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MEETING OF THE SUPREME COURT ADVISORY COMMITTEE

December 8, 2006

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COPY

Taken before *D'Lois L. Jones*, Certified
Shorthand Reporter in Travis County for the State of
Texas, reported by machine shorthand method, on the 8th
day of December, 2006, between the hours of 9:08 a.m. and
3:51 p.m., at the Texas Law Center, 1414 Colorado, Room
101, Austin, Texas 78701.

INDEX OF VOTES

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

<u>Vote on</u>	<u>Page</u>
Rule 296	15373
Rule 296	15388
Rule 296	15392
Rule 296	15409
Rule 296	15412
Rule 296	15414
Rule 296	15421
Rule 296	15422
Rule 226a	15427

Documents referenced in this session

06-10	Rocket Docket, initial e-mail from J. Boyd
06-11	Rocket Docket, initial subcommittee report
06-12	Subcommittee report TRCP 216-299a (12-6-06)
06-9	TRE subcommittee report 9-29-06 (referenced and attached in October meeting)

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2 CHAIRMAN BABCOCK: Good morning, welcome
3 everybody. Anybody know how cold it is outside? It seems
4 very cold.

5 HONORABLE HARVEY BROWN: It's cold.

6 CHAIRMAN BABCOCK: 31 degrees, according to
7 Ms. Senneff, but we're on the record, and the first order
8 of business is to hear from Justice Hecht, as is our
9 custom.

10 HONORABLE NATHAN HECHT: Well, the five
11 members of our Court who were on the ballot this year were
12 all re-elected, so that's cause for great celebration in
13 our ranks; and the opposite happened in Dallas County; and
14 I am advised by a number of people that that may give rise
15 to more conversation in the Legislature this session about
16 how we select judges in Texas, so losing 41 incumbent
17 judges is a small price to pay, I guess, but it would be
18 nice to talk about it just to see.

19 On the rules front, we have some parental
20 notification rules out for comment that are not
21 controversial and you may have seen them in -- they're in
22 this month's *Bar Journal*, and they are just kind of some
23 cleanup rules, and effective on December 1st were some
24 changes in the Federal Rules of Civil Procedure regarding
25 what's come to be called electronic discovery, or more

1 generically, the discovery in civil litigation of
2 electronically stored information, information that is not
3 fairly characterized as a, quote, "document," end quote,
4 and I don't know why those rules have gotten such national
5 press, but they have.

6 Lawyers have been doing this for sometime,
7 but I think there has been a good bit of lag in the
8 litigation bar in this kind of discovery, and no doubt it
9 will pick up some with this -- with the attention being
10 called to it; and I suppose that raises the question,
11 which I'd like for you all to think about -- we don't have
12 to decide it today -- of whether we should consider
13 corresponding changes in our civil rules regarding
14 electronically stored information in discovery.

15 The Texas rule, which we adopted as kind of
16 an afterthought, I think, Alex, I think we were in Steve
17 Susman's house getting ready to leave and we thought about
18 electronic discovery, and so we threw something together,
19 and it turned out to be the model for the country, but it
20 actually does dispose of -- it does treat the issues,
21 while briefly, pretty evenhandedly, but I guess as time
22 passes we'll need to revisit that and see whether we
23 should make some of the changes that are in the Federal
24 rules.

25 The Federal rules picked up our snap back or

1 claw back provision, which says basically that if you
2 produce something by some sort of mistake, whether it's
3 negligent or not and you now claim it's privilege and you
4 wish you hadn't done it, there's a procedure to get it
5 back; and while you can't unring the bell, you could at
6 least minimize some of the damage, and it can't be used in
7 the merits procedure.

8 So there's that, but more importantly, the
9 Federal rules have two provisions. One is that a party
10 responding to a discovery request need not go look for
11 information in places that the party identifies as being
12 not reasonably accessible, so this really is the first
13 time in history that you don't even have to go look for
14 it, and this is very important because of the way
15 electronically stored information is kept. Almost
16 certainly if you have backup tapes that there's something
17 on those backup tapes that's relevant because they were
18 copying everything during the relevant time period, but
19 you're not going to go look because you're going to give
20 them the active information first. You can dispute about
21 that, and there are ways of resolving whether you
22 eventually have to go look and who is going to go pay for
23 it, but this is really the first time where the responding
24 party can just say, "No, I've looked here and here and
25 here, and I haven't looked over here, and I'm not going to

1 until somebody makes me," and it's kind of a nod to the
2 realities of the production of this kind of information.

3 The second thing is that there is a
4 prohibition on sanctions against a party for losing
5 information in the good faith routine operation of a
6 system. As you probably know, just turning your computer
7 on and off loses some information. If you use word
8 processing, which I assume all of you do, every time --
9 unless you configure your software specially, every time
10 you save a new draft it erases the last one, or if not the
11 last one the one before that, and so drafts are not
12 except. They are automatically erased. Some of that
13 information is retained by the program, but you can't
14 always tell how much, and so information can be lost just
15 because the system is doing what it's supposed to be
16 doing, and so sanctions are prohibited in that situation,
17 which I think will be a fairly limited number of
18 situations, but nevertheless it's a recognition that that
19 could happen.

20 So there are those specific provisions in
21 the new changes that perhaps we should look at at some
22 point, and then even though our discovery rules are
23 relatively new and seem to be working fairly well, at
24 least from the reports that filter up, they do -- they are
25 built on the premise that we're going to be exchanging

1 paper. I mean, that's just kind of the unspoken
2 assumption, and maybe we need to go through and see if
3 they should be changed to acknowledge the reality, which I
4 think in five more years will be almost -- a huge part of
5 discovery will be electronic information and not paper.

6 But anyway, I don't know if we want to do
7 that right away, and perhaps we want to just kind of look
8 and see how things develop in the Federal system and how
9 our own discovery problems are going, but that's -- if we
10 did undertake that it would be a fairly significant
11 undertaking, and I think that's it, unless people have
12 questions.

13 CHAIRMAN BABCOCK: Any questions? I'll have
14 one for you in a minute.

15 HONORABLE NATHAN HECHT: All right.

16 CHAIRMAN BABCOCK: All right. Well, in
17 terms of what we're doing today -- and I trust everybody
18 got the word that we're not going to meet on Saturday. I
19 didn't think our docket was going to be difficult to get
20 through in one day. We're going to go to this new item of
21 the rocket docket in a minute. At about 10:30 we're going
22 to skip over to Buddy Low's Rule 904 because there is a
23 guest here, Bruce Williams, from Cotton Bledsoe, a fine
24 firm in Midland, who wants to address us on that topic.
25 So if we're done with rocket docket by 10:30 then we'll go

1 right into Buddy's rule and hear from Mr. Williams. If
2 we're not done with rocket docket, discussing it, then
3 we'll break and hear from Mr. Williams because he has a
4 plane he'd like to catch back home.

5 There are a number of efforts going on
6 around the state that are coming from the Texas Supreme
7 Court that deal generally with the problem, perceived to
8 be a problem, that there is a lot of litigation business
9 that has been diverted out of the civil justice system to
10 arbitration, to mediation; and the result is that there is
11 a diminishing number of trials, that the jury trial is
12 almost disappearing from the landscape.

13 This is not something that's unique to
14 Texas. It's been observed on the Federal level as well.
15 Judge Higginbotham of the Fifth Circuit started speaking
16 about this probably four or five years ago. As a result,
17 Chief Justice Jefferson has appointed a task force to look
18 into this issue. There is a project that Kent Sullivan I
19 know is involved in and perhaps other people of this
20 committee, and the Legislature is looking at thinking
21 about how to change or reform the system to make it more
22 friendly to the users of the system, that is, the people
23 who are claimants and file lawsuits and the people who
24 defend them. Justice Hecht, do you want to say anything
25 more than that about the task forces or whatever?

1 HONORABLE NATHAN HECHT: Well, as you know,
2 I've written on this, and a whole lot of other people
3 have, too, and I was at a conference this week where there
4 were state judges from around the country, and so the
5 reports are generally the same, which confirm that jury
6 trials by absolute number and as percentage of cases
7 disposed of are way down, like by half or more from 15, 20
8 years ago. And so query is, is this something we should
9 be concerned about, and if so, what are the causes and
10 what should we do about it, and there's very little
11 forensic evidence about the causes and very little way to
12 get any. You can look at some things, like in Texas, for
13 example, when the workers comp law changed, that whacked
14 400 jury trials out of our state docket, just bingo, but
15 other states have not had those kinds of changes and they
16 still had a sharp decline in the number of jury trials.
17 So while you can identify things here and
18 there, they don't seem to be explaining the larger
19 picture, and they certainly don't explain what's going on
20 in the Federal system; and while this is happening on the
21 civil side in most states, and certainly in Texas, the
22 criminal side is essentially unchanged. It has about --
23 it's down about 10 percent, but it has about the same
24 number of trials that it has always had, but I don't have
25 much to do with criminal law, but the people who do say

1 that there just haven't been any changes in the criminal
2 law in the last 20 years, and it basically functions the
3 same way it's always functioned.

4 So one of the reasons to talk about the
5 rocket docket is would that get some of our business back.
6 I think there are two basic views about what could be
7 wrong, or maybe three, three basic views about what could
8 be wrong. One is a kind of an institutional bias against
9 jury trials, which tort reform represents, maybe other
10 legislative initiatives represent, just kind of a movement
11 away in an institutional sense, and some people feel quite
12 strongly that that's the answer, but there's 50 states and
13 in most of the states there have not been those
14 initiatives and still jury trials are down, so it's hard
15 to say if that really explains it.

16 Second reason is that our product, if you
17 look at it that way, is just not very attractive. It's
18 too expensive and it takes too long and people don't like
19 it and the results are too unpredictable and if you can
20 stay out of it you do. And so if you can put arbitration
21 agreements into contracts then you put them in there, and
22 even the lawyers who complain most vigorously about
23 arbitration put arbitration agreements in their fee
24 contracts, so maybe that's part of it, although, again,
25 it's just hard to know, but if it is then are there things

1 that we can do to make the civil justice system more
2 attractive to repeat users as a way to resolve disputes or
3 not?

4 And then finally, there is a very strong
5 view that the reason trials are down is because there's a
6 public perception that's bad about the jury system and
7 about trial lawyers, and we should get a real good
8 advertising campaign going and try to correct that
9 misimpression. And then there are people who believe just
10 as strongly that while that's fine to do that, it's not
11 going to fix what's really wrong, because people who are
12 not using the system are not using it because they've been
13 fooled into not using it, but they're not using it because
14 they've thought about it and they don't like it.

15 So anyway, there it sits; and query, what,
16 if anything, should be the reaction. And so one
17 possibility is the stuff we talked about this morning, and
18 we're looking for -- the Supreme Court is trying to
19 encourage people to look at other possible solutions. I
20 suspect there is not one or maybe not even three or four.
21 It may be a sort of a play of things that will help
22 matters, or it's possible that this is just a variation
23 with the times, and it's down now, but like the economy,
24 it will be up some day and we should worry about other
25 stuff, but it seems to me we have to at least think about

1 it.

2 And so there are these other groups that
3 will be woking on it, but nobody really has -- that's
4 involved in these groups has a fixed agenda about we need
5 to do this, this, this, and this, and then everything will
6 be fine, so I think the more -- the more we are able to
7 reflect on it and draw on the experience of groups like
8 this, the better off we'll be.

9 CHAIRMAN BABCOCK: Great. And I have been
10 told whether it comes to pass or not, but it's a great
11 compliment to this committee, that whatever is proposed
12 will -- before it gets to the Court will flow through this
13 committee for its advice and inspection and review,
14 including Senator Wentworth told me that if there is
15 legislation, he anticipates that, as with past
16 legislation, that to the extent that there are rules
17 needed to implement the legislation then it will be
18 directed to us to look at.

19 This rocket docket idea is not being looked
20 at or discussed by any other group that has any sort of
21 formal charter that I'm aware of, and it occurred to me,
22 frankly, when I read an article in the *New York Times*
23 which was somewhat critical of the Eastern District of
24 Texas, because, as you know, that has been a hotbed of
25 patent litigation and litigation involving intellectual

1 property, and the suggestion in the *Times* was that there
2 was something evil going on here that perhaps the jurors
3 in the Eastern District in Marshall and in Texarkana were
4 somehow pro-plaintiff in a patent case, which seemed to me
5 to be on an odd idea to the extent that anybody in the
6 Eastern District of Texas has given a lot of thought about
7 what patent law is all about, and I'm talking about at the
8 jury level.

9 And in reading the article and having
10 practiced in the Eastern District of Texas, it just
11 screamed out to me that the reason why that venue is
12 attractive to people, plaintiffs and defendants alike,
13 frankly, is because the judges of that district have
14 gotten together and have decided that they are going to
15 move their cases very, very swiftly to trial so that --
16 and I from personal experience know that I filed a case
17 myself against Microsoft because I was concerned that this
18 small company that I was representing could not withstand
19 a lengthy expensive battle with Microsoft and that
20 Microsoft was fully capable of litigating for five years
21 and my guy wasn't, and it came to pass that we filed the
22 case in Texarkana, and it came to resolution within 18
23 months, and everybody seemed to be happy with the process.

24 The other jurisdiction that we have to look
25 at is the Eastern District of Virginia, which has probably

1 the most notorious rocket docket in the country and has a
2 long history of experience with it, and it just occurred
3 to me that a lot of cases are filed there solely because
4 the litigants know that they will get a trial -- and Jeff
5 will tell us in a minute, but I think the literature that
6 he -- research shows that the average time from filing to
7 trial in a civil case in the Eastern District of Virginia
8 is five months. Sometimes it's seven months, some years
9 it goes a little longer, but basically five months, which
10 if you think about it is remarkable, and I'm not saying
11 that that is something that we should do, but it certainly
12 seemed to me and to Justice Hecht and the Court that
13 that's something that we should look at.

14 So that's why it's on our radar right now.
15 The subcommittee, Jeff Boyd's subcommittee, has not had
16 time to look at it exhaustively, but they have had enough
17 time to make a preliminary report to us. There's an
18 outline that Jeff prepared that has been distributed, and
19 with that said, I'll turn it over to Jeff.

20 MR. BOYD: Thanks, Chip. This is a new
21 issue to our subcommittee as of a couple of weeks ago, and
22 we gathered up some information and visited earlier this
23 week about it, so there's not a whole lot substantively
24 that I can report to you, but what I would like to do this
25 morning is kind of describe the issue of the

1 subcommittee's charge as we currently have formulated it
2 based on what Justice Hecht and Chip have advised us,
3 describe to you a little bit about what we have done so
4 far, and where we see ourselves going as a subcommittee on
5 the issue and then open it up for your input and advice,
6 informational and directional, for the subcommittee to
7 consider and take to heart as we start digging into this
8 issue.

9 At our subcommittee meeting, I think Justice
10 Bland made a comment about how we want to make sure that
11 as we devote a lot of time to this over the next year we
12 do it in a way that's worth it, and I thought to myself,
13 "Are we going to be living with this for a whole year?"
14 and, you know, we probably will be. I mean, I think this
15 is a pretty big issue and one that is going to take some
16 digging.

17 What you need this morning, if you like to
18 have materials in front of you, is the one and a half page
19 preliminary report of the subcommittee, and then there's
20 also an e-mail that I think copies were available and
21 that's somewhat duplicative or kind of an earlier version
22 of the committee report, but attached to that e-mail was a
23 list of articles that we started off with as a
24 subcommittee, and that might be useful to you as well.

25 The issue as we've currently formulated it,

1 the charge of the committee is stated in the
2 subcommittee -- subcommittee's initial report that's been
3 provided, and that is to explore, evaluate, and advise
4 this committee on whether and how the implementation of a
5 rocket docket within the Texas state court system may
6 reduce cost and delay, and thereby promote the role and
7 use of jury trials in the resolution of legal disputes.

8 Justice Hecht and Chip have given a good
9 description of the background that brought up this issue
10 and that was described to us as a subcommittee as we
11 started considering it. I think we start off with the
12 recognition that it's a controversial issue in many ways,
13 and I know my first reaction when we were asked to
14 consider the issue was, well, is there really a problem
15 with vanishing jury trials or is it cyclical and is cost
16 and delay really a reason for that if there is a problem,
17 and if both of those are true, then would a rocket docket
18 really be an appropriate solution to that? And Texas
19 courts are -- and I practice a lot more in state court
20 than I do in Federal court, and part of the reason is
21 because state courts tend to let lawyers run the show
22 rather than judges, and I like that, and most of the time
23 the lawyers on the other side of the case and I are able
24 to work well together to either resolve it very quickly if
25 necessary or let it sit there a long time if necessary to

1 allow the things to happen.

2 And so there is -- as a practicing lawyer I
3 have kind of an initial reaction of resistance of the idea
4 of being forced into any kind of rocket docket approach.
5 Our subcommittee is made up primarily of judges and former
6 judges, and Pete Schenkkan and I are the only two on that
7 are not, and so we have a lot of input and insight from
8 judges as well, who probably inherently have some
9 resistance to it as well, because at least according to
10 all the literature we've looked at so far, the fundamental
11 requirement for a successful rocket docket is a judge
12 who's willing to work a lot harder and take control of the
13 case from the beginning and not allow the lawyers to do
14 so. So there may be some initial resistance and some
15 controversy.

16 Chip mentioned the idea of a rocket docket,
17 at least from our preliminary research, goes back at least
18 as long ago as I've been alive in the Eastern District of
19 Virginia. It's not a brand new idea. They adopted what
20 has been referred to as the early versions of their rocket
21 docket back in the early Sixties. I remember 10 or 12 or
22 so years ago when I did a lot of asbestos litigation
23 Orange County had a form of rocket docket for asbestos
24 cases, and that's the first I remember hearing the phrase.

25 As it turns out, there are lots of courts

1 around the country, a lot of Federal district courts, but
2 also a lot of state courts in various jurisdictions who
3 have adopted some form of fast track or rocket docket
4 resolution either as a mandatory or an optional approach,
5 and even some at the appellate level. There are appellate
6 courts who have adopted rocket dockets for appeals, what
7 they call rocket dockets, and yet in the meantime -- and I
8 was not here at the last meeting, I was not able to be
9 here, but I did read the materials and then reviewed some
10 of the transcript and recall the issue that came up from
11 the State Bar's committee recommending that we expand the
12 notice period prior to trial from 45 days to 75 days
13 because 45 days seemed too short, and as I recall the
14 subcommittee recommended against that recommendation and,
15 in fact, this committee, too. So there is resistance,
16 there are good arguments and push and pull both ways on
17 the issue.

18 As a subcommittee we do plan to look at some
19 of those more philosophical strategic questions but not
20 get too bogged down in them and instead focus more on what
21 is a rocket docket, how does it work and does it work and
22 what does it do, what effect does it have. Assuming that
23 there is a phenomenon of a vanishing jury trial that is
24 not just cyclical but, in fact, if something is not done
25 it will undermine our historical -- the basis that makes

1 us unique as a system of jurisprudence, assuming that's
2 the case and assuming that's a bad thing and assuming that
3 cost and delay is the factor, then is the implementation
4 of a rocket docket a way to address it; and if so, how
5 would you go about doing that? And so that's kind of how
6 we plan to approach this as a committee.

7 We gathered a number of articles that --
8 some as recent, in fact, if you've read this month's *Texas*
9 *Bar Journal* there's an article in there about the Eastern
10 District of Texas in Marshall and their rocket docket, so
11 very recent literature and there seems to be a lot more,
12 but just at our very quick initial search to gather some
13 law review articles and similar journal articles, there
14 are articles beginning back in '81 that we found just from
15 our very first search, and I'm sure they go back further
16 that talk about this concept, and so we began by gathering
17 those articles.

18 Members of the subcommittee have reviewed
19 and at least skimmed through a number of those articles,
20 and then we sat down and tried to just create a
21 preliminary list of issues that as a subcommittee we see
22 that it's necessary for us to begin to address. We're so
23 early in the process now that I think both the issue as we
24 have formulated it and the specific issues that we think
25 we need to address are -- will likely be changed as we dig

1 deeper into this process and hopefully perhaps even from
2 your comments today.

3 The charge that I've provided -- I mean, the
4 initial report of the subcommittee that's been provided
5 lists those preliminary list of issues that we think we
6 need to address, and perhaps it's helpful to skim through
7 that for a second and then give you-all a chance to
8 provide some input to us as we get into this. First is
9 gathering up some background data such as what is the
10 average time of disposition by jury trial from filing to
11 disposition in Texas and how has that changed over time,
12 have the new rules changed that. I didn't practice back
13 before the discovery rules, but I've heard about
14 practicing before the discovery rules, and my guess is
15 before the old new rules were implemented things were
16 different then, and I always hear stories about how you
17 would grab your file and run to the courthouse, and so the
18 discovery rules, probably not just the new ones, but the
19 old new ones probably have an effect, and we want to try
20 and gather some data if we can on that.

21 What is a rocket docket? Just a preliminary
22 review indicates there are a lot of different forms of
23 that, but what are the basic principles. Sort of the
24 overarching issue, No. 3, does a rocket docket in fact
25 offer a method to address the perceived problem of the

1 vanishing jury trial. No. 4, what courts have previously
2 implemented some form of a rocket docket. No. 5, what
3 rules and procedures do rocket dockets typically use, what
4 is it that makes a rocket docket a rocket docket, and I
5 have provided in this report just a preliminary list of
6 things, a very early setting of a fixed and immutable
7 trial date. You know early on your trial is coming up,
8 it's coming up soon, and it's not going to be moved, what
9 we used to call in Orange County I guess the try, settle,
10 or dismiss docket. Once you get put on that with that
11 date you either try it, you settle it, or you dismiss it
12 on that date. It doesn't get continued.

13 A short discovery period, short period for
14 amendments and dispositive motions, no continuances,
15 central docket rather than individual dockets. Some of
16 the courts have said that's a key factor to make it work
17 because you need judges who are available when your
18 primary judge may not be. What other factors are
19 inherent, Issue No. 6. Judges committed to a speedy
20 resolution, I mentioned that earlier. There is one
21 article that's a pretty interesting article. I think it
22 was about the Nevada courts. I can't remember. I'll have
23 to go back and look. No, Maricopa County, Arizona, I
24 think it was, where one of the older judges described not
25 what is a rocket docket but how did we get one and talks

1 about how it really took leaders from both the bench and
2 the bar early on to step up and say this is important, we
3 want to do it, and so there's some good sort of soft
4 information in some of the articles we've seen about what
5 it would take to transition to a -- successfully to a
6 rocket docket.

7 Of course, Issue No. 8, we want to identify
8 what would be the benefits and downsides to a rocket
9 docket, and there are articles that sort of -- they happen
10 to criticize for tending to be more favorable to the
11 plaintiff side than the defense side, although that seems
12 to be only if you are, in fact, a very well-prepared
13 plaintiff because once you file that suit it's time to
14 move. As you probably know, particularly out in Virginia,
15 and more and more so now in the Eastern District of Texas,
16 there are lawyers who make a very fine living because they
17 know the rocket docket and nobody else does, and so the
18 local counsel practice is very important to a rocket
19 docket, which could be both a benefit and/or a downside.

20 And then, of course, Issue No. 9, under what
21 circumstances could or should rocket dockets be made
22 available in the state courts in Texas. I mean, is it on
23 the one extreme we just change all the rules and from now
24 on if you file a suit in Texas you're on a rocket docket,
25 to the other extreme, which is it's only available if

1 somebody goes in and convinces a court that this
2 particular case needs to be put on a rocket docket, a
3 request by one side or for good cause shown, or request by
4 one side based on objective criteria, or would it be
5 available only by agreement of all parties. I mean, there
6 are a lot of variety of ways that that could be
7 approached, and as a committee we plan to explore those.

8 The last item on the list, Issue 10, I don't
9 know that we'll spend a whole lot of time on except
10 perhaps the third little point there, civil -- I mean,
11 there are criminal -- Eastern District of Virginia all
12 have had some high profile cases, criminal cases, recently
13 that took a lot longer than their average, but for the
14 most part all of their criminal cases are rocket docket
15 cases. We don't plan to really look at that, but we need
16 to consider whether and how any kind of approach like this
17 would affect family cases or juvenile cases or others,
18 particularly those with statutory deadlines already in
19 place; and we plan to focus at the trial court level, not
20 the appellate, not at this point consider appellate court
21 level, although like I say, just reviewing the literature
22 you automatically learn about that as you go because there
23 are some appellate courts that have adopted rocket
24 dockets.

25 And so that's kind of where we are as a

1 committee. These are the issues we plan to look at. Our
2 approach is, to begin with, to continue to gather more
3 literature and information to help us really kind of
4 understand the lay of the land and what the issue is and
5 begin to address some of these specific issues. There are
6 people who are very familiar with rocket docket either
7 because they're judges in the Eastern District of Virginia
8 or the Eastern District of Texas or wherever else or
9 they're practitioners, and somewhere along the way we
10 think we'll probably do some talking with some of them,
11 and that's pretty much how we plan to approach it.

12 So with that, I think the -- what we could
13 benefit from from this committee today is initial
14 responses, thoughts, specific recommendations on where we
15 might turn to begin to gather all this information and
16 data.

17 CHAIRMAN BABCOCK: Yeah, let's just
18 brainstorm this a little bit. Buddy.

19 MR. LOW: All right, Chip. Well, one of the
20 things the committee may start looking at, the rocket
21 docket in the Eastern District started with Thad
22 Heartfield who had the Hyundai case that John Ward, who is
23 now a judge up there moving those cases, was one of the
24 primary lawyers involved; and when they met they told
25 Judge Heartfield, said, "It's going to take us three years

1 to try this case." He said, "Gentlemen, this case will be
2 tried in nine months," and he explained to them how. You
3 may talk to Thad. He set it up. Certain discovery, he
4 did his own. So that is a source.

5 Another source would be the criminal docket.
6 It's not down. In a criminal case you get your Brady, you
7 get your Jinx, you get them a statement after the witness
8 takes the stand and testifies. I mean, and you get a
9 trial a certain date unless it's waived, so that is a
10 rocket docket that has operated in this state for a long,
11 long time, but those are sources that the committee may
12 consider.

13 CHAIRMAN BABCOCK: Great. Yeah, Carl.

14 MR. HAMILTON: Do either of these courts
15 like the Eastern District or Virginia, are they mandatory
16 for all cases or just discretionary or what?

17 CHAIRMAN BABCOCK: Virginia is mandatory,
18 and I think Texas is, too.

19 MR. HAMILTON: For all cases?

20 CHAIRMAN BABCOCK: For all cases. Yeah, I
21 filed a case in the Eastern District of Virginia as a
22 plaintiff right about this time of year, and the
23 responsive pleading was due January 5th, and the lawyer on
24 the other side called me up and said, "Would you agree to
25 a one-week extension so I don't have to work over the

1 Christmas holidays?" And I said, you know, "sure." So he
2 filed an unopposed motion, which was denied within 24
3 hours, so that -- that's a -- that gave me a sense of how
4 fast we were going to be moving. Anybody else? Yeah,
5 Frank.

6 MR. GILSTRAP: You know, we could go through
7 a long kind of philosophical discussion about why this is
8 happening and whether we need it or everything. I think
9 it might be more profitable to think about, well, is it
10 possible even in Texas, and you know, it would be
11 interesting to go back and look at some of these
12 jurisdictions and see exactly what made it happen. So far
13 what I've heard is judges getting together. So I guess
14 maybe all the judges in Johnson County could get together
15 and say, "We're going to have a rocket docket." I don't
16 know, but it doesn't look to me like -- or have they been
17 able to do it through a rule amendment?

18 Because we tried that with Rule 190, and I
19 don't know what the answer to that is. You know, I mean,
20 what really is -- if -- maybe we need to look and say,
21 okay, if this is a tentative goal how will we get there,
22 and, you know, it may be impossible, or it may be that we
23 don't want to pay the price. Are we talking about a
24 cultural change among lawyers? That's going to be real
25 difficult.

1 CHAIRMAN BABCOCK: Richard.

2 MR. MUNZINGER: Well, what prompted me to
3 raise my hand was the cultural change among lawyers. I
4 was in the Eastern District of Virginia a year or so ago.
5 Discovery was served. The discovery was objectionable. I
6 researched the question, came up with seven Federal cases
7 supporting my position, was told by my adversary that I
8 would lose. I went to the Court and lost, and when I lost
9 my adversary cited not a single case. I said to the
10 magistrate who was handling the matter, "Judge, I cited
11 seven cases in support of my position. I don't understand
12 this."

13 "Yes, Mr. Munzinger, it's hard to find cases
14 in this area of the law."

15 "Yes, ma'am, but I found seven in my favor."

16 "I understand. I won't sanction you.
17 Produce the material." Now --

18 CHAIRMAN BABCOCK: You beat the sanctions,
19 anyway.

20 MR. MUNZINGER: That's the Eastern District
21 of Virginia. Your trial date, if that's the way it's
22 managed, will affect your discovery and evidence rules and
23 everything else. I would urge the committee to do one
24 thing, and that is when you do your statistical ask how
25 many jury trials are conducted in the Eastern District of

1 Virginia and compare it to the same statistic in other
2 places, because what happens is people quit. Now, if
3 trials are pursuits of truth and justice, you quit. You
4 quit because your judge won't read a motion for summary
5 judgment. I'll carry the motion for summary judgment
6 until after the jury trial. That happens to us all in
7 many, many cases, rocket docket or otherwise.

8 Is that justice? It's not justice, and it's
9 not the implementation of rules that the Court and the
10 Court's deciding case law. It's exalting the need for
11 clearing the judge's docket above truth and justice and
12 the interests of free citizens. It's offensive. The
13 Eastern District of Virginia is not a place of you want
14 to -- I don't want to get into a philosophical discussion,
15 but that's what prompted it. You're going to work a
16 change in cultures, ask yourself if you're getting more
17 jury trials or you're just getting people quitting early
18 in the litigation, because that's what you're getting.

19 CHAIRMAN BABCOCK: But you don't feel
20 strongly about it, fortunately.

21 MR. MUNZINGER: No, not at all.

22 CHAIRMAN BABCOCK: Justice Gray.

23 HONORABLE TOM GRAY: Well, this actually
24 kind of dovetails in with that, because what -- what
25 you're fundamentally dealing with is the cost of

1 litigation, and not just the cost to the litigants, but
2 the cost to the taxpayer and the need for judges, and if
3 you're not going to create more judicial positions, the
4 need for staff. So I would encourage Jeff as he's going
5 through this and he looks at the places where they have
6 implemented some type of process for accelerating the
7 cases, what is the staffing available.

8 To get a motion ruled on in 24 hours
9 required somebody to take that motion around to the judges
10 and get it ruled on or some -- even if it's an IT
11 solution, to put it into the judge's hands to get a ruling
12 on it, and that takes staff and it takes IT support, and
13 so it takes resources. So it's not just a matter of
14 adopting a rule and saying this is the way we're going to
15 do it. You're going to have to have some economic
16 resources from the state behind it to say this is a worthy
17 function and we want to accomplish it.

18 CHAIRMAN BABCOCK: Yeah, Skip, and then
19 Professor Hoffman.

20 MR. WATSON: Well, there is a precedent for
21 having it happen. I don't know if this has been
22 discussed, but the wholesale Federal movement came about
23 as a result of legislation. The 1990 Civil Justice Reform
24 Act was Congress weighing in on this problem. That's not
25 to say there weren't districts that were doing it before

1 then, but the 1990 Civil Justice Reform Act was Congress
2 coming in and saying in response to the cry of "Our
3 dockets are clogged up. We need more judges," "We'll give
4 you the judges, but you're going to give us something. We
5 have the purse strings, and what we are going to do is
6 require every United States district to prepare a report
7 prepared by litigants, judges, and practitioners in every
8 court on the reason for," quote, "cost and delay in the
9 United States district courts."

10 Chip, you may remember when that was done in
11 the Northern District. Darrell Jordan headed our
12 committee. I headed the parts from the Western Divisions,
13 and Terry Oxford and I prepared the report for the
14 Northern District, and the legislation had very specific
15 criteria, some of which is being tracked in what Jeff is
16 talking about.

17 One of those criteria which Congress deemed
18 critical was early personal judicial involvement in
19 evaluating the case, and the theory was that the judge
20 should put the time that goes in on the back end, you
21 know, at getting ready for trial, at the charge
22 conference, studying the post-verdict motions, trying to
23 undo the train wreck, do that at the front end of getting
24 a handle on the case, and is this a case that's going to
25 require my time, is this a case that should even be in my

1 court, is this 10-count complaint one that should really
2 be one count, and do I need to assign a law clerk to
3 Shepherd this, do I need to assign a magistrate to
4 Shepherd it.

5 The beauty of that is that Congress not only
6 required the reports, they required plans. Every United
7 States district court by statute had to prepare a plan for
8 cost and reduction in civil litigation. Those plans are
9 available in every district clerk's office in the United
10 States. The next thing that's great is that every one of
11 us on those committees were, again, charged by statute
12 with reviewing the statistics on every judge, and I mean
13 it was startling the ones who moved their dockets and the
14 ones who didn't, and the statute went further and requires
15 every district court to have the clerk's office, the chief
16 clerk's office, to compile statistics at the end of every
17 year showing their success under the cost and reduction
18 plan in civil litigation. There is a treasure trove of
19 material out there.

20 I reviewed the plans just to see, you know,
21 how bad did we blow it, you know, in trying to figure ours
22 out because it was seat of the pants. It was good people
23 trying to do it, but, you know, we didn't know how to do
24 it, and we didn't want to offend the judges, and some of
25 them really didn't like that committee telling them that

1 you need to adopt alternative dispute resolution or move
2 your cases along, and I studied the ones from the other
3 districts in Texas, and there was a tremendous variation
4 in how they approached it.

5 I mean, some, like in the Eastern District
6 said, you know, we're going to get the trains running on
7 time and move them. Some just sort of adopted alternative
8 dispute resolution and decided to approach it by, "Look,
9 we know that 95 percent of the cases settle, at least by
10 the courthouse steps. We're going to get them to settle
11 at the front end," you know, and so ADR was the kind of
12 panacea, but that's about all they did. But, I mean,
13 this, this ground has been plowed, and it's been plowed in
14 every district court, and by statute they keep statistics
15 on how they're doing, so you can compare the plan that's
16 sitting in a file cabinet somewhere in every clerk's
17 office with the annual statistics of what they've done,
18 and you can even compare those by chambers, and they're
19 not going to publicize it, but it's there.

20 CHAIRMAN BABCOCK: Yeah, the genius and the
21 curse of the Civil Justice Reform Act was that every
22 district got to do its own plan. You had to do a plan,
23 but everybody could do it pretty much how they wanted to,
24 and those plans were filed in a file cabinet, and there
25 was no mechanism for any central body to say, okay, we

1 like this one, we like that one. So the Eastern District
2 of Texas developed one approach, and the Northern District
3 of Texas, where Skip and I were on the committee,
4 basically said, "We sort of like the way things are."

5 MR. WATSON: You got it.

6 CHAIRMAN BABCOCK: And we didn't recommend a
7 lot of changes. We did suggest that maybe some judges
8 weren't working as hard as others, which we did with some
9 trepidation, but that massive effort brought some reform,
10 but in many districts it just was business as usual, after
11 a lot of effort. Professor Hoffman.

12 PROFESSOR HOFFMAN: I think the point I
13 wanted to make is that for -- I'm in favor of and I think
14 that it's a good effort to think about reducing cost and
15 delay. I think there is a danger in coupling that to this
16 vanishing trial phenomenon, and so the point I want to
17 make is that those are ends in themselves, and they may or
18 may not be achievable, either centrally or otherwise, but
19 I think that this committee that is created more likely to
20 do work picking up on the theme I heard Justice Bland say
21 in her comment, doing work that will actually be valuable,
22 if we don't tie it to the vanishing phenomenon for
23 whatever it is.

24 A related point I'd make is that a couple of
25 months ago when I was at that jury trial summit in Houston

1 I actually had reported data that I gathered that said in
2 Houston at least time and disposition rates are actually
3 better today than they were 20 years ago when trial rates
4 were higher, and so although there are some folks --
5 Sherry Diamond has done the work on the Federal side --
6 that thinks that the longer time it takes Federal cases to
7 go to trial today may account for the drop in the trial
8 rate, that doesn't appear to be bearing itself out, and
9 that just goes back to Justice Hecht's point that there
10 are a lot of explanations that have been offered up, but
11 not all square up.

12 So the main point I want to make is I think
13 there is something to be said here. I think that we ought
14 to take a harder look at what we have done with the
15 discovery levels because it seems to me that that goes
16 part of the way, if not all of the way, in thinking about
17 treating cases differently where some can move faster than
18 others, but that's part of a larger project about cost.

19 CHAIRMAN BABCOCK: Professor Dorsaneo.

20 PROFESSOR DORSANEO: Jeff, I think you ought
21 to contact people who have been practicing for a good long
22 period of time and actually have been doing litigation
23 trial court work and talk to them about, you know,
24 basically what has happened, and I have been practicing
25 for roughly 40 years, and I don't think that's nearly long

1 enough to make me appreciate what has happened over the
2 years. I'm thinking someone like Jim Cowles in Dallas who
3 -- and other comparable people who would have a much
4 better idea about what really has changed over time, and
5 they could probably tell us what they've seen with their
6 own eyes, and that might be more meaningful than what some
7 professor would write in a *Law Review* article, some young
8 person.

9 Second, some years back when John Hill was
10 chief justice we had another approach to this same problem
11 that ultimately yielded our meager administrative rules,
12 Rule 7 on times for disposition, et cetera; and I can't
13 think of anything over all that time period, other than
14 perhaps the effort to have uniform local rules, that was
15 rejected more wholeheartedly by the bench and bar. Now,
16 times have changed, but, you know, that effort could be
17 looked at to see, you know, what was attempted and why,
18 why was it so unpopular that it made the proponents
19 unpopular in the legal community generally.

20 CHAIRMAN BABCOCK: We're not scared about
21 that, are we?

22 PROFESSOR DORSANEO: Well, I think some of
23 us are. And the last thing, where the Federal courts have
24 kind of ended up in terms of working forward from the
25 Civil Justice Reform Act reports probably indicates that

1 that's not a very good model, if we're worried about the
2 vanishing jury trial and about things moving forward in a
3 sensible fashion.

4 CHAIRMAN BABCOCK: Justice Jennings, then
5 Buddy, then Judge Christopher.

6 HONORABLE TERRY JENNINGS: Well, just
7 generally speaking, it occurs to me that a rocket docket
8 may not have the effect that we're trying to -- or solve
9 the problem we're trying to remedy here, which is the idea
10 that cases that have merit should go to trial and be
11 resolved in accordance with our jury system. It occurs to
12 me the opposite is going to happen, that when you set up
13 this rocket docket, as Richard Munzinger points out, it's
14 going to force cases to settle and some cases that maybe
15 shouldn't settle, that should go to trial, and you should
16 go to resolution. It's going to force those kind of cases
17 to settle rather than to have a trial.

18 And one thing I'd like to point out, I don't
19 know that this is a new problem. Sixteen years ago I went
20 from a civil law firm to the district attorney's office in
21 Harris County to get trial experience because I couldn't
22 get any trial experience as a young lawyer at a civil law
23 firm, and so I don't know that this is a -- it may be
24 getting worse and becoming far more noticeable now, but it
25 occurs to me that this is an ongoing problem, and one

1 thing that I've noticed -- and there are a number of
2 reasons why I think things haven't changed on the criminal
3 side, as Justice Hecht pointed out. Things really haven't
4 changed.

5 Well, on the criminal side, you have a much
6 more simpler system. You have, you know, the Code of
7 Criminal Procedure is codified in one place. It's -- I'd
8 recommend looking at that. I mean, and, again, this may
9 not be very popular as far as, you know, streamlining the
10 rules, but I think that could have a great effect, because
11 at least in a criminal case you know that -- and again,
12 there are a number of reasons a criminal case is simpler
13 to try and, therefore, there are more trials. You know,
14 you're dealing with intentional crimes and so forth, and
15 you have a system that's built up, and you have a district
16 attorney's office where there's pressure to get cases to
17 trial and so forth and so on. Yes, you have that, but you
18 also have a simplified Code of Criminal Procedure, and it
19 occurs to me, you know, as an appellate judge over the
20 years, you know, when we get appeals from criminal trials
21 they're over trials.

22 A lot of the work that we do on the civil
23 side is over procedural matters, and it occurs to me that
24 maybe the Code of Civil Procedure and also the Texas Civil
25 Practice and Remedies Code have gotten so complicated and

1 so voluminous that we're spending so much time arguing
2 over, you know, what this particular provision means or
3 that provision means. That goes into increasing the cost
4 of litigation. It has a number of other effects
5 throughout the system, you know, making it more
6 cumbersome, harder to get to trial, harder to get
7 experience, and I think rather than maybe focusing on just
8 like a rocket docket, which may or may not be helpful,
9 that maybe it is time -- and I know that Dorsaneo has
10 pointed this out before -- maybe it is time to maybe think
11 about looking at the Code of Civil Procedure and going
12 through it and streamlining it and making it easier for
13 people to understand so that we're fighting a lot less
14 over what various provisions mean, and you can actually
15 get cases moving through the system.

16 CHAIRMAN BABCOCK: Buddy, then Judge
17 Christopher, then Carlos, and then Justice Duncan.

18 MR. LOW: Chip, I don't think the idea is to
19 have more civil trials. I think it should be to have the
20 availability of a civil trial and make it attractive, but
21 not more. We're not going to have more. There are going
22 to be less because way back in the dark ages Lucius Bunton
23 and I used to call each other. We had a client named
24 Vernon Winchester. "How many cases did you try for Vernon
25 this week?"

1 "Well, I tried one for a 350-dollar car
2 wreck. I tried one 300." I mean, and you don't have
3 those. They can't afford that. You're not going to have
4 those little cases, and maybe we shouldn't have those, so
5 when Lucius got appointed to the Federal bench he called
6 me --

7 CHAIRMAN BABCOCK: He was a one man rocket,
8 as I recall.

9 MR. LOW: "I think I'm going to have a
10 docket like old Vernon and you and I had." I said, "Well,
11 go with it," and I think he did. He told me -- I never
12 practiced before him. I never had that much nerve, but --
13 and I don't mean it derogatory. He was a good friend, but
14 from what I'd hear he would let you -- he said he was
15 going to let them choose. You want on the rocket docket,
16 then fine, he would encourage them; otherwise, he had his
17 regular docket.

18 Now, I don't know how differently he treated
19 them, but we're not going to have more jury trials, and
20 that shouldn't be the idea, to get more, but it should
21 make it available and make it attractive and affordable.

22 CHAIRMAN BABCOCK: Yeah. Judge Christopher.

23 HONORABLE TRACY CHRISTOPHER: Well, I agree
24 that reducing cost and delay through a rocket docket does
25 not equal more jury trials, so I don't -- you know, the

1 premise of looking at the rocket docket from that point of
2 view doesn't really strike me as, you know, cause and
3 effect. I think if you looked at state court statistics
4 you will find that the vast majority of state court cases
5 are disposed of within twelve months, and, you know, maybe
6 you want it to be nine months, maybe you want it to be six
7 months, but is that really a goal that the majority of the
8 practicing lawyers here want?

9 We're looking at, you know, high-placed
10 members of the bar here. Would people here support that
11 idea? I don't think they would, just like Richard said.
12 That in most lawyer's mind is not justice. The idea that
13 a judge wouldn't grant a one-week extension on an answer
14 that was agreed to, from a state judge's viewpoint seems
15 crazy, crazy.

16 CHAIRMAN BABCOCK: Yeah, you're definitely
17 an elected --

18 HONORABLE TRACY CHRISTOPHER: We're in an
19 elected position. Why on earth would we not agree to a
20 one-week extension on filing an answer? If we want to cut
21 down delay in some cases, we have interlocutory appeal
22 problems, we have increasing liberal use of mandamus
23 problems, we have liberal pleading amendments, third party
24 practices and responsible third party practices. Those
25 three things slow down any important case in the state

1 court system and would require a huge sea change.

2 I've only been on this committee for three
3 years and -- or four years, and the vast majority of the
4 time we are trying to prevent the trial judge from doing
5 things. Now, now, you want the the trial judge to have
6 the control to do things. It's a huge sea change.

7 CHAIRMAN BABCOCK: Carlos.

8 MR. LOPEZ: I'll stand up since I'm way back
9 here. I agree with much of what she just said, and I want
10 to add one other piece to that puzzle, and that is
11 discovery. I mean, you know, the eternal debate about how
12 much is enough and how much is too much, and you know,
13 it's what makes our system great because you actually know
14 what you're talking about when you go to trial, but we all
15 agree there's a happy medium, and I think a lot of us
16 agree we haven't quite reached it yet. It's hard to push
17 a case as a trial judge when you've got this idea in the
18 minds of the lawyers, the litigants, perhaps their parties
19 and other judges, that discovery is good and that,
20 therefore, more discovery is better, always.

21 I can't speak for regional differences, but
22 in Dallas I get these requests from the other side, and
23 I'm thinking this is the lawyers and I ask about why we
24 possibly need all that. The other lawyer goes, "Yeah,
25 Judge, that's right, so, you know, we're going to agree to

1 continuance." And I'm like what is going on here, so I
2 think until we -- one of the things we might need to
3 address that's systemic, in addition to some of the things
4 she just said, is how we feel about discovery.

5 I mean, I've long said we've got pattern
6 jury charge, which kind of give the trial court some real
7 good, I think, direction about what to do, and everybody
8 knows ahead of time what that charge is going to basically
9 look like in certain scenarios, and I think the reason we
10 haven't done it is it would be such a hard thing to do,
11 but some type of pattern discovery thing that at least as
12 a template says if you've got a breach of contract case
13 here are some things that are relevant. I know they're
14 all different, but they're also all similar, and some
15 guidance that gives the judge a template that says this
16 ridiculous request is so off the chart, you know, I think
17 that would help because until you -- in my experience a
18 lot of those things delayed it, but so did the need for
19 more and more and more and more discovery. You just can't
20 try a case fast when you've got a nine month discovery
21 period, and so until you address that I think you can
22 probably do a rocket docket, but I'm not sure you could do
23 it well until you mesh those competing concerns or at
24 least try to.

25 CHAIRMAN BABCOCK: Justice Duncan.

1 HONORABLE SARAH DUNCAN: Yeah.

2 CHAIRMAN BABCOCK: Did you have a comment?

3 HONORABLE SARAH DUNCAN: I know nothing --
4 I've never been a part of a rocket docket other than
5 accelerated appeals in the court of appeals, so my
6 comment, my concern is more theoretical. When you talk,
7 Jeff, about spending a year on this, there were things
8 that came to mind that we have spent a year or years on.

9 CHAIRMAN BABCOCK: Oh, decades.

10 HONORABLE SARAH DUNCAN: And part of what
11 always bothers me in those year and decade-long inquiries
12 is it seems to me that either because of the charges that
13 were given or from the Legislature or the Court or from
14 ourselves, we don't define our goal sometimes very well;
15 and when I'm reading this charge, the subcommittee's
16 charge, it seems to assume that it is possible for a
17 rocket docket to, one, reduce cost and delay, and two,
18 promote the role and use of jury trials in the resolution
19 of legal disputes; but then I hear from Judge Christopher
20 you need to unlink those two.

21 I don't so much care what the goal is. I
22 just think it would be helpful for the subcommittee and
23 for all of us if we defined what the goal is. Is the goal
24 to reduce cost and delay of the system and at what price,
25 or is the goal to have more jury trials and at what price?

1 And to just assume they're linked going in can cause us to
2 be doing this for a decade and really produce no
3 beneficial results for anyone.

4 CHAIRMAN BABCOCK: Pete Schenkkan, then
5 Frank, and then Richard had his hand up.

6 MR. SCHENKKAN: Following up really on what
7 Justice Duncan just said and what Professor Hoffman said
8 and from the particular perspective of a member of our
9 committee, I'd like to make sure that the work we do is
10 focused so we are not doing the wrong thing and not doing
11 the thing that is of use to the full committee and to the
12 Court, and there are two different kinds of discussions
13 going on here. One is about the pros and cons of all
14 types of a rocket docket. The other is about the causes
15 and all cures, possible cures, for the vanishing jury
16 trial. I don't think these are the same thing.

17 I hope we're not being asked to take on the
18 latter because it seems to me to be a really large,
19 open-ended topic with the distinct possibility that the
20 reasons -- and I'm not even sure of the facts, but
21 assuming that jury trials are vanishing, there's the
22 distinct possibility that they're vanishing because of
23 things like what happened in Dallas in November.

24 I mean, if you are somebody who has lots of
25 money at stake, that really doesn't look like a very good

1 system for assuring you will get a good, objective, valid
2 answer at the end of the day. Let's just sweep them all
3 out because they're on the wrong side of the party line
4 this time around, and, you know, I can imagine many other
5 causes for people trying to take their cases out of the
6 jury trial system that are different from it just costs
7 too much and takes too long to get to an answer.

8 So I'm hoping that -- this is to ultimately
9 reinforce what each of you said. I'd like to make sure
10 for the subcommittee's purpose that our charge is narrowed
11 to what about doing a rocket docket to save money and time
12 and looking at the pros and cons of that and not how do we
13 solve the vanishing jury trial problem, unless I have
14 misunderstood the charge and it is the latter, in which
15 case I'd sort of like to have a discussion of how we go
16 about doing that, because I think it's different.

17 CHAIRMAN BABCOCK: Frank, can I just say
18 something before you start?

19 MR. GILSTRAP: Please.

20 CHAIRMAN BABCOCK: Yeah, I think that the
21 phrase "the vanishing jury trial" is perhaps
22 underinclusive in the sense that it is meant to be
23 shorthand for it appears that a lot of dispute resolution
24 is moving out of the system that we're all part of, the
25 civil court system, to other places; and is that a good or

1 a bad thing; and if it's a bad thing, what are the ways to
2 make, as Justice Hecht said, the product, the civil
3 justice system, more attractive; and there are a lot of
4 people studying a lot of different things to say, okay, we
5 can make the product more attractive by -- as Justice
6 Jennings said, we can change some of the rules and we can
7 make jury instructions more plain and we can do other
8 things, but I think the charge is, is a rocket docket
9 concept something that would be beneficial to bring things
10 back -- bring cases back into the system, and I could be
11 wrong about that, but I'll let the gentleman to my left
12 correct me.

13 HONORABLE NATHAN HECHT: No, that's exactly
14 right. Let me just say, I think there's as close to
15 consensus as you can get in the legal community, in the
16 American legal community, on any subject that something
17 profound is happening to the civil justice system, and the
18 numbers are just -- they're just too staggered, and they
19 are over such a long period of time and in so many
20 different jurisdictions, and they're all parallel, so it's
21 very difficult to say it's cyclical or something.

22 But, that said, then -- you know, then there
23 are questions that everybody has raised, is it good or bad
24 and can anything be done about it, should anything be done
25 about it, would the cost of doing something be worse than

1 what's happening; and there really aren't any answers that
2 anybody has come up with convincingly to those questions.
3 People have a lot of theories, and as I said at the
4 beginning, they run the gamut from, you know, let's get
5 out there and preach it better, to, well, let's fix this
6 and this and this and this, to, you know, all the way from
7 just a better campaign to tinkering, but nobody -- while
8 there's a consensus that something's happening, there's
9 almost no consensus that this approach or this approach is
10 likely to be very helpful.

11 But, you know, it's the one percent rule,
12 so-called, that if there's only a small chance of
13 something happening but the consequences are going to be
14 dire, you have to contend with it because it's just too
15 great a risk. So the risks to the way the American civil
16 justice system operates are considerable enough that I
17 think we have to explore these things.

18 Now, I agree with Sarah that it's better to
19 have a focused charge than not, but this is just an area
20 where nobody knows for sure, and there's lots of opinions
21 and not many facts, and so I know the Legislature is going
22 to be looking at this. They're going to be looking at
23 specialized courts, they're going to be looking at all
24 kinds of things that are suggested that maybe would help
25 things be better, and it would be better to have a

1 reasoned response like we have presented to them in the
2 past when they were contemplating different things than
3 just say, "Well, no, we don't think that would work," and
4 so, you know, I myself don't know whether -- how much --
5 how much we're going to find at the end of this trail, and
6 ironically, when you have fewer jury trials, they go to
7 trial faster. So in a sense the delay part of it has been
8 cured by the fact that there aren't any, and when I was on
9 the trial bench it was awfully difficult for a busy judge
10 to get a difficult case to trial in two years. You really
11 had to work at it because you had 25, 28 cases set every
12 Monday morning, and four or five of them wanted to go to
13 trial. Most of them didn't, and so it was hard to get a
14 case to trial in two years. Now the trial judges tell me,
15 you know, you want to go sooner than that, fine.

16 So they are tied together a little bit, but
17 there -- you know, there's some independence to them, too,
18 and I'm sorry that there can't be a more focused charge
19 given, but I do think we're just -- we're dealing with
20 some issues that a lot of people around the country are
21 looking at, trying to come up with good solutions, and I
22 think we have to try in Texas courts.

23 CHAIRMAN BABCOCK: I think the order was
24 Frank, who graciously deferred to me, and then Richard and
25 then Bill and then Justice Duncan again.

1 MR. GILSTRAP: Starting out with what
2 Justice Hecht said, I think one conclusion we can draw
3 from that is probably the way to address this problem is
4 not to try to go through some type of system-wide reform.
5 It's going to get bogged down in some kind of discussion
6 of goals. It's going to be thwarted by politics, and at
7 the end of the day it may not have any effect. It's going
8 to take years.

9 Go back and look at the Federal model. As
10 Skip was talking, as a result of the 1990 Civil Justice
11 Reform Act and the autonomy that Federal judges have, we
12 now have some fairly good empirical information. We know
13 about how the district courts in the Northern District of
14 Texas as opposed to the Eastern District of Texas operate,
15 and that is extremely valuable. We don't have that at the
16 state court level, and if you're going to try to do a
17 reform it seems to me it might be make more sense -- and
18 I'll just throw this out since we're brainstorming -- to
19 find someplace in the state of Texas, and there would be
20 some political considerations, where the judges in a
21 certain county could get together and say, "Okay, we're
22 going to set up a rocket docket" and just see how it
23 works. I think we'd get a lot quicker information and a
24 lot more valuable information from that than going through
25 some type of two-year reform process in this committee and

1 then the Court and the Legislature.

2 CHAIRMAN BABCOCK: Richard Munzinger, you
3 had something? No? Yes?

4 MR. MUNZINGER: I don't want to bore
5 anybody, but Justice Hecht talked about the problem we're
6 losing business. Buddy talked about Judge Bunton. When
7 decisions are made whether to arbitrate or to try a case
8 in court, the decision is influenced to a large extent by
9 those of us in this room who practice law. So my client
10 says to me, "I have an arbitration clause, should I seek
11 to enforce it or should I try the case in court?" The
12 question becomes, first, which court, state or Federal?
13 Well, let's pretend that we're dealing with a case where
14 the case can be removed to Federal court or can be filed
15 in Federal court originally because there is Federal
16 jurisdiction. A client goes through a litany of
17 considerations or you go through the litany of
18 considerations that you have with your client, saying
19 whether you would prefer arbitration or recommend
20 arbitration as distinct to trial.

21 I once had a securities case in which the --
22 an issue was the propriety of the investment, and to
23 understand the propriety of the investment required
24 several hours of work with an expert witness, and a jury
25 if it were a jury trial to explain the nuances of tax law

1 so that the jury could understand why this investment had
2 been made or had been recommended.

3 We were in chambers with Judge Bunton, and
4 he said to me, "Mr. Munzinger, you know that no case in my
5 court takes more than three days to try." I said, "Judge,
6 sir, I have an expert witness, it will take me at least
7 two hours to lay the groundwork to get" -- and he began to
8 laugh. "Mr. Munzinger, experts don't testify in my
9 court," and this is true. In Judge Bunton's court in
10 many, many cases you stood up as a lawyer and you read a
11 summary of what your expert witness would say, not -- the
12 witness didn't testify, and you didn't read that he was a
13 professor of this and he had done that and he had done
14 this. "He's been qualified as an expert, Mr. Munzinger.
15 Don't waste the jury's time," when qualifications may have
16 made all the difference in the world as to the
17 believability and credibility of the expert, and that was
18 the court that I was going to take a multimillion dollar
19 investment question to a jury and so what would my -- what
20 would your advice be?

21 Well, your advice would be take it to a
22 forum in which the nuances and the details of the case may
23 be examined with a degree of interest required for justice
24 and truth, and if that means that you avoid the United
25 States District Court, don't use it, and if it means you

1 avoid the 171st District Court in El Paso County, don't
2 use it.

3 The things that prompt lawyers to recommend
4 arbitration are questions of the integrity, intellectual
5 integrity of the -- or intellectual ability of the judge,
6 his or her integrity, do they play favorites, are you in
7 front of Joe Schmoehawkin, who is a big contributor to the
8 state court judge? Big consideration here. Those aren't
9 things that are cured by statistical studies and rules
10 changes.

11 Another thing you consider is is a jury of
12 twelve laypersons competent to make a decision as to
13 whether drug X will or won't work, for god sakes, and for
14 them to understand it and listen to days and days and days
15 of Ph.D. testimony, are they going to understand. Oh,
16 these are the considerations. That's why I think the
17 system to some extent is not getting cases, and I don't
18 want to bore anybody, but that -- that's a problem, and
19 that was why I raised the point about is the goal here to
20 increase the number of jury trials? Then start asking
21 whether these rocket dockets are getting jury trials or
22 quick settlements.

23 And, Buddy, I worked for Vernon Winchester,
24 too. He taught me how to try lawsuits. Vernon Winchester
25 was the toughest claims manager in America.

1 MR. LOW: He was.

2 CHAIRMAN BABCOCK: 300-dollar claims at a
3 time, right?

4 MR. MUNZINGER: Oh, he was the meanest,
5 toughest guy you ever saw in your life. Made trial
6 lawyers out of a lot of us, didn't he, Buddy?

7 MR. LOW: Boy, he did. He trained me, not
8 very well, but a lot of it.

9 MR. MUNZINGER: Me, too.

10 CHAIRMAN BABCOCK: Bill. You know this
11 Winchester guy?

12 PROFESSOR DORSANEO: No. I'm not that old,
13 not quite. Proceduralists know how to simplify the
14 procedural system, if that's what people want to do. I
15 mean, in a sense the 1937 version of the Federal rules and
16 our subsequent modification of Texas rules involved, you
17 know, some simplification. We've had some simplification
18 in terms of jury charge practice during Judge Pope's
19 leadership era, but for the most part we haven't really
20 simplified things procedurally. We've kind of made things
21 more complicated in a variety of different ways.

22 I gather that these rocket docket systems
23 somehow bypass the procedural rules that we normally go
24 by, either because the judge doesn't go by them or some
25 local rule or practice is used instead.

1 CHAIRMAN BABCOCK: Or he just says the rules
2 real fast. Just kidding, Bill.

3 PROFESSOR DORSANEO: I don't hear anybody in
4 academic circles seriously saying that we need to simplify
5 the joinder rules or we need to modify pretrial practice
6 rules that are, you know, mostly what academic lawyers
7 find fascinating. That could be done, and that's
8 something the committee could do, and a reasonably good
9 proceduralist could tell you exactly what could be done to
10 make the entire system, you know, more streamlined, but
11 nobody is interested in doing that, so it seems to me. So
12 I wonder if that should be put up as a -- as a potential
13 goal and examined from top to bottom.

14 CHAIRMAN BABCOCK: Justice Duncan, then
15 Judge Yelenosky, then Richard Orsinger.

16 HONORABLE SARAH DUNCAN: My apologies to
17 Justice Hecht and the committee. I apparently didn't
18 articulate my concern very well. If the -- if the primary
19 concern is the vanishing jury trial, it seems to me that
20 the subcommittee ought to be able to determine what type
21 of cases are not getting tried, what type of cases are
22 going to ADR, to mediation, to some other type of dispute
23 resolution. My hunch is those cases -- I mean, just
24 looking at appellate opinions around the state -- are
25 cases in which there is an arbitration -- some type of

1 alternative dispute that's imposed upon the parties. My
2 understanding is that that's not necessarily a less
3 expensive system, maybe quicker, but it's extraordinarily
4 expensive.

5 So all I'm suggesting is let's identify what
6 kinds of cases are leaving the system, if our primary
7 concern is the vanishing jury trial and that our product
8 isn't attractive to the people we want it to be attractive
9 to, and then let's work on resolving that problem,
10 because, you know, I think if you look at most of the
11 docket is family law cases. I don't perceive that those
12 cases are leaving the system. Now, they're going to
13 different types of decision-makers, like magistrates or
14 whatever, but I'm not -- I'm not saying cases aren't
15 leaving the system, and I'm not saying that that's not a
16 concern of mine. I'm saying I don't want to impose a
17 rocket docket on everybody just because people -- cases
18 are leaving the system without any empirical proof that
19 imposing a rocket docket on everybody is actually going to
20 bring cases back into the system.

21 That's what I mean about the fuzziness of
22 the linkage here, is let's identify what the primary goal
23 is. If it's to make our product more attractive to our
24 customers, let's figure out what about our product isn't
25 attractive to our customers right now and fix that.

1 CHAIRMAN BABCOCK: Judge Yelenosky.

2 HONORABLE STEPHEN YELENOSKY: I want to
3 touch on three points, so you'll know when I'm done.

4 CHAIRMAN BABCOCK: One.

5 HONORABLE STEPHEN YELENOSKY: One is public
6 perception, the second is what lawyers want, and the third
7 is central docket. I don't know that anybody has spoken
8 to the public perception. In the mere two years I have
9 been on the bench I have sat through a lot more jury
10 trials than I ever tried myself, and in very many of those
11 on voir dire the question is asked by the plaintiff's
12 attorney, who is leery of what the public is thinking
13 about plaintiffs attorneys, "How many people think there
14 are too many jury" -- or "How many people think there are
15 too many trials?" In liberal Travis County you will get
16 95 percent of the people raising their hands saying there
17 are too many -- too many cases.

18 Now, that's a blunt perception. They don't
19 say too many lawsuits or too many trials, but I think you
20 can take that as a public perception that if they were
21 listening to us in this room they would say, "What do you
22 mean there's a problem? That's good." So I'm not making
23 a value judgment on that. I'm just saying that's
24 something you need to recognize, that this room is not --
25 is not representative of the public at large.

1 Secondly, what lawyers want -- and this will
2 tie a little bit into the central docket -- is the problem
3 that lawyers, when both sides want to do it, can't get it
4 done because the judges aren't available, or is it that
5 one side wants to do it and the other side doesn't and we
6 need to tell judges in the proper instances to hear that
7 dispute and under our level three force them into
8 something that's even shorter than level two.

9 I'm on the subcommittee with Jeff and
10 everyone else, and we talked a little bit about this a
11 couple of days ago. Level three certainly would allow you
12 to do in an individual case a rocket docket kind of thing,
13 but I've never gotten the signal as a trial judge that I
14 should really entertain a level three that's faster unless
15 everybody wants to do that. Now, if we were signaled that
16 that was the case then I think the mechanism is certainly
17 there, but do lawyers want it?

18 Tying into central docket, in Travis County,
19 this morning I was late because I was handling our own
20 little 15-minute Friday morning rocket docket in which
21 because -- Judge Christopher, because it's a state court
22 and not a Federal court I granted a continuance, but the
23 result of that continuance was because the lawyers wanted
24 it that they're getting another hearing Monday morning at
25 9:00 o'clock and then a second hearing -- these are

1 related matters -- the following week, any time they want.
2 The judges are available. They can get that hearing, and
3 this is just a minor instance of it, but my understanding
4 of our statistics in Travis County is that you can pretty
5 much get a hearing when you want because we have a central
6 docket. So if both lawyers want to do it, it can be done;
7 and moreover, jury trials, the number of jury trials we
8 didn't reach last year was probably three or four.

9 And the lawyers can speak better to this
10 than I could in Travis County, but I think if you're
11 talking about whether judges are available in a central
12 docket system, they are. So then you're saying the
13 problem is that one lawyer wants to do it and the other
14 doesn't, and then you're talking about a command structure
15 that I haven't gotten the signal we should have now, which
16 is to force people through a rocket docket.

17 And then related to that -- we also
18 discussed this at the committee meeting -- if you're going
19 to have a rocket docket, from the lawyer's perspective,
20 maybe less so from the judge's perspective, but if all
21 their cases are on a rocket docket then lawyers' case
22 loads are going to have a decrease and their turnover is
23 going to have to increase. Rather than having 30 cases
24 which take a year or two, they're going to have to have 15
25 cases that take six months and then turnover to 15 cases,

1 because when you have one rocket docket among all your
2 cases that's fine, but if they're all rocket docket that
3 is a different kind of sea change, and I am done.

4 CHAIRMAN BABCOCK: Okay. Good. I mean good
5 comments, not good that you're done. Judge Patterson I
6 think had her hand up, Richard, before you did. Sorry.

7 MR. ORSINGER: That's fine.

8 CHAIRMAN BABCOCK: And she's a judge.

9 HONORABLE JAN PATTERSON: I'm glad to hear
10 Judge Yelenosky's comments because I was going to yield to
11 him to ask about the practice because my sense also is
12 that there are some districts, as Richard points out, that
13 really do this job well and some maybe less well and that
14 the ones -- and I want to -- I think statistical would be
15 very important to know if there is a relationship between
16 timing and jury trials and use of the system, but I think
17 anecdotal is also very important, because my sense is
18 that -- and you-all can tell me if I'm wrong, but we have
19 two very different adjoining counties here, Williamson and
20 Travis, but I think in both of those counties the system
21 is very user-friendly, which I -- and noncoercive and yet
22 you can get a jury trial within six months, if you want
23 one.

24 And so I think that time and fast is not in
25 and of itself a value, as Richard points out, but we

1 need -- we can have it all in my view. We can have the
2 justice, and we can have a thoughtful system. Time is not
3 necessarily the ultimate value, although it does feed into
4 it. It is a very important factor, but I think both of
5 these counties without straining or using the coercive
6 rocket docket have managed to provide a very user-friendly
7 system.

8 I think we also slid into -- both state and
9 Federal courts slid into this system in a cultural manner.
10 We became accustomed to lengthy discovery and cumbersome
11 procedures, and I think that through judges and lawyers,
12 and particularly efficient, effective, honest judges, that
13 we can dredge our way back to a better point. I don't
14 think that faster is necessarily a value, but I do think
15 efficiency is a value, and I think that -- I'd like to
16 think that lawyers look for -- whether it's the counties
17 or the systems that are the most efficient or that those
18 are the ones that do attract the good business.

19 I also speak up because I have practiced
20 extensively before Judge Bunton, and I never was the
21 target of his water gun, which was also used in the rocket
22 docket, and that system was a little bit -- as Richard
23 points out, a little less thoughtful sometimes, although
24 there was also a -- an attitude of why not, why can't we
25 get this done in a practical amount of time and why can't

1 we be efficient, and so I have a great deal of admiration
2 for that tone. I don't think it has to turn into a matter
3 as some of these Eastern District rocket dockets, Eastern
4 District of Virginia rocket dockets, turn into as a matter
5 of ego and "We'll show those lawyers we can get it done,
6 whether they want to get it done or not."

7 I would like to think that we can have it
8 all, that the state system is a user-friendly, effective
9 system in most -- in many parts of the state and that we
10 should fine-tune it and make it even better, and so I
11 don't think it's necessarily a -- the rocket docket will
12 produce more jury trials, but we ought to produce a better
13 system than the rocket docket or some aspect of that,
14 noncoercive, I point out, would move us in that direction
15 to make it a better system.

16 CHAIRMAN BABCOCK: Thank you, Judge.
17 Orsinger and then, David Jackson, you had your hand up a
18 long time ago. I'm sorry I missed you, but we'll do
19 Orsinger, then you, then Nina, and somebody else is down
20 there, but Orsinger first.

21 MR. ORSINGER: Okay. I have several points
22 because I have been taking notes. The first is, is that I
23 think that this committee is as good a place as any to
24 discuss big picture concerns over the litigation process
25 as long as we are not being circular in our discussions.

1 Once we stop covering new ground I feel like we've
2 probably done what good we can, and we have the ear of the
3 head of the court system here in Texas concerned about the
4 larger issues, and so I think a certain amount of our time
5 for that is appropriate.

6 Second, I think that looking at the rocket
7 docket is overly limiting. I think we ought to look at
8 the entire dispute resolution process, particularly if
9 what's happening is that people are telling us that they
10 prefer alternate dispute resolution mechanisms to the
11 traditional litigation model, and if that's true then
12 maybe we should spend some of our time being sure that the
13 alternate dispute resolution processes are achieving
14 justice, and I'd say by ADR I mean, for example, mediation
15 and particularly arbitration and then summary trials and
16 some of the other alternate dispute resolution processes
17 that we don't do too much. And I would a like to ask the
18 question of how do summary judgments fit into this whole
19 process of migration away and how does appeal fit into it.

20 Now, with regard to arbitration, between two
21 big corporations and particularly on a multinational
22 basis, arbitration is the only effective alternative
23 because there is no international jurisprudence or trial
24 system that can resolve issues on an international basis.
25 What I'm concerned about is consumer cases, which I would

1 include family law people in consumers, but I'm talking
2 about individuals who are contracting with businesses or
3 even industries.

4 I'm concerned that when they enter into an
5 arbitration agreement they think it's going to be cheap,
6 and they don't realize what rights they're giving up, and
7 they don't realize that the arbitration process is going
8 to cost them because they have to pay for their judge and
9 they have to pay for their court reporter and they have to
10 pay for their courtroom, instead of those being provided
11 for free by the government. I'm also concerned about the
12 lack of oversight in the arbitration process. In the
13 particular instance there is no oversight that the
14 arbitrators are applying Texas law at all, much less
15 correctly and either procedurally from the standpoint of
16 evidence or substantively from the standpoint of making
17 decisions that are founded on Texas law.

18 I'm also concerned about increasing
19 arbitration as opposed to litigation that we lose the
20 importance of contribution of the common law process of
21 developing the law on a case-by-case basis based on
22 specific fact problems of real people rather than just
23 theoretical concerns that might issue from a committee and
24 become some kind of statute, and perhaps we ought to
25 consider more appellate review of the process and the

1 substantive law that's being applied in arbitration
2 awards.

3 Now, on the subject matter of the jury
4 system, which I very strongly support, to me personally,
5 the jury system is more important to us in criminal law
6 than in civil law. The grand jury process, which was
7 originally, I think, conceived as a limitation on
8 government of uses has turned out just to be nothing more
9 than a discovery process for prosecutors, and the only
10 human face I guess standing in front of the railroad train
11 of a prosecution that really has got more minim than it
12 should is the petit jury, and we do have to live with the
13 horrible cases where obvious murders are acquitted for the
14 wrong reason, but on the whole I favor the jury system in
15 the criminal law as a protection of our civil rights, and
16 that appears to be healthy. It appears that the jury
17 system is doing well in the criminal law process.

18 Now, on the civil side, to me the jury is
19 important because it puts a human face on the application
20 of the law to individual cases, and having a jury up there
21 interpreting the law and applying it to the facts is a
22 humanizing process, and apart from that it brings average
23 people into the litigation process so they can see what
24 the law is and how it applies and see how judges act in
25 their courtroom, and if they're influenced they can allow

1 their vote to be heard in judicial elections or even
2 legislative elections.

3 Now then, from the standpoint of what do we
4 do about it, we're dealing with people here, which means
5 psychology, and the principles of psychology in modern
6 business practice suggest that we should have an
7 experimental approach, that we ought to have a committee
8 that develops a model or a hypothesis, that we ought to
9 test it intellectually or theoretically first, and then
10 when it's been through all of our thought experiments and
11 debates and everything then we put it in practice
12 somewhere, and it seems to me that you should put it on a
13 voluntary basis on a widespread basis for those people who
14 both sides elect to a rocket docket, let them elect into a
15 known set of procedures that they agree will apply and no
16 one is forced in against their will and then also at the
17 same time find one or two local jurisdictions where the
18 judges are willing to impose a rocket docket and make it
19 mandatory, because at some point you're going to have to
20 experiment mandatory application of the principles.

21 And then I think we're going to need
22 briefing attorney support for wherever the rocket dockets
23 are in place because I think it's unreasonable to expect a
24 state district judge with no briefing support to be able
25 to deal with the many motions and things that will be

1 presented, and I think we ought to monitor the progress of
2 both the voluntary systems and one or two counties of
3 involuntary, which by the way, we did the involuntary on
4 the electronic filing stuff and we're still at that stage
5 where there is a few counties where electronic is filing
6 and then there is a number where it's voluntary, and it
7 reminds me of a story I read in some inspirational
8 literature I'll share with you that the Apollo 11 moon
9 project was off course 95 percent of the time, but because
10 of mid-course corrections they were able to achieve a soft
11 landing on the moon.

12 So I think what we need to realize is that
13 our model doesn't have to be perfect before we implement
14 it in one locale or on a voluntary basis. We can come up
15 with a reasonable, workable model. We can promulgate it
16 not as an official rule of procedure but as an ancillary
17 order of the Supreme Court, subject to modification by a
18 signature of five judges, and proceed if you will on a
19 kind of a interactive basis. Or it could be by a local
20 rule.

21 Okay. The next point I want to make is the
22 summary judgment procedure. It is oriented right now
23 toward eliminating meritless claims or defenses or
24 eliminating cases that have no fact issues. In reality
25 the primary use of summary judgment in my practice is to

1 present questions of law to the trial court for resolution
2 so you can decide how to settle your case. I don't know
3 if that's the experience of everyone else. Maybe 99
4 percent of the summary judgments are frivolous cases being
5 thrown out of court, but the ones I find are legal issues
6 that can't be resolved by the parties and they want some
7 guidance, and maybe we ought to allow trial judges to hand
8 down rulings in the summary judgment context on pure law
9 questions without regard to whether there are conflicting
10 fact issues or not and then open up some kind of
11 interlocutory appeal to the court of appeals that's more
12 than what we have now, which is voluntary on everybody's
13 part, so that we can get these legal questions that are
14 case determinative up to a final decision by the court of
15 appeals and back down to the trial court as a basis for
16 settlement.

17 Last point I want to make is that I think we
18 should consider --

19 CHAIRMAN BABCOCK: What point number is
20 this?

21 MR. ORSINGER: But it's the last one. The
22 family law matters require separate consideration, and
23 they do dominate our docket, but I'll just give you --

24 CHAIRMAN BABCOCK: What a novel thought.

25 MR. ORSINGER: I'll give you two for

1 instances, although I could give you many. Some divorces
2 are filed when one party is unhappy with the marriage, but
3 the marriage is reconcilable because the divorce is a
4 wake-up call to the other party to attend to the
5 complaints of the one who is willing to leave the
6 marriage. Now, we could decide that we want to elevate
7 the speed at which we dispatch divorce cases over the
8 prospect of people initiating the divorce process before
9 they really truly want to end their marriage, but if we do
10 the other, which has been the traditional approach, that
11 we are going to be sensitive to the fact that in family
12 law litigation a divorce may mean you have a problem, but
13 it doesn't necessarily mean the problem is failed, then we
14 need to leave the litigants time to see if they can work
15 out their personal problems before they're forced to
16 divorce because of some rule we adopt here in Austin,
17 Texas.

18 With regard to the children, sometimes
19 children do not react well to a parent deciding to leave
20 the marriage. It may be the result of an affair, it may
21 be the result of just disaffection; but the children,
22 particularly the older children, tend to take it
23 personally; and if you are forcing a parent access plan on
24 children who are still grieving from the breakup of their
25 parents' marriage, you're going to force someone to put in

1 place a permanent arrangement with the children that's not
2 subject to modification, short of initiating another
3 lawsuit; and if you put that in place before the family is
4 ready for it, we're again forcing people to put their
5 personal relations into a formal place and a formal
6 arrangement that's not subject to modification simply
7 to -- because of some abstract rule of how quickly you
8 want to work cases. So that was my comments.

9 HONORABLE JAN PATTERSON: We can make a
10 decades long project out of this after all.

11 CHAIRMAN BABCOCK: But other than that,
12 Justice Hecht.

13 HONORABLE NATHAN HECHT: Several minutes ago
14 when he began he said "What about summary judgments," and
15 just statistically, in state courts we only -- in Texas we
16 only keep them for district courts, and they're down in
17 absolute numbers and in the rate of summary judgment,
18 unless maybe in the last year for the first time, and in
19 the Federal system they are flatlined.

20 HONORABLE JAN PATTERSON: Where are pleas to
21 the jurisdiction?

22 HONORABLE NATHAN HECHT: I don't think we
23 keep statistics on that.

24 HONORABLE STEPHEN YELENOSKY: But aren't we
25 doing what Richard says we need to be able to do? Maybe I

1 didn't understand what you were saying, but it sounded to
2 me you were describing a partial summary judgment, which
3 we do all the time. I mean, we clear out eight out of
4 nine claims because --

5 CHAIRMAN BABCOCK: Sure.

6 HONORABLE STEPHEN YELENOSKY: -- the facts
7 are irrelevant, it's not a claim.

8 MR. GILSTRAP: It's not appealable.

9 MR. ORSINGER: We're talking about cases
10 where the law is unclear. In other words, you may have a
11 claim if you interpret the law one way, and you don't if
12 you interpret the other way, and it's not clearly
13 frivolous, and yet it is outcome determinative. So we
14 have to try a whole case to a jury verdict and appeal it
15 before we find out what the law is.

16 HONORABLE SARAH DUNCAN: What statute of
17 limitations applies.

18 CHAIRMAN BABCOCK: Hang on for a second.
19 Bruce Williams is here. Bruce, do you have to speak now
20 or else you'll miss your plane?

21 MR. WILLIAMS: No, no. I'm good.

22 CHAIRMAN BABCOCK: Okay. Let's -- we're at
23 our normal break time. I know David and Nina for sure.
24 have been very patient waiting to say their piece, not
25 only through Richard's soliloquy, but before that, so

1 we'll break, come back, hear from them, and then turn to
2 Mr. Williams so that he can take care of his travel plans.

3 (Recess from 10:41 a.m. to 10:55 a.m.)

4 CHAIRMAN BABCOCK: Back on the record.

5 Here's what we're going do. We're going to take two more
6 comments on this topic, one from David Jackson and one
7 from Nina Cortell, and then we're going to break, suspend
8 the discussion, although we're going to come back to it,
9 and talk about the 904 because Bruce Williams has made the
10 trip here to talk to us and needs to talk to us, so David
11 Jackson first and then Nina and then we'll move on to Rule
12 904.

13 MR. JACKSON: My comment --

14 CHAIRMAN BABCOCK: This better be good,
15 you've waited so long.

16 MR. JACKSON: Well, that was one of my
17 points, you shouldn't have taken a break for what I had to
18 say, but mine is more from a practical point of view that
19 sort of dovetails along with what Judge Gray was saying.
20 California went through this in the early Nineties, and
21 they called it the rocket docket, and there was a mad rush
22 throughout the country to bring in court reporters from
23 all over the country to try to get them there to solve
24 this crisis that they had with all these trials going on
25 in all of these courtrooms, and people were going out

1 there. They were leaving Texas and leaving Arkansas and
2 leaving wherever they could leave to go to California and
3 get these jobs, but their rocket sort of fizzled out. You
4 know, they burned up all the cases that they had, and it
5 worked, and now those reporters are, you know, leaving. I
6 mean, it wound up being very successful and then it sort
7 of just -- they didn't have anything else to do for a
8 while. So you might want to study that from a point of --

9 CHAIRMAN BABCOCK: Thanks. Nina.

10 MS. CORTELL: I just want to say that one of
11 the crown jewels of the judicial system is appellate
12 review, and with all due deference to some of the
13 criticisms that have been lodged against our trial system
14 or trial judges, what we're hearing now are monumental
15 horror stories coming out of arbitration, and I think the
16 love affair with arbitrators could be coming to a pretty
17 quick end for a variety of reasons. One of them is,
18 sometimes at least, the perceived arbitrariness of the
19 decision and then the nightmare of a limited appellate
20 review.

21 So with that in mind, it seems to me it's
22 good and fine to talk about expediting the trial system,
23 but I would suggest that the subcommittee at least look
24 briefly at the timetable of the appellate review system,
25 because the fact that we offer appellate review is huge.

1 It's a big advantage. I think it may ultimately cause for
2 a lot of people to forego the arbitration system both in
3 the contract clause and otherwise, but the limitation on
4 our appellate system can be you've got it, but it can
5 itself take anywhere from one to five years, and,
6 therefore, I think the timetable at the appellate level at
7 least deserves some review by the subcommittee.

8 CHAIRMAN BABCOCK: Thanks, Nina. Okay.
9 Buddy, would you transition us to Rule 904 and introduce
10 Mr. Williams, who has come to speak with us?

11 MR. LOW: I will, but it's kind of hard to
12 go from a rocket docket down to an affidavit, but we'll do
13 that. We presented 904, which is the result of about two
14 years work of the State Bar committee, including
15 professors, judges, plaintiffs lawyers, defense lawyers,
16 and whoever. They worked for two years on the project
17 because the statute was not sufficient, and there are
18 some -- I'll let Bruce tell you a little more about that.
19 The committee, the subcommittee approved -- worked with
20 them for about six months, and we came up with a joint
21 recommendation. It was presented last time, and some of
22 the comments -- I made note of some of the comments that
23 were made.

24 First, there was a change from the statute
25 from the number of days. Second, there was a question of

1 whether this would be considered substantive law, which
2 the Supreme Court couldn't or shouldn't change. The
3 answer to that is the Supreme Court doesn't do anything
4 like that without going through the Legislature, and if we
5 pass something then the Court has their discretion and
6 their right to follow up and so forth, and I'll point --
7 that's one of the points, and the Legislature would have
8 to be notified.

9 The second concern was whether medical bills
10 have been paid by insurance and that kind of thing, and
11 the last thing was -- and I think we've pointed out and if
12 you need to point it out more clearly -- this affidavit by
13 custodian or doctor does not prove that this treatment was
14 necessitated by the accident giving rise to the lawsuit.
15 It only goes to the reasonableness and the charges are,
16 you know, necessary for the condition, the reasonableness,
17 and tries to short-circuit and prevent from having to go
18 item to item during the trial. You have that already
19 done.

20 The problem we were having is initially I
21 think somebody would just say, "I object." Then you had
22 to prove it. Now, under what we've done you have to go in
23 and show what you object to and why and have the proper
24 affidavit. I asked Bruce -- Bruce has worked on this for
25 a couple of years, and I've worked on it maybe 30 minutes,

1 so let's go from somebody that doesn't know what he's
2 talking about to let you-all hear from somebody that does.
3 Bruce.

4 MR. WILLIAMS: I'm thankful to be here and
5 to have the opportunity to talk to you for a minute. I'm
6 with the Cotton Bledsoe law firm in Midland. I'm board
7 certified in civil trial and personal injury law. I've
8 been on this committee for many years. I don't want to
9 tell you how many because the board has come up with a
10 rule that if you've been on the committee six years that
11 you have to be off of there --

12 MR. LOW: Don't suggest that.

13 MR. WILLIAMS: -- which is part of the
14 problem here. I have been the chairperson -- this is my
15 second year as the chairperson, and most of the people who
16 worked on this rule had to be kicked off the committee
17 because they've been on the committee for too long, and so
18 we've got a whole bunch of new people, and they're very
19 good people. We still have law professors and a justice
20 of the Court of Criminal Appeals and a couple of civil
21 appeals judges, and so the quality of the people is very
22 good, but it's kind of like herding cats a lot. You know,
23 you have plaintiffs lawyers, you have defense lawyers, you
24 have judges, and they all want to go a different way, and
25 they all -- if they're new on the committee then they want

1 to plow the same ground and go down all the bunny trails
2 that you just went down. So we've gotten to a point with
3 Rule 904 that I think we're about there, but then the
4 Legislature has now thrown a skunk in the jury box, and
5 that is the paid or incurred statute such that, you know,
6 the medical bills that go to the jury is not just those
7 that are reasonable and necessary, they now also have to
8 have been actually paid or incurred, which this rule does
9 not address, and so those are some of the things I need
10 some direction from you if we want to go down that bunny
11 trail.

12 One of the things I do understand is you
13 cannot solve every problem with a single rule, and for the
14 reasonable and necessary I think the rule that we've come
15 up with is very good and addresses a lot of the problems
16 that we currently have and the gamesmanship that's been
17 going on for years. Some of that gamesmanship is, you
18 know, for the plaintiff's lawyer it's a cheap way to prove
19 up reasonable and necessary, and that's important. One of
20 the problems is that if the defense lawyer files a
21 counter-affidavit then that knocks out your affidavit, and
22 you then have to go and get somebody to come into trial
23 and testify to reasonable and necessary.

24 On the defense side, there's been
25 gamesmanship because in smaller cases defense people will

1 use the statute as a settlement tactic. They will
2 actually go get somebody to do the counter-affidavit so
3 that in a case of low cost you now have upped the ante for
4 the plaintiff's lawyer and so that when you go to
5 mediation they know they're going to have to bring the
6 doctor or doctors to prove up reasonable and necessary, so
7 you've put your chip in on how this is all going to work
8 at trial and why they should settle it today.

9 Some of the other games is that the
10 reasonable and necessary affidavits that have come in,
11 they include language of causation sometimes. You know,
12 you get an affidavit that looks like -- I had my secretary
13 do one that just came in. It's a form, and it looks like
14 this, and they all look the same, and you might get right
15 before the time period for these to be filed you'll get a
16 stack this high in your office from the law firm, and each
17 one of them will have these affidavits on them. They all
18 appear to be the same thing that you get, but they may
19 have in there -- they may have inserted that "These are
20 reasonable and necessary as a result of the accident of
21 such and such date," so then if you haven't noticed that
22 and you haven't gotten somebody to controvert that
23 affidavit then the other attorney will say at trial, "Gee,
24 no, you didn't controvert it, so you can't challenge it
25 now." That affidavit has to go in.

1 What are some of the other games that are
2 played? I expect that one of the games that's going to be
3 played now is that we'll see affidavits that include the
4 language of actually paid and incurred within the
5 language -- within those single-spaced affidavits. So
6 part of the problem also is that you might have as the
7 plaintiff's lawyer submits that to the doctor, the doctor
8 doesn't have time to fool with this, gives it to the
9 person who is the record custodian and billing. They sign
10 it automatically. They attach those records that were --
11 that have been incurred from that date, and you're going
12 to have flu shots in there on an accident, you're going to
13 have Pap smears, you're going to have things that don't
14 have anything to do with this accident, but if you haven't
15 gotten an expert to file a controverting affidavit then
16 you're not going to be able to test those things that
17 obviously aren't relevant to the issues that you're
18 talking about.

19 So the defense lawyer is faced with what do
20 I do about charges that are not related to this accident?
21 The affidavit is not supposed to be about causation, but
22 if I don't controvert it can I then complain about the Pap
23 smear, the flu shot, that it's obvious aren't going to be
24 part of it, but less obvious, can I complain about the
25 ringing in the ears that has been pre-existent for ten

1 years before the accident that they came in and were
2 treated for in addition to all the other things they were
3 treated for.

4 So long way of saying there's lots of
5 gamesmanship that's currently going on with regard to
6 affidavits of cost and necessity of services, and this is
7 our best effort at trying to cut down on some of those
8 games, and we're not going to be able to cut down on them
9 all. The general thought and scheme that we're trying to
10 achieve here is that not so different from the statute as
11 it exists, the plaintiff's attorney can file an affidavit
12 of reasonable and necessary. The defense attorney, if
13 he's going to contest it, has to get somebody who is
14 qualified to fill out an affidavit -- controverting
15 affidavit, but once that controverting affidavit is filed,
16 under our scheme it does not knock out the original
17 affidavit of the plaintiff's lawyer. It allows him to
18 continue to go forward with that affidavit.

19 The controverting affidavit is also
20 submitted to the jury. It becomes a fact question for the
21 jury to figure out, for the lawyers to argue in closing
22 argument if they want to, but it doesn't -- that makes it
23 such that the plaintiff's lawyer once a controverting
24 affidavit is filed doesn't have to go and get the doctor
25 to come in and prove up reasonable and necessary. It also

1 allows for additional cross-examination at trial if you
2 want to, and so I think it is a better system than what
3 the Legislature has come up with in the Civil Practice and
4 Remedies Code, section 18.001.

5 MR. LOW: Bruce, let me interrupt you for
6 just a second.

7 MR. WILLIAMS: Okay.

8 MR. LOW: If I understand what you're
9 saying, what it means is proper affidavit, I mean, doesn't
10 get to necessary, a proper counter-affidavit, either one
11 of those may introduce those affidavits at trial, but if
12 they choose they can call a witness.

13 MR. WILLIAMS: They can, right.

14 MR. LOW: So it won't keep them from calling
15 the witness.

16 MR. WILLIAMS: No.

17 MR. LOW: But it means you don't have to.
18 You have a choice.

19 MR. WILLIAMS: That's correct.

20 MR. LOW: But if you don't file a
21 counter-affidavit then you can't do that.

22 MR. WILLIAMS: That's right.

23 MR. LOW: And the counter-affidavit can't
24 say, "I just object." It's got to point out specifically.

25 MR. WILLIAMS: Just like it is now.

1 MR. LOW: If you get like a Sloan case that
2 came out of the Beaumont court, you can strike that part
3 of the affidavit, that necessitated by reason of this
4 action?

5 MR. WILLIAMS: Right. That's the other
6 thing in the rule that we have included --

7 MR. LOW: Okay.

8 MR. WILLIAMS: -- is a direction to the
9 court that if you've got that shenanigan going on of
10 somebody including the language in an affidavit that's not
11 supposed to be in there, that the court can strike
12 it --

13 MR. LOW: Right.

14 MR. WILLIAMS: -- and should strike it.

15 MR. LOW: I apologize for interrupting. I
16 just wanted to be sure I understood. Thank you.

17 MR. WILLIAMS: Right. Right. The
18 problem -- I mean, it's -- I think it's the best that we
19 could come up with at this point in time. The problem is
20 the skunk that's in the jury box, and my question to you
21 is should we go back to our committee and try to attack --
22 and try to put something together to assist the bar and
23 our judicial system in addressing paid or incurred?

24 CHAIRMAN BABCOCK: Okay. Pete.

25 MR. SCHENKKAN: I don't know about the

1 answer to that question, but I do think that even with the
2 more limited task some more precision in the words is
3 needed. Both the text of the proposed rule and the text
4 of the proposed -- the introduction to the proposed
5 affidavit depart from the statute in a way that is not
6 necessary and may create an opportunity for mischief,
7 including some of the kinds you are concerned about. If
8 we look at (d) on the second page, "This rule does not
9 affect the admissibility of other evidence concerning
10 reasonableness and necessity, except that the opponent of
11 the affidavit may not contest reasonableness and necessity
12 of the services." The statutory language which has been
13 used up above in (a) and (b) is about the amount charged
14 being reasonable and the services being necessary, and
15 those are not the same things as the services being both
16 reasonable and necessary. It's both over -- more
17 inclusive in one way, less inclusive in another.

18 I think (d) should track (a) and (b). "This
19 rule does not affect the admissibility of other evidence
20 concerning the reasonableness of the amount charged and
21 the necessity of the services" and, again, "except that
22 the opponent may not contest the reasonableness of the
23 amount charged."

24 MR. LOW: Pete, slow down and let Bruce have
25 just a minute -- that's a good point -- so that he can

1 make a note of that because it could be misunderstood, the
2 necessity that we want to get to.

3 MR. SCHENKKAN: Okay. And then there's one
4 more that goes with it, if this is time.

5 MR. LOW: Yeah. Go ahead.

6 MR. SCHENKKAN: And that's in (f)(1) when we
7 introduce the proposed affidavit that now says, "An
8 affidavit concerning cost and necessity." Again, it
9 should not say "cost." The amount charged in most of our
10 medical system is not the cost. The cost is set by other
11 law, and it is lower than the amount charged. The
12 provider is often obliged by law to charge his usual and
13 customary charge, knowing that the law is the amount that
14 is paid or due is less, and so we don't want to introduce
15 another word here. We want to again say, "An affidavit
16 concerning the reasonableness of the amount charged and
17 the necessity of the services," is okay if it's done the
18 following way.

19 MR. LOW: Bruce, do you -- I don't want to
20 stop it, but do you have that? Just one second.

21 MR. SCHENKKAN: I can kind of write it down
22 if you like.

23 MR. LOW: Okay. Now, go ahead. I'm sorry.

24 MR. SCHENKKAN: And then this is -- you're
25 quite right that there is a whole separate layer of

1 question about what efforts you want to try to make by
2 rule to head off the potential for mischief for people to
3 introduce in these affidavits that's a harder question,
4 and all I can say about that is I don't try these kinds of
5 cases, but I have the background that lets me know that
6 this really is important because an affidavit that
7 establishes the amount charged is not the same thing as
8 establishing "This is the amount due," and for many legal
9 purposes the relevant question is what was the amount due.
10 An example I know about is the subrogation rights of the
11 workers comp insurance, which is only to the amounts due
12 under the workers comp, not the amount the health care
13 provider charged. I don't know how to solve it, but I
14 agree with you that's the second layer of the problem.

15 MR. WILLIAMS: And I'm looking for
16 direction. You know, we've sent this up here several
17 times. We've had good comments from you, but I want more
18 direction before I go back to my committee and say, "Let's
19 go back to the drawing board again and try to figure this
20 out."

21 CHAIRMAN BABCOCK: Frank.

22 MR. GILSTRAP: Pete said he didn't want to
23 talk on paid or incurred, but I think he did, and it seems
24 to me if -- isn't there a threshold question that has to
25 be answered here, and the last time I looked at this there

1 hadn't been an appellate opinion, but I may be wrong. I
2 haven't looked at this in several months.

3 MR. WILLIAMS: No, there are no appellate
4 opinions.

5 MR. GILSTRAP: That there is a split in the
6 way some trial courts are doing this.

7 MR. WILLIAMS: Yeah.

8 MR. GILSTRAP: Some trial courts are saying,
9 "We're not going to put paid or incurred in front of the
10 jury, rather I'm going to address that after the jury
11 makes its decision based on \$5 million of reasonable and
12 necessary medical expense when in fact the person was on
13 Medicaid and didn't pay anything." And some -- but if you
14 read the statute and it looks like that maybe does go to
15 the jury, so it seems to me that's a crucial question that
16 has to be answered. If it goes to the jury, it seems to
17 me this affidavit is a perfect vehicle for putting that
18 in, but I don't think we can answer that until we decide
19 whether or not the jury is going to decide it or the judge
20 is going to decide it after the jury comes in.

21 MR. WILLIAMS: There was a paper that was
22 done for the personal injury -- advanced personal injury
23 course that was very good that tracked what had been done
24 in several district courts, I believe in Dallas County and
25 some surrounding counties, and they were all different,

1 and some put the burden on the defendant, some put the
2 burden on the plaintiff, and I've brought examples of what
3 I'm doing to try to address this. I'm sending written
4 jury -- written deposition questions to the person who
5 fills out the affidavit to see was it Medicare, was it
6 Medicaid, was it Blue Cross/Blue Shield, do you have an
7 agreement to only take that amount and not charge the rest
8 against to the patient, and to kind of figure that out,
9 but that's -- that's making a whole lot of work for
10 everybody on these issues when maybe we could address it
11 in maybe not this rule but maybe another rule. I don't
12 know.

13 CHAIRMAN BABCOCK: Yeah, Richard, and then
14 Tom.

15 MR. ORSINGER: It occurs to me before you
16 make these affidavits super admissible that maybe rather
17 than having an affidavit that if you comply with this
18 you're safe, but you can go ahead and play games with it
19 and if the judge believes it then you have this super
20 affidavit, maybe you ought to have an affidavit that says
21 if your affidavit is exactly what this rule says then it
22 has this powerful effect, and if it deviates even one word
23 then it's the normal Rules of Evidence, and that would cut
24 down on people trying to lace in causation and stuff like
25 that. Right now it's just an invitation to follow your

1 form. It could be a requirement to follow your form.

2 CHAIRMAN BABCOCK: Tom, then Judge
3 Yelenosky.

4 MR. RINEY: First, with respect to the paid
5 or incurred statute, no one has spent more time analyzing
6 the language of that statute than Jim Purdue, and I think
7 that he would agree with me that the literal language of
8 the statute itself actually does not make sense. It just
9 doesn't even read as a logical sentence. So I think for
10 your committee to try to tackle that is designing the
11 impossible at this point. I would leave that alone as a
12 separate issue.

13 Secondly, with respect to -- I don't really
14 know the answer to all of this, but as I hear the
15 discussion and how we're doing it, it kind of reminds me
16 of our discussion earlier this morning about complexity of
17 litigation and unnecessary cost. Gosh, this ought not to
18 be that complicated. It is, but when was the last time
19 that anybody spent much time dealing with medical expenses
20 in Federal court. I mean, the answer is the judge says,
21 "We're not going to listen to that. You-all work it out
22 and then tell me what it is." Even if paid and incurred
23 is an issue, "You-all figure it out or get me the
24 information, but I am not going to listen to testimony
25 about reasonable and necessity of medical care or any of

1 these other factors."

2 So I don't have the answer to that, but we
3 need to try to keep it from being too complicated, which
4 was, of course, the original purpose of the statute, was
5 to simplify it.

6 CHAIRMAN BABCOCK: Right. Judge Yelenosky.

7 HONORABLE STEPHEN YELENOSKY: Well, I was
8 just -- now I'm going to agree. I hadn't heard it until
9 then, but the paid and incurred has to be resolved, and I
10 don't think we can try to resolve it by an affidavit
11 that's going to pick one way or the other. I'm one of the
12 judges that deals with it post-verdict, and so if you do
13 an affidavit that doesn't allow me to do it post-verdict
14 without an appellate decision then you've sort of decided
15 that issue. As far as not deviating one word from the
16 affidavit, you know, that's going to nullify affidavits
17 when we don't want to nullify them, and the issue -- we
18 spoke to this last time but I'll say it again. I mean,
19 causation shouldn't be -- it shouldn't attempt to
20 establish it by this. If it's in there, it should be
21 ignored by the judge, and maybe that's all you need to say
22 rather than say you can't change one word.

23 You know, I mean, and some of that stuff
24 that you described in Federal court does go on. You get
25 the lawyers that come in and say, "Well, there's a bunch

1 of stuff in here about flu shots that doesn't have
2 anything to do with the accident." And I ask plaintiff,
3 "Does it have anything to do with the accident?"

4 "No."

5 "Well, go back, clear everything out and
6 just give the jury, you know, what pertains to this case."
7 So, that's what -- I mean, if we have to give that
8 direction then we should give that.

9 CHAIRMAN BABCOCK: Buddy.

10 MR. LOW: I think one of the things that
11 Pete was getting at is not -- I mean, one of his things
12 was that the word "necessity" should not be misconstrued
13 to mean necessity because of the accident, but necessity
14 for the treatment, and that was what you were getting at,
15 wasn't it, Pete, that that language in (d) needs to make
16 clear what we were talking about necessity, wasn't it?

17 MR. SCHENKKAN: Well, I just wanted the
18 necessity that was used here to be necessity of the
19 services exactly as in the statute, but I agree with Judge
20 Yelenosky.

21 MR. LOW: Right.

22 MR. SCHENKKAN: Causation shouldn't be in
23 there, but any effort by us to say by rule what shouldn't
24 be in there risks getting people --

25 MR. LOW: Yeah.

1 MR. SCHENKKAN: -- fighting about whether
2 you put one word too many or different in the way that --
3 you know, what we need there is judges who will say, "Wait
4 a minute. You're trying to use this affidavit for the
5 wrong purpose. I'm going to allow the evidence on
6 causation. We've got a trial on causation." All we've
7 taken off the table is once this person got to this
8 medical state the services were necessary.

9 CHAIRMAN BABCOCK: Professor Dorsaneo, then
10 Judge Christopher.

11 PROFESSOR DORSANEO: So what this affidavit
12 does, it does -- it does reasonableness, it does what I
13 would regard as kind of one half of necessity, and it
14 doesn't deal with payment at all.

15 MR. WILLIAMS: Just like the statute.

16 PROFESSOR DORSANEO: So it gets about half
17 the job done, but it won't get you to a jury on what the
18 jury actually determines, and that's the number.

19 MR. WILLIAMS: Yeah. And I would temper
20 that with but if you don't do anything then you're left
21 with what you've got now, which is not good.

22 PROFESSOR DORSANEO: So this is a half
23 measure that's better than the current situation.

24 MR. WILLIAMS: Well, and that's what I'm
25 asking from direction from you. If a rule of evidence --

1 which is what we've put together for you to approve to
2 send to the Supreme Court, if a rule of evidence won't
3 clarify what actually paid or incurred means then we have
4 to wait for the Legislature to do that or we have to wait
5 for these to go through the appellate process to get
6 some -- some idea of what that means.

7 HONORABLE STEPHEN YELENOSKY: Bill, why are
8 you saying it doesn't get you to a number? The jury goes
9 to the number if you do it the way some judges do and then
10 post-verdict you deal with the paid or incurred. What's
11 missing for the jury? I mean, the jury gets to their
12 number based on an affidavit. They don't get to the
13 causation based on the affidavit.

14 PROFESSOR DORSANEO: Causation is missing.

15 HONORABLE STEPHEN YELENOSKY: Well, yeah,
16 sure, but that's not going to be dealt with by affidavit
17 anyway.

18 PROFESSOR DORSANEO: But a lot of cases call
19 what you're calling causation necessity, made necessary by
20 the accident or by the malpractice or by --

21 HONORABLE STEPHEN YELENOSKY: Well, that's
22 what I'm calling causation --

23 PROFESSOR DORSANEO: Yeah.

24 HONORABLE STEPHEN YELENOSKY: -- and that's
25 not what this affidavit is intended to show.

1 PROFESSOR DORSANEO: Well, I don't know what
2 would be wrong with showing that. Maybe there is
3 something terribly wrong with it, but I don't know why you
4 would stop kind of halfway through the streamlining
5 process, particularly if there is the ability to do a
6 counter-affidavit. Maybe because the counter-affidavit
7 needs to be done with respect to causation by an expert.
8 Maybe that's the problem.

9 HONORABLE STEPHEN YELENOSKY: Well, I guess
10 because I thought the streamlining was to deal with the
11 financial aspect of this alone and that --

12 PROFESSOR DORSANEO: But you still need a
13 doctor --

14 HONORABLE STEPHEN YELENOSKY: Yes.

15 PROFESSOR DORSANEO: -- to testify about --
16 so you're not leaving the doctor out. So if you're going
17 to bring him, you know, what's the point? I'm sure when
18 doctors are called to prove up causation they're asked
19 about the other stuff. The affidavit isn't used.

20 MR. WILLIAMS: Yeah, the problem with the
21 affidavit is it's not -- normally it's not filled out by
22 the doctor. It's filled out by a record custodian, who
23 couldn't testify to causation.

24 CHAIRMAN BABCOCK: Judge Christopher.

25 HONORABLE TRACY CHRISTOPHER: Well, I'm a

1 little unclear about what the counter-affidavit is
2 supposed to do. There is currently case law that says for
3 a counter-affidavit to be effective the doctor has to have
4 personal knowledge basically or some basis for making his
5 opinion, so the doctor would have to look at the records
6 or look at something before the doctor did his
7 counter-affidavits. We have some case law out there that
8 says that, but I'm unclear what you want the
9 counter-affidavit to do here.

10 So here's my example. The guy goes in, he
11 has a back strain, it's treated conservatively, then he
12 has an operation. All right. Bill comes in, the doctor
13 says -- or custodian says total amount for these services,
14 you know, \$15,222. Is the counter-affidavit supposed to
15 say \$15,223 is too much for those services or is the
16 counter-affidavit supposed to say, "I've looked at it and
17 the surgery was not necessary and only this conservative
18 treatment is reasonable"?

19 MR. WILLIAMS: Either one, because it's
20 reasonableness of cost and the necessity of the services,
21 so it could be attacked on either basis.

22 HONORABLE TRACY CHRISTOPHER: Well, but now
23 that's causation.

24 MR. WILLIAMS: No. No.

25 HONORABLE STEPHEN YELENOSKY: No, it's not.

1 HONORABLE TRACY CHRISTOPHER: The doctor is
2 not saying the back surgery cost was wrong or that the
3 person shouldn't have had back surgery. He's just saying
4 the back surgery is not related to the accident.

5 HONORABLE STEPHEN YELENOSKY: No, no, no.
6 He may be saying ---

7 HONORABLE TRACY CHRISTOPHER: Well, I don't
8 understand what the --

9 HONORABLE STEPHEN YELENOSKY: Well, the --

10 HONORABLE TRACY CHRISTOPHER: -- affidavit
11 is doing.

12 CHAIRMAN BABCOCK: Don't talk over each
13 other.

14 HONORABLE STEPHEN YELENOSKY: Well, I mean,
15 somebody may be saying --

16 HONORABLE TRACY CHRISTOPHER: Let me ask the
17 people who authored this what they think the
18 counter-affidavit is.

19 HONORABLE STEPHEN YELENOSKY: All right.

20 MR. WILLIAMS: Yeah, what I think it's
21 saying is that, for instance, the doctor would say, "I've
22 looked at these medical bills." For instance, let's say
23 it's a chiropractor. "I've looked at these medical bills.
24 There is too much chiropractic care. I don't know what
25 the cause of his -- I'm not saying what the cause of his

1 complaints are, that it was the accident or before the
2 accident or after the accident, but I'm saying that for
3 his complaint there are too many and it's over too long a
4 period of time for somebody who is a chiropractor to be
5 rendering this type of care. It's not needed or it's not
6 necessary, it's not advisable."

7 HONORABLE TRACY CHRISTOPHER: So it was poor
8 medical practice or not related to the accident? I'm
9 trying to understand --

10 MR. WILLIAMS: It's not necessary.

11 HONORABLE TRACY CHRISTOPHER: -- what it is.

12 MR. WILLIAMS: Wasn't necessary. The
13 services were not necessary.

14 CHAIRMAN BABCOCK: Carlos has had his hand
15 up so long that your arm is about to fall off.

16 MR. LOPEZ: I'm doing the only workout I
17 really do nowadays. I struggled through thousands of
18 these back when I was in county court, or as I called it,
19 car wreck court. Most of it -- and I think there may be a
20 reason for this. Most -- I would have to think back long
21 and hard to try to remember a counter-affidavit that
22 actually said, "We think the treatment was fine for what
23 physical symptoms the guy had, but we don't think those
24 physical symptoms were caused by the accident."

25 So there was kind of a very fine line

1 between whether the treatment was necessary for the, you
2 know, knee ligament as opposed to whether the knee
3 ligament was caused by the car wreck, and I don't know
4 about everywhere else, but in Dallas 99.9 percent of the
5 time these affidavits were being used in very small amount
6 of controversy cases where it was usually a soft tissue
7 injury that pretty much there wasn't really a whole lot of
8 dispute about whether or not the person's neck injury was
9 caused by the accident. It was whether the person was
10 telling the truth about having a neck injury in the first
11 place and whether -- which is not in the affidavit -- and
12 whether or not he should have gone to the chiropractor six
13 thousand times or --

14 MR. WILLIAMS: They're used --

15 MR. LOPEZ: -- whether they agree it's a
16 neck injury.

17 MR. WILLIAMS: In every personal injury case
18 whether they're small or great they're used. I can tell
19 you that. I do primarily a defense practice. I have
20 tried two major plaintiff cases in which I have
21 gotten verdicts over a million dollars, and as the
22 plaintiff I absolutely use these.

23 MR. LOPEZ: I understand what Bill Dorsaneo
24 is saying, I think, which is if we're going to streamline
25 it, why not really streamline it, and I'm not saying

1 that's a good or bad idea. I think it's different and
2 additional to what you've at least currently been arguing
3 about, but --

4 CHAIRMAN BABCOCK: Justice Bland.

5 HONORABLE JANE BLAND: On a different
6 subject, Bruce, I think Jim Perdue brought up at our last
7 meeting that the proposed rule recommends that the
8 affidavit be served on a party at least 60 days before
9 trial and the statute has 30 days --

10 MR. WILLIAMS: Right.

11 HONORABLE JANE BLAND: -- with a different
12 sort of deadline then for the counter-affidavit than what
13 you-all have in the rule, and I was wondering what the
14 committee's thinking was on having different deadlines
15 than those in the statute and whether that's --

16 MR. WILLIAMS: We're trying to prevent a
17 "gotcha." That's what we're trying to do. We're trying
18 to get those affidavits sent, because they're done in
19 stacks. They're not done one at a time when they get
20 them. They amass them, and when the case is getting set
21 for trial then it's just like anybody that's got a small
22 office, you're saying, "Okay, what do we need to do to get
23 ready for trial? Okay, we need to get all of these
24 filed," and then you get them like this.

25 So for the defense then to try to come up

1 with a counter-affidavit that has to be done through an
2 expert, not just, you know, a clerk in the doctor's
3 office, it takes time to do that and to figure out what
4 you've got; and for that expert to review those you've got
5 to get them to the expert, he has to review them, he has
6 to be comfortable with filling out a counter-affidavit;
7 and this counter-affidavit is not a cookie cutter. You
8 have to explain what it is that you're saying and why
9 you're saying it so that the court can -- if it goes
10 beyond reasonable and necessity and gets into causation,
11 the court pursuant to the rule can strike it.

12 CHAIRMAN BABCOCK: Bill and then Judge
13 Yelenosky and then Buddy.

14 PROFESSOR DORSANEO: Stephen, you said you
15 tried the payment part after the jury verdict comes in?

16 HONORABLE STEPHEN YELENOSKY: Paid or
17 incurred.

18 PROFESSOR DORSANEO: How do you get to do
19 that in a jury case? How do you get to decide one of the
20 issues?

21 HONORABLE STEPHEN YELENOSKY: That's one of
22 the -- well, that's one of the questions that has been
23 debated about what it means, whether it's an evidentiary
24 issue or whether it's ultimately just a question of what's
25 to recover.

1 PROFESSOR DORSANEO: Well --

2 HONORABLE TOM GRAY: Jan is --

3 PROFESSOR DORSANEO: That strikes me as --

4 HONORABLE TOM GRAY: Jan is going to
5 decide --

6 PROFESSOR DORSANEO: -- very odd.

7 HONORABLE TOM GRAY: -- whether or not he
8 gets to do that and then Nathan is going to tell Jan
9 whether or not she decided that question correctly.

10 PROFESSOR DORSANEO: I mean, that seems to
11 me --

12 HONORABLE JAN PATTERSON: So that's another
13 10-year project.

14 CHAIRMAN BABCOCK: Yeah, it's all very cozy.

15 PROFESSOR DORSANEO: That seems to me to
16 violate somebody's right to jury trial on an issue --

17 HONORABLE STEPHEN YELENOSKY: Well, then --

18 PROFESSOR DORSANEO: -- that's important
19 about what you get.

20 HONORABLE STEPHEN YELENOSKY: Well, then you
21 need to represent somebody on that issue, but -- you know,
22 and get an appellate decision. We haven't gotten one.

23 PROFESSOR DORSANEO: Okay. One other
24 comment. Buddy said at the beginning that whether this is
25 -- these changes are procedural or substantive should be

1 something for the Court and we shouldn't be getting
2 involved with that.

3 MR. LOW: No, I didn't say we shouldn't get
4 involved.

5 PROFESSOR DORSANEO: I misunderstood you
6 then, but I think as part of the process of deciding that
7 something is procedural, you know, in most systems the
8 committees and the Court's attitude about whether it's
9 procedural rather than substantive is treated as
10 significant, if not determinative, of the
11 substance/procedure distinction; and it seems to me
12 certainly that periods of time, 30 days or 60 days, would
13 be appropriately regarded as procedural items rather than
14 something that's substantive in character. I think
15 generally we should weigh in on the issue because I think
16 that's significant in how the matter would ultimately be
17 analyzed.

18 CHAIRMAN BABCOCK: Justice Hecht trumps a
19 trial judge.

20 HONORABLE STEPHEN YELENOSKY: That's
21 obvious.

22 HONORABLE NATHAN HECHT: Well, to give a
23 little guidance, I think the committee -- your committee
24 should propose what you think is the best work, and if
25 that's not anything like the statute, well, so be it, and

1 then we'll take up whether it's -- whether we should go to
2 the Legislature and say "change this," or whether we
3 should propose it as a rule and get them to object to it
4 or how we should -- you know, or start over, but I think
5 we should start with the best, and one thing that strikes
6 me about this is that it's still fairly cumbersome,
7 because it seems to me that from my experience on the
8 trial court a long time ago that basically all the
9 plaintiff ought to have to do is just say this is it, and
10 that's prima facie. It's not just an affidavit to send to
11 the jury that somehow the jury could disbelieve. I mean,
12 if they bring -- if they satisfy whatever we think is a
13 threshold requirement, whether it's a pleading, specific
14 pleading, verified affidavit, or whatever it is, that's
15 the end of it.

16 And then if the defendant wants to take it
17 on, they should have to come back and say, "Well, we
18 disagree with this, this, this, this," and join issue like
19 you would under Rule 90 or under -- I was thinking of Rule
20 193.7, which has to do with proving up documents that are
21 produced during discovery. It seems to me the same idea,
22 that if you come in with bills that are on a doctor's or a
23 hospital's letterhead and they look to be like the bills,
24 that ought to be the end of it unless somebody says,
25 "Well, no," as you said, there are too many chiropractic

1 charges or you shouldn't have had a flu shot or -- and
2 then whatever those issues are they can be fussed about.
3 And of course, the simpler the better, but I wouldn't -- I
4 wouldn't feel constrained to propose something that was
5 bounded by the statute if the practice doesn't think the
6 statute is working very well. I mean, this is our chance
7 to make it work better if we can.

8 CHAIRMAN BABCOCK: Judge Yelenosky, then
9 Carl.

10 HONORABLE STEPHEN YELENOSKY: Well, and,
11 Bill, in further defense, what's going on in these cases,
12 they don't disagree either about what was charged or about
13 what actually is paid or incurred, and so they're not
14 really asking for a determination. They are arguing about
15 what the jury gets to hear. The defense wants to say,
16 "You don't get to put in front of the jury that this
17 operation was charged for this amount" because, of course,
18 they don't want it to look like it was an expensive,
19 serious operation, and likewise, the plaintiff does, and
20 so it's a question of what gets before the jury. If you
21 tell them the jury gets to hear everything, at the end you
22 can argue about what's paid or incurred, they come in and
23 they agree on what was paid or incurred. So that's what's
24 going on, and the appellate courts can decide that.

25 Earlier, Judge Christopher, I think one

1 question you asked that maybe wasn't answered, in
2 determining the necessity of the services, is it really
3 you're saying that it was improper medical care, I think
4 the answer to that is "yes," or excessive medical care.
5 That's the issue, excessive medical care. The doctor is
6 presented with a particular condition. Based on the
7 presentation of that condition is what the doctor did
8 medically necessary, or, as the defense claims, was it
9 excessive? The causation issue is entirely different.
10 The person could have presented with a back injury because
11 they had a car accident, or they could be presented with
12 that particular back injury because on the way from the
13 car accident they were dropped off the gurney outside the
14 E. R., in which case there is an intervening cause, or
15 they could be presenting with a particular back condition
16 because of a pre-existing condition, all of which are
17 causation issues and none of which have to do with given
18 the presentation of the condition was the medical care
19 appropriate. So my answer to your question is "yes," and
20 that's what it goes to, and that's all it goes to.

21 CHAIRMAN BABCOCK: Carlos, then Buddy, and
22 then Jim.

23 MR. LOPEZ: I want to ask just a second, are
24 you saying that it would be basically if they went through
25 the right hoops, what the committee decides are the right

1 hoops, and they do so right way then it would be a
2 rebuttal of presumption because it could be rebutted by
3 counter-affidavit, but if not rebutted would be
4 conclusive? It would be conclusive, a rebuttal of
5 conclusive presumptions.

6 HONORABLE NATHAN HECHT: Well, I'm
7 suggesting something like that --

8 MR. LOPEZ: Yeah.

9 HONORABLE NATHAN HECHT: -- because if it
10 doesn't seem to be a very viable --

11 MR. WILLIAMS: That's the way the statute is
12 now. If you haven't filed a controverting affidavit then
13 you don't get to argue that it wasn't reasonable and
14 necessary, and it's the same way in the rule that we
15 proposed. If you don't file a controverting affidavit
16 then the affidavit that's been provided by the plaintiff
17 is the end of that discussion.

18 HONORABLE NATHAN HECHT: Well, but I read it
19 as going to the jury, and the jury can -- the affidavit
20 can say a thousand dollars and the jury says, "Well,
21 \$600."

22 MR. LOPEZ: Right.

23 HONORABLE NATHAN HECHT: There's no basis
24 for disbelieving an affidavit. If it says a thousand,
25 that's the end of it, and it shouldn't be just something

1 that goes to the jury. It should be established in the
2 case unless somebody says, "No, and here's the reason
3 why," and then they need to fuss about it.

4 MR. WILLIAMS: Well, there's a lot of
5 reasons why that don't have to do with reasonable and
6 necessity, and that is causation, right?

7 HONORABLE NATHAN HECHT: Oh, yes, right.

8 MR. WILLIAMS: And --

9 HONORABLE NATHAN HECHT: No, I'm just
10 talking about the two issues here that are on the -- that
11 we're dealing with, which Bill calls it half causation.

12 PROFESSOR DORSANEO: Half necessity.

13 HONORABLE NATHAN HECHT: Or half necessity,
14 right. It's just that part, but, sure, you can argue
15 about the bigger causation issue.

16 MR. WILLIAMS: Right.

17 CHAIRMAN BABCOCK: You have a presumption
18 that can be rebutted by evidence up to a point, and at
19 that point the presumption becomes irrebuttable and
20 established as a fact.

21 HONORABLE NATHAN HECHT: Right.

22 CHAIRMAN BABCOCK: Carlos.

23 MR. LOPEZ: Well, yeah, you can argue
24 against it. You can argue against it if you've done the
25 right things to put yourself -- but you can if you've

1 filed a counter-affidavit.

2 HONORABLE NATHAN HECHT: Right.

3 MR. LOPEZ: Which I agree that's how it
4 seemed like it should work right now, but different trial
5 judges handle that very differently.

6 MR. WILLIAMS: Right.

7 CHAIRMAN BABCOCK: Jim Perdue.

8 MR. PERDUE: I hesitate to weigh in because
9 I worry sometimes about being counterproductive, but if I
10 could step back from this for a second, we have Chapter 18
11 of the code on the books, which is a legislative enactment
12 I think on its face designed to remedy an overexpense or
13 overcomplication within the litigation system out of
14 basically a common law requirement that the medical bills
15 be reasonable and necessary. So they made -- the
16 Legislature provided us a means to wire around that, and
17 what I've heard, at least in the presentation, is
18 exclusively a defense perspective that there are games
19 being played with that provision and calling essentially
20 using the statute a game, because the game -- the statute,
21 18.001, provides an affidavit that is signed by the
22 custodian of records as to the reasonableness and
23 necessary -- reasonableness and necessity of the charges.
24 That is not a game. That is a legislative
25 determination that that is a way to avoid the time and

1 expense of involving treating physicians and having to be
2 deposed or come to trial to withstand appellate review of
3 the reasonableness and necessity of their charges. That
4 was exactly why the Legislature put this into place. So
5 we use affidavit practice to avoid what would be extremely
6 burdensome on physicians and extremely burdensome on
7 plaintiffs to have a doctor essentially prove up every
8 charge in every case. So I don't think that the
9 suggestion that using an affidavit from a records
10 custodian is a game should be -- should be -- can go
11 without question, and the idea then that there is a misuse
12 of affidavits or that plaintiffs are abusing the process
13 of the affidavits is one that's just been put forth that I
14 at least take some issue with because I don't know of
15 anybody who is reporting that as a general concern.

16 And then what this rule does is it changes
17 the law of both -- as enacted by the Legislature as far as
18 the time lines and other procedural requirements and
19 appellate review of that, specifically Turner vs. Peril,
20 as far as what is required for a counter-affidavit. So it
21 raises the standard apparently for plaintiff's practice,
22 it lowers the standard for defense practice when it comes
23 to counter-affidavits and the Turner case, and you know,
24 we had this conversation last time.

25 I did not hear, at least from the trial

1 judges, that they felt there was any abuse that was not
2 handled judicially. If a plaintiff puts in an affidavit
3 and a custodian of records signs off that the charges were
4 proximately caused by the car wreck, that's irrelevant, so
5 what, whether it be the trial judge or the court of
6 appeals. That doesn't stand, it seems under present
7 practice, a present practice does not permit that to
8 stand, so how is that a game, quote-unquote, that it needs
9 a remedy through what appears to be a more complicated
10 procedure?

11 Just on one point, because this appears like
12 it will go back to the drawing board somewhat, but on
13 whether this is procedural or substantive, the change from
14 30 days to 60 days is in my opinion extremely substantive.
15 For example, when you have a patient who is actively
16 treated leading up to trial, I have a severely
17 brain-damaged patient, they're incurring medical charges
18 over a thousand dollars a day. If you essentially create
19 a system that is designed to gut some portion of their
20 medical expense recovery because of the timing of their
21 trial, that is a substantive limitation on what they've
22 got.

23 This thing does provide for, it seems to me,
24 a minilitigation on the issue. It seems to provide for
25 cutting off the rights by extending this time line. There

1 is a lot about it that I tend to agree with at some level
2 because I love the idea that a substantive
3 counter-affidavit should be required, but if you read the
4 rule and the comment provided for the rule, I don't see
5 how the rule itself gets us to a substantive
6 counter-affidavit in compliance with Turner vs. Peril. So
7 I apologize, just to add a different perspective onto the
8 conversation, I think there are a bunch of issues going on
9 here.

10 CHAIRMAN BABCOCK: Thanks, Jim. Buddy.

11 MR. LOW: First of all, Bruce did not say
12 that the gamesmanship was by the plaintiff's initial
13 affidavit. That was not the gamesmanship. The
14 gamesmanship is what follows.

15 MR. WILLIAMS: Right.

16 MR. LOW: Where somebody comes in and they
17 say, "We object" then you have to bring the doctor. What
18 we cure is they have to come in now, the defendant has to
19 come in and say, "This is what's wrong with it," has to be
20 specific, and then once they do that under the statute now
21 you can't bring that affidavit that you originally filed.

22 MR. WILLIAMS: Right.

23 MR. LOW: Now you can introduce that
24 affidavit, so the gamesmanship was not -- as you construed
25 it. The gamesmanship was what followed, and so that's --

1 MR. WILLIAMS: But I can tell you insurance
2 companies who say, "We want you to controvert every
3 affidavit because we want those things knocked out" so
4 that they have to bring the doctor so that when we get to
5 mediation they know it's going to cost them money to bring
6 that dadgum doctor. So there is a lot of gamesmanship on
7 the defense side going on on these things.

8 CHAIRMAN BABCOCK: Bill, then Justice
9 Gaultney, and then Judge Christopher and Justice Bland and
10 anybody else on that row.

11 PROFESSOR DORSANEO: Would it be a bad idea
12 to define necessity?

13 MR. WILLIAMS: You know, in my opinion it
14 would not, so that when you take -- necessity is not
15 causation, because I've had that argument lots of times at
16 trial. Even when they haven't inserted the causation
17 language they're saying, "See, the doctor said that this
18 was necessary." You know, so you've got to find -- either
19 it's the result of this accident, it's necessary, these
20 were reasonable and necessary. I've had that argument
21 done. I make the objection, you know, and most of the
22 time the judge will say, "That's right, Mr. Williams,"
23 and --

24 PROFESSOR DORSANEO: Because in my
25 experience lawyers use the word "necessary" as kind of a

1 magic word rather than without having any particular
2 meaning assigned to it.

3 MR. WILLIAMS: Right. Right.

4 CHAIRMAN BABCOCK: Justice Gaultney.

5 HONORABLE DAVID GAULTNEY: Well, I in the
6 initial discussion heard that there was gamesmanship on
7 both sides. That was, I think, the premise for the
8 proposal, and then also I think in the discussion I heard
9 some disagreement on what necessity means, so there
10 apparently is still some ambiguity. I think the rule goes
11 towards at least eliminating that ambiguity. I think,
12 Jim, that you wouldn't think that an affidavit could
13 establish the second half of causation linking it up to an
14 accident. I think you said it today, and I think you said
15 it last time.

16 MR. PERDUE: I think I said it last time.

17 HONORABLE DAVID GAULTNEY: Right, so if the
18 rule can clear up that ambiguity, you would be in favor of
19 that I would think.

20 MR. PERDUE: If a rule requires that a
21 counter-affidavit meeting the standard that the law says
22 now and that if you don't have a counter-affidavit that
23 meets that standard then you cannot challenge the initial
24 affidavit, yeah. But I guess my primary concern is this
25 encourages a counter-affidavit practice at a lower level

1 than what we have now. It is a -- this is a substantive
2 change to 18.001. .

3 CHAIRMAN BABCOCK: Judge Christopher.

4 HONORABLE TRACY CHRISTOPHER: I agree,
5 because -- well, I don't know what it is like in Midland.
6 I just know in Harris County in our personal injury cases
7 nobody is filing counter-affidavits, and people still get
8 up and say, "Too many visits to the chiropractor," and the
9 juries are still giving about half the chiropractor
10 visits, and I don't see how -- if we're not talking about
11 causation in a counter-affidavit then you can't really
12 eliminate the flu shot, okay, because nobody is going to
13 say the flu shot wasn't necessary or that it was bad
14 medicine. It just doesn't belong here, which means
15 causation. Okay. It wasn't caused by the accident, so I
16 still see these counter-affidavit -- the causation and the
17 necessity as having a lot of troubles, and I'm not sure
18 that this improves what we have.

19 CHAIRMAN BABCOCK: Okay. Frank. Sorry.

20 MR. GILSTRAP: I agree with Bill Dorsaneo
21 and Judge Christopher that causation is to a certain
22 extent implied by necessity, and if you want to think that
23 out you could go back to that old case involving the
24 liability nexis and the damages nexis, and I think the
25 necessity part here is the damages nexis, and we could go

1 through that and we could define necessity, and that might
2 make it a more perfect world, but for purposes of this
3 procedure it seems to me why don't we just say in the rule
4 that the affidavit as submitted under this procedure is,
5 to use the words of the statute, "only evidence that the
6 amount a person charged for a service was reasonable at
7 the time and place the service was provided and that the
8 service was necessary." That's all you can use this
9 affidavit for and then they can't use it to establish some
10 larger issue of causation. That's not why we have this
11 procedure, and that affidavit can't be evidence of that.

12 CHAIRMAN BABCOCK: Okay. Justice Bland.
13 Did you have something?

14 HONORABLE JANE BLAND: I was just going to
15 say that it seems like that the types of problems that
16 you're describing are not problems that are solved by the
17 counter-affidavit but just by, you know, striking the
18 original affidavit. You don't have to file a
19 counter-affidavit to say that the original affidavit
20 shouldn't have that causation in it. Just redact that,
21 and as Judge Christopher mentioned, you don't have to have
22 a counter-affidavit to say the flu shot wasn't caused by
23 the accident, so I'm not really seeing the potential for
24 gamesmanship being cured by this counter-affidavit and by
25 pushing it all out more ahead of trial.

1 My fear is that that's just going to give
2 everybody 60 days to fight about this and paper it up;
3 whereas now, you know, at least if they file it 30 days
4 before trial then somebody has to really think, do I
5 really need to attack this affidavit, do I really have the
6 basis for it, and if I do then I've got to get it and get
7 it done, and so I don't see the 60 days as solving any
8 gamesmanship problem.

9 MR. WILLIAMS: I don't see 60 days as being
10 magic. You know, if this committee said, "Gee, we don't
11 really like 60 days, we'd rather you go back to 30 days,"
12 I think all we were trying to do is prevent a "gotcha" and
13 we can go back and change that if that's what the
14 committee wants.

15 HONORABLE JANE BLAND: But what is it about
16 this proposal that improves over what's in the statute I
17 guess is what I'm trying to figure out?

18 MR. WILLIAMS: Because the defendant must
19 find an expert and has to get this information to an
20 expert and has to get the expert to focus upon the
21 information and submit an affidavit on it.

22 HONORABLE JANE BLAND: But doesn't the
23 statute already require that for a counter-affidavit?

24 MR. WILLIAMS: What's that?

25 HONORABLE JANE BLAND: It already requires

1 the defendant to get an expert.

2 MR. WILLIAMS: That's right.

3 HONORABLE JANE BLAND: To file a
4 counter-affidavit.

5 MR. WILLIAMS: And so when you do that with
6 -- if I get a stack this big 30 days before trial, I don't
7 have any time to submit a counter-affidavit. I can't get
8 that information to an expert. I can't get an expert to
9 focus upon that within 30 days of trial so that I can file
10 a counter-affidavit, so I'm stuck.

11 HONORABLE JANE BLAND: I mean, but how are
12 you stuck? If the whole purpose of this is to get, you
13 know, a qualified expert to say that these are the
14 reasonable and necessary costs and expenses, how are you
15 stuck under the current statute, because the current
16 statute says exactly what I think your proposed rule says,
17 which is get an expert --

18 MR. WILLIAMS: Right.

19 HONORABLE JANE BLAND: -- to counter it, and
20 we want to make it difficult. That's the idea. The idea
21 behind it is we don't want counter-affidavits to be filed
22 willy-nilly in every -- for every single cost that's
23 incurred because of the reasons Justice Hecht articulated.
24 So what about what you're proposing is an improvement over
25 the statute, I guess?

1 MR. WILLIAMS: All I'm saying is that it
2 just gives you an opportunity to get an expert involved if
3 that -- if this particular affidavit merits it.

4 CHAIRMAN BABCOCK: Carlos, will you yield to
5 Buddy because Buddy is --

6 MR. LOW: The improvement apparently is not
7 understood. The improvement is now you file a
8 counter-affidavit, you can't introduce your affidavit.
9 You don't have a choice. Now, the improvement is you can
10 file a counter-affidavit, and the plaintiff has a choice.
11 He can then offer his affidavit. Under the practice now
12 once they file a counter you're to live people. You can't
13 introduce that affidavit. That's the improvement.

14 As to the answer to Frank, the comment says,
15 "The rule only addresses reasonableness of costs and
16 necessity of services. It does not address other issues."
17 Now, that's fairly clear.

18 PROFESSOR DORSANEO: Yes, too clear.

19 CHAIRMAN BABCOCK: Carlos.

20 MR. LOPEZ: I just want to -- I'm a little
21 concerned about what Frank was talking about the language
22 where you say it's "only evidence of" and the idea that
23 "only" modifies which category of evidence it is, meaning
24 it's only evidence of necessity rather than causation; but
25 when you use the word "it's only evidence," you invite the

1 idea that it's not conclusive evidence, it's just some
2 evidence, which as our instructions tell the jury you can
3 believe all, some, or none of what a witness, including an
4 affiant, says; and that's the argument that's always been
5 used by the defendants to say, "Judge, why are you
6 granting a directed verdict on this unchallenged affidavit
7 any more than you would grant a directed verdict on any
8 other affidavit?"

9 In other words, what is it about this
10 affidavit that is so great that makes it unchallengeable,
11 and you know, you kind of see the logic. You've got one
12 witness who says the light's red, only one witness, and
13 that's the only evidence on the issue. The jury says, "We
14 don't believe the light was red because our character
15 witness was shifty, he was beady-eyed, and we didn't
16 believe him," and apparently, you know, you can do that.
17 So we just have to make it real clear that it's going to
18 be, you know, conclusive in the face -- if an unchallenged
19 affidavit is going to be conclusive I think we need to use
20 the word "conclusive" or some similar words.

21 MR. WILLIAMS: The statute doesn't provide
22 -- now it doesn't provide it's conclusive. It provides
23 that it's sufficient to support a finding.

24 MR. LOPEZ: Right, and that's to support a
25 finding.

1 MR. WILLIAMS: Just like any witness
2 would -- just like the example that you gave and that
3 Judge Christopher gave. If it's a chiropractor affidavit,
4 they don't have to believe it.

5 MR. LOPEZ: I mean, my personal opinion is
6 that based on the way the rule, you know, is now, it
7 allows for the defense to stand up and argue, "Don't
8 believe this affidavit."

9 MR. WILLIAMS: Right.

10 MR. LOPEZ: And if, you know, we're going to
11 change that, which I don't think is a bad change, but if
12 we're going to change it we need to be very specific and
13 explicit that that's what we're doing because I think
14 there's a lot of confusion about that.

15 CHAIRMAN BABCOCK: Justice Bland, then Bill,
16 Carl.

17 HONORABLE JANE BLAND: Well, it seems like
18 we're saying the filing of the counter-affidavit knocks
19 out the plaintiff's affidavit under the current statute.

20 MR. WILLIAMS: It does.

21 HONORABLE JANE BLAND: But only the filing
22 of the counter-affidavit doesn't knock out the plaintiff's
23 affidavit. It's just on the other side, if the plaintiff
24 attacks the counter-affidavit and says the
25 counter-affidavit doesn't comport with the requirements of

1 the standard, the counter-affidavit is no good, it doesn't
2 knock out the affidavit; and that was the litigation, you
3 know, three or four years ago; and I think that's why
4 there are very few of these contests filed anymore because
5 it became clear that trial judges, at least in our area of
6 the state, were not going to accept counter-affidavits
7 that didn't have -- that didn't fulfill the requirements
8 of the statute and were not going to use that as a basis
9 for knocking out the plaintiff's affidavit.

10 So I don't see that the current statute, you
11 know, just basically says if something gets filed then the
12 plaintiff is out of luck. It's just if the plaintiff
13 files an affidavit that has, you know, causation language
14 that's extraneous that needs to be struck or just
15 irrelevant, you know, then it gets out. If the
16 counter-affidavit doesn't comport with the terms of the
17 statute, it gets out, and I'm still sitting here saying to
18 myself, so other than having more affidavits admitted in
19 front of the jury I'm not seeing what the new rule does,
20 because I think what you're saying is, well, then we'll
21 just admit the original affidavit and the
22 counter-affidavit.

23 MR. WILLIAMS: That's right.

24 HONORABLE JANE BLAND: We won't ever have
25 this discussion of whether the original affidavit or the

1 counter-affidavit meet the requirements of the rule.

2 MR. WILLIAMS: Except for the court -- my
3 proposal as an addition to this rule is "By motion or
4 objection of a party or on its own motion the trial court
5 shall strike any portion of an affidavit or
6 counter-affidavit that attempts to include language of
7 causation, liability, or otherwise makes assertions beyond
8 the scope of this rule prior to its submission to the fact
9 finder."

10 CHAIRMAN BABCOCK: Professor Dorsaneo.

11 PROFESSOR DORSANEO: Well, I was just going
12 to say that the City of Keller opinion, among others,
13 points out that the all, some, or none instruction that
14 Carlos just talked about is at best an oversimplification.

15 MR. LOPEZ: I'm just going on AJC. And you
16 guys in here wrote it.

17 CHAIRMAN BABCOCK: Carl Hamilton.

18 MR. HAMILTON: Buddy, as I read the comment
19 it says if an affidavit is controverted the parties may
20 present additional evidence, but under rule (d) you don't
21 have to controvert it if you specify a testifying expert;
22 is that right? (d) says that you could introduce other
23 evidence, but only if you file a counter-affidavit or, as
24 specifically disclosed, a testifying expert on the issue.

25 MR. WILLIAMS: Right. This rule does not

1 affect the admissibility of other evidence concerning the
2 reasonableness and necessity except that an opponent of an
3 affidavit may not contest reasonableness and necessity of
4 the service unless the opponent files a counter-affidavit
5 or has specifically disclosed a testifying expert as to
6 the specific issue in question, and that comes up lots of
7 times when you've taken a -- they've filed affidavits and
8 you haven't filed a counter-affidavit, but they bring a
9 doctor or they take a doctor's deposition, and in the
10 deposition before trial or at trial you ask them about
11 that and they say, "This wasn't reasonable or necessary."

12 MR. HAMILTON: I know, but the comment is
13 not accurate where it says you can only do that if you
14 file a counter-affidavit.

15 PROFESSOR DORSANEO: Uh-huh.

16 MR. HAMILTON: The comment says if an
17 affidavit is controverted by counter-affidavit the parties
18 may present additional evidence, but you can present
19 additional evidence if you designate a testifying expert
20 also, right?

21 MR. WILLIAMS: Right: That's a good point.

22 CHAIRMAN BABCOCK: Buddy, do you -- do you
23 think you have gotten enough feedback? More than you
24 want?

25 MR. LOW: The old boy that they wanted him

1 to go back to school, he said, "I've already got more
2 learning right now than a mute," so --

3 CHAIRMAN BABCOCK: Would you propose to try
4 to address these comments and then come back to the next
5 meeting with a --

6 MR. LOW: Yeah, what I'll do, I'll have --
7 the committee, we first operate together. I'll get
8 together with the State Bar committee because it is a
9 great committee, and they've spent a lot of time on this,
10 and we will do that.

11 CHAIRMAN BABCOCK: Okay. Well, Bruce, thank
12 you so much for visiting with us today, and I hope you
13 still have time to get back to Midland before the sun
14 sets.

15 MR. WILLIAMS: I enjoyed the experience.

16 CHAIRMAN BABCOCK: Fortunately you're not
17 under oath here. Let's -- we've got about 15 minutes
18 before lunch. Let's just bounce back to the rocket docket
19 real quick because there were several people came up to me
20 and said that they wanted to to speak, but if you will
21 recall, one of the resource materials we had was a 1994
22 *Baylor Law Review* article entitled "Lonesome Docket," a
23 play on the McMurtry book *Lonesome Dove*, I assume.

24 HONORABLE SCOTT BRISTER: Correct.

25 CHAIRMAN BABCOCK: And interestingly enough,

1 the last -- the conclusion is "The public is demanding
2 greater efficiency in the civil justice system. At the
3 same time the same public is neither funding more courts
4 nor filing fewer claims. The trend of increases in
5 pending case loads without corresponding increases in the
6 number of judges to try them means that shorter trials are
7 a matter of necessity, not choice. It is true that those
8 demanding quicker trials are usually not the ones who have
9 to live with the verdicts. Nevertheless, when attorneys
10 making \$200 per hour resist any suggestion" -- "resist any
11 suggestion of limiting trial time, there is at least the
12 appearance of a conflict of interest."

13 Now, twelve years later, we find that even
14 though there has been no increase in funding that is
15 perceptive, we can perceive, the case filings are down,
16 and the author of this article was then on the trial bench
17 in Harris County and has now ascended to the Texas Supreme
18 Court and is here, so Justice Brister, do you have any --

19 HONORABLE SCOTT BRISTER: To defend my --

20 CHAIRMAN BABCOCK: Do you have any comments
21 about these 200-dollar an hour lawyers?

22 HONORABLE SCOTT BRISTER: Well, anything
23 that's good for the profession.

24 CHAIRMAN BABCOCK: We've been talking about
25 this -- the idea of making our product more attractive,

1 and one of the ideas, as you know, is this rocket docket.
2 Any thoughts that you would have or that you would like to
3 share with us?

4 HONORABLE SCOTT BRISTER: Well, I'm
5 favorable, in favor of it, in favor of giving trial judges
6 the discretion to do it, but as we all know, with vacation
7 letters and everything else, there's always somebody in a
8 case that doesn't want it to get to verdict very fast, so
9 you've got to have some discretion of trial judges to say,
10 "I'm sorry, in the interest of justice we just have to do
11 it." So it can't be something that's just entirely up to
12 agreement of parties because that will rarely occur.

13 CHAIRMAN BABCOCK: Bill Wade, you had -- you
14 came up to me and said you wanted to say something.

15 MR. WADE: Well, I, too, have appeared in
16 Judge Bunton's court.

17 MR. RINEY: Briefly.

18 MR. WADE: Briefly, and that's a blur in my
19 memory because it went by so fast because we didn't even
20 get a -- well, the lawyers didn't get a break for lunch.
21 The only reason there was a lunch break is because he did
22 let the jurors have lunch, and I've also been appointed to
23 represent criminal defendants in Federal court, which is
24 another sort of a rocket docket, because in that case, if
25 you want to liken the U.S. attorney to a plaintiff, he's

1 already got his case prepared before it's filed.

2 I really question whether or not a rocket
3 docket is the answer to any issue that we're -- should be
4 addressing, and I want to say "amen" to everything that
5 Dick Munzinger said, and I'd also like to say this, that I
6 have -- I have some real concern any time about referring
7 to the Federal practice as the gold standard when my
8 limited experience is that the Federal practice is
9 designed to deter litigation and to make it so expensive
10 and onerous that you don't want to go there, and so a lot
11 of people don't. So I would just -- and one thing that
12 has bothered me over the years is seeing us mirror the
13 Federal practice, because I think what that does is it
14 denies access to the court to a lot of people and in a lot
15 of litigation that needs to be determined, but it's too
16 expensive.

17 CHAIRMAN BABCOCK: You know, Judge Bunton is
18 getting a lot of airtime here, but I'd like to nominate
19 Judge McBride, a Federal judge in Fort Worth. In a trial
20 I had with him I said, "I want to put my damages expert on
21 now," and he said, "I don't believe I'd do that," and I
22 said, "Well, why, Judge?" And he said, "Well, because the
23 jury is not going to listen to him anyway." And I said,
24 "Well, you know, the plaintiff's claiming \$10 million in
25 damages and I've got a guy who is going to say that that's

1 not right."

2 The judge says, "Well, okay, you've got five
3 minutes to put him on," and I said, "Fine, Judge, we'll do
4 it in five minutes," and he looks at my opponent, the
5 plaintiff's lawyer, and he says, "You've got five minutes
6 to cross him," and the lawyer looks at him and says --
7 never been in this court before, and said, "Well, Judge,
8 you know, I can't possibly cross-examine this man. I've
9 taken his deposition for a whole day, he's got complex
10 formulas, and I couldn't possibly cross him in five
11 minutes. I just can't possibly do it."

12 McBride doesn't say anything, looks at his
13 watch and he says, "You have three minutes to
14 cross-examine him," and I got him on and off in less than
15 five minutes. I pointed that out to McBride as I sat
16 down. The guy got up and started asking him about where
17 he went to high school, and I think he must have thought
18 Judge McBride was kidding because at the end of three
19 minutes Judge McBride said, "Counselor, sit down," and he
20 just looked at him kind of like "Yeah, right, I'm not
21 finished," and asked another question. He said, "I said
22 sit down," and he did. So that was a speedy trial that we
23 had.

24 HONORABLE SCOTT BRISTER: Let me say in
25 defense of rocket dockets, though, for every one of those

1 stories we've got a story of the judge who comes in 20
2 minutes late, every witness drags on day in and day out.
3 I mean, I've had some of the most famous plaintiff's
4 attorneys who were the biggest objectors to my rocket
5 docket as a trial judge come to me and tell me the story
6 about the other case they were in where the judge wouldn't
7 make anybody do anything and it lasted for six weeks; and
8 I'll tell you for a fact, on appeal when a four month
9 trial comes up, from O. J. on down, the appeals court is
10 not going to reverse it, because it's too expensive to do
11 it over again.

12 Now, if that's what you want, it's like
13 arbitration. You get one shot and whatever the jury says
14 you're stuck with it, but the problem is the longer the
15 case lasts, the more resistance there's going to be in the
16 system to fixing anything in it, and so you're going to be
17 stuck with whatever happens the first time. So there is
18 another side of the problem, but I'm not sure whether all
19 of those judges, the judges with that problem, can be
20 fixed by a rule.

21 CHAIRMAN BABCOCK: Yeah. By the way, I
22 agree with that, and I think that, frankly, Judge McBride
23 did not deny anybody the right to have the evidence put on
24 in that case. We tried it quickly, but yeah, Jan.

25 HONORABLE JAN PATTERSON: But, Justice

1 Brister, do you at least apologize for the title of that
2 article?

3 HONORABLE SCOTT BRISTER: I don't know. Let
4 me think about it.

5 CHAIRMAN BABCOCK: Okay. Any other comments
6 to that rocket docket? Yes, Justice Hecht.

7 HONORABLE NATHAN HECHT: Pete Schenkkan
8 asked me at the break to clarify, so I'll be happy to,
9 that at least from my perspective and I think the Court's
10 perspective we don't expect Jeff's subcommittee to analyze
11 whether -- how much -- whether a rocket docket would
12 contribute to the vanishing jury trial problem and, if so,
13 how much, because as he rightly points out, to do that
14 we've got to go figure out what the problem is and what's
15 causing it and what can solve it and so on.

16 Rather, because we don't know with any
17 assurance what the problem is and whether it's good or bad
18 and what could fix it or what's causing it, we simply are
19 in the position of having to explore various ideas. So,
20 as Pete said, really what we're supposed to do is think
21 about if there were a rocket docket what would it look
22 like in Texas and what would be the benefits and debits,
23 and that is what we would like to know. Then this
24 committee can weigh in on is it helpful or hurtful and
25 then the Court will have the benefit of all of that

1 wisdom, not only in its own deliberations but in what I
2 anticipate will be ongoing conversations with the
3 Legislature.

4 CHAIRMAN BABCOCK: Yeah. Judge Lawrence,
5 you said at the break you wanted to say something about
6 this.

7 HONORABLE TOM LAWRENCE: Well,
8 interestingly, the JP courts are really not suffering any
9 decrease in the civil case load. Our case load, if
10 anything, has held steady or maybe even gone up a little
11 bit, and invariably we have people that tell us that
12 they'll arbitrarily reduce or sever out a part of their
13 claim to get within our jurisdiction because they want to
14 go somewhere that they don't have to retain an attorney
15 and it's faster and cheaper and they don't have all the
16 discovery problems that they hear such horror stories
17 about, and they just want to get in and out quickly.

18 The -- one of the problems that I see is the
19 binding arbitration clauses. I invariably about once
20 every two months have a plaintiff in that is suing,
21 defendant files a motion to dismiss because of a binding
22 arbitration clause, and the plaintiff had no idea that
23 when he signed this long contract to buy that refrigerator
24 that there was a binding arbitration clause, and then they
25 invariably come back later with a horror story about what

1 happened to them in arbitration and how expensive it was
2 and how they didn't really get to say much about it.

3 Mediation, on the other hand, has been a
4 very good tool for us to cases that are filed if we get
5 them through mediation and parties settle and they're
6 happy. I think mediation has been beneficial.
7 Arbitration has been and is becoming more and more of a
8 problem, but we're not having the difficulty in small
9 claims court cases, for example. Discovery is limited to
10 what the court approves, and there is no outright rule --
11 no outright right to discovery, and the cases move very
12 fast.

13 Now, I know on this committee we tend to --
14 everything we do to try to clarify things tends to expand
15 the rule book a little bit, and none of that makes things
16 go faster. I don't know what the solution is, but I don't
17 feel that having a rocket docket is going to turn around
18 the trend toward people not filing cases in state court.
19 I think generally it's good to have things go faster, but
20 I don't think that's the entire problem.

21 CHAIRMAN BABCOCK: Yeah. Harvey.

22 HONORABLE HARVEY BROWN: I was just going to
23 say that I think that the biggest issue to me is mandatory
24 versus voluntary rocket docket. There is already a
25 procedure in place for parties to agree to a rocket

1 docket. I mean, I was in Judge Christopher's court a
2 couple of months ago and heard her say, "You want a trial
3 in 30 days?" It was an injunction hearing, a case that
4 had been on file a week. "You want a trial in 30 days,
5 I'll give it to you," so the judges have the ability to
6 put something on a rocket docket already if the parties
7 want it.

8 So to me the problem is going to be
9 mandatory. When it's mandatory you're either going to, A,
10 kill the lawyers who can't agree to any extensions, like
11 your judge wouldn't let them do, and we've got to be
12 sensitive that people do have lives outside of litigation;
13 or, B, you're going to impeck justice because the parties
14 of necessity can't do everything under that short time
15 frame; or, C, you're going to make these cases only be
16 handled by huge firms that can throw tons of bodies to get
17 it done in that short time frame and, therefore, are going
18 to spend a lot more money. So it seems to me the
19 mandatory is the real problem here, and what we're trying
20 to address really isn't so much I don't think the timing
21 of trials.

22 I mean, I do some arbitrations and, frankly,
23 the thing that drives the arbitration date is the
24 discovery. If they're not doing any discovery I can try
25 it very quickly, but if they're doing a lot of discovery I

1 try some of those in arbitration just as fast as I did as
2 a judge, and so I don't think it's really a question of
3 anything other than the discovery process is largely
4 driving a lot of this to arbitration, and so I think
5 that's another problem.

6 For the committee, I'd suggest that there is
7 one other overlay they need to think about when they're
8 thinking about mandatory rocket docket, and that is
9 electronic discovery. I was just appointed a special
10 master in a case that was set on a pretty quick docket,
11 nine months, a hundred million dollars in dispute,
12 millions and millions of electronic documents. I mean, I
13 just felt sorry for these lawyers. I mean, they were
14 working every weekend, they had huge teams, but the
15 electronic discovery overlay on this is going to make a
16 rocket docket even more difficult, it seems to me. So I
17 think they need to be sensitive to that.

18 CHAIRMAN BABCOCK: Okay. Well, with that
19 said, unless there is anybody else that wants to weigh in
20 on this now, I think we've given Jeff and his subcommittee
21 a good healthy dose of what everybody thinks, maybe
22 clarified their mission a little bit, and why don't we
23 just break for lunch and be back in about an hour?

24 (Recess from 12:24 p.m. to 1:36 p.m.)

25 CHAIRMAN BABCOCK: So, Elaine, let's talk

1 about Rule 296. Come on, Jim. Jim Perdue. Chop, chop.

2 PROFESSOR CARLSON: You should have a report
3 of the subcommittee reading, the title, on "216 TRCP to
4 299a," if you'll turn to page two because Chip has asked
5 that we start with the findings of facts rules. Our
6 subcommittee through our last meeting was asked to
7 consider four discrete issues in connection with our
8 findings of fact practice. One was whether or not our
9 finding of fact rule should attempt to incorporate the
10 situations in which findings of fact are required and when
11 they're discretion area, whether our findings of fact
12 should be mandated in broad form when feasible to parallel
13 the jury charge rules. We noted from the State Bar
14 committee report that there are complaints voiced by
15 several appellate court practitioners, including Frank
16 Gilstrap, dealing with the voluminous and unnecessary
17 evidentiary findings that is going on in our current
18 practice and whether or not the timing of request for
19 findings of fact should be modified, should we go to the
20 Federal approach and allow a Texas trial judge to make
21 findings of fact at the conclusion of the evidence orally
22 on the record, and finally whether the Federal clearly
23 erroneous standards should be considered.

24 Our subcommittee did not recommend including
25 a statement as to when findings of fact are required and

1 when they're discretionary, with the consensus of the
2 subcommittee being, well, you can find that in IKB
3 Industries, although you do have that standard set forth
4 in Appellate Rule 21 to some extent. Nevertheless,
5 because I had already spent time on this I'm torturing
6 you. On page two, that was my proposed draft that you can
7 join in rejecting. So I guess that's the first issue,
8 Chip, is there a strong -- or do you want me to go through
9 the whole report?

10 CHAIRMAN BABCOCK: No. Let's take it in
11 pieces.

12 PROFESSOR CARLSON: Okay.

13 CHAIRMAN BABCOCK: You want to frame the
14 issue so that everybody can --

15 PROFESSOR CARLSON: Does everyone concur on
16 the subcommittee's recommendation that it would not be
17 prudent to include in Rule 296 a statement of when
18 findings are required as opposed to when they're
19 discretionary?

20 CHAIRMAN BABCOCK: Okay. Judge Christopher,
21 you have a view on that.

22 HONORABLE TRACY CHRISTOPHER: Well, you
23 know, if I'm in the minority, I'm in the minority. I
24 would like clarification as a trial judge. I went and
25 read IKB Industries to see if it would really tell me when

1 I had to do it, and as best I could understand from
2 reading that case, it did not tell me when I should do it.
3 It discussed when a request can extend the appellate
4 timetable, when such findings may be useful for appellate
5 review, so I Shepherdized IKB Industries. 281 cases have
6 cited IKB Industries since it came out, so I think the
7 issue is still perhaps percolating around out there as to
8 when findings of fact are necessary.

9 And from a trial judge's perspective, some
10 of us have had situations where the appellate court has
11 ordered an appeal abated and sent it back to us asking us
12 to do findings of fact and in a case where we didn't think
13 findings of fact were necessary. It was one of those
14 discretionary ones where they're not mandatory but they
15 might be useful, and now the appellate court says two and
16 and a half years later, "Hey, it's really useful for us to
17 go back and figure out the findings of fact two and a half
18 years later."

19 PROFESSOR CARLSON: "Since you can't, we're
20 going to reverse or remand for trial."

21 HONORABLE TRACY CHRISTOPHER: Just a very
22 difficult situation. You know, there are so many cases,
23 even after IKB that say things like "any time there is an
24 evidentiary hearing you should do findings of fact" and
25 "any time there is an interlocutory appeal or an order,

1 you need not do so but the better practice is to do it,"
2 and so, I mean, we get requests for findings of fact and
3 conclusions of law all the time and after many, many,
4 many, many different types of hearings that we have, and I
5 would just -- you know, I'm a hard line person. I like to
6 know, yes, I need to do them and then I get them done, or,
7 no, I don't need to do them and I can ignore this request
8 and I don't have to worry about getting reversed -- or not
9 reversed, but requested two years later to do it.

10 CHAIRMAN BABCOCK: And that was the minority
11 view?

12 HONORABLE TRACY CHRISTOPHER: That's my
13 view.

14 PROFESSOR CARLSON: Yes. We're in the
15 minority, Judge Christopher. I'd be interested if
16 Professor Dorsaneo agrees with me, but our subcommittee
17 was of the consensus that the only time findings of fact
18 are required, absent a statutory special situation, is
19 when you have a conventional full-blown evidentiary trial
20 on the merits. That's the way we were reading IKB, and
21 that was not to say it could be useful any time the trial
22 court enters a judgment, even though it wasn't following a
23 full-blown evidentiary conventional trial on the merits
24 when the court held an evidentiary hearing that led to
25 judgment.

1 CHAIRMAN BABCOCK: Bill, then Kent.

2 PROFESSOR DORSANEO: Well, I agree with you,
3 but I think people -- and you added the words "on the
4 merits," which presumably meant the merits of the claims
5 and defenses under substantive law, right?

6 PROFESSOR CARLSON: Yes.

7 PROFESSOR DORSANEO: There is no clear
8 articulation of what the word "trial" means, you know, if
9 you can have a conventional trial at the bench over a
10 separate part of the proceeding, any separate part of the
11 proceeding; and it's been my view for a considerable
12 period of time that a lot of evidentiary hearings on a
13 part of the case, even if it doesn't involve merits of the
14 claims and defenses, you know, could well be
15 characterizable as a conventional trial. A lot of times
16 we talk about hearings and trials when we're really
17 talking about trials and trials, and that's a confusion
18 that we have.

19 Your draft is, I think, an improvement,
20 although it doesn't solve all of the dilemmas. I would be
21 in favor of what you propose that your committee did not
22 like.

23 CHAIRMAN BABCOCK: Summary judgment is a
24 trial, but you don't to do findings and conclusions on
25 summary judgment, right?

1 MR. ORSINGER: That's because there is no
2 facts to find in a summary judgment, so it's kind of
3 illogical to say that you would make a fact finding.

4 PROFESSOR DORSANEO: It's not a conventional
5 trial under our jargon that we've developed over the
6 years.

7 CHAIRMAN BABCOCK: Yeah.

8 PROFESSOR DORSANEO: Maybe it is a
9 conventional trial now, but it wasn't --

10 CHAIRMAN BABCOCK: It's not thought to be
11 conventional anyway. Kent.

12 PROFESSOR DORSANEO: It's not a trial at
13 all, quite frankly.

14 CHAIRMAN BABCOCK: Kent Sullivan.

15 HONORABLE KENT SULLIVAN: Just a quick vote
16 in favor of clarity and certainty. Whenever an
17 experienced judge like Judge Christopher weighs in as she
18 has, this says to me that we need to have a clearer, more
19 plain language version of the rule that is as bright line
20 as possible, particularly given that her Shepherd's
21 attempt turned up 200 --

22 HONORABLE TRACY CHRISTOPHER: 181 cases
23 discussing that case.

24 HONORABLE KENT SULLIVAN: That suggests to
25 me a dramatic waste of judicial resources constantly

1 interpreting something that apparently cries out for some
2 real clarity. I like Elaine's formulation, and I think
3 maybe we ought to just clearly say that this is exactly
4 what it means.

5 PROFESSOR DORSANEO: Is that a motion?

6 HONORABLE KENT SULLIVAN: I'll be happy
7 to --

8 CHAIRMAN BABCOCK: Is Elaine's formulation
9 the first thing we say here or the minority view?

10 PROFESSOR CARLSON: It's the minority view.
11 Our subcommittee did not endorse this language.

12 CHAIRMAN BABCOCK: Oh, okay.

13 HONORABLE KENT SULLIVAN: My recollection,
14 but I defer to Professor Carlson, was that absent specific
15 statutory instruction to do so or following a, you know,
16 conventional trial on the merits.

17 MR. GILSTRAP: Can I ask --

18 HONORABLE KENT SULLIVAN: That was the way I
19 understood it. I'm not proposing that as the specific
20 language, but that's what I recall.

21 CHAIRMAN BABCOCK: Okay. Frank.

22 MR. GILSTRAP: Can I ask for clarification?
23 I'm looking at page three, and at the top it says "Rule
24 296," and it starts out underlined "if findings are
25 properly requested." Is that the subcommittee

1 recommendation?

2 PROFESSOR CARLSON: Yes, on a subsequent
3 issue.

4 MR. GILSTRAP: Okay. Where are you talking
5 about?

6 PROFESSOR CARLSON: Frank, I am on page two,
7 the bottom paragraph on the page, redlined.

8 MR. GILSTRAP: All right. Sorry.

9 PROFESSOR CARLSON: Beginning with
10 "following."

11 MR. GILSTRAP: And that simply is added to
12 the existing language of the rule? You're not going to
13 take out any of the existing language of 296?

14 PROFESSOR CARLSON: Not so far.

15 MR. GILSTRAP: Okay. That's where we are.
16 Okay. Thank you.

17 CHAIRMAN BABCOCK: Yeah.

18 MR. STORIE: I had one thought, which was a
19 conventional trial doesn't have a specific meaning to me.
20 The point I raised last time was the difficulty we
21 sometimes have in substantial evidence de novo cases where
22 you have conventional trial in terms of how you're putting
23 on evidence, and so I would ask that maybe we add "de
24 novo" or something like that so the findings are not
25 requested in those kind of trials.

1 CHAIRMAN BABCOCK: Okay, Gene. Yeah.

2 PROFESSOR DORSANEO: Conventional trial has
3 a recognized meaning, and it probably does mean on the --
4 it probably does mean on the merits. The word "trial"
5 doesn't have any particular meaning, but "conventional
6 trial" is a term coined by Judge Calvert in the Aldridge
7 case some many years ago, and I think it has a fairly
8 well-recognized meaning, and we've used it before. The
9 words "conventional trial on the merits," I think is
10 language that would say "trial on the merits of the claims
11 and defenses, of substantive claims and defenses" and
12 "conventional" adds that suggestion, too. It's not a
13 trial on a plea and abatement, for example, because of a
14 prior pending action or something like that.

15 MR. STORIE: Again, that's what we have, I
16 think, in all respects except that it's not de novo, so
17 the court is not the fact finder. Does "conventional"
18 carry with it the meaning of de novo and fact finding
19 authority in the court?

20 PROFESSOR CARLSON: I'm sorry. I didn't
21 follow you exactly. You're talking about an appeal from
22 an administrative decision that's tried de novo in the
23 trial court? Do I understand that?

24 MR. STORIE: Correct. But it's substantial
25 evidence de novo. It's not a true de novo trial, so the

1 court has to hear and admit the evidence, but the court
2 does not have discretion in finding facts. That has to
3 defer to the agency decision.

4 PROFESSOR CARLSON: I see.

5 HONORABLE STEPHEN YELENOSKY: Yeah. There
6 are no findings of fact other than it was supported by
7 substantial evidence or not.

8 MR. STORIE: Right, but the prior reading
9 was if it's tried to the court you can ask for findings,
10 and that was the question I had about the rule as it
11 currently is.

12 HONORABLE STEPHEN YELENOSKY: Well, at least
13 in -- I would think that -- we do a lot of those
14 administrative appeals. We don't consider those
15 conventional trials, but maybe that needs to be spelled
16 out.

17 PROFESSOR DORSANEO: I don't -- that's
18 outside of my camp. I mean, I don't know.

19 CHAIRMAN BABCOCK: Elaine.

20 PROFESSOR CARLSON: May I ask a question?
21 Does the Administrative Procedure Act -- is that where you
22 find the substantial evidence standard, or is that from
23 the common law?

24 MR. STORIE: Yeah, the particular cases I'm
25 talking about, though, are actually accepted from the APA

1 generally, so they're under the old standard, which used
2 to be substantial evidence de novo. I think in all
3 administrative appeals where you go introduce the evidence
4 all over again and you have witnesses, documents,
5 everything else, but the court's decision is limited to
6 the legal question of substantial evidence and then
7 whatever statutory questions may be there, too.

8 PROFESSOR CARLSON: So that's not a matter
9 of statutory requirement for the review. That's just how
10 we do it under the common law? I understand what's
11 happening. I'm just trying to figure out is there a
12 statutory provision.

13 HONORABLE STEPHEN YELENOSKY: Usually it's
14 statutory. Usually it's statutory. I imagine there is
15 still some common law, but mostly it's statutory. But
16 either way, it's a substantial evidence review, which is
17 not --

18 PROFESSOR CARLSON: Yeah.

19 HONORABLE STEPHEN YELENOSKY: -- a finding
20 on a preponderance.

21 PROFESSOR CARLSON: Because I was thinking,
22 you know, we could lead off this paragraph with "absent a
23 statutory requirement to the contrary," or "unless a
24 statute otherwise requires," but I'm hearing that his
25 situation is not covered by statutory requirement of de

1 novo review with a deference given to the findings.

2 CHAIRMAN BABCOCK: Gene, is it your
3 experience that most judges would believe as Judge
4 Yelenosky that your -- the situation you're describing is
5 not a conventional trial on the merits?

6 MR. STORIE: I think most would not think
7 that findings are appropriate. There is case law to that
8 effect and yet we still have probably at least three or
9 four a year who will file findings and will think they're
10 appropriate because of the way the rule currently reads.
11 So it's not --

12 CHAIRMAN BABCOCK: They think they're
13 required to do it or they just can do it because --

14 MR. STORIE: They think it's proper to
15 request and to file findings because, as it says now, it's
16 just any case tried to the court without a jury.

17 HONORABLE STEPHEN YELENOSKY: Well, and they
18 find certain facts. They don't just say, "There is
19 substantial evidence to support"?

20 MR. STORIE: Yes.

21 HONORABLE STEPHEN YELENOSKY: They actually
22 find facts?

23 MR. STORIE: Yes.

24 HONORABLE STEPHEN YELENOSKY: Well, there is
25 no cure for wrongness. I mean --

1 CHAIRMAN BABCOCK: Yeah, Frank.

2 MR. GILSTRAP: As I understand, the intent
3 of the change is to tell the court that you only have to
4 make findings of fact and conclusions of law following a
5 conventional trial on the merits and in no other situation
6 are you required to make them.

7 PROFESSOR CARLSON: Absent a statutory
8 requirement.

9 MR. GILSTRAP: Okay. Okay. If that's the
10 case, I'm not sure why we need the language starting in
11 the second line from the bottom, starting with "in support
12 of the judgment." You see, that seems to -- that seems to
13 suggest there might be someplace where you would make
14 findings if you were not dealing with a final judgment.
15 It seems like you could cut off "in all other instances"
16 you don't need findings and conclusions, period,
17 except the -- unless you want to put in there "except by
18 statute."

19 CHAIRMAN BABCOCK: Yeah, Bill.

20 PROFESSOR DORSANEO: That raises another
21 ambiguity. Usually when we use the term "judgment" we
22 mean final judgment, but not always. Sometimes we don't
23 mean judgment at all. We just mean some sort of an order.
24 So, I mean, the words "trial" and "judgment" are just
25 fraught with ambiguities, and I don't know whether we

1 ought to use -- that might be a reason not to use "in
2 support of the judgment" in this draft.

3 PROFESSOR CARLSON: You know, Frank, that
4 language or that thought came out of the IKB decision
5 where they actually were looking at nonconventional trial
6 on the merits that culminated in a final judgment, but
7 I see -- you know, remember that, that line of cases, if
8 you dismiss for this reason but you had a hearing or if
9 you DWOP for this reason but you had a hearing. You heard
10 evidence, you dismiss for sanctions, but you had a
11 hearing. The trial court could make findings of fact, but
12 what you're saying is by including that language it's
13 cutting off the discretionary right, or could be read that
14 way, of a trial court to make findings in a
15 noninterlocutory order?

16 MR. GILSTRAP: I'm reading it to suggest
17 there might be a place that other than following a
18 conventional trial that findings might be required.

19 CHAIRMAN BABCOCK: Judge Yelenosky.

20 HONORABLE STEPHEN YELENOSKY: Did you-all
21 look at plea to the jurisdiction? There's at least one
22 case saying that findings are appropriate because facts
23 can be considered, but I thought the case law was that you
24 considered the facts and you looked to whether they can be
25 resolved sort of on a summary judgment standard, which

1 would lead one to think that you don't make findings,
2 so --

3 CHAIRMAN BABCOCK: Appropriate or required
4 on a plea to the jurisdiction?

5 HONORABLE STEPHEN YELENOSKY: Either. I
6 mean, I would think they're not appropriate if it's really
7 like a summary judgment standard.

8 HONORABLE SCOTT BRISTER: Nobody knows.

9 HONORABLE STEPHEN YELENOSKY: What's that?

10 HONORABLE SCOTT BRISTER: Like everything
11 with plea to the jurisdiction, nobody knows, because
12 there's not a rule.

13 PROFESSOR DORSANEO: Just don't say "after
14 an evidentiary hearing" instead of those other words.

15 CHAIRMAN BABCOCK: Yeah, Frank.

16 MR. GILSTRAP: But the point is Judge
17 Yelenosky is just opening up a huge area here.

18 HONORABLE STEPHEN YELENOSKY: Sorry.

19 MR. GILSTRAP: I think so. There are many,
20 many times that a court will hear evidence and make a
21 decision based on disputed facts. It may be some
22 ancillary area. It may be a jurisdictional. It may be a
23 lot of things, but so far in Texas we have only required
24 findings of fact following a trial on the merits. The
25 Federal courts, they make them all the time, and you could

1 do that. You could say in Texas if there is some
2 ancillary issue that's being tried that could go up, the
3 court can make findings of fact and require it, but that's
4 a huge step, and we're going far beyond where we started.
5 I mean, if we want to go there, I think we've got to
6 realize we're taking a big step.

7 HONORABLE STEPHEN YELENOSKY: And resources
8 need to --

9 PROFESSOR CARLSON: Yeah, we had that
10 discussion at the subcommittee level, Frank, and Judge
11 Peeples pointed out that Federal courts are courts of
12 limited jurisdiction and that the Federal government can
13 print money and they have law clerks and resources to do
14 that.

15 CHAIRMAN BABCOCK: Lots of law clerks.

16 PROFESSOR CARLSON: And we don't.

17 CHAIRMAN BABCOCK: Richard.

18 MR. ORSINGER: From my perspective we ought
19 to evaluate this from the standpoint of when do we want
20 and why do we want findings of fact. We want findings of
21 fact when the appellate court is going to decide whether
22 to reverse a decision. We don't need it for any other
23 purpose. So if you have dismissed a case on special
24 appearance and it's going to be appealed, you ought to get
25 findings of fact to help the appellate court decide

1 whether the case is done properly. If you have an
2 unconventional trial on the merits, whatever
3 unconventional would be, and it's case dispositive and
4 required the trial judge to judge the credibility and rule
5 between two competing versions of the facts, you ought to
6 get findings of fact. We're trying to help the appellate
7 court stay out of the business of weighing the evidence
8 really or acting as a nisi prius fact finder, and we do
9 that by giving them --

10 HONORABLE STEPHEN YELENOSKY: A what?

11 MR. ORSINGER: -- findings.

12 HONORABLE STEPHEN YELENOSKY: What was that?

13 Who is that?

14 CHAIRMAN BABCOCK: A nisi prius.

15 PROFESSOR CARLSON: Who you calling a nisi
16 prius?

17 MR. ORSINGER: Hey, you watch your mouth.

18 CHAIRMAN BABCOCK: Mr. Dirty Mouth.

19 MR. ORSINGER: And so it seems to me if the
20 standard you use is when does the appellate court need to
21 know how and why the facts were resolved the way they
22 were, that's when they need findings, and so I would be
23 attracted to something more like what we have done in the
24 Family Code, which is that you give findings that are
25 necessary to adequately present the case on appeal.

1 MR. GILSTRAP: Chip, but --

2 CHAIRMAN BABCOCK: Judge Patterson had her
3 hand up a minute ago.

4 HONORABLE JAN PATTERSON: Well, the other
5 purpose of it is to facilitate transparency of reasoning
6 so that the appellate court doesn't have to guess at the
7 reasoning below and so that the appellate court is not in
8 a position of saying "will affirm on any ground" and which
9 makes appeal less meaningful, but one thing we need to
10 keep in mind just as we go through this process is that
11 the criminal law has taken Richard's approach, and I think
12 it's the Cullen case, if anybody can speak to that, is
13 that right? Where the Court of Criminal Appeals has now
14 required findings of fact, and I believe that's a
15 suppression hearing, so it's not a conventional trial on
16 the merits, and the purpose of that was to -- because
17 lawyers always request finding of fact in a suppression
18 hearing and courts very often ignore them, and then when
19 it goes up on appeal it's upheld upon any theory, and the
20 facts may or may not be relevant and may or may not have
21 been helpful, but this is a -- to allow a certain
22 transparency of reasoning and understanding on what facts
23 it was decided below and to make appeal meaningful, but I
24 think we can't ignore the movement of the criminal law in
25 that area and the reasons why it's going -- moving also in

1 that direction.

2 CHAIRMAN BABCOCK: Judge Benton.

3 HONORABLE LEVI BENTON: I waive for the time
4 being.

5 CHAIRMAN BABCOCK: All right, sir. Justice
6 Duncan and then Frank.

7 HONORABLE SARAH DUNCAN: Well, another
8 purpose that would be served by findings and conclusions
9 is that whoever is appealing would know how to brief it.
10 We have an enormous number of pages filed in the appellate
11 courts trying to disprove a possible ground for recovery
12 or defense without any knowledge that the trial judge
13 thought it was a possible ground of recovery or defense.

14 CHAIRMAN BABCOCK: That would be summary
15 judgment or more than that?

16 HONORABLE SARAH DUNCAN: Oh, much more than
17 that. For instance, a DWOP. If you've got a dismissal
18 for want of prosecution and the defendant files a motion
19 for dismissal on three grounds, you know, want of -- one,
20 of due diligence in prosecuting the case, failure to
21 comply with Supreme Court standards, failure to appear at
22 a trial or hearing, and the trial judge sits there --
23 Judge Christopher sits there and says, "They didn't fail
24 to appear at a trial or hearing. That's garbage," but we
25 don't know that because there's no record of it, she

1 didn't say it on the record. It's not in the findings,
2 and so on appeal the only way the appellant can get that
3 judgment reversed is to show that none of the possible
4 bases for dismissal was viable in this case.

5 Well, if two of the three the trial judge
6 rejected, we shouldn't -- they shouldn't be briefing it
7 and we shouldn't be having to consider it, but it does
8 take enormous resources to do findings and conclusions,
9 and unfortunately we don't have the power to increase
10 them.

11 HONORABLE TOM GRAY: I was just going to
12 say, but now that you mention it, on summary judgments
13 it's there, too.

14 HONORABLE SARAH DUNCAN: That's right.

15 CHAIRMAN BABCOCK: Yeah.

16 HONORABLE TOM GRAY: A lot of time.

17 CHAIRMAN BABCOCK: Oh, yeah. Big time on
18 summary judgment.

19 HONORABLE TOM GRAY: A lot of times.

20 CHAIRMAN BABCOCK: Frank.

21 MR. GILSTRAP: Well, so to summarize, where
22 we are is on the one hand it really makes a lot of sense
23 to have findings and conclusions in other instances like
24 where you're trying jurisdictional facts or they're being
25 determined by the court, there is a lot of instances in

1 which you could have findings of fact and it would make a
2 lot -- it would make the appeal a lot more meaningful, but
3 do you want to pay that price or do you want to just say
4 we're going to continue with the present system, which is
5 we presume the facts, we presume the facts in favor of how
6 the judge decided, and we're not going to pay that price
7 for -- because of some higher level of transparency by
8 requiring these findings of fact in a lot of cases in
9 which the judges don't want to make them.

10 CHAIRMAN BABCOCK: Fair enough. Yeah, Bill.

11 PROFESSOR DORSANEO: Elaine, some of these
12 other proposals that make it or look like they make it
13 easier for the court to perform this function or to
14 satisfy the requirements of the findings rule, you know,
15 might bear on this issue as to how often we want to
16 obligate the court to make them.

17 CHAIRMAN BABCOCK: Yeah, Sarah -- I mean,
18 not Sarah but --

19 PROFESSOR CARLSON: Sarah wanna be.

20 CHAIRMAN BABCOCK: Elaine.

21 PROFESSOR CARLSON: I'm not speaking for the
22 full subcommittee because we really didn't flesh this out,
23 but when I read IKB and Progeny and other cases, it seems
24 to me that the policy reason for requiring findings of
25 facts following a conventional trial on the merits has

1 been in part to inform a losing litigant of the grounds on
2 which they won and lost so they could possibly narrow the
3 basis for the appeal, and in an interlocutory hearing, you
4 have a discrete matter and you know what it is, because we
5 ruled on it.

6 When you look at the Federal case law on
7 this -- and I don't profess to have any expertise there,
8 just a little bit of knowledge is dangerous, but I did
9 look on the Federal side. Federal courts look much more
10 at the issue in terms of informing the appellate court
11 than we do, and the Federal courts admonish trial judges
12 for accepting the parties' proposed findings of fact and
13 suggest the trial judge ought to be doing this on his or
14 her own and, of course, as Frank said the required in all
15 cases in Federal court with different resources.

16 Richard, what I hear you saying is you
17 appreciate as an appellate lawyer that it would be useful
18 to be able to inform the appellate court the factual
19 determinations by the trial court whether it was a
20 conventional trial on the merits or not.

21 MR. ORSINGER: If it's an appealable
22 question.

23 PROFESSOR CARLSON: If it's an appealable
24 question.

25 MR. ORSINGER: And I don't mean to destroy

1 what you're saying, but there are lots of rulings that are
2 preliminary to the important ones.

3 PROFESSOR CARLSON: Uh-huh.

4 MR. ORSINGER: And we don't want findings on
5 all of those. We want "the case was decided because I
6 went with this instead of that." Let's put that in the
7 record so it can be reviewed on appeal.

8 PROFESSOR CARLSON: So you want it put in
9 the rule that the findings are really important and you
10 can appeal them?

11 MR. ORSINGER: Well, no, I don't. I think
12 the approach of conventional trial on the merits leads us
13 often into areas and debates that have to do with words
14 and not with the reality of trying to get a case that was
15 tried with a bunch of conflicting testimony up in a clean
16 fashion to the appellate court. I think we ought to be
17 focusing on what kinds of hearing or outcomes or rulings
18 are appealable and how do we want to describe them. One
19 way to describe them, which is kind of sort of the way the
20 Family Code has handled this, although in a more narrow
21 fashion, is that we say in the Family Code that the
22 findings of fact have to be sufficient to allow the case
23 to be presented on appeal.

24 We don't tell you what you must include or
25 can include or the degree of specificity or when it occurs

1 or whatever, but it's got to be enough for the appellate
2 court, and so that's a self-enforcing standard because if
3 it's not enough the appellate court will abate it and send
4 it back down. Now, maybe there is some self-adjusting
5 mechanism to determine what kinds of hearings or rulings
6 will require a finding, rather than argue until the cows
7 come home on what's a conventional trial or what's the
8 merits and what's not. Maybe we could find a different
9 way of describing something that basically is outcome
10 determinative, but depends on facts.

11 CHAIRMAN BABCOCK: Carl.

12 MR. HAMILTON: Is it too broad just to say
13 any appealable decision of the trial court?

14 PROFESSOR CARLSON: Well, isn't everything
15 potentially appealable?

16 MR. HAMILTON: Huh?

17 PROFESSOR CARLSON: You mean subject to an
18 immediate appeal?

19 MR. HAMILTON: Yeah, immediate appeal is
20 what I mean.

21 CHAIRMAN BABCOCK: That may be sweeping with
22 a pretty broad brush, wouldn't you think?

23 HONORABLE SARAH DUNCAN: I would bet you
24 that there are issues that are not subject to an
25 interlocutory appeal on which you would very much want and

1 need findings and conclusions.

2 CHAIRMAN BABCOCK: Justice Jennings and then
3 Justice Gray.

4 HONORABLE TERRY JENNINGS: Doesn't it depend
5 on the standard review? If it's a de novo standard of
6 review, who cares about the findings of fact. I mean, if
7 it's a mixed question of law and fact then findings of
8 fact come into play, and obviously if it's abuse of
9 discretion, I mean, if you really want to think about -- I
10 mean, you could put a lot of work and effort into trying
11 to come up with this, but it all depends on the standard
12 of review of the decision, right?

13 HONORABLE STEPHEN YELENOSKY: Right.
14 Substantial evidence review. The court of appeals is
15 going to review it the same way the trial court did. Why
16 do they want anything from me?

17 PROFESSOR CARLSON: Justice Jennings, are
18 you saying that because there's different levels of
19 deference that are given to fact finding that we shouldn't
20 try --

21 HONORABLE TERRY JENNINGS: Yeah, I don't
22 know that we need a rule that covers everything, which is
23 maybe one reason the committee didn't want to have a
24 clear-cut rule because maybe you can't have one because
25 there are so many factors involved. I don't know. What

1 was the reasoning of the committee in that regard?

2 PROFESSOR CARLSON: Well, I guess Bill and I
3 are the ones who aren't that troubled by what a
4 conventional trial on the merits means.

5 PROFESSOR DORSANEO: Not troubled by it at
6 all. But the issue, seems to me, is the one that Richard
7 raised. I mean, you could just as easily have a very
8 satisfactory rule that would say after -- you have to have
9 findings after any evidentiary hearing.

10 PROFESSOR CARLSON: Would you have to have a
11 judgment before you -- would you require a final judgment
12 before that requirement would kick in or --

13 PROFESSOR DORSANEO: No, just some sort of
14 an order.

15 MR. ORSINGER: Well, see, I'm not advocating
16 something that broad because then you get a lot of
17 preliminary findings that get folded into the ultimate
18 outcome. I think there ought to be some way -- perhaps
19 this is similar to a jury verdict or something, some way
20 to say when the ruling is case determinative and whether
21 you admit certain evidence or not, maybe that's case
22 determinative, but I certainly wouldn't want trial judges
23 to do findings on what evidence they let in and what
24 evidence they -- but if it disposes of the case, it ought
25 to be in the category where findings are available. If

1 it's a special appearance that's granted, why should we
2 have to brief it on the assumption that any one of five
3 possible legal theories was the one the judge used?

4 And then family law, by the way, you end up
5 with many things that are not conventional trials on the
6 merits for various reasons. We might cut up some matters
7 to be settled by agreement, some matters to be ruled on by
8 the judge in an informal situation and then may even have
9 a jury deciding some issues, and those don't all
10 necessarily happen in the same seven-day period, so when
11 you try to bring this concept of what is a conventional
12 trial on the merits to a family law case it's going to
13 break down, and if you --

14 PROFESSOR DORSANEO: It needs to except.

15 MR. ORSINGER: Okay. Well, you and I can
16 talk about it some more.

17 CHAIRMAN BABCOCK: Justice Gray had his hand
18 up a long time ago.

19 HONORABLE TOM GRAY: Well, I was going to
20 try to interject an example of a situation when you may on
21 an individualized ruling want some findings that would be
22 helpful to us. For example, like on a 702 hearing on a
23 Daubert analysis, are you saying that the expert is not
24 qualified, are you saying it's not a reasonable area of
25 expertise, that he did not do it properly on this

1 occasion? I mean, there are, as I recall, three or four
2 discrete findings that have to be made before the expert
3 is introduced, and it would sure be helpful to me in
4 reviewing that trial court's decision on appeal if I knew
5 which one of the bases the expert was not admitted on.

6 On another issue on the conclusions of law,
7 I don't think there is any time that the appellate court
8 uses the conclusions of law of the trial judge, because we
9 are not bound by them and if they are in fact findings of
10 fact we use them as findings of fact and so does that even
11 need to be in the rule with regard to conclusions of law.
12 And then I was curious kind of where the majority was, was
13 this just on the subcommittee -- was it just a leave the
14 rule like it was?

15 PROFESSOR CARLSON: Yes.

16 HONORABLE TOM GRAY: And just leave it
17 alone, and was there a reason to just leave it alone or
18 was it just too problematic to fix?

19 PROFESSOR CARLSON: Both.

20 HONORABLE TOM GRAY: Okay.

21 CHAIRMAN BABCOCK: Getting back to Daubert,
22 though, Justice Gray, is there deference given to the
23 trial court on the findings of qualification and all the
24 things that --

25 HONORABLE STEPHEN YELENOSKY: Expert --

1 MR. ORSINGER: Abuse of discretion.

2 HONORABLE HARVEY BROWN: Unless it's a no
3 evidence review.

4 CHAIRMAN BABCOCK: Okay. Judge Patterson,
5 you had your hand up.

6 HONORABLE JAN PATTERSON: I'm not sure which
7 way I come out on this, but the other reason to be
8 inclined towards findings of fact is simply because I'm
9 convinced that it leads towards disposition of cases
10 following trials. The more reasons that a trial judge
11 generally gives, the more explanation, the clearer the
12 reasoning, the less likely it is to be appealed. And that
13 may go to the transparency point, but it's a slightly
14 different point.

15 CHAIRMAN BABCOCK: Okay. Richard.

16 MR. ORSINGER: Another rationale that maybe
17 was included in what you said or maybe not is that I think
18 it would improve user satisfaction. I think one of the
19 reasons we require appellate courts to sign written
20 opinions and some of us fought memorandum opinions as
21 being one or two-line dispositions is that, first of all,
22 it forces the judge to approach the case intellectually,
23 which I think that our law would like.

24 We don't want just an arbitrary decision.
25 We want a rational decision that can be explained in

1 rational terms, and it needs to be put on paper where the
2 thought process that you go through in putting it on paper
3 introduces a kind of a rationalization to it, and it holds
4 the thought processes up to review by other people. And
5 if the trial judge is able to just say "you win" and never
6 say anything, it's not good public policy, just like we
7 wouldn't want the appeal courts to say "you win" and not
8 tell you why. So having findings help, I think, the
9 litigants to see why they lost, which sometimes may avoid
10 appeals if they feel like, man, I just lost because in a
11 swearing match they didn't believe me, I'm not going to
12 get this reversed on appeal, just let it go. I mean, as a
13 policy issue, having judges articulate the reasons for
14 their decisions in a rational way I think is a good public
15 policy.

16 CHAIRMAN BABCOCK: Judge Yelenosky.

17 HONORABLE STEPHEN YELENOSKY: Well, I agree
18 with that. I guess I'm wondering about -- certainly on
19 dispositive things, but I'm wondering about all those
20 motions that we hear and decide in discovery disputes
21 where, you know, there might be multiple reasons for doing
22 it, but judicial economy might lead the trial judge to
23 decide based on the easiest issue that's before him or
24 her, and then do we want to encourage people just to find
25 on that and then appeal on that issue, or does that mean

1 the trial judge has got to have longer hearings to make
2 sure that everything is covered and all the findings that
3 are necessary on every discovery dispute are heard?

4 The other thing is just that I just think
5 it's really complicated because if you say -- I mean, the
6 substantial evidence is a good example because if you
7 don't look at the standard of review and you say, you
8 know, you had a final decision that's going on appeal, I
9 don't see how anything other than, you know, it's
10 supported by substantial evidence or it's not is
11 appropriate, but yet you're saying the court would have to
12 give findings.

13 CHAIRMAN BABCOCK: Harvey, then Bill.

14 HONORABLE HARVEY BROWN: Sometimes I think
15 fact findings don't discourage appellate review, they
16 encourage appellate review.

17 HONORABLE STEPHEN YELENOSKY: Right.

18 HONORABLE HARVEY BROWN: Sometimes if a
19 judge gives the wrong rationale everybody thinks, "Oh," --

20 CHAIRMAN BABCOCK: "What an idiot."

21 HONORABLE HARVEY BROWN: -- "I could take
22 that one up," I'll win that one, so that's why judges are
23 encouraged, frankly, to not give a rationale, so I think
24 that while it might sometimes help avoid appeals, I also
25 think sometimes having fact finding would actually

1 encourage it.

2 HONORABLE JAN PATTERSON: When they make
3 mistakes? I mean --

4 HONORABLE HARVEY BROWN: The ruling may be
5 the right ruling but the wrong reason.

6 MR. GILSTRAP: Right result.

7 HONORABLE JAN PATTERSON: Yeah.

8 HONORABLE HARVEY BROWN: If it goes up on
9 appeal only on that reason, that rationale, then you're
10 going to have it back down and ask for summary judgment
11 again. I'm just saying the assumption that it's
12 necessarily going to result in less appeals is --

13 HONORABLE JAN PATTERSON: I think that's a
14 very common perception that's very misunderstood because
15 it's upheld upon any ground upon which it could have
16 been -- but the reasoning provides the litigant -- it goes
17 back to user satisfaction, to transparency, but also
18 whether there is a basis for appeal. I think it's easier
19 for the lawyer to explain why; and, frankly, the other
20 aspect of it is that it forces the judge through the
21 discipline of making the decision; but I think this rule
22 and run thing that's really developed and now out of
23 control, in my view, is not a good thing for litigants,
24 lawyers, or judges.

25 It's helpful to go through the discipline,

1 but I agree with Judge Yelenosky that you certainly don't
2 want to overdo it and make it available in everything, but
3 I don't -- I've actually had conversations with trial
4 judges who provide explanations. This is apart from the
5 findings of fact, but in a conversation about findings of
6 fact and explanations, and not a one of them who gives
7 explanations has ever been burned by an appellate court
8 just because they gave the wrong rationale, but it goes
9 back to making a system useful and transparent and
10 providing justice.

11 HONORABLE STEPHEN YELENOSKY: Those
12 rationales, though, as we've discussed, are sometimes in a
13 decision letter, which would be different from findings of
14 fact, though, where you could be burned by it, wouldn't
15 it? No?

16 CHAIRMAN BABCOCK: Frank.

17 MR. GILSTRAP: You know, Richard and Justice
18 Patterson are right. It would be a better world if we got
19 clear findings of fact on any dispositive decision in a
20 case. The question is do we really want to put that
21 administrative burden on the judges; and, secondly, how
22 are we going to keep them from loading up on 58 findings
23 of fact? I mean, if we can't solve that problem first
24 then we don't have any business going around here and
25 saying you need more findings in other kinds of cases. I

1 think we ought to solve that problem before we figure out
2 whether or not we want findings of fact in more kinds of
3 cases.

4 CHAIRMAN BABCOCK: Yeah, Bill.

5 PROFESSOR DORSANEO: You know, it is
6 perfectly plain that the language of the rule as it stands
7 now is unsatisfactory. I mean, "in any case tried in
8 district or county court without a jury" as taken
9 literally would cover a wide variety of things that people
10 don't think should be covered and don't read the rule as
11 covering anyway, like it could cover all preliminary
12 motions, all pleas, you know, anything you could think of.
13 Frankly, it could arguably cover summary judgment,
14 although there aren't supposed to be any findings to be
15 made in a summary judgment context.

16 So I think it's a tremendous improvement to
17 provide as much clarification as we can agree on; and I
18 think all of us or most of us could agree that the
19 circumstance or one circumstance in which we want to have
20 findings mandatory is when it's a trial on the merits,
21 conventional trial on the merits, meaning the merits of
22 the claims and the defenses, which I think is the normal
23 understanding of on the merits rather than on the merits
24 of venue or on the merits of jurisdiction; and then to say
25 otherwise, in a sentence like the sentence that Elaine

1 has, that the trial judge may do it, well, that's --
2 that's an improvement as well.

3 We might want to add some kind of language
4 that's coming from the Family Code, instead of just saying
5 "after an evidentiary hearing," saying -- you know, to
6 elaborate on it a little bit more, "after an evidentiary
7 hearing when that would aid in the disposition of the
8 appeal" or whatever the Family Code language that's been
9 selected in the Family Code is; but I think it's a
10 tremendous improvement to put those two ideas in here,
11 rather than -- you know, rather than just kind of let it
12 slide because we can't figure out how to solve every
13 problem.

14 CHAIRMAN BABCOCK: You don't think that 296
15 as written is clearly applicable to nonjury trials,
16 conventional nonjury trials?

17 PROFESSOR DORSANEO: It says " any case
18 tried in the district or county court." I think people
19 believe that doesn't include pleas and abatement and the
20 like, but I'm not sure where that idea ever came from.

21 CHAIRMAN BABCOCK: Richard.

22 MR. ORSINGER: We chased our tail in the
23 family law arena for 20 years about --

24 CHAIRMAN BABCOCK: I wish I'd been there for
25 that.

1 MR. ORSINGER: -- whether a case that is
2 partly tried to the jury and partly tried to the court,
3 whether you're entitled to findings or not, because a lot
4 of times you try custody to the jury but you try property
5 to the judge, and under some court of appeals decisions
6 that meant if you tried anything to the jury you couldn't
7 get a finding on anything else. So the bulk of your
8 appealable case went up without any kind of findings.

9 I really -- I think that I'm not sure the
10 rule is as broken as everyone else says. I'm sorry there
11 are so many cases that have cited IKB. I'd like to know
12 whether they're citing them for the issue that we're
13 debating right now. I think in the family law after
14 decades of screwing around with it we've come to a comfort
15 level of Rule 296 with some tweaking in the Family Code
16 section, and I think it's working pretty well for us now,
17 and I wish maybe there's some way for us to share our
18 experience with the general civil litigators and you could
19 come to peace with it, too, but I don't -- I used to -- in
20 the Eighties this rule was so dysfunctional, this whole
21 series of findings was so dysfunctional you could hardly
22 succeed in bringing a nonjury appeal, and now, it's so
23 much better now.

24 CHAIRMAN BABCOCK: So it's a generational
25 thing.

1 Anybody feel like voting? It appears that
2 the -- Justice Duncan, you don't.

3 HONORABLE SARAH DUNCAN: Well, I think I
4 have made this comment before and maybe got laughed out of
5 the room, but as hesitant as I am to disagree with
6 Professor Dorsaneo, I don't want findings and conclusions
7 after a conventional trial on the merit tried to the
8 bench. I just want them to fill out a verdict form. I
9 don't understand why we require more of judges, who we
10 supposedly trust to disregard irrelevant evidence or
11 inadmissible evidence. Why do we require them to go
12 through this hoop of findings and conclusions when we just
13 ask the jury more or less broad questions on claims and
14 defenses?

15 MR. ORSINGER: Can I respond to that,
16 Mr. Chair?

17 CHAIRMAN BABCOCK: Certainly.

18 MR. ORSINGER: The issue that Sarah has
19 raised, which I totally agree with her, is addressed
20 really in what shouldn't require findings, not when are
21 findings required; and I personally support the idea of it
22 ought to be ultimate issues so that in a car accident case
23 it's negligence, causation, and damages; but in a family
24 law case, you know, is it an ultimate issue whether 5,000
25 shares of GM stock are separate or community or the value

1 of a closely held business or a painting? Are those
2 ultimate issues?

3 You know, the case is going to get reversed
4 or not depending on the value of that business or the
5 character of that stock, and for family lawyers that's an
6 ultimate issue, but it's not really a ground of recovery
7 or defense. So I think we have a lot of debate to talk
8 about, but I agree with you that we ought to have findings
9 only on ultimate issues, but that doesn't mean we
10 shouldn't have findings on pretrial hearings.

11 HONORABLE SARAH DUNCAN: I agree, and if I
12 could follow up on what Richard is saying, what findings
13 and conclusions are, you know, are they findings on
14 ultimate issues, are they finding on claims and -- or is
15 it 150 findings on all of these subsidiary evidentiary
16 questions? That's going to impact maybe control, the
17 burden that's placed on trial judges by expanding findings
18 and conclusions.

19 If we're talking about the kind of findings
20 I see where there are, you know, 150 findings on every
21 evidentiary disputed issue in the case, yes, that would be
22 a huge burden to impose on trial judges any more than it's
23 already imposed; but if what we're talking about is a
24 scaled down version of findings and conclusions more like
25 a jury verdict, then I think we would not only be able to

1 expand it, but we could reduce the burden that's already
2 being placed on trial judges, because some lawyers think
3 they need those 158 findings on all those evidentiary
4 issues, and as a trial judge you sit there and you've
5 listened to all the evidence, and you're like "Why, I
6 can't agree to that." We need to decide what findings and
7 conclusions are supposed to be.

8 PROFESSOR DORSANEO: That's what page three
9 is about.

10 HONORABLE SARAH DUNCAN: But I'm saying that
11 what findings and conclusions are supposed to be has
12 impact on whether we should recommend or want to recommend
13 any expansion of findings and conclusions practice.

14 CHAIRMAN BABCOCK: Judge Christopher.

15 PROFESSOR DORSANEO: That's what I said
16 earlier.

17 HONORABLE TRACY CHRISTOPHER: Well, I kind
18 of agree with you. I like broad form findings. I do that
19 just sort of as a matter of course in some of my cases,
20 but then I think to myself, well, how will a broad form
21 finding that the defendant has sufficient minimum contacts
22 with the State of Texas to support, you know, personal
23 jurisdiction, how would a broad form finding like that
24 help you any more -- help the appellate court any more
25 than my, you know, denying the special appearance? You

1 know, I just -- I don't see how that factual finding would
2 help you if we went broad form.

3 CHAIRMAN BABCOCK: Judge Yelenosky.

4 HONORABLE STEPHEN YELENOSKY: Yeah, I think
5 that's exactly right. Last time we spent a long time
6 actually talking about what findings of fact and
7 conclusions of law should be, and it was this discussion
8 exactly within the context of what it should be for after
9 a conventional trial, but when you start talking -- and
10 that's a legitimate debate, and I don't know that we
11 reached consensus on that, but I agree with Judge
12 Christopher. I don't think that's transferable or helpful
13 really with these other questions because we don't have
14 the paradigm that we do with broad form jury questions.

15 HONORABLE SARAH DUNCAN: I agree, but
16 that --

17 CHAIRMAN BABCOCK: Carl.

18 MR. HAMILTON: Maybe we should talk about
19 Rule 296 first, page three first, and then --

20 CHAIRMAN BABCOCK: Well --

21 HONORABLE STEPHEN YELENOSKY: Well, I think
22 our point is it doesn't matter for these other things
23 because it's not really transferable. You can have the
24 debate, but it's only a pertinent debate when you're
25 talking about findings of fact in a conventional trial, so

1 I don't know that it needs to be done first. I think it's
2 -- wouldn't you agree, Judge Christopher, with that, that
3 it's only pertinent to --

4 HONORABLE TRACY CHRISTOPHER: Well,
5 truthfully I'm of two minds. I agree with Judge
6 Patterson, Justice Patterson, that when I sit down and
7 take the time to go through, you know, point by point by
8 point by point I come up with a better product, but I
9 generally don't have time to do that.

10 HONORABLE STEPHEN YELENOSKY: Well, my
11 question was whether you agree, though, that the debate
12 about this kind of broad form is applicable to a
13 conventional trial findings of fact, but it wouldn't be, I
14 thought your point was, to a venue issue.

15 HONORABLE TRACY CHRISTOPHER: Well, I mean,
16 why not, though. I mean, it seems like -- which is kind
17 of why when I, you know, grant or deny a special
18 appearance, especially if it's based on affidavit
19 evidence, and then two years later I'm asked to do finding
20 of fact, you're kind of like, well, you can read those
21 affidavits. I mean, you know, what was it that I found
22 that you-all would need to know on the appeal?

23 CHAIRMAN BABCOCK: Elaine, the -- I'm sorry,
24 Judge Christopher, were you done?

25 HONORABLE TRACY CHRISTOPHER: No, I just

1 want guidance.

2 CHAIRMAN BABCOCK: Elaine, you started this
3 by saying that the subcommittee, the majority anyway, said
4 no change in the rule, right?

5 PROFESSOR CARLSON: No change in the rule to
6 provide when findings are required and when they're
7 discretionary, to leave the lead-in sentence alone.

8 CHAIRMAN BABCOCK: Leave the lead-in
9 sentence, so let's have a vote on how many people are in
10 favor of that.

11 MR. HAMILTON: What was that again?

12 CHAIRMAN BABCOCK: How many people are in
13 favor of leaving the lead-in sentence, the first sentence
14 of Rule 296, which says, "In any case tried in a district
15 or county court without a jury any party may request the
16 court to state in writing its findings of fact and
17 conclusions of law." The committee, the majority of the
18 committee, recommended that we leave that as-is.
19 Everybody who is in favor of leaving that sentence as-is,
20 raise your hand.

21 All right. All those opposed? By a vote of
22 13 in favor and 10 opposed, the Chair not voting, the vote
23 is to leave that lead-in sentence as-is.

24 PROFESSOR CARLSON: Okay. The second issue
25 that we discussed --

1 MR. ORSINGER: Before we leave that could I
2 make a suggestion? I know this is slightly out of order.

3 CHAIRMAN BABCOCK: It's way out of order,
4 but go ahead.

5 MR. ORSINGER: We have a specific need for
6 findings in a temporary injunction, which are set out in
7 Rule 683, "Every order granting an injunction and every
8 restraining order shall set forth the reasons for its
9 issuance," and we have a lot of case law indicating what
10 findings have to be in a temporary injunction. If those
11 of us who feel like they ought to have findings in a
12 special appearance order then maybe we can fix it in the
13 special appearance rule like we have fixed it with
14 temporary injunctions in the temporary injunction rule.
15 Thank you.

16 CHAIRMAN BABCOCK: You bet. Elaine.

17 PROFESSOR CARLSON: The second issue our
18 subcommittee looked at is whether or not it would be
19 desirable to change the rule so that broad form findings
20 of fact would be required whenever feasible, tracking Rule
21 277 in the jury charge rules; and again, the subcommittee
22 was not in favor of mandating broad form findings of fact,
23 but was in favor, is in favor, of giving the trial court
24 the discretion to make broad form findings of fact.

25 A lot of our discussion in this area looked

1 at some of the things that Sarah has raised, and that was
2 what kind of information do you get in an appellate court
3 from the charge that you would or would not get if you had
4 pure broad form findings of fact, and our discussion was
5 that, you know, you really could miss out on a lot of
6 information if you had broad findings on ultimate issues
7 only mandated, because you don't have necessarily the
8 insight of the court on the burden of proof or you don't
9 have the instructions that would go to the jury to make
10 the mixed finding of law and fact.

11 And our subcommittee really felt that it
12 would not be desirable in all cases to require the trial
13 judge to be that curt in making their findings, that it
14 would be more helpful to have the trial court have the
15 option of making findings of fact on each ground of
16 recovery or defense with the option of making them in
17 broad form if the court so desired. Now, of course, the
18 opposite argument would be -- well, there's a couple of
19 them. One, Sarah would say let's just have the trial
20 judge fill out a verdict and then we would have the same
21 information in both courts.

22 HONORABLE SARAH DUNCAN: But are you saying
23 that for all instances in which findings and conclusions
24 are --

25 PROFESSOR CARLSON: Requested.

1 HONORABLE SARAH DUNCAN: Well, that to me is
2 the hiccup. Sorry.

3 PROFESSOR CARLSON: If they're requested.
4 Well, I don't want to digress from there too much.

5 HONORABLE SARAH DUNCAN: Sorry.

6 PROFESSOR CARLSON: So, you know, it kind of
7 surprised me that our discussion ended up going that way,
8 quite frankly, because, you know, the opposite argument
9 would be, well, we've got this body of law on when broad
10 form submission is and is not feasible that is not
11 necessarily crystal clear, but it is helpful, but for the
12 reasons I stated earlier, our subcommittee felt very
13 strongly that in a bench trial we don't want to try -- tie
14 the trial judge to making only broad form findings.

15 CHAIRMAN BABCOCK: Okay. Discussion on
16 that? Yeah, Frank.

17 MR. GILSTRAP: Richard's comment has kind of
18 made me rethink that. I mean, I could see why that maybe
19 the question of the value of the stock at Microsoft might
20 not be an ultimate issue but it might be an issue that the
21 appellate court needs. At the same time, we still need to
22 discourage, you know, 150 findings. I mean, that's where
23 we started, I think. At the very least we would need this
24 comment down here, "Unnecessary and voluminous evidentiary
25 findings are not to be included in the court's findings of

1 fact and conclusions of law," although --

2 CHAIRMAN BABCOCK: Isn't that a little bit
3 in the eye of the beholder, though?

4 MR. GILSTRAP: Well, okay. Okay. But all
5 it is is some type of, as Richard says, hortatory
6 statement to the judge so when the one side, the winning
7 side, comes in and submits 150 findings at least the
8 defense can say, "Wait a minute, Judge, you're not
9 supposed to do that." Now, I don't know how much further
10 you can go with that. I don't know how much further you
11 can fine-tune that, but we need something to try to
12 discourage that. I would also add, though, that the
13 comment probably needs to say "unnecessary or voluminous"
14 or you're going to end up with a situation like cruel and
15 unusual punishment, it has to be cruel and unusual. You
16 don't want unnecessary findings, you don't want voluminous
17 findings.

18 CHAIRMAN BABCOCK: Okay. Judge Patterson,
19 then Bill.

20 HONORABLE JAN PATTERSON: Just a question.
21 Is the reason that you don't want to confine it to broad
22 form because then there might be litigation and appeals
23 over what is necessary or unnecessary or --

24 PROFESSOR CARLSON: No.

25 HONORABLE JAN PATTERSON: No, okay.

1 PROFESSOR CARLSON: No, really the
2 discussion on this was you're not going to get the same
3 information if all you have is broad form findings of fact
4 and a bench trial.

5 HONORABLE JAN PATTERSON: Okay.

6 PROFESSOR CARLSON: Because you don't have
7 the other information you benefit in the charge, and maybe
8 it's just part of our subcommittee's enamored with our
9 current practice. Everyone agreed that voluminous
10 findings, evidentiary findings, are a problem, and that's
11 why we suggested adding the comment.

12 Frank, you asked what other steps could you
13 take. You could parallel the position we take in
14 objections to the charge and you could say, you know,
15 "numerous and unfounded," "unnecessary or voluminous
16 findings of fact, evidentiary findings of fact, negate
17 your request for finding of fact." You could go that far,
18 but I don't know that we would want that.

19 HONORABLE JAN PATTERSON: I like that
20 comment.

21 CHAIRMAN BABCOCK: Bill Dorsaneo.

22 PROFESSOR DORSANEO: The last time we voted
23 on this in 1997, we --

24 CHAIRMAN BABCOCK: That would be almost a
25 decade.

1 PROFESSOR DORSANEO: -- almost came up with
2 this language: "The judge shall state the finding of fact
3 on each ground of recovery or defense raised by the
4 pleadings and evidence in broad form whenever feasible in
5 the same manner questions are submitted to the jury in a
6 jury trial," and I understand the committee, you know,
7 rejected having that same kind of language used. To me,
8 you know, broad form findings don't require a particular
9 kind of the most broad form finding you could make
10 finding, that broad form findings, the best definition of
11 them are that they are findings that are not granulated
12 under the former separate and distinct system.

13 So something that's a mixed question of law
14 would, in effect, be a broad form finding, mixed question
15 of law and fact would be a broad form finding, even though
16 it may not be the broadest way you could look at the
17 matter. So there's some flexibility in the idea that it's
18 going to be a broad form finding. That's not wedding you
19 to a particular very broad form finding, even though that
20 might be conventional practice in termination of parental
21 rights cases at the moment or whatever. So I don't see
22 what the problem is when it -- if you said "broad form
23 findings whenever feasible," and I think it would make
24 sense for the practice to -- in bench trials to be the
25 same as in jury trials. That would be -- in my mind be

1 like having the judge do what the jury does --

2 PROFESSOR CARLSON: What about --

3 PROFESSOR DORSANEO: -- in rendering a
4 verdict, but short of doing that, all of this stuff
5 together, all three things that are underlined at the top
6 of your page three, you know, they kind of fit together,
7 and you say it's okay. "Unless otherwise required by law
8 the trial court's findings may be in broad form," but if
9 you wanted to be narrow it can't be so evidentiary that
10 it's more than necessary to disclose the basis for the
11 court's -- the basis for the court's judgment. Together
12 with a comment, an improved comment, all of that seems to
13 me to more or less advance the ball in saying, you know,
14 how the judge ought to go about having these findings
15 prepared by the judge or by counsel for the winning party.

16 CHAIRMAN BABCOCK: Yeah, Judge Yelenosky.

17 HONORABLE STEPHEN YELENOSKY: Well, last
18 time we talked a little bit about -- or at least, I mean,
19 I said at the time -- I don't know if anybody agreed with
20 me, but the instructions in the jury charge are
21 conclusions of law, they are not findings of fact. So to
22 say when you get a broad form question and answered by the
23 judge you're not getting the information that you get in a
24 jury trial, you aren't if the judge does not state
25 conclusions of law as to those disputed matters. But why

1 can't that be done either by mimicking the charge and
2 having the argument about what instructions should be or
3 having an argument about what the burden of proof is and
4 having the judge say, "Conclusion of law of the burden of
5 proof is blah-blah-blah," but that's all the instructions
6 are, is conclusions of law.

7 CHAIRMAN BABCOCK: Justice Duncan.

8 HONORABLE SARAH DUNCAN: Well, and that was
9 my question, is that the reason for rejecting broad form
10 findings from a trial judge is that we're not going to get
11 the rest of what's in a charge, why don't we just ask the
12 judge to fill out a charge? Have them craft the charge
13 and fill in the blanks, and then we'll get what statute of
14 limitations is going to apply, what the burden of proof
15 is, what the jury can consider on this disputed fact, but
16 you can't consider this, and we'll get all of that if we
17 just give the trial judge a charge.

18 CHAIRMAN BABCOCK: Carl, I think had his --
19 beat the other two guys just by a fraction.

20 MR. HAMILTON: One of the problems with that
21 is that one advantage to a bench trial is that you don't
22 have to prepare a charge, and sometimes that is extremely
23 time-consuming, is to try to figure out when you don't
24 have the pattern jury charge what the charge really ought
25 to be, and sometimes the court isn't going to agree with

1 it, and so I don't know how in those instances the court
2 can fashion and create a charge without an awful lot of
3 time going into it.

4 CHAIRMAN BABCOCK: Harvey, then Richard.
5 Harvey clearly beat Richard on his hand going up.

6 HONORABLE HARVEY BROWN: I was going to echo
7 the same comment, that a lot of people try nonjury cases
8 just to save the time and money, so going back to our
9 discussion this morning about cost and efficiency, we
10 would lose a little bit of that if we had a formal charge.

11 HONORABLE TOM GRAY: But we might get more
12 jury trials then, too.

13 CHAIRMAN BABCOCK: Hadn't thought about
14 that, had we?

15 HONORABLE HARVEY BROWN: Also, I think the
16 appellate lawyers would like this rule because the first
17 thing a lot of appellate lawyers look at is the charge to
18 figure out the best and quickest way to reverse a trial
19 court, so you have to say, well, you think that's a good
20 thing or bad thing, arguments both ways.

21 MR. WATSON: There are.

22 HONORABLE HARVEY BROWN: I like the rule as
23 crafted because I think it encourages broad form
24 submission, but it doesn't require it. I don't think a
25 judge should be required to do it. I remember one case

1 where I did not do it, and I generally did it, but I
2 thought it was a close, close question, and it would have
3 been easy for me just to answer one question, but the
4 parties wouldn't have any of that transparency you're
5 talking about, and that's one of the disadvantages of
6 broad form submission. I mean, one of the costs of broad
7 form submission is we don't know how the jury got there.
8 There is good policy reasons for doing that. I don't know
9 that all those necessarily apply in every single nonjury
10 trial, and so I think giving the judge the discretion is
11 the best way to do it.

12 CHAIRMAN BABCOCK: Richard.

13 MR. ORSINGER: I agree with that. I think
14 discretion is better. I think that we can trust the
15 judges to control the process better than in the jury
16 charge process. You know, the fight over the jury charge
17 can create lots and lots of ancillary issues and create a
18 lot of error, and that's why we've kind of tamped it down,
19 if you remember the days in the Seventies when we used to
20 have all of those problems.

21 I don't like the fact that the 296 proposal
22 here says that you state your finding. When we get to it
23 later on I think they should be in writing and not
24 dictated from the bench. I don't like the phrase "ground
25 of recovery or defense," because in family law -- which is

1 probably 75 percent of our civil docket at this time --
2 there is neither a ground of recovery nor a defense for
3 anything that we're trying, so this rule is meaningless
4 for 75 percent of our cases.

5 I agree that the three elements together
6 work like Bill said. I think if we can have an agreeable
7 first paragraph there that the second paragraph is okay
8 and the comment is also probably important, too. In terms
9 of the third paragraph, though, about "necessary to
10 disclose the basis for the Court's ultimate conclusion,"
11 again, all the plaintiffs' lawyers points of view are
12 dominating, plaintiffs and defense. In a family law case
13 there are many, many ultimate conclusions that are
14 appealable, and so that word needs to be pluralized. In a
15 plaintiff versus defendant there is only one conclusion,
16 but in a family law case we might have 30 conclusions that
17 might contribute to a reversal.

18 PROFESSOR DORSANEO: On one case.

19 MR. ORSINGER: Let me also say that another
20 argument in favor of giving the judge the choice is that
21 in family law matters most of the appellate review is by
22 an abuse of discretion standard, and you're not going to
23 get a reversal necessarily because of a specific fact
24 finding. You're going to get a reversal because the
25 overall decision is an abuse of discretion. In fact,

1 sometimes that's the only way you can get a family law
2 reversal, and some judges might like to put into the
3 record how they exercised their discretion, their reasons
4 why they decided that they would give the wife 75 percent
5 instead of just saying, "This is the value of everything,
6 this is the character of everything, and this is the
7 property division. Now, you go figure out whether I
8 abused my discretion." I think the trial judges should
9 have the opportunity to say that "This is why I exercised
10 my discretion in this way," and I think we can trust them
11 not to overdo it or abuse it.

12 CHAIRMAN BABCOCK: Bonnie. You didn't have
13 your hand up, did you?

14 MS. WOLBRUECK: I did not.

15 CHAIRMAN BABCOCK: No, I knew that. I was
16 just trying to keep you on your toes down there.

17 MS. WOLBRUECK: Thank you.

18 CHAIRMAN BABCOCK: Dorsaneo.

19 PROFESSOR DORSANEO: I think without the
20 additional language about not making them too voluminous,
21 without having that in the rule, I think we can trust, you
22 know, some trial judges to -- I don't want to use the word
23 "rubberstamp," but to embrace the findings prepared by the
24 winning party, because that's been the conventional
25 practice over time, and that is -- and that's the way --

1 that's the way or one way to draft findings in order to
2 make it difficult for somebody to appeal --

3 CHAIRMAN BABCOCK: Right.

4 PROFESSOR DORSANEO: -- which is the whole
5 point of having won, you know, in the trial court. If
6 there's going to be an appeal, it's going to be a
7 difficult process for you to get this set aside because
8 I'm going to write findings you're going to have
9 difficulty dealing with.

10 CHAIRMAN BABCOCK: It won't look like such a
11 close case after I'm finished.

12 PROFESSOR DORSANEO: Right.

13 CHAIRMAN BABCOCK: Okay. Yeah, Frank.

14 MR. GILSTRAP: I don't see why we need to
15 have the comment as a comment. I mean, why doesn't it
16 belong in the rule? I mean, because, it seems to me the
17 real corrective here is for a court of appeals to say,
18 "We've got 158 findings here. This is too many. We're
19 going to reverse it and send it back and have them do it
20 over."

21 MR. ORSINGER: No, they're going to abate it
22 and send it back and have them do it over.

23 MR. GILSTRAP: All right. Okay. But if
24 they did that a few times because there were just too many
25 findings, too many evidentiary findings, it might cure the

1 problem.

2 CHAIRMAN BABCOCK: Are we going to get into
3 a fight about what's unnecessary or voluminous, though?

4 MR. GILSTRAP: That's for the courts.
5 They're good at that.

6 CHAIRMAN BABCOCK: Well, yeah, but what are
7 we saying? I mean, of course, you don't have any
8 unnecessary findings.

9 MR. GILSTRAP: No, you have tons of them.
10 That's the problem. You have a lot of unnecessary
11 findings --

12 CHAIRMAN BABCOCK: To you apparently.

13 MR. GILSTRAP: -- that don't mean anything
14 to the ability of the court of appeals to decide the case.

15 CHAIRMAN BABCOCK: Judge Benton.

16 HONORABLE LEVI BENTON: I just want the
17 record to reflect that I'm confused. The trial judges
18 don't do enough because they won't make findings, but they
19 do too much because they send up 128, so tell us, please,
20 which way you want it; but in telling us, because these
21 rules are ultimately about the administration of justice,
22 no rule ought to pass or be adopted by the Supreme Court
23 unless a majority of trial court judges approve it.

24 CHAIRMAN BABCOCK: And so you think what we
25 need is a Goldilocks rule, not too much, not too little.

1 HONORABLE LEVI BENTON: Well, I don't
2 understand. This is kind of where we are, but I don't
3 understand.

4 CHAIRMAN BABCOCK: Okay. Let's see how
5 people -- how the committee as a whole feel about this.
6 What's proposed by the subcommittee, Elaine, as I
7 understand it, is this broad form language that we find at
8 the top of page three, correct?

9 PROFESSOR CARLSON: Correct.

10 CHAIRMAN BABCOCK: So how many -- everybody
11 who's in favor of that language, the broad form language
12 at the top of page three, raise your hand.

13 HONORABLE TRACY CHRISTOPHER: All three?

14 CHAIRMAN BABCOCK: No, not all three, just
15 the top one.

16 HONORABLE TERRY JENNINGS: What's the issue?

17 CHAIRMAN BABCOCK: Let me say it again.
18 This is the language that you're voting for: "If findings
19 are properly requested, the judge shall state findings of
20 fact on each ground of recovery or defense raised by the
21 pleadings and evidence. Unless otherwise required by law,
22 the trial court's findings of fact may be in broad form."
23 That's all we're voting on now.

24 MR. ORSINGER: By linking those two
25 sentences together you've forced me to vote against the

1 second sentence even though I like it.

2 CHAIRMAN BABCOCK: You can vote any way you
3 want, Richard.

4 MR. ORSINGER: I know, but it's a poor way
5 to get a reading on this point, in my opinion.

6 HONORABLE JAN PATTERSON: Well, does
7 Richard's point -- if you took out "of recovery or
8 defense," couldn't you just say "ground raised by the
9 pleadings and evidence"? Does "recovery or defense"
10 really add?

11 CHAIRMAN BABCOCK: Well, you know, we can do
12 anything we want. Yeah, Judge Benton.

13 HONORABLE LEVI BENTON: Yeah, I know this is
14 digressing, but the appellate rules are much clearer. You
15 can look at 28.1, it just says on an appeal from an
16 interlocutory order, "The trial court need not but may
17 file findings," so I'd rather -- I join Judge Christopher.
18 I'd rather have a bright line rule. My preference would
19 be that the trial court need only make findings from a
20 bench trial to support a final disposable judgment because
21 that's a bright line rule. Because otherwise, it's -- you
22 know, I don't want to be in a position where like she says
23 three years later the court abates and says, "Hey, we want
24 the findings." The appellate rule is much clearer. I
25 don't know why we just don't in some ways mirror the

1 appellate rule.

2 CHAIRMAN BABCOCK: Richard, you don't
3 like -- you like the first sentence, but you don't like
4 the second sentence?

5 MR. ORSINGER: Well, You're forcing me to
6 vote on three things. You're forcing me to vote on
7 whether they can state the findings or whether we ought to
8 stick with our current practice of official written
9 findings in separate Rule 296. I don't think we ought to
10 fold that into this vote.

11 CHAIRMAN BABCOCK: We're not forcing you to
12 vote.

13 MR. ORSINGER: Okay. By adopting -- by
14 voting on the entire language we're not even debating yet
15 on whether the trial judge should be able to state them or
16 whether we should stick with our current practice of a
17 separate set of written findings, and I don't think we
18 ought to vote on that until we have a debate on that.

19 Secondly, why do we have to have "ground of
20 recovery or defense" in there when three quarters of the
21 cases we try to the court don't have a ground of recovery
22 or defense. So, for example, Bill has written in here,
23 "Shall state findings of fact on each ultimate issue
24 raised by the pleading and evidence." I like that a lot
25 better than "each ground of recovery or defense"; and

1 then, thirdly, I like the second sentence the way it is,
2 with no changes.

3 CHAIRMAN BABCOCK: Elaine.

4 PROFESSOR CARLSON: Richard, we can -- let's
5 just promise to come back to the state findings --

6 MR. ORSINGER: Okay.

7 PROFESSOR CARLSON: -- when we get to that
8 next section. I understand now what you're saying, which
9 scares me, but if you'll just hold that, if we promise you
10 we'll return to that issue, depending on the vote on oral
11 versus non.

12 MR. ORSINGER: All right.

13 MR. SCHENKKAN: Well, I'm confused here
14 because this is -- in the thing we're voting on is the
15 "findings on each ground of recovery or defense," which is
16 a change; and I'm in the school at the moment that says
17 it's not broke, let's not fix it. So I'm against the
18 change to add on each ground of recovery or defense. Are
19 you saying we're not voting on that now? We're going to
20 take that up later?

21 CHAIRMAN BABCOCK: Richard has thrown a
22 monkey-wrench in my voting plans here, and we're going to
23 vote on each word, actually, to see if we can get a
24 consensus.

25 HONORABLE JAN PATTERSON: Voluminous voting.

1 CHAIRMAN BABCOCK: I mean, we'll do it any
2 way anybody wants, but it seems to me that the
3 subcommittee put two sentences together, and if you don't
4 like either one of the sentences I guess you'd vote
5 against it, but if it's just a -- if it's just a minor
6 word change, Richard, I mean, we can fix that, but I think
7 what you're voting -- what you're voting on is sort of the
8 idea about whether we need this language in the rule, even
9 though you might make minor adjustments to it sometime
10 later. Does that work for you?

11 MR. ORSINGER: Okay. As long as I'm not
12 foreclosed from debating those issues by this vote.

13 CHAIRMAN BABCOCK: No, of course you're not.
14 We've got breaks and we've got tonight, because you're
15 easily amused.

16 Everybody who's in favor of this language
17 that I just read a minute ago at the top of page three
18 raise your hand.

19 MR. HAMILTON: Issues?

20 PROFESSOR DORSANEO: No, we're not doing --
21 just as-is, where is, with all faults.

22 CHAIRMAN BABCOCK: All opposed?

23 This one passes by a vote of 19 to 10.

24 HONORABLE SARAH DUNCAN: And some of us
25 voted twice.

1 CHAIRMAN BABCOCK: Carl did, but I only
2 counted him once.

3 HONORABLE SARAH DUNCAN: I voted twice, and
4 I think you counted me twice.

5 HONORABLE STEPHEN YELENOSKY: The Chair
6 voting.

7 CHAIRMAN BABCOCK: I had you down as
8 against.

9 HONORABLE SARAH DUNCAN: I voted for and
10 against.

11 CHAIRMAN BABCOCK: You voted for and
12 against? I didn't count your for, so --

13 HONORABLE SARAH DUNCAN: I raised my hand.
14 Who else who raised their hand didn't get their vote
15 counted?

16 CHAIRMAN BABCOCK: Okay. We can do it again
17 if we want, but I don't think it's close enough.

18 MR. ORSINGER: I think we ought to contact
19 Jimmy Carter and have him --

20 CHAIRMAN BABCOCK: I think we'll get Al
21 Gore's crack Florida team in here to check this vote out.

22 Okay. Are we down, Elaine, to the comment
23 or are we down to "orally on the record"?

24 PROFESSOR CARLSON: I hate to do this, but
25 I'm going to, and I'm not speaking for the subcommittee,

1 but I thought Professor Dorsaneo's suggestion was probably
2 a good one, that if -- in what we just voted to be
3 included would the sense of the committee be offended if
4 we changed the words "ground of recovery or defense" to
5 "ultimate issues"?

6 CHAIRMAN BABCOCK: Sarah, do you think
7 now --

8 HONORABLE SARAH DUNCAN: I'm for it.

9 CHAIRMAN BABCOCK: You're for it. Okay.

10 HONORABLE SARAH DUNCAN: That's why I voted
11 against. That's one of the reasons.

12 MR. HAMILTON: That's why I voted against.

13 HONORABLE SARAH DUNCAN: For that reason.

14 CHAIRMAN BABCOCK: Okay. So if we fix that
15 we pick up a couple of votes.

16 HONORABLE SARAH DUNCAN: No. If we voted
17 three times I would have voted for and against three
18 times. I actually think a friendly amendment would have
19 been a good way to resolve this.

20 CHAIRMAN BABCOCK: Skip.

21 MR. WATSON: I just need to ask a question.
22 When we say "findings of fact on each ultimate issue," so
23 ultimate issue means negligence, he was negligent, which
24 is, of course, a conclusion of law.

25 PROFESSOR DORSANEO: No, it isn't.

1 MR. WATSON: And you're saying findings of
2 fact on -- there need to be multiple then because it's
3 plural, that on each ultimate issue we're saying finding
4 of fact, is going too fast; finding of fact, he failed to
5 brake; finding of fact, he wasn't keeping a proper
6 lookout. I just want to make sure I know what I'm voting
7 on.

8 PROFESSOR DORSANEO: No.

9 MR. WATSON: What is a finding of fact when
10 you're talking about an ultimate issue?

11 CHAIRMAN BABCOCK: Okay.

12 MR. WATSON: That's all I'm asking.

13 CHAIRMAN BABCOCK: Our chair, our
14 subcommittee chair, said that she thought that the
15 suggestion made by Professor Dorsaneo had merit and that
16 we should talk about it, and that was the language that
17 says "on each ground of recovery or defense raised by the
18 pleadings and evidence" should be changed to say "shall
19 state findings of fact on each ultimate issue raised by
20 the pleadings and evidence."

21 Okay. So that's what we're talking about.
22 So we're going to strike ground of recovery or defense and
23 say "shall state findings of fact on each ultimate issue
24 raised by the pleadings."

25 MR. WATSON: And hence my question of what

1 does findings of fact mean in the context of an ultimate
2 issue? What is being defined as an ultimate issue?

3 HONORABLE SARAH DUNCAN: And that's why to
4 me it should not be "each ultimate issue" but "all
5 ultimate issues," because then you will have more than one
6 finding and more than one conclusion, and the sentence
7 would make grammatical sense, but I see your point.

8 CHAIRMAN BABCOCK: Pete.

9 MR. SCHENKKAN: Do we mean this to be
10 limited to findings, or will the judge be required and is
11 the intent to require findings of fact and conclusions of
12 law on each ultimate issue or all ultimate issues?

13 MR. WATSON: That's my point, Pete.

14 MR. SCHENKKAN: That's why I'm coming at it
15 from another direction, because that's my point, too. I
16 mean, I deal with a number of kinds of trials that maybe
17 don't have to be tried as bench trials but always are as a
18 practical matter, declaratory judgment actions. I don't
19 know what the ultimate issues in those cases are. To the
20 extent I think I know what that means I think they're
21 generally law issues, and I think that's why the lawyers
22 drift into treating them as nonjury trials even though
23 often there are some disputed facts.

24 CHAIRMAN BABCOCK: Okay. Bill.

25 PROFESSOR DORSANEO: Here is my sense of it.

1 Once upon a time before September 1, 1973, the ultimate
2 issue in a negligent car wreck case was speeding, failure
3 to apply brakes, or lookout. When we went to broad form
4 submission as a mandatory item, as Judge Pope was saying,
5 if we went to the ultimate issue in car wreck cases
6 negligence cases being negligence.

7 MR. WATSON: Correct.

8 PROFESSOR DORSANEO: And, you know, that's
9 relatively clear in that one little area of the law. It
10 doesn't matter whether it's clear all the time and in all
11 other contexts. The words "ultimate issues" are still,
12 you know, more congenial than on each ground of recovery
13 or defense because they are what they are, and that's what
14 you need to shoot for in terms of when you're making
15 findings.

16 To me, to say -- second point, to me, saying
17 "findings and conclusions" is kind of not a good idea
18 anymore because our findings are now -- whether we
19 mandated them or not the way we think about findings is in
20 a more broad form way. Mixed questions of law and fact,
21 you know, rather than discrete subsidiary issues like
22 speed, brakes, or lookout, so to try to parse the
23 difference between factual findings and conclusions is not
24 profitable really. It's not -- it's not useful. I mean,
25 once upon a time findings were very much in terms of what

1 happened things, okay, only. You know, those kinds of
2 findings. When we apply the law to the facts in the
3 context of a particular finding we eliminate the necessity
4 for saying you also need conclusions for each thing,
5 because each ultimate -- the answer to each ultimate issue
6 is in effect a conclusion or on the way to the ultimate
7 conclusion as to what the judgment needs to be.

8 CHAIRMAN BABCOCK: Richard, then Justice
9 Duncan.

10 HONORABLE SARAH DUNCAN: To answer Skip's
11 question, my spin on the answer to your question would be
12 that with the rule we've adopted the trial court could
13 have a finding on speed and on lookout and on brakes, or
14 they could say that "I find that the defendant was or was
15 not negligent." We've given them the opportunity to do
16 either one, I feel like by our vote.

17 With regard to conclusions of law, we
18 mentioned this in passing in the earlier debate, but
19 conclusions of law are reviewable de novo; and even if the
20 judge has premised the ruling on the wrong law, if the
21 facts found applied to the correct law lead to the same
22 result, you get an affirmance. So from a practical
23 standpoint you don't get any mileage out of arguing that
24 the trial adopted an incorrect conclusion of law, because
25 the court of appeals is free and frequently they do

1 substitute their own view of the law to the facts found by
2 the judge, trial judge. So do we even need to carry
3 conclusions of law forward? Are they helpful, are they
4 useless? I don't even attack them anymore in my briefs.

5 CHAIRMAN BABCOCK: Justice Duncan.

6 HONORABLE SARAH DUNCAN: We're going to lose
7 -- as we discussed on the previous matter that we debated,
8 we are going to lose the trial judge's legal conclusions
9 that inform the findings of fact on the ultimate issues.
10 For instance, trial judge finds a finding defendant was --
11 defendant breached its fiduciary duty to plaintiff. Well,
12 in a jury charge we would -- if limitations was a question
13 in that case, we would get an instruction on limitations
14 and if -- all that's -- we're going to lose all that if
15 all the judge has to do is make findings on ultimate
16 issues and not disclose the judges's conclusions of law,
17 and I think that's a mistake, that sometimes those are the
18 basis upon which an appeal is going to be affirmed or
19 reversed, is what those legal conclusions were that
20 underlie the findings on ultimate issues.

21 CHAIRMAN BABCOCK: Elaine, then Frank.

22 PROFESSOR CARLSON: It was not the
23 subcommittee's intention to eliminate conclusions of law.
24 We left that in in different places. Here we were just
25 addressing what the finding of fact should -- the form

1 they should take.

2 HONORABLE SARAH DUNCAN: Okay. Thank you.

3 CHAIRMAN BABCOCK: So the issue here right
4 now that we're talking about, we can talk about it some
5 more, but whether we're going to put "ultimate issues"
6 instead of "ground of recovery or defense," we're still
7 talking about it. Frank and then Richard Munzinger.

8 MR. GILSTRAP: I agree the requirement for
9 conclusions of law is still going to be in the first
10 sentence of Rule 296. The language you're talking about
11 requires a finding of fact on every ground of recovery or
12 defense. It doesn't limit the judge. The judge can say,
13 "Okay, I find negligence, and I also find speed, brakes,
14 and lookout." I mean, he can go on and make, you know,
15 more detailed findings. There is no prohibition. It says
16 they may be -- and this allows Richard's concern about,
17 well, there are certain issues like division of property.
18 He can go on and make those. All we've got is a
19 requirement that we've got to have a ground -- a finding
20 to support every ground of recovery or defense just like a
21 jury issue. That's all we've done here, and I don't think
22 we add anything by saying "ultimate issue." That's
23 dealt -- because it's optional, you see. He can do that
24 if he needs to. We'll deal with that in the second
25 sentence down there.

1 CHAIRMAN BABCOCK: Okay. Anybody else?
2 Lamont. I knew you were going to say something.

3 MR. LAMONT JEFFERSON: Yeah. I'm not sure I
4 understand what it is we're trying to do. I mean, the
5 rule as it's written now gives a lot of room for the judge
6 to do what the judge is requested of doing, and this is a
7 rule change that looks like it's designed to do something,
8 but it doesn't really encourage any particular -- any
9 particular action by the trial judge, so I'm -- I don't
10 understand why the rule change is necessary. I mean, I
11 don't understand what we're trying to encourage judges to
12 do.

13 CHAIRMAN BABCOCK: Munzinger is about to
14 tell you.

15 MR. MUNZINGER: He just took my point. I
16 don't -- I've listened to the discussion for two meetings
17 now. I come away with the belief in my own mind that no
18 substantive change is intended by the amendments to the
19 rule, that we seek clarity and assistance to the trial
20 courts in the hopes that somehow we will simplify the task
21 of appellate court justices who are often called upon to
22 deal with hundreds of findings of facts that are
23 immaterial, and here you come and you're going to do all
24 of this to the rule. Are you going to add a comment
25 saying, "We don't mean to change the substance"? If you

1 don't do that are you telling the bar that you intended to
2 change the substance? Are you creating problems by
3 changing the rule?

4 If it ain't broke, don't fix it. The only
5 problem it seems to me is, is that appellate court
6 justices are inconvenienced by the overprudence of
7 practitioners in trial courts who are faced with a
8 request. What happens in practice is the trial lawyer
9 wins the case, the adversary says "file your findings" or
10 vice-versa, and the guy sits down and spends five hours
11 thinking of every dadgum fact he can think of, sticks it
12 in the deal and takes it to the judge, who thinks "I
13 better sign this," and he does. Well, now all that we've
14 done here is solved problems for appellate justices, and
15 to all the appellate justices I apologize to you for being
16 insensitive to your needs, but the truth of the --

17 HONORABLE TRACY CHRISTOPHER: You're already
18 hurting ours.

19 MR. MUNZINGER: -- matter is this, in a
20 nonjury case every one of you will say in your written
21 opinion, "Every presumption is indulged to support the
22 judgment of the trial court. There was evidence in the
23 record, even though the finding didn't specify it in a
24 right way, Smith said X, so there was evidence to support
25 the judgment on that issue and we're not going to remand

1 this case because Munzinger either didn't or did put in a
2 separate finding in the findings of fact and conclusions
3 of law," and so what we've done is prove that you can
4 debate the number of angels on the head of a pin to no
5 use. Leave it alone.

6 CHAIRMAN BABCOCK: Carl.

7 MR. HAMILTON: Well, on the subcommittee we
8 started out with the problem being raised last time about
9 too many findings --

10 CHAIRMAN BABCOCK: Right.

11 MR. HAMILTON: -- and that's what we were
12 trying to do, is to cut down. So then we said, well,
13 let's just do it in broad form and then we had problems
14 with that because that doesn't give the court enough
15 information sometimes, and so that's why we came up with
16 the option, and of course, I like the minority part and
17 which I think we ought to add to that where if the court
18 is going to make evidentiary findings that it make them
19 only so much evidentiary facts as are necessary to
20 disclose the basis for the ultimate decision.

21 CHAIRMAN BABCOCK: Okay.

22 MR. HAMILTON: So we now have come up with a
23 compromise to give the court discretion to do it broad
24 form or -- broad form on the ultimate issue, but he's got
25 to put in enough evidentiary facts to help the court know

1 the basis for the conclusion.

2 CHAIRMAN BABCOCK: Judge Yelenosky.

3 HONORABLE STEPHEN YELENOSKY: Those two
4 words do make a difference to me as a trial judge.

5 CHAIRMAN BABCOCK: Which two words?

6 HONORABLE STEPHEN YELENOSKY: Broad form,
7 because the lawyers are not going to submit it unless
8 they're confident that it's okay, and putting it in the
9 rule to indicate that broad form is okay not only makes it
10 possible for them to do it, it allows the judge to say,
11 "No, I want it in broad form." Judge can do that now, but
12 unless that judge has been sitting around at these
13 committee hearings like I have, they don't know that it's
14 okay to do broad form because we're not sure what the
15 court of appeals is going to want, so it does make a
16 difference to the trial court.

17 The other thing I would just point out is
18 earlier I said, you know, the instructions to the jury are
19 conclusions of law, but they're special conclusions of law
20 because they are reviewed by the court of appeals. The
21 conclusions of law that a court makes and puts in the
22 instructions as to the burden of proof can be obviously a
23 point of appeal, so you do need to preserve that, but
24 that's the obligation of the lawyers to get in the
25 conclusions of law or to get the judge to admit that he

1 thinks or she thinks the burden goes this way when, in
2 fact, they think the court of appeals will find it to be
3 the other way. So they are different conclusions of law
4 than what we're used to.

5 CHAIRMAN BABCOCK: Justice Brister.

6 HONORABLE SCOTT BRISTER: I second that.
7 The first time I had ever heard that you could do broad
8 form findings of fact as a judge was the last time we
9 discussed this in committee in 1997 or 8, and I had been a
10 trial judge for nine years and practiced for 18 years, and
11 nobody had ever mentioned that to me. It was news to me
12 that you could do findings and conclusions in broad form.
13 I think it would be news to a lot of people, and it would
14 be helpful to say that in the rule if that's what all of
15 us sitting around the table understand it to mean.

16 CHAIRMAN BABCOCK: Yeah, Bill.

17 PROFESSOR DORSANEO: I hate to do this to
18 you, but I think the word "ultimate" needs to be pitched
19 to just say "issues," because "ultimate" at least suggests
20 to me broad form.

21 MR. WATSON: That's what I'm saying, Bill.
22 It's in there twice, and I'm going to be arguing on appeal
23 that when the finding of fact is, okay, he was negligent,
24 I'm going to be saying, "Okay, I get a de novo standard of
25 review because you're calling a conclusion of law a

1 finding of fact".

2 PROFESSOR DORSANEO: But it's not a
3 conclusion of law. Get that out of your head. It's not.
4 It's a finding of fact. What juries decide are findings
5 of fact. I mean, that's the definition of finding of
6 fact, not, you know, some kind of notion of how broad or
7 narrow it is in the texture of the universe.

8 CHAIRMAN BABCOCK: Yeah, but I could see
9 where a conclusion of law would have a great deal of -- to
10 do with what kind of facts you've got to find. Suppose
11 you're trying a nonjury libel case and you determine that
12 the plaintiff is a private figure, not a public figure.
13 That's going to change what kind of facts you're going to
14 find, so --

15 PROFESSOR DORSANEO: But that's not a
16 conclusion of law. That's just kind of a legal concept.

17 CHAIRMAN BABCOCK: No, no, no. It is a
18 conclusion of law. It's absolutely a conclusion of law.
19 Whether -- the status of the plaintiff is a matter of law
20 for the court. So it's an issue of law.

21 PROFESSOR DORSANEO: All right. It's an
22 issue of law, but it's not a conclusion of law.

23 CHAIRMAN BABCOCK: Well, so we shouldn't say
24 the word "issue" in here then. Yeah, Richard.

25 PROFESSOR DORSANEO: "Factual issue."

1 MR. ORSINGER: In a nonjury appeal of the
2 very scenario you outline you're still free to argue that
3 the wrong legal standard was used, even if there's no
4 legal standard apparent from the trial court record.

5 CHAIRMAN BABCOCK: True.

6 MR. ORSINGER: And if you can show that the
7 facts found by whoever the binding fact finder are don't
8 fit into the proper law, you get a reversal. On the other
9 hand, if they do fit into the proper law, you get an
10 affirmance whether the trial judge stated the proper law
11 or not. So you kind of get back to the question of since
12 the only thing that's binding really that's coming out of
13 the trial court is the fact finding and since the
14 appellate court is de novo review on the court's
15 perception of the law anyway, do we even really care what
16 the law was that the trial judge applied? I mean, do --

17 HONORABLE JAN PATTERSON: Yes. Yes, we do.

18 MR. ORSINGER: -- we want to know that
19 because it affects our judgment or do we just want to
20 force them to state the law on the record or what?

21 CHAIRMAN BABCOCK: We care if your party is
22 trying to figure out who's going to win or lose.

23 HONORABLE STEPHEN YELENOSKY: What if they
24 applied the wrong burden?

25 PROFESSOR DORSANEO: If the standard of

1 review is abuse of discretion, it makes sense to me to
2 take into account whether the trial judge had on his or
3 her mind some -- something that amounts to legal nonsense,
4 because, you know, under those circumstances you could
5 easily say, well, they could have been done for some
6 number of right reasons, could have been within the
7 court's decision if the right legal rules were applied,
8 but the wrong legal rules were clearly applied, and that's
9 on the face of -- that's confessed, okay, above the
10 judge's signature, and I think under those circumstances
11 it would make more sense for a court of appeals to say,
12 "This needs to be done over. We just can't just ignore
13 this flawed thought process that led to the result."

14 MR. ORSINGER: Wouldn't you agree, though,
15 that that's going to require a change in the standard of
16 review because right now --

17 PROFESSOR DORSANEO: I think there's
18 confusion.

19 MR. ORSINGER: -- had a stupid idea about
20 the law, if you can uphold the judgment based on the fact
21 finding with a correct version --

22 CHAIRMAN BABCOCK: I feel like I'm on some
23 PBS program.

24 PROFESSOR DORSANEO: I can show you four or
25 five cases where the courts of appeals have reversed

1 because they say, "That's too stupid."

2 MR. ORSINGER: And I think they should.

3 CHAIRMAN BABCOCK: Let's vote on whether we
4 insert the word "issue," not "ultimate issue," but "issue"
5 in place of "ground of recovery or defense." Okay. So
6 everybody that wants the friendly amendment suggested by
7 Professor Dorsaneo and seconded by the subcommittee chair,
8 Professor Carlson, raise your hand.

9 PROFESSOR CARLSON: I seconded "ultimate."

10 HONORABLE TOM GRAY: Now it's not a friendly
11 amendment.

12 PROFESSOR CARLSON: It's not. It's
13 unfriendly, but I'll take it.

14 CHAIRMAN BABCOCK: All those against? Only
15 one vote, Sarah.

16 MR. LOW: No, no. I'm not against. I just
17 wanted to ask a question.

18 CHAIRMAN BABCOCK: Well, don't raise your
19 hand then.

20 PROFESSOR DORSANEO: That's what started
21 this problem last time.

22 CHAIRMAN BABCOCK: 14 to 6 it passes.

23 MR. ORSINGER: Could I say in the record
24 that the only reason I voted for that was that Bill said
25 if I didn't vote for that there might be something worse

1 enacted.

2 CHAIRMAN BABCOCK: So you're under duress,
3 so your vote may not have as much weight. Okay, Elaine.

4 PROFESSOR CARLSON: All right. So that
5 brings us on page three to the third paragraph. The
6 minority view on the paragraph was that it would be useful
7 to include a statement that the trial court's findings are
8 to include only as much of the evidentiary facts as is
9 necessary to disclose the basis for the court's ultimate
10 conclusions. Carl Hamilton was the author of that
11 sentence, so, Carl, I'll let you sort of address what your
12 thought process was.

13 MR. HAMILTON: Well, that's just sort of the
14 Federal approach to mandating how judges write opinions.
15 They also don't want too many evidentiary facts. We
16 inserted the word "only," but it's just helpful to the
17 appellate court to know the factual basis for the ultimate
18 conclusions. If the trial court just finds negligence,
19 that's not very helpful to the Federal court. They don't
20 know whether they found brakes, they found lookout, what
21 it was they found.

22 CHAIRMAN BABCOCK: Okay. Any discussion on
23 that?

24 MR. GILSTRAP: Is the language "ultimate
25 conclusion," does that come from the Federal rule?

1 MR. HAMILTON: It's not a rule. It's
2 just --

3 MR. GILSTRAP: Okay.

4 MR. HAMILTON: -- Federal cases.

5 MR. GILSTRAP: Why "ultimate conclusions" as
6 opposed to "decisions"?

7 MR. HAMILTON: "Decisions" is fine.

8 PROFESSOR DORSANEO: That would be better,
9 Carl.

10 MR. HAMILTON: Or "ultimate facts" or
11 something.

12 CHAIRMAN BABCOCK: Okay. Richard.

13 MR. ORSINGER: I like this concept. If
14 we're going to leave the word "conclusion," I'd ask that
15 we pluralize it because in family law cases there will be
16 many conclusions. If we say "the decision," a singular
17 decision is okay.

18 CHAIRMAN BABCOCK: Okay. Professor
19 Dorsaneo.

20 PROFESSOR DORSANEO: That's my job. Call me
21 "Bill." Trial court's findings, why don't you use "are
22 to"? Why did you say "are too" instead of some other kind
23 of language? What do you mean by "are to"? Do you mean
24 "must," "should"?

25 MR. HAMILTON: "Must." No, not "must."

1 MR. ORSINGER: "Should."

2 MR. HAMILTON: "Should."

3 PROFESSOR DORSANEO: Maybe "are to" is fine,
4 but it doesn't mean "must."

5 MR. HAMILTON: Well, it doesn't mean "must,"
6 no.

7 CHAIRMAN BABCOCK: Okay. What else? Okay.
8 Everybody in favor of this sentence, changing the word
9 "ultimate conclusions" to "decision," raise your hand.

10 MR. LAMONT JEFFERSON: Are we voting on the
11 change to "decision"?

12 CHAIRMAN BABCOCK: No. We're voting on the
13 sentence that is -- as-is, but substituting "decision" for
14 "ultimate conclusion." Did everybody understand that?

15 Okay. Everybody opposed, raise your hand.
16 By a vote of 14 to 2 it passes. Next, Elaine.

17 PROFESSOR CARLSON: And then --

18 MR. SCHENKKAN: 13 people abstaining. Does
19 that tell you something?

20 MR. GILSTRAP: But what?

21 PROFESSOR CARLSON: We thought it would be
22 useful to include the comment you see, that "unnecessary"
23 -- and I'll take Frank's amendment -- "or voluminous
24 evidentiary findings are not to be included in the court's
25 finding of fact and conclusions of law." Frank, I don't

1 know if it was you or someone else that said do we want to
2 make this only a comment or do we want to include it in
3 the rule. So I guess first do we like the sentence and
4 then secondly, if we do, do would we want it as a comment
5 or in the rule itself?

6 CHAIRMAN BABCOCK: Yeah, Richard.

7 MR. ORSINGER: I like it, but I don't think
8 we want to say "conclusions of law" if this rule is now
9 going to deal just with findings of fact.

10 CHAIRMAN BABCOCK: No, the rule is not
11 dealing with --

12 MR. ORSINGER: Well, where is the language
13 then that does deal with conclusions?

14 MR. GILSTRAP: First sentence of Rule 296.

15 CHAIRMAN BABCOCK: First sentence. It's not
16 on this piece of paper here.

17 HONORABLE STEPHEN YELENOSKY: How does this
18 differ from the sentence we just voted before? It sounds
19 like a voluminous and repetitive and unnecessary repeat of
20 the sentence we just voted on.

21 CHAIRMAN BABCOCK: Yeah, Mr. Bill.

22 PROFESSOR DORSANEO: I don't think it does
23 really differ, but I think this is a problem, and so it
24 might not be a bad idea to say it two different ways since
25 this is a problem, just so people get the point.

1 HONORABLE STEPHEN YELENOSKY: Well, the
2 language we just voted on is new as well, so I would think
3 new language is highlighted language, but --

4 CHAIRMAN BABCOCK: Any other comments on the
5 comment? All right. With the friendly amendment,
6 "unnecessary or voluminous," how many people are in favor
7 of this comment? Raise your hand.

8 MR. MUNZINGER: As a comment?

9 CHAIRMAN BABCOCK: Yes.

10 HONORABLE SARAH DUNCAN: Oh, as a comment?

11 PROFESSOR DORSANEO: Yes.

12 CHAIRMAN BABCOCK: Yes. How many opposed?
13 By a vote of 18 to 6 that passes. Next, Elaine.

14 PROFESSOR CARLSON: Okay. The last three
15 amendments that appear in the final three paragraphs on
16 page three deal with whether or not we should amend our
17 practice to allow the trial court when requested to make
18 findings of facts and conclusions of law orally and
19 recorded in open court in the presence of counsel
20 following the close of the evidence. That's close to
21 Federal practice except Federal practice is in every case.

22 CHAIRMAN BABCOCK: It doesn't say "as
23 requested," does it? "If requested."

24 PROFESSOR CARLSON: Well, we could put that
25 in, but when you look at the entirety of the rules this is

1 all premised on a request.

2 CHAIRMAN BABCOCK: Okay. Richard and then
3 Justice Jennings.

4 MR. ORSINGER: As much as I like and respect
5 members of the committee I think this is a horrible idea.

6 PROFESSOR CARLSON: But you're sensitive.

7 CHAIRMAN BABCOCK: So you mean -- what
8 you're about to say you mean as nice as possible.

9 MR. ORSINGER: There are so many
10 ramifications that run off of this. If you leave the
11 timetable the way it is then when a judge hands down some
12 two or three findings at the conclusion of the hearing
13 when they announce their ruling, you have now triggered
14 the 10-day time period to file a motion for request --
15 requested amended or additional findings.

16 PROFESSOR CARLSON: That's true.

17 MR. ORSINGER: There will not be an
18 appellate lawyer in sight. The thought of appeal will not
19 have occurred to anyone because there won't even be a
20 written judgment yet. There might not be a judgment for
21 another 30 days, and yet we're engaged in the appellate
22 process of drafting the rules, drafting the findings that
23 are going to control the outcome of the appeal, and it's
24 triggered by some maybe vague statement that the judge
25 dictates at the end of the case like, you know, "I believe

1 her and I don't believe him," and so now your timetables
2 are all running, there is not an appellate lawyer in
3 sight, you don't have a judgment drafted yet, and so I
4 think that that process is going to boil down to there
5 aren't going to be any findings because the trial judges
6 are not going to give you soberly thought out
7 comprehensive findings off the top of their head at the
8 end of a weary trial, and it's going to be too late to
9 request that they be modified or amplified, and so all of
10 that's waived, and so I think your finding process will
11 just completely collapse on you.

12 CHAIRMAN BABCOCK: Justice Jennings.

13 HONORABLE TERRY JENNINGS: At the risk of
14 being stoned, I just wanted to point out on Rule 296, I'd
15 like to ask for a vote for those of us to have the ability
16 to express ourselves that we don't necessarily need any
17 change.

18 MR. LOW: Any change. So the Court would
19 have some view that there are some people who haven't
20 voted and that have a view, at least a number of people,
21 that don't want to make any change.

22 HONORABLE LEVI BENTON: Second.

23 HONORABLE TERRY JENNINGS: To leave the rule
24 as-is.

25 MR. LOW: Yeah.

1 CHAIRMAN BABCOCK: Okay. Thank you. We'll
2 get to that vote.

3 MR. LOW: Okay.

4 CHAIRMAN BABCOCK: We'll take a vote in a
5 minute. Justice Gray.

6 HONORABLE TOM GRAY: I think the fix for
7 Richard's concern is to modify the rules regarding when to
8 make the request for additional findings, but I think that
9 from a practical standpoint it will at least give you an
10 honest evaluation of what was actually motivating the
11 trial court to make the ruling in the manner in which it
12 did, untainted by the careful crafting of findings by the
13 winning party that subsequently will be handed to the
14 trial judge and the trial judge adopt as the findings, and
15 so I like the opportunity for the immediacy and the
16 frankness of what will be put on the record at that point.

17 CHAIRMAN BABCOCK: Okay. Judge Yelenosky.

18 HONORABLE STEPHEN YELENOSKY: Just a
19 question. What happens if the judge both speaks at the
20 end of the trial in phrases that could be interpreted as
21 findings and later issues written findings?

22 PROFESSOR CARLSON: We have an appellate
23 decision.

24 HONORABLE STEPHEN YELENOSKY: What's that?

25 PROFESSOR CARLSON: We did not address that.

1 HONORABLE STEPHEN YELENOSKY: And what does
2 that do to the timetable? Just an issue.

3 PROFESSOR CARLSON: We really did not
4 address that.

5 MR. ORSINGER: And what do you do if they
6 conflict? Judge, what happens if the elaborately written
7 findings by the winner conflicts with an oral finding from
8 the trial judge?

9 HONORABLE TOM GRAY: Well, I expect that
10 they will conflict at times.

11 MR. ORSINGER: Okay, so --

12 HONORABLE TOM GRAY: The ones we find now
13 carefully crafted after the fact, they conflict, but
14 that's just something that we struggle through, but I'm
15 talking -- I mean, it's the equivalent of having
16 additional findings and conclusions under the current
17 practice. If you convince the trial judge to sign
18 something that conflicts with what he stated and results
19 in a judgment going the other way, then you've, you know,
20 gotten yourself into an appellate box, and whatever comes
21 out will come out, but it's going to be based first on the
22 fact that I think it's going to be easier to -- for the
23 trial judge to do. It's going to be more immediate
24 timewise, and there's going to be fewer problems in the
25 delay.

1 Because as some of the trial judges have
2 said, they want to make this ruling. If they're going to
3 have to do it, let's go ahead and make it. While it's
4 there, it's fresh on our mind. It's not done 20 or 30
5 days later. It's not done in the haste of reading five or
6 six pages of findings at this point. "This is the reason
7 I'm making this ruling," and go with it from there. If
8 something happens later that results in conflicting
9 findings, we will have to deal with that on appeal.
10 You'll have to deal with that in the briefing.

11 HONORABLE STEPHEN YELENOSKY: My concern may
12 go away and I may have misread it. If it's clear that it
13 only constitutes a finding of fact or conclusion of law if
14 the judge says on the record, "I'm now making findings of
15 fact, conclusions of law." The way I read it, the judge
16 could say anything that somebody could then say are
17 findings of fact, and they very well may be, but the judge
18 might say a lot of things, particularly in a family law
19 case, that he or she doesn't necessarily want as a finding
20 of fact, but instead wants as a lecture to the parties. I
21 mean, if I know I'm making findings of fact and only when
22 I say I am, then I don't really have a problem with it.

23 HONORABLE JAN PATTERSON: A stamp, need a
24 stamp.

25 HONORABLE TRACY CHRISTOPHER: I just think

1 it's probably an unnecessary addition to the rule that
2 trial judges aren't asking for. And if this is supposed
3 to be for our convenience, I haven't heard anybody really
4 wanting it.

5 CHAIRMAN BABCOCK: Frank.

6 MR. GILSTRAP: Well, I don't know that it's
7 necessarily for the trial court's convenience. It may be
8 for the practitioner's convenience. I certainly think
9 that it might be helpful to allow the trial judge to make
10 findings from the bench, you know, a la the example of
11 Barefoot Sanders that I talked about last time. If he
12 says, "These are my findings. I'm going to come back
13 today and I'm going to make my findings. Here they are.
14 I'm going to dictate them." You know, that's fine. I
15 understand there's a problem with the timetable, but if he
16 says, "These are my findings," that should be enough. If
17 he doesn't say, "These are my findings," then we shouldn't
18 count them as such.

19 HONORABLE STEPHEN YELENOSKY: That's what I
20 -- that's how I feel.

21 CHAIRMAN BABCOCK: Okay. We ready to vote
22 on this? I think we can probably vote on all three
23 because we can talk about the language more.

24 PROFESSOR CARLSON: Yeah.

25 CHAIRMAN BABCOCK: But the concept is

1 whether or not we're going to permit the trial judge to
2 make oral findings under the circumstances expressed here
3 or similar thereto.

4 PROFESSOR CARLSON: Correct.

5 CHAIRMAN BABCOCK: Okay. So everybody in
6 favor of permitting the trial judge to make oral findings
7 of fact and conclusions of law, raise your hand.

8 All those all opposed? That goes down in
9 flaming defeat, 7 to 15, 7 for, 15 against, the Chair not
10 voting.

11 HONORABLE SARAH DUNCAN: Wait. I just saw
12 Elaine doing -- keep going, but don't do that. Keep
13 going. I'm sorry.

14 CHAIRMAN BABCOCK: Keep going? Justice
15 Jennings would like a show of hands as to who thinks that
16 everything we've done has been irrelevant for the last two
17 hours?

18 MR. LOW: Could we say wants to make no
19 change?

20 HONORABLE TERRY JENNINGS: To Rule 296.

21 CHAIRMAN BABCOCK: All right. Is that what
22 you think would be useful, Judge Jennings? Just everybody
23 that doesn't want --

24 HONORABLE TERRY JENNINGS: If it ain't
25 broke, don't fix it.

1 CHAIRMAN BABCOCK: No changes to Rule 296.
2 Everybody here, regardless of your prior votes, who does
3 not want to see any change to Rule 296, raise your hand.
4 All right.

5 And regardless of your vote, everybody that
6 thinks Rule 296 should be changed in some form or fashion
7 raise your hand.

8 PROFESSOR DORSANEO: Chip, I voted for it.
9 Add one.

10 MR. ORSINGER: He's for change.

11 CHAIRMAN BABCOCK: You're for change. Okay.
12 Everybody for change keep your hands up, make sure I get
13 the -- because it's close.

14 Well, it is 14 for change and 14 for no
15 change. So maybe --

16 MR. SCHENKKAN: Well, we have one more
17 voting member I know hasn't left because he's left his
18 computer who might return.

19 CHAIRMAN BABCOCK: Well, I'd like the record
20 to reflect that the Chair gets to vote in the event of a
21 tie.

22 MR. FULLER: Can you add me to the change
23 category?

24 CHAIRMAN BABCOCK: So I vote for no change,
25 but it's been fun.

1 MR. ORSINGER: No change, okay.

2 CHAIRMAN BABCOCK: Let's take --

3 MR. FULLER: You can add me to change.

4 CHAIRMAN BABCOCK: You vote for change?

5 MR. FULLER: Yeah.

6 CHAIRMAN BABCOCK: Okay. Well, then it's 15
7 to 14, the Chair not voting.

8 (Recess from 3:25 p.m. to 3:40 p.m.)

9 CHAIRMAN BABCOCK: All right, Elaine, the
10 ball hog that she is, wants to keep going, because she has
11 some sort of secret rendezvous with her husband somewhere.

12 HONORABLE SARAH DUNCAN: Lucky you.

13 PROFESSOR CARLSON: It's true.

14 CHAIRMAN BABCOCK: So we'll talk about Rule
15 226a, which is something that has come to the Court via
16 David Beck, who is now the president of the American
17 College of Trial Lawyers.

18 PROFESSOR CARLSON: Mr. Chairman, I am going
19 to defer to Carl Hamilton to present this because Carl was
20 the principal scrivener in, I think, the very wonderful
21 language you see, so Carl.

22 CHAIRMAN BABCOCK: Okay. Carl.

23 MR. HAMILTON: Well, Dave Beck submitted a
24 proposed instruction to the jury, which we looked at. We
25 thought there was a few problems with that in that he

1 talked about the adversary system, but he didn't tell us
2 what that was, and I think probably a lot of jurors don't
3 know what an adversary system is. He talked about the
4 lawyers being criticized.

5 CHAIRMAN BABCOCK: Carl, speak up. The guys
6 at the end of the --

7 MR. HAMILTON: Talked about the lawyers
8 being criticized, and we felt like maybe that language
9 wasn't appropriate for a jury instruction, and finally, he
10 talked about lawyers doing things in the best light
11 possible, which probably wasn't in accordance with the
12 Rules of Professional Conduct, so we took a look at some
13 of the articles on advocacy. There's one about ethical
14 standards for the advocate or judge, by E. Wayne Thode and
15 then there's the Rules of Professional Conduct, and so we
16 came up with what you have before you, which does define
17 the adversary system and takes out the part about the
18 lawyers being criticized and incorporates Rule 301 of the
19 Rules of Professional Conduct.

20 It's an attempt, I guess, on the part of
21 Dave to try to paint lawyers in a better light instead of
22 them being criticized to point out to the jury what their
23 function is.

24 CHAIRMAN BABCOCK: Well, I think for my own
25 self, I think you did a great job, Carl, very well

1 written. What's everybody think? Justice Gray.

2 HONORABLE TOM GRAY: I would just like, you
3 know, to point out that this may give some attorneys who
4 are being sued for malpractice a pause for concern if this
5 is part of the mandatory instructions. That might be one
6 in which it could be viewed as a comment on the weight of
7 the evidence or something. I don't know. It's just I can
8 see that some attorneys being sued would not enjoy this.

9 CHAIRMAN BABCOCK: Okay. Buddy.

10 MR. LOW: The attorney has to operate within
11 the rules of -- I mean, not vigorously present just
12 evidence, but within the rules and the ethical standards
13 and so forth. It looks like he just vigorously does what
14 his clients claim, but he should be limited to the code of
15 conduct which you can't present certain things or side bar
16 or so forth, not just -- this could be, I think, not as
17 limited as it should be.

18 CHAIRMAN BABCOCK: Okay. Judge Yelenosky.

19 HONORABLE STEPHEN YELENOSKY: Well, I mean,
20 I think it's great for civic education in the abstract,
21 but this is something that would have to be read by the
22 trial judge before every case and applicable to every
23 attorney's performance in preview of that performance when
24 we know -- and I've not seen this very often at all, but
25 sometimes attorneys are way out of bounds, and I wouldn't

1 want to be saying at the beginning of trial that what
2 you're about to see is exactly the way it should be.

3 CHAIRMAN BABCOCK: Uh-huh. Okay. Who else?
4 Any other comments? Okay. Carl, you want to move it for
5 a vote?

6 MR. HAMILTON: I guess so. I guess if the
7 committee wants to have something like this then --

8 CHAIRMAN BABCOCK: Well, it's not the
9 committee that much cares, it's if the Court wants it.

10 MR. HAMILTON: Okay. Then our subcommittee
11 wants this, so I move that we adopt it.

12 CHAIRMAN BABCOCK: Okay. Any other
13 discussion? Jeff.

14 MR. BOYD: Clarification, I'm trying to
15 figure out which page has the exact language that we're
16 actually looking at right now.

17 CHAIRMAN BABCOCK: It's the --

18 MR. BOYD: Is it December 6th, 2006, down in
19 the bottom of this one?

20 CHAIRMAN BABCOCK: Yes.

21 PROFESSOR CARLSON: Yes.

22 MR. BOYD: With the line down the margin?

23 CHAIRMAN BABCOCK: That's it. Any other
24 discussion? All right. All in favor of adopting this
25 language from Rule 226, for Rule 226a, raise your hand.

1 HONORABLE STEPHEN YELENOSKY: Would you
2 repeat that? I'm sorry. I apologize.

3 CHAIRMAN BABCOCK: Everybody in favor of
4 this language?

5 Everybody opposed?

6 HONORABLE SARAH DUNCAN: I'm going to change
7 my vote. I'm sorry.

8 CHAIRMAN BABCOCK: Okay. It is defeated by
9 a vote of 7 to 12, the Chair not voting.

10 MR. LAMONT JEFFERSON: Chip?

11 CHAIRMAN BABCOCK: Yeah, Lamont.

12 MR. LAMONT JEFFERSON: I mean, David's cover
13 letter said that kind of the purpose for this instruction
14 was to assist in the negative perceptions and the
15 vanishing jury trial idea, right, and I think that the
16 idea of modifying the jury instruction is a good one, and
17 we haven't looked at it in a long time, and I think there
18 are ways that we can do that. And so, I mean, I'm in
19 favor of that, but the particular -- there's a whole lot
20 of different ways to do that and to modify the
21 instructions to make -- kind of put the jury trial in the
22 right perspective for jurors and for the laypeople.

23 I didn't vote for or against this particular
24 language because it almost suggests that, you know, the
25 better lawyers are the more aggressive, more zealous, at

1 least apparently so in the courtroom, that they're the
2 ones who give the more forceful testimony or are, you
3 know, the ones that are revered by our society or
4 whatever, but I mean, so I think a change and I think
5 looking at Rule 226a and the instructions, I think it
6 merits the attention of the Court, but, you know, just an
7 up or down vote on this language I think is --

8 CHAIRMAN BABCOCK: Yeah. I didn't express
9 it on the record, but I will. I am concerned that
10 language like this will sort of give the judge's
11 imprimatur to activities or actions in the court that
12 everybody at this table would say, "We didn't mean that
13 when we were talking about the adversary system."

14 HONORABLE SARAH DUNCAN: That was Steve's
15 comment and --

16 CHAIRMAN BABCOCK: That was Steve's comment.

17 HONORABLE SARAH DUNCAN: -- that's what
18 caused me to change my vote.

19 CHAIRMAN BABCOCK: Yeah. And so I suspect
20 that that's the motivation behind a lot of the votes
21 against this language, but it's -- it's an issue I know
22 the Court's interested in, and they've got -- it was a
23 pretty close vote to begin with whether we even did this
24 at all, 12 to 10, and then this language, you know, didn't
25 make it, and if the Court wants to follow up on the

1 concept and come up with its own language, I'm sure they
2 won't be critical of anything we've written, just say it
3 differently if they decide to do it. Would that be true?
4 Okay.

5 Well, here's some good news. We all get out
6 of school early today because Bill has got another
7 commitment that he has to leave for and he's got the only
8 other agenda item on our docket, so we'll hold that over
9 for the next time, which is unscheduled, but we'll get a
10 schedule for 2007 out.

11 And let me say, we set, I think, a record
12 today. All but eight of our members were here at one
13 point or another during the day, and even better than
14 that, all but three RSVP'd, which is certainly a huge
15 record, and it really helps Angie out from everything from
16 how big the table's got to be to the food that we order to
17 everything else, so if you think of it and can RSVP, that
18 would be great. And have a great holiday, everybody, and
19 thanks for your help, as usual a terrific day of work.
20 Buddy.

21 MR. LOW: Chip, I'd like to give both you
22 and Angie a round of applause for a good year of work on
23 the committee.

24 (Applause)

25 CHAIRMAN BABCOCK: Thank you very much.

1 We're in recess.

2 (Meeting adjourned at 3:50 p.m.)

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2 REPORTER'S CERTIFICATION
3 MEETING OF THE
4 SUPREME COURT ADVISORY COMMITTEE

5 * * * * *

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7
8 I, D'LOIS L. JONES, Certified Shorthand
9 Reporter, State of Texas, hereby certify that I reported
10 the above meeting of the Supreme Court Advisory Committee
11 on the 8th day of December, 2006, and the same was
12 thereafter reduced to computer transcription by me.

13 I further certify that the costs for my
14 services in the matter are \$ 1636.00.

15 Charged to: The Supreme Court of Texas.

16 Given under my hand and seal of office on
17 this the 26th day of December, 2006.

18

19

D'Lois L. Jones
D'LOIS L. JONES, CSR
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