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MEETING OF THE SUPREME COURT ADVISORY COMMITTEE

February 20, 2009

(FRIDAY SESSION)

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Taken before *D'Lois L. Jones*, Certified Shorthand Reporter in and for the State of Texas, reported by machine shorthand method, on the 20th day of February, 2009, between the hours of 9:00 a.m. and 5:01 p.m., at the Texas Association of Broadcasters, 502 E. 11th Street, Suite 200, Austin, Texas 78701.

INDEX OF VOTES

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

Documents referenced in this session

09-1 Senate Bill 445

09-2 Revised Order Following TRCP 226a

09-3 Draft Juror Question Rule.

09-4 Report on Jury Innovations (Judge Christopher)

09-5 Summary of SCAC Note-taking discussions

09-6 Proposed revision to TRE 606

09-7 Proposed amendments to Rules 296-329(b)

09-8 Administration Rules of Evidence recommendation

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CHAIRMAN BABCOCK: Well, welcome, everybody, to a new term, new three-year term of our committee. We've got many, many old and familiar faces, but we've got some new members; and at the risk of embarrassing them, and that will only be the first time, I wonder if everybody could introduce themselves and tell us a little bit about their background; and, Eduardo, I was going to start with you.

MR. RODRIGUEZ: I was going to get Ms. Albright a chair.

CHAIRMAN BABCOCK: But since you're already standing maybe you can tell us a little bit about yourself.

MR. RODRIGUEZ: I'm Eduardo Roberto Rodriguez from Brownsville. I've been practicing trial law there for about 40 years.

CHAIRMAN BABCOCK: Okay. Roger Hughes.

MR. HUGHES: Yes, well, my name is Roger Hughes. I'm with a little firm called Adams & Graham. I'm from Harlingen, Texas, and I've been doing civil litigation, mostly on the defense side, since 1981, with a few years defending some of the Army's finest drug dealers in the JAG Corp.

CHAIRMAN BABCOCK: Great. Judge Evans.

HONORABLE DAVID EVANS: I'm David Evans. I'm the judge of the 48th District Court. Prior to that time I was in civil practice, appellate practice.

CHAIRMAN BABCOCK: Okay. R. H. Wallace.

MR. WALLACE: I'm R. H. Wallace with Shannon Gracey in Fort Worth. I have been in private practice since 1984, doing mainly commercial litigation and professional liability defense.

CHAIRMAN BABCOCK: Mark Glasser.

MR. GLASSER: Mark Glasser from Baker Botts in Houston, where I practice principally securities and oil and gas litigation.

CHAIRMAN BABCOCK: Okay. Rusty Hardin.

MR. HARDIN: I went into private practice in '91 after about 15 years as a prosecutor in Houston, so my practice now is about 85 percent civil trial work and 15 percent criminal.

CHAIRMAN BABCOCK: And I think all the way down to Justice Guzman.

HONORABLE EVA GUZMAN: Good morning. I'm Eva Guzman. I'm a judge on the 14th Court of Appeals. I've been there about -- coming into my eighth year. Before that I was on a family district court bench.

CHAIRMAN BABCOCK: Well, welcome to all of you. I think you'll find this work sometimes tedious, but

really fascinating, interesting, and of great service to the Court and the State of Texas. I want to tell the new members a little bit about how we operate. First of all, all of these meetings are open to the public, and they are transcribed by our faithful court reporter, who can go on and on and on as we drone on forever. We'll have a break in the morning and a break in the afternoon. If our work requires it, sometimes we will spill over to Saturday morning meetings, but we will not have to do that this time.

There is a -- at these meetings we sometimes have people who ask to address the committee and have particular expertise and points of view that they want to express. Within reason, we always accommodate those people and allow them to tell us what they think and ask them questions if we think that what they say will be helpful to our work. We do not take formal sworn testimony, but I've never in the time I've been on this committee felt that anybody was trying to mislead us in what they said. The transcripts and all of the materials that are pertinent to our work is contained on a website, and Angie, who is my colleague and assistant and has been with this committee for five or six years, will you tell us -- tell them how to get to the website?

MS. SENNEFF: Right now it's just at Jackson

Walker's website, which is www.jw.com, and go down to the bottom of the home page, and there's a link to SCAC, and that's where everything is.

CHAIRMAN BABCOCK: Great.

MS. SENNEFF: All the stuff for each meeting is under the "featured items," and the stuff from prior meetings and historical stuff is under the library.

CHAIRMAN BABCOCK: And if anybody has any questions about logistics or about what's going to be on the calendar or how we're going to do things, Angie is available to answer your questions, and I'm sure she's already been in contact with most people by e-mail.

Our work gets done here in this meeting which is held generally every other month here in Austin either at this facility, or at the State Bar headquarters. We do, however, have subcommittees, and they are organized by -- mostly by rule, although there are a couple by topic, and the new members should have received assignments to a particular subcommittee. These things are not set in stone. If you want to do work in a -- on another subcommittee, I'm sure that that's -- wouldn't be a problem at all. The subcommittees have chairs and vice-chairs, and there should be a chart that has been distributed to everybody showing that.

Angie just told me she didn't do that, but

she will. But she will do that. I'm often asked how do things get before this committee. That has changed over the years, but a long, long time ago the committee would pretty much take up -- a lawyer wrote a letter to this committee and said, "We want you to look at this potential rule change," and we would spend a lot of time and effort looking at it and then we would give it to the Court, and the Court would say, in effect, "Why did you look at this, because we're not interested in changing this, and thanks for the effort." So in recent years we have tried to pretty much institute the procedure that we only want to look at things that the Court is interested in having us look at, so something gets on this docket because Justice Hecht and the other members of the Court are interested in the topic, and they've asked us to look at it and give us -- give them our best advice about what should be done.

And that brings up another topic. We are, as our name suggests, advisors to the Court. We aren't the Court ourselves. What we say is only advice, and I know those of you who have been in private practice know that your clients often don't take your advice, and I think you'll find in this effort that our client often does not take our advice. That doesn't mean we're right or wrong, it just means that they have a different view, but I think they always appreciate the effort and the good

advice we try to -- we try to give them. That's all I have right now.

We do have as a common practice at the beginning of every meeting, Justice Hecht gives us a status report. Among the things that he generally covers is how our work product is doing with the Court. In other words, if we referred them something recently, did they like it, not like it, is it under consideration, or will we never hear about it again, but thanks anyway. So with that, I will turn it over to Justice Hecht.

HONORABLE NATHAN HECHT: Thanks, all of you, for being here for this beginning of the new term of the committee that has been in existence since 1940. The Legislature passed the Rules Enabling Act in 1939, following a movement across the country to move the formulation of Rules of Procedure to the judiciary and the Bar and away from the Legislature. Remember the old field code in New York that was such a model for procedure for a while, all of the procedure rules in all of the states were made by Legislatures with a few quirk exceptions, and then there was a huge wave Roscoe Pound and others sponsored at the beginning of the 19th century, lawyers and judges should make these rules because they have to live with them.

This committee was formed in 1940 to take

the rules that existed in the statutes, a few rules that had been formulated by the courts, and the Federal rules and put them together into the package of some 820 rules that were our Rules of Civil Procedure for awhile. Then, as now, the Supreme Court looked around the state and tried to select and encourage to participate the best and the brightest of lawyers, judges, and academics that it could find because this is a very large state, its practice is very diverse, it is a leader in the civil justice system in the United States, and so we like to be well-acquainted with procedures that are working, changes that need to be made, procedures that are not working, the whole gamut of the operation of the judiciary.

So most of our work here will be on the Rules of Procedure, civil procedure, appellate procedure, and the Rules of Evidence, but there are Rules of Judicial Administration, which this committee has worked on in the past and will continue the work on as well as other rules that govern the operation of the judiciary and the Bar that the Court will want your input on. When the committee reaches recommendations, Chip sends them to me, and I send them to the Court. The Court discusses these recommendations in conference, goes through them line by line and decides whether we think this is a appropriate action to take, whether we should wait, whether we should

look at it again, what's the right thing to do.

So we seek your advice even on things that you would rather not see happen, so we'll ask you from time to time is this a good idea, and when you vote unanimously against it, we'll ask you if it was a good idea, how would you do it? And because there are lots of factors at play here -- and we'll talk about most of them on today's agenda, as a matter of fact.

We have partnered with the Legislature in the last several sessions in writing rules and procedures to effectuate policies that they have enacted, so some of these are in some detail, like the rule regarding offer of judgment. The Legislature has a fairly detailed statute about that. It's hard fought over there, but once those policies were set, the Legislature left it to the Court, and we drew on the expertise of this committee to write a rule that would effectuate those policies. Sometimes the directions given by the Legislature are fairly general. In that same session the Legislature asked us to look at class actions and essentially do whatever needed to be done. So we -- but we encourage and cooperate with that relationship because, again, we think that it's a very good thing for the Bar and the judiciary to -- when policies are set by the Legislature, to have the actual working out of them done by the group that has to live

with them, and so this has been a good relationship the last several sessions, and we hope it continues.

We have today some consideration of jury procedures. We've talked about these for several meetings and now we'll come toward finishing them up. There is pending in the Senate, Senate Bill 445, introduced by Senator Wentworth of San Antonio, that addresses note-taking and juror questions; and my assurance to him is that when that comes for hearing soon we will be able to furnish him the work, the deliberation that this group has done, on those issues so that the Legislature will have the benefit of that as it considers that bill and perhaps others.

So the committee has 55 members. 52 are appointed by the Court. One is designated by the Lieutenant Governor, one by the Speaker of the House, and one by the Court of Criminal Appeals. In the past we have had a district clerk and a county clerk amongst us to help us with the issues on that side of our operation, and it turns out that both of them have retired at the end of this last three-year term, and it seemed to the Court that rather than have them sit through endless discussions about jury questions and jury note-taking it would be better to call on them when we need them and free up those two positions for someone else, and so we have done that,

so we will not have here as a regular matter representatives of the clerks' offices, but when we get into appellate or trial procedures that need their input, we have -- we can easily call upon people from their groups to come and to help us with that as we have in the past.

So five other members of the committee retired, and we thank them for their service, and we have the seven that have introduced themselves, and I just say a word about our thoughts in that regard. We have here a strong proponent of the judiciary of both the appellate and the trial bench, and we, of course, need that very much in consideration as well as from the law schools and the practice.

Justice Guzman, we're pleased to welcome. She didn't tell you that she's a member of the ALI or that her husband is a police officer in the Houston police force, and it was interesting to me that the first year she was on the appellate bench in 2002, the Houston Police Association voted her the best appellate justice, which is good. It would have been worse if they hadn't.

Judge David Evans is Judge David L. Evans of Fort Worth, not to be confused with Judge David M. Evans, former Judge David M. Evans of Dallas, and was a captain in the Army infantry before he went to law school and has

been on the district court in Fort Worth since 2003. Mark Glasser is from -- Judge Evans incidentally is from Texas A&M and --

HONORABLE TOM GRAY: Whoop.

HONORABLE NATHAN HECHT: -- Baylor, Justice Guzman from the University of Houston and the South Texas College of Law. Mark Glasser is from Columbia and the University of Texas and a law clerk to Judge William Wayne Justice, former chief judge of the Eastern District of Texas. He is also a former lead vocalist for Midlife Crisis and Hot Flashes. His drummer was Rob Mosbacher.

Rusty Hardin is from Wesleyan and SMU. He was an American History teacher in Montgomery, Alabama, before he was a captain in the Army and finally talked SMU into letting him into the law school, where he has -- in which profession he has done okay. He was voted Texas Prosecutor of the Year in 1989 before he went over to the dark side, and tomorrow night he gets SMU's distinguished alumnus medal. Anna Nicole Smith when being cross-examined by him said, "Screw you, Rusty."

CHAIRMAN BABCOCK: Not an exact quote, but the sentiment was the same.

HONORABLE NATHAN HECHT: So if you get peeved at Rusty during these meetings you might think of that phrase. Roger Hughes is a native of Topeka and from

the University of Kansas and the University of Texas, and he, too, was -- as he mentioned was in the Army in the JAG Corp. We've got lots of Army people here, and Eduardo Rodriguez is a native of The Valley, of Edinburgh, and operated the elevator at the United States Capitol when he was going to George Washington University to help pay his tuition and carried such luminaries as President LBJ and Charlton Heston up and down the corridors of the Congress. He is a former president of the State Bar and member of the American College, and there's a bunch of other stuff, too.

And R.H. Wallace is a good Navy man and a graduate of the Naval Academy as well as the Baylor Law School, former managing partner of Shannon Gracey in Fort Worth, and a member of the American College. So it was among those credentials that the Court found a lot of expertise and experience to call upon in these new members.

Now, with respect to the agenda, before we get to that, one other thing that will be coming up soon, the courts of Texas, trial courts of Texas, as you know, have been experimenting with electronic filing for several years, and it is now in operation in 29 counties in Texas. It is approved on a county-by-county pilot project basis, but the template for the operation is the same, and it has

been used in various counties. We, of course, are trying to expand that, and there is some hope that we will be able to move to a full and required electronic filing in Texas trial courts in the next couple of years, but there are lots of problems with that, which we don't have to go into now. Funding problems, operational problems with the various counties, as well as the legal problems of fashioning rules to get that done.

Meanwhile, there is a project under way. TAMES is the acronym, Texas Appeals Management and E-filing Systems, which will call for e-filing in all of the 16 appellate courts in Texas, and it's moving along much faster, and I hope that we will have a presentation on that, either the next meeting or certainly the meeting after that, but hopefully the next one, including changes in the Rules of Appellate Procedure that would permit electronic filing in the courts of appeals, the Supreme Court, and the Court of Criminal Appeals.

The most significant changes in that regard are in the preparation and filing of the record, both the reporter's record and the clerk's record, which we expect this project to call for that to be done electronically and throughout the state. So that's a little easier to do. The courts of appeals have about 11,000 filings every year. We have about 1,100. I'm not sure what the Court

of Criminal Appeals workload is, but anyway, 11,000 and 1,100, something on the -- it's going to be something on the order of 15,000, which is about four percent or something of the civil cases and a tenth of one percent of the major criminal and civil cases that are filed in the state. So there's a much smaller docket to deal with. The Bar tends to be a smaller group of people. The problems are smaller. We have only 16 clerks to deal with, so we hope that that will move along very smoothly, but as I say, the appellate courts are very interested in this, are very excited about it. Chief Justice Hedges is the head of the task force that's working on this, and it's very far along, so we will hear something about that probably next time.

Then on the agenda today the Court has taken up the proposed changes in the standard jury instructions, which are included in an order following Rule 226a of the Rules of Civil Procedure, and we have made a few changes, and they are somewhere available to you, and it says at the top "Revised Order Following Texas Rule of Civil Procedure 226a" in a little box, so if you don't have it you can get one, and the changes made by the Court are underscored or struck out and most of them are editing kinds of things, but when we get to this on the agenda, I will tell you what the two or three things are that the

Court thinks it needs more help on and get your responses. We hope to have at the conclusion of this meeting your thoughts on the order following 226a and all of these issues, so, as I say, we can advise the Senate committee, to the extent it wants help, what we have concluded on these subjects.

And then finally, we have been asked by the Court Rules Committee of the State Bar of Texas, which is another group, but it's appointed by the Bar, and they, too, study the Rules of Procedure and make recommendations. Those recommendation -- all recommendations that are made to us almost always with rare exceptions, whether from the Bar, from Bar sections, from individuals, wherever they come from, come through this committee before they go back to the Court for decision. So this is sort of the clearinghouse for all of these things, but the Court Rules Committee has asked the Court on an expedited basis to consider a change in Rule of Evidence 1010, the basic import of which is to allow for verification without an oath.

The Federal system allows this simply sign it under penalties of perjury, and that means that. Texas does not have that provision, except for prisoners, so should we have it more widely. The request from the Court Rules Committee was that the Court approve this at once so

that it might be considered during the session. The Court declines to do that and would rather get your input on it, but we out of regard for the committee's recommendation, we would like to do that soon, so I think, Mr. Chairman, that's all I've got.

Okay. Buddy Low, who has been on this committee since the 1840s, I think --

MR. LOW: 1864.

HONORABLE NATHAN HECHT: -- is the vice-chair of the committee. Now, I've been the Court's liaison since I've got on the Court, and Kennon Peterson on my left is the Court's rules lawyer, rules attorney, and you are always welcome to call her at the Court. These are administrative matters, so there's no ex parte about this. You can call, talk about the status of things, ask questions, get her e-mail address, and contact her whenever you need to because she works with the Court on all of these issues and has since last summer.

CHAIRMAN BABCOCK: Great. Thank you, your Honor. One other note before we get to work, and that is we -- the Court and I have decided that it would be a nice tradition if at the beginning of each three-year term we would get together for a reception and a picture, so tonight at 6:00 o'clock at Jackson Walker, which is 100 Congress, it's right at Congress and Cesar Chavez.

There's maps I think on the back table. At 6:00 o'clock there will be a reception, and at some time during the reception we will have a picture of this committee taken, and the Court has indicated they might even hang us all at the Court.

HONORABLE STEPHEN YELENOSKY: Can I substitute a picture of myself when I started on this committee in 1993?

CHAIRMAN BABCOCK: If we had had that tradition back then that would have been a nice progression.

All right. So our first topic of business today is the jury procedure issues, and Professor Carlson and Judge Christopher are the chairs of this effort, so which of you is the lead?

HONORABLE TRACY CHRISTOPHER: Want me to? Okay.

Well, I'm quickly reading the proposed rule from the Supreme Court, which does make a significant change from what we've previously discussed and voted on here. So I'll first talk about note-taking. Since we -- I did a summary of our previous discussions, and it's dated February 20th, and it details the votes that we took and the previous issues that we talked about. Since that time Senator Wentworth filed his bill about juror

note-taking, and the significant change that he has in his bill is that jurors could not take notes during deliberations -- or could not take the notes back during deliberations, but the language that the Supreme Court has come up with keeps our recommendation that -- well, keeps our recommendation that the jurors can use their notes during deliberations, so that hasn't -- it's a change from what Senator Wentworth's bill is, but it's not a change from what our previous discussions and previous votes have been on this point.

HONORABLE NATHAN HECHT: And could I just say there, Judge, that there -- the Court has some ambivalence about this because there are strong voices on both sides of the debate; and as Judge Christopher says, we talked about it at some length and I think the Court's leaning is to approve jurors taking notes back into the jury room with the caveats that are -- that follow, don't tell anybody else about them and remember that they're not evidence, recognizing realistically that those are not always going to be observed; and so we proposed this, but I should have added earlier that these changes are significant enough that we -- even though they are approved by order and not part of the rule-making process, the Court intends to put them out for comment in the public and the Bar before it makes the changes. So that's

there for discussion basically for the time being.

HONORABLE TRACY CHRISTOPHER: Okay. Well, you don't want this group to discuss again whether or not we should take notes back into the jury room, do you? We pretty much discussed that three times and have all thought it was a good idea. The majority thought it was a good idea.

HONORABLE NATHAN HECHT: I think the majority did. For what that's worth.

HONORABLE TRACY CHRISTOPHER: I think it was overwhelming majority.

HONORABLE NATHAN HECHT: It was substantial. It was.

HONORABLE TRACY CHRISTOPHER: And I would like the record to reflect it was an overwhelming majority.

HONORABLE NATHAN HECHT: But others are screaming loudly.

HONORABLE TRACY CHRISTOPHER: Yes, but those people are going backwards, not forwards in terms of improving the jury system, and I will tell Senator Wentworth that if he ever asks my opinion, that not allowing jurors to have their notes in the jury room to refresh their own memory is going backwards from the current system, from what, you know, the vast majority of

trial judges already do in civil cases.

CHAIRMAN BABCOCK: Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: Well, I agree, but -- and my question is if anyone is here who opposes them going back to the jury room, what are we -- what is the juror to think he or she is doing in taking notes? You take notes either to review them and memorize them or to refer to them. Is the juror to think when they're told you can't -- you can take notes, but you can't take them back to the jury room, boy, I better study up on my notes real good before we go back to deliberate? I just don't understand how that's supposed to work. Does anybody have an answer?

MS. CORTELL: I believe they shouldn't go back into the jury room, but I will say I was a juror recently in a criminal case where I couldn't take them back, and I did just what you're saying, Steve. I studied like I was cramming for an exam.

HONORABLE STEPHEN YELENOSKY: And when did you do that, during breaks or during the trial?

MS. CORTELL: I'm sorry?

HONORABLE STEPHEN YELENOSKY: Did you do that during the trial?

MS. CORTELL: I was allowed to keep my notes throughout trial. They weren't even collected at the end

of the day. The only time I was not allowed access to my notes was during deliberations.

HONORABLE STEPHEN YELENOSKY: Well, that would be my concern about what would happen. An unintended consequence would be exactly that. If you tell people to take notes but you tell them ahead of time you're not going to have them later, they are going to study those notes during the trial perhaps or maybe -- maybe during breaks, but that would be a concern.

CHAIRMAN BABCOCK: Professor Dorsaneo.

PROFESSOR DORSANEO: I haven't taken a survey of this, but my sense is that students take their notes into the exam, that that's the more normal method used in law schools, but they may not be able to take texts that weren't assigned, dictionaries and the like. That's a sensible place to draw the line.

CHAIRMAN BABCOCK: Good point. Okay. Judge Christopher.

HONORABLE TRACY CHRISTOPHER: The second major issue that is in Senator Wentworth's bill that we have discussed before was whether or not we would let jurors take their notes home when the trial was finished or take their notes home during the course of the trial. I see that the Supreme Court's draft says that they can't do either of those things, so that would be different from

what we had voted on before. Now, I will say I don't think that that was as overwhelmingly in favor of letting the jurors take their notes home, but it was a strong majority that thought jurors ought to be able to take their notes home; and in connection with that, we did vote to amend TRE 606 just to make clear that a juror's notes couldn't be used, just like a juror's testimony couldn't be used in connection with questioning the validity of the judgment.

So I had drafted proposed revisions to TRE 606, even though it's not my committee. I just did it so we would have it here today in case we were interested in looking at it. And I just simply added in "in a juror's notes" in two places there that seemed to make sense to me. That change would not be necessary presumably if we vote to destroy jurors' notes. So I don't know whether you want us to talk about that issue some more. As I say, we have talked about it several times. There was a vote, 24 votes in favor of letting jurors take their notes home if they wanted to, eight votes in favor of destroying all juror notes. So -- but we can talk about that point again if you would like to. I know it's one issue that the State Bar committee was worried about in connection with jury misconduct, so that's why I went ahead and did the revision to TRE 606.

HONORABLE NATHAN HECHT: And we don't want to -- the Court's mind is far from fixed at this point. This is just the result of the last conference, but this is a work in progress, so if there's more to add to the discussion then I think it would be good to do that, without going back -- without replowing all the ground all over again. The concern is that if there are lots of breaks during the trial, sometimes there are protracted breaks, if jurors can take their notes with them at lunch, at recesses, overnight, at the end of the trial, different times, there's just a huge opportunity for mischief that's not there if they don't.

CHAIRMAN BABCOCK: Yeah, Steve.

MR. SUSMAN: I think the biggest danger is if they take their notes home and they have the proper spelling of names, they can go to Google and find out whatever they want about the case, and it is irresistible, and I don't care what the judge tells them. So, I mean, they're going to do it anyway, but they have a problem remembering the proper names and the spellings, but if you let them take their notes home the internet is too powerful and too tempting, and so I think -- I am one who favors, on whether they take notes, I think it's important that they be able to take notes, but I see no proper purpose by them taking them home at night and only the

chance for great abuse.

CHAIRMAN BABCOCK: Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: Well, if that's a concern, then the concern is much greater than just having the proper names. One of the suggestions I have on the instructions from the judge is we make clear on investigating, examples of not investigating, which I always tell a jury --

MR. SUSMAN: Sure.

HONORABLE STEPHEN YELENOSKY: -- is do not get on the internet and Google this. It's not just proper names. They can Google the subject matter. They can Google the name of the firm involved, and there's all kinds of things they can find on the internet from what they remembered during the trial. They don't need their notes to do that, so if you're suggesting that the instruction of the court not to do that is in effective then we've got a much bigger problem.

CHAIRMAN BABCOCK: Judge Christopher.

HONORABLE TRACY CHRISTOPHER: Well -- oh, there it is, okay. I thought we had -- in our previous draft we had really highlighted the internet, you know. It seems to have been sort of watered down. I'm with Steve on, you know, you really -- and I say it in every single trial. "Don't look things up on the internet," but

it doesn't matter whether they take their notes home or not. They can look things up on the internet.

HONORABLE STEPHEN YELENOSKY: And they don't have to go home. They have an iPhone during the day, they can look it up during the day.

HONORABLE TRACY CHRISTOPHER: And we have wi-fi at the courthouse. In long trials jurors bring their computers to the courthouse to do work at breaks and at lunch, and, you know, taking the notes home won't make a bit of difference for that kind of mischief.

CHAIRMAN BABCOCK: Professor Dorsaneo.

PROFESSOR DORSANEO: Ultimately the issue gets down to whether somebody could use in a new trial hearing evidence that extraneous prejudicial information was obtained and used during jury deliberations, so I think a related problem is what we're going to say in Rule 327b and 606(b) about new trial practice after there's been jury misconduct, what we would all probably regard as jury misconduct. I'm not sure I would -- I think I probably agree with Steve. It's very unlikely that you would just be able to tell people don't do this, and I think it probably would be a bad idea to have new trial practice examine whether somebody went home and Googled. I feel much differently about them bringing -- jurors bringing dictionaries, newspapers, textbooks, into the

deliberations; and our current evidence rule and 327b might, in fact, say that you can't raise those matters in a motion for new trial, because those things coming with jurors aren't outside influences.

I don't think that our Court has ever faced that issue, but there are several courts of appeals opinions that say, well, yeah, that's naughty, but nothing can be done about it, so maybe that's getting us too far into it, but I think that's where you ultimately go.

CHAIRMAN BABCOCK: Okay. Justice Gray.

HONORABLE TOM GRAY: The part that concerns me about the -- what's under discussion and the way the rule is proposed and providing the materials, it becomes a question of whose notes are they if they are made on materials provided by the state and the state controls those notes at the end of the day and at the end of the trial, does it become a state record, because it is owned and controlled by the state; and if it is a state record, its destruction becomes a statutory issue and has to be retained and would require a statutory amendment to effectuate the destruction of those notes, if they are state records.

Whereas if they're personal property and they can take it on either state provided materials or their own personal materials and then we take them from

the juror, have we done an unconstitutional taking to the extent there may be any value there, and certainly in some of the trials where they are the subject of a lot of publicity they could be valuable, and so that's why I -- actually, Richard Munzinger I think was the one that made the argument that people can come into these jury proceedings, they can take notes, they can take them home with them, they can do whatever they want to with them, and who are we as the government to say that a person because they happen to be sitting on the jury cannot do that, and so I like the fact that the jurors can take them, they can take them into deliberations, they're told what to do with them and what not to do with them and then they can do whatever, but I would prefer that they be able to do whatever they want to with them after the trial.

CHAIRMAN BABCOCK: Judge Christopher, did we -- remind me. Did we say that the notes would be collected by the bailiff on breaks and at the end of the day, but at the end of the trial they could take them home?

HONORABLE TRACY CHRISTOPHER: No.

CHAIRMAN BABCOCK: We just said they could have them the whole time.

HONORABLE TRACY CHRISTOPHER: Right.

CHAIRMAN BABCOCK: Okay. Thanks. Judge

Yelenosky.

HONORABLE STEPHEN YELENOSKY: I want to respond to a couple of things. With respect to, well, why can we tell them, I can see both arguments about whether they should be allowed to keep their notes or not, but in answer to your question why should we be able to tell jurors because they happen to be on the jury they can't keep their notes. Because they're on the jury. We tell people on the jury you can't talk to each other about the case, and people out in the audience can talk about the case, because they're on the jury I think that's a legitimate response.

As to the internet, and maybe this is just something we should put on the agenda for another time, but I think this is a big issue. It's just touched here, but looking on the internet is a much greater risk than somebody going out to the accident site where a car wreck happened and, therefore, obtaining evidence that they shouldn't have at trial, and I do think that people maybe don't consider it to be that, but we need to think about how we educate them to that.

I take some time in telling them, "When you look on the internet, what you're doing is obtaining secret evidence," and people respond to that. I think jurors respond to that. They know what secret is, and

they have an aversion to secret evidence. And I talk about "If you find out things about this case over the internet, you know something that the parties don't know you know. That's like having a secret trial, and we don't want to have that."

I don't know what to do other than to try to educate them about that; but I am strongly against being passive and assuming that they are going to go on the internet and we can do nothing about it, because I think that they can find out all kinds of things on the internet which, one, may be true and limineed out or the other parties won't know about or, two, may be false; and so I'm concerned about what I'm hearing, which is, well, they're going to do that.

CHAIRMAN BABCOCK: Okay. Any other comments? Yeah, Steve.

MR. SUSMAN: I mean, the immediate problem is whether they should take notes home during the trial at night. I haven't heard anyone make an argument for why they need them. Why should they -- what positive -- taking notes during the trial actually keeps them attentive and may be a better way to comprehend, but what is the -- what is the argument, the reason for allowing them to take them home at night when on the other side is it could encourage them, A, to discuss the case with -- do

things they aren't supposed to do admittedly, discuss the case with their family, go get advice about issues, go do research on their own on the internet. I mean, I just don't understand the positive value that we would -- that would be derived from letting them take them home at night.

CHAIRMAN BABCOCK: Judge Christopher.

HONORABLE TRACY CHRISTOPHER: Well, I think it's kind of funny, since I know Steve is a big proponent of juror questions that he wouldn't want jurors to be able to take their notes home at night, look them over, and come up with some good questions, because on the two times I've allowed jurors to do questions, that's what they did. They went home, they looked over their notes, and then they had questions when they came back the next day that they saw from gaps in their notes. So that's one sort of juror empowerment idea. If we really want them to ask questions, which I know Steve does, this gives them the ability to look over their notes and figure out, you know, what they need to ask.

But more importantly, the vast majority of times there are personal things interspersed in with their juror notes. There will be shopping lists. There will be, you know, a reminder to take the dog somewhere. There will be little notes like that that jurors have written to

themselves thinking that those notes are theirs and expecting to be able to take them home. Now, surely we can tell them they can't do it, surely we can tell them to be sure not to put anything personal in any of your notes, but that's how they're using them now.

CHAIRMAN BABCOCK: Okay.

MR. LOW: Chip?

CHAIRMAN BABCOCK: Yeah, Buddy.

MR. LOW: One argument -- and I'm not for or against this. One argument was they may want to go home by themselves and then make notes of things they didn't get a chance to write down during the day about a witness or something like that. That was one of the arguments I heard, not -- I'm not endorsing that, but that's one of the arguments.

CHAIRMAN BABCOCK: Yeah, Justice Gray.

HONORABLE TOM GRAY: Following up on what Judge Christopher said, I think it's an issue of the control and the perception, who's in control, what happens if they get lost. If the government is in control of the notes overnight, on weekends, whatever, and suddenly the juror can't get them back then it's a government action and the juror is skeptical. Also, if the government is going to be in control of them at any period of time, the juror is going to take an entirely different type of note,

I believe, for fear of review by someone else.

I mean, like Judge Christopher said, there may be all kind of personal comments, and then that comment to me raises the question are we going to instruct them about what is appropriate note-taking? We all assume that it's going to be about the evidence and numbers and times and difficult concepts. Are we going to tell them that you can't write down your opinion of the witness' credibility or actions that are taken that cause the -- or cause the juror to question the credibility of the witness? So if you want sort of no holds barred note-taking then the juror needs to be in control of those notes the whole time.

CHAIRMAN BABCOCK: Okay. Yeah, Justice Sullivan.

HONORABLE KENT SULLIVAN: I just want to note that I'm always afraid that we're fighting the last war. It seems to me that an underlying assumption here is that note-taking is going to take the form of paper note-taking, and you already have generations of kids, if I can use that term, who wouldn't think about taking notes on paper, and I think that underlies our entire discussion here. I'm worried that we're not effectively grappling with technology on a lot of different levels. Paper note-taking will go the way of the dinosaur very quickly,

quite frankly, and has already gone that way by way of some of the younger generations. I would go back to Steve Susman's comment in terms of the impact on juries and jury deliberations. I'm very concerned about the internet and trying to communicate effectively with jurors as to why they should no engage with --

HONORABLE STEPHEN YELENOSKY: I think Steve Susman said that his position was it's going to happen, and I was arguing against that, that we have to --

HONORABLE KENT SULLIVAN: And I agree with Judge Yelenosky in this sense, is that if we look more proactively and more dynamically at the issue of instructing jurors, we could -- and I think this is what Judge Yelenosky was saying, we can communicate to jurors why it's a bad idea and why at least as a group they would -- they would probably effectively exclude that sort of information. One reason, of course, is that the internet is not necessarily reliable. I mean, there is a lot of incorrect information on the internet, and I think as a group you can communicate reasons why you shouldn't do that, and it would probably be effective.

You could field test, probably objectively test, whether or not it's effective, and I think that this is the sort of issue that we need to try and get in front of, but we are still pretty far behind. Debating paper

note-taking, it's not that it's completely irrelevant, but, boy, it misses the mark in terms of what the global far more important issue is.

CHAIRMAN BABCOCK: Okay. Justice -- Lamont, hang on for a second. Are you -- with respect to what we're talking about now, are you saying that we should allow people to take their laptops into court and take notes on their laptops? Is that the point about the obsolescence of paper and pen?

HONORABLE KENT SULLIVAN: I think, quite frankly, in most courtrooms around the state you probably don't have an effective way to keep someone from keeping something like this out because laptops, quite frankly, are going by the way of the dinosaur.

CHAIRMAN BABCOCK: Right.

HONORABLE KENT SULLIVAN: Laptops for the younger generation aren't useful. They're not as --

HONORABLE STEPHEN YELENOSKY: I thought I was hip.

HONORABLE KENT SULLIVAN: They're not as vocal. Technological convergence means you're going to be able to hold all of that in the palm of your hand, and I'm holding up an iPhone, and I am certainly not a high-tech person.

CHAIRMAN BABCOCK: Is there anything about

this rule that would not permit somebody to take notes on their iPod or --

HONORABLE STEPHEN YELENOSKY: It says you can't.

CHAIRMAN BABCOCK: You've got to turn your electronic devices off.

HONORABLE NATHAN HECHT: But in a nod to possibilities, we did say at paragraph 10 on page four "using the materials the court has provided," I mean, at least acknowledging there is a far off chance that the court might provide an electronic device on which to take notes. Although, then the next sentence says, "Don't use any personal device that you have."

HONORABLE KENT SULLIVAN: And I guess what I was trying to say is I agree with Steve Susman's comment that the temptation is overwhelming to do things that are normal and routine in your everyday life, and if I pick up my iPhone or my PDA on the way out of the courthouse, even if the courtroom procedure is such that it's been taken away from me, it will be irresistible for me not to make notes or do something with it, and I guess what I'm saying is I think we ought to be more proactive about grappling with that and with internet usage and the like.

CHAIRMAN BABCOCK: Are you saying that this sentence ought to be taken out of this, the "do not use

any personal electronic devices to take notes"? Should that be deleted from this and the contrary be said?

HONORABLE KENT SULLIVAN: No. In all candor -- and I did not mean to divert us, but I'm a plain language advocate in that I would explain to people the reasons behind your rules so that people of, you know, common sense and ordinary experience will then understand, and there is a greater likelihood that people will comply. The best example of that would be this internet usage issue. I think simply saying "Don't use the internet" and saying no more will not be an effective communication to the average person. It probably isn't now. It certainly is unlikely to be very soon.

HONORABLE STEPHEN YELENOSKY: Well, that's why I say a lot more.

HONORABLE KENT SULLIVAN: Exactly.

CHAIRMAN BABCOCK: Lamont.

MR. JEFFERSON: If the question on the floor is should jurors be allowed to take notes home, I think the answer to that ought to be no for some of the reasons that have already been expressed, but I think the main thing is we want what happens in the courtroom to decide the case, and we try to control that by what the jurors hear and what evidence they get and even when they deliberate, and so we don't want to encourage jurors to do

anything outside of the courtroom to investigate or really even to think about the case.

We want all of that to happen in the context of the trial, of the courtroom, so it seems to me that we -- for that reason we don't want jurors to take notes with them or -- which simply encourages them to work on the case outside of the courtroom; and the other problem that I think should not be underestimated is the problem of control, control of the notes; and if the rule says that jurors can take notes home and if everybody knows that jurors are taking notes home, there is going to be tremendous pressure on a lot of interested parties to get ahold of the notes and to maybe report on the notes; and so I just think that it's vitally important. I absolutely agree that jurors ought to be able to take notes, but I think it's vitally important that once we do that that we've got to maintain control of that process.

CHAIRMAN BABCOCK: Eduardo.

MR. RODRIGUEZ: I agree with Lamont. I think that, you know, there's some things we can't control. We can't control people going to their house at the end of the day and getting on the computer and doing whatever they want. We can tell them not to, but it gives them a lot more opportunity if they've got their notes at home to be able to do that, so I agree that we ought to

allow them to take notes. I don't think we ought to let them take them home at night. At the end of the trial, I think they ought to be turned back to the bailiff and destroyed.

The rules that are set out here provide that you can't use the juror notes in any way to try and get a new trial or in any appellate issue, so all that having notes at home do is provide another avenue for the attorneys to try and go -- you have a 10-2 verdict, you go to the person, if you lost, that's got some notes and find something that maybe will just go into an area that we're not supposed to go into anyway, and so I strongly believe in allowing notes. I don't think it's beneficial for them to take them home at night, and at the end of the trial I think they ought to stay with the court, and the court ought to either seal them or destroy them.

With respect to the technology and where we're going there, to allow them to take notes on iPhones I think is a very dangerous thing because you really don't know if they're taking notes on their iPhones or they're doing other stuff. If they -- I mean, there's no way to monitor that in the courtroom, and it's a big temptation. I mean, you look around here today, and we're all supposed to be paying attention, but at some time or another all of us are going to be looking at our Blackberries or iPhones

and text messaging something back to the office, and so to expect jurors not to do that during the trial if they have that vehicle available to them I think is asking too much.

CHAIRMAN BABCOCK: Roland, then Buddy, then Roger. And then Judge Christopher.

MR. GARCIA: I agree with what's been said, and there's also the risk, Eduardo, of the just plain old inadvertent disclosure. They can take them home and inadvertently something gets disclosed or it gets lost and then found again by yet a third party or an interested party or a neighbor or what have you, media or what have you. It just seems like there's all sorts of unnecessary risks by taking them outside the courtroom control.

CHAIRMAN BABCOCK: Buddy.

MR. LOW: Back in the old day, which I can speak to, one of the first things a losing lawyer did was go in the jury room and look in the wastebasket and try to get -- that was one, notes and things. You remember, Mike, they used to do that and just give them more room.

Another thing is that we're overlooking -- if we get too engrossed in notes or the iPod or whatever you call it -- I don't have one -- what about visual aids? You have visual aids. You have something real important. That's really discouraging when you've got a super document they ought to be paying attention to, and you

flash it up there, and they are doing that. That's -- and it would be more prone to do that if you allowed electronic equipment in.

CHAIRMAN BABCOCK: Roger Hughes, then Judge Christopher.

MR. HUGHES: Yes, I agree with Eddie and Lamont, and what I fear is -- and I've heard the phrase before -- satellite litigation in the middle of trial. By nature trial lawyers kind of are suspicious people. What do you think a trial lawyer is going to do if he thinks or she thinks that the other side has hacked into the iPhone of a juror who has taken notes? What do you think is going to happen if a trial lawyer thinks, you know, "I don't think those jurors notes just happened to disappear at home. I think they got -- I think it was somebody got in and took them and I want to know the whole circumstance of this." So what are we going to do? Shut down the trial and have discovery against jurors about their -- what they're doing with their iPhones or what they're doing with their notes when they take them home, what kind of security they're keeping?

All I see -- and in high stakes litigation those could be some very difficult choices for a trial lawyer to have to make, none of which I think come up if the government, so to speak, takes care of the notes when

they aren't -- when the jurors aren't in the courtroom.

CHAIRMAN BABCOCK: Judge Christopher.

HONORABLE TRACY CHRISTOPHER: I've let jurors take notes for --

CHAIRMAN BABCOCK: You look beleaguered.

HONORABLE TRACY CHRISTOPHER: I've let jurors take notes for 14 years. I've never ever, ever had any satellite litigation about notes. I've never had anyone worry about what happens to the notes when they take them home. I never have had anyone worry about any aspect of the notes, and I have tried big cases with big law firms where a lot of money was at stake, and nobody cared or thought anything of it.

We give the adults, the jurors in our jury box, instructions. We want them to follow our instructions. They might not follow our instructions, but to worry about whether they're following our instructions and the notes is silly. What you're doing now is you're sort of -- the person with the best memory can go home and Google the most effectively versus the person with the worst memory that has to write notes to take them home to Google effectively. That's what you're telling me you're worried about, and you're worried that they might go home and talk about the case. Well, they can do that with or without notes. They can go home and write a blog about

the case with or without notes. They can Twitter about the case with or without notes. You know, you're just --

HONORABLE STEPHEN YELENOSKY: You better explain that to Buddy.

HONORABLE TOM GRAY: Explain it to me. I don't know what Twitter is.

HONORABLE TRACY CHRISTOPHER: I don't know. It's some new thing where at any minute of the day you tell people what you're doing. That's clearly, but I --

CHAIRMAN BABCOCK: Her rant's not done yet. Hang on.

HONORABLE TRACY CHRISTOPHER: I don't want to be responsible. Me, the court, the bailiff, we do not want to be responsible for people's notes. I totally agree with Justice Gray that that causes a whole bunch of problems.

CHAIRMAN BABCOCK: Justice Sullivan.

HONORABLE KENT SULLIVAN: First of all, I agree with Judge Christopher, and I just wanted to try and make clear my earlier comment of saying that what I was trying to suggest is that in this sort of area when you're worried about questions of influencing juror deliberations, the point I was trying to make is something like technology is going to be a far more important issue than this question of, well, do they take them back in the

jury room or not or how can they use their handwritten notes, this way, take them home, et cetera. Technology has swamped that. If you'll look at it in terms of what is going to have a bigger potential impact as outside influence, and we don't in these proposed instructions even mention, I don't think, the word "internet."

HONORABLE NATHAN HECHT: Yeah, we do.

CHAIRMAN BABCOCK: It's there.

HONORABLE KENT SULLIVAN: Oh, do we?

HONORABLE STEPHEN YELENOSKY: We do, but not enough.

HONORABLE TRACY CHRISTOPHER: Not enough.

HONORABLE KENT SULLIVAN: But there's no forthright comprehensive instruction to people about technology is likely a part of your everyday life. You use it in various ways. Here is how we want you to deal with it, and I think it's really important. That's a modern approach as opposed to simply this bright line, you know, that tells them to ignore what they do and experience every day and will more.

CHAIRMAN BABCOCK: Judge Peeples, will you yield to Judge Christopher for a small point?

HONORABLE DAVID PEEPLES: Sure.

HONORABLE TRACY CHRISTOPHER: Just two more minutes, just two more minutes. They're in trial, they're

not allowed to use their PDA, they're not allowed to have their Blackberry there, so they're taking paper notes. I give them a 15-minute break, they all run downstairs, smoke their cigarette, get on their Blackberry, and they can write down any notes they want to at that point.

HONORABLE KENT SULLIVAN: Right. Exactly.

HONORABLE TRACY CHRISTOPHER: And take them home and have them and, you know, send them out and cause satellite litigation. It just doesn't happen. It doesn't happen. It's not to worry about. Sorry.

CHAIRMAN BABCOCK: Judge Peeples, then Judge Evans.

HONORABLE DAVID PEEPLES: Judge Yelenosky made a very helpful suggestion that I hope the Court will urge. On page four toward the top, it does say in (d), or actually (e), don't go to the internet. I think that ought to be bolstered and made more hefty. He said he tells his jurors that would be a trial on secret evidence, and I think this could be bolstered and made stronger by using terms like that that get their attention, because the idea of a secret trial is kind of scary, and a lot of people I think would identify with that.

HONORABLE STEPHEN YELENOSKY: They tend to nod when you say that. They have enough knowledge of history, I think --

HONORABLE DAVID PEEPLES: Yeah, some.

HONORABLE STEPHEN YELENOSKY: -- and American values to find that important.

HONORABLE DAVID PEEPLES: Something like that I would think ought to be on page four.

CHAIRMAN BABCOCK: Judge Evans, and then Bill.

HONORABLE DAVID EVANS: My experience has been the same as Judge Christopher, except recently in Tarrant County we have a law firm whose appellate section has started to file motions to seal and have access to the juror notes, and so I think we need to address that status, because I think it will continue on. We've allowed jurors to take notes, take them back to the back, and now we're receiving from one firm requests to have access to those notes following the verdict, so --

CHAIRMAN BABCOCK: And, Judge, how does that request come? Is it a motion?

HONORABLE DAVID EVANS: It comes in the form of a motion, and the civil judges in Tarrant County take the position -- have taken the position that they're not available, that they're personal items of the jurors.

Now, what we do is we offer to destroy them for them when they leave, but we don't allow them to take them home at night, and I'm not sure why we've evolved --

why we've gone with that process of trying to work that out, but we are receiving motions, so I just want -- it's not a whole satellite. I think it's just a small sputnik right now, but it's out there.

HONORABLE NATHAN HECHT: Let me just ask Judge Evans, so then when they leave at night they leave them with the bailiff?

HONORABLE DAVID EVANS: In my courtroom we have a place for them to hang on the front of their chair, and the bailiff makes sure that the courtroom is secure at night and no one gets any access to it. We've also put them inside the jury room, and we don't allow -- and we also have a safe. The reporters all have exhibit locked areas in our courthouse, and so we have taken them in longer trials over the weekend into those areas so that they're secured overnight.

CHAIRMAN BABCOCK: What about at the end of the trial, Judge? Do you keep them?

HONORABLE DAVID EVANS: I tell my jurors that they may take them home if they wish or they may leave them with the bailiff, and if they are left with the bailiff they will be destroyed, and I just leave them with that option. I don't think you could have a mandatory destruction policy and take notes at home. I just concur with what I heard back here is that if they're going to

take them home they'll make Xerox copies. So if the paramount policy issue from the Court is destruction of the notes at the conclusion, then they can't leave the courthouse.

CHAIRMAN BABCOCK: Yeah.

HONORABLE DAVID EVANS: And that just trumps everything else in my opinion, so -- and I can live with either one.

CHAIRMAN BABCOCK: Yeah, Bill.

PROFESSOR DORSANEO: Well, I just wanted to point out that at the last meeting of the appellate judges conference of the United States in Phoenix in November, one of the topics that was most hotly debated by the appellate judges who attended -- and there were hundreds from across the United States -- is whether the appellate judges should be allowed to use the internet or should they be restricted to -- should they be restricted to the record on appeal, and I'm of the same view as probably everyone here, that, no, you know, you shouldn't be allowed to Google things up if it wasn't part of the trial record, but that is not a widespread view among that fairly large group. So maybe what we think is subject to being modified by what everyone else thinks subsequently.

CHAIRMAN BABCOCK: Buddy.

MR. LOW: I think Lamont really hit what

we're doing. Everybody agrees that we want the case decided on what goes on in the courtroom. Now, does note-taking help that process? What helps that process and what hurts it, and that's where we have the conflict, because we all want that, and note-taking certainly does help that, help people to remember and so forth, but then you can go beyond it where you invite them to go outside the record, and we don't want any case decided on facts outside the record.

CHAIRMAN BABCOCK: Okay. Yeah, Frank.

MR. GILSTRAP: I think we're all in agreement that while we may not be effective at doing this, what we're trying to do is we're trying to prevent the jurors from getting information someplace other than the courthouse. That was the old prohibition, don't go out to the scene of the car wreck and look. Well, in Rule 6 or in part 6 on page four, I'm not sure that we've ever done that, and I'm not sure the change really advances the ball. The idea behind it was that in the preamble we're saying don't investigate the case, and in furtherance of that, don't do these things. I never thought we ever made a very good connection between the rationale and the prohibitions, but in this one, I think it even gets further away.

I think if you want to try to do something

you need to go in there and say, "Look, we want you to get stuff only in the courtroom, and this is why we want you to get stuff only in the courtroom, and so for this reason we don't want you to do this." Now, it's not going to work, but the idea is to educate the juror and spell it out, and I'm not sure we're spelling it out very well.

CHAIRMAN BABCOCK: Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: Well, again, you said it's not going to work. One of the things we tell them that is very natural for people to do and we count on them not doing it is going home and talking to their spouse or significant other about the case, and if we can count as we have, I guess, for centuries on people not doing that largely, why can we not count on an instruction on this?

MR. GILSTRAP: Maybe you're right. I'm just not saying what about our ability to prevent it, but at least we ought to try, and the way we're supposed to try is to tell them why.

HONORABLE STEPHEN YELENOSKY: No, I think everybody agrees with that. But I don't understand the distinction between other prohibitions we give them that we rely upon and we don't have satellite litigation on. Usually we don't have jurors questioned about whether they spoke with their spouse or not, but anyway, I don't see

how it's more natural to Google than it is to go home and tell your wife or your husband or your significant other what happened during the day.

CHAIRMAN BABCOCK: Okay. Justice Gray.

HONORABLE TOM GRAY: You know, back when Buddy first started practicing law --

CHAIRMAN BABCOCK: It's always an easy laugh.

MR. LOW: How do you know that?

HONORABLE TOM GRAY: I read it in the history books, Buddy. We had absolute control over their access to the internet or their newspaper contact or people trying to talk to them. We called it juror sequestration. If we have a trial that has that level of need for confidentiality and avoidance of public disclosure or outside influence coming in during the -- we've got a way to deal with it, but I agree with the comments that have been made that, you know, I haven't seen this to be a problem in trials conducted now.

I mean, we've gotten away from that whole concept of sequestering juries. I mean, just literally in the back of our court's office is the old bunkhouse where there's a toilet in one end and a shower in the other and a place for a bunch of bunkbeds. I mean, we can go back to that in any individual case in which it's important,

but I just don't see that that's where we are in this problem.

CHAIRMAN BABCOCK: Okay. Justice Hecht.

HONORABLE NATHAN HECHT: We may be getting close to the -- to having exhausted the subject, but let me ask one other question about Senate Bill 445, which makes rule -- I mean, note-taking mandatory. It provides in Section 25.003(a), "The rule promulgated by the Supreme Court must allow jurors in a civil trial to take notes regarding the evidence during the trial," and I don't know if the -- I don't recall the committee commenting on whether it should be within the trial judge's discretion because of whatever reason.

HONORABLE JANE BLAND: We did.

HONORABLE TRACY CHRISTOPHER: We did. 29 to 4 to make it mandatory. 29 to 4 to make it mandatory.

HONORABLE STEPHEN YELENOSKY: In favor of mandatory?

HONORABLE TRACY CHRISTOPHER: 29 in favor of mandatory, informing the jurors that they had the right to take notes.

CHAIRMAN BABCOCK: Okay. Judge Evans, you had your hand up a second ago. Did you want to add anything?

HONORABLE DAVID EVANS: I just said that

when I rethought it, when I first confronted this in 2003 I decided that the notes were the personal property of the jurors, that they are free to discuss the deliberations or not to discuss their deliberations. We give them that instruction at the conclusion of the trial, and so they were free to share their notes or not to share their notes with counsel. I would have to worry about the admissibility of it later on.

I don't agree with Justice Gray where he was with what they are, but I am concerned about whether the notes are court records under the Supreme Court rules. I know they're not evidence based on this rule, but calling them for personal use, I'd like the Court to at least define whether they are court records that I have to maintain under the Rules of Administration or not or destroy under the Rules of Administration and -- or are they the personal property of the jurors subject to restrictions as we restrain them throughout the trial about not discussing. We can place restraints on them about not taking them home, if that's possible. I just think that there's a conflict, that that needs to be resolved by the Court as to whether you want them destroyed at the end or not.

CHAIRMAN BABCOCK: Justice Hecht.

HONORABLE NATHAN HECHT: Which reminds me of

one other question, and I don't think we've discussed this, and that is do we fully treat the subject in the standing order that accompanies Rule 226a, or should there be a separate rule that says this is how jurors take notes and set it out? I mean, we've kind of done it through the back door here, and it seems to be working fairly thoroughly, but, query, do we need a separate rule? And I think the question even becomes more difficult when we talk about questions.

CHAIRMAN BABCOCK: Bill.

PROFESSOR DORSANEO: I've always thought that the 226a approach is a plaud approach, that if it's good enough to be said in the rule book, it ought to be said in a procedural rule.

HONORABLE NATHAN HECHT: It started in the Sixties. 1967, I think, and I suppose -- we haven't been able to track down why it's in an order, but I suppose it's there because it's easier to change.

PROFESSOR DORSANEO: Well, it hasn't been very easy to change.

HONORABLE NATHAN HECHT: Well, we haven't changed it much, but we haven't felt like we had the need to change it, but I guess, you know, there's a statutory process for rule-making and not for orders, so for, you know, keeping exhibits and stuff there's orders rather

than --

PROFESSOR DORSANEO: But you yourself said that this is sensitive enough that we're not going to follow that --

HONORABLE NATHAN HECHT: We're going to send it out.

CHAIRMAN BABCOCK: Very unusual. Not the sending it out, but no hands up right now. Judge Christopher.

HONORABLE TRACY CHRISTOPHER: Well, do we want to look at TRE 606 in terms of adding "in a juror's notes" in connection with this? Because I mean --

CHAIRMAN BABCOCK: Yeah.

HONORABLE TRACY CHRISTOPHER: -- I do think we all agree that if we're going to let the jurors, you know, take notes home and we're going to make it mandatory that everybody gets this instruction, that we should add something into 606(b) about it, so my proposed revisions, I just added "in a juror's notes" in two different spots. Now, rather -- whether we want to do any more wholesale tinkering with the rule or not, but that would just be a quick fix.

CHAIRMAN BABCOCK: Everybody got -- everybody have that? There's just a small change, but it would add a juror's notes as one of those things that

couldn't be inquired about post-verdict.

HONORABLE EVA GUZMAN: Or you might want to add "or any electronic recordings of" -- to the extent we are going to look prospectively, there may be a situation where they do record things on an iPod or something.

HONORABLE NATHAN HECHT: Yeah.

CHAIRMAN BABCOCK: Okay. Any other comments? Yeah, Bill.

PROFESSOR DORSANEO: I guess you're presuming that the jurors' notes are not an outside influence within the last sentence.

HONORABLE TRACY CHRISTOPHER: Well, my -- the -- I left it just like it is here because in my opinion it's a little convoluted, but if a juror's notes said, you know, "I was bribed to," you know, "render verdict in favor of the defendant," then perhaps that juror note ought to be admissible evidence. So --

CHAIRMAN BABCOCK: Eduardo.

MR. RODRIGUEZ: Yeah, what --

HONORABLE TRACY CHRISTOPHER: That's why I left it just the way it was.

MR. RODRIGUEZ: I'm trying to figure out where we are. Has the decision been made that we recommend that jurors be able to take their notes home? And if that's so, what if a juror's notes say something

about, you know, "Googled," you know, "A, B, C"?

HONORABLE TRACY CHRISTOPHER: Well, then we go back to that question, is that an outside influence --

MR. RODRIGUEZ: Right.

HONORABLE TRACY CHRISTOPHER: -- which is not a hundred percent clear under case law as to whether it is or is not, whether it actually requires third person acting on the juror versus the juror looking at things themselves. I don't think that that's definitive.

CHAIRMAN BABCOCK: Eduardo, I think where we are is that in our last meeting the recommendation was to let jurors take their notes home, but the Court disagreed and rewrote the -- rewrote the order to say, no, they're going to leave them with the bailiff, and the bailiff is going to destroy them. I think probably still a majority of the committee would say let them take them home, but that's up in the air, as Justice Hecht said, because his Court is not of exactly one mind about the issue, and they may after hearing this discussion, you know, change their mind, but assume for now that the bailiff is going to get it, and they're going to be destroyed. That might make this revision, you know, unnecessary, but -- Alex.

PROFESSOR ALBRIGHT: I don't think it makes it unnecessary at all, because what if in the middle of trial somebody decides they want to subpoena the notes and

they're there, or what if the bailiff forgets to destroy them or bailiff destroys them by throwing them in the trash can and somebody gets them out. There are many ways that things are supposed to be destroyed and they're not and then they get out.

CHAIRMAN BABCOCK: Yeah, there could be a dumpster diver who gets them out.

MR. RODRIGUEZ: Well, from the perspective of this new member, I would tell the Court that I agree they shouldn't take them home.

CHAIRMAN BABCOCK: Should not take them home?

MR. RODRIGUEZ: Yes.

CHAIRMAN BABCOCK: Okay. Yeah, R. H.

MR. WALLACE: Yes, and I agree with that. I mean, I have listened and since I have not heard the previous debates, but I think note-taking ought to be allowed. I think they ought to take it to the jury room. I don't think they ought to be able to take them home. I think they ought to be taken up and destroyed at the end of the trial. Now, how we get there, I'm not sure, but I just haven't heard any compelling reason why they ought to be able to take them home. There was a comment that they might -- you know, study the notes at night and come up with some questions, if we're going to allow jurors to

submit questions.

I realize that's another topic, but it kind of bleeds over because I just assumed because of the way I've seen it in the past, if they have questions, they submit them right then when that finish -- when that witness is finished questioning, not after they go home at night and look at their notes and come up with a list of questions, because my fear there would be a very high probability that there is going to be a Perry Mason wannabe on the jury who comes in every morning with a big list of questions to be asked, and the judge and the lawyers have a hard time controlling that trial, so I don't see that as a good reason to allow them to take them home at night.

CHAIRMAN BABCOCK: Justice Hecht.

HONORABLE NATHAN HECHT: Another question for Judge Christopher. Do we need to make a corresponding change in Rule of Civil Procedure 327(b)?

PROFESSOR DORSANEO: Yes.

HONORABLE NATHAN HECHT: Yes?

PROFESSOR DORSANEO: Yes.

HONORABLE TRACY CHRISTOPHER: Yes. I think I just didn't pull that one up, too, because there --

CHAIRMAN BABCOCK: Right.

HONORABLE TRACY CHRISTOPHER: Although that

would be a little bit harder to change, but --

HONORABLE NATHAN HECHT: Right.

HONORABLE TRACY CHRISTOPHER: -- probably should add something in there.

HONORABLE NATHAN HECHT: They're frequently cited together.

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

MR. ORSINGER: You know, I just wanted to mention my litigation perspective on this issue of jurors taking notes home. In the family law trials that are tried to juries on the property side and on the parent-child side, we tend to mark a lot of exhibits that we give copies to the jury because our issues could be real complicated. In a property case you might ask the jury 50 or 75 different cases. It may be one general question, but in the list a lot of subparts, and it's kind of ineffective to try a case like that unless -- unless the jury has exhibits.

So typically in a property case each side will have a sworn inventory and appraisement, and it will list all their assets, all their bank accounts, all their credit cards. In a parent-child suit you're going to have psychological evaluations where they're going to have MMPIs, Rorschachs, all kinds of stories about people

that were sexually abused by their parents and all that kind of stuff. Those are generally handed out to the jury, been my experience. Judge Guzman was a family law judge, she might have have a different perspective than mine.

Anyway, my experience is at the end of the case they generally will take those exhibits up because they don't want that kind of private information floating around, and I know that the original exhibits are in the court's record, and the court's record are in the public, and so if you wanted to make the effort you could get that information, but we have that concept of practical obscurity, I think is the one we use, that if it's real hard to get the information you can kind of control it, but if it's real easy to get the information it's easy to disseminate.

Well, in a family law case you're going to find the jurors are going to take notes on these exhibits, and so your discussion about whether they take their notes home is also a discussion about whether they're going to take the exhibits home. And if we limit the powers, the court's power to take their notes away at the end of the trial, then we are also limiting the court's power to take the exhibits away from them at the end of the trial, and I just want to be sure that the public policy that we're

considering recognizes that notes may be taken on copies of exhibits that we might otherwise think, oh, sure, the court has the power to collect all of those social studies or psych evals and not let them take them home or not let them have them at the end of the trial and that they have notes on them and we don't prohibit -- if we limit the court's power to take notes away then we're limiting the court's power to control the exhibits.

CHAIRMAN BABCOCK: Justice Gray, why do you think that the notes are court records?

HONORABLE TOM GRAY: Not court records. State records.

CHAIRMAN BABCOCK: State records.

HONORABLE TOM GRAY: Yeah, Texas Government Code, like 442 something, I can get it for you later. I mean, a court record is probably always a state record, but obviously all state records are not court records, and if -- I mean, we deal with that with our -- one of the problems in TAMES, as a matter of fact, is the fact that things become or are state records, and depending on their media form, whether it's paper or electronic, controls how you have to keep them and archive them and deal with them, and so that's where we got off into it, in doing our document retention policy at the court, and it's a huge problem, and I don't remember anything of this nature that

has less than like a -- you know, a six-year lifetime.

CHAIRMAN BABCOCK: Well, do you think it's -- I understand you say state records are broader than court records, but is it a court record?

HONORABLE TOM GRAY: My understanding of the way Rule 12 functions and the definition of court record, it would not be because most of the -- well, that rule is worded oddly with regard to judicial records versus court records, and I don't have it in front of me now, and I don't know. I would have to go back and study it.

MS. PETERSON: There's a definition of court records in Rule 76a in the Rules of Civil Procedure.

HONORABLE STEPHEN YELENOSKY: But it's not a court record under 76a.

CHAIRMAN BABCOCK: Doesn't sound like a court record under 76a.

HONORABLE STEPHEN YELENOSKY: But to the extent it is under 12 and the Court wants to do this, the Court can change Rule 12. The only issue would be if it's some kind of governmental record under a statute.

CHAIRMAN BABCOCK: Well, let's go to Rule 12. You're not talking about the Rules of Civil Procedure.

HONORABLE STEPHEN YELENOSKY: No.

HONORABLE TRACY CHRISTOPHER: RJA.

CHAIRMAN BABCOCK: Yeah, the judicial administration rule, right?

HONORABLE TOM GRAY: And those are -- Rule 12 controls judicial records, and this would not be a judicial record, because -- so I think we're good under Rule 12, and I haven't studied it under 76a for the court record.

HONORABLE TRACY CHRISTOPHER: I think it would fit into this definition. Judicial record means a record made or maintained by or for a court in its regular course of business. If my bailiffs are now maintaining the note, it's a judicial record under that, made by or for the court.

MS. PETERSON: But not pertaining to its adjudicative function.

HONORABLE TRACY CHRISTOPHER: Well, it's not my adjudicative function.

HONORABLE DAVID PEEPLES: Skip, Rule 12 says -- Rule 12.3 says, "This rule does not apply to records controlled by a Rule of Civil Procedure." So why couldn't -- of course, if it's in 226a that might not be a Rule of Civil Procedure, but the Court by rule could control this.

CHAIRMAN BABCOCK: Yeah, but the question is do we have to have another rule if we want to achieve this

result. That's the point. And what about state record? You say there's a statute. Would these notes be a state record, you think?

HONORABLE TOM GRAY: I think by the time you get to -- through the analysis, if you don't clearly say, "We're going to provide you pen and paper, but they're your notes and you can do anything you want to with them," you know, I admit we need some control over them during the course of the trial and tell them you can't show them to other people and discuss them during the trial, but they're yours after the trial, we don't care what you do with them, but people can come get them and may create a problem.

I think by the fact that you've given them the materials, they are at that point paid because of their jury fee, they are being done in connection with state business, otherwise known as dispute resolution through jury trials, and so I think they become as much a state record as anything -- the docket sheets or anything else that may happen during the course of the trial.

CHAIRMAN BABCOCK: Pete Schenkkan, who is hiding back there behind Judge Christopher. Watch your back, Judge.

MR. SCHENKKAN: Only because I came in so late. It seems to me that it's clearly not a judicial

record under Rule 12. It says in Rule 12(d), "A record of any nature created" -- ignore the rest -- "in connection with any matter that is or has been before a court is not a judicial record." That ought to be dispositive of judicial record. I don't put it beyond the realm of possibility that the Legislature has misspoken in some statute it has created somewhere that would mean that notwithstanding the fact that it's not a judicial record it's still some kind of a state record. That's possible. But I don't think we can ascertain that here, and if it is, I believe Senator Wentworth needs to fix it in Senate Bill 445.

CHAIRMAN BABCOCK: Okay. All right. Anything more on 606(b)? Yeah. Justice Gaultney.

HONORABLE DAVID GAULTNEY: Just by clarification, I assume that if there's something in the juror's notes the way this rule would read by adding that with respect to the outside influence, the juror can be asked about the notes and those would be admissible, so the last clause would not exclude that possibility.

HONORABLE TRACY CHRISTOPHER: That's what I think.

CHAIRMAN BABCOCK: Bill.

PROFESSOR DORSANEO: Well, this -- you're just talking about overlaps with our subsequent proposal

with respect to revisions of 327b, so we'll be back to these issues.

CHAIRMAN BABCOCK: Well, how is it going to work, Judge, if -- Judge Christopher, if the juror is asked about outside influence, and they say "yes" or they say "no," and the lawyer says, well -- no matter what they say, the lawyer says, "I want to look at the notes to see if there's any outside influence." How does that get resolved under this rule?

HONORABLE TRACY CHRISTOPHER: Well, I don't know. It depends on whether they were destroyed or not.

CHAIRMAN BABCOCK: Let's assume they weren't.

HONORABLE TRACY CHRISTOPHER: Assuming they weren't, if the -- you know, if the juror wants to give them the notes, they can. Just like now, a juror can choose to give an affidavit if they want. They can choose not to give an affidavit if they don't want to. I mean, we did discuss adding that in. You can choose to show your notes to the lawyers or you can choose not to. You can throw them away yourself, do whatever you want to with them; and if a juror got subpoenaed to show up at court in a motion for new trial and to bring their notes with them, then they'd bring their notes with them if they still had them.

CHAIRMAN BABCOCK: So they bring their notes with them. What if they say, "I choose not to share my notes with you"?

"Well, wait a minute, you've been subpoenaed. Judge Christopher, make them bring the notes and give them to me, I want to look at them."

HONORABLE TRACY CHRISTOPHER: I think if they've been subpoenaed they need to bring them, but --

MR. GILSTRAP: Chip, that's already covered in the rule. It has an exception. Anything about the juror may testify as to whether outside influence was improperly brought, and that trumps everything else in the rule, and same with 327b.

CHAIRMAN BABCOCK: Right.

MR. GILSTRAP: You know, if a juror stands up in the jury room and says, "Hey, I just got offered $5,000 to vote for the plaintiff," you know, that's said in the jury room, but it still can be inquired to, inquired into, because it involves outside influence, and notes aren't any different.

CHAIRMAN BABCOCK: Yeah. What -- suppose that you go interview the juror after the trial, and the juror says, "Well, you know, I know I wasn't supposed to get on the internet, but, frankly, I did, and I learned some things about the defendant that I just wasn't too

comfortable with," and "Well, did you take any notes on that?"

"No."

"Well, I want to see your notes."

"Well, I don't have them. The bailiff has them." Okay. Well, we're going to go to court, and now, Judge Christopher, you're in court, and the defense lawyer says, "I've got some outside influence here and the juror says that she didn't take any notes on this, but I want to see the notes. I want to see if they show up on the notes."

HONORABLE TRACY CHRISTOPHER: My crack bailiff will have already destroyed them, will have shredded them.

CHAIRMAN BABCOCK: And is that the right result?

HONORABLE STEPHEN YELENOSKY: Well, the next step is to go to the hard drive.

MR. LOW: Chip, one thing, when we're talking about looking at 327 about jury misconduct, we need to look at 606 of the Rules of Evidence. It also goes into what a juror must testify, so when you -- you need to relate --

PROFESSOR DORSANEO: That's what we're doing.

MR. LOW: Well, okay, but those aren't entire -- they are consistent, I think, but --

CHAIRMAN BABCOCK: Yeah. It's a quagmire. Ralph.

MR. DUGGINS: No, I don't want to comment.

CHAIRMAN BABCOCK: Okay, no comment. Back to you, Judge Christopher.

HONORABLE TRACY CHRISTOPHER: I'm ready to move on to juror questions.

CHAIRMAN BABCOCK: Okay. Let's take our morning break.

(Recess from 10:39 a.m. to 10:58 a.m.)

CHAIRMAN BABCOCK: All right. Judge Patterson, Justice Patterson, then Justice Gray.

HONORABLE JAN PATTERSON: I agree with the thought, with the Court's opinion to not take the notes home, and I like the draft. My only concern is that in that paragraph, the last paragraph of 6, and I think that kind of underscores that it's based upon the evidence in the court, but the second sentence, I wonder whether that is inadvertent that it doesn't say, "Your conclusion about this case must be based on the evidence in the courtroom, presented in the courtroom," not only -- instead of "what you see and hear."

CHAIRMAN BABCOCK: What page are you on?

HONORABLE JAN PATTERSON: Page four.

CHAIRMAN BABCOCK: Page four.

HONORABLE JAN PATTERSON: The last paragraph that the Court added on item 6. But I also think that the state record issue can be taken care of by definitions both in this rule and in the statute, so I don't see that as a problem.

CHAIRMAN BABCOCK: Okay. Thank you. Justice Gray.

HONORABLE TOM GRAY: The definition of state record, and you have to be careful about -- because it uses other words that are defined and courts get defined as agencies are included, is at 441.031 of the Government Code, and it actually created a -- it expanded the issue a little bit when I had my staff attorney read it to me. It's any record that is made or received by, and that would very easily capture the notes when they are received by the bailiff.

CHAIRMAN BABCOCK: Okay. All right. Any other comments on that issue? Justice Hecht.

HONORABLE NATHAN HECHT: On page seven of the Court revisions to the proposed instructions, the sentence toward the bottom, "It is also possible that you might be held in contempt or punished in some other way." The Court was unanimous in thinking that should be struck.

So --

CHAIRMAN BABCOCK: Okay. Anything else? Richard Orsinger.

MR. ORSINGER: Two things. Back on page four where we were talking about evidence presented in open court, I'm a little concerned about the use of the word "presented" rather than "admitted." It appears in (c), and it appears in the final sentence of paragraph 6. Because lots of times evidence is presented or the jury may think it's presented when it's not admitted, and the real test is whether it's admitted or not, particularly if they're instructed after they hear some testimony to ignore it, and I would like it if the word "admitted" was in there, although it may not really actually matter in practice.

CHAIRMAN BABCOCK: Yeah, Ralph.

MR. ORSINGER: On page seven --

CHAIRMAN BABCOCK: Sorry.

MR. ORSINGER: -- which Justice Hecht just commented about, "It is possible you may be held in contempt or punished." It may be offensive, but it also tends to enforce the seriousness of these instructions. It's not just like a lot of the other gobbledy-goop that they have heard so far and will hear during the trial, and I also wonder if it's fair to these jurors if we do have

the power to hold them in contempt and put them in jail for violating this that we don't tell them we have that power. It seems to me that if they are at risk of going to jail, it's fair to them to tell them they're at risk before we give them these rules and don't tell them what the punishment is for not -- for violating them.

CHAIRMAN BABCOCK: So if you were on the Court it wouldn't have been unanimous.

MR. ORSINGER: Well, I can understand that it's offensive to people. These people are members of the public that have been brought down, probably against their will, but they're coming to fulfill their civic duties; and to insult them by saying, "We might put you in jail even though we brought you down here against your will anyway," I can understand that; but on the other hand, if somebody violates this, if we're serious that we're going to put them in jail, I think we ought to tell them in advance they might go to jail, and they might observe them more carefully, and they might, therefore, stay out of jail. So that's my perspective.

CHAIRMAN BABCOCK: Thanks, Richard. Ralph.

MR. DUGGINS: I think the Court should consider dropping voir dire on page one, in the one, two, three, fourth where they added it and over on the next page at the end. I mean, a juror is not going to know

what those words mean, and if we're going to --

HONORABLE STEPHEN YELENOSKY: Couldn't hear you.

MR. DUGGINS: Let's use plain English if we're going to put something in there. There's a good example where somebody might go look that up.

HONORABLE STEPHEN YELENOSKY: That will keep lawyers from giving bad translations from the French, which they always do.

MR. ORSINGER: Only they call it Latin, even though it's French. They usually say, "This is a Latin phrase that means" and they give the wrong definition. It's French.

HONORABLE TRACY CHRISTOPHER: Well, we do define it for them. We say, "They will ask you some questions during jury selection, which we call voir dire," because the lawyers are going to use those words, so that's why we kept it in that way.

CHAIRMAN BABCOCK: Okay. Fair enough. What's next, Judge?

HONORABLE TRACY CHRISTOPHER: The next is the juror questions. The senate bill offered is to make juror questioning mandatory. The last time we discussed this we voted to make it discretionary, so what we drafted is a rule, 265.1, on the procedure if the judge decides --

does decide to allow juror questions. So it's a whole new rule with a lot of instructions. The actual format of how things are going to take place is pretty standard throughout the country, it seems like, in terms of the process, the jurors write down the questions anonymously, give them to the judge, the judge shows them to the lawyers, the lawyers have a right to object, and then the question is asked. That's pretty much a standard process with some slight variations throughout the country.

These instructions came from one of the state's pattern jury charge instructions. I can't remember which one.

MS. PETERSON: New Jersey.

HONORABLE TRACY CHRISTOPHER: Yeah, New Jersey, and then we had Professor Schiess from UT put them into --

CHAIRMAN BABCOCK: Texas.

HONORABLE TRACY CHRISTOPHER: -- more understandable plain English for us. So basically it's a whole new rule, subset (a), discretion of the court. "On its own initiative or on a party's written motion the trial court in its discretion may allow jurors to submit written questions to the witnesses." We had a fairly long discussion in the subcommittee about whether to give specific examples on when it might be useful or not

useful, but decided not to, just to leave it "trial judge in its discretion."

We did give the ability to the trial judge to do it on its own motion rather than waiting for a motion from the parties, which, you know, has the effect of almost making it mandatory if you've got a judge that's interested in the process and wants to start doing it. The judge can do it in any case they want to, basically. Do we want to just go spot by spot, or should I talk about the whole rule, or how do you want to do it?

CHAIRMAN BABCOCK: Why don't you talk a little bit about the whole rule and then let's go spot by spot?

HONORABLE TRACY CHRISTOPHER: Okay. So what we planned was if the judge has decided to allow juror questions, the trial court has to inform the parties before voir dire in case they wanted to talk to the jury about it, you know, for any reason, just to give them that opportunity to ask jurors about that process. "If juror questions will be allowed, the trial court must read the following instructions to the jury after the jury is seated, and may repeat any or all of these instructions to remind the jury of its role."

So these are fairly long instructions about being a neutral, keep an open mind, don't discuss the

evidence. It's pretty comprehensive instructions to it, and the reason why we put in there "may repeat any and all of these instructions," occasionally we think that jurors when they have had the opportunity to ask questions have sort of deviated from their rule as neutral fact-finders through their questions. So it's something to remind the juror you can repeat some of these instructions, and I think Steve just tried a case in front of Judge Mike Miller, and he used these instructions in a case, and he'll tell you about how it worked out because I think he was pretty happy with it all, and Judge Miller did say at one point he didn't ask a question and he reiterated to the jury why he wasn't asking a question using some of the language in these instructions.

You know, "I've made the decision, don't worry about it, don't think anything about the fact that I didn't ask the question. "

MR. SUSMAN: Yeah --

HONORABLE TRACY CHRISTOPHER: That's what those instructions were.

CHAIRMAN BABCOCK: Steve wants to break in about an anecdote about that trial.

MR. SUSMAN: No, I was just going to say it worked out great. It was the first time I have ever done a trial in state court where questions were asked by the

jurors, and --

CHAIRMAN BABCOCK: Glad you added that last phrase.

MR. SUSMAN: Huh?

CHAIRMAN BABCOCK: I'm glad you added the last phrase.

MR. SUSMAN: You know, and it was -- we sent out a questionnaire, our own questionnaire, to the jurors after the trial to see how they liked it, whether they found it distracting or helpful, and most of them have responded that they liked it, that they thought that it was important that their thoughts were appreciated. They appreciated that their thoughts were valued, and the way the judge did it is he handed each juror a piece of paper to write -- with each witness, and at the end of each witness, while the witness was still on the stand, the jurors passed all of their pieces of paper whether they had written a question or not to the bailiff, who handed them to the judge, and the judge would look through them.

Now, a couple of times there were no questions, but usually there were two or three jurors had questions for a witness. The judge would read them, call us up to the bench, show us the questions. We didn't have -- only one occasion was there a serious objection to a question because it was about seeking an expert opinion

from someone who had not been designated as an expert, and the judge wasn't going to ask that opinion question, so -- and then he would ask the questions and allow both lawyers to further follow up with questioning the witness about the question.

I thought it was terrific, and I think it's -- his instructions were very -- if these were the instructions he was using, they were very good and very clear. He was a new judge. He had never done it before, and I think Tracy gave him the forms to use, so it worked out very well, and we didn't have any problems, and there were things that were developed by the jurors that -- on their questions that were important that we did follow-up on.

CHAIRMAN BABCOCK: Who was your opposing counsel, Steve?

MR. SUSMAN: David Beck, and, you know, I think David liked it, too. I think you can check with David. He thought -- well, we've talked about it since. He thought it was a good thing, too.

MR. GILSTRAP: Did you destroy the questions when the trial was over?

MR. SUSMAN: I'm sure they were destroyed. No one was very much interested.

CHAIRMAN BABCOCK: But the questions are

probably in the record.

HONORABLE TRACY CHRISTOPHER: Yeah.

HONORABLE STEPHEN YELENOSKY: Yeah, they were read.

CHAIRMAN BABCOCK: Sorry, Judge Christopher.

HONORABLE TRACY CHRISTOPHER: No, that's fine. Basically the format, just as Steve said, is that we would have a juror question form, and it would be standardized, with the instructions again and a place for the juror to write the question on it, and then you would pass the forms out or have the forms available, depending upon, you know, what your jury box is like for everybody to do it. Then if you get a question from the jury, and I think, actually, we don't specifically say this. I noticed that we missed it, to wait until the end of the witness, because normally we wait until the end of the witness before we ask the jury if you have any questions, and now that I'm looking at this, I think we dropped that step out.

MS. PETERSON: It's in the instructions, "In this trial after the parties have asked their own questions of each witness."

HONORABLE TRACY CHRISTOPHER: Oh, there it is. Okay. Good. Just to make it even clearer, we might add a 3 point there. So what we had written down is you

get the written question from the jury, the trial court must allow the parties to read the question and make objections to the question on the record and outside the jury's hearing. There's a question about whether we want to remove the witness from the courtroom in connection with that. The trial court has to rule on the objections. In its discretion the trial court may reword the question or decide not to ask the question at all. If the trial court rewords the question, the trial court must read the reworded question and allow the parties to make a new objection to the reworded question on the record and then the trial court actually asks the witness the question, and the parties will be allowed to ask follow up questions, and then we have put down that the question needs to be part of the court record.

CHAIRMAN BABCOCK: Okay.

HONORABLE TRACY CHRISTOPHER: So that's sort of the format that we've come up with.

CHAIRMAN BABCOCK: Yeah, great. Justice Hecht.

HONORABLE NATHAN HECHT: And the Court has looked at this because we're anticipating being asked to respond to Senate Bill 445, so as Judge Christopher says, the provision regarding juror questions is -- seems to be mandatory. It says the Supreme Court must adopt rules,

and let's see, "The rules promulgated must require a court to permit jurors in a civil trial to submit to the court written questions." So we have the question of mandatory versus discretionary, and if there's to be discretion -- let me back up. If it's mandatory, then it seems that this approach like the approach on note-taking might work. In other words, we just put the instructions in the general instructions, and that prescribes the procedures and pretty much takes care of the issue. If it's -- if there's an element of discretion or if lawyers can object to its use in a particular case or because of particular circumstances, then that seems to need a standalone rule which spells all of that out.

However, Senate Bill 445 is not entirely clear, because the last provision of the section says that the court may for good cause prohibit or limit the submission of questions to witnesses, which makes it sound like you have to do it unless you don't want to do it, but you have to have good cause, for whatever that means. So I'm not exactly sure whether the statute's mandatory or not, and usually the Court does not look at drafts before the committee has looked at them, but as I say, we're trying to move this process along, so we've already looked at it and not in detail like we will, but the -- I might tell you that the Court is leaning against asking

questions and certainly against having it mandatory.

MR. HARDIN: What was the last part? I didn't hear it.

HONORABLE NATHAN HECHT: Having it mandatory. Having it mandatory.

CHAIRMAN BABCOCK: Not going to ask questions at all, but if we do, it would be discretionary.

HONORABLE NATHAN HECHT: But there are judges on the Court who like this like it is.

HONORABLE TOM GRAY: Judge, does that mean you would affirmatively prohibit it --

HONORABLE NATHAN HECHT: Yes.

HONORABLE TOM GRAY: -- when you say you're not going to allow it, or you're not going to require it or put it in the rules?

HONORABLE NATHAN HECHT: Well, we didn't get to that level of specificity.

CHAIRMAN BABCOCK: Bill, and R. H.

PROFESSOR DORSANEO: Both of these documents, and the bill even more so than proposed Rule 265.1, treat these questions as juror questions rather than questions proposed by jurors and asked by the judge as the judge's questions. I don't -- I'm more comfortable with them being the questions proposed by jurors with the judge deciding whether to ask them in that form or adjust

them or to fix them up or the like. Now, maybe I haven't thought about it that long, so I could change my mind, but something -- something seems more legitimate about the judge asking questions that have been proposed.

CHAIRMAN BABCOCK: Okay. R. H.

MR. WALLACE: On rule -- I'm sorry, the bill, 445, there is a couple of provisions that seem to be problematical to me. It says the -- one is on the first page, that juror questions must be submitted anonymously and before jury deliberations begin. That could be after final argument, and to me it ought to be -- it ties in on the next page where it says, "A witness may be recalled to the stand to answer a jury question." The common practice that I've seen is after both sides have finished with a witness, a witness is very often excused, and they're gone.

MR. HARDIN: Absolutely.

CHAIRMAN BABCOCK: Right.

MR. WALLACE: So I don't see that -- there needs to be some tweaking of when these questions have to be asked.

CHAIRMAN BABCOCK: Judge Yelenosky, then Steve, then --

HONORABLE STEPHEN YELENOSKY: Last time I think we talked about from the trial judge's perspective

whether it puts undue importance on questions to have the judge read them, and of course, we'll do whatever the Supreme Court and/or the Legislature requires us to do, but that's one consideration. What Professor Dorsaneo was suggesting maybe adds to that and emphasizes that it's a judge question when all it is is the judge has received the question, ruled on it as if it were asked by an attorney, and then reads it because otherwise you have to have somebody else read it, and you don't want one attorney or the other to read it. That's the first point.

Second point is the statute would not -- would require it to be read verbatim, and I would just make the point that if the Legislature wants juries to be able to ask questions, to require the judge to read them verbatim is going to increase exponentially those questions which are not allowed because there is a good objection to them. Jurors don't -- aren't expected to know how to ask questions such that they're unobjectionable, and so they could, for instance, predicate the question upon their view of the facts and then ask a question, and if that question has to be up or down verbatim, a lot of those are going to have a good objection to them. So I wonder if that's an unintended consequence of the proposed statutory change. Of course, our rule would allow the judge to reword. So two points.

CHAIRMAN BABCOCK: Steve, then Roger.

MR. SUSMAN: Well, I think the way it worked in our trial and the way I think it should work is that the juror questions would come from the judge to protect the anonymity of who is asking the question. So it's not jurors raising their hand and interrupting the proceeding, but insofar as I think it's a horrible idea for the Court or anyone to -- the Court or the legislators to outlaw the practice, because, I mean, you learn things about improving trials by experimenting, and there is going to be a lot of experimentation going on with this, and I think the end result will be they'll hear around the Harris County courthouse how it worked in our trial and the lawyers liked it and it was good, and other judges will begin doing it. We should not prohibit Texas judges from following practices that are being followed across the country, because it improves jurors' comprehension. That would be horrible.

I like the way the statute is worded, I mean the proposed legislation, in that the rule is that you -- the jurors are allowed to ask questions in this way, by that I mean questions through the judge, unless the judge for good cause -- and I can think a lot of reasons. Maybe that should not be the standard, unless the court decides this should not be a case in which questions are asked,

because I think unless you put -- unless you do it that way it will not become -- it will take a long time for it to become the norm. I suspect it will become the norm pretty soon, but I think it will become the norm faster if we have a rule that affirmatively argues for it, but I just -- I keep -- what is the thought process? I mean, I would be curious, what is the thought process of those that would say we should not have any jury questions? I mean, in no shape or form, no none ever?

HONORABLE NATHAN HECHT: Chip?

CHAIRMAN BABCOCK: Yeah, Justice Hecht.

HONORABLE NATHAN HECHT: We understand that that's the holding of the Court of Criminal Appeals in criminal cases, and that court has allowed note-taking for nearly two decades, but in Morris against State, apparently they hold it as per se harmful in a criminal case. Of course, there are obviously huge differences between a criminal case and a civil case in that regard, and there's all sorts of things that the jury might ask about, like "Why didn't the defendant tell us where he was that day?" That's what I would want to know if I were on the jury.

CHAIRMAN BABCOCK: "Have you ever been convicted of anything?"

HONORABLE NATHAN HECHT: Yeah. "Is this his

first time?" But the reason that it's on the table is -- that's the reason, is because as opposed to juror questions -- I mean, juror note-taking, which seems to have some level of approval up and down throughout the country, the views are mixed on this one.

CHAIRMAN BABCOCK: Okay. Roger, then Rusty, then Hugh Rice.

MR. HUGHES: I just wanted to echo the comment made earlier about in the proposed statute where it says "a witness may be recalled to the stand." When I read that a whole bunch of things went off in my brain. One of them was what if the witness originally testified by deposition on written questions or by video? Does that mean the jurors can then demand the witness be summoned live to answer their questions? There is also the practical problem of what happens when we have a out-of-town expert or an expert witness who may be held over for an extra day and certainly at the expense of one party or another. That's a practical issue that may be resolved by the trial judge, but I still think the statute or the rule needs to be limited to witnesses who testify live on the stand. I think if we get to the point where the jury can say, "I'm sorry, doctor so-and-so," or, you know, "I want him to come down here from Dallas and testify live to answer my questions," or "Well, gee, that

witness is local, it's just a police officer, let's just get him in here, and I want to see him answer the questions." I don't think that's what the statute intends, and I don't -- I think probably some tweaking needs to be necessary on that.

CHAIRMAN BABCOCK: Yeah, Rusty. Then Hugh Rice.

MR. HARDIN: You know, when I was a young prosecutor I wanted to restrict judges as much as possible because I thought I knew better what they should and shouldn't be able to do, and the longer I've been practicing the stronger I feel that as much discretion to a judge as is possible should be given. So I think it's a horrible idea for us to tell judges what they cannot do, because I think that trends, as Steve says, happen, and judges have some unique good ideas of their own, and they ought to run their court the way they think is fair. We've always got the vehicle of abuse of discretion if we think they're out of control, and so I would urgently argue against telling them they cannot do it.

Secondly, I had an experience recently, and I think I can come at it pretty objectively since I lost the case very badly and we had questions, and I -- so -- and I still very much endorse it, and the way Judge Baker did it, it seems to me that a way you could do it with the

rules that worked very well for us. Aren't we really talking about informing and educating the jurors? So if that's the case, what the questions would do, it sounds like similar to Steve's situation, the questions would come from the juror. It was always while that witness was still on the stand.

I think it's a horrible idea to let them come back in the next day with questions for somebody who is no longer there, and we've got all of those kind of logistical problems and things. I think it should be while the witness they've got a question about is on the stand, before they're excused, and then the questions then would come to the judge. The judge would have them Xeroxed to us. The lawyers look at them. If either of the lawyers had an objection to the question or the judge did, to say the judge had an objection to the question she could just say, "This one we all agree we're not submitting, we're not going to deal with, right?" We never had a disagreement actually, and then it was up to the lawyers as to whether they asked the questions.

This juror has written a note saying they want to know X, Y, Z. Well, if you don't want to educate them about that then you do that at your own peril, but either lawyer would have had the right to address it, and we didn't actually read the question to the jury, to the

witness. We simply looked at that, okay, this juror wants to know about X, and so you ask about it. You might ask it in an open-ended way that would address the subject or not.

The notes -- I didn't find out until the end of the trial, all the notes were from the same juror, but they were really some really good questions; and as I say, I walked away from it fully in favor of the process, as long as the lawyers have some control over what they address with witnesses; and I don't see why it has to be read by the judge outloud. The judge is just simply the gatekeeper. This is a subject that would be proper for you folks to go into with the jury if you want to. They want to know about it, or at least one person on the jury wants to know about it. And I found it worked very well that way, but I would strongly say it ought to be up to the judge as to how it's done.

CHAIRMAN BABCOCK: Hugh Rice.

MR. KELLY: Well, my point is somewhat related to Rusty's because recalling the witness I think ought to be in the discretion of the judge, and I would doubt that very many judges would allow a witness to be recalled, particularly an out-of-town witness, but you may get the question, see what the question is, the party -- one party -- the party that controls that witness out of

town and is going to pay his bills may want him to come back. He may be in favor of it. The other --

MR. HARDIN: He could have --

MR. KELLY: -- guy may just be terribly opposed.

MR. HARDIN: -- the discretion to --

MR. KELLY: You know, so if you just give it in the sound discretion of the judge then it would probably take care of it.

CHAIRMAN BABCOCK: Richard Munzinger, and then Judge Yelenosky.

MR. MUNZINGER: One of the subjects that we may end up discussing some day is why people don't want jury trials and they arbitrate cases. That concern has been voiced all over the Bar and the bench, so now we're going to adopt a rule which allows a juror to ask a question in writing. If you don't say to the judges that it must be done while the witness is available during the trial then you give me a strategic or tactical weapon. "Oh, wait a minute, Judge, that's a heck of a point, let's call Mr. Smith back."

"Yes, but he lives in San Francisco."

"Well, who cares, Judge, we're here for the truth."

"Well, I'm not going to make him come back

from San Francisco."

"Oh, wait a minute, Judge, this is an important point."

The rule ought to make it clear to the trial courts that the questions need to be asked while the person is available, lest you make litigation even more expensive than it is, more cumbersome than it is, more time-consuming than it is. We all worry about juror dead time. The judges in cases that I try are saying, "Hurry up, do this, do that, do this, do that. We don't want those jurors to think we're lazy." Well, now we've got to sit around and wait three days while Mr. Smith, who is in San Francisco, can't make it back on Monday. He's got another case to testify in. This is a -- to me it would be a very serious problem if you don't require that the question be submitted at the time the witness is available on the stand.

And the point over here about the electronic witness, the deposition witness, that's a very valid point. Are you going to write the rule where if the electronic witness is available because he lives in the jurisdiction he may be forced to be called for the jury question to be asked of him? Doesn't that raise the very same problems that I just articulated but in a different context? And I think it would be a -- the rule -- if

we're going to have to have the rule, and it appears that we're going to have a rule, we need to be very careful about what we do about having these questions asked while the witness is available on the stand.

And one last point, lawyers ought to be free to object to the question and do so outside of the presence of the jury, in my opinion. I think that you can be prejudiced if you are required to object to the question in the presence of the jury, and I also think that a valid subject worthy of discussion is whether or not if the court rules that the question should not be asked may either party then seek to reopen the testimony of the witness? I would think that could be done. I've never had it -- I've had juror questions, but we've not had this procedure go through, and we've not had a written rule that gave us guidance, but, you know, if I say to a judge in an ordinary case, "Oh, gosh, Judge, I need to bring up point X that I forgot to bring up," sometimes the judge may let me do it if I did forget, sometimes he might not, and this question may ring a bell in somebody's mind they wanted to exploit this area now that either they -- they may have seen but they didn't realize the jury thought it was keen and they need to get after it, and you may want to give some guidance as to whether you allow the parties to reopen that subject matter when the judge

doesn't ask the question. Obviously it's going to be reopened by the follow-up questions with the attorney if the question is asked.

CHAIRMAN BABCOCK: Judge Yelenosky. Then Judge Christopher, then Eduardo, and then Judge Patterson.

HONORABLE STEPHEN YELENOSKY: A number of people seem concerned about the recall part. I think that's a nonissue. All the problems you're citing are going to be readily apparent to any trial judge, and no trial judge unless required to wait is going to wait. As they do it now, those judges who read the questions send the jury out or call the counsel up, find out what the questions are immediately after each witness, and that's how it's going to be done. No judge is going to collect questions at the end of the trial and then call them back, and this doesn't require them to do that.

But I think a real issue is what Rusty points out, and again, I think it's a policy or a philosophical question that's going to be answered by the Legislature or the Court; but the way Rusty described his experience is how I do it, which is giving the lawyers information they may not know, questions that the jury has, and leaving the lawyers to decide whether to ask it. If the Legislature looks at this as a jury empowerment statute and jurors are getting frustrated, and therefore,

we need to require judges to take their questions and read their questions, then they're maybe not concerned about whether the lawyers want to ask the questions or not. But if what you're concerned about is just getting more information to both sides that they may use in their case then you would use the approach that Rusty Hardin has experienced and that I have used.

CHAIRMAN BABCOCK: Judge Christopher.

HONORABLE TRACY CHRISTOPHER: I just wanted to make it clear that our draft rule does vary significantly from the proposed legislation.

HONORABLE STEPHEN YELENOSKY: Yeah.

HONORABLE TRACY CHRISTOPHER: So, for example, the intent of our draft rule is that the questions would be asked after every witness.

HONORABLE STEPHEN YELENOSKY: Right.

HONORABLE TRACY CHRISTOPHER: And although we didn't put it in there, we could easily put in there obviously there's no questions for a witness called by deposition. I mean, you know, that's just not workable, that you could have questions of a witness called by deposition.

With respect to -- and our rule allows for objections, and it allows the judge not to ask the question, which is different from the legislation, appears

to be different from the legislation. So our draft is fundamentally different from the bill as currently proposed. With respect to whether the judge should ask the question or whether the lawyers should just look at the question and ask the question, if they wanted to, we discussed it in a subcommittee, and we thought it was better for the judge to ask the question so that the lawyers didn't seem to be currying favor with the juror. Okay, the juror wants this question asked. Well, I'm going to ask that question because the juror wants that question asked, so the idea is to take that sort of concept out by just letting the judge ask the question that the juror submitted.

And then finally, even though I'm not a big fan of jury questions myself, although, I'm willing to try it if the lawyers agree to it, ten percent of the judges surveyed already do it. We have two court of appeals cases that say it's okay in civil cases, and in the Federal circuit they consider it well-entrenched in the common law and in American jurisprudence, so I really would hate to see the Supreme Court prohibit it.

CHAIRMAN BABCOCK: Okay. Eduardo.

MR. RODRIGUEZ: Two points. Number one is I agree with the proposed rule that's been brought up. I think it's obvious we shouldn't apply questions to people

that have been deposed or come via that manner. I've tried cases with jury questions, and they've done exactly as the judge has said. The judge takes up the questions. He gets the lawyers aside, and he decides which ones are obviously questions that are not to be asked, and then those that he's going to submit he gives an opportunity to argue one way or the other, and then he asks the questions, so -- precisely so that the party who has got the witness on the stand doesn't have a leg up because they get to ask that question first.

The second point is that with respect to Judge Wentworth's statute, we -- some of us said on the State Bar Administration of Courts task force and it was my understanding that Judge Wentworth put this up -- has proposed this legislation precisely to get -- to get action from the Supreme Court and if -- and he wants -- I don't think he's necessarily -- will not abide changes to the thing, to his bill, but he wants some action on it, and so I think that he can be approached after -- by the Court with proposed changes that would modify this as long as the substance of what he wants, which is to allow jurors to propose questions.

CHAIRMAN BABCOCK: Yeah. Justice Patterson, and then Judge Evans.

HONORABLE JAN PATTERSON: Well, I think that

our committee's approach is a good one, as is the approach by ABOTA, and that we should not stand in the way of the progress of the evolution of that process, that we should allow questions. The problem with the rule -- the statute as drafted is it has layers of mandatory conduct. I mean it requires -- it's one thing to make the process mandatory to allow for questions by jurors. It's another thing to require every question to be asked verbatim, and I agree with Rusty that it has to be discretionary with the judge for a whole variety of reasons, but the good cause paragraph doesn't soften the requirement that you must ask every question verbatim. It seems to go more towards the process of whether questions are allowed, and also I really think that it's -- it's not well thought out to require every question, no matter how poor, no matter how inadmissible. There is no out in this statute, and it's just -- it really takes all discretion away from the trial judge, which is the nature of the admission of evidence, so it's -- it's -- I don't think it was drafted by a lawyer.

CHAIRMAN BABCOCK: Judge Evans, and then Buddy.

HONORABLE DAVID EVANS: Although it's infrequent there's a few times when there's a topic that neither party wants to have brought before the jury, and

the jury -- the way I read the bill, a jury could open a can of worms that neither party wants to do it, and there wouldn't be a legal objection to it. They both say, "We just don't want to go off in that area and because it both harms us and we're staying out of it." I'm not clear under the bill or under the rule whether the trial judge has the authority to say, "Fine, you don't want to open up that area, we're not going to open it up," and I think that should be up to the advocates. If they both say, "We just don't want to go off into that area," then I think a trial judge should respect that of the advocates. They have the duty to represent their clients.

HONORABLE JAN PATTERSON: It allows for objection but not exclusion. I mean, it just doesn't make sense.

HONORABLE DAVID EVANS: And the only thing I see on that as an evidentiary objection, they say, "No, that's relevant" and they say, "No, it's prejudicial."

"Well, no." I know it's infrequent, but I think it is up to the evidence controlling.

CHAIRMAN BABCOCK: Buddy, then Steve.

MR. LOW: That was the point I wanted to make, what if neither side wanted to open the door --

MR. HARDIN: Right.

HONORABLE DAVID EVANS: Yeah.

MR. LOW: -- to something like that. That was my first point. The second point was -- and it's already been raised just recently that the way the statute reads it says you may object. Then right after that it said juror questions are required to be read. What if it's about insurance? I mean, they object to it. That's fine. I've got to read it. Now, you come over and you say, well, "the Court may for good cause prohibit," and the justice is correct. It's prohibit the submission of the question. The process. So those are the two points that I wanted to raise that smarter people than me have already raised.

CHAIRMAN BABCOCK: Steve, then Justice Gaultney, then Carl.

MR. SUSMAN: And I think these are all worked out because in our trial -- I mean, the judge would show us the questions, and by the way, this requirement that they be read verbatim is ridiculous, given some of the handwriting we were dealing with. If the judge was not allowed to kind of guess what the words were, the question could never have been asked verbatim.

But there was several questions where David Beck and I looked at each other and said "nope," that -- the judge didn't read that question. He looked at the lawyers, and the lawyers said "no," but he gave us an

opportunity outside the presence of the jury to make a record. He always put on the record, "No one objects to this, I'm going to read it. Does anyone object to my reading this?" No one did.

And so, I mean, it worked so easy. I mean, to do it the way those -- we tried in Houston, it really works. You had to ask the question while -- the jury was told in advance the question has got to be asked while the witness is on the stand. I mean, at the end of all examination you -- and the judge would give them time, you know, if you don't -- if you have any questions, write them down now. He would give them like five minutes while we were sitting there to write a question and pass it down, so he would give them a little time at the end to write their question and pass it down. Everyone passed down the papers. The lawyers couldn't tell where the question was coming from.

And, I mean, it worked perfect, and I think to have the lawyers -- leave it up to the lawyers to ask the question, that's wrong, because the reason the jurors seemed to like it on our questionnaires was it showed them respect, that we appreciated their words. I mean, so if the lawyers -- and who would go first, and it would be horrible, so I mean, I think it's the judge can ask it.

CHAIRMAN BABCOCK: Justice Gaultney.

HONORABLE DAVID GAULTNEY: Yeah, I must admit that I'm thinking in terms of the number of appellate issues that are going to be raised thus far in this process if it's mandatory and if this bill is followed, but I guess my thinking is that traditionally it seems to me we have a different system than the Federal system. I mean, we traditionally have thought in terms of a judge doesn't ask questions because it might be viewed by a juror as a comment on one side or the other, particularly in a criminal case, that it might be viewed as favoring the prosecution; and so, you know, I think that the same concern with jury questions exists, and that is that -- and it's reflected in the instructions that are given, that is that you are neutral fact-finders and not advocates for either party and then again that you're not supposed to have -- you know, give an opinion about the case, criticize the case.

I mean, I think a lot of times perhaps questions might be coming from a juror with an advocacy mind frame, so I think the problem that some of the courts have had in the past with jury questions is the fact that it puts the jury in a different role. It puts it in the role of an advocate, potentially, rather than in a more neutral role. So I have a problem with the mandatory nature of it.

I also have a -- it sounds to me like in the cases where it has been tried it's been done by agreement of the parties. Well, that's one thing. If you've got the agreement of both counsel saying, "Judge, we want to do it this way," then I can see fewer appellate issues, but if you've got a judge exercising discretion in a particular case over the objection of a party to permit jury questioning, you know, then I think you create other problems. So I was wondering if the rule -- if the drafters had thought in terms of making this by agreement of the parties, in the discretion of the court with the agreement of the parties.

HONORABLE TRACY CHRISTOPHER: We did, but I think kind of our sense of the committee was that we wanted it a little bit broader than that, and we also talked about putting some "you can't appeal" language in there, but Elaine told me I couldn't put that in a rule of procedure, so I took it out.

HONORABLE NATHAN HECHT: That's a good try, Judge.

CHAIRMAN BABCOCK: Okay. We've got Carl, we've got Jeff, we've got Mike, and we've got Buddy.

MR. HAMILTON: Am I next?

CHAIRMAN BABCOCK: Yeah.

MR. HAMILTON: I assume from the bill that

the intent is that the juror can ask any question about something that's relevant. The rule seems to say that they can submit questions to clarify testimony that's already been given. I'm wondering if that's intended to restrict their questions to clarifying what's already been testified to, or can they ask something that hasn't even been brought up with that witness before?

CHAIRMAN BABCOCK: Good point. Good point. Mike.

MR. HATCHELL: Ready for me?

CHAIRMAN BABCOCK: Yeah.

MR. HATCHELL: Oh. I've been reading an appellate record from Florida over the last month where they do allow jury questions, and I think on balance I would agree that it's a useful process, because cases are now so complex that I think frequently we don't realize that we're shooting over the heads of jurors and missing what they're really interested in; and secondarily, I think it involves the jurors in the process a little bit more. I think that the draft that I see probably deals with most of the problems that I've seen come up in this particular record, but I do think that as a word of caution I will tell you that, number one, mandatory reading of questions is a terrible idea because in this record at least a third of the questions are totally

unintelligible or wacky.

The other thing I think that you need to be aware of is there is a price you pay for doing this in terms of downtime and jurors being sent outside. There is an enormous amount of -- not wrangling, but going over the questions, taking objections, deciding what they mean, and reading them to the jury. The other thing I would tell you is that only about 10 percent of the questions are really relevant to anything. Most of them just show that the jurors weren't paying attention. But that said, I still think it's a pretty decent idea.

CHAIRMAN BABCOCK: Jeff.

MR. BOYD: I had a question that is the opposite of the issue that was addressed before, and that is what if both or all attorneys do want the question read and none assert an objection? As I read the rule, it says in spite of that the trial court in its discretion can decide not to ask the question at all, and I'm wondering what the reason is for that.

HONORABLE TRACY CHRISTOPHER: Well, that was to cover the situation truthfully where both -- the question itself is not objectionable, but neither side really wants the question asked.

MR. BOYD: Okay, so if the parties agree that the question shouldn't be asked.

HONORABLE TRACY CHRISTOPHER: Right.

MR. BOYD: But as written it sounds like even if the parties want it asked the judge could say, "No, I'm not going to ask it."

HONORABLE JANE BLAND: Just like if both parties want an agreed continuance, Jeff. It doesn't mean the trial judge has to grant it.

MR. BOYD: Yeah, but you're talking about here evidence on the case that's not objectionable. I mean, maybe there's a reason. I just don't see what the reason is.

HONORABLE TRACY CHRISTOPHER: Well, we also discussed -- we did discuss that possibility, to give the judge that discretion and then the thought was the parties could ask to reopen the witness if they wanted to.

CHAIRMAN BABCOCK: Buddy.

HONORABLE TRACY CHRISTOPHER: Or recall the witness to the stand.

CHAIRMAN BABCOCK: Buddy, and then Lonny.

HONORABLE TRACY CHRISTOPHER: But we can tinker with that language if you're unhappy with that.

MR. LOW: I just wanted to comment that I think the committee has done a good job of explaining to the jury that their questions are just like the lawyer questions so they won't be offended if they're not asked,

and I think their instructions are excellent.

CHAIRMAN BABCOCK: Yeah. Lonny.

PROFESSOR HOFFMAN: If the Court is inclined to allow this in some way, I guess I would encourage that we accept the view that we're early into the experimentation, and we ought, therefore, not to limit the different ways that this is done so that it strikes me as strange that on the one hand we're in favor of doing this because we want to let this be experimentation and try to do things; on the other hand, we're suddenly so sure that having lawyers ask the questions is terrible and others are sure that judges should do it or not do it. So I would say let's leave some room for playing around, and we can revisit this conversation when we actually know it doesn't work.

CHAIRMAN BABCOCK: Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: I was just -- what Mike was recounting reminded me of some of the questions that we were asked that weren't questions, and if I were required to read them verbatim they wouldn't have gotten asked by anybody. It would be something like in a property case "I don't know what a plat is." That's not a question. Now, you can make it into a question, but if I'm required to read it verbatim I'm not really sure how an appellate court would do with that. You put the

witness on, you go "I don't know what a plat is."

CHAIRMAN BABCOCK: Sort of a reverse jeopardy kind of prize. Justice Hecht.

HONORABLE NATHAN HECHT: Well, and as I listen to this, I don't want to lose track of the point Rusty made earlier, which is maybe you don't ask them at all. Maybe you just tell the lawyers --

HONORABLE STEPHEN YELENOSKY: That's how I do it.

HONORABLE NATHAN HECHT: -- "The jurors have asked these questions. Now, do what you want," and they can go decide if they want to ask some more questions or not or -- and it takes care of your question, which is, you know, if you're talking about some product or something and the jury just doesn't understand the concept, well, then it may be a whole -- it may be two hours worth of examination to go back through and say, well, this is -- relay the ground work, and it sort of takes -- it has two virtues. It takes all of the procedural rigor out of verbatim or not or judge asks it or the lawyers ask it or all of that and leaves discretion not only with the trial judge, but with the lawyers themselves if they don't want -- if the juror asks a question that neither one of them wants to go into, the judge says, "The jurors have asked this question." The

lawyers say, "Well, fine, we don't have anything else to say."

CHAIRMAN BABCOCK: Pete, then Steve, then Eduardo.

MR. SCHENKKAN: Doesn't the judge need to have the -- if the questions are possibly going to get asked at all, if they're not just going to go with the suggestion that you inform the lawyers so they learn at least what some jurors are thinking or wondering about, if the question is going to be asked at all doesn't the judge need to have some counterpart to the same control the judge has over the questions asked by the lawyers? "Well, I think the objection to that question as asked is sustained. Would you rephrase the question, counselor?" And, you know, obviously we don't want to engage in that with the individual jurors, but the subsequent equivalent of that is I've got the lawyers in here and they agree that as phrased this isn't a proper question or there's a problem with it, but there's a core of it that is -- suggests that there's something -- at least one juror or maybe more than one is confused or interested in that's legitimate, and we can cure that, and it seems to me we've got to let the judge do that some way or another.

CHAIRMAN BABCOCK: Steve.

MR. SUSMAN: Yeah, my problem, Justice

Hecht, with leaving it up to the lawyers is it's awkward. I mean, I put a witness on, opposing counsel crosses. I do redirect, there's a recross, and that's it. And the judge then takes them out after questions, sends them out. We agree on the question, and they then say, "You-all do what you want to do." Who's got the first shot at that witness? The witness, the witness -- everyone has crossed, recrossed, redirected, everything, okay. Do I have it or does opposing counsel have it?

Now, every question virtually is favorable to one side or another, so, you know, am I going to get the shot at the first, and even if it's hurtful to me I'm going to be asking it because it's hurtful to me. Even if it's a bad question I would phrase it in a way that would be hurtful. I mean helpful, or not so -- like I'm not scared of it. It just seems too tactical. It's like, okay, and it was much better the way -- where the judge asked the question. Then he says, "Do either of the lawyers have any follow-up?"

HONORABLE STEPHEN YELENOSKY: And who went first?

MR. SUSMAN: Huh?

HONORABLE STEPHEN YELENOSKY: And who went first then?

MR. SUSMAN: I think he let the person whose

witness it was go first. It really doesn't make a whole lot --

HONORABLE STEPHEN YELENOSKY: But, I mean, you still have the same issue.

MR. SUSMAN: Yeah, but at that point in time it didn't make a lot of difference. I think he let whoever's witness it was had the first right to follow-up.

HONORABLE STEPHEN YELENOSKY: But you could do that without the judge. That would be the answer to your question who asks first, if you don't have the judge asking and not all the questions are for one side or the other.

MR. SUSMAN: Not all of them are.

HONORABLE STEPHEN YELENOSKY: Both attorneys wanted them to know what a plat was.

MR. SUSMAN: Not all of them are, but some of them are.

CHAIRMAN BABCOCK: If you'll defer to me for two seconds, there's another problem, too, because if the judge gives the questions to the lawyers and the lawyers look at it and then whoever goes first, they answer it and the other guy stands up and says, "I object," well, now they're objecting not to the lawyer's question. They're objecting to one of the juror's questions, and they may not want to do that or they may be scared to do that.

That would take the normal dynamic out of it.

MR. HARDIN: I'm sorry, I don't understand. Chip, how would that work? Because if the question comes from the juror, it's already been determined before either lawyer has addressed it whether it's objectionable or not.

CHAIRMAN BABCOCK: Well, not necessarily, because what I heard Justice Hecht say was that the question comes from the juror, the judge gives the lawyers the question or questions and says, "Okay, Susman, it's your witness, you can ask any of these you want."

MR. HARDIN: No, but the process I was describing and I think that he has is, is that all of that's decided before the lawyers --

CHAIRMAN BABCOCK: So you hash that out ahead of time?

MR. HARDIN: Each of us -- the bailiff went back and made a copy of the questions real quick and each side looks at it. Judge wants to know are you going to have a problem with any of these questions. If you do, "I don't think this one should be asked. You all agree?"

"Yeah, we agree," or so -- and then the questions that each lawyer has now are the ones the court has already decided --

CHAIRMAN BABCOCK: Okay.

MR. HARDIN: -- and the lawyers have agreed

are not objectionable.

CHAIRMAN BABCOCK: That solved that problem.

MR. HARDIN: Then the question becomes whether they choose to address it, and the thing that Steve is talking about is is it always happened in the trial I had while -- the question was raised while that lawyer was questioning the witness, so that's how you decided who went first. It wasn't like, okay, the witness is through on the stand now, anybody got any questions? It was questions that came up during one lawyer's questioning of it. That lawyer could decide not to address it, and the other lawyer back on redirect or recross could decide I want to address that issue, and he could, but it had already been -- the gatekeeping function had already been served.

CHAIRMAN BABCOCK: Gotcha. Eduardo, will you yield to Susman for two seconds?

MR. RODRIGUEZ: Yes.

MR. SUSMAN: I just forgot to say one thing. In my trial we never had to send the jury out. I mean, they sat in the box while it happened at the bench. You know, the lawyers would come up to the bench. The judge had one of these white noise machines or something so the jury couldn't hear very well.

CHAIRMAN BABCOCK: Don't always work, but --

MR. SUSMAN: I don't know, but we never had to -- it was very quick. I mean, it did not take a lot of time, and I assume there are trials where you would have to send them out because it's going to be a huge argument, but --

CHAIRMAN BABCOCK: Yeah. Eduardo, sorry.

MR. RODRIGUEZ: My experience was the same as Steve's. The jury never went out of the courtroom while we went to the side bench and had objections or not, but my question now is a procedural question, and maybe it's addressed to the justice, but is what we're doing here proposing something that the Supreme Court is going to go to the committee with as a substitute to this proposal, or are we not going to -- or is the Supreme Court not going to address this bill and then if it passes write the rules the way we're -- that may be discussed here?

CHAIRMAN BABCOCK: As I understand what we're doing, is, number one, having a discussion that will mostly inform the Court, but I suspect that the Senator will probably get a copy of this discussion to -- for whatever use he may want to make of it, and the Court may or may not, you know, rewrite this draft rule and submit that to the Senate if they want, but -- and in a minute we'll take some votes on some big issues after we finish

the discussion.

MR. RODRIGUEZ: Well, I mean, with all due respect, you know, we may -- whatever vote we take, I don't foresee the Senator sitting down and reading a record. It's going to take some active participation from somebody to go and sit down and explain what was going on, because if we just expect him or his staff to sit down and sift through our thoughts and then try to change, you know -- make changes to his bill, that may or may not happen, and so I'm -- my only concern is, is the necessity to be proactive in light of the proposed bill and how are you going to make or present changes that will make that proposal more palatable to the system --

CHAIRMAN BABCOCK: I'll defer to Justice Hecht and --

MR. RODRIGUEZ: -- and not just rely on letting it happen without somebody being involved in -- and seeing to it happening.

CHAIRMAN BABCOCK: I'll defer to Justice Hecht, but I think the interface between Senator Wentworth is going to be with the Court, not this committee. Lonny.

PROFESSOR HOFFMAN: Right, and so again I was going to echo, and perhaps I'm too far in the back, I don't see what we gain. I see much that we lose by if we go down the route of discussing juror questions as an

option of mandating one form or another. We've been singing the praises, most of us, of trial court discretion, and there are all kinds of variances and all kinds of -- we have bifurcated trials in some cases and jurors that want to get ahead of the game, they want to ask a question. All kinds of circumstances that we don't know, and so sometimes it does make sense to have the lawyers ask the questions, I would suspect. Maybe it depends on the length of the trial, right? There are all kinds of things, so in a sense I would sort of echo the first part of what I think Eduardo was saying. I hope we keep our eye on the ball of what we would be doing.

CHAIRMAN BABCOCK: That would be unusual for us, but --

PROFESSOR HOFFMAN: Right, but let's focus on -- I mean, the Court was leaning against the direction of having questions. That's where I think the most useful part of the discussion could be.

CHAIRMAN BABCOCK: Hugh Rice, and then R. H.

MR. KELLY: Let me apologize in advance for making a rather long comment, but one point that I think argues strongly in favor of mandatory allowance of questions during trials is the limited vocabulary of jurors. Now, add too -- those that attended the last meeting will remember that at the end of the trial that

one of the members referred to the juror said in this case involving personal injury at a pallet, the jurors at the end of the trial said, "Oh, by the way, none of us knew what a pallet was." Okay. That's one point.

Another point that was made earlier was that at the end of a trial the jurors didn't know what the word "occurrence" meant, and then lastly, two ethnic points. All of you probably had the experience of dealing with members let's say of a people who live let's say in an old traditional black community. I had four pages of confused deposition testimony once trying to communicate with a woman about where the traffic light was, and finally at the end she says, "You mean some lights be's on wires and some lights be's on poles. This light be'd on a wire." Now, that woman is going to have trouble if she was ever on a jury understanding a bunch of stuff that real smart lawyers, you know, are so obsessed with, you know, high falutin' language. They don't get it.

The second one has to do with people whose native language is Spanish but who are fluent in conversational English. That doesn't mean they have a very broad vocabulary in English. I've got household workers that work for me that are perfectly fluent, but if you hit them with a 50-cent word, it goes right past and frequently they are hesitant to say, "I don't understand

that word." So that's my full speech.

MR. GARCIA: What's a 50-cent word?

CHAIRMAN BABCOCK: R. H.

MR. WALLACE: I've tried cases with jury questions, and although the first time I faced it with great trepidation because even though we all know a jury trial is a search for the truth, there's some things we just as soon not be too clear about, but all in all I ended up liking it. I thought it worked well. It didn't slow the trial down, but I think the key ought to be whether we make it mandatory or discretionary for the judge to do it. The manner in which he does it, he needs to have broad discretion in doing it.

MR. LOW: Yeah, right.

MR. WALLACE: He asks the questions, whether he allows the attorney, and what order to go in, I think that could depend on the particular question, it could depend on a lot of factors that the judge ought to have the discretion on how to do that.

CHAIRMAN BABCOCK: Buddy.

MR. LOW: Yeah, that was what I was going to suggest we have, that at the beginning discretion to ask questions, but if they're mandatory, then we should put "Except as required specifically herein, the trial judge shall have broad discussion" -- or "discretion in

administering these," and you leave it up -- you've got to leave a lot of it up to the trial judge. That should -- if it is mandatory we should still have a discretionary clause.

CHAIRMAN BABCOCK: Yeah, Judge Christopher.

HONORABLE TRACY CHRISTOPHER: I love these new people. They are for trial judge discretion. Yay.

CHAIRMAN BABCOCK: Wait a minute. That comment came right after Buddy, who could hardly qualify as a new person.

HONORABLE TRACY CHRISTOPHER: The previous group had not been so nice to us trial judges, so I really like our new replacements. Thank you.

CHAIRMAN BABCOCK: It occurs to me that if, as Justice Hecht said, there are members of the Court who might be inclined to say no how, no way, under no circumstances should this be permitted, we might take our first vote on whether or not it's the sense of this committee that there ought to be an absolute prohibition on juror questions. That okay with you, Judge Christopher?

HONORABLE TRACY CHRISTOPHER: Sure.

HONORABLE DAVID EVANS: Can we reframe that to say "questions and/or communications" because what I get was not a question, it was "I don't understand this,"

and one of the points that Justice Hecht brought up was they communicate up to you that they don't understand and then leave the framing.

CHAIRMAN BABCOCK: Okay. Both the draft rule and the statute seem to be phrased in terms of written questions, but you raise a good point, because it might be broader than that, but that would be language of the --

HONORABLE DAVID EVANS: That's fine.

CHAIRMAN BABCOCK: -- of the rule or of the statute, but everybody who is in favor of telling the district judges that they may not permit juror questions, raise your hand.

And everybody else who thinks that the trial judge should either have discretion or be required to allow jurors to --

MR. HARDIN: Can we break that down? Can we break that down, could be given discretion and then a separate vote on discretion versus required?

CHAIRMAN BABCOCK: Well, yeah, that's the next vote, but everybody that thinks that juror questions ought to be asked in some way, whether it's discretionary with the court or mandatory with the court, raise your hand.

So that's 38 to 1, the Chair not voting. A

couple of other people didn't vote either, so at least as far as this committee is concerned, Justice Hecht, that's how we feel about it.

Now, the next question it seems to me would be whether the court should have discretion of some sort as specified in draft Rule 265.1(a) or whether we like the approach that the Senate Bill 445 takes, which seems to make it mandatory except for good cause. So everybody who is in favor of discretion of the trial court -- discretion of the trial court, raise your hand.

And everybody who thinks it ought to be mandatory with a good cause exception, raise your hand. All right. It's 36.

MR. KELLY: Can I ask a clarifying question?

CHAIRMAN BABCOCK: Let me announce the results first.

MR. KELLY: Huh?

CHAIRMAN BABCOCK: Let me announce the results first, then you can clarify it. It's 36 in favor of discretion. It's two in favor of mandatory with good cause. Yeah, Hugh Rice.

MR. KELLY: Yeah, do you mean mandatory that at the outset of the trial the judge decides whether or not to allow questions at all during the whole trial or are you talking about specific questions?

CHAIRMAN BABCOCK: That's not what I -- no, no. That's not what I meant. I meant the approach that 445 takes.

MR. KELLY: That's to say in all cases there must be juror questions allowed. Okay. Then I voted the right way.

CHAIRMAN BABCOCK: Anybody want to change their vote?

PROFESSOR DORSANEO: I'll change my vote based upon what you just said. What I voted affirmatively was that the judge is supposed to engage in the process, but might rephrase the question or not ask it.

CHAIRMAN BABCOCK: So how did you vote? Were you in the 36 or were you in the 2?

PROFESSOR DORSANEO: I was in the two.

CHAIRMAN BABCOCK: Okay. So it's 37 to 1 now.

MR. ORSINGER: Well, no, wait a minute. The issue here was whether all trial judges will be required to allow questions, not whether they must read them verbatim as written, so you shouldn't change your vote.

PROFESSOR DORSANEO: Well, I didn't change my vote. He changed his question.

CHAIRMAN BABCOCK: It's still 36 to 2. We get the idea. We get the idea. Okay. Judge Christopher,

anything more on -- nothing on the discretion issue, but we have other things to talk about on the rule itself, don't we?

HONORABLE TRACY CHRISTOPHER: Well, based on the discussion, I guess the next vote might be whether we want a rule that specifically tells the judge how to do it or a rule that says, you know, the trial judge has discretion to do it however he or she wants.

CHAIRMAN BABCOCK: Okay. That seems like a reasonable thing to vote on. How many people are in favor of having a rule that says we could have juror questions, and it's up to the discretion of the court as opposed to -- that would be -- everybody in favor of that will vote the first time, and then the opposite of that would be discretion but with guidance. Okay. So --

MR. LOW: Well, wait, Chip. Guidance may come from the lawyers as -- you know, as to who does that.

CHAIRMAN BABCOCK: I'll amend what I said. Judge Christopher is saying that the alternative is a rule that gives the court guidance.

MR. LOW: Right. Yeah, right.

CHAIRMAN BABCOCK: So everybody that wants a rule that says discretion of the court just in -- and that's it, the court has discretion, raise your hand.

HONORABLE TRACY CHRISTOPHER: Can I just

rephrase it?

HONORABLE SARAH DUNCAN: Please do. Please do.

HONORABLE TRACY CHRISTOPHER: Before we take the vote.

CHAIRMAN BABCOCK: Okay.

HONORABLE TRACY CHRISTOPHER: Imagine that this draft rule was only (a), okay.

CHAIRMAN BABCOCK: That was what I thought you were getting at.

HONORABLE TRACY CHRISTOPHER: Imagine it was only (a) and all the rest of it was gone, because that's sort of my understanding of the way some people think we ought to let it develop, we ought to, you know, let people work on it, trial by trial by trial basis.

CHAIRMAN BABCOCK: A laboratory.

HONORABLE TRACY CHRISTOPHER: Imagine we're just looking at (a) versus something (a) plus, (a) plus directions.

CHAIRMAN BABCOCK: So if we phrase the vote, Judge, in terms of everybody that thinks that the rule should stop after (a)?

HONORABLE TRACY CHRISTOPHER: Right.

CHAIRMAN BABCOCK: Okay. Everybody that thinks the rule should stop after (a) raise your hand.

And everybody that thinks it should continue after (a) raise your hand.

HONORABLE SARAH DUNCAN: Are we voting on it continuing this way?

HONORABLE TRACY CHRISTOPHER: No, just some continuation.

CHAIRMAN BABCOCK: All right. Seven people thought that it should end after (a), and 32 thought that it should continue after (a). Okay.

HONORABLE SARAH DUNCAN: Can we now ask the question of whether there should be a procedure mandated by what comes after (a)?

PROFESSOR CARLSON: Versus?

HONORABLE SARAH DUNCAN: Versus the trial judge, as Lonny was saying, can adjust the procedure to the case or to the court.

CHAIRMAN BABCOCK: Judge Christopher.

HONORABLE TRACY CHRISTOPHER: Can I ask, because I do think these instructions are important --

MR. HARDIN: Yes. That's the problem with limiting it to (a).

HONORABLE TRACY CHRISTOPHER: So, you know, I think however you use them, instructions to this effect that the jurors are supposed to be neutral, that, you know, we may or may not ask your question, don't take it

amiss if we don't, those sort of instructions I think it would be useful if in a rule these instructions were available to the judge to use however they saw fit.

CHAIRMAN BABCOCK: Well, you've got --

HONORABLE TRACY CHRISTOPHER: So I want to know whether people liked those instructions.

CHAIRMAN BABCOCK: You've got it as the judge must read these.

HONORABLE TRACY CHRISTOPHER: Yes.

CHAIRMAN BABCOCK: Okay. Steve.

MR. SUSMAN: Yeah, I think I'm a big supporter of setting out the procedure that she sets out because so many times even if you -- I mean, what happened in our trial, I remember jury -- everyone's got these jury comprehension improvement projects, so it just occurred to me as a last-minute thought before the first witness, "Judge, could the jurors ask question?" David Beck said, "Yeah, that sounds fine," but we had no idea what to do, and the judge didn't have any idea. It was like his second trial ever, and so we were lucky we were in a courthouse where somehow he got hold of your forms at a break.

HONORABLE TRACY CHRISTOPHER: (Indicating)

MR. SUSMAN: E-mail. Okay, that was it. He sent an e-mail around, and she brought the forms, and it

worked perfectly. Well, I mean, if I hadn't been in that kind of courthouse with Tracy on the e-mail we wouldn't -- we would have totally screwed it up and probably had a bad experience with it, so I'm totally in favor of having these kind of rules that -- because I think they work.

CHAIRMAN BABCOCK: And Sarah's question I think is whether or not the word "must" ought to be here in (b)(2)(a).

HONORABLE SARAH DUNCAN: I discern a difference between guidance and mandated procedures. I'm in favor of guidance. I'm not in favor of mandated procedures in this instance.

CHAIRMAN BABCOCK: SO you would change "must" to "should."

HONORABLE SARAH DUNCAN: I would just say, (b), here's a recommendation how to do this so that when you're in Steve's position and David's position and you don't know what you're doing because you're in Lampasas County --

CHAIRMAN BABCOCK: Now, he's not going to admit to not knowing what he's doing.

HONORABLE SARAH DUNCAN: -- that here's a way to do it.

CHAIRMAN BABCOCK: Judge Peeples.

HONORABLE DAVID PEEPLES: I'm in favor of

some things being mandated, some being discretionary. For this reason I think this group needs to be reminded about once a year that we're not writing rules for Judge Christopher and Judge Evans and Judge Yelenosky. We're writing for 425 district judges, no telling how many county court judges, in East Texas, the Panhandle, South Texas, Central, everywhere, and we just need to remember that some of these people need more guidance than the superstars of the trial bench.

HONORABLE DAVID EVANS: Oh, well, I'm feeling good.

CHAIRMAN BABCOCK: Yeah, this committee is nothing but good for your ego, Judge Evans. Justice Hecht.

HONORABLE NATHAN HECHT: It's exactly 440 district judges and 240 statutory county judges, so we've got 680 judges scattered around.

CHAIRMAN BABCOCK: So on the issue of the trial court must read as opposed to the trial court should read, you're a "must" kind of guy?

HONORABLE DAVID PEEPLES: Maybe.

CHAIRMAN BABCOCK: Judge Evans.

HONORABLE DAVID EVANS: The one that strikes me is the limitation on the question must be to clarify the testimony of the witness, which sets a limit

subject-matter-wise where they can go into, and that would be why I would want the instructions, is at least to limit the question. Now, if it's put somewhere else in the rule and stated that the question could only be that, but I think you do have to have standard form instructions, and the rest of us are going to -- we're going to elaborate on these anyway. I've never seen a trial judge just read these instruction that doesn't then put its own interpretation on it or additional comments.

CHAIRMAN BABCOCK: Yeah. Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: Well, I just want to know whether -- and I was trying to find out from Judge Christopher if I'm unclear -- do we as it's phrased now by -- well, as the rule is phrased --

HONORABLE TRACY CHRISTOPHER: Oh, I see what you're talking about.

HONORABLE STEPHEN YELENOSKY: -- would this require a judge to decide there are either going to be questions or not; if there are questions, this is the only way to do it; or does it allow a judge to say there are going to be questions, but not exactly like this? The way I read it now, it's the former. I can either do it or not, but if I'm going to do it, this is the only way to do it, and that may be fine. I just want to know what we're voting on, because that would disallow the procedure I've

been using.

CHAIRMAN BABCOCK: Judge Christopher.

HONORABLE TRACY CHRISTOPHER: Well, what I wanted to have a vote on first was should we have certain instructions that we give the jury every time. Not necessarily the content, because as I see in here, there are a few comments about -- that include the procedure in this first set, so what I'm really getting at is more of the substance of the instructions rather than the procedure at this the time. So, for example, if we ultimately wanted to vote with the Rusty/Stephen, you know, let the lawyers do it version, we would have to change some of the language in this set of instructions. But the idea behind it is that there would be a set of instructions that the trial judge should read if they allowed juror questions.

CHAIRMAN BABCOCK: Rusty.

MR. HARDIN: Then people like me, and maybe others like me, would like to change my vote, because that was the problem of just saying (a) and afterwards. I totally agree that the guidance to the judges ought to be provided, and that's down here after (a). So really my vote against just making it (a) would be -- in favor of just making it (a) would be different now, because if we could word this to where you're talking about and what

Judge Christopher says at the end, the instructions would be if a judge discretionarily has decided to have questions, then there have to be instructions, whether these or others, as to how it is done and the procedure as to which one -- you know, little technical stuff can be changed, but I think the judges should be given guidance.

HONORABLE TRACY CHRISTOPHER: For example, in this (2), the first instructions that we give the jury, paragraph (1), (3), (4) and (5) are all just basic instructions. It's only paragraph (2) that gets into the actual procedure.

HONORABLE STEPHEN YELENOSKY: So you could have -- paragraph (2) could have alternate paragraphs.

HONORABLE TRACY CHRISTOPHER: Right. So perhaps we would vote on -- well, I guess maybe before we start changing everything, let's vote on whether we want -- or did we already vote on that, one procedure or multiple procedures? You know, to allow -- it's got to be this way with the judge asking the question after objections, or we're going to allow the judge to have more discretion as to how to handle the questions. If we could maybe have that vote first that would sort of simplify this.

CHAIRMAN BABCOCK: Okay. So the first -- people voting in favor would be in favor of having one

procedure which the judge must follow.

HONORABLE TRACY CHRISTOPHER: Right. Which is multiple procedures.

CHAIRMAN BABCOCK: Everybody in favor of having one procedure that the judge must follow, raise your hand.

All right. How do you frame the other side of this question, Tracy?

HONORABLE TRACY CHRISTOPHER: Giving the judge the discrection --

MR. MUNZINGER: "Do you want chaos in the courtroom?"

CHAIRMAN BABCOCK: Sorry. There was a sidebar.

HONORABLE TRACY CHRISTOPHER: Giving the judge discretion to craft the procedure.

CHAIRMAN BABCOCK: All right. Everybody in favor of giving the trial judge discretion to craft the procedure.

MR. LOW: There's a third thing.

CHAIRMAN BABCOCK: All right. That vote was 20 to 16, with some grumbling.

HONORABLE DAVID PEEPLES: Chip, can I make a point? I would like to see a lot mandatory -- I mean, one procedure mandatory, but it would contain some elements of

discretion, and I think that was not clear when we voted.

CHAIRMAN BABCOCK: Yeah, Justice Guzman.

HONORABLE EVA GUZMAN: I was going to say the judge should have the discretion to accept an agreement of the parties on how they're going to --

CHAIRMAN BABCOCK: Proceed?

HONORABLE EVA GUZMAN: -- proceed with the questions, should it be mandatory.

CHAIRMAN BABCOCK: Yes, Elaine.

PROFESSOR CARLSON: Judge Lawrence, would this be applicable in JP courts?

HONORABLE TOM LAWRENCE: Well, I was going to ask that question. Does Chapter 25 of the Civil Practice and Remedies only apply to county and district court?

CHAIRMAN BABCOCK: We're scrambling for the answer.

HONORABLE TOM LAWRENCE: Based on Justice Peeples' obvious slight I'm assuming that he intentionally left out 900 JPs also.

CHAIRMAN BABCOCK: We're researching. We'll get that answer for you in a second. Eduardo.

MR. RODRIGUEZ: Yeah, my question is -- and I may not have understood because I already realized I missed -- I didn't understand one of the votes they took.

Is the vote that we took that asking questions is not mandatory? I mean, I think that's what -- because as I see the bill, he's -- he wants -- he wants judges to have to ask -- allow jurors to ask questions.

CHAIRMAN BABCOCK: Right.

MR. RODRIGUEZ: How -- how that procedure is done I see as being discretionary, but what we're -- by voting that it not be mandatory, we're not really changing anything in the law as it is now, because right now judges have the discretion to ask questions, and I think what he -- what he wants to do is that right now 10 percent of the courts in the state may allow questions. I think what Wentworth's objective is is to make all judges allow questions, and I don't know that we're answering that by what we're doing because we're not changing anything.

CHAIRMAN BABCOCK: Well, we are answering it. We may not answer it in the way that it looks like he wants it. Steve.

MR. SUSMAN: I do think this would satisfy him. I mean, I have been one of the big ones who's lobbying him to do something like this. I've been after him for a long time, and I think something like this would satisfy him because, frankly, this is a procedure. It is the imprimatur this is an appropriate and proper thing for courts in the state of Texas to do. It's not only you can

do it if you can figure out how to do it and you get the lawyers to agree. I mean, this says it's appropriate to do.

MR. LOW: Right.

MR. SUSMAN: Essentially. But in your discretion you could, you know, not allow it, but I do think that it's a lot of -- a huge step over where we currently are, where you've got to -- you know, when you raise the subject of questions, is there any case authority that says it's proper, and you've got to go site cases. Okay, now next, so how do we do it, you know.

CHAIRMAN BABCOCK: Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: I just want to respond. I don't see our role as taking what the -- one legislator has proposed at this point. It may have a lot of support, I don't know. Certainly beyond me to predict what's going to happen in the Legislature. I thought our role, since the Supreme Court has told us to look at this question, is to give our advice from our perspective as judges and attorneys, and the rest of it's up to other people.

MR. HARDIN: Eduardo, he has very specific requirements that they must do, and he doesn't just say they have to do it. He has it actually set out in this.

MR. RODRIGUEZ: Yeah, I know.

CHAIRMAN BABCOCK: Pete Schenkkan.

MR. SCHENKKAN: I was wondering if perhaps after lunch the most useful thing to the Court might be to walk through the numbered items under (b) that Tracy has in here and get kind of a sense of the house on each one as to whether they are fundamentally, you know, something that would be useful to provide, you know, a really bad idea, or if there's some third option; and that might be about as much more progress as we could usefully make to the Court, which obviously there's only two decision makers that are going to ultimately get this done, the Court or the Legislature; and I think we'll be done if we've given our sense of the house on these seven items and any that aren't on the list.

CHAIRMAN BABCOCK: Yeah. Absolutely right, and we're going to take a break for lunch in just a second. Judge Lawrence, was it Chapter 25 of the Civil Practice and Remedies Code that we're worried about?

HONORABLE TOM LAWRENCE: Yeah, that's the amendment to Senate Bill 445.

CHAIRMAN BABCOCK: Yeah, well, somebody has got it wrong. David Beck, who is the author of a book about the Civil Practice and Remedies Code, says that Chapter 25 is blank.

HONORABLE TOM LAWRENCE: Well, I guess --

MS. PETERSON: Oh, this is adding Chapter 25.

CHAIRMAN BABCOCK: Oh, so we're going to add a Chapter 25.

HONORABLE TOM LAWRENCE: If that's the case then the language says "civil trials in this state" which means it would apply to JP courts.

CHAIRMAN BABCOCK: Yeah.

HONORABLE TOM LAWRENCE: Which raises a separate issue, both with this and note-taking. We don't have an equivalent to 226 in the JP court, so I would propose if we do this that we take No. (10) on page four and five and take that language and either add it to 553 or 554 and that with regards to the juror questions that we do the same thing.

CHAIRMAN BABCOCK: Got it.

HONORABLE TOM LAWRENCE: If we're going to do that. The juror questions would actually be pretty helpful sometimes in JP courts because it's not unusual to have both the plaintiff and defendant rest without actually mentioning what the damages are, and then the jurors send questions out, "Well, what are the damages," well, you know, so, this really would be a positive thing for JPs.

CHAIRMAN BABCOCK: Our lunch breaks are an

hour long and it starts now.

(Recess from 12:28 p.m. to 1:29 p.m.)

CHAIRMAN BABCOCK: All right. Judge Peeples has called for a revote.

HONORABLE DAVID PEEPLES: But to be specific, we voted 20 to 16, and I think there were people who didn't know how to vote. I would like --

HONORABLE STEPHEN YELENOSKY: You want to vote for them?

CHAIRMAN BABCOCK: After lunchtime lobbying --

HONORABLE DAVID PEEPLES: I would like to see us vote where one of the choices is that we think there ought to be something beyond (a) that has some mandatory provisions and some elements of discretion, and I think that ought to be put as one of the alternatives.

CHAIRMAN BABCOCK: Tracy, do you object to that sort of a vote?

HONORABLE TRACY CHRISTOPHER: Nope.

CHAIRMAN BABCOCK: She's a voting kind of person.

HONORABLE TRACY CHRISTOPHER: The more votes, the better.

CHAIRMAN BABCOCK: So just to be clear, say it one more time, Judge.

MR. BOYD: You better give all choices.

CHAIRMAN BABCOCK: Yeah, give the whole vote.

HONORABLE DAVID PEEPLES: One choice, people should be given a chance to vote to say they're in favor of, if they are, of having some elements that judges who want to do this have to do. For example, it might be in writing, the questions have to be in writing and so forth, but there ought to be some room for discretion. Some aspects of it should be up to the trial judge in his or her discretion.

MR. GILSTRAP: Is it if you choose to exercise your discretion to submit questions then your discretion is limited in this fashion? Is that what you're saying?

HONORABLE DAVID PEEPLES: Yeah, there's A, B and C, and we can talk about that would be required and X, Y, and Z would be discretionary with the court, if you choose to.

MR. SUSMAN: Is this just for discretion in general, or do you have anything particular in mind?

HONORABLE DAVID PEEPLES: I happen to favor what the subcommittee came in with right here, but there might be some tweaking of that.

MR. SUSMAN: Like what?

HONORABLE DAVID PEEPLES: But some things are in here are required. For example, you need to explain to the jury how they do it and their questions have to be in writing and not raising their hand. I would say that ought to be mandatory. A judge shouldn't have the discretion to allow oral questions, just raise your hand.

MR. SUSMAN: But what would be discretionary?

HONORABLE DAVID PEEPLES: Well, I think we need to talk about that, but, for example, one of them would be the discussion we had about whether the judge should always read the question or maybe let the lawyers read it or ask it. That, for example, I would be willing to leave probably to the discretion of the court. I'd want to hear the arguments on that, but I think there are some people -- and I think I'm in this category -- that would say if you're going to do it, there are some things you would have to do, and there would be other elements where you could do it one way or do it the other way in your discretion, and I just don't think there was a chance to vote for that when we voted 20 to 16.

MR. BOYD: How does that --

CHAIRMAN BABCOCK: Yeah, Jeff.

MR. BOYD: -- differ -- just so I'm clear,

how does that differ from what we did vote for?

CHAIRMAN BABCOCK: Well, Judge Peeples will answer that.

HONORABLE DAVID PEEPLES: I don't think that was expressly given as an alternative, and the record will say what it was, but I'm kind of reluctant to say it now. My recollection would be contradicted by the record, but it might have been, you know, are you for discretion or for having it mandatory.

CHAIRMAN BABCOCK: Well, we'll hear from your appellate lawyer, Skip Watson.

MR. WATSON: But, Judge, I mean, I certainly don't mind revoting on it, but I'm like you. I like the draft. I just was telling Tracy I thought it was just superb work, and I'm afraid if I vote for your proposition that I'm voting to leave some of the things that you just said are mandatory are out. I mean, I'm with Steve. Tell me what's discretionary, then I can vote.

CHAIRMAN BABCOCK: Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: Well, I mean, the big one that's been mentioned and we've been talking about is whether the judge would have discretion to receive questions, turn them over to the lawyers to do with what they will, or not. I mean, that's the big one. Maybe we take a vote on that.

MR. WATSON: Can we vote on that? Is that okay, David, if we vote on that?

HONORABLE DAVID PEEPLES: Yeah, but I just think to me I didn't want this draft to go to the Supreme Court with a pathetic 20 to 16 vote of confidence. I mean, I think if the committee were to vote up or down as to whether to send this to the Court it would be better than 20-16, but this is basically do it this way, but I think there is some room for discretion.

MR. WATSON: But the discretion would be beyond the draft that we have in front of us, to add something to it as opposed to take something away from it. That's what you're saying?

HONORABLE DAVID PEEPLES: There was some sentiment expressed by some of our members for giving judges discretion to do it one way or the other, and I didn't want them to vote against this draft thinking there was no such discretion, you know, and maybe they didn't.

HONORABLE STEPHEN YELENOSKY: Can you think of any other issue that requires --

HONORABLE DAVID PEEPLES: Not right now.

HONORABLE STEPHEN YELENOSKY: I mean, to me the draft is just fine if we want to eliminate discretion to submit the questions to the attorney. The only thing I would changes is -- maybe is make that discretionary. I

don't feel particularly strongly about that, but there's been some support for that procedure in some cases. For one thing, it's quicker.

CHAIRMAN BABCOCK: Jeff.

MR. BOYD: Just because the one other area where there may be an issue about judge's discretion is the one I brought up about whether the judge can exercise discretion not to ask a question that the lawyers agree should be asked and there is no objection.

CHAIRMAN BABCOCK: Buddy.

MR. LOW: I'm glad to know I wasn't the only person confused. I'm not positive what we voted for, but I was thinking the same thing that David is thinking, because this draft says "must," and when somebody tells me must, I either look for a way out or I do it. And I think there are certain items that we can draft that you must do, and my must list would be shorter than my discretionary list, and I don't know what I'd put in must and what discretionary, but I would sure give all the discretion to the trial court. But there are certain things that David has outlined that I think should be done, and it's -- and I didn't get the idea that we were voting or that we were voting more or less everything is "must," and maybe I'm wrong.

CHAIRMAN BABCOCK: Judge Peeples, would this

be a way to frame your vote that would be perhaps more informative to the Court? Could we vote on the language of (b)(2) little (a) whether people favor the language as drafted, "The trial court must read all of the following instructions to the jury," et cetera, versus "The trial court should read all of the following instructions." That sort of gets right back to where Sarah started, but Tracy is shaking her head, so --

HONORABLE TRACY CHRISTOPHER: I don't think that's the issue, because I think in these five paragraphs, I think based on my understanding of people's comments, most of them agree with paragraph one, three, four, and five. It's only paragraph two that is actually a procedural paragraph that causes them problems. So I would prefer a vote that removes paragraph two, because otherwise I think it will be skewed because the people who don't like paragraph two are going to vote no on whether instructions must be read to the jury or not.

CHAIRMAN BABCOCK: Well --

HONORABLE TRACY CHRISTOPHER: And I think most of them would agree it's a good thing to read instructions to the jury. It's just a matter of what instructions they are.

CHAIRMAN BABCOCK: Rusty.

MR. HARDIN: I would modify that even a

little bit more. I'm one of those who wants the lawyers to be able to do it, as you know, but I don't see that paragraph two prevents that. It looks to me as I read this that you could do -- even those who feel the way I do, if there is anybody else, about the lawyers doing it, would not be precluded from doing it all the way through the juror question form. Until you get to three on page two you can make everything there mandatory, and then people could tinker with language as far as the other stuff if they want or decide out, but we could make -- I wouldn't have any objection to making all of (a) through (b), and there's (b) again. There's actually two (b)s, but all the way through how the question -- juror question form is to be. It seems to me that that would give guidance to the trial courts that we're talking about, they have to do it in every case, and then we could argue about whether or not the other things could be discretionary.

CHAIRMAN BABCOCK: So you say that (2)(a) and (2)(b) should be mandatory?

MR. HARDIN: I'm comfortable with that, even though if some of the other things are not, that way everybody would have to -- every trial judge in the state would know that if they're going to do questions --

CHAIRMAN BABCOCK: They've got to do this.

MR. HARDIN: -- they've got to start out doing this.

CHAIRMAN BABCOCK: Judge Peeples, how do you feel about that?

HONORABLE DAVID PEEPLES: I think I favor that, and the more we talk about it I would kind of like to have a vote on 265.1 as it is, making sure that anybody in here who doesn't like that would say why or why not.

CHAIRMAN BABCOCK: Okay. Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: Well, I mean, can't we just take a vote, because if I lose this vote then I'm going to vote for it as-is. The question just is should it be modified to allow what I said before, which is that the questions would be given to the attorneys to read. If so, (2) does need some modification because it refers to the judge asking the questions, and if that's voted down then, you know, we can move on. If it's voted up then we just need to make that --

MR. HARDIN: Just making sure, I don't mean to argue about this, but if you look at paragraph (2) that's going to happen whether he allows the lawyers to do it or not.

HONORABLE STEPHEN YELENOSKY: Well, it says "Do not take it personally and do not assume that it is important that I decided not to ask your question."

MR. HARDIN: That would be the only part of that. You're right. Yeah. That one "I" does, but that could read it it's important -- "and do not assume that it is important that your question wasn't read."

HONORABLE STEPHEN YELENOSKY: Well, no, it could be, but if everybody votes against having the option then we would just leave it like it is. That's what I'm saying, so I just want a straw vote on the option.

CHAIRMAN BABCOCK: Well, I'm afraid if we take --

MR. RODRIGUEZ: I don't understand, because I don't read this as saying that the judge doesn't have the option. I mean, this doesn't say that the judge has to ask the question or that he can't let the lawyers do it the way Rusty did it in his trial or do it the way Steve did in his trial.

HONORABLE STEPHEN YELENOSKY: Well --

MR. RODRIGUEZ: I don't read it that way, and maybe that's my --

HONORABLE STEPHEN YELENOSKY: Well, I do. I do. At least that last sentence.

CHAIRMAN BABCOCK: Okay. With deference to everybody, I think it might be a better thing right now to have a vote on whether (2)(a) and (2)(b) should be mandatory versus discretionary. We can tinker with the

language later and, you know, somebody brought up the issue of to clarify. I mean, that's an issue and there are probably other issues, but once we're satisfied with what the instructions are going to be, they ought to be mandatory as opposed to discretionary. So everybody who is in favor of making the instructions contained in (2)(a) and (b) mandatory, raise your hand.

MR. SUSMAN: (a) is already discretionary, right?

CHAIRMAN BABCOCK: Right.

HONORABLE TRACY CHRISTOPHER: Actually, it's (b)(2)(a).

CHAIRMAN BABCOCK: All those opposed? 31 to 3 in favor of making them mandatory. So now let's go through them and see what we want to change about them, if anything. And, Judge Peeples, we could have the vote about whether just accept it as-is, but that way if we did and everybody voted let's just leave it as -- we would be deprived of a discussion about these things.

HONORABLE DAVID PEEPLES: And being true, that's fine, but, you know, this is different from what 445 --

CHAIRMAN BABCOCK: Yeah. Yeah.

HONORABLE DAVID PEEPLES: -- does, and I think Senator Wentworth and the Legislature just might be

interested in knowing how strongly we think it ought to be different.

CHAIRMAN BABCOCK: So now they know 31 to 3.

HONORABLE DAVID PEEPLES: 31 to 3, yeah.

CHAIRMAN BABCOCK: Yeah, Buddy.

MR. LOW: Chip, what I really had in mind, I don't see anything wrong with these musts, but we might not have covered everything, so what I was talking about is anything not specifically mandated here and above may be instituted by the trial court.

CHAIRMAN BABCOCK: Right.

MR. LOW: Subject to abuse of discretion is what I meant, something that may give rise to something we haven't thought of, because a lot of things --

CHAIRMAN BABCOCK: Trial court could supplement with supplementary instructions.

MR. LOW: Yeah, but couldn't be inconsistent with that is what I really was thinking about.

CHAIRMAN BABCOCK: Good point. Richard Munzinger.

MR. MUNZINGER: Eduardo's interpretation of the rule is the same as mine. As it is presently written it is not clear to the trial court whether the trial court has discretion to allow the attorneys to ask the question that the juror has written. I believe this is your

interpretation. I don't want to put words in your mouth. But it is not clear whether the trial court may allow the attorney to ask the question, one of the attorneys to ask the question, whether the trial court itself should ask the question. It's an ambiguity by omission. There is nothing in here that says one way or the other. The implication from the rule is, is that the judge is going to read the question himself, but the rule does not so require.

I would be in favor of removing any ambiguity by omission and requiring the trial court to ask the question rather than allowing one or the other lawyer to ask the question in as much as some tactical advantage or perceived tactical advantage could be obtained by allowing a lawyer to be the person who is identified with the subject of inquiry.

CHAIRMAN BABCOCK: How would you --

MR. MUNZINGER: All the lawyers, he wanted to do that or whatever, and it puts the lawyer who didn't ask the question or wasn't permitted to ask the question in a disadvantageous position. The rule should say that the judge will read the question, not the lawyers. Why I take that position, again, I'm not one who is in favor of a lot of arbitration. At the same time I appreciate the fact that jurors and judges believe that our proceedings

as they are are too complicated, too time consuming, too expensive, et cetera. So now any time that you do anything at all that allows this procedure to go on or makes it more complicated in my opinion you're working to your disadvantage.

The point here is two qualified lawyers have had this witness on the witness stand and asked questions, cross, redirect, recross, et cetera. Both have now said, "I pass the witness." I have done all I know how to do to bring those points out to the court and to the jury. I'm over with, and all of the sudden a juror has a question, which the judge says, for whatever reason, "I'm going to read this question." Instead of letting the judge do it or having the judge do it he gives it to one of the lawyers to have the lawyer do it, and that again, if I'm the lawyer who didn't get to ask the question, I have to ask myself, making a quick decision, have I been placed at a disadvantage and I need to do something about it, and I think the best way to do this is to make the court read the question, even though he may reframe it, and then the lawyers ask whatever questions they think are necessary and then go on about your business.

MR. SUSMAN: I agree.

CHAIRMAN BABCOCK: There are three ways to do it. The judge can do it, the lawyers can do it if they

want, or we can leave it so the judge can go either way.

MR. MUNZINGER: I understand, and my point was that ambiguity in the rule in my opinion should be changed so that it is clear that the trial court itself must do the reading.

CHAIRMAN BABCOCK: Right.

MR. MUNZINGER: And all you trial judges that say you want the discretion, I agree that you should have the discretion, but as someone pointed out, not everybody is a superstar. I have practiced all over the state, and I'll tell you right now there are not -- everybody is not as smart as you, and more importantly they're not all as honest as you, and that's a real problem. A compromised bench is a real problem. It's one of the reasons why we have a lot of arbitration.

CHAIRMAN BABCOCK: Okay, who had their hand up? Rusty?

MR. HARDIN: Why would you want them to read the question?

CHAIRMAN BABCOCK: R. H.

MR. WALLACE: Well, this gets back to my argument earlier about giving the judge the discretion as to how to deal with those questions. Paragraph (3), if you omit the paragraph (6) the way it is now, which that assumes the trial court is going to ask the question. I

agree. It doesn't say that anywhere, but the way it's written, and if instead you said something -- and though this is not great draftsmanship, but that the court may in its discretion decide the manner in which the question is posed to the witness and the appropriate follow-up questions that may be asked by the party. To me that leaves that whole area within the discretion of the trial court as to whether they ask them, whether they allow the parties to ask them, which one goes first, who goes second, so I mean, if you're a discretion proponent, that's something I would propose.

CHAIRMAN BABCOCK: So you would put that in (4), subparagraph (4).

MR. WALLACE: In place of (6), I think is probably where it would most go and it may be some -- because No. (6) is the one that assumes the judge is going to ask the question.

CHAIRMAN BABCOCK: Okay. All right.

MR. WALLACE: And that's the only way it's going to be. That's the way I would do it.

CHAIRMAN BABCOCK: Buddy.

MR. LOW: One thing also is not -- there's nothing in this rule that says if I were the judge I would tell them before I started, I would say, "This is not my question. This is not any of the lawyers' question. This

is a juror question." In other words, the judge got -- should have discretion to do that, not just one, two, three.

CHAIRMAN BABCOCK: Well, it seems to me like this debate is getting to the point where either we're going to mandate that the judge ask the question, or we're going to let the lawyers ask it at their option, or we're going to give the judge discretion on how he does it. Those are the three things. And we should all -- we all -- it ought to be clearer whatever we decide.

MR. LOW: I didn't mean I'm -- I was assuming that the judge is going to ask the question. I'm for that. And I'm going back to my little tail-end thing I put where the judge may have discretion. If he wants to he can tell them specifically "It's not my question."

CHAIRMAN BABCOCK: Right. I hear you. Yeah, Gene.

MR. STORIE: I have I guess a psychology question, and Richard, I would ask it to you in particular. That is, why is it an advantage to ask the question and why is the implication not something like this lawyer was either too dumb to think of getting this fact out or else was trying to cover something up?

MR. MUNZINGER: It could be either way. But the effect of having the lawyer ask the question is that

it's going to prolong the -- potentially prolong the trial, may not, but if the judge asks the question it's the jury procedure that, as the rule contemplates, the judge ask the question for the juror. The lawyers are free to go into it or not, but psychologically I don't know whether it would be an advantage to me or not, but it could be, and that's -- I'm not -- heck, every lawyer has a different view of what he has to do in court in every different case, and if I thought that some juror had raised something really significant and the judge lets my adversary ask the question, I may prolong my case by calling other witnesses. There's no telling what I would do. I don't know.

CHAIRMAN BABCOCK: Steve, then Rusty.

MR. SUSMAN: I have some minor questions about the wording of the thing. I've already expressed the view that I think the judge should be asking the questions.

CHAIRMAN BABCOCK: Yeah.

MR. SUSMAN: Why must the court inform the jurors before voir dire? What's the magic about that? I mean, in our case in fact we didn't decide it until after the jury was seated. So it seems to me that clearly the judge needs to form the jury and read this instruction before the first witness is excused. And again, the

instruction says "after the jury is seated." I would say maybe you should say "before the first witness testifies" or something like that, because you don't really need this instruction before opening statement, opening argument, right? It's before the witness testimony.

I also think that you should change -- it says "in this trial" -- the instruction -- "this trial after the parties have asked their own questions of each witness and before each witness is excused from the stand," comma, "you can write and submit any questions," to make it clear that you're not going to be calling back witnesses to answer any of the questions that they come up with later, and after -- down the first paragraph of this, the second line from the bottom, "Your question should not" -- "Your question should not give any opinion about the case, criticize the case, identify who you are, or comment on the case in any way." You don't want them including in the question anything that will allow the lawyers to identify who they are, particularly if the judge is inclined to read it verbatim, and that is actually in the questionnaire form. They are not supposed to sign it for that reason, supposed to be anonymous, but I would make those changes.

MR. HARDIN: I'm just worried about telling a judge he has to do something in a given situation other

than these general instructions, tell him he has to follow a certain -- him or her a certain procedure. What occurs to me is that we're in trial, and Steve talks about a deal where he and David decided, no, we don't want to go down that trail, so they didn't go down it, but you can't count on your opposing counsel always being that way. Some of us are not all that agreeable in trial, and so you may end up with a situation where the lawyer that the question is directed to deliberately does not want to go down that trail, but the judge says, "This says I've got to read it," and that's -- that to me is what happens every time we start telling judges what they have to do.

HONORABLE DAVID EVANS: With the exception of the judges here, there may be some judges you wouldn't want to ask the questions, and lawyers would rather just have the two lawyers work it out.

MR. HARDIN: Thank you.

HONORABLE DAVID EVANS: You get a nonresponsive answer on a witness, and the judge is asking the questions, you could have a judge just go off and right off the bench, and before you know it your witness is destroyed, and I could see a lot of reasons for trying a lawsuit where I would say, "No, Judge, you know, we'll just work that out between us and we'll reopen it."

MR. HARDIN: What happens if the witness --

what happens if the witness asks the judge a question? The judge reads the question, say, "Now, Judge, what about so-and-so?" What's the judge can do?

HONORABLE DAVID EVANS: I guess I would object to the question, you know, but really from my perspective there are cases where lawyers may not want a particular judge to do interrogation.

CHAIRMAN BABCOCK: David Jackson.

MR. JACKSON: I'm sitting here listening to the debate, and I can see the lawyers using the opportunity to ask the question as a chance to sell himself to the juror who came up with this question. Like "This is an excellent question. I wish I had thought of this question." You know, I can see lawyers doing that sort of stuff, so I think coming from the judge is how I would want it.

CHAIRMAN BABCOCK: Roger.

MR. HUGHES: Well, I favor that the judge ask the question and that for all of the reasons above I would just add this. My experience generally is that if the question is asked by the judge the witness doesn't fence with the judge. He answers the question, she answers the question, fairly straight up and fairly much to the point, because the judge is not going to tolerate shilly-shally; whereas if the person who didn't call the

witness to the stand is going to ask the jury's question, the witness may fence with them a little bit, so I tend to favor that.

The other thing is if you have the -- the situation where you don't want the judge asking that question, well, maybe that's a good time to ask to reopen the examination for your side and start it over again, and that would be a matter for a judicial discretion.

CHAIRMAN BABCOCK: Okay. Judge.

HONORABLE TRACY CHRISTOPHER: In 226a we have the following statement about the standard instructions that we give all the time. We say that "The following oral and written instructions, with such modifications as the circumstances of the particular case may require shall be given by the court to the jury." So my suggestion is, is that we add that language in to give people a little bit more comfort that the judge can sort of modify the instructions if they want to, right up there at (2)(a). We can just say, "The trial court may modify these instructions as the circumstances of the particular case may require." So that gives you the ability as time goes on to, you know, add a few things, delete a few things, that sort of thing, as the process evolves.

I accept Steve's suggestion of adding in "and before each witness is excused." I think that's

probably a good suggestion to that first sentence. And for me, I've heard good reasons pro and con on, you know, letting the lawyers ask the questions, and I guess I would vote to make it discretionary, to have it either way and in the judge's discretion.

CHAIRMAN BABCOCK: Either way in the judge's discretion. Okay. Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: Well, I'm sensitive to the point that's been made that there are some 600 judges out there and all but maybe I guess five or six trial judges who are here aren't going to get the benefit of this discussion. They're just --

MR. HARDIN: And JPs.

HONORABLE STEPHEN YELENOSKY: I said trial judges.

MR. HARDIN: But your numbers weren't right.

HONORABLE STEPHEN YELENOSKY: Oh, I'm sorry. Seven or eight, whatever. I'm sensitive to the idea that they will get the rule, and although it doesn't say you can't do something, it doesn't say you can. I'll know that I can just -- if it's ambiguous that I can just submit the questions to the attorneys, but how will they know that?

HONORABLE TRACY CHRISTOPHER: I think we would have to modify No. (6).

HONORABLE STEPHEN YELENOSKY: Well, I think I agree -- earlier it was said it's ambiguous and that leaves discretion. I would rather know that I have the discretion and they know that they have the discretion to do it or not rather than it be ambiguous. So, you know, I -- either I win or lose, fine, but let's be clear for the trial judges who aren't here so they know whether they have to read the questions or whether instead they can give them to the attorneys.

CHAIRMAN BABCOCK: Yeah, Richard. Then Buddy.

MR. MUNZINGER: That is a weakness to the current draft of the rule, and it's a point that I think Bill Dorsaneo just said on a different subject earlier. We have some guidance or rules to the trial court that are included in the text of the instructions to the jury but are not set out to guide the trial court. For example, where in this rule do we tell the trial court you should or must have the -- solicit written questions from the jury after each live witness? That doesn't appear in the text of the rule. It appears in the instruction to the jury, but not in the text of the rule. Why do --

HONORABLE TRACY CHRISTOPHER: I agree with that one missing.

MR. MUNZINGER: -- we have a statement in

the rule that the question of whether or not the judge should read the question is guided by the Rules of Evidence and Procedures contained in the instruction to the jury, but not in the formative statement to the court that that is the rule that will govern what you do here. My point is you've covered the subject matter of the issue, but you've put it in the instructions to the jury, as distinct from a separate paragraph that would give guidance to the trial court.

CHAIRMAN BABCOCK: Buddy.

MR. LOW: Chip, there's some that think that the lawyers, if the lawyers decide a certain way, they decide it, then what would be wrong with a rule except by agreement of counsel the judge must read it? In other words, it gives rise to the lawyers if they want to agree who is going to read it; but I can tell you, you can ask the same question, two different lawyers, one is going to say "Did you actually see that," and "did you actually see it?" I mean, there are different ways of asking the question.

CHAIRMAN BABCOCK: Okay. Yeah, Hugh Rice.

MR. KELLY: If you want a war story, we had Judge Louis Dixon for years was declining in health because of Parkinsonism. In his last year and a half, nobody could understand a damn word he said. You wouldn't

want him to do it.

MR. GILSTRAP: There you go.

CHAIRMAN BABCOCK: It seems to me that we --

MR. KELLY: The lawyers had to all agree what his rulings were.

MR. LOW: I know.

CHAIRMAN BABCOCK: We're going to take a vote on how many people think it ought to be the judge asking the questions, how many people think it ought to be the lawyers asking the questions, and how many people think it ought to be the judge's discretion to do it one way or the other. Can we do a vote on that?

MR. MUNZINGER: Yeah.

CHAIRMAN BABCOCK: How many people think it ought to be the judge asking the questions?

How many people think it ought to be the lawyers asking the questions? Dissenting again.

HONORABLE TOM GRAY: Wait a minute, I think Rusty would vote for that if he was in here.

HONORABLE JANE BLAND: No, he gave me his proxy vote for -- to option.

CHAIRMAN BABCOCK: You've got to be present to win.

HONORABLE TOM GRAY: That's right, present to win.

CHAIRMAN BABCOCK: How many people think the judge ought to have discretion to do it either way?

HONORABLE TRACY CHRISTOPHER: Jane's got two hands up to vote for Rusty.

HONORABLE JANE BLAND: Yeah, the last thing he just said is when this vote goes, vote for discretion.

HONORABLE STEPHEN YELENOSKY: And I heard it.

CHAIRMAN BABCOCK: Okay. Here's the vote. 14 for the judge doing it, 1 for the lawyer asking the questions, although, Rusty, we speculate in absentia might have voted for that, and then 22 saying the judge should have discretion to do it one way or the other. So that's a good read.

Judge Christopher, should we go down through these paragraphs one by one to see if anybody has comments on them?

HONORABLE TRACY CHRISTOPHER: Sure. I think the one that I got most questions on at lunch was the limitation of clarification of the testimony. Some people thought that that was too limiting.

CHAIRMAN BABCOCK: Yeah. The sentence that says "any questions you submit should be to clarify the testimony the witness has given"?

HONORABLE TRACY CHRISTOPHER: Right.

CHAIRMAN BABCOCK: Okay. Yeah, Steve.

MR. SUSMAN: No one has answered the question why the timing of before voir dire.

HONORABLE TRACY CHRISTOPHER: Oh, I did.

CHAIRMAN BABCOCK: She accepted that.

MR. SUSMAN: Oh, she accepted that? I didn't hear you.

HONORABLE TRACY CHRISTOPHER: No, no, no. I did not.

MR. SUSMAN: See, I didn't think she accepted it.

HONORABLE TRACY CHRISTOPHER: The reason why to do that is I think it could affect the voir dire strategy as to you might want to ask people, "Are you the kind of person that likes to ask questions? Are you" -- I mean, "the kind of person that likes to take notes?" Those little facts might be useful to a lawyer in picking the jurors, so, you know, interest of full disclosure, if I'm going to allow it, I think we ought to allow it before voir dire, and the lawyers can talk about it if they want to.

MR. LOW: What if it's like his case and they didn't even think of it or agree to till after? Then they couldn't do it.

MR. SUSMAN: Can you -- Tracy, could you

word it in a way that if the lawyers ask, the court should do it?

HONORABLE TRACY CHRISTOPHER: Sure.

MR. SUSMAN: I mean, the last thing you're thinking about when you're thinking about conducting voir dire is are these jurors going to be able to ask questions, and we don't want to eliminate the possibility of doing it simply because the lawyers forgot to do it.

HONORABLE TRACY CHRISTOPHER: Okay. Yeah, we can put that in there.

CHAIRMAN BABCOCK: Do that. Okay, great. What about this issue about "to clarify"? Yeah, Ralph.

MR. DUGGINS: I have one suggestion. Not on that point, but I would suggest inserting "live" before "a witness" in that first line, and this is real picky. I would change "can" to "may" since it sounds better.

HONORABLE TRACY CHRISTOPHER: You know, I don't think jurors will understand what we mean by "a live witness."

CHAIRMAN BABCOCK: As opposed to a dead one.

HONORABLE TRACY CHRISTOPHER: As opposed to a dead one. Especially if we're reading this right at the beginning. They'll be like, "A live witness?"

HONORABLE STEPHEN YELENOSKY: "A witness who appears in person."

MR. DUGGINS: Whatever. I was just trying to address the issue earlier about that this rule should have no application to a deposition, a witness who testifies through an oral or written deposition.

HONORABLE TRACY CHRISTOPHER: I already agreed with Skip that we did skip a step, and my step would be to make step (b)(3), "At the end of each live witness, the judge will ask the jurors to pass the juror question form to the bailiff with any questions that they have for that witness." And so then the judge would know he was supposed to gather the forms at that point.

CHAIRMAN BABCOCK: Okay. Hugh Rice. Then Bill.

MR. KELLY: You know, if a witness testified by deposition, the supplemental questions could be by depositions, usually not that hard, particularly if the guy's local. If it's a doctor, you get him after hours, take him on for 15 minutes.

MR. RODRIGUEZ: No, no, no.

MR. KELLY: No?

HONORABLE STEPHEN YELENOSKY: No.

MR. KELLY: It's been done in cases I have been in.

CHAIRMAN BABCOCK: Bill.

PROFESSOR DORSANEO: I was looking at these

approved instructions, and it does appear that voir dire doesn't start until the lawyers start asking questions. That's what you mean by -- not "Thank you for being here. We are here to select a jury." It hasn't started yet.

HONORABLE TRACY CHRISTOPHER: True, I mean, I can't imagine that I would interrupt at some point and say, "Oh, by the way, we're going to let the jurors ask questions."

PROFESSOR DORSANEO: No, but you have this before voir dire, voir dire.

HONORABLE STEPHEN YELENOSKY: Voir dire. That's the Texas --

PROFESSOR DORSANEO: Well, it depends on a lot of things, but --

HONORABLE TRACY CHRISTOPHER: Well, I didn't want to say "before trial begins." I did want it to be before voir dire.

PROFESSOR DORSANEO: I just wondered whether you meant you're supposed to do this -- if you look at the approved instructions, the first thing the judge says is "Thank you for being here." Does this have to be done before that or does it -- if it's done, does it have to be done a couple of paragraphs lower? "They will ask you some questions during jury selection, which we call voir dire, but before we begin voir dire," which kind of

suggests that we haven't begun voir dire yet, we're just talking.

HONORABLE TRACY CHRISTOPHER: Well, now you're back on 226a.

PROFESSOR DORSANEO: Yeah. I want to know when in your rule does voir dire start.

HONORABLE TRACY CHRISTOPHER: When the lawyers start to ask the questions --

PROFESSOR DORSANEO: Okay.

HONORABLE TRACY CHRISTOPHER: -- is the technical legal definition of when voir dire begins and/or a juror questionnaire that exceeds the standard question mandated by the state.

CHAIRMAN BABCOCK: Richard Orsinger.

HONORABLE TRACY CHRISTOPHER: In my opinion.

MR. ORSINGER: I would like to speak more forcefully than has been so far that I don't think it should be limited to clarifying questions, and I don't think a lawyer should be able to object to a juror question because it's not clarification and instead it's an omitted topic. The point, I think, to having the jurors have more participation in the trial is to be sure that the evidence that they're hearing is the evidence that answers their questions; and if the lawyers have either consciously or unconsciously omitted to say

something that's important, I don't think that that should preclude a juror asking a question. It's compounded on page two where it says -- the form says "to clarify any confusion." So a juror probably would say, "Gosh, well, I guess if I'm not clarifying confusion, I can't ask a question," and it may be in a sense that any question a juror has is confusion, but I just think it's going to be arguments between lawyers as to whether this clarifies something or whether it goes into a new area.

CHAIRMAN BABCOCK: Frank. Sorry.

MR. ORSINGER: Also, I don't like the repeated use of the term "parties" as the ones who are reviewing the questions and making the objections. You know, when I voir dire a jury, I always tell them, "Please understand it's the attorney's professional responsibility to make objections to the evidence, whether they're sustained or not. If you won't hold it against my client," and this is written to make it look like the parties are the ones who are driving the decision on whether or not the question is asked. I think they understand the lawyers' role is to make objections, and I think we ought to use "attorneys" throughout here instead of "parties" on both of these pages.

And then lastly, the one, two, three, fourth paragraph on page one is really not a comment about the

questioning process. It's more of a comment about the role of the jurors generally and keeping their minds open and the fact that they can deliberate later. We already say that in other parts of the instruction to the jury. Maybe this is salutary to remind them that they shouldn't take sides in their questions. On the other hand, you know, you could argue that this is already covered elsewhere. I'm talking about the one that says, "Remember, you are neutral. Keep an open mind. In the privacy of the jury room you can deliberate," and I don't know if it's necessary. I don't know that it's harmful, but I don't know if it's necessary to say that in the middle of this rule.

CHAIRMAN BABCOCK: Okay. Stephen, and then Elaine.

HONORABLE STEPHEN YELENOSKY: Well, I just have a question because Richard pointed out something that hadn't occurred to me. Is this first sentence intended to change the Rules of Evidence such that there's now an objection that a juror question goes beyond clarification? Because those are two separate issues. We might want to say it's not an objection, but nonetheless we want to instruct jurors to try to keep their questions to clarification. So I think we need to resolve that.

CHAIRMAN BABCOCK: Okay. Elaine.

PROFESSOR CARLSON: Judge Christopher, my recollection on some of our subcommittee discussions were the subcommittee was fairly divided at what point the use of juror questions is disruptive of the adversarial process, and I thought that we had -- the subcommittee compromise anyway was perhaps the best beginning of the use of juror questions would be to limit it to clarification as opposed to the jurors doing the advocating and bringing in new and different topics.

HONORABLE TRACY CHRISTOPHER: I think that that is the fear with juror questions. Now, perhaps we could phrase it a little more broadly than it is, and I certainly don't expect that to be a real objection in the trial, but if you just tell them "You can ask questions," what are they going to ask questions about? You have to -- you know, we want them to ask a question that's pertinent to what the witness just testified about. We don't want them to ask, "Well, are you asking for attorney's fees," when, you know, it's four witnesses down about attorney's fees, or --

HONORABLE STEPHEN YELENOSKY: "How much money do you make?"

HONORABLE TRACY CHRISTOPHER: You know, "Where is the wife?" You know, that's what I'm afraid if we don't limit what kind of a question they can ask, that

we'll just get sort of these off-the-wall questions that don't really pertain to what the witness testified about. Now, we can work with it, but that was the idea.

CHAIRMAN BABCOCK: Lamont, then Judge Sullivan.

MR. JEFFERSON: I thought Mike Hatchell's comments earlier about what's going on in Florida was instructive, and I think that that's kind of what we would expect to see or I would expect to see in Texas, is that if a jury gets that -- I mean, I think we're giving too much credit to juries to ask the right questions. I don't think a jury is going to come up with the -- you know, the turning point question that's going to make the case. The value of allowing them to ask questions is two-fold. One, it allows them to participate in the process, and then it gives the lawyers an idea of whether they're connecting with the jury. So it's most important the jury gets to ask any question that they want to ask so that the lawyers have an idea of whether the evidence that they're spending all their time presenting is making an impact. It's not so much that we're going to get, you know, some great epiphany from a juror's question. The lawyers do a pretty good job of asking questions. The issue is whether we can tell from the jury's communication back that there is actually a connection.

CHAIRMAN BABCOCK: Buddy.

MR. LOW: They could ask, "Did anybody interview so-and-so? Is he going to testify?" It could be a number of questions. "Did anybody look at the weather reports?" I mean, they could just ask unlimited. It should be directed to a question that they feel that juror has information -- that witness has information on.

HONORABLE TRACY CHRISTOPHER: Right.

CHAIRMAN BABCOCK: Eduardo.

MR. RODRIGUEZ: Well, I mean, that's why the judge looks at the questions and decides whether they're asked or not. I mean, if they ask something about how much he makes, he's not going to ask that question. I mean, you know, I've tried in South Texas cases with jury questions; and, you know, the jurors' questions always pertain to what the witness had just testified about. They didn't go off in opposite directions, but some of them were not appropriate and the judge didn't ask them. I mean, that's why you have judges there to look at the questions that are presented, and he decides whether they should be asked or not.

CHAIRMAN BABCOCK: What if we changed "to clarify" to "relevant to"? Would that help or hurt?

HONORABLE TRACY CHRISTOPHER: I'm not sure "relevant to" is a really great word for the jury.

CHAIRMAN BABCOCK: Okay. Judge Sullivan.

HONORABLE KENT SULLIVAN: Just one thought that I had as we discussed this is that when you're talking about questions of relevance and issues of juror empowerment generally and the possibility of opening up any subject matter to the jury for questions, one problem we have in our current process is that we do not empower jurors with any information about what the ultimate issues necessarily are. In other words, the judge really hasn't told them what questions they are likely to have to ultimately answer. In some cases it may be obvious, but in other cases, of course, it may be absolutely not obvious at all, and since we give no clue as to what the jury charge is likely to be, it becomes potentially problematic in this area to the extent that we don't have any subject matter specific information to jurors as part of this or case specific information to jurors as part of this process.

CHAIRMAN BABCOCK: Well, for the people that don't like "to clarify" what would be a better word or words? Bill?

PROFESSOR DORSANEO: I don't like "to clarify" because that just does suggest that "What did he mean when he said that?"

CHAIRMAN BABCOCK: Right.

PROFESSOR DORSANEO: And that's obviously too much of a limitation.

CHAIRMAN BABCOCK: You think it's too limiting.

PROFESSOR DORSANEO: Yeah. And I don't like "relevant" because it's too --

CHAIRMAN BABCOCK: Broad?

PROFESSOR DORSANEO: Well, it's too amorphous really.

HONORABLE TRACY CHRISTOPHER: How about "should be about the testimony"?

PROFESSOR DORSANEO: I would say "concern the matters about which the witness testified."

HONORABLE TRACY CHRISTOPHER: Just "about." Just "about."

PROFESSOR DORSANEO: Yeah, "about the matters."

HONORABLE TRACY CHRISTOPHER: "should be about the testimony the witness has given."

MR. LOW: Why do you have "about"? Just "concerning the matters."

MR. MUNZINGER: How is that functionally different from "clarify"?

PROFESSOR DORSANEO: I like "concern" better. "Concern the matters about which the witness

testified."

CHAIRMAN BABCOCK: Say that again.

MR. MUNZINGER: How is that functionally different from asking --

MR. BOYD: Still limited to the scope.

MR. MUNZINGER: -- "clarify testimony of the witness"?

PROFESSOR DORSANEO: Well, it's a subtle difference, but I think if I'm told I'm supposed to get clarification, I'm really thinking like "Did you mean this or did you mean that" rather than, you know, "What's a plat?"

CHAIRMAN BABCOCK: Hugh Rice.

MR. KELLY: Would "related to" be any better?

MR. RODRIGUEZ: You know, we're thinking like lawyers instead of like jurors. I mean, this is for jurors. I mean, "clarify" and "related to" may be some language that some of our jurors unfortunately are not -- don't know what they mean.

CHAIRMAN BABCOCK: Is there anybody here that can speak jury?

MR. RODRIGUEZ: "About what he testified" is closer to what they're thinking.

HONORABLE TRACY CHRISTOPHER: It's "about."

MR. KELLY: How about "something to do with"?

CHAIRMAN BABCOCK: Jeff, and then Steve.

MR. BOYD: It seems like we either have to limit the discussion to the scope of the direct and cross, which is what "clarify" and "concern" and "related to the testimony" do, or you limit it to information that's relevant to the issues in the case, which is what the objections are for, and I don't -- I'll weigh in with those who say you shouldn't limit it to the scope of direct and cross. We don't do that in Texas for lawyers' questions, and I don't know why the judge can't rule on objections if the question is not relevant to the issues in the case, and so I would delete the sentence completely, and if the jury asks a question about, "Well, what does your wife do a for a living, I think I know her?" "Objection, that's irrelevant," and the judge strikes the question.

CHAIRMAN BABCOCK: Steve.

MR. SUSMAN: I agree, too, but I think the solution is to eliminate that sentence, just "any questions you have for that witness" and then the judge has -- and then the lawyers, working with the lawyers, decides whether it's a proper question or not. It may not be a question that clarifies the testimony. It may be the

witness didn't testify to something that the juror is curious about. "Why didn't this something happened?" Okay. "Why didn't someone make a call" or, you know, "Why didn't you complain to so-and-so?"

CHAIRMAN BABCOCK: Hayes.

MR. FULLER: I realize we're searching for the truth and, you know, woe be it that everybody has won a trial because somebody on the other side forgot to do something, but having survived someone's direct case and then having them fail to prove each and every element of their claim, are we now going to allow the juror to come in and save the other side?

CHAIRMAN BABCOCK: That was sort of Judge Lawrence's point, that the parties frequently forget to put on any evidence of damages.

MR. FULLER: I think if you limit it to the scope, you know, you've at least got a slim chance that they're not going to be able to go beyond the scope, and if they fail to do it, it may not make any difference, but that is a bit of a concern.

CHAIRMAN BABCOCK: Tracy, how do you feel about the sentence going away, the clarifying sentence?

HONORABLE TRACY CHRISTOPHER: I would prefer to leave the sentence in and change "to clarify" to the word "about."

CHAIRMAN BABCOCK: And you deliberately want the questions --

HONORABLE TRACY CHRISTOPHER: Limited.

CHAIRMAN BABCOCK: -- limited to clarification.

HONORABLE TRACY CHRISTOPHER: I do.

CHAIRMAN BABCOCK: Okay. That's a pretty good thing to vote on, isn't it? Leave the sentence in, take it out. Okay. Everybody that wants to leave the sentence in, raise your hand.

Everybody that wants to take it out, raise your hand. Okay. By a vote of 20 to 10, leave it in.

HONORABLE STEPHEN YELENOSKY: And does that answer the question as to whether there's now a scope objection?

CHAIRMAN BABCOCK: That's Tracy's intent, yeah.

HONORABLE STEPHEN YELENOSKY: Well, originally it wasn't. She said it wasn't her intent to add an objection.

CHAIRMAN BABCOCK: She's been persuaded.

HONORABLE STEPHEN YELENOSKY: So you think there should be an objection that it's beyond the scope?

HONORABLE TRACY CHRISTOPHER: I mean, I think it's one of the things that we would talk about at

the bench. I'm not saying that -- and which is why I gave the trial judge the discretion not to ask the question at all.

CHAIRMAN BABCOCK: Right.

HONORABLE TRACY CHRISTOPHER: Which normally, you know, I don't have the discretion to say to you, "Hey, don't ask that question."

HONORABLE STEPHEN YELENOSKY: But I think the trial judges need some guidance on that, because, you know, whether they get -- I mean, the rules right now say that, you know, direct us on scope, so why wouldn't this rule tell us whether juror questions are limited to scope or not?

CHAIRMAN BABCOCK: Bill.

PROFESSOR DORSANEO: Is this kind of what you're thinking about? Let's say it's a contract case, consequential damages are claimed, and the juror question is, "Well, was that loss within the contemplation of the parties at the time the contract was made?"

HONORABLE STEPHEN YELENOSKY: Well, I wasn't thinking --

PROFESSOR DORSANEO: I mean, what would you do with that?

MR. ORSINGER: That means you've got a lawyer on the jury.

HONORABLE STEPHEN YELENOSKY: You might. I wasn't thinking of that precise one, no.

PROFESSOR DORSANEO: Well, there are a lot of others that could be like that.

HONORABLE STEPHEN YELENOSKY: Right. Sure.

PROFESSOR DORSANEO: Personally I don't think lawyers should have enough of a stake in winning or losing for that question to be kept out, since it's very, you know, pertinent under the law.

HONORABLE TRACY CHRISTOPHER: Well --

PROFESSOR DORSANEO: But I could see other times in this committee people have thought this should be more like a game between us rather than a game that concerns itself with whether the right questions are asked.

HONORABLE TRACY CHRISTOPHER: I don't think that it would become a legal objection. The way I envisioned it, suppose they did ask a question about damages that had not been brought up yet. All right. Well, that's not clarifying the witness' testimony. That's something new that they forgot to ask about. Well, I wouldn't prevent the asking of that question. I might say, "Oh, Mr. Plaintiff's lawyer, looks like you need to ask this question yourself," okay, because we do have the right in Texas to freely recall our witnesses any time we

want to, so even though I had passed the plaintiff and had failed to ask him about future pain, I could, you know, let him sit down and call him right back up and ask him about that.

So my idea in having that language in the instruction is to just sort of try to limit kind of the off-the-wall questions that you would get from the jury about other witness' testimony or other things that are not really pertinent to that witness, and that's where I kind of went down to the idea of, well, you know, that's a question that the lawyer ought to be asking, not the judge, if they've forgotten some element of damages or something. So I kind of like the idea to go back to that discretionary.

CHAIRMAN BABCOCK: Bill.

PROFESSOR DORSANEO: Mike, those things from Florida that were wacky, were they questions that were asked or questions that were proposed and not asked?

MR. HATCHELL: They were so wacky that the judge wouldn't put them on the record.

PROFESSOR DORSANEO: How do you know they were so wacky then if you don't know what they were?

MR. HATCHELL: You could tell from the conversations between the lawyers and the judge, like "Well, you're not going there." Well, most of the time, I

mean, the judge would show it to the lawyers, and they could not even figure out what the question was.

CHAIRMAN BABCOCK: Okay. Let's focus on paragraph (2). Does anybody have any comments about paragraph (2)? Judge Christopher.

HONORABLE TRACY CHRISTOPHER: If we just change that last sentence, "do not assume it is important" to say "do not assume it is important that the question was not asked," even though that would be passive, but that way it would cover the idea of who is asking the actual question.

CHAIRMAN BABCOCK: Gotcha. Any other comments? Bill.

PROFESSOR DORSANEO: Do you want to make the second or the third sentence passive, too, or do you think it's good to say, "I will"? Rather than "the same rules will apply to your questions that are applied to the parties' questions."

HONORABLE TRACY CHRISTOPHER: Either way.

CHAIRMAN BABCOCK: Jeff.

MR. BOYD: Is anyone else bothered by the colloquialism "do not take it personally"? Maybe "do not assume" --

CHAIRMAN BABCOCK: "Do not take offense."

MR. BOYD: "We're not being critical of your

question." I mean, "Do not take it personally" sounds a little colloquial for a judge.

HONORABLE TRACY CHRISTOPHER: We're trying to be colloquial. We're trying to be friendly. We're trying to be understood.

CHAIRMAN BABCOCK: "Do not take offense"?

PROFESSOR DORSANEO: They won't know -- I think "do not take it personally" is something somebody can understand. To not take offense, like --

CHAIRMAN BABCOCK: Yeah. Okay. Roger.

MR. HUGHES: Well, I guess after you said, "Some questions may be changed or rephrased and others may not be asked at all," it sounds rather apologetic to say, "Please don't get offended." It sounds to me like -- I'm just not in favor of judges apologizing to jurors or to lawyers for doing their job or making a ruling. I mean, bluntly, I would just take the whole sentence out, that sentence out. You've told them that their questions may need to be changed or rephrased. At that point the judge has done the job.

HONORABLE EVA GUZMAN: I did look at the rules in other jurisdictions addressing juror questions, and most of them did contain a sentence similar to that, and I think and studies have shown that the jurors may assume their question was -- that there was something

wrong with it, and maybe one of the parties or the other decided that there was something wrong with the question. So most of the jurisdictions do have that sentence.

MR. HUGHES: Okay.

CHAIRMAN BABCOCK: Okay. Any other comments about this paragraph? Let's go to paragraph three.

PROFESSOR DORSANEO: Chip, maybe Tracy said something, but this end part, why do you say "and do not assume it is important that I decided not to ask your question"? What does that --

PROFESSOR DORSANEO: Judge Christopher says to change that "and do not assume it is important that the question was not asked."

PROFESSOR DORSANEO: Okay. I think the change is good, but why is -- why would they think it was important that the question -- do not assume that the question --

HONORABLE TRACY CHRISTOPHER: Well, suppose the jury said, "How much insurance does the defendant have," and we don't ask that question. Well, we don't want them thinking it's important that I didn't ask the question. We want them to just sort of ignore the fact that they asked that question and we're not asking it.

PROFESSOR DORSANEO: That looks like, sounds like, a lawyer's mind at work to me.

HONORABLE TRACY CHRISTOPHER: Maybe, but that's what we're worried about, because they will ask questions like that.

HONORABLE STEPHEN YELENOSKY: Yeah, there's a lot of "pay no attention to the elephant in the room." I mean, I think we have to do that here.

CHAIRMAN BABCOCK: Okay. Third paragraph. Any comments? Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: "You must treat your questions and their answers the same way you treat any other testimony. Some questions will be asked, but not all," so it's not testimony until the question gets asked and answered, so it needs to refer to "you must treat any questions submitted and asked and answers to those," something like that, because they can submit a question, but they're not supposed to think anything of it unless it gets asked. You must -- yeah, and we just need to focus on the answers probably. "You must treat answers to any questions asked," something like that.

CHAIRMAN BABCOCK: Got it. Any other comments on this paragraph? All right. Paragraph four.

MR. GILSTRAP: Richard's comment about this I thought was a good one. Probably doesn't belong here.

CHAIRMAN BABCOCK: Repeat the comment.

HONORABLE TRACY CHRISTOPHER: That it's

duplicative of what we say in other --

MR. ORSINGER: It's not specific to the question answering process, and it is duplicative, although it's certainly not harmful to remind them in this context. On the other hand, is it important to remind them that they're going to deliberate at the end of the trial and they should keep their minds open.

CHAIRMAN BABCOCK: Justice Gaultney.

HONORABLE DAVID GAULTNEY: I actually think this paragraph is important, because what we're doing with this question answering, is taking the jury out of the traditional role and putting them in a role that has the danger of entering the area of advocacy, and their role models in terms of asking questions are the lawyers in the case or the advocates, so if they try to ask questions like an advocate, it's not exactly I don't think what we're trying to --

CHAIRMAN BABCOCK: Bill.

PROFESSOR DORSANEO: Well, I think this -- up until the point the jurors start deliberations, they're not -- they're neutral fact-finders and not advocates, but I'm reminded of Scotty Baldwin's book about jury selection and the deliberative process where he says sensibly what you're trying to do is get people on that jury that are going to make your arguments during the deliberations,

that that's what you're doing, and I think that is what people are doing. I have a little trouble with this first sentence being stated or being stated so broadly.

CHAIRMAN BABCOCK: Okay. Other comments about paragraph four?

Paragraph five. Any comments about paragraph five? Bill.

PROFESSOR DORSANEO: Why do we care where they get the question? I mean, people -- you know, I'm sitting here next to Carl, saying, "Carl, are you going to ask that question? It's a good question." So then I'll ask it. It's Carl's question.

HONORABLE STEPHEN YELENOSKY: Well, then that violates the rule against talking --

HONORABLE TRACY CHRISTOPHER: Because they're talking.

HONORABLE STEPHEN YELENOSKY: -- to one another about the case. It violates that rule. I mean, I'm not sure that we should say it because it implies that you could be talking about the questions, which we say elsewhere you can't be.

PROFESSOR DORSANEO: I'd take it out.

CHAIRMAN BABCOCK: Richard Orsinger.

MR. ORSINGER: I don't like to do this, but I disagree with Bill. I think that it's going to be

natural over the lunch for two people to say, "I'd like to ask -- what do you think about this question."

"Well, you know, why don't you change it this way?" I mean, it would just be second nature to me that jurors might not think they were violating any rule by discussing not the testimony, mind you, but a question that hasn't been asked yet.

PROFESSOR DORSANEO: So you agree with me. You don't disagree with me.

MR. ORSINGER: Well, maybe I misunderstood you, which I don't like that either.

PROFESSOR DORSANEO: I don't like the fact that you have so much more hair than I have.

MR. ORSINGER: Would you like some of mine?

CHAIRMAN BABCOCK: It's not even 3:00 o'clock yet.

MR. LOW: Richard, how can you discuss questions without discussing the testimony?

HONORABLE STEPHEN YELENOSKY: Right.

MR. LOW: How can you do that?

MR. ORSINGER: Well, you could pass your question to somebody and say, "Do you think this is a good question?" or "Would you make any edits to this question?"

MR. LOW: That has to relate to the testimony. It's about or related to the testimony. How

can you discuss that?

MR. ORSINGER: You better go back and read the general instruction. I don't think it --

MR. LOW: Oh, I read everything.

CHAIRMAN BABCOCK: Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: Well, I mean, we're very clear about note-taking, you can't show your notes to anyone else, and what I tell jurors there is if you're sharing your notes with somebody you're discussing the case through written form, and that violates that principle I gave you earlier. Same thing is true here. Maybe we need to explain it in a different way, but surely if they're discussing questions that violates that prohibition, and if that's second nature then we need to work harder in telling them not to do it.

CHAIRMAN BABCOCK: Okay. Any more comments about paragraph five? Okay. Let's go to the juror question form.

PROFESSOR DORSANEO: I have an overall comment that this is too long.

CHAIRMAN BABCOCK: You're talking about --

PROFESSOR DORSANEO: One, two, three, four, five is too long, and it should be shortened to the extent it could be shortened.

CHAIRMAN BABCOCK: In plain language.

PROFESSOR DORSANEO: I don't necessarily speak plain language, but the concept, I like the concept.

CHAIRMAN BABCOCK: I was being facetious. Okay. The juror question form, paragraph one, any comments?

We previously talked about the "clarify any confusion," and Orsinger said that that was inconsistent with "to clarify the testimony." We had a vote about "to clarify the testimony" and decided to leave it in. Is there a problem with it here in this part? Orsinger.

MR. ORSINGER: Yeah, I was going to make a different point.

CHAIRMAN BABCOCK: Well, make this point. It was yours.

MR. ORSINGER: Okay. Again, I think this is even more limiting than "clarify." It may be that the reason you want to clarify is not because you're confused but because you think other people might be confused. Maybe we're over-intellectualizing what the jury's process might be, but frankly, I think if anybody on the jury has a question they should feel free to ask it and let somebody else decide whether it's relevant or not or whether it clarifies or doesn't clarify or whether it reflects confusion or maybe a more accurate understanding than others might have. But you say that's already been

voted and lost, so it's just a revote.

CHAIRMAN BABCOCK: Well, no, I don't think it has. I think the first vote was on the language about should be to clarify the testimony and now we're -- we've got language that says "clarify confusion." So --

MR. ORSINGER: I thought there was a compromise that Tracy was going to say about the testimony.

HONORABLE TRACY CHRISTOPHER: I'm okay with "about."

MR. ORSINGER: Yeah, I like "about" too because it's not as confining. I would hate for somebody to be afraid to ask a legitimate question because they were not sure whether it qualified as an acceptable question or not.

CHAIRMAN BABCOCK: Okay.

MR. ORSINGER: I'd rather the judge decide if the question is acceptable.

CHAIRMAN BABCOCK: Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: I was just going to suggest, I mean, whatever we did in the first section should be verbatim in the juror's question form. Why complicate it by saying it a different way after we worked on crafting exactly what we want to say? It's the same instruction.

CHAIRMAN BABCOCK: Yeah. Okay. Any more comments on this paragraph?

MR. ORSINGER: I've got one.

CHAIRMAN BABCOCK: Yes, sir.

MR. ORSINGER: I made it before, before I realized we were going to do the paragraphs individually, but, again, I think where we say that the parties are doing things like making objections and whatnot, I wish we would put the word "attorneys" in there so that the jury doesn't -- if they're going to be offended they just think it's the lawyers being lawyers and not the parties being bad.

HONORABLE TRACY CHRISTOPHER: Well, we started out with "attorneys" but then we had to put in "and anyone," you know, "representing themselves."

MR. ORSINGER: Well, why don't you let the judge -- instead of reading that to every jury where 99.999 percent are going to have attorneys, except in Tom's --

HONORABLE STEPHEN YELENOSKY: That's dropping.

MR. ORSINGER: -- court system, let's just let the judge kind of wing that on the fly.

THE WITNESS: We could do "attorneys," brackets, "parties."

MR. ORSINGER: I'd like that better.

HONORABLE TRACY CHRISTOPHER: That's fine.

PROFESSOR DORSANEO: Just make -- don't hide the actor, you know. "After the questions have been asked," "after each witness has been examined," or "after questions have been asked to each witness."

MR. ORSINGER: I mean, do we -- why are we telling them there is an objection process anyway?

HONORABLE TRACY CHRISTOPHER: Well, they're going to see it. They're either going to come up to the bench and see it or we're going to send them out for it, and they're going to know that they get sent out when there are objections. And that way it's not hidden from them that that's what we're doing.

CHAIRMAN BABCOCK: Okay. That was a comment about the second paragraph. Any more comments about paragraphs one or two?

MR. HAMILTON: I don't think we need the "at all" at the end of that last sentence.

CHAIRMAN BABCOCK: And why not?

MR. HAMILTON: Because they may not be asked, period.

CHAIRMAN BABCOCK: Superfluous.

MR. HAMILTON: What does it add?

CHAIRMAN BABCOCK: Judge Christopher.

HONORABLE TRACY CHRISTOPHER: One thing that we did discuss in the subcommittee, which I thought was a little cumbersome, but then it turned out that Judge Miller did it, and I know Steve was just asking me about it and he really liked it, is that the judge passed out 12 forms, so every juror had a form, and even if they didn't have a question, they sent back the blank form to the bailiff so that the anonymity of the question writer is preserved even more versus just one person writing and, you know, passing the question down over eight hands and making it clear who had the one question for the witness. I thought that was sort of unnecessary, but --

MR. SUSMAN: No, it's --

HONORABLE TRACY CHRISTOPHER: -- he liked it and thought it was a good way to handle it, so I thought we might discuss that procedure, and if we are going to have that procedure, we would probably tell the jury that.

CHAIRMAN BABCOCK: Steve.

MR. SUSMAN: And really, it also kind of takes -- those who don't want to question, ask questions, aren't embarrassed by never turning anything in. I think it lets them off the hook easy. I mean, there were many times that the judge got twelve pieces of paper and there was no questions. He would go through them and say, "No questions." I think it's good to ask them each to turn in

their form after every witness. If there is a question then we have a question. Otherwise it preserves anonymity completely.

HONORABLE DAVID PEEPLES: Steve, can you not see who's writing and who's not?

HONORABLE STEPHEN YELENOSKY: They could be taking notes.

MR. SUSMAN: You really couldn't, because you don't know whether they're taking notes. You know, usually they're writing them -- I mean, I guess if they waited until the end to write the question, but some of them write the questions as they go. You can't see whether they're taking notes or whether they're writing on the question form.

CHAIRMAN BABCOCK: That's assuming they get to take notes.

MR. SUSMAN: Right.

MR. LOW: Chip, would they be given more than one form if they have several questions or how do you handle somebody that might have --

CHAIRMAN BABCOCK: You get a form for every witness, right?

MR. LOW: I know, but what if they've got six or seven questions of that witness?

MR. GILSTRAP: They only get one.

MR. LOW: Can you only ask one question?

HONORABLE TRACY CHRISTOPHER: They just write them all on the same piece of paper if they had more than one question.

MR. LOW: Well, I've seen some pretty long questions.

HONORABLE TRACY CHRISTOPHER: But anyway, that was something that is not in here, if we wanted to institute that procedure, and it might be something that might need to be spelled out because it might not be intuitive to the judges across the state that that would be a good thing to do.

CHAIRMAN BABCOCK: Strikes me that would be a good thing to do, but how does everybody else feel? Richard Orsinger.

MR. ORSINGER: I don't think it's going to preserve anonymity. Anybody that's sitting behind the juror or next to the juror is going to see if they're filling out a question, and I'll -- if I can't see whether they're filling out questions, I'm going to be having someone sit where they can see who's filling out the questions. I don't think it's going to be anonymous in practice, but I like the idea of having them turned in because I think it encourages participation. If you have to call attention to yourself if you're the only one and

you are repeatedly asking questions, I think people might feel self-conscious that they're slowing the trial down or people are rolling their eyes when you get another question; and if you can just slip it in a stack and pass it down to the end and nobody knows for sure whether you're the guy hanging up the trial, I think it would encourage jurors to ask questions; and I think this is a good thing to encourage.

CHAIRMAN BABCOCK: Bill.

PROFESSOR DORSANEO: Well, I'm going back to that No. 5 and then the first sentence in the next deal that, frankly, I would delete both of them, but if you like the idea of saying "This is because my" -- "in my overall instruction that you must not discuss the case among yourselves," if you like reinforcing that and not just treating that as something that's, you know, merely aspirational, which, I think it might be, why don't you say "with anyone else"? And the same thing, "and not something you got from," you know, "another person." You know, personally I think you can tell people not to discuss the case with their fellow jurors or with anyone else until you turn blue, and that's like telling, you know, rocks to fly. That's not going to happen. Maybe I'm just a cynic, but --

HONORABLE SARAH DUNCAN: I think you have

children.

MR. SCHENKKAN: You're clearly not a superhero.

PROFESSOR DORSANEO: Well, I knew that.

MR. SCHENKKAN: Or at least you don't have that power to make rocks fly.

CHAIRMAN BABCOCK: Okay. All right. We need to get back to Tracy's point about having a procedure for turning in each page, but any comments on paragraph three of the juror question form?

MR. LOW: Paragraph three, I thought had already been raised the question that you may treat your questions --

HONORABLE TRACY CHRISTOPHER: Right.

HONORABLE STEPHEN YELENOSKY: Right, and that should --

HONORABLE TRACY CHRISTOPHER: Make that same thing.

CHAIRMAN BABCOCK: Make that same change. Okay.

MR. LOW: All right.

CHAIRMAN BABCOCK: Now, what about a procedure for having each juror hand in this form, whether they've got a question or not? I'm sorry, Tom. I missed you.

MR. RINEY: It was related to that issue.

CHAIRMAN BABCOCK: Okay.

MR. RINEY: I agree that it may not be intuitive if you don't have everybody turn one in that it somehow destroys anonymity, but surely there is some way to communicate that as a potential problem to the trial judges without giving out a specific instruction on how to pass out pieces of paper and take them up. That depends on the geographic layout of the courtroom, how specific judges use bailiffs, and I think we ought not to try to go too far in that.

CHAIRMAN BABCOCK: Okay. Steve.

MR. SUSMAN: Again, I mean, I think it's -- I mean, I think it's helpful to a trial judge to know this trick. Actually, it wouldn't have been readily apparent to me to do it in this way to preserve anonymity, you know, pass any questions you have in, and we would have sat there watching who it was and knowing who was our jurors and who was a bad juror and who was a good juror for us, but somehow the judge -- I don't know whether Judge Miller got it from you, Tracy, or how he got that idea, but he came up with it, and I think it was a brilliant stroke to come up with it, and I think it's a great procedure. How do you get them -- how do you suggest it without putting it in a rule?

HONORABLE DAVID EVANS: You've got judicial conferences.

CHAIRMAN BABCOCK: And only people in this room are going to know that trick.

MR. SUSMAN: Right.

HONORABLE STEPHEN YELENOSKY: Some judges are going to send the jurors out, and what they prefer to do there is as the jurors go into the jury room the bailiff gets the questions that are there, rather than, you know, keeping the jury in the jury room, so there are different ways that anonymity might be preserved, and it is kind of micromanaging.

CHAIRMAN BABCOCK: Okay. What's the consensus, or do we have a consensus about whether Tracy should try to write something on that or not? Judge Evans, how do you feel, the superstar judge that you are?

HONORABLE DAVID EVANS: I think that when this rule comes out it will be covered redundantly in education process and discussed, and judges will come forward with ideas, and anonymity of jurors on questions will be paramount. If anything, it just would be in a comment perhaps from the Court that would be designed to preserve anonymity of the jurors and then leave it to us on how to hand out papers and collect them. Otherwise we will -- that would be my suggestion.

CHAIRMAN BABCOCK: Yeah, Bill.

PROFESSOR DORSANEO: I assume we're going on to something else. Are we going to --

CHAIRMAN BABCOCK: Well, let's get closure on this.

PROFESSOR DORSANEO: There are five lines or six lines here on the page. Are you going to -- like the Bar exam you have to answer in five lines? Okay. Even though you might have --

HONORABLE TRACY CHRISTOPHER: When I put it on a piece of paper I will fill up the whole piece of paper, but I didn't want to do that for purposes of the draft here. I don't know how many lines that actually comes out to.

PROFESSOR DORSANEO: You're not telling them that if they need more -- you know, more space to --

HONORABLE TRACY CHRISTOPHER: Well, that's kind of one of the things where -- I mean, in my jury box we've got a little rail in front of them where they can put their notes, and I anticipate a bunch of these forms are just going to be sitting there, for them to pick up and use if they want to, but that's the sort of thing where different courtrooms are going to have different setups, some judges are going to say, "These forms are going to be in the jury room," you know, "pick up as many

as you want." That's the kind of micromanaging that I didn't want to get us into.

PROFESSOR DORSANEO: You don't want to restrict the amount that you get from a juror?

HONORABLE TRACY CHRISTOPHER: No. I mean, that wasn't the plan. It was just --

CHAIRMAN BABCOCK: If these jurors are empowered, they'll probably flip it over and write on the back if they need to. Okay. How many people think that Judge Christopher ought to write some language micromanaging the passing out of paper?

HONORABLE STEPHEN YELENOSKY: See, it's how you ask the question.

HONORABLE TRACY CHRISTOPHER: Chip's in favor of this one, too.

CHAIRMAN BABCOCK: How many people are in favor of Judge Christopher writing some language about every juror ought to pass in a piece of paper? Everybody in favor of that, raise your hand.

PROFESSOR DORSANEO: I'm in favor.

CHAIRMAN BABCOCK: Okay. Everybody against?

There were 4 in favor and 24 against, and Carl has got a comment post-vote

MR. HAMILTON: Well, I have an alternative. Why can't we just put a sentence in there that instructs

the judge to use whatever procedure he wants to to ensure the anonymity of the question and let him do it however he wants to?

CHAIRMAN BABCOCK: Is there not something already in there that says it's supposed to be anonymous?

MR. BOYD: The statute says that.

CHAIRMAN BABCOCK: Huh?

MR. BOYD: The statute, 445.

HONORABLE TRACY CHRISTOPHER: We do tell them not to put their name on the form, but other than that we don't say "try to make it as anonymous as possible."

PROFESSOR DORSANEO: Watch out for Orsinger's agent.

CHAIRMAN BABCOCK: Yeah, right. Steve.

MR. SUSMAN: There should be something in the rule --

THE REPORTER: Whoa.

CHAIRMAN BABCOCK: About anonymity?

MR. SUSMAN: -- that the judge should do it in a manner that ensures jurors' anonymity or something like that.

HONORABLE STEPHEN YELENOSKY: We're not going to create some appellate issue, are we, or satellite litigation about whether the question was truly anonymous

or somebody figured out who it was? Is there some error there?

MR. WATSON: I certainly hope so.

CHAIRMAN BABCOCK: Watson's in favor of that, actually.

HONORABLE STEPHEN YELENOSKY: Yeah. I mean, I hope not. I hope we're just saying aspirationally we should try to make it anonymous.

MR. SUSMAN: Aspirationally.

HONORABLE TRACY CHRISTOPHER: Well, we'll come up with a comment to that effect.

CHAIRMAN BABCOCK: Okay. We'll do something. Let's take subparagraph (3).

HONORABLE DAVID EVANS: Chip, did we change "clarify" to "about" in both places?

HONORABLE TRACY CHRISTOPHER: Yes.

CHAIRMAN BABCOCK: Yeah. I think, didn't we, Judge Christopher?

HONORABLE TRACY CHRISTOPHER: Yes, I said "about."

HONORABLE DAVID EVANS: And removed "confusion"?

HONORABLE TRACY CHRISTOPHER: Yes.

CHAIRMAN BABCOCK: Subparagraph (3).

HONORABLE TRACY CHRISTOPHER: Okay.

Actually, I was adding a new (3) just to indicate the issue that's kind of percolated, percolated, to say, "At the end of each live witness the judge will ask the jurors to pass the form to the bailiff," to indicate that it is limited to live witnesses, and that's an instruction to the trial judges, and we all know what that means.

CHAIRMAN BABCOCK: All right. What about subparagraph (3)? It's got some parentheticals.

HONORABLE TRACY CHRISTOPHER: Okay. Yeah. The paragraph (3) as written, which will become paragraph (4), we had a question about whether the witness should be able to hear our discussion about the questions; and right now if something happens at the bench, if the -- sometimes the witness hears what's going on and sometimes the witness doesn't; and I just -- we wrote this rule in a way to allow it to be a bench conference, if it's going to be quick and short when the judge looks at the question versus something that's going to require the jury to leave the room to go over these questions, so I think Kent was most worried about this, and I wasn't.

HONORABLE KENT SULLIVAN: Actually, though, I think we're exactly on the same page in terms of results. I mean, we both think that the judge has got to have discretion to make whatever adjustments are necessary under the circumstances. I just thought that because this

is a completely new process that it's useful to try to describe the boundaries of discretion, and I mean, it kind of goes back to what we were talking about a moment ago.

This bill, for example, talks about "juror questions must be submitted anonymously." You know, what does that mean, and does that force the judge's hand? My intent here was just to say if you say the judge has the discretion to do X, Y, and Z, you ought to let them know -- ought to let everybody know. I thought it would particularly help the lawyers here. If some lawyer felt it truly affected the process for the witness to be up there listening to some extended discussion, it's helpful to tell everybody that that's within the judge's discretion to remove the jury and remove the witness if it was appropriate.

CHAIRMAN BABCOCK: So subparagraph (3) would have both sentences in it?

HONORABLE STEPHEN YELENOSKY: How is that different, though, from any other question that may be debated without the jury in front of a witness that's not suggested by the jurors? I mean, you know, we use discretion on that now as well. I mean, there are lots of times the witness is sitting there, the jury is out, and the lawyers are arguing about the question. So why is this a new twist?

CHAIRMAN BABCOCK: Well, the answer is because of the case, right?

HONORABLE STEPHEN YELENOSKY: Because what?

CHAIRMAN BABCOCK: Because of the case that's cited on page three.

HONORABLE STEPHEN YELENOSKY: Well, whatever the case says, I assume it's not particular to questions that come from jurors is my point, so if it's a problem, we wouldn't fix it here. I mean, we need to fix it --

CHAIRMAN BABCOCK: Well, my question, Judge Christopher, was your subparagraph (3) here, the bracketed sentence is not an alternative language to the first sentence. It's something that would be in addition.

HONORABLE TRACY CHRISTOPHER: Yeah, it would be in addition. I just didn't think it was necessary, but it's in addition.

CHAIRMAN BABCOCK: All right. Buddy.

MR. LOW: But that's why we went away from speaking objections in deposition. You know, you can object, and say, "He's already told you such-and-such" and so forth, and we get away from that, and the lawyer can kind of inform the witness what his answer ought to be, and the judge should have discretion of removing the witness if he wants to so the lawyer can't tell him how to answer.

HONORABLE STEPHEN YELENOSKY: Well, and I'm wrong if this case is specific to juror questions needing more safeguard for witnesses than any other questions. I haven't read the case, but I don't understand why it would matter whether the witness hears a juror questions or debate about it as opposed to a lawyer question and debate about it, but so I'm wrong if the case says they're different.

HONORABLE TRACY CHRISTOPHER: Well, the case -- neither case discusses it, and I really considered it dicta, personally, looking at it, but --

CHAIRMAN BABCOCK: But Justice Sullivan did not, so --

HONORABLE STEPHEN YELENOSKY: That's usually what I think when I don't agree.

HONORABLE TRACY CHRISTOPHER: Right. Exactly.

CHAIRMAN BABCOCK: Okay. Is the consensus to leave both sentences in or just have the first sentence and delete the second? Everybody that thinks we ought to have both sentences, raise your hand.

Everybody that thinks that we should delete the second sentence, raise your hand. A close vote, but 12 people say both sentences, 11 say first sentence is sufficient, so the Court can deal with that, the Chair not

voting.

PROFESSOR DORSANEO: I don't understand the issue. I mean, it's in the bill, too, and what does the second sentence add? Why would somebody want the second sentence?

HONORABLE STEPHEN YELENOSKY: "Outside the presence of the witness."

PROFESSOR DORSANEO: I know what it says.

HONORABLE STEPHEN YELENOSKY: Well, I don't know why they would want it either, but --

PROFESSOR DORSANEO: But it showed up in these two places, so there must be some motivation to put it in there.

CHAIRMAN BABCOCK: Well, I think part of it may be what Buddy just said.

MR. LOW: If you're sitting there as a witness and he says, "Bill, such-and-such" and I say, "Okay, wait a minute." "Well, Bill has testified to such-and-such. Yeah, that's in the record." Judge says "No, it's not the the record."

"Oh, he -- oh, yeah, now I know. Yeah." You're my witness, "Yes, sir, he's right." The lawyer is right.

CHAIRMAN BABCOCK: I believe I said that.

HONORABLE STEPHEN YELENOSKY: How is that

different from --

MR. LOW: That's why we did away in objections at depositions and they just tell you how to object and now, you know --

CHAIRMAN BABCOCK: Orsinger.

MR. ORSINGER: The reason I don't like the second sentence is apart from the fact I don't think it helps at all, because they're going to hear all the objections during their testimony, is that if you take the witness -- send the witness out in the hallway with no constraint on it, somebody is going to be out there talking to the witness about how to answer the questions that may come from the jury, and we don't normally let somebody take a break in -- I mean, occasionally it happens that you break in the middle of somebody's testimony, but here the lawyers have finished, there's some questions from the jury that are going to be objected about, they send somebody out in the hallway to tell them how to answer the question. I really feel like it's an opportunity to woodshed the witness in the middle of an examination that I don't like.

MR. LOW: You're going to send him in the jury room. You're not going to send them in the hallway to --

MR. ORSINGER: It doesn't say in the jury

room, does it? It says "from the courtroom."

MR. LOW: No, the jury is not in there. They're in the box.

HONORABLE STEPHEN YELENOSKY: No, the jury is in the jury room. Maybe. Well, they might be. Some courts send them --

MR. ORSINGER: I have a greater fear that the witness is going to be in the hallway being woodshedded than the witness is going to learn something from hearing an argument between the two lawyers at the bench.

HONORABLE DAVID EVANS: Well, what right does this confer that doesn't exist already?

HONORABLE TRACY CHRISTOPHER: Right.

HONORABLE DAVID EVANS: In trial procedures.

MR. ORSINGER: None.

HONORABLE DAVID EVANS: Because a judge can remove a witness while a discussion goes on without objection and often do, and a party may request it, so I don't know what this does that you don't already know you can do and would do --

CHAIRMAN BABCOCK: Yeah.

HONORABLE DAVID EVANS: -- if you thought it was necessary to protect your parties. It seems to be just excess to me.

CHAIRMAN BABCOCK: And typically when there are 12, 11 votes the Court will cast the deciding.

MR. SCHENKKAN: Unlike the other times?

CHAIRMAN BABCOCK: Unlike the other times when they always follow our -- let's talk about paragraph (4). Any comments on that? Anything on (4)? Ralph.

MR. DUGGINS: Shouldn't we combine (4) and (6)?

CHAIRMAN BABCOCK: Well, (6) is going to be rewritten.

MR. DUGGINS: Should we say after the word "may," "ask the question," comma, "reword the question or decide not to ask the question." I mean, it seems obvious, but I don't know why we don't say that.

CHAIRMAN BABCOCK: Well, but (6) is now, as I understand it, going to be reworked to say it's the judge's discretion whether the lawyers ask it, the judge asks it, or --

MR. DUGGINS: Well, I would combine (4) and new (6) then is what I'm suggesting.

CHAIRMAN BABCOCK: Okay. All right. Yeah, Jeff.

MR. BOYD: (4) raises the issue I've mentioned a couple of times about whether the judge can refuse to ask even if the parties want it asked.

HONORABLE DAVID EVANS: The judge may refuse to ask it, but I doubt he can deny the parties the right to reopen, just to point -- I mean, that is always there, and you would be in a barrel if you denied a party to reopen with a question in a record.

CHAIRMAN BABCOCK: Yeah, R. H.

MR. WALLACE: I'm wondering if (4) wouldn't suffice just by saying, "The trial court must rule on any objections to the question," period, and eliminate paragraph (5). I mean, because those kind of things it seems to me just obvious that the judge has the right to say, "Okay, I'm not going to submit it this way, but I'll submit it this way," and the parties are going to have a right to object to that.

HONORABLE DAVID EVANS: And will.

HONORABLE TRACY CHRISTOPHER: Well, we were --

PROFESSOR DORSANEO: Mr. Chairman?

HONORABLE TRACY CHRISTOPHER: We were trying to address the bill, which said you have to read it verbatim.

MR. WALLACE: Right.

HONORABLE TRACY CHRISTOPHER: So --

HONORABLE KENT SULLIVAN: Right.

HONORABLE TRACY CHRISTOPHER: Which we

didn't want to be ultimately the law. We wanted the idea that we would be able to --

MR. WALLACE: Well, and it depends. I mean, if you're getting away from it being verbatim, if it's got to be verbatim then --

CHAIRMAN BABCOCK: Orsinger, or is it Bill that asked?

MR. ORSINGER: Not me.

CHAIRMAN BABCOCK: Bill.

PROFESSOR DORSANEO: The second sentence of (4), I would make that a separate thing in the list, and I understand the idea, but you can, you know, rule on an objection; and the ruling on the objection could be, well, the question is bad insofar as it says this; but if I reword it I can make it work, but I still think it stands alone better being separate from "The trial court must rule on any objection to the question," and I really think even -- I think that's the gratuitous thing, to say that the trial judge has to rule. I don't mind saying it. Or make it part of (5), which is really about rewording.

CHAIRMAN BABCOCK: Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: Yeah, I think it's not only gratuitous to say the court must rule, I'm a little concerned that we're creating another layer of law that applies only to questions of jurors.

PROFESSOR DORSANEO: I think we are.

HONORABLE STEPHEN YELENOSKY: And I made the point earlier about sending the witness out, and yet here, yeah, we're supposed to rule on objections, but I don't think elsewhere in the rules it says at a specific point the court must rule on objections, and we know objections can be waived, and all that law ought to apply to this, and I'm concerned about putting stuff in that creates a different layer.

PROFESSOR DORSANEO: Me, too.

HONORABLE TRACY CHRISTOPHER: Well, there's a lot of procedure that we all know should happen that isn't in a rule, and since this is a new procedure, the thought was we needed to make clear that the judge should actually rule on the objections, and yes, it's true, sometimes they're waived sometimes. You know, I can't tell you how many times people say "objection, form" in trial and just keep on going because they think they're in a deposition and never ask me to rule.

HONORABLE STEPHEN YELENOSKY: I know. I say, "Do you want a ruling?"

HONORABLE TRACY CHRISTOPHER: But since this was new the thought was we really wanted to make sure that it wasn't just whatever they asked was going to get asked.

HONORABLE STEPHEN YELENOSKY: But the

unintended consequence of that, I don't think you intended that, but maybe that can be dealt with by something that says, you know, other than the peculiar parts about this, everything else is treated as it would be under the Rules of Evidence and Procedure, something like that.

MR. LOW: But he must rule then. We used to have a judge that would say, "Objection noted. Move on, counsel, and if I find that I'm wrong I'll instruct the jury to disregard that." Well, what are you going to do there? You've got your witness. You can't --

HONORABLE STEPHEN YELENOSKY: Well, whatever the appellate rule is on that ought to be the same for this.

CHAIRMAN BABCOCK: How about the judge that says, "I'll carry that objection"?

HONORABLE STEPHEN YELENOSKY: Right. It may be bad, but it shouldn't be a different standard or, you know --

CHAIRMAN BABCOCK: We got it. Paragraph (5), comment?

MR. ORSINGER: I wanted to respond. Some of the appellate -- some of the procedure professors might want to listen to what I'm saying, but I don't think that the Rules of Appellate Procedure require the trial judges to rule. I think it just says that if the trial judge

won't rule you need to object to the trial court's refusing to rule. This actually is a different tenor. This is actually mandated --

HONORABLE STEPHEN YELENOSKY: Right.

MR. ORSINGER: -- that the trial judges rule, which I don't think the law requires or I don't think the rules require. They don't mandate a ruling on objections yet. So this is kind of like moving into new territory that it's probably reversible error, or at least it's error not to rule even if you don't object to them not doing it.

HONORABLE STEPHEN YELENOSKY: So you agree we shouldn't do that.

MR. ORSINGER: I'm happy with the way we've been doing it. I don't think we ought to make the judge rule. I think if we do anything we ought to say you can object if the judge won't rule, but --

MR. LOW: How are you going to ever reverse that?

MR. ORSINGER: Well, the standard reversal is probably the same. The question is probably waiver. I don't know. If the rules require that you rule, I mean, why do we not require the judges to rule on anything else except for jury question objections?

PROFESSOR DORSANEO: Our preservation rules

put the burden on the lawyer to --

HONORABLE TRACY CHRISTOPHER: What rule number is that?

PROFESSOR CARLSON: Appellate Rule 33.

PROFESSOR DORSANEO: 33, Appellate Rule 33.

MR. ORSINGER: And then it's also in our packet here, is a revised Rule 303.

MS. CORTELL: Under tab four.

MR. ORSINGER: Yeah. We're going to have to do some surgery on that when it comes up, but anyway, the only point I'm making is we have this unique situation where we're requiring the judges to rule where we purportedly haven't before, and all of you proponents for judicial discretion ought to be speaking up here.

CHAIRMAN BABCOCK: Judge Christopher, what do you think about that? Speechless.

Justice Sullivan, you got any comments on what Richard just said?

HONORABLE KENT SULLIVAN: I didn't hear the last part.

CHAIRMAN BABCOCK: What he just said.

HONORABLE KENT SULLIVAN: We're looking for Rule 103 of the Rules of Evidence.

CHAIRMAN BABCOCK: He's basically saying he doesn't like the fact that you're requiring the judge to

make a ruling.

HONORABLE KENT SULLIVAN: I will say I've just been an advocate of clarity in the rules. You ought to be able to read from the face of the rule, and I would go so far as to say it would be nice if someone who was pro se and of reasonable intelligence if they had some idea of what was going on here, and I think clarity is a good thing.

HONORABLE STEPHEN YELENOSKY: Well, we better rewrite all the Rules of Civil Procedure because they're dealing with the rest of them, too.

HONORABLE KENT SULLIVAN: That's a different topic.

MR. LOW: I still don't understand, Chip, how the judge may say, "Okay, I'm not required to rule right now. I'm going to wait until two days later when he's in Mexico," and I say, "Okay, I'll ask that question," and then what are you going to do? I don't know how you ever reverse something like that. If he ultimately rules, because the rule doesn't say that you've got to rule immediately.

HONORABLE STEPHEN YELENOSKY: Well --

MR. LOW: Get a ruling.

HONORABLE STEPHEN YELENOSKY: But it says something different than what the rest of the law says,

good, bad, or indifferent, might create two things to be litigated that arguably could lead to different case law based on whether it's a juror question or an attorney question.

MR. LOW: This is a unique new thing, and I think you ought to have rules, and a judge that's not able to rule on that right now maybe ought to catch an opponent. I just think that the judge should do their job and rule on something that he's required to rule on now and --

HONORABLE STEPHEN YELENOSKY: But you think it should be -- it's more important for the judge to rule on these questions than on other objections?

MR. LOW: I don't consider important and what's not important. I consider this something new and something that you need an answer immediately. Other things you might not, who wins and loses the case might be more important than that, and he might not rule on that until later. This is a different thing, it's new, and the judge ought to be able to rule. There's no reason he shouldn't be able to.

CHAIRMAN BABCOCK: Carl, then Hayes.

MR. HAMILTON: I'm trying to think what the objection would be, but essentially the objection would be that the question shouldn't be asked for some reason.

CHAIRMAN BABCOCK: Right.

HONORABLE TRACY CHRISTOPHER: Right.

MR. HAMILTON: And so if the judge asks it then he's overruled the objection. If he doesn't ask it, he's sustained the objection, I would assume.

MR. LOW: No.

MR. HAMILTON: Why do we need a ruling?

CHAIRMAN BABCOCK: Buddy's got an answer to that.

MR. LOW: What if he later comes up, like Judge Baker and "I'll carry that along and I want to hear the other testimony," and then the man's in Mexico, and he says, "Okay, now I'll allow it," and you've got to call him back. I mean, why not rule, get it over with.

MR. FULLER: But haven't we built into this procedure that we're talking about now that this process will take place before the witness is excused? So that problem wouldn't arise. I mean, while that witness is on the stand the judge either is going to ask the question or not ask the question, in which case you'll know what the feeling is toward your objection.

MR. LOW: Maybe so. Maybe so.

CHAIRMAN BABCOCK: I'm with you. All right. Subparagraph (7). (6) is going to be rewritten. Subparagraph (7), any comments?

MR. DUGGINS: Why do we need that? If the question is going to have a discussion about whether to ask --

HONORABLE DAVID EVANS: Which record, the clerk's record, reporter's record?

HONORABLE TRACY CHRISTOPHER: Clerk's record, just like jury questions that we get during deliberations.

HONORABLE DAVID EVANS: And so that's --

HONORABLE TRACY CHRISTOPHER: Don't you think?

HONORABLE DAVID EVANS: Well, I think reporter's record maybe is a court's exhibit because you're going to have some control over that question as an exhibit that you don't have in a clerk's record. Parties will be calling for it, but I'm not wed to it. It's just got to be specified whether it's reporter's record or clerk's record. Their handwriting and who asked the question, I'm not sure if the question would be embarrassing or not, but I'm just trying to figure out how I'm supposed to keep track of it. Do I file mark it or do I mark it as a court exhibit and hand it over to the reporter?

HONORABLE TRACY CHRISTOPHER: I was doing it just like, you know, the forms --

HONORABLE DAVID EVANS: File mark --

HONORABLE TRACY CHRISTOPHER: -- we get during jury deliberations.

HONORABLE DAVID EVANS: -- and so a nonparty will be filing papers in the clerk's record. I'm just -- I've got fees. I'm just trying to figure out where we are with that, and the court's file, that's where it's going to end up.

CHAIRMAN BABCOCK: Any more comments on subparagraph (7)?

HONORABLE DAVID EVANS: Either way, Tracy.

CHAIRMAN BABCOCK: Yeah, David.

MR. JACKSON: If you mark it as part of the reporter's record, then the question goes in the jury room when they deliberate as an exhibit.

HONORABLE DAVID EVANS: No, a court's exhibit doesn't go back.

HONORABLE TRACY CHRISTOPHER: Could be a court exhibit.

CHAIRMAN BABCOCK: Okay. Bill.

PROFESSOR DORSANEO: Wouldn't we want to change the appellate record, clerk's record provisions, in appellate Rule 34? Maybe say it here, too, but it would seem to be more appropriate to say, you know, "any juror question submitted," okay, "pursuant to" rule whatever in

the clerk's record part of the appellate rules.

HONORABLE DAVID EVANS: What happens to the unsubmitted ones that you deny? Are you talking about submitted to the court or actually asked? How were you using that term, submitted to the judge for ruling?

PROFESSOR DORSANEO: The same way it's -- whatever way it's here, "The trial court must include any submitted juror question form in the record." I don't know why you would want any one that was submitted. What would you do with it?

HONORABLE DAVID EVANS: I'm not sure I'm clear on that question, but it just needs to specify which record it's going into, either the reporter's or the --

PROFESSOR DORSANEO: But it ought to say -- all my point is it ought to say that in the rule that's about the appellate record.

HONORABLE DAVID EVANS: All right.

CHAIRMAN BABCOCK: Justice Hecht.

HONORABLE NATHAN HECHT: What's David's view on this? David, should it be in the reporter's record or the clerk's record?

HONORABLE DAVID EVANS: Well --

HONORABLE NATHAN HECHT: No, I mean, I'm sorry.

CHAIRMAN BABCOCK: Jackson.

MR. JACKSON: I guess I'm confused on, you know, if it's a juror's question and it gets an exhibit sticker put on it and you haven't gone to the jury yet for deliberations, so that's an exhibit that's along with all the other exhibits that have been marked during all the other questions and answers, and how are you going to keep that separate from going back into the jury room when the jury goes in to deliberate with all the exhibits?

HONORABLE STEPHEN YELENOSKY: But we do that now. I mean, we tell the court reporter -- we accept something that's not going to go to the jury and --

MR. JACKSON: That's if the judge has ruled that it's not been admitted. Then we separate it out.

HONORABLE TRACY CHRISTOPHER: I think it ought to be the clerk record.

HONORABLE NATHAN HECHT: I'm just wondering practically, I mean, could you mark it as a court's exhibit? Because it seems to me if you put it in the clerk's record you're going to have a heck of a time finding it when the case is on appeal because you're going to be sitting there looking at the reporter's record, and it says we've got this question and we argued about it and we couldn't decide whether to ask it or not so we didn't and then you're going to be rummaging around through the clerk's record, which they're going to be scattered all

over the place because they will be in between filing motions in limine and no telling what all else and it would just be hard to find.

HONORABLE DAVID EVANS: And you're going to have an anonymous question when you're making your verbal record. You won't have it marked as anything, you'll be discussing it. Then it gets a file mark, and it won't get a page number and a Bates stamp number until the clerk's record is prepared so --

HONORABLE NATHAN HECHT: Exactly.

HONORABLE DAVID EVANS: -- somebody in the appellate record is going to have to -- it's going to go from the statment of facts, go over to the clerk's record and try to link it up, and exhibit numbers are much easier to work with when you're referring to something in a live trial.

HONORABLE NATHAN HECHT: It's already hard enough to match up the jury question requests and objections between the reporter's record and the clerk's record because they're not -- the lawyers are talking about things that are not marked, and it's just always some question about exactly what they're talking about.

HONORABLE STEPHEN YELENOSKY: Well, would it facilitate it to say, "The judge shall read the questions into the record"? I know you can still put the document

in, but that would make it easier.

HONORABLE NATHAN HECHT: I just wondered from David if there's any reason why the court reporter can't make this part of the --

MR. JACKSON: I don't see any problem with doing that. It's just that there's nothing out there that says what you do with this document once you mark it. What we normally do with documents when we mark them is if they're admitted, they go into the jury room, and if you're sending juror questions into the jury room then you're messing up your program.

CHAIRMAN BABCOCK: Buddy.

MR. LOW: Chip, what would be -- say there's a question. Judge says, "That's not a proper question." Both parties say it's not a proper question. Why should that be in the record anyway? I mean, what difference does it make? Only if they admit something and you object to it on the record or they failed to and you make a bill of exception because they wouldn't allow it, so why offer something that doesn't matter anyway?

HONORABLE DAVID EVANS: Well, Buddy, if it's marked as a court exhibit, I could authorize it to be removed and destroyed. If it's put in a clerk's record, I cannot remove it from the district clerk's record.

MR. LOW: I'm talking about just --

MR. GILSTRAP: Why put it anywhere?

MR. LOW: Yeah. Why put it anywhere?

MR. GILSTRAP: The objectionable question is the question that's asked. It's not the question submitted.

MR. LOW: Why put it in the record?

CHAIRMAN BABCOCK: Judge Christopher, then Skip.

MR. ORSINGER: That's not right.

HONORABLE TRACY CHRISTOPHER: Well, we did actually discuss in the subcommittee the idea that the judge would read the question into the record, like we do often when we have juror questions during deliberations. We'll go on the record and we'll say, "I've gotten a question from the jury. Here's the question. Here's how I propose to answer it. Are there any objections?"

HONORABLE STEPHEN YELENOSKY: Right.

HONORABLE TRACY CHRISTOPHER: But that's pretty time-consuming if it's a pretty basic question, and we just show it -- and the thought was we're trying to sort of shorten the time frame of this bench conference if it's happening at the bench versus, you know, during a break or something. You show it to them. People say, "yes, objection," "no objection," and you ask it. It's absolutely true that if both sides agree that it shouldn't

be asked there's no need to keep it, I would think. And if I ask the question and the objection is on the record, then the question is there, so it might not be necessary to admit the form, but the thought was let's do it just to make sure we know what we're talking about.

CHAIRMAN BABCOCK: Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: That's a good point I hadn't thought. You wouldn't really have an opportunity to read it into the record because you're up at the bench, doing things by -- I mean, the easiest thing is just to make it a court's exhibit. We do that all the time. The attorneys agree something is not going back. When the exhibits go back to the jury they make sure it's not in there. I don't see that as a problem.

CHAIRMAN BABCOCK: Hayes.

MR. FULLER: One issue on this. If the judge refuses to read the question, said, you know, "I don't like this question," but one or the other lawyers said, "No, that's a real good question. We need the answer to that." I guess we could reopen perhaps.

HONORABLE TRACY CHRISTOPHER: Right. Right.

MR. FULLER: If that doesn't occur, are we talking about some situation where you said, "Okay, I know you don't want to read the question. I think it's a really good question. I've got to make my record. I want

that witness asked that question anyway, and I want a bill on it."

HONORABLE TRACY CHRISTOPHER: I think you have to. Exactly.

HONORABLE DAVID EVANS: Exactly.

CHAIRMAN BABCOCK: Justice Gray.

HONORABLE TOM GRAY: I think the word "form" -- if you leave (7) in, the word "form" needs to come out in light of the procedure that was used at Steve's trial. If you had 12 witnesses and only one witness was asking the questions, you would have 132 blank forms turned in in part of the record, just to -- to gnat at the language, but --

CHAIRMAN BABCOCK: All right. Anything else? Bill.

PROFESSOR DORSANEO: Well, I still don't know exactly what happens with this form if the question isn't asked. What happens on appeal? Who can say what?

MR. ORSINGER: I have a comment to make about that. Can I answer that?

CHAIRMAN BABCOCK: Certainly.

MR. ORSINGER: My view of it -- and I'd be curious to hear what your response is -- is that the mere failure to read the question to the jury by the judge is not error.

HONORABLE TRACY CHRISTOPHER: I had that in the rule.

MR. ORSINGER: I think what you're going to have to do is you're going to have to -- if the court says, "No, this is no good," you're going to have to move the court to read it; and if the court won't do it, that's still not enough. You're going to have to ask to reopen your examination of the witness and ask the question, and then if the judge refuses to allow you to do that then you need to offer a bill by asking the question to the court reporter and then get the answer into the record.

PROFESSOR DORSANEO: And the question is whether we explain all of that or imply that somehow this is --

MR. ORSINGER: I'm totally against trying to spell out how to preserve error on this point in this rule, but I think you ought to hire an appellate lawyer if you can't figure it out.

PROFESSOR DORSANEO: I agree with hiring appellate lawyers.

MR. LOW: But if you mess the record up, Skip, you cure --

HONORABLE STEPHEN YELENOSKY: Would you like to read your number into the record?

CHAIRMAN BABCOCK: Yeah, right.

PROFESSOR DORSANEO: Right now this (7) suggests that if you do this, that if it gets there then that does you some good. But I agree with what you say.

MR. ORSINGER: I think it's misleading.

PROFESSOR DORSANEO: I think they just talked about it up there at the other end of the room.

MR. ORSINGER: Just remember when you're the appellee you'll be able to -- harmless error every time.

HONORABLE TRACY CHRISTOPHER: I'm okay with leaving it out. People just thought, new procedure, we ought to keep track of these questions.

CHAIRMAN BABCOCK: It's in the bill, too. It's in the senate bill.

PROFESSOR DORSANEO: Maybe they know why.

CHAIRMAN BABCOCK: They might know why, but the good news is the Court's going to have the benefit of this discussion. Judge Christopher, who else was on your subcommittee besides Elaine?

HONORABLE TRACY CHRISTOPHER: Well, It was Elaine's original subcommittee. Tommy and --

CHAIRMAN BABCOCK: Well, who else is on Elaine's subcommittee?

PROFESSOR CARLSON: Tommy and Bobby Meadows.

HONORABLE TRACY CHRISTOPHER: Bobby. Kennon did a lot of work for us.

CHAIRMAN BABCOCK: Well, it's an absolutely first-rate work product, terrific job.

HONORABLE DAVID PEEPLES: In that case I was on it, too.

CHAIRMAN BABCOCK: Really outstanding, outstanding work.

(Applause)

CHAIRMAN BABCOCK: We'll take our afternoon break. Back in 15 minutes.

(Recess from 3:16 p.m. to 3:39 p.m.)

CHAIRMAN BABCOCK: All right. We are back on the record, and we are on to Item 4 of our agenda, the proposed amendments to Rules 296 through 329(b). It's Ralph Duggins and, once again, the hard-working Professor Elaine Carlson, and, Ralph, you're going to kick it off I'm told.

MR. DUGGINS: Thank you. At the last meeting Justice Hecht and Chip appointed a group of Elaine, Nina, Bill, Sarah, Mike, Judge Peeples, me, and then also Kennon was gracious enough to join our subcommittee to try to take a stab at looking at 296 through 329; and what we have done and brought in this spiral bound set that's back here and also posted is to revise existing Rules 296 to 299a, the findings of fact rules, so those are we think substantial improvements to

existing rules.

Then Rule 300 is a new rule that defines a final judgment. I guess it's safe to say it would replace existing 300 and 301, but it's really a different rule, and then Rules 301 to 304 are completely new rules, and Rule 301 we attempted to place in one rule all of the post-verdict and post-judgment motions to indicate when you file a particular motion, explain the purpose of those motions and the relationship to each other, and to make the relationship between motions for JNOV and motions to modify, we hope, clearer.

In Rule 302 we tried to set out the basis for new trial practice because there is -- in our judgment there was very little guidance in the existing rules. In Rule 303, this rule was primarily found in the TRAP rules, and the thought was that it needed to be moved to the trial court rules, and then 304 is an effort to try to redo and improve 329(b).

Now, that's just a very high level overview of what we've tried to do. Elaine took the lead in 296 to 299a, so I'd like to ask her to kick off the discussion on those rules and go from there.

PROFESSOR CARLSON: Let me give you an overview of what our subcommittee felt were desirable changes to the finding of fact rules. The first was that

the finding of fact rules should be modified to parallel the jury charge rules insofar as encouraging broad form findings when feasible. We also tried to address an issue that came up -- Hayes, I think you'd remember if it was the State Bar Rules Committee -- on voluminous and evidentiary findings, so those were sort of paired together.

The subcommittee also felt that the timing of requests for findings of fact should be modified, but it's a little bit counterintuitive the way it's currently structured because, except for the original request for findings of fact, all of the subsequent steps, such as the reminder or the request for additional -- the court making of the additional or amended findings, the time period varies from court to court. I mean, case to case, excuse me, because it depends upon when the prior triggering act took place, when the original request was actually made, and when the court actually made its filing. So in every case that time period is necessarily unique, which is a little bit counterintuitive from the situation that we generally use at the post-judgment phase of having our timetables often relate back to one time period, like when the judgment is signed.

Our subcommittee also felt that the reminder requirement to remind the Court when it's failed to make

findings of fact when you have timely requested them was not a good idea. We don't have a reminder requirement in other situations to preserve error, and our subcommittee felt that that should be eliminated, and then our subcommittee felt that the finding of fact rule should clarify the effect of findings made by a trial court in a judgment improperly as opposed to our separate document requirement for findings. We also looked at the language of the existing rules to try and modernize them as we have as a committee fairly regularly, changing "shall" to "must" or using "may" or "will" instead of "shall," according to Professor Dorsaneo's reminder.

And in fulfilling -- as Ralph said, we divided and conquered after we decided on policy determinations and then each subcommittee member was tasked with coming up with drafts and then presenting them. In fulfilling my assignment of redrafting the rules under these guidelines, I suffered a very severe case of deja vu because this is --

CHAIRMAN BABCOCK: Sarah just nodded.

HONORABLE SARAH DUNCAN: No, I rolled my eyes actually.

PROFESSOR CARLSON: This is the third or fourth time, but they're getting better every time. The last we took this issue up was when the State Bar Rules

Committee brought a proposal, and I went back and read the transcripts in December -- so it was quite joyous between the holidays -- October from 2006 and December 2006 to just try and get a sense of what the debate was and what that -- what the Supreme Court Advisory Committee felt at that time; and it was an interesting trip down memory lane; but I won't bore you with those votes other than to tell you after several meetings the final vote was 14 for and 15 against not changing the rule, so we've been down the road before, but we're getting better we hope in light of those suggestions.

In dealing with the timing issue -- and I'm going to go through now rule by rule. In Rule 296 we thought ideally there would be a shorter time period for findings to be made so as to facilitate the trial court's memory in getting the process done, and so the subcommittee felt it would be better to shorten the time period for making the initial request for findings of fact for 10 days after the judgment is signed and then maintain the same -- essentially the same period we have now, 20 days for the trial court to make their findings of fact. So in Rule 296(a) we went for 10 days instead of 20 days, and as you recall from the case law, the initial request for findings of fact you're not required to include proposed findings, although that would probably be a good

idea, unlike the request for additional or amended findings. So it's not too difficult to get a request out in 10 days, although if you want to supply the court with your proposed findings that will take a little bit more time.

In proposed Rule 296(b) is where we worked and finessed the broad finding notion, and so now we would require that when findings are properly requested the judge is to "State the findings of facts and conclusions of law" -- and this is the new language -- "on each ultimate issue raised by the pleadings and evidence," with the hope "ultimate" might suggest not minute. "Unless otherwise required by law, findings of fact must be in broad form when feasible." Of course, that sentence is trumping 277 for our jury charge. The "unless otherwise required by law" is included because there are some instances where statutorily the trial court is required to make more specialized or specific findings, depending upon what the case is.

And then we include -- I included a sentence that did get voted up the last go around in our last Supreme Court Advisory Committee two years ago session, so it's certainly not binding today. "The trial court's findings are to include only as much of the evidentiary facts as is necessary to disclose the basis for the

court's decision."

Then the comment reinforces the notion saying, "Unnecessary or voluminous evidentiary findings are not to be included in the court's findings of fact."

Rule by rule, Chip, or --

CHAIRMAN BABCOCK: I think so. Unless you think grouping them would be easier.

MR. ORSINGER: No, it's not easier.

PROFESSOR CARLSON: No.

CHAIRMAN BABCOCK: No, I wouldn't think so. Richard.

MR. ORSINGER: Okay.

CHAIRMAN BABCOCK: It's not even chum in the water yet.

MR. ORSINGER: I like everything about this rule except for the going from 20 to 10 days. The biggest problem I have with the finding of fact process as a lawyer who handles many nonjury appeals is that the trial lawyers don't realize that there's a 10-day -- 20-day deadline now on findings. They think of the 30-day deadline on motions for new trial and the clients frequently will contact me between the 20th and the 30th day after the judgment is signed when it's too late for me to request findings as a matter of right.

Now, the Legislature, because of its

interest in speed in parental termination cases, adopted an even more accelerated timetable to, if you will, preserve error or start the appellate process in parental termination cases; and that's resulted in a lot of injustice because a lot of people were not aware of that accelerated timetable, and we've discussed that in this committee itself. I think that there is a lot of harm being done already by having a 20-day deadline when most lawyers are only aware of the 30-day deadline, and moving it up to 10 is moving it in the wrong direction.

I feel like what we should do is allow findings to be requested up to 30 days, and then however you want to configure the process after that is kind of unimportant, because by that time someone with some knowledge of these rules will have gotten involved and they can follow those odd timetables, so I like very much what the committee has done in terms of broad form.

I think it's a pernicious practice for the winning lawyer to draft all of these horrible statements that the judge is finding about the personalities of the loser and all of that, and -- but really the speed, all of this speed, all of this hurry up, hurry up, hurry up, in the first 75 days of the appellate process so that we can wait, you know, nine months to file our briefs and a year and a half for our oral argument is foolish. We're not

speeding anything along. All we're doing is waiving people's right to present their appeal effectively, so I would strongly urge everyone to consider making this 30 days and change the subsequent timetables accordingly, but not necessarily -- I don't want to push it out over 105 days. I think we could play with them. I just think the first 30 days is really critical.

CHAIRMAN BABCOCK: Frank.

MR. GILSTRAP: I agree with Richard on the timing factor. I do have some questions or concerns about the proposed part (b). I mean, I understand the goal here. The goal here is to somehow deter judges from making 150 findings of fact and you go up on appeal and you lose because you didn't assign error to No. 73. That's the abuse that we're trying to deal with here, and I don't know how much good this is going to do. It possibly would allow an attorney to object to voluminous findings and preserve error that way. So I understand the goal. I think it's a good goal. I'm not sure that (b) really advances the ball that much. I think the second sentence is good, "Unless otherwise required by law, findings of fact must be in broad form whenever feasible."

The first sentence has got some problems. "If findings," I guess they mean if finding and conclusions or is it just finding, "are properly

requested." What's "properly"? Does that mean timely requested or does it mean somehow you could not have the right if you requested it in the wrong form? "The judge must state the findings of fact and conclusions of law on each ultimate issue." Is that the same as controlling issue? I mean, we do have case law that talks about controlling issue. I don't know what an ultimate issue is, although I know the idea behind it.

The third sentence, "The trial court's findings," you can leave out "trial court's." It doesn't help anything. "Are to include," I think is that maybe we're adding to Professor Dorsaneo's lexicon of mandatory and permissive words, but I don't think we've said "are to" before. Does it mean must or should include? I think that's what it should say. "Only as much in evidentiary facts as are necessary" -- not "is" -- "to disclose the basis for the court's decision." I'm not sure what the -- I mean, we all know what it is, we all know what they're trying to do with this, but I think you're putting a lot of language in there that is not really going to help. If people are -- you know, I think we could probably do the same thing with the second sentence and maybe combine that with the next rule, which is also a mandatory requirement to make the findings, and simplify it that way.

CHAIRMAN BABCOCK: Great. Skip.

MR. WATSON: Well, I have two comments. The first is I agree with Richard. I think it ought to be 30 days. I think it ought to be the same as for a motion for new trial. My -- Buddy and I and one or two others may have done this long enough to remember the days when a motion for new trial was a short fuse, and I remember a lot of malpractice from that when stuff had to be preserved and trial lawyers, frankly, are healing up for 7 of those 10 days after a big trial, and when they get back after those 7 days the desk is so full that the last thing they're thinking about is their motion for new trial. It was moved -- that was lengthened for a reason. This needs to be consistent to it since they both extend the appellate timetable, and to me it just makes sense.

I have a fundamental problem with tying this to broad form and specifically making it ultimate issue submission, and that is not because I think there should be evidentiary findings. Like everybody else who does this, I have to wade through the chaff of evidentiary findings trying to get down to what the issues are, and I understand full well what the Court, the committee, everyone else is trying to do here, and that's get rid of the junk and get down to what's important.

The issue is what's important and whether we can appeal from it. I just want to focus very quickly on

what is a, quote, ultimate issue. What is it that's being found here? Is it good enough that the court just says, "I find negligence"? That's the ultimate issue in most people's minds reading this. That's what would be found many times in broad form. It was negligence. Second question, was it a producing cause of damages? If so, how much? You know, here's the number.

But the inherent problem with that is shown on page four under Rule 299 where we get to the problem that wakes me up at 3:00 o'clock in the morning, and that's presumed findings for not making your request, and in (b) we say when one or more what? Ultimate issues? No. Elements. Elements, necessarily referable to what? The ground. I assume that's the ultimate issue, the ground. "Omitted unrequested elements, when supported by the evidence, will be supplied by presumption."

Here's what's going to happen by trying to pretend that this is the same thing as a jury charge. Broad form charges, unless I've completely missed the point here, were never intended to allow juries to go in and just decide negligence, period, an ultimate issue. We moved what was in multiple specific special issue questions into an instruction so that the constituent issues are necessarily found in an instruction by answering "yes" to negligence. They find act. They find

that a reasonably prudent person wouldn't have done that act or wouldn't have made that omission. They find causation, because they are told they can't answer "yes" on an ultimate issue without finding those acts.

Now, let me give you an example of where we're going to get bitten in this. Just as simple as I can make it. Let's go back to law school and the examples of how you drafted a simple car wreck negligence submission. You have to have the act, you know, whatever was done. Let's say that was pleaded as three things, speed, failure to brake, or failure to turn to the right to go off the road to avoid the collision. Three things are pleaded as acts. Then in the old system the jury would go along and find, yes, I am persuaded that he was going too fast. We have no skid marks, but he testified he braked. I think he probably did, so I'm not going to find failure to brake, but I am going to find failure to swerve off to the right and avoid the collision.

They then find separately that a reasonably prudent person would have done the top one and the bottom one, you know, and that caused the injuries. If the only finding of fact that I'm appealing is negligence, is the, quote, broad form ultimate issue, without me seeing what constituent element acts were submitted, I have no way of knowing what the judge was persuaded to find that finding

on.

Now, let me say here that just assume, for example, that there was no evidence of excessive speed, that that couldn't be found. Let's assume that the judge wasn't persuaded on something such as failure to brake or the others, but he actually found, he actually -- there was real error in this thing, and the true basis of the decision was speed, but there was the same evidence on braking, where it could have gone either way, based on how you were persuaded. The judge was persuaded, I think the person doesn't brake. You know, that would -- well, excuse me, wasn't persuaded to brake, but he based it on speed, he based it on the one where there was no evidence.

I can't show under this system without the constituent elements that he based his actual action that he -- that was the basis of the negligent finding was one on which there was no evidence, because there was evidence on the other two, but he wasn't persuaded by it. There was evidence, but they didn't meet the burden of persuasion with the judge. If he was forced to set out the constituent elements instead of the ultimate issue, I could show that, because the only one listed would be speed, and what I don't understand under this attempt to shoehorn dealing with the judge into the jury when the same findings of fact are having to be made to come to the

ultimate legal conclusion, is why I can't consistently see constituent elements of the cause of action, each one of them, so that I have an effective right of appeal.

PROFESSOR DORSANEO: Mr. Chairman?

CHAIRMAN BABCOCK: Yeah.

PROFESSOR DORSANEO: I think of Jack Pope here where he would say the ultimate issue in a negligence case is negligence, and just -- would just say that the old way of thinking that it's speed, brakes, or lookout is gone and needs to be gone, that you shouldn't -- that you shouldn't be even thinking about whether it was this one or that one or that one because it doesn't matter.

MR. WATSON: Then we should take constituent elements out of the second half.

PROFESSOR DORSANEO: And I think that is the jury charge law. I think that what I said is the jury charge law. That was the big complaint in McElroy Vs. Members Mutual Insurance Company, and Frank Evans writes, "Hey, you're not -- you're not able to make that argument anymore." Yeah, it is a little harder for a defendant to avoid liability if the ultimate issue is negligence, because five jurors could think this and five jurors could think that. That's just the way it is. That's the only way to go to broad form.

CHAIRMAN BABCOCK: There you go citing cases

again. Justice Hecht.

HONORABLE NATHAN HECHT: Well, I just --

PROFESSOR DORSANEO: That's what I do.

HONORABLE NATHAN HECHT: -- wonder if those are good examples, though, because we don't get -- I don't recall seeing very many nonjury trials on negligence. I was a trial judge for five years, and I tried two, out of probably four or five hundred trials, negligence cases to the bench. The cases that are tried to the bench are not cases where the issues are that ill-defined.

MR. WATSON: It was an example, Judge. I mean, say it's a breach of a partnership agreement and --

HONORABLE NATHAN HECHT: Right.

MR. WATSON: -- there are 10 acts of breach.

HONORABLE NATHAN HECHT: Right. And that's why I want to say that in those kinds of cases from the perspective of an appellate judge, it's very useful to know what Judge Christopher thought about it, as she sat there and watched the whole thing, and it's -- I don't know what the other appellate judges think; but from my point of view, when I see that the trial judge thought this was fraud, this was a misrepresentation, but not all of this other stuff, or this was relied on, not this, or this was an element of the commercial transaction or not that, or I believed this witness, not this one, that's

useful to know; and I agree that it's very unhelpful to just have a stack of 150 findings that the winning side thought of every way in the world to try to nail down the judgment. Kind of like writing interrogatories, except now you're writing findings of fact. That's not very useful.

But every once in a while we get in the appellate record a letter from the judge to the parties that says, "I've thought about this, and I'm going to rule this way because I think this, this, this, and thus and so and somebody please draw that up," and I know there's the law about how much weight that stuff like that can be given, but I'll tell you as a practical matter you're inclined to give it quite a bit of weight because it's coming from the judge as opposed to the parties that write things up, and so I want -- I would hate to discourage that. I know we can't encourage it or mandate it because the trial judges don't have the time or the assets to do that in every case like Federal trial judges, but in the few cases that it's done, it's useful, so --

CHAIRMAN BABCOCK: Roger, you had your hand up.

MR. HUGHES: Yeah. I think it's not so much over the phrasing of a rule, because I think it really has to do with an issue we've come back to, is what are the

real elements of a cause of action. Once upon a time back when Gus Hodges ruled the whole thing about special issues I think you would have said whether the defendant braked or whether he didn't or whether he swerved, that's an element, but along came broad form submission; and with it I think there was a philosophical shift that whether the defendant braked or not and whether he turned or not and whether he was going too fast, those aren't controlling issues. The only question is did he do some act that everybody agrees was negligent, and so what I see underlying this discussion is do we really want to go back to a day when one of the controlling elements was which act or omission was negligent, which statement or omission was a misrepresentation of fact, and what I would favor is I like Rule 299 the way it is.

I would just conform the Rule 296 and leave to the case law to decide what is a controlling element, because I, frankly, think it's a good idea that findings of fact and conclusions should be -- should mirror the kind of findings that a jury has to make. I think our problem today is we're now struggling to figure out what kind of findings the jury has to make. That would be my suggestion.

CHAIRMAN BABCOCK: Richard Orsinger.

MR. ORSINGER: I want to comment at two

levels. One level is that there is a different policy that applies between jury trials and bench trials in terms of the management of the trial process and appellate review of the trial process, and my recollection of the problems we were having with broad form submission -- well, before broad form submission -- was that there would be conflicts in jury verdicts that we wouldn't find out until the jury had been discharged, and there was an inordinate amount of time spent on making fine distinctions between components of claims as a grounds for reversal, and the decision was kind of made that we're going to just fold the jury verdict up into a kind of a simple answer and we're going to close off any inquiry into the thinking that they had and we're going to get a verdict of peers and then the appellate court is not going to reverse it unless it's really evident from the appellate record that something was wrong.

I was on the pattern jury charge committee family law when we were dealing with broad form in the family law area and helped to write the charge that was finally tested in E. B., which was the parental termination case where broad form really I think had its first test or at least the pattern jury charge approach to broad form had its first test; and in the Austin court of appeals, the court of appeals was concerned that there

were three or four different grounds of termination alleged, and yet there was a finding of best interest; and they returned a 10 to 2 verdict; and the Austin court of appeals was concerned that you couldn't tell from the broad form whether all 10 of the jurors agreed on the same termination ground, did they -- or did 10 of them at least agree on neglect or did five of them agree on neglect and five of them agreed on failure to support within their capability.

And the Austin court reversed, but the Supreme Court reinstated or they reversed the Austin court and they said we don't care if five thought there was abuse, five thought there was neglect, or three and three, as long as you can get 10 that agreed that grounds for termination exist and that there's best interest, then you've got a verdict. I can understand that better when we're dealing with a jury verdict.

Now, in a bench trial we only have one mind. There's no doubt that the one mind found that that -- if you will, the equivalent of the same 10 jurors found whatever the grounds of liability were, because there was only one person making the decision; and if it's a bench trial and there's just one person and there's five alternate theories for recovery and under broad form if we're not going to know which five the trial judge relied

on, then we've got the same problems, I guess, examining the trial court's process as we did with the jury's process; but it's not necessary.

And let me move from the philosophical level to the practical level. As an advocate, the problem I have briefing a case with no findings, which is kind of the same problem I'm going to have briefing a case with ultimate issues, is that I've got to brief every single pled theory. I've got to negate every single factual ground, I've got to say no evidence on one, two, three, four, and five; and then five if there was evidence, there was error somehow in the way that that was tried. Maybe there's a reason to do that because of the jury trials and the fact that we decided verdicts are going to be opaque. We don't have really that for trial judges, and so why shouldn't we force the trial judge to tell us which of the five theories the trial judge was in favor of and then let's just brief that theory. Why bother to brief three or four or five theories that the trial judge didn't accept simply because we won't let the trial judge tell us which one she or he did accept?

And I don't think there is any big cost to it like there is with a jury verdict. When you've just got one judge it's easy to have findings. He can say, "I reject," you know, "this component of that theory, this

component of that theory, and I accept this one." And then let's take the appeal up on the basis the decision was really made on without having to negate all the ones it was possibly made on that we can't prove it wasn't made on, if that makes sense.

CHAIRMAN BABCOCK: Pete Schenkkan, then Gene.

MR. SCHENKKAN: One kind of mechanical thing about page four, since we're reading page one and four together, and then one more substantive thing. The mechanical thing is at page four in (b) we've got, "When one or more elements necessarily referable to the ground omitted necessary elements will be supplied and" --

PROFESSOR CARLSON: There's a phrase left out there.

MR. SCHENKKAN: Yeah, and the phrase I think is "have been found by the trial court."

MR. WATSON: Right.

MR. SCHENKKAN: And the additional phrase "necessarily referable to the ground" is a substitute for "thereof" in the existing rule, right?

PROFESSOR CARLSON: Right.

MR. SCHENKKAN: So now with that clarification, the fundamental thing I'm confused about is I guess starting back where we began. What is intended by

the use of the word "ultimate issue" in one rule as opposed to "ground of recovery or defense" and "element of a ground of recovery or defense" in the second one? I don't know whether I agree with the distinction or not, because I don't know what distinction is being attempted by the use of "ultimate issue" in the one area and these other terms in the second area.

It may be that those that have a lifetime of experience with jury trials do understand this, but I'm suggesting to you that a lot of us whose practice hasn't been in that area don't come into this with that understanding. We need help here in understanding why we're using these two different sets of words and what the distinction is before we can grapple with the question that Richard asks, which is should we do it or how should we do it. We need help understanding what y'all are doing here.

CHAIRMAN BABCOCK: Gene.

MR. STORIE: Yeah, I would like to offer another illustration, and I think I have noticed that Justices Pemberton and Patterson have already left. We actually argued a case in the Third Court last week, and the principal issue was whether the trial court needed to make a finding on whether a computer program satisfied the requirements of the comptroller's rule that interpreted a

statute. And the judge, not Judge Yelenosky, one of your colleagues, found that indeed it qualified as a computer program under the elements shown in the statute itself but declined to make a finding under the rule. So, of course, we won the case. The appellate's only argument is the trial court had to make a finding that matched up with the rule, and having failed to do so, the judgment has to be reversed. Well, that's a fine question, but I think it certainly speaks to the idea that you need more than the ultimate finding in the findings.

CHAIRMAN BABCOCK: Who was next?

MR. GILSTRAP: Bill was. Bill and Nina.

PROFESSOR DORSANEO: Well, I think I can speak for the committee and Elaine could just as well, that we used the words -- thought about using an adjective at all before the word "issue," and that's primarily what we were thinking about. We weren't really thinking about making element and ground; and listening, I think that probably does make more sense; but we wanted an adjective because we didn't think "issue" was clear enough, and we -- for me, "ultimate issue" is a better word, although it may not be as good an approach as using element and ground and let that evolve.

MR. SCHENKKAN: Is that what is meant by "issue"? Put aside the question of ultimate for a moment.

"Issue" means ground or defense.

PROFESSOR DORSANEO: It really means -- to me it means -- to me it means a legal element of a ground of recovery or defense.

MR. SCHENKKAN: Element of a ground or defense.

PROFESSOR DORSANEO: Yeah. That's what it means to me, and I think we just have the word -- we use the word "issue" here because we, still thinking about the word -- we're still thinking issues when we mean questions. But -- so I agree that it could be cleaned up a little bit, but I want to pick up on what Richard said, because what Richard said made a lot of sense to me, that maybe, maybe, bench trials are just different. What Justice Hecht said and I started scribbling here a little bit. Richard, listen to this. The last sentence I said instead of what it says now, "The trial court's finding must include" -- put "only" in if you want -- "as much of the evidentiary facts as are necessary to disclose legal and factual" or just "factual basis for the court's decision," to kind of say, okay, yeah, it's broad form whenever feasible.

There may be a -- there may be an inconsistency there, but picking up the idea that, okay, trial judge, there are five factual claims under whatever,

pick the ones that you think, but don't just pick every one that could be picked. And I like -- you convinced me on what you said about, well, maybe we can get the trial judges to work a little harder on this, but then there's a practical side, whether they ever will, and they -- and in my experience --

HONORABLE NATHAN HECHT: They're not.

PROFESSOR DORSANEO: It will be a rare occasion.

CHAIRMAN BABCOCK: The superstar judges will. Justice -- hang on. Justice Hecht.

HONORABLE NATHAN HECHT: Yeah, I mean, they take you to judge school and they say, "For god sakes, don't ever tell anybody what you're thinking, you're just going to get reversed," and so you just grant the summary judgment. You don't say a word about it, and you hope that the appellant doesn't cover all the points. And -- but just because that happens as a practical matter, and it's going to keep happening, doesn't mean you should prevent the other thing from happening when every once in a while you get a judge who, for whatever good reason, virtuous reason or another, wants to say, "This is what I thought about this case. I didn't think this person was telling the truth, and here's why, and this is why I thought it should come out this way."

PROFESSOR DORSANEO: I'd rather, if we're going to work on that, rather say -- and I do think it's a very serious problem for appellate lawyers and lawyers who aren't appellate lawyers who are appealing cases that you have to make all of these arguments that nobody really argued about. Okay? And I think that's what Richard -- the point he makes on that is an excellent point, but it is -- it's a bigger problem, and I think it would be easier in the summary judgment context to be clear as to why summary judgment was granted than perhaps in other contexts.

CHAIRMAN BABCOCK: Nina and Buddy, would you yield to Alex for a second?

MS. CORTELL: Sure.

PROFESSOR ALBRIGHT: I just have one clarifying thing on all of this talk about what's a ground of recovery, what's an issue. Everybody is talking about older cases. We also need to think about the Crown Life vs. Casteel case and all of its cases. I mean, all the cases following it, and it might -- those cases may have some language that would be helpful. I'm not remembering right now.

MR. GILSTRAP: That's an older case?

PROFESSOR ALBRIGHT: It's a newer case.

MR. GILSTRAP: Okay.

CHAIRMAN BABCOCK: Nina.

MS. CORTELL: I have a few comments. One, just on the timetable, I think it's fine to make it longer. I think there are some problems with that, but this is a one paragraph filing. It's very distinct from a motion for new trial or some of the other ones that we want more time for, and the idea of the earlier deadline was just to move the process along more quickly. I know I've had the problem where I'm up on appeal and I'm still waiting on findings, sometimes if it's an accelerated appeal or whatever. So I just wanted to give that nod toward the 10-day rule.

More importantly, on the language of ultimate issue, that may not be the right terminology, but obviously -- I think where we all are unanimous and where we want to get to is we would love to have findings that really clarify why the judgment was entered so that you have a clear record for the appellate court. I think that everyone has that goal. I think the hard part is how do you get there. Using Richard's hypothetical, there are four theories for breach, I think was your -- breach of fiduciary duty or fraud. Let's say there's four theories. My experience is that the winning party, the plaintiff in this case, will put all four theories into the findings so that I'm really not any better off at the end of the day

because you get 30 pages of findings. You often get very little review at the trial court level. It just gets signed, and I understand that, because trial courts don't have the staffing and so forth for that, but what we were trying to do was avoid this sort of barrage of findings that -- many of which are extraneous, going up in the appellate flow.

Now, the words we use and how we get there, I'm persuaded we need to go back to the drawing board on that. But the problem is that too often under our current findings practice what you end up with is a massive document that we wish looked a little bit more like the letter that Justice Hecht referred to, which really explains why the judge ruled the way he did, but we often don't have that in the findings that are actually signed.

CHAIRMAN BABCOCK: Buddy.

MR. LOW: Chip, I don't have any answers, but I have a question. These rules started in 1940 at a time when you had all of these details; and people said, "Well, wait a minute, I don't want to give that up to try a case nonjury. I want the judge to have to go through the same thing the jury did." That was so that you went through the whole -- whole shebang, and lawyers would write everything. "He wasn't even looking." "He was looking at the floor." They would put all of that stuff

in there.

All right. If -- and then I thought, well, I'll be smart and I'll ask the judge. I said, okay, judge, he said, "I ruled again the defendant." I said, "On what grounds?" He'd take the plaintiff's pleading and say, "Everything he pled." I quit doing that. So, but, why not just have a conclusion of law? The court compares the pleadings and the evidence and see if it's supported by he found negligence, he didn't find that. Why get into the judge's mind? We were entitled to that because they wanted this to substitute for a jury trial. Why have findings of fact now? That's my question.

CHAIRMAN BABCOCK: Pete. You have an answer?

MR. SCHENKKAN: No.

CHAIRMAN BABCOCK: Okay.

MR. SCHENKKAN: I have another question, or another tack on this. Focusing on the difference between bench trials an jury trials, and what we're talking about here is bench trials, it seems to me the closer analogy might be administrative law cases, which I have done for a living for a long time; and administrative agencies are generally required by their own statute and also generally required by the APA when they hold the agency equivalent of bench trials, so-called contested case, to make

findings of fact and conclusions of law; and sometimes the statute tells them to do that in more detail. And then the Texas Supreme Court was confronted with the question, well, how close do we have to parse those findings of fact to decide whether to affirm this order or not, and for a number of years while the Chief Justice of the Austin court of appeals was John Powers, the Austin court of appeals took the view that you needed to be very good in those findings of fact and conclusions of law and spell out the -- you know, the exact elements of each of the relevant statutory criteria and the facts that supported those.

And the agencies said, "No, this is just sticking in the bark of words and wasting time and getting us reversed for the wrong reasons," and finally the Texas Supreme Court sided with the agencies in Charter Medical and said as long as there is a reasonable basis here that allows us to see from the record how they got from the record to this side wins, we don't care. I think that's a fair summary of Charter Medical, and I'm wondering if that same thing isn't true here; and if it's true here, then if -- if that's what you want, if all you want is to make sure that the trial judge, who is sitting as the fact-finder as well as the law interpreter, has a reasonable basis, why don't we just say that? "Explain to

us in your findings factually how there's a reasonable basis how you got from here to there."

That isn't going to stop the prevailing lawyer from saying what -- "Here are 10 different possible bases," unless the higher courts don't like nine of them. Right? And it still doesn't. In administrative law we still offer findings of fact and conclusions of law that are 30 pages long because nothing bad can happen to us if it chops off 30 pages.

CHAIRMAN BABCOCK: Justice Gray, and then Frank and then Judge Christopher.

HONORABLE TOM GRAY: Well, first, a quick comment on the 10 days that I wasn't going to comment on until Nina commented on, and then I'm still getting appeals where it's been six months after the judgment before the parties get the judgment, and so 10 days after the judgment may still -- is going to present a problem in being very short to the time that the judgment is actually signed, and so I've got at least an issue with 10 days versus the more traditional 30 days.

As far as the -- I thought Alex's comment was dead on. With regard to E. B., probably would have had a different result had someone objected to what we later called a Casteel objection to being unable, i.e., not reasonable or whatever that language is in there,

feasible, not feasible, to submit on the broad form, because in Casteel it was multiple theories of recovery that one of which was not supported by any evidence.

PROFESSOR DORSANEO: No, one of which was not legally viable.

MR. ORSINGER: Not legally viable.

HONORABLE TOM GRAY: Okay. Not legally viable.

MR. ORSINGER: There was a following case that expanded out to no evidence.

HONORABLE TOM GRAY: There was a follow-up to it that was no evidence.

PROFESSOR DORSANEO: I know which ones I like and which ones I don't like.

HONORABLE TOM GRAY: The point being that if there's a ground of recovery that is not supported by either law or the evidence, there is a way to get to that through the appeal, and if they -- if the person who prevails attempts to use the broad form and then one of those grounds is shown to be not viable, then they have to go back and do it all over again; and so there's an incentive then for the party that prevails to pick a horse for the judge to agree on that he -- that that person can then support on appeal; and so I think while I understand Skip's point on needing to know and the beauty of knowing

the different theories that the trial court may be going with them on, I think there's a way to get through that beyond just stopping at the attack on the broad form submission.

CHAIRMAN BABCOCK: Okay. Frank, and then Judge Christopher.

MR. GILSTRAP: As I understand it, I think this is right, you know, a ground of recovery is a theory of recovery. An element is what they used to call a controlling issue. It's that the person was negligent, not that he was late for lunch and that's why he was driving fast. Richard is correct. We don't have the problem of having all 12 jurors or 10 jurors agree on the same theory, but we do have the problem in both nonjury and jury in that if you have granulated findings -- that's what they used to call them -- you know exactly what the judge or jury decided the case on, but with -- and that was the problem that -- that was what existed before broad form, and the problem was there were just too doggone many. You know, you had was the defendant -- did he run the red light, was it the proximate cause of the accident, did he fail to turn left, was it the proximate cause of the accident; and you go back and see all of these old charges that, you know, some of them had a hundred questions, so that was the vice. They got rid of it with

broad form questions.

The vice today with findings of fact is not necessarily that. I think you probably could get a judge, if you wanted to, to actually say what theory of recovery that he was -- he decided the case on. The problem is that you have all of these evidentiary findings, and they're still too many, and that's the problem we're trying to deal with here. I think that you do need some type of language in here. It may be aspirational that would speak in these terms of controlling issues and broad form issues, but you've got to put some teeth into it, and it needs to be made reversible error.

And the only way you're ever going to put teeth into this is when some court of appeals says, "Look, you've sent us 150 fine evidentiary findings. It's wrong. Go back and do it again." I can't imagine that happening, but that would actually start to cure the problem. Right now we can put all of this -- what Richard used to call hortatory language in here, but the judges aren't going to follow it unless it's made reversible error.

CHAIRMAN BABCOCK: Judge Christopher.

HONORABLE TRACY CHRISTOPHER: I think the 10 days is too short. I think often parties don't know when the judgment is going to be signed. There might not be a hearing that they're in front of the judge on and they

know it's being signed that day, and at least in our county they'll -- the clerk will enter it and then they get a postcard notice in the mail, and so we've already eaten up three, four days at that point. I just think 10 days is too short to do the request.

And then with respect to the idea behind broad form findings, I like it as a trial judge. It's a nice thing to be able to do. I've already done it on probably 20, 30 cases where I just said, you know, "I find the defendant was negligent, and it was a proximate cause of damages to the plaintiff"; and, you know, "There's this much in medical bills and this much in pain"; and it's a very simple thing to do because you just track the language of the jury charge; and if I was really worried about it, I might actually cut and paste the whole definition of negligence within my finding of fact to make sure that I've gotten the elements under the ground, if I'm understanding the distinction between the two of them, and I'm not sure that I do, frankly.

But from a trial judge's point of view -- and I'm a little interested because I don't understand the appellate issue -- is it harder if you have 150 findings to reverse the verdict or is it easier if you have 150 findings to reverse the verdict?

MR. ORSINGER: I would answer if they're all

evidentiary they generally get ignored or don't get mentioned in the appellate opinion, although it's possible they may have prejudiced the appellate court against you, but they're usually not mentioned because they're just evidentiary. The real vice is when you have multiple theories that you have to brief when probably the case was only tried on one theory, and you should be able to spend your whole brief on that one theory.

HONORABLE TRACY CHRISTOPHER: But don't you have that same problem -- I'm sorry -- with a jury charge also? If the question is just was the --

MR. ORSINGER: The jury might be judge.

HONORABLE TRACY CHRISTOPHER: -- defendant negligent and there were four or five different possibilities on why the jury was negligent and the jury just answers "yes," you don't know which one they did it on. Why is it any different for the judge?

MR. ORSINGER: It's different because we made a policy decision that the social cost or procedural cost of exactitude in the jury is too costly to us. We have that behind us. We have explored it, we have decided to move a new direction. There is virtually no cost to having a trial judge put in the record what their real thinking is; and if they don't do a good job of it, unlike with a jury trial, under the Casteel case you've got to

reverse it and go back and try the case with a new jury. All you have to do here is remand -- is to abate the appeal and remand it to the trial court saying, "We would like more specific findings that set out what your real foundation for your judgment is." So the litigation costs or social costs, I guess, to being more accurate in bench trials is very small relative to a jury trial, and I think you should weigh it differently.

CHAIRMAN BABCOCK: Roger.

MR. HUGHES: I still think it comes down to this. It's not just are we going to permit some sort of Casteel objection to be made to the charge -- I mean, to the court's findings of fact, because if it does, I think the proposed Rule 298 could do what a Casteel objection is supposed to do for a jury charge. I think it still comes back down to a basic gut decision that we're going to have -- that's going to have to be made, and I'm not sure whether it has to be made as a rule or a matter of a case decision as to whether we're going to say not knowing which act or omission was negligent, not knowing which representation the court found to be a misrepresentation, obstructs the appellant's ability to present his case or her case to the court of appeals.

It's not the social cost, because if it obstructs the appellant's ability to attack a jury verdict

not to know which act or omission was negligent, which representation was false, then it must be so for a judge's, and that's plainly it to me, and I'm not sure that this committee can solve it, but I think getting back to my original suggestion, I think if you change Rule 296 to talk about the elements of a ground for relief or a defense, I think you will have done as much as you can, short of the Supreme Court finally resolving the issue, you know, the question to begin with.

CHAIRMAN BABCOCK: Pete, then Skip.

MR. SCHENKKAN: Well, if that's what you want to do, you're going to have to rewrite 299 substantively, because the real obstacle to doing what you want at the moment is the presumed finding rule. At the moment if the judge says, "I find there was fraud because there was misrepresentation," then we're going to presume that the judge also found that it was a proximate cause of damages, even though they just immediately moved to the damages, because it says in 299 if they found one of the elements of a ground of recovery, broad, breach of the duty, we're going to presume the findings we need for the rest of them. You know, so we're not going to get there by -- if we have a problem and that's the problem, we need a different solution for the problem.

CHAIRMAN BABCOCK: Skip.

PROFESSOR DORSANEO: I don't think so.

MR. WATSON: I think the answer to the question that's being asked of what is the appellate problem, to me is this. It may be different to others, but the Court finally enforced the idea that we have two different kinds of harm that are reversible in this state when it did Casteel, City of Houston, Romero, and the others. It decided that it's got to know -- I mean, Casteel was actually saying that we have a fundamental right to determine a case was decided on proper legal grounds, and if a ground has no evidence supporting it, it is not a proper legal ground. That's a question of law. It's not a proper legal ground, and it was really enforcing 44.1(b), or whatever it is, that says that if the way you do something prevents a person from showing that a case was really not decided on a proper legal ground when you have several grounds, some of which are proper, but the finder of fact -- and I don't care -- to me it shouldn't matter whether he or she is wearing a robe or not, but if that person actually is human and makes a mistake and doesn't decide a case on a proper legal ground, then our system of submitting or showing how the case was decided must show whether the case was decided on the disputed ground.

And to me the difference between what I'm

talking about and what Richard was talking about in E. B. is simply I don't care if the same five people came down on the same issue. What I care about is if one of those four grounds had no evidence. Then I care very much whether I can demonstrate that they decided it on that ground. That matters, and until the Court repeals 44.1 and says, no, it really doesn't matter if you can effectively present the fact that this one should not have been before the court, the finder of fact should not have been able to consider this, and until it says Casteel, City of Houston, Romero are out the window, then before juries we are in a situation that the author of Romero said you have three choices. You can either not put it in the instruction or you can separate it out so that there's a separate finding so that we know that's what it was based on or you can get reversed under 44.1(b). And I'm just asking, is that going to apply to judges or are they exempt? To me that's the philosophical question.

CHAIRMAN BABCOCK: Elaine and Sarah have the answer to that.

PROFESSOR CARLSON: Well, the thought process of the subcommittee was that it would, I think. I mean, we were trying to do that parallel for the very reasons that you're suggesting, so at your own peril would you stand with broad form findings of fact if you have a

ground unsupported by the law or any evidence.

CHAIRMAN BABCOCK: Sarah, then Richard Munzinger.

HONORABLE SARAH DUNCAN: A couple of points. I don't think that the Casteel line of cases -- that they can repeal 44.1 if it's -- those weren't decided because of harmful error, I don't think. There's a constitutional right to appeal in civil cases under the Texas Constitution, and Federal constitutional law says that if you're going to provide appeal it has to be a meaningful appeal.

Bill and I debated this exact question 20 years ago at a San Antonio seminar. My view was, as Skip says, that I should be able to know what the basis of the jury's decision is. Bill took the opposite view, and it wasn't -- you know, we had a harmless error rule long before Casteel. We have a different Court, who has a different view of it, who has lived with it longer to see what the problems are with broad form submission as it has come to be defined, which I think actually looking back at Judge Pope's comments at the SCAC meeting where that was floated what has come to be known as broad form submission is not what was initially proposed.

All that aside, I don't think we're paying enough attention to what Buddy said on the historical

roots of our findings and conclusions rules. They were trying to make it like jury trials, but we've rejected doing jury trials that way, so why do we want to impose on the trial judges what we have said we're not going to impose on the juries because of all the reasons that we said we're not going to do it? The risk of having irreconcilable findings of -- it getting too evidence-based and requiring too much. Now, Judge Yelenosky, of course, has an answer to this, but I don't see a reason for treating judges and juries differently, bench trials and jury trials.

I don't agree with what broad form submission has come to be known as, but if that's what we're going to do with juries, I don't see why we don't just -- and I understand, Justice Hecht, that you want to know the basis of their decisions. Well, I would like to have known the basis of the jury's decision, too, but just because I want to know it, doesn't mean the system costs aren't too high for me to impose that as a requirement.

CHAIRMAN BABCOCK: We're going to have to break away from this for a second. Actually, more than a second, because the Court is interested in hearing from the great Buddy Low on the issue of the Rule of Evidence 1010.

MR. LOW: Okay.

CHAIRMAN BABCOCK: So we're going to defer the rest of this discussion until our next meeting. We're not meeting tomorrow, and, Buddy, can you take us through this in 12 minutes?

MR. LOW: I can even beat that.

CHAIRMAN BABCOCK: If you can beat 12 minutes then we'll get out of here early.

MR. LOW: Okay. I got a call from the chairman of the State Bar Evidence Committee claiming that they need the Supreme Court to pass a Rule 1010 which is called "Unsworn declarations." There is such a thing in the Practice and Remedies Code pertaining to prisoners. They can sign, it says, "subject to perjury," and that's by statute because they can't get a notary. And I said, "Well, that's fine." Said, "We want to have a conference call with you tomorrow." I said "Okay." So they call and they tell me that they need this because they need the Legislature to amend the definition of perjury to include this, and I said, "Well, why don't you go to the Legislature for the whole thing? You've got the idea," and they didn't really tell me, but I heard that they had been to the Legislature.

So I told them, I said, "My committee" -- it was like two weeks ago. I said, "I can't get the committee together and make recommendations to the Supreme

Court advisory," so feel free to go straight to -- I put it on Judge Hecht. I said, "Write him, but I can't do it." So Judge Hecht asked me if I would get my committee together or poll them and see, you know, what we thought about it. Well, my first thing was to call or write the different committee members. Judge Benton, I called, and he thought there was something in the uniform laws on that. There really wasn't. There was something about out of country declarations. Judge Jennings, who used to be a prosecutor, was not in favor. He thought we were getting away from formality too much, it would be very difficult to prove perjury because somebody could just say, "Well, you know, nobody described that to me. They just passed it over and I signed it." And technically a notary should keep a record and identify and go through all of that.

I called Professor Hoffman, and he said that the notary was an unnecessary formality, that it was probably pretty good, but he thought it ought to be legislated. Elaine was against it. Harvey Brown, my goodness, he was strongly in favor of it because he had a Federal thing similar to that, and the case was in -- some way got into state court, and he had to get the judge to allow this to be admitted. I mean, I don't know why that was a lot of trouble, but any rate, I didn't hear from Tommy.

I did some research, and I found at the Federal rule -- now, my first question to them was if you're going to have a rule like that, why put it in the tens. The nines are the one. Well, I found that 902 of the Federal rules, they have a -- they have a comment, they have a statute, particularly on it. I found Utah passed a rule on it, and it was a lot of confusion because some judges wouldn't apply it. They said that should be statutory, so then the Legislature in Utah had to go back. That's the only -- you know, and make it a legislative act.

The pros and cons of what it does, it does away with a notary, and the pros and cons, you can argue them all day. The other question I asked them was should it apply to criminal cases, criminal law, and they hadn't really thought about that. I said, well, you know, we've got to know that. The next philosophical question is if we do it, we can't do it all. We can't make it a crime. We can't change the perjury laws. So I guess the first question -- or I don't know what question comes first, whether you say should we make a rule, should it be legislative, is the thing good or bad, whichever way it is, and that's basically -- I told you everything I know.

CHAIRMAN BABCOCK: Justice Hecht.

HONORABLE NATHAN HECHT: And I think I can

just build on that and tell you what I think the Court would like to know, which is pretty simple, and that's is this a good idea or not.

MR. LOW: Yeah.

HONORABLE NATHAN HECHT: I don't think we can do it, and I think the Court's tentative view is that this can't be done by rule because at least tentatively the perjury statute does not -- would not make this perjury, and since that's in the Criminal Code, there's nothing that can be done about that. The Federal system does it by statute and says that the statement made under the penalty of perjury is -- you can prosecute the falsity of that as a crime of perjury, so they don't have the problem, and so the only question I think the Court is interested in is just in case we get an inquiry from the Legislature, which we may not, but generally would it be a good idea to have statements, affidavits, motions for summary judgment, verified pleadings, whatever it was, made under penalty of perjury, and an amendment to the Penal Code that says that's perjury if it's false, or should we keep it the way it is?

MR. LOW: Judge, their question was, they said we have to pass a rule first before the Legislature will consider that; and what came first, the chicken or the egg?

CHAIRMAN BABCOCK: Yeah. Let me say that in Federal court, especially in jurisdictions other than Texas, you almost never see anymore an affidavit. It's always declarations, and in states where they have this rule and the implementing statute, you never see affidavits. You always see declarations. California, for example, is a jurisdiction that does it this way, and the practical benefit, the reason it is a good thing, is that when you're -- particularly as our economy expands across state lines, when you've got a witness in California that you're trying to get some testimony for and that person may not have ready access to a notary, it is just much simpler and costs less money to get a declaration, and the only thing you have to be sure about is that the declaration is treated as seriously and as formally as the affidavit is when the guy presumably puts his hand up and says to the notary, "I swear I'm telling the truth here."

MR. LOW: Chip?

CHAIRMAN BABCOCK: Yeah, Buddy.

MR. LOW: I'm sorry. 902 is the only place the advisory committee commented on the statute, and they said, "A declaration that satisfies 28 USC 1746 would satisfy the declaration requirements of Rule 902," paren, (11). Not all the others, but that really -- the others are self-proven and so forth, but that's the only

reference in the 902, is that it satisfies section (11) of 902.

CHAIRMAN BABCOCK: Yeah.

MR. LOW: And that's a comment.

CHAIRMAN BABCOCK: Yeah. Well, I guess my point is that the thing -- the reason to say it's a good thing is because of the ease of getting it. Now, the countervailing balance Judge Yelenosky wants to say.

HONORABLE STEPHEN YELENOSKY: Well, I think it depends, and partly it's a -- you know, you're talking about Federal court, and you're talking about witnesses out of state, and you're talking about usually people who are represented by counsel, but we're not talking about something that would be usable only under those circumstances. We're talking about something that in every instance, at least as I understand it, would be equivalent to an affidavit.

MR. LOW: Right.

HONORABLE STEPHEN YELENOSKY: And culturally right now I don't think people think that they can be subject to perjury unless something magical happens, they're standing in front of a judge who has a robe on or they see a notary, and maybe it would be fine if people became accustomed to understanding this. One of the things that might be necessary is like we do with consumer

notices, certain things have to be in all bold and a certain font. Maybe that would get us there, but I already see in court -- and we know as judges one of the instructions we get is to administer the oath in a way that impresses upon the person the seriousness of the oath; and you just said, Chip, important to know that the person knows that the -- well, who's going to make sure that the pro se litigant who is signing under penalty of perjury on the interrogatories knows the importance of that?

And I'm not just saying for the purpose of prosecution, because we know how little that ever happens. I'm saying for the purpose of elevating what they're doing to something that they truly consider serious. I see it minimized even at the affidavit stage, people coming in court and saying, "Well, I signed the affidavit, but the attorney wrote it for me" and blah-blah-blah. It's already a problem with affidavits. Unless there's the huge education, there's something specific that screams this is just like standing up in front of a judge, I think we're going to have real problems, because it will be credible that the person did not understand the seriousness of it.

CHAIRMAN BABCOCK: Alex.

PROFESSOR ALBRIGHT: If you think going

before a notary does that then you haven't sat by many --

HONORABLE STEPHEN YELENOSKY: I don't know that it does.

PROFESSOR ALBRIGHT: I have two notaries sitting outside my office, and the law students and people from all over the university come in all the time getting things notarized, and not one word is ever said about the importance of the oath or what they're doing. They just show them their driver's license and get it all down.

HONORABLE STEPHEN YELENOSKY: Well, that may be a problem with how the notaries do their work.

PROFESSOR ALBRIGHT: But I think it may be that you can do it through the wording of whatever you're signing as well as you can with the notary.

CHAIRMAN BABCOCK: Carl, then Hayes, then Bill, and then, I'm sorry, Judge Christopher.

MR. HAMILTON: As a matter of background, a few years ago the Court Rules Committee prepared the legislation to this and sent to it the State Bar, and they submitted it to the Legislature, and, Hayes, didn't you work on that some?

MR. FULLER: I was going to comment on that, Carl. Court Rules Committee addressed this five years ago. It was brought to us, and it was pretty much unanimous at that committee. It was approved by the State

Bar liaison as part of their legislative packet. It has been approved by the State Bar liaison the last two legislative sessions and has failed in both sessions, my understanding, primarily because of the opposition of the notary publics, and I think the last time it was -- Chairman Smithey may have changed. He may not be the chair of that committee, but I believe at one time he didn't even let it come up for a vote. I think they had testimony.

In response to Justice Hecht's question, it is a good procedure. The problem is right now, of course, it's not sanctionable, because it's not subject to perjury. Inmates in the state of Texas can use this procedure, but you and I cannot use this procedure, and the committee felt like -- the Court Rules Committee felt like it was very useful. It is the Federal practice, but there is a problem that unless the perjury statute applies we can't do it. So the short answer to your question is, Justice Hecht, yes, it's a good procedure; and if asked, I think --

CHAIRMAN BABCOCK: Judge Christopher, then Judge Evans.

HONORABLE TRACY CHRISTOPHER: Although I'm not necessarily opposed to this, because I actually like the language, "I declare under the penalty of perjury that

the foregoing is true and correct," which is a lot stronger than "Subscribed to and sworn before me on the," blank, "day of," blank, which is what your notary paragraph says, the one reason we do have notaries is to verify that the person signing it is that person signing it. So the fact that --

PROFESSOR ALBRIGHT: Yeah.

HONORABLE TRACY CHRISTOPHER: -- your notary requires the driver's license and notes it down indicates that, yes, you know, I really signed that document. And that goes away with this declaration.

CHAIRMAN BABCOCK: Judge Evans.

HONORABLE DAVID EVANS: It doesn't state that it's made on personal knowledge, and so you duck the "true and correct." You say it's true and correct, well, that's what I heard, that's what I understood, and so I'm not comfortable with the last sentence. And "under penalty of perjury," that doesn't -- they won't know that that requires them to have personal knowledge of the facts. We're just going to get into a series of conclusionary, baseless statements to base evidence on, and I have the same problem of identification, but I might be willing to go with -- I would suggest maybe a witness that identifies a person, so --

CHAIRMAN BABCOCK: For what it's worth, in

California their last line says, "I declare under" -- something about "pain of perjury under the laws of the State of California," and I've got a case where all the witnesses are in Aruba, and they're all signing these things, and, you know, unless they show their happy face in California -- but that's where the case is, so maybe they will show their happy face there.

Yeah, Roger.

MR. HUGHES: Well, I was on the State Bar Rules Committee when we went through this, and what's been said before about our history is exactly true. The reason why I so strongly opposed it is if you've ever tried to get a client in Hong Kong or Canada to sign a special appearance so you can get it filed on the 20th day, now you understand why this statute might be necessary. In Canada, notaries are very scarce. What they provide are called oath takers. Now, I wasn't exactly sure I wanted to go in front of a Cameron County or a Hidalgo County judge and explain why a Canadian oath taker was the same thing as a Texas notary, and it gets only worse when you're dealing with clients who are in Mexico who cannot come across the border, at least not legally, because notaries over there are a lot stickier than our notaries, and expensive, I might add. And it only gets worse if your client is in Hong Kong, and you've got to have that

affidavit for the special appearance, which has to be filed today at 5:00 o'clock or whatever.

And as far as the form that it's true and correct of personal knowledge, I think that can be part of the body of the affidavit to be admissible. I don't think the statute of defining what an affidavit is requires that it be -- everything be made on personal knowledge. That's my two cents worth.

CHAIRMAN BABCOCK: Okay. So, Justice Hecht, here's the bottom line. There are pros and there are cons to this rule, and you've heard the two sides of the debate.

We're going to recess now until our next meeting on April 17th. And if you-all can get by the reception and, more importantly, the picture taking tonight starting at 6:00 at Jackson Walker's offices, 100 Congress. The parking garage is off Cesar Chavez and it's -- if you go by Congress on Cesar Chavez headed to Mopac, and the little driveway right between our building and the next building, which is an apartment building under construction, that's where the parking lot is. Get your ticket and take it to the reception area. They'll stamp it for you, and that will be that, and we hope to see all of you at 6:00.

(Meeting adjourned.)

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REPORTER'S CERTIFICATION
MEETING OF THE
SUPREME COURT ADVISORY COMMITTEE

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I, D'LOIS L. JONES, Certified Shorthand Reporter, State of Texas, hereby certify that I reported the above meeting of the Supreme Court Advisory Committee on the 20th day of February, 2009, Friday Session, and the same was thereafter reduced to computer transcription by me.

I further certify that the costs for my services in the matter are $1,989.00.

Charged to: The Supreme Court of Texas.

Given under my hand and seal of office on this the 5th day of March, 2009.

D'Lois L. Jones

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