the 9th Circuit said "Oh, no, it isn't. We disagree, and it's plenty constitutional. And we're going to let you off the hook because of ambiguity; but if that happens again, you're in big trouble, and don't anybody else try it." So there. Richard.

MR. ORSINGER: I'd like to address the on-line issue. I'm concerned about that as a proposition because it's so ill defined; and we have been talking in terms of Westlaw and LEXIS, but a growing number of Texas lawyers are not going with either, and they're going to the National Law library on-line library that is available free of charge all the way back to 1950 through my Texas bar web page. And then you have some courts of appeals, notably the Dallas Courts of Appeals that they still put many of their opinions on their own website.

And so if you want to say that something is on-line, you can't confine yourself to Westlaw and LEXIS, and you really have to open yourself up to the possibility that some cases are available on the worldwide web if you go to the court of appeals. And I think that that's a very difficult line to draw, and I think we shouldn't draw it.

CHAIRMAN BABCOCK: Pam.

MS. BARON: I was just going to point out that the Supreme Court in Lehmann did cite unpublished opinions, but said they were merely examples. So...

CHAIRMAN BABCOCK: Well, let's bring them up on ethics charges.

(Laughter.)

JUSTICE NATHAN HECHT: But I didn't do the CLE course in Dallas.

CHAIRMAN BABCOCK: I saw a brief recently which cited an unpublished opinion and had a footnote which said "I know I'm not supposed to cite this; but the Supreme Court Advisory Committee has recommended that this stupid rule be abolished, so it's okay." Judge Patterson.

JUSTICE JAN P. PATTERSON: Judge Brister, I think, just told us at lunch, not in confidence, that he just cited two unpublished opinions in a decision.

And the whole reason that we are publishing everything now was a pay-in to the marketplace of ideas. And I think we can allow and trust the marketplace of ideas to distinguish between a 1960 Harris County criminal case that only the DA's Office has access to. It will get the same treatment as an Arkansas county court. And the marketplace of ideas will handle those issues. I have confidence.

CHAIRMAN BABCOCK: Okay. We've got three options here. Let's take them one by one. The status quo, the Court suggests that the current 47.7 not be changed so that you can't cite, neither the court nor counsel can cite DNP opinions. That's the status quo. How many people are in favor of that? Raise your hand.

HONORABLE F. SCOTT MCCOWN: Excuse me. Are we talking about previously unpublished, not future unpublished?

CHAIRMAN BABCOCK: Right. There aren't going to be any in the future.

MR. ORSINGER: You're talking about the first Supreme Court alternative?

CHAIRMAN BABCOCK: Yes, the first Supreme Court alternative, which is the status quo.

MR. GILSTRAP: The status quo is it can't be cited. If they're not published, they can't be cited. Is that it? We can't site unpublished opinions.

CHAIRMAN BABCOCK: Frank, it reads "Opinions not designated for publication by the court of appeals under prior rules have no precedential value and must not be cited as authority by counsel or by the court." That's the current practice. How many people are in favor of that rule? Raise your hand. How many people are against that rule? There was one person in favor of the rule and 17 against.

Let's go to the next rule, and that is the second Supreme Court suggestion which is "Opinions not designated for publication by the court of appeals under prior rules may be cited."

HONORABLE F. SCOTT MCCOWN: I think it would make more sense to vote on the other alternative first..

CHAIRMAN BABCOCK: Okay.

HONORABLE F. SCOTT: Logically.

CHAIRMAN BABCOCK: It doesn't matter to me. "Opinions not designated for publication by the court of appeals under prior rules have no precedential value, but may be cited."

MS. BARON: Chip.

CHAIRMAN BABCOCK: Yes.

MS. BARON: As a question, I'm definitely against one. And you know, between two and three I have a preference; but I'd rather have either of those than one.

CHAIRMAN BABCOCK: Yes. I think that's --

MS. BARON: So can I vote for both two and three, or do I just vote for one?

MR. ORSINGER: Well, by voting against one everybody here is against it except for Frank.

MR. GILSTRAP: I think one is out.

(Laughter.)

MR. ORSINGER: I think that we made our

position known.

CHAIRMAN BABCOCK: I think --

MR. YELENOSKY: Choose between two and three.

HONORABLE F. SCOTT MCCOWN: I guess that's it. How many want two and how many want three?

CHAIRMAN BABCOCK: How many want two and how many want three? Two is "has no precedential value, but may be cited." Three is just "may be cited," silent as to precedential value.

PROFESSOR DORSANEO: Yes. That's right.

HONORABLE F. SCOTT MCCOWN: Two is the one on the left side of the page.

CHAIRMAN BABCOCK: Right.

HONORABLE F. SCOTT MCCOWN: And three is the one at the bottom on the right side of the page. Two is the one on the left side, 47.7. Three is the last one on the right side, 47.7.

PROFESSOR DORSANEO: Why don't we look at the way the court has asked us to vote on it? It's on page 15.

CHAIRMAN BABCOCK: Justice Hecht, how do

you want us to vote on it?

JUSTICE NATHAN HECHT: On page 14 we have the three rules set out there, page 14.

CHAIRMAN BABCOCK: Okay. Here is how we're going to vote. Door number two is on page 14 on the left side and it reads "Opinions not designated for publication by the court of appeals under prior rules have no precedential value, but may be cited." How many people prefer door number two over door number three? Raise your hands. 10 members favor that.

MS. SWEENEY: 11, Chip.

CHAIRMAN BABCOCK: 11. Sorry. I didn't see you, Paula.

And door number three, "Opinions not designated for publication by the court of appeals under prior rules may be cited." How many people prefer that? 12. So 11 people prefer door number two, and 12 people prefer door number three.

JUSTICE NATHAN HECHT: I thought the court was divided.

(Laughter.)

MR. HAMILTON: Then he'll change his

vote; and then it will be twelve to twelve.

CHAIRMAN BABCOCK: Okay. Let's try to get through the TRAP Rules here. 49.10, the Court is not inclined to make this change. So Bill, how come they're off track here?

PROFESSOR DORSANEO: I don't know that I -- I think I agree with them. But we, other people. I said I don't put any of this stuff in my motions anyway. Okay. And Pam said "Well, you should."

CHAIRMAN BABCOCK: All right. Who wants to speak up for SCAC proposed 49.10?

MS. BARON: I do.

CHAIRMAN BABCOCK: Pam wants to speak up for it.

MS. BARON: I think it's just a consistency point. If you cite a lot of cases in your motion for rehearing, you are going to need an index of authorities and a table of contents and other things that are going to use up your page limits; and the rule is does not exempt them from your page count and technically right now they are in your page count whether the courts are counting them in that page count.

MR. ORSINGER: Are they required, Pam? Are you required to include that in your motion?

MS. BARON: No. It's a question of whether it's helpful on an individual basis.

MR. ORSINGER: So for you it's a choice as an advocate to put it in there as part of your tools; but for the rest of us that don't do that it's our choice not to do that. Right?

MS. BARON: Well, if it's something that is useful to the Court and provides very little information other than an index, why should it count as your page limit when it doesn't in any other context under the appellate rules?

CHAIRMAN BABCOCK: Bill.

PROFESSOR DORSANEO: We could certainly fix this problem by saying, you know, making it more complicated, say that although -- we could remove the suggestion that the Court doesn't like; but I will never put those in a motion for rehearing until the world becomes flat. So I don't need your, the thing that you want. I'd be willing to say that if you

want to do that, it ought not to count against your pages; but I don't know that I want to go to all that trouble.

CHAIRMAN BABCOCK: Is Pam a voice in the wilderness here, or are there other people that?

MS. BARON: Can I make one more comment?

CHAIRMAN BABOCK: Yes.

MS. BARON: I mean, I agree some of these things you don't have to put in a motion for rehearing and they're just in here because it parallels exactly with the briefing rules. You don't need an identity of parties and counsel on your motion for rehearing. You may need a table of contents. You may need an index of authorities if there are a lot of them. You need a signature page. You need certificate of service. You may or may not need some of them. You need a statement of points which is required.

CHAIRMAN BABCOCK: Skip.

MS. BARON: Or issues.

CHAIRMAN BABCOCK: Sorry.

MR. WATSON: I was wondering has the Court ever bounced one for being too long

counting the index of authorities and everything?

JUSTICE NATHAN HECHT: I don't know that we have; but I don't --

MR. WATSON: I took this statement that the length of the motion does not appear -- I mean, I thought that meant go ahead and do it the way you've been doing your petition for review. Start counting on the argument page. And if somebody slaps your hand, then you're the first. I mean, I just see do it the way you want to do it, Pam, and it's going to go through.

PROFESSOR DORSANEO: Start your numbers after.

MR. WATSON: Yes, I mean.

MS. BARON: Well, we have 14 --

CHAIRMAN BABCOCK: That's what those little Roman numerals are for. Right?

MS. BARON: We have 14 different courts of appeals interpreting those. We see what has happened in other situations under the rules where we've had that. We have had different results in all the courts. I'm just saying we want consistency. I think 15 pages

for a motion for rehearing to the court of appeals is awfully short; and I don't want to have to count this stuff.

MR. YELENOSKY: Let's throw her a bone.

CHAIRMAN BABCOCK: Pam, do you have any instance where one of your briefs has been bounced?

MS. BARON: No. But I'm just waiting.

MR. ORSINGER: Well, do you confine yourself to 15 pages including all of this preliminary stuff, or do you just go ahead and do like Chip and Skip and you renumber it?

MS. BARON: I can't remember what I've done. I think I've tried both ways. I try and come in within 15 pages total; and sometimes I don't include index of authorities even though it might be useful.

MR. ORSINGER: Why don't you try his approach and see if it works.

MS. BARON: I think the point of the rule is that we're not supposed to be, you know, trying to get away with something. We should know what the rules are.

MR. YELENOSKY: What's the argument against it?

CHAIRMAN BABCOCK: Well, you do have an indication from the Court now that the change suggests that a motion should contain components that are not required, so that should give you a little comfort.

MS. BARON: Well, what if we take out the parts that definitely aren't, I mean, that you would not put in there? You wouldn't put -- well, you might have an appendix in your motion for rehearing. I think that's entirely possible.

PROFESSOR DORSANEO: I do put in an appendix. I don't count the pages any more than I count the pages in any other appendix.

MR. ORSINGER: When you consider the statistics on the motions for rehearing that are granted I think this is a hypothetical discussion.

CHAIRMAN BABCOCK: Pam, --

MS. BARON: Thanks a lot everybody.

(Laughter.)

CHAIRMAN BABCOCK: -- I really feel your pain.

(Laughter.)

CHAIRMAN BABCOCK: All right. What is

this over here on the right, 52.7, Record?

PROFESSOR DORSANEO: Oh, that's what we're working on. That's 9.5 revisited.

CHAIRMAN BABCOCK: Okay. Got you. So we don't need to talk about that.

55.2, the Court is going to do that, so we don't need to talk about that. 56.3.

MR. GRIESEL: 55.1 at the bottom of page 16.

PROFESSOR DORSANEO: But that, Justice Hecht talked about 55.1.

JUSTICE NATHAN HECHT: We're just going to --

CHAIRMAN BABCOCK: Sorry.

PROFESSOR DORSANEO: They're just going to do that. He told us they're going to do that whatever we say.

CHAIRMAN BABCOCK: So 55.2 is okay. Now 56.3.

JUSTICE NATHAN HECHT: We just noticed as we were going through the court of appeals settlement rule that we don't have a provision in our rule that says we can settle part of a case, which we do all the time. And it just seemed like if we were going to put it in one

place, we ought to make sure it's in the other place so people wouldn't read the court of appeals rule and think they could do it and read our rule and think they couldn't.

CHAIRMAN BABCOCK: It seems reasonable. Any objection or any comment about this? Okay. What about 64.6?

MS. BARON: That's the same thing.

CHAIRMAN BABCOCK: The same thing as 49.10.

PROFESSOR DORSANEO: We may revisit that more and want to come back with some more congenial language. How is that, Pam?

CHAIRMAN BABCOCK: All right. But there will be no whining about it.

(Laughter.)

CHAIRMAN BABCOCK: All right. We are done for the day. Coming events, tomorrow the process server guy was waiting around here all day, which I feel badly about; but we have told him that we will let him kick off in the morning, so that's in keeping with our agenda.

But then unless somebody tells me -- and the Rule 6 item has already been taken off our

agenda. Unless somebody really wants to get to these other agenda items, we're going to then go to FED for a number of reasons. Is that okay with everybody?

HONORABLE F. SCOTT MCCOWN: So what is on for tomorrow?

CHAIRMAN BABCOCK: Rule 103, FED, new assignments and whatever else we can get back from the agenda.

MR. YELENOSKY: We'll have a special guest for the FED.

CHAIRMAN BABCOCK: And we're going to have a special guest for FED. Just to follow up, Bill, I've got that for next time on the TRAP Rules we have got Rule 9.5 and Rule 52 regarding a party serving a copy of the record in the original proceeding. We've got Rule 33.1(d), revision to the SCAC language and Rule 38, requisite of briefs that are going to be discussed by your subcommittee and brought back to us in March.

And tomorrow, 8:30 tomorrow all right with everybody? And our next meeting in March is on the 8th and 9th; and it will be at the Texas Association of Broadcasters, 502 East

11th, because they bumped us out of this room again.

PROFESSOR DORSANEO: What was the fourth one, Chip?

CHAIRMAN BABCOCK: Rule 38.

PROFESSOR DORSANEO: Oh, yes.

MS. SWEENEY: Motion to adjourn.

CHAIRMAN BABCOCK: Motion to adjourn granted.

(Adjourned 4:52 p.m.)

****

CERTIFICATE OF THE HEARING OF

SUPREME COURT ADVISORY COMMITTEE

****

I, ANNA RENKEN, Certified Shorthand Reporter, State of Texas, hereby certify that I reported the above hearing of the Supreme Court Advisory Committee on the 25th day of January, 2002, and the same were thereafter reduced to computer transcription by me. I further certify that the costs for my services in the matter are $ 1287.50 charged to Charles L. Babcock. Given under my hand and seal of office on this the 3RD day of FEBRUARY, 2002.

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

Anna Renken

ANNA RENKEN, CSR
Certification 2343
Cert. Expires 12/31/02

#005,5076AR/DJ