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MEETING OF THE SUPREME COURT ADVISORY COMMITTEE
9
August 25, 2000
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(AFTERNOON SESSION)
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19 Taken before William F. Wolfe,
20 Certified Court Reporter and Notary Public in
21 Travis County for the State of Texas, on the
22 25th day of August, A.D. 2000, between the
23 hours of 1:20 o'clock p.m. and 5:00 o'clock
24 p.m., at the Texas Law Center, 1414 Colorado,
25 Rooms 101 and 102, Austin, Texas 78701.

COPY

1 INDEX OF VOTES

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

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1 (MEETING RECONVENED AT 1:20 P.M.)
2 CHAIRMAN BABCOCK: Okay, guys,
3 let's get going. Okay, Elaine, quit
4 kibitzing. All right. We're back on the
5 record at 1:20, five minutes late. Sorry.
6 Paula, you've got the floor and I suggest we
7 start with No. 1.
8 MS. SWEENEY: Thank you. No. 1
9 is a top-of-the-list kind of place to start.
10 What I would like to propose is this -- and
11 Alex, thank you for what you pointed out
12 before. The reason that this was done this
13 way is so that we can go through these, and
14 assuming that there is going to be a rule and
15 the Court would like our input on what ought
16 to be in it, we can go through these things
17 sequentially as we look at the different
18 concepts, and we can mess with the language,
19 we can amend it or whatever you all want to
20 do.
21 The first concept that we all felt ought
22 to be in the rule is No. 1 on Page No. 1,
23 "Attorneys for the parties have a right to a
24 reasonable time for voir dire," and the
25 component parts of that, and Steve Yelenosky

1 pointed it out, that the parties are the ones
2 who have the right, and the right is that
3 their lawyers -- not the judge -- their
4 lawyers, or they, if they're pro se, have a
5 right to a reasonable time for voir dire. So
6 that's the first concept, and I guess that the
7 procedure ought to be to lay it out there and
8 see -- or move for it to be included in a
9 proposed rule.
10 CHAIRMAN BABCOCK: Okay. Let's
11 talk about No. 1 and see if we've got any
12 discussion.
13 HON. MICHAEL H. SCHNEIDER:
14 I've got one question.
15 CHAIRMAN BABCOCK: Yes, Judge
16 Schneider.
17 HON. MICHAEL H. SCHNEIDER:
18 Shouldn't it be parties? Didn't you say
19 that?
20 MS. SWEENEY: Yes, that's what
21 I just mentioned. Steve pointed that out.
22 And we'll draft this so that we're -- we got
23 into some multiple commas and apostrophes a
24 second ago here trying to do it, but it will
25 be drafted or ought to be drafted to reflect

1 that the concept is the parties have a right
2 to voir dire, and that right is for their
3 lawyers or for themselves to do it, not the
4 judge. The parties have the right, themselves
5 or their lawyers, to do voir dire for a
6 reasonable of period of time. Bill.
7 PROFESSOR DORSANEO: Paula, is
8 it part of that that the judge will have a
9 very -- well, let me put it this way: In our
10 order now, following Rule 226a, the place
11 where the judge tells the panel about the case
12 are two blanks, this is the case, a civil case
13 of X versus -- blank 1X versus blank 2Y. And
14 that was a conscious decision to limit the
15 role of the judge, I believe, in just doing
16 the same kind of thing. Does this first
17 number raise that issue too in an implicit
18 way?
19 MS. SWEENEY: In my judgment it
20 does not. I think it leaves that as is; that
21 whatever the judge has permission to do now,
22 the judge has the same scope regardless of
23 what we do with this clause. Now, it may come
24 up in some other things later on, but I don't
25 believe it's included in this part.

1 CHAIRMAN BABCOCK: Wouldn't the
2 rule we're talking about be inserted between
3 226 and 226a?
4 HON. SCOTT A. BRISTER:
5 Probably after 226a.
6 CHAIRMAN BABCOCK: Isn't the --
7 HON. SCOTT A. BRISTER: Because
8 you give the admonitory instructions in 226a
9 first.
10 CHAIRMAN BABCOCK: To the
11 entire panel?
12 HON. SCOTT A. BRISTER: Right.
13 PROFESSOR DORSANEO: I'm
14 talking about the Rule 226a, and then there's
15 an order in the rulebook which is not 226a,
16 it's the order of the Supreme Court
17 promulgated in accordance with 226a. It's
18 commonplace for all of us to talk about the
19 order as if it's the rule. It is not.
20 CHAIRMAN BABCOCK: That's
21 right. Okay. So we're really talking here
22 about a 226b rule, right?
23 MS. SWEENEY: Fine.
24 HON. HARVEY G. BROWN, JR.: So
25 if I can clarify, it's still all right for me

1 to ask my jury panel, "Is anybody going to be
2 on vacation next week," you know, to ask
3 general questions?
4 MS. SWEENEY: This has nothing
5 to do with that.
6 HON. HARVEY G. BROWN: Okay.
7 MS. SWEENEY: This just
8 clarifies that the parties get to do voir
9 dire. As to what the judge gets to do, that's
10 covered elsewhere. This is a separate sphere,
11 so to speak.
12 CHAIRMAN BABCOCK: Okay. Any
13 more discussion? Judge Rhea.
14 HON. BILL RHEA: Well, the
15 "covered elsewhere," I'm real concerned about
16 this. That may be covered, and maybe what
17 you're talking about is 226a, but that's just
18 general instructions. 226a does not include
19 my preparatory examination at the beginning,
20 which simply is the, you know, "Here is the
21 case. Here is what it's about. Do you know
22 anything about it? Have you talked to the
23 lawyers?" Nor does it include what I
24 typically do. There is general voir dire, the
25 lawyers finish their questioning, and then

1 when they finish that, if we bring them back
2 individually, I ask those individual
3 questions. I've got the discretion to do
4 that. I think it works best. It eliminates
5 this whole issue of leading questions. There
6 are a lot of advantages to it. Lawyers tell
7 me what they want me to ask about individually
8 and I ask those questions individually, and it
9 works great.
10 I believe under these rules, because it's
11 specifically enumerated as the attorneys'
12 right to ask the questions, that I would lose
13 that ability. And I don't want to lose that.
14 I think that's a terrible thing.
15 MS. SWEENEY: Well, I disagree,
16 Judge. I see the concept as separate.
17 There's not a rule right now that says that
18 you have the authority to do that. You just
19 do it, and I don't see that that changes it.
20 And as you'll see as we go further on with
21 other concepts, and I guess I'm making a plea
22 for some conceptual clarity, what this does is
23 what the Legislature wanted, which was to
24 protect the parties' right to do their own
25 voir dire. I don't think it does anything

1 either way to whether or not you have the
2 authority, discretion or what have you to ask
3 those other questions. Now, we can put a
4 section in someplace that says you can or
5 can't, but that's a whole other study.
6 HON. SCOTT A. BRISTER: It
7 would be the first paragraph of the task force
8 rule. The task force rule starts by saying
9 after giving the 226a instructions, the court
10 examines about general qualifications, the
11 court in its discretion may make a brief
12 statement of the case, examine the prospective
13 jurors to disqualify; however, no examination
14 by the court shall preclude the parties from
15 making their own statement and examination.
16 Then go on with what the attorneys have the
17 right to do.
18 MS. SWEENEY: And I strongly
19 disagree. And I would say from my perspective
20 that the reason that this wasn't adopted in
21 part is because it says the court shall
22 examine the prospective jurors as to their
23 general qualifications and may make a brief
24 statement of the case. And I don't think that
25 we ought to have that in the rules because I

1 don't want the judge stating my case for me.
2 I want to do it my way. I don't want some
3 judge getting up there sneering about my
4 case. So I do not think that that and this
5 concept are interrelated. I don't think
6 they're mutually exclusive, but I strongly
7 disagree that we ought to have that in the
8 rule.
9 CHAIRMAN BABCOCK: Paula,
10 what's your experience now? When you try a
11 case, does the judge typically say something
12 briefly about what kind of case it is?
13 MS. SWEENEY: Yes. But
14 typically it's "This is Jones vs. Smith, M.D.,
15 it's a malpractice case. These are the
16 folks. Does anybody know them? And Baylor
17 Hospital is a party," you know, which is one
18 thing; as opposed to a more detailed, you
19 know, "This is a case for mental anguish and
20 physical pain. Does anybody here think that's
21 stupid?"
22 HON. SCOTT A. BRISTER: Or
23 Pennzoil vs. Texaco, this is the biggest case
24 that's ever been filed in the history of the
25 state of Texas.

1 MS. SWEENEY: Now, if we could
2 put that in, that the judge will introduce my
3 cases that way, I will withdraw everything I
4 have said.
5 So anyway, I think there's a difference
6 there between substantive versus
7 identification.
8 CHAIRMAN BABCOCK: Steve.
9 MR. SUSMAN: I think we're
10 getting a little off track with this. Does
11 anyone have any question about whether (1)
12 should be included? I mean, we could go on
13 and debate whether judges should have any
14 power at all to say anything or what we ought
15 to say about judges, but that's not what we're
16 weighing.
17 MR. LOW: But that's one step
18 that Paula proposes in No. 1.
19 MR. SUSMAN: Right, we're on
20 Paula's laundry list.
21 MR. LOW: Okay. I just want to
22 be sure that you and I are on the same page,
23 and I agree with you.
24 MR. SUSMAN: I mean, is there
25 anything wrong with No. 1? Let's put that to

1 the vote.

2 CHAIRMAN BABCOCK: Well, Bill

3 Dorsaneo had his hand up first, then Judge

4 Rhea.

5 PROFESSOR DORSANEO: I think it

6 should be included. I think it should be

7 included because it's the right way to do it.

8 And I also think it should be included because

9 it's not necessarily the way it's done other

10 places and we ought to make our way clear.

11 CHAIRMAN BABCOCK: Judge Rhea.

12 HON. BILL RHEA: Well, if I

13 heard Paula right, she doesn't have any

14 argument with some appropriate limited

15 participation by the court, but I don't see

16 that in here. And I think I may have heard

17 you also correctly that you wouldn't have any

18 objection to, when we got to the point of

19 formulating the rule itself, that we have some

20 acknowledgement of that, that it not should be

21 silent as to the judge's participation.

22 CHAIRMAN BABCOCK: Buddy, then

23 Steve.

24 MS. SWEENEY: I'm saying they

25 should be separate, Judge; that I'd like to

1 talk about this concept now and vote it up or
2 down, and then we can talk about the judges
3 concept as a separate concept, judge
4 participation, separately elsewhere. But for
5 logistics, I'd like to address this issue.
6 HON. BILL RHEA: Okay.
7 CHAIRMAN BABCOCK: Buddy.
8 MR. LOW: For purposes of this,
9 if somebody is concernced that they can't do
10 something they can do under existing law, you
11 could have a comment, something to the effect
12 that the rights of the judges under the
13 existing case law are not interfered with or
14 something like that.
15 CHAIRMAN BABCOCK: Steve.
16 MR. SUSMAN: I think Paula said
17 what I intended. We ought to stick on this
18 right now, vote this.
19 CHAIRMAN BABCOCK: But as I
20 hear Judge Rhea, he's objecting to this
21 because it excludes, or to him it excludes,
22 participation by the court, so that's why, if
23 I hear your objection --
24 HON. BILL RHEA: But that's
25 looking at the matter as a whole. If we're

1 going to deal with it in a later section,
2 fine.
3 MS. SWEENEY: It would not be
4 out of order, to be procedural about this, to
5 raise that issue after this vote at some point
6 during the discussion. So I don't think this
7 precludes that. This is separate from that.
8 CHAIRMAN BABCOCK: I hear you.
9 Bobby.
10 MR. MEADOWS: I frankly don't
11 think it is separate, because what we're
12 talking about is how voir dire is conducted.
13 Now, I'm in favor of No. 1 on the subcommittee
14 list, but unless I'm missing the subtext, I
15 don't see why that's in any way a problem with
16 what's stated in No. 1 of the jury task
17 force. It says the court shall -- the task
18 force says that the court shall examine the
19 jurors as to their general qualifications,
20 period. The court in its discretion may make
21 a brief statement of the case, which I think
22 we all acknowledge the court can do and does.
23 Then it goes on to talk about lawyers. So to
24 me it's all one big thing. And I would be in
25 favor. I'm certainly in favor of having an

1 acknowledgement and a statement of the
2 parties' rights to have their lawyers
3 participate in voir dire.
4 I wouldn't just -- we could do it in some
5 kind of order, I guess, but if we're going to
6 take it up in context of the task force work,
7 we're not -- I know we're going to go through
8 the subcommittee, the 11-point proposal. I
9 mean, I'm a part of that; I agree with it.
10 But I thought we were going to discuss it as a
11 part of the consideration of what the jury
12 task force did, and not to just treat them as
13 completely separate items or matters. So
14 anyway, I just raise that point. I'm in favor
15 of both of them, and I think that they are.
16 CHAIRMAN BABCOCK: Okay. Judge
17 Peeples.
18 HON. DAVID PEEPLES: I'd like
19 to say a couple of things. I made every
20 meeting of the subcommittee, and I don't think
21 that it was ever suggested that No. 1 would
22 cut down on what judges can do. That's
23 something I first heard here.
24 Now, the second thing, Chip, the way we
25 did this, I think the Committee told the

1 subcommittee to come up with a rule. And I
2 had a proposed rule early at one of our
3 meetings, and very quickly in that meeting it
4 became apparent to all of us that it would be
5 more helpful to talk about general principles,
6 and so that's what we did. And that's what I
7 think we're getting ready to do about here,
8 but it seems to me it ought to always be in
9 the context of both the jury task force rule
10 and the idea we're going to have to have a
11 rule written. But analytically it's just
12 easier, instead of focusing on language -- it
13 ought to say "comma" and "but" and passive
14 voice and so forth -- what we're doing now is
15 focusing on general principles, which is good,
16 and we shouldn't get hung up on drafting and
17 what's going to cut down -- I think for No. 1
18 to cut down on what judges can do, I think
19 that is just an extraordinary suggestion that
20 nobody thought about during the drafting
21 process that we went through.
22 MS. SWEENEY: I agree. The
23 first time that it's been raised is here
24 today. That's not the intent. I don't think
25 that's what it does, and I would suggest that

1 we vote. Does everybody agree with the
2 concept to go into the rule that parties have
3 a right for the lawyers to do voir dire for a
4 reasonable amount of time?
5 CHAIRMAN BABCOCK: Judge Brown,
6 then Steve, then Buddy.
7 MR. SUSMAN: I thought we were
8 voting.
9 CHAIRMAN BABCOCK: Well, we're
10 not, because Judge Brown had his hand up.
11 HON. HARVEY G. BROWN: No, I
12 wasn't voting. So we're not going to draft a
13 rule today, we're going to come up with
14 principles. Then I guess we'll go back to the
15 subcommittee, and the subcommittee will draft
16 a rule where we can see if we really think the
17 principles work. It might be for some of us,
18 part of a principle might only work if there's
19 a corresponding principle that goes along with
20 it. In other words, I might vote for this,
21 but the next time it comes around, if it says
22 no, judges have no right, well, then my view
23 on this might totally change, because the
24 whole rule has to be voted on.
25 HON. SCOTT A. BRISTER: Right.

1 For instance, at the subcommittee, I was only
2 for (1) if there was also (2), because it
3 seems to me it's not fair to say, you know,
4 this is just a judge problem, we just need to
5 fix these judges. No, there are attorney
6 problems, too. And judges and attorneys, we
7 all have a role. And judges can put limits,
8 and attorneys -- we talked about, well, should
9 we just make it attorneys have the right, or
10 should we just make it judges can put time
11 limits? And we decided as long as you have
12 both, is wasn't an attack on either group.
13 CHAIRMAN BABCOCK: Steve, did
14 you have something you wanted to say? No.
15 Mike, did you have your hand up?
16 MR. HATCHELL: I must have been
17 stretching.
18 CHAIRMAN BABCOCK: Buddy, do
19 you have anything to say?
20 MR. LOW: No, I was voting.
21 CHAIRMAN BABCOCK: All right.
22 So Paula, that was my understanding. We were
23 going to try to agree on general principles,
24 and then you would draft something, and we
25 would consider that as the first item of

1 business at our next meeting sometime in
2 October, October 20th. Yes, Buddy.
3 MR. LOW: I think that what
4 Paula is proposing is that this be the rule,
5 and it doesn't take away and you stop there.
6 Their committee considered that, and that's in
7 generalities. I don't know how much more work
8 you can do. You either do that or you go to
9 one of the others. I think we need to vote on
10 just that. If somebody doesn't want to vote
11 for that, then vote against it.
12 CHAIRMAN BABCOCK: Anybody else
13 on this? All right. Is everybody ready to
14 vote on No. 1? Is everybody ready to vote?
15 Okay. Everybody in favor of No. 1 raise their
16 hand.
17 MS. SWEENEY: I'm glad we
18 debated that.
19 CHAIRMAN BABCOCK: That would
20 be unanimous, I believe. Is anybody against?
21 There's nobody against, so we're unanimously
22 in favor of No. 1. Let's go on to No. 2.
23 MS. SWEENEY: As Judge Brister
24 pointed out, (2) exists because -- (2)
25 initially was phrased differently. (2)

1 initially said judges may not set unreasonable
2 time limits on voir dire. And Judge Brister
3 and Judge Peeples, and I think Judge McCown
4 was there, they felt like that was an implied
5 slam, an implied criticism of our judiciary
6 kind of ab initio. You know, you all are
7 already unreasonably doing stuff and we want
8 you to stop. So that's why you have the
9 positive phrasing here, that judges may set
10 reasonable time limits with the codicil that
11 they shall not unreasonably abridge the time.
12 And that was to balance all of those
13 considerations. No one on the subcommittee
14 has a problem with (2) existing. We feel like
15 it sets out what the law is and ought to be.
16 CHAIRMAN BABCOCK: Okay. Any
17 discussion on No. 2? All right. No
18 discussion. Then everybody in favor of No. 2
19 raise their hand. Anybody opposed? That
20 carries unanimously.
21 So let's go to No. 3.
22 MS. SWEENEY: Can we go
23 straight to damages? Okay. Moving on to Page
24 No. 2, the group on this page does come, much
25 more than the first that we already voted on,

1 from the task force proposals. And what we
2 did was sort of extract concepts from the task
3 force and break them down. And they are more
4 or less in order of -- they're in the order we
5 got to them in, but I think we got to them in
6 the order that we'd like them. More people
7 like them better at the top of the list and
8 fewer people like them better at the bottom of
9 the list. The caveat to all of this is now
10 we're getting into content. And this is
11 different than what the legislators were
12 doing.
13 This does in my view run the risk of
14 intended consequences. In my view it runs the
15 risk of changing our existing practice because
16 people are going to look at this and say this
17 is exclusive. This is how you have to do it.
18 This is the only way you can do it. This
19 changes things. This is how it has to be
20 done. So many of us, including quite
21 obviously I think me, are leery of these and
22 don't actually want them. But they are
23 concepts to be discussed.
24 CHAIRMAN BABCOCK: Steve.
25 MR. SUSMAN: Paula, could you

1 tell us which of these, 3 through 7, do not in
2 your view or the members' of the subcommittee
3 view correctly reflect current law?
4 MS. SWEENEY: As each one is
5 phrased, that's not so much the issue as the
6 fact that now we're making a list of what the
7 law is. And so if it's not on here or if
8 there's a shade or a nuance in here that's a
9 little different from what people think the
10 law is, we're now saying this is the law.
11 MR. SUSMAN: But you're not
12 prepared today to tell us that any of these, 3
13 through 7, do not accurately state current
14 law?
15 MS. SWEENEY: I think there's a
16 question. I don't have any problem with (3).
17 I don't have any problem with (4), although
18 right there with (4) you run into unduly
19 invasive, what does that mean, and so on. But
20 I think that's the existing law. I think an
21 objection now that that question is unduly
22 invasive is something for the court to
23 consider. But you run into the issue we were
24 talking about earlier about somebody's
25 income. You know, I don't know why it might

1 be relevant, but it might be.
2 (5), I think, is the law, but if you
3 write it down, you say you've got to have a
4 substantially correct statement thereof. Does
5 that mean I can't explain the law of
6 negligence using my favorite red-light analogy
7 anymore? There's nothing in the applicable
8 law that says that negligence means don't run
9 the red light, and a medical malpractice case
10 is just like not running a red light. It's
11 just a different -- you know, there's nothing
12 there that says that's a substantially correct
13 statement of the law. Can I still do that?
14 Or is some two-year associate from a big firm
15 going to jump up and say, "There's nothing
16 here in the law about red lights in
17 malpractice cases, Judge. She can't say that
18 anymore."
19 So those are the kinds of concerns about
20 destroying the advocacy aspects of voir dire,
21 about creating unintended consequences, that
22 many of us have and feel that the Legislature
23 did not intend for this to happen.
24 CHAIRMAN BABCOCK: But as a
25 general matter, I think what I hear you saying

1 is that these are correct statements of the
2 law; it's just that there may be nuances.
3 MS. SWEENEY: I'm pretty
4 comfortable with 3, 4 and 5. When you get
5 down to 6, 7 and 8, I start to get really
6 tense, Chip. I'm not sure that it's correct
7 to say a party cannot inquire as to a
8 panelist's probable vote in every situation.
9 CHAIRMAN BABCOCK: Okay. So
10 you think 6, 7 and 8 may not be a correct
11 statement of law?
12 MS. SWEENEY: I do personally.
13 Others disagree with me, though. I know Judge
14 Brister does.
15 HON. SCOTT A. BRISTER: They
16 are exact quotes from the law.
17 CHAIRMAN BABCOCK: Okay. Bill.
18 PROFESSOR DORSANEO: I'm going
19 to talk only about (3). I'm not going to talk
20 about the others. I think (3) is something
21 that is important to be in a rule about voir
22 dire examination, Texas voir dire examination,
23 primarily because it is unusual in trial
24 advocacy or across the country -- or I believe
25 it is unusual; trial advocacy teachers act

1 like it's unusual -- for the court to permit
2 the parties to state briefly the nature of the
3 case, the way we do it. And I think that the
4 way we do it is a better way to do it than the
5 way the criminal lawyers do it, when they're
6 talking about, you know, if I bring a box of
7 doughnuts in here, would you infer from that
8 that I mean for you to have one, okay, when
9 they're talking about drugs being made
10 available to other people by one person. I
11 think that's stupid. But the general view
12 across the country is that if you talk about
13 the case in voir dire, then you're being
14 naughty. That's not the way we have thought
15 in civil cases, and I think it's important for
16 our rule to say that you're allowed to do this
17 because that's the way we do it.
18 I think that Dr. Waites said that's a
19 good thing to do, too, because it makes
20 everything else more meaningful. So I like
21 (3) being in here, and I think it's a very
22 important component.
23 MS. SWEENEY: And that's
24 exactly -- what you just said capsulizes the
25 problem, because (3) says, "State briefly the

1 nature of the case." You know and I know how
2 we do it in Texas, but what I do is not state
3 briefly the nature. State briefly the nature
4 of the case would be "This is a malpractice
5 case." Well, my brief nature of the case runs
6 a little longer than that usually, yet someone
7 is going to pick this up and say, "You already
8 done stated the nature when you said this is a
9 malpractice case. That's all you can say."
10 So right here, although this is fine and
11 correct, we have to have it -- you know, I
12 don't -- I take that back. We don't have to
13 have it. But this is true. We can have this
14 right at the present time. Someone is going
15 to take this and say that's all you can do.
16 PROFESSOR DORSANEO: Well, we
17 could change it and make it more like the
18 opening statement rule.
19 MS. SWEENEY: Yes.
20 CHAIRMAN BABCOCK: Okay.
21 Steve, Wendell, and then Buddy.
22 MR. SUSMAN: I see what you're
23 saying, Paula, in (3). I think (3) is clearly
24 dangerous in restricting -- has potential for
25 restricting what goes on at the present in

1 voir dire. Why do we even need (3)? I mean,
2 isn't that encompassed in (1) and (2)? I
3 mean, the lawyers have the right to conduct
4 voir dire, whatever the hell that means, and
5 then -- I mean, I definitely see your point
6 here.
7 CHAIRMAN BABCOCK: Let Wendell
8 go next.
9 MR. HALL: To address Paula's
10 concern, perhaps adding language something
11 along the lines of "The court at a minimum
12 shall permit the parties," so that everyone
13 understands this is sort of a baseline minimum
14 that will be permitted during voir dire, and
15 not that this is some sort of new rule that
16 we're trying to impose on the parties; that
17 this is what has to be allowed at the very
18 minimum.
19 MS. SWEENEY: One of the
20 proposals that was made in the Legislature
21 was, to give an analogy, parties shall have
22 one hour for voir dire in a Level 1 case;
23 shall have two hours -- a minimum of one, and
24 a minimum of two for a Level 2 and three for a
25 Level 3. And that was disfavored because

1 those minimums because maximums. If you have
2 an hour, then you only have an hour. So if
3 you at a minimum have a right to only state
4 these things, at a maximum that's all they
5 have to give you.
6 CHAIRMAN BABCOCK: Buddy.
7 MR. LOW: Well, the same thing,
8 if there's a minimum, then you have no right
9 to more than the minimum. What if there's a
10 case and my guy was an alcoholic and that's
11 going to come out? Don't I have a right --
12 that's not the nature of the case, but don't I
13 have a right to ask the jurors about
14 alcoholics and could they be fair to somebody
15 who used to be an alcoholic? I mean, it has
16 to go more than just the brief nature.
17 CHAIRMAN BABCOCK: Bill, then
18 Judge Brister.
19 PROFESSOR DORSANEO: Well,
20 Paula, you've convinced me that better
21 language than "the nature of the case" could
22 be substituted here to capture what I would
23 have thought this meant. I think we should
24 have this concept in the rule.
25 Frankly, Steve, I'm afraid that at some

1 point in time somebody will say maybe after
2 this rule is done that, well, they didn't say
3 you could do it like that; I guess we're going
4 to be like everybody else now, like how all
5 the trial advocacy teachers teach people to do
6 it and you have to teach them how to do it
7 when they get actually into the courtroom.
8 MR. SUSMAN: I've never heard
9 of a voir dire in Texas complying with this
10 first sentence. I mean, it's impossible. No
11 one just states briefly the nature of the
12 case.
13 PROFESSOR DORSANEO: Well, to
14 me that means something different than what
15 you're reading it. I'd say it should say,
16 "State briefly what you expect to prove and
17 the relief requested," which is more the
18 nature of an opening statement, an opening
19 statement description, and that's what we do.
20 CHAIRMAN BABCOCK: Judge
21 Brister.
22 HON. SCOTT A. BRISTER: Well, a
23 couple of things. Number one, remember, we're
24 not trying to write a rule that covers
25 everything every attorney may ever try to do

1 in voir dire and every restriction every judge
2 may ever try to put on. We're talking about
3 the general principles. That's all we're
4 talking about. We could have an
5 interesting -- the jury task force put it this
6 way: It says you have the right to ask
7 questions for matters reasonably related to
8 the exercise of challenges for cause or
9 peremptory challenges. There are different
10 ways you can state it, but I would urge,
11 number one, that we stick to general
12 principles; number two, these are -- no
13 question, this is what the law is. You can
14 find this, if you look long enough, in cases.
15 The fact that judges might -- I don't
16 understand the argument, well, judges might
17 abuse the law more if we write it down in a
18 rule. They will abuse the same rule if you
19 have to go look in the case books for it. I
20 don't think that makes any sense.
21 And number three, if a judge abuses it,
22 remember, right now, what is your objection if
23 I say you may do -- I will do voir dire in
24 this case? You won't. Your only objection is
25 you have denied me constitutional due

1 process. You have no statute. You have no
2 rule. You have no nothing. I could cut you
3 off completely, and your last rule is
4 constitutional due process. And you hope that
5 five out of nine judges will agree with you
6 that whatever I told you you couldn't do was
7 constitutional due process. I don't see how
8 this hurts your right to complain on appeal
9 that some judge is being too restrictive by
10 putting it in a rule.
11 CHAIRMAN BABCOCK: Steve.
12 MR. SUSMAN: Well, the
13 difference is, I mean, if you're going to be
14 like you're going to be, I just have to pray
15 that I avoid having my case fall in your
16 court. If you write a rule like this, you
17 invite every other judge in Harris County to
18 be like you. You invite them all to be in
19 agreement and say, "Hmm, brief statement of
20 the nature of the case." So now I've got real
21 problems. I mean, it's just not an unlucky
22 draw when I get you. I get an unlucky draw
23 when I get anyone, because they're reading a
24 rule that's inviting them to eliminate the
25 standard practice that lawyers have used,

1 which is to argue their case basically.
2 CHAIRMAN BABCOCK: I think
3 Buddy had his hand up next, and then Bill and
4 then Steve.
5 MR. LOW: To state that you
6 have a right to do that, it doesn't encompass
7 what else you have a right to do. So it looks
8 like by not including it you cut it off, and
9 that's what they're going to say.
10 CHAIRMAN BABCOCK: Bill
11 Dorsaneo.
12 PROFESSOR DORSANEO: I don't
13 know of a case that says or that describes --
14 I haven't found one to put in my case books.
15 I use the Babcock case myself for voir dire
16 examinations, but I don't know a case that
17 actually says that your briefly stating the
18 nature of the case allows you to tell the jury
19 what happened and what you expect to prove,
20 you know, in five minutes or 10 minutes, the
21 facts, the basic facts in this case. I don't
22 think there is such a Texas case that explains
23 that. I know that's Texas law that you can do
24 that, but I don't know a case that says that.
25 And I'm very concerned with "briefly state the

1 nature of the case" as language because I
2 think it's ambiguous and it's susceptible to
3 being abused. And if people would be willing
4 to vote that the lawyers get to say briefly
5 what they expect to prove, we would be better
6 off, I think.
7 CHAIRMAN BABCOCK: Buddy, and
8 then Stephen.
9 MR. LOW: But see, the problem
10 is there's not a case on that. That kind of
11 tells you it really hasn't been a heck of a
12 problem if there's not a case in Texas on it.
13 PROFESSOR DORSANEO: Well, it's
14 reported to be a problem in some trial courts
15 where it may be translated into giving you
16 five minutes, but what that means is you're
17 not allowed to tell them anything.
18 HON. SCOTT A. BRISTER: Make no
19 mistake about it. There are -- in criminal
20 cases you may not state anything about the
21 case. There's apparently nothing
22 unconstitutional about that because those
23 folks appeal every case on every
24 constitutional ground imaginable. In a
25 criminal case you may not say, "This is a

1 robbery, and what my client is accused of
2 doing is this, that and other."
3 PROFESSOR DORSANEO: Well,
4 Judge, you can talk about the indictment.
5 They talk about the indictment or the
6 information.
7 HON. SCOTT A. BRISTER: Well,
8 you can read the indictment, but you can't go
9 into the details of the case in any manner
10 because, of course, they believe that that
11 leads to jurors saying, "Well, if he
12 confessed, then I feel this way about it," and
13 deciding on the facts. So I mean, if you all
14 don't want to put in a right to ask a brief
15 statement of the case, I don't think the
16 judges are going to object. But for crying
17 out loud, is that what you really want? You
18 don't want in a rule that you have a right to
19 state anything about the facts of the case?
20 Then I think you probably will in some courts
21 not be allowed to say a thing other than "This
22 is a malpractice case." I just can't imagine
23 that's what the attorneys want.
24 CHAIRMAN BABCOCK: Steve.
25 MR. TIPPS: I disagree with

1 Bill and Steve about this merging of opening
2 statement with voir dire. I don't know what
3 the cases say, but in my mind, at least in the
4 last 10 or 15 years in Texas state courts,
5 there is a distinction between what you can do
6 on voir dire and what you can do in opening
7 statement. And I don't think, as the law is
8 currently practiced, that it is the common
9 practice to lay out everything that you think
10 you can prove in voir dire. I mean, I think
11 that's for opening statement.
12 I'm not sure where these words come from,
13 but they are familiar to me as a trial
14 lawyer. I mean, that's typically what I hear
15 trial judges say, which is, you can briefly
16 state the nature of the case. And that means
17 more than "This is an auto wreck case" or
18 "This is a business disparagement case." I
19 mean, you're able to tell the jury enough
20 about the case so that they can answer your
21 questions intelligently, but I don't think
22 voir dire is the time that you should argue
23 the case, and I don't think we ought to have a
24 rule that suggests that it is.
25 CHAIRMAN BABCOCK: Paula, do

1 you pass --

2 MS. SWEENEY: Well, may I make

3 one suggestion. I would suggest that we vote

4 at this juncture whether the house wants to

5 incorporate other concepts besides what we've

6 talked about already. If we do, then we

7 should go through all of these. If we don't,

8 because of the philosophical -- there is a

9 philosophical schism between having a right to

10 do it and then writing what the things are

11 that go in it. And if we want to get into

12 writing what the things are that we can do in

13 voir dire, then we should continue doing what

14 we're doing. But it may well be that we

15 should vote do we want to do that ab initio

16 and then have whatever additional discussion

17 is appropriate.

18 CHAIRMAN BABCOCK: Steve.

19 MR. SUSMAN: Well, I would urge

20 that we not do it in that way because I'm

21 finding it very helpful to take these one at a

22 time rather than vote against them all. I

23 mean, I first looked at them and thought I

24 agreed with all of them. And on the first

25 one, all of a sudden I don't agree with them

1 having heard the arguments. So I think it's
2 helpful to take them one at a time.
3 I also heard a formulation down there
4 that I would be very satisfied on No. 3 in
5 lieu of what's here, and that is the court
6 shall permit the parties to tell the panel
7 enough about the case so they can answer the
8 questions intelligently. That to me is a real
9 bona fide fair limitation. I mean, we can
10 agree, okay, and it may not be so brief, but
11 that's always what I thought was the test.
12 You tell them enough about the case so they
13 can intelligently answer your questions. And
14 I would accept that as a substitute language
15 in (3), because I frankly think the brief
16 nature of the case, you know, that's a term of
17 art that a lot of courts have adopted in
18 briefing, you know. It's supposed to be a
19 part of the brief that's like one sentence.
20 MS. SWEENEY: So you would
21 suggest something like the court shall permit
22 the parties to tell the panelists enough about
23 their case so they can intelligently answer
24 questions about their qualifications,
25 backgrounds and experiences?

1 HON. SCOTT A. BRISTER: Or
2 intelligently exercise their strikes for cause
3 or peremptory strikes.
4 MR. SUSMAN: Sure.
5 CHAIRMAN BABCOCK: Bill.
6 PROFESSOR DORSANEO: Mr.
7 Chairman, as far as where we have similar
8 language that's been construed in our
9 rulebook, our order of trial rule, which is
10 the rule that describes the nature of an
11 opening statement, says, "The party upon whom
12 rests the burden of proof on the whole case
13 shall state to the jury briefly the nature of
14 his claim or defense," which I think is
15 roughly comparable, but then it goes a little
16 further, "and what said party expects to prove
17 and the relief sought."
18 Now, I think anybody looking at the
19 language of the drafted concept could easily
20 say, well, that's two out of the three
21 things. And I think it's important to allow a
22 brief statement of what the party expects to
23 prove. I'm not talking about going into a
24 great, long -- you know, I tell my students
25 10 minutes max. That's basically from looking

1 at actual well-done examples of the brief
2 statement before you begin asking questions.
3 Before you begin asking questions. I would
4 suggest that that's a better formulation than
5 state briefly the nature of the case.
6 MR. SUSMAN: Is it better than
7 the alternate language, which is -- I mean,
8 you seem to simply replicate opening
9 statements.
10 PROFESSOR DORSANEO: Well, I
11 think that --
12 MR. SUSMAN: What is wrong with
13 the alternate?
14 PROFESSOR DORSANEO: The
15 alternate language, I don't have a problem
16 with that either. I see them as companions,
17 not in opposition or competition with each
18 other.
19 CHAIRMAN BABCOCK: Judge
20 Patterson and then Judge Brown.
21 HON. JAN P. PATTERSON: I think
22 it would be interesting to go through each of
23 these. On the other hand, I also don't want
24 to discard Paula's idea of seeing where we are
25 now and seeing if there is some agreement that

1 we don't need to go beyond the first two. I
2 think a vote on that would be helpful.
3 CHAIRMAN BABCOCK: Okay. Judge
4 Brown.
5 HON. HARVEY G. BROWN, JR.:
6 This is not responsive to that since I had my
7 hand up earlier. But the second page of this
8 Section 2 has in paragraph (c), the second and
9 third sentences seem to do what Bill just said
10 and the suggestion down here from Stephen,
11 adopted by Steve Susman.
12 MS. SWEENEY: I'm lost. Second
13 page of Section 2 what?
14 HON. HARVEY G. BROWN, JR.: The
15 second page of the packet here has what's
16 called "Examination of Jury Panel by Voir
17 Dire, New Rule 226(b)." I don't know who
18 drafted it. I have no idea.
19 MS. SWEENEY: It comes from
20 Jamail & Kolius.
21 HON. HARVEY G. BROWN, JR.:
22 Okay. Well, you probably won't be too unhappy
23 with this then. The second and third
24 sentences of paragraph (c) seem to do what
25 everybody has just been talking about.

1 PROFESSOR DORSANEO: There's
2 another interesting thing. Our order of trial
3 rule doesn't say who goes first in voir dire.
4 CHAIRMAN BABCOCK: Have you
5 ever had a problem with that?
6 PROFESSOR DORSANEO: Well, I
7 always try to go first.
8 CHAIRMAN BABCOCK: Well, if
9 you're the plaintiff, I bet you 100 times out
10 of 100 you go first.
11 PROFESSOR DORSANEO: I bet
12 that's not right. I've gone first as a
13 defendant a number of times.
14 MS. SWEENEY: Chip, could we
15 get a sense -- following on what Judge
16 Patterson said, can we got a sense of the
17 house on just whether folks want a whole bunch
18 more stuff, or do you all want to --
19 HON. DAVID PEEPLES: If we're
20 going to do that, I want to have some
21 discussion on it, not just a vote right now.
22 This is a fundamentally important question
23 here. We need to really air that out if we're
24 going to have a vote like that.
25 HON. SCOTT A. BRISTER: I don't

1 see that it would be helpful to me, if I were
2 on the Supreme Court, to see "And the
3 Committee refused to address anything else
4 that might be put into the rule." I don't
5 mind taking a vote on it at some point that we
6 do or do not think it ought to cover other
7 matters, but they may disagree with us and
8 they may need some suggestion.
9 CHAIRMAN BABCOCK: Yeah. I was
10 going to say, I think at the risk of spending
11 the rest of the afternoon on this, Paula, that
12 even if we had a vote of fifteen to nine to
13 quit here, I think we ought to create a record
14 of people's views on the rest of the things.
15 MS. SWEENEY: I'm actually not
16 suggesting we quit here either way. I just
17 want a sense of where people think this ought
18 to go. But if you all want to just --
19 CHAIRMAN BABCOCK: Well, I
20 don't mind that, but I think we ought to
21 create a record on all 11 items. But I don't
22 mind if people want to vote and give a sense
23 of where they are. Would that be helpful to
24 you?
25 MS. SWEENEY: It would to me,

1 but if --
2 CHAIRMAN BABCOCK: Well, you're
3 chair of the subcommittee. You're going to
4 have to raise something, so --
5 MS. SWEENEY: I would like to
6 get a sense just from the group if you all
7 feel like we ought to get into content,
8 period. Let's stop at (1) and (2) that we
9 already talked about, which is no unreasonable
10 limitation, parties have a right, or get into
11 content.
12 CHAIRMAN BABCOCK: Judge
13 Schneider.
14 HON. MICHAEL H. SCHNEIDER:
15 Does that mean, though, Paula that we wouldn't
16 have a discussion of the other issues?
17 MS. SWEENEY: No, no, no. I'm
18 proposing to have exactly the same
19 conversation regardless. I just think it
20 would be helpful to us. If you all want to --
21 I'll withdraw it. Let's just move on.
22 CHAIRMAN BABCOCK: John Martin.
23 MR. MARTIN: Chip, I agree with
24 Judge Peeples. I think we need more
25 discussion. I know I need more discussion

1 before I can vote on that. I think we should
2 vote on that, but I think we should vote on it
3 at the end after we have the discussion
4 instead of voting on it now before we have the
5 discussion. We're going to have the
6 discussion anyway, so why not make that an
7 informed vote after we have the full
8 discussion instead of now before we hear it.
9 CHAIRMAN BABCOCK: I think
10 after this discussion Paula now agrees with
11 you, so we'll do that. That would be good.
12 MS. SWEENEY: No, I don't. I'm
13 just withdrawing my motion.
14 CHAIRMAN BABCOCK: She agrees
15 with you to the extent that she'll pull down
16 her request for the time being.
17 PROFESSOR DORSANEO: I like
18 (3), but again, I really only like it if it
19 adds a few little words, you know, briefly the
20 nature of its claim or defense or the nature
21 of the case, and what he, she or it expects to
22 prove, because if you leave that one out, it's
23 obviously left out when somebody goes back and
24 compares it to the existing procedural rule
25 and the order of trial and the proposals that

1 are before the Committee. Really I think
2 that's the most important, probably the most
3 important part.
4 CHAIRMAN BABCOCK: Judge
5 Brister.
6 HON. SCOTT A. BRISTER: I think
7 we all agree you have a right -- I'm ready to
8 agree we have a right to say enough about the
9 case to do an intelligent voir dire. All
10 we're talking about here are the principles,
11 not the language. We could spend a long time
12 drafting the language today.
13 I suggest we address the principle. And
14 I can't imagine any of us here who really
15 think -- maybe there are a few that think you
16 shouldn't be able to say anything about the
17 case. Maybe there are a few who think you
18 should be able to do your complete opening
19 statement in voir dire a second time. But I
20 would bet 98 percent of us are in the in
21 between, you should be able to do more than
22 the one and less than the second. And if
23 that's the principle, why don't we just
24 approve that principle and worry about
25 drafting the rule later.

1 CHAIRMAN BABCOCK: Cindy.
2 MS. LOPEZ GARCIA: That was
3 going to be my comment. I thought that,
4 especially with respect to No. 1 and 2, they
5 were principles that we were going to agree or
6 not agree on. Then I got a little bit
7 confused when we started going into No. 3.
8 The comments were more that those were content
9 and not just general principles anymore. If
10 they are general principles as (1) and (2) and
11 we're asked to give our opinions on those or
12 vote yea or nay, I'm all for going that way.
13 And then let's go -- that the subcommittee, as
14 I understood, was going to go back and
15 specifically draft the language to bring back
16 to us.
17 CHAIRMAN BABCOCK: That's a
18 good point. I think these are general
19 principles, are they not, Paula?
20 MS. SWEENEY: Yeah. What I
21 meant by content was, the first two general
22 principles that we talked about, and I don't
23 mean the content of the wording, what we've
24 already voted on, (1) and (2), have to do with
25 the ability to do voir dire globally and the

1 right to do that. What we're now talking
2 about is the content of voir dire, not the
3 content of the language of the rule. And
4 there is a -- I think that we need to decide
5 whether we want to discuss the content of voir
6 dire, what's going to happen in it, or leave
7 it alone. That's where there is -- we're
8 stepping across a river and going over to talk
9 about some other stuff.
10 CHAIRMAN BABCOCK: But it's
11 still general principles we're talking about.
12 MS. SWEENEY: General
13 principles about content, yes.
14 CHAIRMAN BABCOCK: Steve.
15 MR. SUSMAN: I think for most
16 of us, if we took a vote here, we would agree
17 with Scott's formulation: It's something less
18 than opening statement and something more than
19 a brief statement of the nature of the case.
20 And if you all can come up with language that
21 puts it in between, I think that reflects what
22 the law is, and I would be satisfied with
23 that.
24 CHAIRMAN BABCOCK: Okay. So
25 let's see how everybody feels about this. If

1 the general principle represented by No. 3 is
2 that the court shall permit the parties to
3 state the nature of the case, and the amount
4 of time that the statement is going to take is
5 as Steve Susman and Judge Brister said, and
6 the relief requested, and further to question
7 the panelists about their qualifications,
8 background and experience for a reasonable
9 period of time, if you're in favor of that
10 general principle as I have stated it, raise
11 your hand.
12 MS. SWEENEY: I object, because
13 we haven't decided whether we're going to -- I
14 mean, what principle?
15 MR. SUSMAN: The one that we
16 just voted on.
17 MS. SWEENEY: To do what? What
18 are we going to do with it, is the question.
19 Are we voting to put this -- do we want these
20 in the rule or not? Are these just principles
21 that people should talk nice to each other?
22 I'm in favor of that. But why --
23 MR. SUSMAN: We just voted in
24 favor of sending this back to the committee
25 and saying write this into the rule.

1 MS. SWEENEY: Well, you all
2 voted to include this in the rule?
3 MR. SUSMAN: Yes.
4 MS. SWEENEY: So we have now
5 just taken a vote to go ahead and start
6 writing about content of the rule?
7 MR. SUSMAN: Yes.
8 MS. SWEENEY: But we're backing
9 into it and pretending we're not doing that,
10 and I would like to be clear. Are we going to
11 do that or not?
12 HON. SCOTT A. BRISTER: I
13 thought after we went through this, we were
14 reserving it, then we would -- having said,
15 you know, this is a general principle we agree
16 with, these are general principles we agree
17 with, now, having all of those on the table,
18 how many of you think we should just forget
19 about those general principles as far as
20 writing a rule, and how many think we should?
21 So we would address that as --
22 CHAIRMAN BABCOCK: Paula, the
23 way I envision this working is that we're
24 going to create a record on how people feel
25 about general principles. At the end of the

1 day, we will vote about whether or not the
2 subcommittee should expend its time and effort
3 in writing a rule that embodies only 1 and 2
4 or should include 3, 5 and 11, or whatever we
5 may agree on, as a general principle. And
6 that way the Court, when we send up whatever
7 rule we send to them, will have the benefit of
8 this record. So that if we decide at the end
9 of the day today to only include 1 or 2, they
10 at least can look and say, "Okay, what did
11 they say about 3?" And they can say, "Well,
12 everybody seemed to like 3, but there was
13 some" --
14 MS. SWEENEY: So we're not
15 voting to put these in the rule, we're just
16 voting on whether we think they're good
17 concepts?
18 CHAIRMAN BABCOCK: Right.
19 Steve.
20 MR. SUSMAN: I don't understand
21 why we're going through this charade. Can't
22 we read No. 3 and say it ought to go in the
23 rule or it shouldn't go in the rule? We're a
24 rules advisory committee. We're not sitting
25 here as the ALI talking about what's a great

1 principle of law. It either should go in the
2 rule or it shouldn't go in the rule. Can't we
3 vote that way now?
4 CHAIRMAN BABCOCK: Well, I
5 think Paula's point is that there are some
6 people that believe that probably no rule --
7 in fact, the majority of her committee believe
8 that no rule is appropriate, but that for
9 certain reasons, some of them politically
10 motivated, others worried about that there is
11 a problem out there, that it should be limited
12 to (1) and (2) and we ought to let common law
13 handle everything else, kind of what Justice
14 Hecht said that started it out. So I don't
15 think it's inappropriate to at the end of the
16 day have an expression of opinion about
17 whether or not we ought to get into content.
18 But having said that, let's create a record on
19 all of these and do that.
20 So just so we're clear on our vote, we
21 were in the middle of a vote when an objection
22 was raised, which is now overruled, and there
23 were 20 people by my count that voted in favor
24 of it as a general principle. How many people
25 are against it?

1 MR. YELENOSKY: Chip, can I just ask
2 a question real quick?
3 CHAIRMAN BABCOCK: Let me
4 finish the vote first. Okay? So how many
5 people are against the --
6 HON. JAN P. PATTERSON: The
7 vote is on the first half of (3), right?
8 CHAIRMAN BABCOCK: No. We're
9 going to vote it again and I'm going to state
10 it again. Okay? We're going to vote again
11 and I'm going to state it again.
12 How many people are in favor of (3) as a
13 general principle as modified in this way:
14 The court shall permit the parties to state,
15 I'm omitting the word "briefly" and inserting
16 instead something that the subcommittee would
17 work out, which is as Steve Susman and Judge
18 Brister formulated it, less than opening
19 statement, more than brief, to state the
20 nature of the case and the relief requested
21 and to question the panelists about their
22 qualifications, background and experiences for
23 a reasonable period of time. That's what
24 we're voting on. How many people are in favor
25 of that as a general principle? How many are

1 against that? It carries by a vote of 25 to
2 five.
3 MR. LOW: Chip, may I say one
4 thing?
5 CHAIRMAN BABCOCK: You can say
6 two things, but let Steve say something first.
7 MR. YELENOSKY: It's sort of a
8 point of order. It seems to me in the past we
9 have done our service to the Supreme Court by
10 discussing everything that we should discuss
11 and they had the benefit of our discussion. I
12 haven't seen us in the past take a vote like
13 this, except maybe a straw vote to see sort of
14 where we should go in the discussion, but not
15 about is this a good general principle or
16 not. If we want to discuss it and if some of
17 the reasons that people vote against it or for
18 it are explained in the record, ultimately
19 voted against or for it being a
20 recommendation, then that's in the record for
21 the Court to see.
22 HON. SCOTT A. BRISTER: That's
23 what we've been doing for 30 minutes.
24 CHAIRMAN BABCOCK: Well, in
25 response to that, I think what we talked about

1 earlier was that we're going to go through
2 this process today, the subcommittee is going
3 to write up whatever this Committee thinks
4 they ought to write up, and then at our next
5 meeting we'll have a full-blown discussion on
6 specific language. So the general record is
7 going to be created today, and then the
8 specific record with respect to the language
9 will be created in October.
10 MR. YELENOSKY: Well, I guess
11 the point -- the thing is that some people may
12 want to vote against it on the belief that
13 case law may say exactly what the rule says,
14 but when a court gets to interpreting a rule,
15 they interpret it different than case law.
16 I've never had an appellate court ask me what
17 are the facts of that rule, but I've had them
18 ask me what are the facts of that case because
19 it might be distinguished.
20 CHAIRMAN BABCOCK: Well, that's
21 your privilege to vote against it for that
22 reason. Judge Patterson.
23 HON. JAN P. PATTERSON: And
24 because we spent so much time on the first
25 part of that, the first clause, and we didn't

1 discuss qualifications, background and
2 experiences, I would just hope that we can
3 remember that we are not choosing those exact
4 words, because I think that it's possible that
5 there are many common questions that we do ask
6 that might not be included within those
7 three. And I think that's the kind of
8 objection that I would be concerned about, is
9 that someone would say, "Your Honor, that's
10 not covered by qualifications, background and
11 experiences," and that becomes a litany.
12 I can think, for example, if you asked
13 someone, "What bumper stickers do you have on
14 your car? What are you reading today in the
15 courtroom?" that those might not be
16 encompassed within those three phrases, or
17 those three words might be viewed in the
18 context of the nature of the case, so that's
19 my concern on that one.
20 CHAIRMAN BABCOCK: And I think,
21 Judge, that that points out kind of our
22 process. You're having to express that. Now,
23 the subcommittee should keep that in mind when
24 they're drafting. If they don't keep it in
25 mind to your satisfaction in October, then you

1 raise that and we'll see if we can change some
2 specific language. Buddy.
3 MR. LOW: Chip, what I object
4 to is, once you've gone beyond attorneys
5 having a reasonable time for voir dire and
6 judges having a right to set reasonable
7 limits, you're not getting into general
8 principles, you're getting into specifics. I
9 object to calling it general principles. I
10 could say you've got five minutes for voir
11 dire and that's a general principle.
12 CHAIRMAN BABCOCK: What do you
13 want to call it?
14 MR. LOW: I wouldn't call it
15 that. I'd call it specific mechanics of the
16 rule.
17 CHAIRMAN BABCOCK: Let's call
18 it the Cubs.
19 MR. LOW: Call it anything, but
20 let's not call it general principles, I don't
21 suppose, beyond that. And Paula's belief is
22 that once you do that, that then you're into
23 new territory. I agree we ought to discuss
24 these, but the reason I voted against it is
25 because it's not a general principle.

1 CHAIRMAN BABCOCK: Okay.
2 Hatchell, you're confusing me the way you're
3 scratching your ear. Is your hand up?
4 MR. HATCHELL: No.
5 CHAIRMAN BABCOCK: Steve.
6 MR. SUSMAN: I do think the
7 judge made a great point that the insertion of
8 the words "qualifications, background and
9 experiences" could be read as a limiting
10 thing. Maybe you just want to take them out
11 and just say question the panelists for a
12 reasonable period of time. If you remove all
13 three, you don't have any of this problem of
14 limitation.
15 CHAIRMAN BABCOCK: Judge
16 Peeples.
17 HON. DAVID PEEPLES: Rule
18 226(a), subparagraph (4), which is read to
19 every jury panel by every judge in a civil
20 case says the parties through their attorneys
21 have the right to direct questions to each of
22 you concerning your qualifications,
23 background, experiences and attitudes. We
24 took out the word "attitude." Now, that's the
25 law right now.

1 MR. SUSMAN: Fine. Add
2 attitudes.
3 HON. DAVID PEEPLES: And that
4 doesn't constrict one cotton-picking thing in
5 a case anywhere in the state. Why can't we go
6 with that?
7 PROFESSOR DORSANEO: That's
8 fine. I think qualifications should go first
9 because it covers everything.
10 MS. SWEENEY: I'm trying to
11 write this down so we can talk about it. Is
12 it fair, Steve, I've got your proposal that
13 the court shall permit the parties to tell the
14 panelists enough about the case so they can
15 intelligently answer questions about their
16 qualifications, background, experiences and
17 attitudes? Is that --
18 PROFESSOR DORSANEO: Good.
19 CHAIRMAN BABCOCK: Well, he
20 backed off of that actually in fairness.
21 MR. SUSMAN: Yeah. I think
22 that's still it.
23 MS. SWEENEY: You do want that
24 or you don't want that considered?
25 MR. SUSMAN: I like it, because

1 I think it does end up with something between
2 a brief statement and an opening statement.
3 MS. SWEENEY: Okay.
4 CHAIRMAN BABCOCK: That's the
5 concept we're driving toward, I think. Aren't
6 we, John?
7 MR. SUSMAN: And don't forgot
8 to add the word "attitude."
9 MS. SWEENEY: I have it right
10 here.
11 PROFESSOR DORSANEO: And put
12 "qualifications" first, because that's the
13 biggest word.
14 MR. JEFFERSON: Well, many
15 lawyers don't even really do a statement.
16 They get across what the case is about through
17 the questioning. You know, they say, "The
18 plaintiff is alleging this about this pill
19 that the plaintiff took, and how many of you
20 have taken it?" They sort of -- the whole
21 purpose of voir dire for them is to make that
22 argument during the questioning and there's
23 not even an opening statement at all. And in
24 drafting the rule, I would take that into
25 consideration, because there may not be even

1 an incentive for some lawyers to make an
2 opening statement or a general statement about
3 the case. They do it during their
4 presentation or during their questioning of
5 the jury.
6 MS. SWEENEY: So are you okay
7 with permitting the parties to tell the
8 panelists enough about the -- the Dorsaneo
9 proposal was that they shall permit the
10 parties to state briefly the nature of the
11 case, which sounds like you've got to do that
12 first. I'm reading this one that you can just
13 sort of do it as you go along.
14 MR. JEFFERSON: Yes.
15 CHAIRMAN BABCOCK: Okay. Any
16 more comments about No. 3?
17 Let's go on to No. 4. The court shall
18 prevent any examination that is unduly
19 invasive, repetitive or argumentative. Is
20 anybody against this one?
21 MS. SWEENEY: I'm against
22 including it in a rule, yes.
23 PROFESSOR DORSANEO: We're not
24 talking about that yet, right?
25 CHAIRMAN BABCOCK: Right.

1 MS. SWEENEY: I'm just making a
2 record.
3 CHAIRMAN BABCOCK: Paula, I
4 don't think anybody is going to claim waiver
5 on you.
6 MR. SUSMAN: Well, I'm not sure
7 this tells you anything or gives you any
8 guidance. What does "unduly invasive" mean?
9 Every question asked during voir dire is
10 invasive. So what is unduly invasive?
11 HON. DAVID PEEPLES: Steve, can
12 I speak on that? In every jury case I try,
13 during voir dire I think about the rules and
14 so forth, and I have become very, very
15 sensitive to the fact that we're dragging in
16 people from whatever they wanted to be doing.
17 Whether it's from jobs and they're not getting
18 paid or homemakers or whatever it is, they've
19 been brought against their well in there, and
20 it's a very intimidating situation. A
21 courtroom with a bunch of people asking you
22 questions and a judge and a bailiff, it's a
23 very intimidating thing. We're used to it,
24 but they're not, and our heart ought to go out
25 to them, it seems to me.

1 And so to tell judges, to give judges
2 some backbone is exactly the reason I think
3 this is a very good provision that ought to be
4 in there. Yes, there is going to be -- a
5 judge here might read it more expansively than
6 a judge next door. That is going to happen to
7 any rule you write. But I think we need to
8 give something that can guide people and that
9 they can show to lawyers so it's not just the
10 judge ruling against them saying you've gone
11 too far. We should say, "Look, the rule says
12 this." It's very helpful, and I think we
13 ought to be very concerned about jury
14 panelists.
15 CHAIRMAN BABCOCK: Stephen
16 Tipps and then Judge Lawrence.
17 MR. TIPPS: I second what Judge
18 Peeples said. I think the answer to Steve's
19 question is that what including this in the
20 rule does is tell judges and lawyers what the
21 law already is, which I believe not all
22 lawyers really understand, because I don't
23 think -- I think there's a lot of
24 misunderstanding and confusion among trial
25 lawyers concerning exactly what they can do

1 and what they can't do on voir dire. And I
2 think putting all of this in one place would
3 be helpful.
4 And I think also putting in a statement
5 like this over time would probably result in
6 appellate courts developing a better
7 understanding concerning what is invasive and
8 what is not invasive in light of the needs of
9 voir dire and the times in which we live. And
10 I think that's a positive thing, and I don't
11 think we can predict exactly what a court is
12 going to decide is invasive or not, but that's
13 what the judicial system is all about.
14 CHAIRMAN BABCOCK: Judge
15 Lawrence.
16 HON. TOM LAWRENCE: I'm not
17 arguing against the concept, but the way this
18 is stated, does this place some affirmative
19 burden on the court to act even without a
20 motion being made by one of the parties?
21 HON. DAVID PEEPLES: Yes.
22 There's nobody there to take up for that
23 juror.
24 HON. SCOTT A. BRISTER: Both
25 attorneys are there arguing, "Throw the client

1 in jail."

2 MS. SWEENEY: And that's

3 exactly what's wrong with this rule, is it

4 puts judges in the middle of an adversarial

5 process as advocates, and they ought not to be

6 there.

7 HON. SCOTT A. BRISTER: But to

8 appoint attorneys for jurors to protect their

9 rights, we don't want to get into that. I

10 don't think it's true that this rule makes it

11 reversible error if the judge doesn't. If you

12 decide -- you know, nobody objects -- if you

13 decide it's fair game, it's close enough to

14 the issue, then it's a judgment call. Is it

15 unduly invasive?

16 But I certainly wouldn't want a rule --

17 let me put it again. Surely we all agree that

18 the judge does not commit error by saying,

19 "You two folks have gone too far in asking

20 these people whether they individually have

21 had abortions." Surely we don't mean to ban

22 the judge; that the judge cannot stop it.

23 Surely we don't mean to say the judge has to

24 and we're going to try the whole case all over

25 again because the judge didn't. So if we're

1 not going to say either of those two extremes,
2 the middle is, if the judge thinks it needs to
3 be done in this case, you can; if the judge
4 goes too far, it's reversed. And that's the
5 general principle. That's all unduly invasive
6 says.
7 CHAIRMAN BABCOCK: All right.
8 Bill Dorsaneo, then Judge Schneider.
9 PROFESSOR DORSANEO: Well,
10 after listening to Steve and everybody else, I
11 crossed out the word in my mind, "unduly," and
12 I ask you to look at it now. The court shall
13 prevent any examination that is invasive,
14 repetitive or argumentative. No, right? The
15 answer to that is no. So maybe this is one of
16 those things that needs to be worded in terms
17 of what you can do, but don't be a horse's
18 rear end. Okay? Like the thing you did for
19 the judges earlier on unreasonable
20 restrictions timewise, I'm not -- I agree that
21 I don't think it means anything, yet it
22 suggests something that I don't agree with so
23 much as on unduly, so much as that on unduly.
24 CHAIRMAN BABCOCK: Judge
25 Schneider had his hand up. Go ahead.

1 HON. MICHAEL H. SCHNEIDER:
2 Well, I think the point made by Judge Lawrence
3 there -- maybe it wasn't his point I'll quote
4 off of -- but basically if you state this, if
5 the court shall prevent this, do you see some
6 type of situation where someone might complain
7 to the Judicial Conduct Commission that
8 perhaps the judge -- it's not just reversal.
9 It could be a matter of conduct on the part of
10 the judge.
11 CHAIRMAN BABCOCK: Bobby.
12 MR. MEADOWS: But shouldn't it
13 just be cured or fixed by saying the
14 examination shall not be unduly invasive,
15 repetitive or argumentative?
16 CHAIRMAN BABCOCK: Wallace, did
17 you have your hand up?
18 MR. JEFFERSON: Just in looking
19 at this rule generally, I think that there's a
20 difference in perspective between judges and
21 lawyers that maybe the whole Committee or the
22 subcommittee ought to keep in mind. The judge
23 obviously is very solicitous toward the
24 jurors. They're voters, for one thing. And I
25 don't think it's only political, but you know,

1 the bailiff is trying to take care of them and
2 make sure they are marched through the process
3 and things are going okay with them and
4 they're happy. And the lawyers generally
5 don't really care. They just want to be able
6 to argue to the jurors for as long as they
7 want to about their case.
8 I remember there was one case recently
9 where the judge left the opening argument
10 open -- I mean, closing argument open. Take
11 as long as you want. Four hours later, you
12 know, the jury finally gets the case because
13 the lawyers are wanting -- you know, they
14 don't care about the time. They just want to
15 argue their case to the jury.
16 I think in formulating this rule we've
17 got to be very careful about this, because a
18 judge can get in the way of a lawyer's
19 presentation of the case, I think. A
20 lawyer -- the jury can sift through the
21 advocacy, but the lawyer is going to try to
22 get his point across or her point across as
23 aggressively as they can. And usually the
24 lawyer on the other side is going to object if
25 they're going too far. But to the extent the

1 judge cuts you off, you know, after every
2 second or third question or doesn't want you
3 to get too much into a personal matter, it
4 can, I think, restrict the advocacy.
5 And that's where I think we've got to be
6 careful about just what perspective we're
7 dealing with, and when the rule is written,
8 that both of them somehow find -- you know, if
9 it becomes a rule -- that both of these ideas
10 find their way into the rule.
11 CHAIRMAN BABCOCK: Cindy.
12 MS. LOPEZ GARCIA: We were all
13 taught in law school in trial advocacy that
14 you don't use voir dire to give your argument,
15 right? But how many trial lawyers do you
16 know, either defense or on the plaintiff side,
17 that don't become invasive; that that's part
18 of voir dire; that aren't repetitive, because
19 they're explaining their case and trying to
20 get their point across; and that are not
21 argumentative to some extent? I mean, that is
22 part of that. Even though we sit here and say
23 you don't want that in there, it is in there
24 to some extent.
25 The check and balance of that, there is a

1 couple of -- well, three of them. Number one,
2 a judge always says when they start off, "It's
3 not only your duty, but it's your privilege to
4 sit here on the jury today." And they take it
5 seriously. They may not want to be there, but
6 that's part of the process.
7 The other check and balance is you have
8 opposing counsel there who hopefully, if
9 they're doing their job and they're
10 representing their client the way they're
11 supposed to be, are going to get up and object
12 whenever you've done something that was
13 improper or not according to the rules.
14 And then the other thing is, I think if
15 you look at No. 3, why do you need No. 4? If
16 you're already setting out the parameters or
17 the principle or whatever you want to call it
18 that these are the areas in which you're
19 allowed to question the prospective jurors on,
20 then you don't need No. 4.
21 CHAIRMAN BABCOCK: Judge Brown,
22 then Judge Lawrence.
23 HON. HARVEY G. BROWN, JR.: I
24 think you have to have No. 4. I think there
25 are a couple of good suggestions on changing

1 the language, but with all due respect, I
2 think the judges are the only people in the
3 courtroom who really do care about the jurors
4 completely. And it's not political in the
5 least in my view. I would beg to differ with
6 Wallace. In Harris County, the chances of
7 those jurors affecting my race are pretty
8 remote with millions of people. It's just
9 fundamental fairness.
10 And the real reason we need it isn't
11 because of oral voir dire, because oral voir
12 dire is self-policing to some extent. You
13 don't want to argue with a juror because the
14 juror might take it out on you. You don't
15 want to ask an overly invasive question
16 because a juror might be offended. The real
17 problem is questionnaires, 60-page
18 questionnaires we get sometimes. "We've
19 agreed on all these questions, Judge," and
20 they don't even want us to read it. I think
21 it's my duty to read it. And I think it's my
22 duty to find out if there's a question like
23 "How much do you make?" And I'll bet there's
24 a lot people at this table that wouldn't like
25 to say in public how much money they make.

1 I'd like to ask some people around this table
2 how much money they make. A lot of them
3 wouldn't want to say because it's just
4 fundementally unfair.
5 And that's why I think we should do
6 something to correct the system. You don't
7 hear complaints from jurors afterwards about
8 some of these questions. We do. And it's
9 going to affect our system of justice someday
10 if we continue to allow that to go on.
11 CHAIRMAN BABCOCK: Judge
12 Lawrence.
13 HON. TOM LAWRENCE: There are
14 several things that trouble me about this.
15 One is that you've got this shell language in
16 there which is placing an affirmative burden
17 on the judge to enforce an admittedly
18 subjective standard, unduly invasive,
19 repetitive or argumentative. And you're
20 forcing the judge to take the position not to
21 respond to an objection made but to inject
22 himself into the voir dire process and come
23 down on one side or the other to a subjective
24 standard. I just think I would be more
25 comfortable with "may." I mean, as an

1 aspiration, it's fine, but I think practically
2 it's got problems.
3 CHAIRMAN BABCOCK: Well, the
4 other way to do it is to put the prohibition
5 on the parties and take the judge out of it.
6 Steve.
7 MR. SUSMAN: Could I ask our
8 scientist here, Dr. Waites, whether there have
9 been any studies of people who have been
10 called to jury service as to their reaction to
11 voir dire? We hear these -- we're hearing
12 judges tell us that they perceive jurors as
13 being mistreated frequently and unhappy. But
14 are there any studies that have been done
15 asking people who have been down there what
16 they think?
17 DR. RICHARD WAITES: There are
18 a lot of studies. Some of them were done very
19 scientifically and some that are not so
20 scientific. But what generally jurors tell us
21 is that they don't mind being asked questions
22 about their attitudes and their opinions, they
23 just don't like being grilled about it or
24 being made to look like the bad guys, whatever
25 that means.

1 HON. JAN P. PATTERSON:
2 Cross-examining.
3 DR. RICHARD WAITES: Exactly, I
4 think, for two reasons. One of the reasons,
5 we live in the south where people treat each
6 other a little more genteelly than they do in
7 the north. So I think to some short extent
8 this is kind of a regional issue, so I think
9 we're more sensitive to it.
10 But also it seems what jurors tell us is
11 that they are also very aware that people
12 watch reality TV and everybody is in front of
13 a camera these days, and so whatever you say
14 is subject to being discussed in public by
15 anybody. So I don't think jurors are as
16 sensitive about talking about their
17 attitudes.
18 The issue here that I see in the courts,
19 and I do probably 40 or 50 jury selections in
20 different courts across the country a year, is
21 there is a different interpretation of what
22 "invasive" means. And what is unduly
23 invasive to Judge Gilmore in federal court in
24 Houston may be different from what is invasive
25 in Judge Brister's court or Judge Patterson's

1 court where they are. And I feel like that's
2 really where you might want to focus your
3 attention.
4 HON. SCOTT A. BRISTER: See,
5 that's why I think you have to have "unduly."
6 I think if it's the critical issue of the
7 case, it would be wrong to restrict, if
8 somebody were asked -- if the plaintiff asked
9 it and the defendant wants to make sure, it
10 would be wrong to restrict him from asking a
11 second time. That's repetitive if you asked
12 it twice. It's the critical issue. You don't
13 want to restrict it just because it's
14 repetitive. It has to be unduly repetitive.
15 You don't want to restrict it just because
16 somebody might say, "Gosh, that's got a little
17 bit of argument when you ask the question that
18 way." It's when it's gone too far. There is
19 no way to write a rule that says how far is
20 too far. We can leave it as we do right now,
21 which is basically it totally varies from one
22 court to another. It is probably totally
23 unreviewable because almost -- you know, how
24 are you going to preserve error on it? It's
25 just not done. And if a judge does or doesn't

1 strike them, you know, how do you -- there are
2 just no civil cases on that, so it's totally
3 ungarnered.
4 And remember, what does it hurt us to
5 throw the sop to the public to say if it
6 becomes too unduly -- I mean, how is it going
7 to look if we vote down a proposal that, no,
8 you have a right to do unduly invasive voir
9 dire? I mean, I am amazed we are discussing
10 this. How could you oppose a rule that
11 restricts you from unduly invasively inquiring
12 of people? We ought to be ashamed.
13 CHAIRMAN BABCOCK: Boddy
14 Meadows.
15 HON. MICHAEL H. SCHNEIDER: I
16 don't think the record should reflect that
17 people are opposing that, Scott. We're merely
18 discussing the situation.
19 CHAIRMAN BABCOCK: Bobby.
20 MR. MEADOWS: The language may
21 not be exactly the same, but we should keep in
22 mind that our new Discovery Rules give a party
23 a right to shut down a deposition that's
24 unduly invasive, repetitive or argumentative.
25 It seems to me to be pretty straightforward

1 that an examination of a jury panel that is
2 unduly invasive and the rest of it shouldn't
3 be allowed.
4 CHAIRMAN BABCOCK: Judge
5 Brister, how do you feel about Judge
6 Schneider's point that this may be putting the
7 judges in a difficult position and opening
8 them up to complaints with some commission?
9 HON. SCOTT A. BRISTER: Well,
10 the commission usually doesn't take any --
11 they don't spend any time on complaints that a
12 judge violated a rule of procedure. I mean,
13 your remedy for that is appeal.
14 CHAIRMAN BABCOCK: But if some
15 juror comes and complains and says, "Wait a
16 minute, this rule says the court shall prevent
17 any examinations unduly invasive, and they
18 asked me whether I've ever had an abortion.
19 What's the deal with that?"
20 HON. SCOTT A. BRISTER: Well, I
21 can imagine a circumstance -- well, the
22 question is, will the rule make any
23 difference? And no, I can imagine a juror
24 being publicly humiliated by a judge, and I
25 cannot imagine the Judicial Conduct Commission

1 would stand by and say, no, we're not going to
2 do anything about it today. And so is this
3 rule going to change the standard? I can't
4 imagine it's going to make it easier or harder
5 to discipline judges because you allow
6 somebody to be publicly humiliated.
7 CHAIRMAN BABCOCK: Steve.
8 MR. SUSMAN: Scott, part of
9 this is the humiliation factor, the
10 embarrassment factor. It depends on whether
11 the question is asked to the panel as a whole
12 or the person is brought to the bench and in
13 the presence of the two lawyers is asked the
14 question like "Have you had an abortion?"
15 That's not captured in here in any way, and
16 maybe what you ought to be -- instead of the
17 word "invasive," it ought to be is it unduly
18 embarrassing or something in a way that you
19 avoid it by asking those questions only in the
20 presence of the judge and the two lawyers.
21 One could argue that juror service is
22 such a serious undertaking that nothing ought
23 to be considered unduly invasive, I mean,
24 unless you're asking something that there is
25 some other statute that says you cannot ask a

1 person this, like do they -- I don't know what
2 it would be, but that there's some public
3 policy that the Legislature has passed that
4 says you can never inquire about this. Okay.
5 That's off base.
6 But why should anything else be off base
7 when you're trying to find out whether a
8 person is likely to be a fair juror? What
9 should be required is that those questions be
10 asked at the bench and not in front of
11 everybody to embarrass people. So why don't
12 we -- I don't have any problem with writing
13 something that requires you to protect jurors
14 from being embarrassed. But I do have kind of
15 a problem with the way it's worded now,
16 because I don't think an unduly invasive
17 question should be off limits if it's done
18 with --
19 HON. SCOTT A. BRISTER: What if
20 it's irrelevant?
21 MR. SUSMAN: An irrelevant
22 question?
23 HON. SCOTT A. BRISTER: In
24 other words, your jury consultant tells you,
25 "I'd like to know how they're going to vote

1 in the upcoming presidential election."
2 That's not what the jury trial is about, but
3 it may. Whether you're a republican or
4 democrat may affect certain --
5 MR. SUSMAN: Well, what is
6 irrelevant --
7 MS. SWEENEY: If judges start
8 to decide what is relevant in a voir dire, we
9 have just fallen off this cliff entirely. You
10 all are going to do our voir dire for us by
11 deciding what's relevant, embarrassing,
12 invasive or proper --
13 HON. SCOTT A. BRISTER: But
14 that's what the Brandborg case says.
15 MS. SWEENEY: No. And that's a
16 criminal case and it's totally different. And
17 if --
18 HON. SCOTT A. BRISTER: No,
19 it's a juror case.
20 CHAIRMAN BABCOCK: Hey, guys --
21 MS. SWEENEY: If you all are
22 going to start deciding what is relevant and
23 not relevant, what is unduly or not unduly
24 invasive and you want a rule to give you
25 permission to do it more than you already do,

1 then that's what's wrong with putting this in
2 a rule and that's why we ought not to do it.
3 We are standing the practice on its head if we
4 start putting judges in the position of
5 advocates. They are not. They ought not to
6 be. And if we write it in a rule, we're
7 stepping into a huge hole.
8 CHAIRMAN BABCOCK: Be careful
9 not to talk over each other. The court
10 reporter was having a hard time taking it
11 down.
12 MS. SWEENEY: I'm sorry.
13 CHAIRMAN BABCOCK: That's
14 okay. Steve.
15 MR. SUSMAN: Again, as long as
16 you have peremptory challenges that I can make
17 for any reason other than some constitutional
18 infirmities, who are you to tell me that what
19 I want to know is irrelevant? Maybe I have a
20 jury consultant that has told me that this is
21 relevant on whether you want to strike this
22 person. I don't think relevance should be
23 required.
24 HON. SCOTT A. BRISTER: You
25 all, this is easy. This is the law. There's

1 a difference between, in my car wreck case,
2 asking how does everybody feel about abortion
3 going down the row versus a case where the
4 defendant is -- it's an abortion that's at
5 issue in a medical malpractice case. And the
6 difference in the two cases is relevance. We
7 do this all the time.
8 CHAIRMAN BABCOCK: Carl.
9 MR. HAMILTON: Well, it just
10 seems to me like if we put (3) in there that
11 says that we're going to allow the lawyers and
12 parties to tell enough facts in the case to
13 permit the panelist to answer the questions
14 relating to the qualifications, it's a simple
15 matter just to say the questions shall not be
16 unreasonably invasive, repetitious or
17 argumentative. You put the burden on the
18 other side to object if they are. Then I
19 suppose that inherently the court will also
20 have the power, if there was no objection, to
21 step in and prohibit it.
22 CHAIRMAN BABCOCK: Well, that
23 would cure Judge Schneider's problem there.
24 Judge Lawrence.
25 HON. TOM LAWRENCE: If the rule

1 said "the court may," then the judge would
2 have the opportunity to do it but there would
3 be no affirmative burden on him to do it. Or
4 if you took out the words "the court shall"
5 and just said "the parties shall not examine
6 witnesses in a way that is," then that would
7 be fine, because an objection could be made
8 and the judge could respond to that. Of
9 course, the problem with that is that if
10 nobody makes an objection because one side is
11 content to let the other side rip his britches
12 in front of the jury, then that doesn't solve
13 the problem and the poor juror has no one to
14 speak for him. So if you left in "may," then
15 you would at least solve that problem if it
16 got too far out of hand. And either side can
17 make an objection the judge can respond to,
18 which takes him off the hook for the
19 affirmative burden.
20 CHAIRMAN BABCOCK: Bobby
21 Meadows.
22 MR. MEADOWS: Well, don't you
23 really get to it if you just change the
24 language to say "the examination shall not
25 be"?

1 MS. SWEENEY: I already wrote
2 that. I've got Meadows' proposal should say
3 the examination shall not be unduly invasive,
4 repetitive or argumentative. I've added the
5 Susman suggestion of embarrassing, and I've
6 added that Brister suggests relevant.
7 HON. SCOTT A. BRISTER: I don't
8 have any problem with that switch.
9 CHAIRMAN BABCOCK: Judge Brown.
10 HON. HARVEY G. BROWN, JR.: I
11 haven't heard anybody give a cogent reason why
12 we should give witnesses this protection under
13 the rules but not a juror. I mean, Bobby made
14 that point before and I thought that was a
15 pretty strong argument personally.
16 MS. SWEENEY: Because in a
17 deposition there's not a judge there to rule.
18 In the courtroom, the judge has discretion to
19 make rulings to protect juror under the
20 existing law. There's somebody there. You
21 don't have to stop the deposition, so we
22 didn't have to write it into the rule.
23 HON. HARVEY G. BROWN, JR.: So
24 if you're saying that it's in the existing
25 law, then restating it here is not changing

1 the law, which is part of your argument.
2 MS. SWEENEY: The reason that
3 it is wanted here in a rule is to expand the
4 power of the court to intrude more and more
5 often, and I think that's wrong.
6 MR. SUSMAN: The language
7 "unduly invasive" is not in the deposition
8 rule.
9 MR. LOW: It is not in the
10 deposition rule.
11 MR. SUSMAN: You can't stop the
12 deposition because a question is unduly
13 invasive. Every question ought to be unduly
14 invasive in a deposition. Therefore, there's
15 no rule that allows you to stop and instruct
16 the witness not to answer an unduly invasive
17 question.
18 CHAIRMAN BABCOCK: I think the
19 word is abusive, not invasive.
20 MR. SUSMAN: Abusive is better
21 than invasive.
22 HON. HARVEY G. BROWN, JR.:
23 That would be fine.
24 MR. SUSMAN: I think abusive
25 captures it better because it's the

1 embarrassment thing too.
2 MS. SWEENEY: Do you want
3 abusive and embarrassing or just abusive?
4 MR. SUSMAN: I think abusive is
5 fine. I like that.
6 CHAIRMAN BABCOCK: Judge
7 Schneider.
8 HON. MICHAEL H. SCHNEIDER:
9 Paula, I agree with you about your concern
10 about judges. And I understand your concern
11 too about taking care of the juror. I think
12 we should keep in mind, and my view is that,
13 again, we're not just talking about attorneys
14 who abuse this, but pro se litigants who can
15 also be very abusive to jurors. We need to
16 make sure that the court has that authority to
17 at least police them as well.
18 CHAIRMAN BABCOCK: Bill.
19 PROFESSOR DORSANEO: If we're
20 going to use any word, abusive is much better
21 than all of these words. What's unduly this
22 or that? All of us can agree that you
23 shouldn't unduly do anything. We all have in
24 our own mind what that means, and I'm agreeing
25 with it. I'm agreeing with myself; I may not

1 be agreeing with you. And I think it ends up
2 being, you know, more something that could be
3 abused. Even abusive has its own problems,
4 but at least it has more of an objective
5 flavor to it.
6 CHAIRMAN BABCOCK: Well, we
7 have used it in the Discovery Rules. And as
8 we found out a meeting or two ago, that's
9 worked pretty well. Stephen.
10 MR. TIPPS: But unlike
11 discovery, in which there is a real
12 possibility that the lawyer is going to abuse
13 the witness if the witness is on the other
14 side, very few lawyers are going to truly
15 abuse potential jurors. However, lawyers do
16 sometimes ask questions or want to ask
17 questions that are unduly invasive or unduly
18 repetitive or unduly argumentative. And I
19 think that that ought to be objectionable, and
20 that judges ought to have this rule as a basis
21 for granting that objection if indeed that
22 happens. So I think this language is much
23 better than abusive.
24 CHAIRMAN BABCOCK: Anne, do you
25 want to say anything?

1 MS. McNAMARA: Me? No.
2 CHAIRMAN BABCOCK: It looked
3 like you were working it up to say something.
4 Okay. Steve.
5 MR. YELENOSKY: Well, I guess
6 abusive maybe captures something that invasive
7 doesn't, because as Judge Brister was pointing
8 out, the relevance question -- the question
9 may be very invasive. I don't know whether
10 unduly -- as Bill Dorsaneo says it, nobody
11 does anything unduly in their own mind. But
12 it could be invasive but necessary because
13 it's very relevant, like you said, in an
14 abortion case.
15 So when you say unduly invasive, is that
16 going to prevent the question that is quite
17 relevant but embarrassing to anyone? Whereas
18 no one would say it's abusive, because it is
19 quite relevant even though it's embarrassing.
20 And it's not abusive because it's quite
21 relevant, embarrassing, and we're going to do
22 it only in the presence of the judge and the
23 two attorneys. So that's why I like abusive.
24 CHAIRMAN BABCOCK: Judge
25 Lawrence.

1 HON. TOM LAWRENCE: Where
2 you've got a pro se on one side or two pro
3 ses, if you don't give the judge some ability
4 by saying, for example, the court may prevent
5 instead of shall prevent, then the other party
6 may not know. The pro se may have no idea
7 that he can make this objection. So I would
8 argue that you leave the court some discretion
9 without making it an affirmative burden on the
10 court.
11 CHAIRMAN BABCOCK: Bill, then
12 Buddy.
13 PROFESSOR DORSANEO: This is
14 just a point of information. In Rule 269,
15 which deals with really argument and the
16 conduct of counsel, there is some command
17 language in there. I don't know whether it's
18 a good idea in that rule, but it wouldn't be
19 completely inconsistent to have command
20 language, although I think I would probably be
21 opposed to that myself.
22 CHAIRMAN BABCOCK: Buddy.
23 MR. LOW: The judge can handle
24 it if something -- the two pro ses, he can
25 call them back to his chambers and kind of

1 outline it and say, "Why do you want to do
2 that?"
3 HON. SCOTT A. BRISTER: They're
4 not coming in my office.
5 MR. LOW: I thought you would
6 go for that.
7 HON. SCOTT A. BRISTER: There's
8 a bailiff with a gun between them and me.
9 CHAIRMAN BABCOCK: Okay. We've
10 been talking about No. 4 I think probably long
11 enough unless somebody has something new to
12 say. Paula, did you want to say something
13 else?
14 MS. SWEENEY: No. I want
15 help. What do you all want me to do, us to
16 do, with this when we go back to our
17 committee? I've got a general sort of sense
18 that we want to take "the court shall" out and
19 have it be "the examination shall," so that
20 we're not may or shalling the court, either
21 one. I've got abusive as a concept, took
22 embarrassing back out. Do we want abusive,
23 invasive, repetitive, argumentative, or just
24 abusive? Do we want unduly or not unduly?
25 HON. SCOTT A. BRISTER: It

1 seems to me that's something that ought to be
2 discussed at the subcommittee maybe with a
3 little research.
4 CHAIRMAN BABCOCK: Yeah. Why
5 doesn't the subcommittee take a whack at that,
6 Paula. And if you can't reach a consensus,
7 then just bracket the language and make
8 abusive one and invasive, repetitive or
9 argumentative the other, and we'll take a
10 final vote on it in October.
11 PROFESSOR DORSANEO: I like
12 "embarrassing" myself in the context of maybe
13 you shouldn't ask this in front of everybody
14 else. I was on a jury panel the other day,
15 and that happens all the time.
16 MS. SWEENEY: Bill, is that
17 covered by abusive? Is it abusive to ask
18 someone if they've had an abortion in front of
19 the whole group, but if you get them up to the
20 bench, does that -- I mean, embarrassing,
21 abusive -- I'm liking this abusive thing, and
22 you don't have to say unduly abusive, you can
23 just say abusive.
24 MR. YELENOSKY: Well, you can
25 say the court shall prevent abusive questions,

1 and the court shall ensure that very invasive
2 questions are asked in private.
3 PROFESSOR DORSANEO: Well,
4 something might not be abusive that's clearly
5 embarrassing. I don't mind asking somebody an
6 embarrassing question and insisting on an
7 answer, if that's going to be done, you know,
8 after or up at the bench so everybody else
9 doesn't hear that you were a draft evader or
10 whatever the hell is embarrassing that might
11 be very pertinent.
12 CHAIRMAN BABCOCK: Okay.
13 Within these general parameters, how many
14 people are in favor of the subcommittee
15 drafting language with respect to the general
16 proposition -- I won't call it a principle,
17 Buddy, I'll call it a general proposition --
18 of No. 4? Everybody raise their hand.
19 Everybody against. That passes 22 to four.
20 No. 5. A party may not inquire as to a
21 panelist's probable vote or attempt to commit
22 a panelist --
23 MS. SWEENEY: No, you skipped
24 one.
25 CHAIRMAN BABCOCK: I'm sorry.

1 No. 5. Questions concerning a panelist's
2 opinion about the applicable law must be
3 prefaced by a substantially correct statement
4 thereof. Discussion on that. Stephen.
5 MR. YELENOSKY: Well, actually
6 can I just add or suggest to the committee,
7 when they're drafting this, there was a point
8 made earlier that was quite a bit earlier and
9 I don't know if it got picked up, the
10 difference between questionnaires and asking
11 at the bench, embarrassing questions, because
12 I do think that people are going to be much
13 more reluctant to answer an embarrassing
14 question in writing knowing full well that,
15 although the paperwork is supposed to be
16 secret, it can go anywhere. I think a woman
17 would not want to answer in writing "Have you
18 had an abortion?" than they would in front of
19 just the judge without putting it on paper, so
20 just to point it out to consider.
21 CHAIRMAN BABCOCK: Noted in the
22 record.
23 MS. SWEENEY: I got it.
24 CHAIRMAN BABCOCK: Now on to
25 No. 5. Bill.

1 PROFESSOR DORSANEO: How does
2 that work? I mean, the only case, the main
3 case that I can think of is where a lawyer
4 misstated the elements of mental anguish
5 damages, and the Supreme Court or maybe it was
6 the court of appeals case that said, well,
7 under those circumstances, it was not improper
8 for your challenge for cause to be overruled
9 because you had a lot of misinformation in
10 your preparatory remarks or your question.
11 How does this work otherwise?
12 CHAIRMAN BABCOCK: Well, I'll
13 tell you one area about how it would work.
14 Let's say you've got a public figure libel
15 case. Let's just say you do. So the
16 plaintiff's lawyer gets up there and says,
17 "Now, you're going to be asked about malice
18 in this case. And let me tell you that this
19 reporter absolutely hates my client and he's
20 had a long history of hating him. He's got
21 ill will against him. He's got bad motives.
22 And so when you hear about malice, has anybody
23 ever had any malice in their heart?"
24 Well, that's not the right statement for
25 malice in public figure libel cases. Malice

1 in that context means knowledge of falsity
2 with reckless disregard for truth, that is,
3 you in fact entertained serious doubt about
4 the truth of what you're saying.
5 PROFESSOR DORSANEO: So
6 basically, thou shalt not misstate the law.
7 Yeah, that can happen in a lot of places.
8 HON. SCOTT A. BRISTER: This
9 really comes up frequently, more frequently
10 probably in criminal cases where this is a
11 common -- there are a hundred cases that say
12 this, where the deal is, for instance, let's
13 say on the plaintiff's side, the plaintiff
14 says, "The law says you're entitled to mental
15 anguish. Is there anybody who can't award
16 mental anguish?" Well, the law does not say
17 you're entitled to mental anguish. The law
18 says the jury may award mental anguish if the
19 facts support it in an amount that you think
20 is reasonable.
21 Then you have to call the plaintiff's
22 attorney and say -- this is really the judge's
23 way to make sure the question is a little
24 fairer, so that the record is not stated in
25 such a way where, you know, question, anybody

1 can't award -- you know, "I'm entitled to
2 mental anguish. Is there anybody who can't
3 award it?" The first 20 jurors say they have
4 some problem with that, so strike them all for
5 cause.
6 This is in fact a way for the judge to
7 not butt in to voir dire any more than you
8 have to, because you call the attorney up and
9 say, "Don't make me get me involved in
10 rephrasing your question for you. Just tell
11 them what the law is first and then ask your
12 question."
13 CHAIRMAN BABCOCK: Steve.
14 MR. SUSMAN: Is there any rule
15 on this for opening statement or closing
16 argument?
17 MS. SWEENEY: No.
18 MR. SUSMAN: And yet we all
19 know kind of generally what you're supposed to
20 do, and I don't see where this is a big
21 problem. I mean, if you make some stupid
22 statement of the law in voir dire and ask the
23 jurors if they agree with it and it ain't the
24 law, certainly the judge is not going to
25 strike them for cause. And they're going to

1 suffer the consequences because it's just
2 stupid.
3 PROFESSOR DORSANEO: I agree
4 with that. You can write a rule that says,
5 "Don't tell rocks not to fly," or something
6 like that. I mean, that's what I was getting
7 at before. How does this work? I mean,
8 lawyers are going to misstate the law. That's
9 just inevitable, so you just can't write a
10 rule that says you can't misstate the law.
11 It's kind of pointless.
12 CHAIRMAN BABCOCK: Elaine, what
13 do you think about this?
14 PROFESSOR CARLSON: I agree
15 with Bill.
16 HON. SCOTT A. BRISTER: This is
17 not a misstatement. This is where they don't
18 tell -- these are not lawyers. They don't
19 know that there's a prerequisite question
20 before you get to punitive damages. They
21 don't know about Moriel or any of this other
22 stuff. And the lawyer just asks, "Is there
23 anybody who can't consider awarding punitive
24 damages?" And they've heard this is a car
25 wreck case where the plaintiff had minor

1 injuries.
2 And I'm not saying that they're
3 misrepresenting the law. There's not really a
4 ground for objection on misrepresenting. They
5 just don't tell anybody what the law is and
6 that there are other things that have to be
7 found before you get something. And if the
8 juror raises their hand and says, "If that's
9 all there is, I'm not doing it," the record
10 will look like that is a biased juror when you
11 ask him a few more questions.
12 Now, the other way you could do it is
13 more time consuming, which is the judge butts
14 in and does our -- then you get into the rehab
15 and how much rehabbing can the judge do,
16 because that's what all these rehab cases
17 are. All the rehab cases are where the judge
18 then starts talking with the jury and says,
19 "Did you know this was the law?"
20 "Oh, no, I didn't know that was the
21 law. I didn't know the other was the law.
22 That was the law? Well, if that's the law,
23 then I'll do it that way." That's how rehab
24 always comes up, because there was not a
25 statement given to the jurors of what the law

1 is. So really, especially if you're not going
2 to do rehab, you're going to have to do this.
3 CHAIRMAN BABCOCK: Wallace.
4 MR. JEFFERSON: The problem
5 with this is you would have to have a formal
6 charge conference before the trial began
7 really to figure out what the law was. And I
8 would say the law is this and the other side
9 would say the law is this, and the judge would
10 give you what the law is before you begin voir
11 dire. And I think that would prolong the
12 trial and be very confusing. And if you're
13 wrong about the law, then you can be corrected
14 on it, but an objection can be made, "Judge,
15 that's not the law, and we ask you to instruct
16 the jury that that's not the law, and I'll
17 give you the law." That sort of thing.
18 CHAIRMAN BABCOCK: Paula.
19 MS. SWEENEY: Well, by way of
20 unintended consequences, let's say a litigant
21 misstates the law. Is that reversible error?
22 Have they just mistried their case? Have they
23 just lost on appeal because they didn't say it
24 right in voir dire? We put it in the rule
25 now. It says it here in the rule. There's an

1 unintended consequence I guarantee someone is
2 going to take up on appeal. I think this is a
3 bad idea for every reason that's been stated,
4 including the fact that it allows the judge to
5 strip my voir dire, which many apparently
6 would like to do.
7 CHAIRMAN BABCOCK: Now, now.
8 Let me ask you a question: Do the people who
9 are trying lawsuits around the state, is there
10 a lot of stuff in voir dire where people are
11 telling the jury what the law is?
12 MS. LOPEZ GARCIA: We get it
13 occasionally. But a lot of times what happens
14 is, if you start to get too far into it, the
15 judge is going to say -- if you make that
16 mistake, the judge is going to get into it and
17 is going to say, "I will instruct the jury on
18 what the applicable law is going to be at the
19 proper time in this case."
20 CHAIRMAN BABCOCK: See, what I
21 don't like about this No. 5 is that it almost
22 says it's okay to talk about the law as long
23 as you do it this way. And to me, that's an
24 invitation for people to start talking about
25 the law at a very preliminary stage of the

1 case.

2 HON. SCOTT A. BRISTER: But

3 you've got a right to ask whether the

4 jurors -- you, right now. Now, if you want to

5 waive this, that's one thing, but this is for

6 you. You have a right to ask whether the

7 jurors hate all workers' comp cases or

8 disagree with punitive damages or they're

9 biased against punitive damages. You have

10 that right now. That's what this says. But

11 before you can ask them, "Does anybody

12 disagree with punitive damages," and 20 of

13 them raise their hand, strike them all for

14 cause, stop. You have to say -- you have to

15 do more than that. You have to give them

16 the "If you find this, that and the other,

17 now, that's what the law is. Do any of you

18 disagree with that?" because these are laymen

19 and they don't know what the law is.

20 Now, if you want to waive the right to

21 ask them -- I mean, the law has been for a

22 hundred years that you've been able to find

23 out if the jurors are biased against the law.

24 Now, if you all don't want to instruct them

25 what the law is and don't want to ask them

1 that question, that will shorten voir dire.
2 But you all don't want to waive that, do you?
3 CHAIRMAN BABCOCK: Bill.
4 PROFESSOR DORSANEO: Now that I
5 understand it, I like it. And I'll tell you
6 why. I think lawyers need to know that if
7 they're going to talk about mental anguish or
8 malice or whatever, that they better
9 understand what they're talking about.
10 The case that I use in my case book is a
11 case where somebody, maybe it was a juror,
12 probably it was a juror saying, "What do you
13 mean by mental anguish?"
14 And the lawyer said, "Oh, it's kind of
15 this."
16 And then the juror said, "Well, I don't
17 think I could award that."
18 And the challenge for cause is overruled,
19 and the court of appeals or the Supreme Court,
20 I think it may well be a court of appeals
21 opinion, says, well, you know, the wrong
22 definition of mental anguish was given so the
23 answer doesn't count against the juror. What
24 the lawyer said is not right.
25 I think it's much better coming from the

1 lawyer than the judge butting in and saying,
2 "Let me tell you about the law of mental
3 anguish at this point." I think it's much
4 better for the lawyer to think in advance, "If
5 I'm going to talk about this, I better know
6 what I'm going to talking about." And even
7 the way it's formulated works better. I
8 didn't understand it at all before.
9 CHAIRMAN BABCOCK: Skip, and
10 then Steve.
11 MR. WATSON: Well, I would just
12 follow up on what Bill was saying. This whole
13 discussion to me has sounded like it was the
14 plaintiff's lawyer versus the judge, and I'm
15 wondering where the defense lawyer is. In
16 your example, I'm sure there was an
17 objection. I'm a bit more comfortable with
18 the adversarial process working and the
19 objection being made. I think we still have
20 trial by consent. And the thing that I'm
21 seeing is that if the judge becomes actively
22 involved in saying, "Whoa, Counsel, down,
23 misstatement," you know, throughout the case,
24 that the whole concept of trial by consent is
25 going to go out the window, and there will be

1 an adversarial process between the bench and
2 bar. Whether it be defense counsel or
3 plaintiff's counsel on the other side, it
4 doesn't matter, but just being able to sit by
5 and let the judge carry the ball.
6 CHAIRMAN BABCOCK: Steve.
7 MR. SUSMAN: The problem I'm
8 having is -- and maybe Judge Brister can help
9 us. Can you give an exampe of voir dire where
10 the lawyers talk about the applicable law?
11 HON. SCOTT A. BRISTER: Well,
12 the vast majority of the cases are criminal,
13 and I guess the primary example said on
14 criminal voir dire, this is the first murder
15 charge this person has had, and of course, the
16 probation -- the range of punishment mandated
17 by the Legislature, and the juror has to
18 agree, "I will consider the whole range," is
19 probation to life for a first murder. The
20 second murder, you don't get probation. But
21 the first one -- so that the problem is that
22 the defense, the defendant in a criminal case,
23 stands up and says, "Anybody who can't
24 consider probation if you find him guilty of
25 murder?" 70 jurors raise their hand because

1 if they find the guy guilty of murder -- and
2 then the judge or -- and I certainly don't
3 want to put a burden on the judge who has to
4 do this, reversible error, whatever makes
5 it -- you know, the state always objects and
6 says you've got to explain to them what murder
7 means, which is it can include a mercy
8 killing.
9 MR. SUSMAN: But here is my
10 problem. I got your point. You're not
11 complaining that the lawyer is stating the law
12 wrongly, because in your example there was no
13 statement of the law.
14 HON. SCOTT A. BRISTER: No, I'm
15 not -- that's not --
16 MR. SUSMAN: You're
17 complaining, you're getting back to the old
18 complaint of the lawyer who is asking an
19 irrelevant question, to which I have the same
20 objection that I had before. I don't want the
21 judges to decide whether my questions on voir
22 dire are relevant or not. Because maybe my
23 jury consultant has told me that it doesn't
24 matter whether he can get probation or not, we
25 want to find out what kind of person this is.

1 Maybe it's helpful in a case where even
2 probation is not available to know whether
3 otherwise the person might be willing to give
4 probation. So I don't want -- you're only
5 objection is relevance.
6 HON. SCOTT A. BRISTER: I'm not
7 concerned about that at all. All this says is
8 that before you strike them for cause because
9 they're biased against the law, that's all
10 this reaches, you can strike jurors because
11 they're biased against the law that's involved
12 in the case. And before you can get them
13 struck for cause for that, you have to tell
14 them what the law is.
15 MR. SUSMAN: That's a different
16 issue.
17 HON. SCOTT A. BRISTER: I'm not
18 concerned whether it's relevant or not.
19 MR. SUSMAN: But that's a
20 different issue. It should be worded a
21 different way. All you're saying is that you
22 should not be able to strike a juror for cause
23 who expresses disagreement with a law that
24 doesn't exist.
25 HON. SCOTT A. BRISTER: Or a

1 law that they don't know anything about.
2 MR. SUSMAN: That's fine.
3 CHAIRMAN BABCOCK: Dr. Waites
4 had a comment.
5 DR. RICHARD WAITES: It seems
6 to me that the voir dire process is primarily
7 about identifying biases in jurors and
8 eliminating those biases. There are a lot of
9 very interesting studies that are out there,
10 but the more recent studies indicate that --
11 they actually studied the effect of judicial
12 instruction on what the law is during voir
13 dire. It's very interesting.
14 There was a recent study that was
15 published last month in the Journal of
16 Personality and Social Psychology, I believe,
17 which studied the difference in voir dire
18 where the judge instructed the jurors on what
19 the law was on a particular damages issue and
20 the effect of uncovering bias when a judge
21 didn't do that. And they determined that
22 jurors will give you the politically correct
23 answer if you force them to do that.
24 So if you say to a juror, "Ma'am, the law
25 says that mental anguish damages are only to

1 be awarded in case there is liability, would
2 you be able to follow the law?" then you're
3 going to get a very skewed view of what that
4 juror has to say.
5 On the other hand, if you -- my
6 inclination, after looking at all of the
7 research and having done trial advocacy for
8 several years, is to try to keep law out of
9 voir dire altogether. Because what happens
10 is, when lawyers ask the questions and they
11 talk about the law, it skews the results they
12 get from their questions. When the judge
13 talks about the law, the juror wants to be
14 politically correct and follow the law, follow
15 the judge's instructions.
16 So it seems to me that the best thing to
17 do, if the Committee really wants to promote
18 identifying bias, would be to find a way -- if
19 you really want to do this -- is to find a way
20 to do it so that it encourages jurors to be
21 honest and discourages discussions of law
22 during voir dire.
23 CHAIRMAN BABCOCK: Judge Brown,
24 and then Judge Rhea.
25 HON. HARVEY G. BROWN, JR.:

1 This is one where I disagree with Scott,
2 because I don't think this is just plaintiffs
3 versus the judges. I think this is one, if
4 the lawyer wants to ask the question in my
5 court, I say, "Fine, ask the question." But
6 just know I'm not going to strike for cause.
7 If you think it helps you make a decision
8 about who you want to strike, because you're
9 maybe a little bit off the law and you just
10 want to kind of get a feel for their
11 attitudes, it's perfectly permissible. So I
12 think you should be allowed to ask that
13 question, if you want, but it's not a basis
14 for cause, so I don't think we need a rule.
15 CHAIRMAN BABCOCK: Judge Rhea.
16 HON. BILL RHEA: From what I've
17 heard from the two judges and Steve, it seems
18 to me that we're at a point of agreement. I
19 think I just heard Scott say this. If this
20 No. 5 is really just talking about it as a
21 ground for striking for cause, then
22 essentially what we're doing is codifying Bill
23 Dorsaneo's case that he just described, which
24 I think is fine and good and we ought to do in
25 part because lawyers tend not to understand

1 that. And anything we can do in my view to
2 help just the day-to-day lawyer understand
3 what their responsibilities are and what the
4 parameters of what they can and can't do in
5 court are is a good thing. And if they are
6 awakened to the fact that they have to be
7 careful to say the law correctly if they
8 expect the judge to rule on a for cause
9 strike, then that's a very good thing, because
10 that happens all the time, just that
11 description. They make an incorrect statement
12 of the law, they get a bad answer, they file a
13 motion to strike for cause. I deny it, and
14 they get all upset because they think they've
15 got a ground for it and they don't. So this
16 is a good thing, I think.
17 CHAIRMAN BABCOCK: Judge
18 Schneider.
19 HON. MICHAEL H. SCHNEIDER: I
20 would say I agree with Judge Brown's
21 analysis. But also it seems to me when we
22 moved from (4) to (5) we crossed another
23 threshold, because in (4) back to (1), we're
24 talking about protecting jurors, and here
25 basically we're talking about, you know,

1 biasing jurors or basically rehabilitation.
2 And so those are issues that I think that the
3 counsel can handle with the court, but you
4 don't have to put it in the rules as far as
5 how far you can go.
6 Therefore, really the more I look at
7 these, I'm more inclined right now to say stop
8 on No. 4. I don't put that before you right
9 now, but that's the way I'm looking here,
10 because it seems to me the rest of them can be
11 issues that can be talked about whether or not
12 a person is disqualified for cause.
13 CHAIRMAN BABCOCK: Okay. A
14 couple of more comments and then we're going
15 to vote on this general proposition. Bobby.
16 MR. MEADOWS: Well, with due
17 regard, Judge Schneider, I think No. 5 is very
18 much about protecting the jurors for the
19 reason that a juror who is removed for cause
20 improperly is denied an opportunity to serve
21 on the jury. It's also protecting litigants
22 who care about that particular juror who is
23 gone for reasons that they should not be. If
24 you've got someone who is being removed from
25 the jury panel because they feel a certain way

1 about an incorrect statement of the law and
2 the judge allows them to be taken off for
3 cause, then that litigant and that juror have
4 been denied, I think, or they may have an
5 argument that they have been denied having
6 somebody on the jury who should otherwise
7 stay.
8 CHAIRMAN BABCOCK: As fits a
9 high ranking appellate justice, Justice
10 Schneider gets the last word.
11 HON. MICHAEL H. SCHNEIDER: I
12 don't either, only 90 percent of the time. I
13 understand, I know what you're saying, Bob,
14 and I think it's a good argument, but I think,
15 again, you're dealing with the issue here of
16 whether or not -- the real issue here is, are
17 you going to allow rehabilitation of jurors or
18 not? Now, that's fairly what you're talking
19 about here. And as far as giving a juror a
20 right to serve or not to serve, that can be
21 determined when you determine that issue of
22 rehabilitation.
23 CHAIRMAN BABCOCK: Okay. We're
24 going to get to talk about this some more.
25 HON. MICHAEL H. SCHNEIDER: I

1 understand that, but this -- then you
2 shouldn't be talking about it here.
3 HON. SCOTT A. BRISTER: He's
4 right. They are clearly related. In a car
5 wreck case, say it's a rear-ender car wreck,
6 say, the defendant stands up. "How many of
7 you think that when you hit somebody from
8 behind, you're at fault?" Everybody raises
9 their hand. Get them all struck for cause,
10 some of those people just because they think
11 there's a law that says that. And the answer
12 is different if you're allowed to rehab them
13 and say, "Did you know the law, because there
14 is no law that says you are at fault if you're
15 the person from behind?"
16 "No, I didn't know that."
17 "Would that change your answer?"
18 But it isn't here. If you can't rehab,
19 if the question and answer, "How many of you
20 think you're always at fault if you're behind
21 regardless of what any other circumstances
22 are," if they raise their hand, they're struck
23 for cause. Nobody asks them any more. We
24 will never find that out unless we rehab them
25 or unless -- you have to tell them what the

1 law is, because they don't know. They're just
2 people.
3 CHAIRMAN BABCOCK: Judge
4 Schneider.
5 HON. MICHAEL H. SCHNEIDER: I'm
6 not disagreeing with you. I'm just saying
7 that you don't need to make this statement in
8 a rule. You can deal with that on the issue
9 of rehabilitation. You don't need to put this
10 in the Rules of Civil Procedure.
11 CHAIRMAN BABCOCK: I really my
12 own self think that this is going to cause a
13 lot of mischief. I think you're going to get
14 a lot of lawyers talking about what the law
15 is, whereas you can regulate what you're
16 talking about, Judge Brister, now just the way
17 you're doing it right now. You don't allow
18 that to go on in your courtroom where people
19 just say what the law is and get a bunch of
20 jurors raising their hand.
21 HON. SCOTT A. BRISTER: Well, I
22 certainly agree.
23 CHAIRMAN BABCOCK: Okay.
24 MR. MEADOWS: My point, Chip,
25 is not so much that this as a particular

1 principle is so important that it should have
2 a place in the rule. My concern, and perhaps
3 it does fold into rehabilitation, although I
4 think it does bear on a juror's right to
5 serve, but the whole rehabilitation issue is
6 probably my greatest interest in this rule,
7 and that is because if you've got a situation
8 which is as simple as we've been talking about
9 where someone identifies themselves as being
10 unwilling to follow the law, whether it's an
11 incorrect or not statement of it, then those
12 become magic words that cannot be changed
13 through a greater explanation or a thorough
14 explanation of the law. If that particular
15 juror is just gone because they've uttered the
16 words, "I can't be fair" or "I'm leaning that
17 way or this way," then that's a problem.
18 CHAIRMAN BABCOCK: Steve, then
19 Buddy, then we're going to vote.
20 MR. YELENOSKY: Well, again,
21 hitting the theme about are these really
22 rights of jurors, I disagree with Bobby and I
23 agree with Judge Schneider, because I don't
24 think a juror has a right not to be struck
25 because they misunderstood the law. I mean,

1 that may be a bad thing, but I don't think
2 it's a right. I think you have a right not to
3 be struck because of your race. You have a
4 right not be struck because of a failure to
5 accommodate your disability. But what we're
6 talking about here are the rights of the
7 litigants. And I don't think a person has
8 that right as a juror. It may be a bad thing
9 because I think we're using loosely rights of
10 jurors in the same way I described earlier.
11 CHAIRMAN BABCOCK: All right.
12 Buddy, because you're the co-chair of this
13 committee, you get the last word. The chief
14 justice may get a word.
15 MR. LOW: The lawyer cannot
16 just disqualify the juror. The judge has to
17 do it. And if the question is an improper
18 question of the law and the judge knows the
19 law, like the judges here, they're not going
20 to strike him. They're not going to
21 disqualify him. So you're not going to have
22 one that's disqualified because some lawyer
23 misstated the law. You're going to have one
24 disqualified because some judge didn't know
25 what the law was.

1 MS. SWEENEY: Can we write that
2 in the rule, the judge has to know the law?
3 CHAIRMAN BABCOCK: All right.
4 Everybody in favor of the general statement
5 contained in (5) following this discussion,
6 questions concerning a panelist's opinion of
7 applicable law must be prefaced by a
8 substantially correct statement thereof, raise
9 your hand.
10 HON. BILL RHEA: Can I ask a
11 question real quick? Are we talking about in
12 the context of this being a basis for a motion
13 for a strike for cause?
14 CHAIRMAN BABCOCK: No.
15 HON. BILL RHEA: Or are we
16 talking about as written?
17 CHAIRMAN BABCOCK: As written,
18 generally as written. In favor.
19 MR. HAMILTON: It has to be as
20 a basis for cause, doesn't it?
21 CHAIRMAN BABCOCK: No, it
22 doesn't. We're talking about Rule 226(b).
23 MS. SWEENEY: You just can't do
24 voir dire unless you say it just right.
25 CHAIRMAN BABCOCK: Okay.

1 Everybody in favor raise their hand.
2 Everybody against raise your hand. 24 to four
3 against, so it fails by a vote of four to 24.
4 Let's take up in the next --
5 MR. HAMILTON: Can I ask a
6 question about that first? Does that mean
7 that it also fails if it's as a basis for a
8 strike for cause?
9 CHAIRMAN BABCOCK: No. I don't
10 think it touches that. It just means that
11 Paula's subcommittee is one subdivision
12 lighter in terms of their drafting.
13 HON. BILL RHEA: Can we vote on
14 that as a separate vote?
15 CHAIRMAN BABCOCK: Excuse me?
16 HON. BILL RHEA: Can we vote on
17 that as a separate issue as this No. 5 applies
18 to grounds as a motion to strike for cause
19 only?
20 CHAIRMAN BABCOCK: We can at
21 the end of the day, if you want.
22 No. 6. A party may not inquire as to a
23 panelist's probable vote or attempt to commit
24 a panelist to a particular verdict or
25 finding. Discussion on this No. 6.

1 Bonnie, we've been talking about the
2 clerks a whole lot since you've been gone.
3 MS. WOLBRUECK: That's what I
4 was afraid of.
5 MR. YELENOSKY: You're going to
6 do voir dire.
7 CHAIRMAN BABCOCK: Yeah, the
8 clerks are now going to conduct the whole voir
9 dire. Judge Peeples.
10 HON. DAVID PEEPLES: I think
11 what No. 6 is attempting to get at is this:
12 If we prove A, B and C, can you by your
13 verdict do so and so? And what that asks the
14 jury to do is, before eyeballing one witness,
15 based on some evidence but not all of it, and
16 of course, we've all seen it in the seminars,
17 get a commitment from them before voir dire
18 and have them extracted. And so I think this
19 No. 6 would keep that from happening, and it's
20 the law right now.
21 CHAIRMAN BABCOCK: Bill.
22 PROFESSOR DORSANEO: Well, I
23 think we'll have a lot argument about "can
24 you" and asking that in a different way. I
25 mean, I'm not so sure about "can you," whether

1 that's bad. "Would you" is pretty clearly a
2 commitment. "Could you" is less so. And
3 maybe if your point is that all of these
4 things really amount to the same thing, even
5 if the language is changed, well, maybe that's
6 true. But I see a difference between
7 qualifying jurors and committing them in
8 advance. Asking what somebody could do, I
9 think, is fundamentally different from asking
10 them would they.
11 CHAIRMAN BABCOCK: Buddy, then
12 Paula.
13 MR. LOW: Well, if you're
14 asking a panel, I mean, just generally like
15 punitive damages or pain and suffering, are
16 you attempting to get them committed to
17 awarding something, or are you just finding
18 out whether they could do that at all, is that
19 an attempt to get them committed? Well, maybe
20 it's not a commitment, but it would bother
21 Steve.
22 CHAIRMAN BABCOCK: Paula, then
23 Steve.
24 MS. SWEENEY: The trouble that
25 I see with this is -- and I don't think you

1 can say "Promise to me you're going to A, B
2 and C" in voir dire under existing law. But
3 you're defending the case and there's huge
4 sympathy for somebody who has got third degree
5 burns over 75 percent of their body, and you
6 want to look the juror in the eye and say, "I
7 know you feel sympathy. I do too. But can
8 you look this plaintiff in the eye and tell
9 him no?" Is that committing them or not
10 committing them? Or is that just finding out
11 about them?
12 What happens when you start writing these
13 this way is, well, hell, I don't like that
14 question. He tried to commit him. No, don't
15 let him do it. Well, I think if you're bold
16 enough to do it and you can do it and you can
17 get away with it, you ought to ask those kind
18 of questions. But if we have a rule like
19 this, we're going to be hampering people's
20 abilities to explore the harder case. We need
21 to be able to ask those hard questions that go
22 to the core of the case. It's not commitment,
23 but it's going to be argued that it is.
24 CHAIRMAN BABCOCK: Steve, then
25 Frank.

1 MR. SUSMAN: I mean, I get a
2 little comfort here in the notion of there's
3 got to be a vote, verdict or finding. But I
4 mean, suppose you ask them, well, would you
5 hold it against my client that he tape
6 recorded the conversation? Or would you hold
7 it against him if he had an extramarital
8 relationship? Is that committing him to a
9 vote or a finding or a verdict? Probably not,
10 but it's committing him. You're going to
11 remind him in the final argument that they
12 agreed not to hold it against him. Should I
13 be able to do that? Why not? Lawyers have
14 done that forever. I'm troubled with it, but
15 if it's simply a verdict or a finding, you
16 know, I could go with that.
17 CHAIRMAN BABCOCK: Frank.
18 MR. GILSTRAP: The problem I've
19 got is that at this point, when you really
20 start restricting the type of questions that
21 can be asked, and as Dr. Waites just told us,
22 these are the questions that are most
23 predictive of the outcome.
24 CHAIRMAN BABCOCK: Mike.
25 MR. HATCHELL: I'm not in the

1 trial court much any more, but I read every
2 voir dire in every case that I appeal. And in
3 a case that involves punitive damages, in
4 every case you will have jurors who
5 philosophically cannot award punitive
6 damages. They're philosophically opposed.
7 Now, if you inquire about that, you're
8 inherently inquiring about how a juror is
9 going to vote, so I think I'm very concerned
10 about the breadth of inquiry as to a
11 panelist's probable vote because of the
12 prevention from it, ferreting out basically
13 jury nullification concepts.
14 CHAIRMAN BABCOCK: Judge
15 Brister.
16 HON. SCOTT A. BRISTER: Well, a
17 couple of things. What the jury consultants,
18 correct me if I'm wrong, usually will tell you
19 is what you should ask is "How do you feel
20 about punitive damages?" That's how you find
21 out more. And nothing is wrong with that
22 question. I think it's a drafting issue to
23 say we all agree that's okay. But I assure
24 you, I went around the state giving talks on
25 juries, and there are Texas judges who raised

1 their hands who said they would allow the
2 following question: "We've told you what our
3 case is. They've told you what their case
4 is. Who are you going to vote for?" Judges
5 in Texas actually raised their hands. They
6 will allow that. And I don't doubt that you
7 can do a very case-determinative voir dire if
8 the judge will let you ask that question. You
9 can probably make a real good prediction if
10 you ask them how they're going to vote, if you
11 told them all the facts, relevant facts of the
12 case, which in civil cases you know most of
13 what those are, and you let them ask and then
14 strike.
15 But for crying out loud, if we're going
16 to do that, let's just skip the trial and
17 whoever can get the most people on the jury
18 wins. That would save a lot of time. But
19 this is not what jury section is about. As
20 the Shoukfeh case shows, many judges and many
21 attorneys are not aware of this issue. Some
22 of the judges who are aware of it simply
23 disagree. They simply think it's fine to ask
24 how you're going to vote, and then what you're
25 entitled to is a jury who, having heard all

1 the facts, has no idea how they are going to
2 vote. My view is that is not what democracy
3 or right to jury trial or any of that stuff
4 was about, so we could tell it by the fact
5 that anybody that had any opinion you just get
6 rid of.
7 This to me is not something that you're
8 going to change by having more CLE courses for
9 judges. Some judges disagree with me. They
10 think this is a fine way to pick a jury and
11 that the jurors ought to have no idea how
12 they're going to vote after they've heard what
13 most of the facts are in the case.
14 As I tried to point out in the Shoukfeh
15 case, I think it is just wrong to be striking
16 jurors because, having heard the arguments and
17 what the case is going to be about, they think
18 that at this point one of them makes more
19 sense. And I think we have to have a rule
20 that allows trial or appellate judges, when
21 you have gone too far in that regard, to say
22 this was an improper jury selection, jury
23 strike, jury trial, and we need to have a rule
24 on it.
25 CHAIRMAN BABCOCK: Dr. Waites.

1 DR. RICHARD WAITES: I don't
2 think I have ever heard a trial advocacy
3 speech or a trial advocacy teacher try to
4 teach that a trial lawyer should tell jurors
5 or ask jurors that "If I prove this to you,
6 will you agree that I should win the case?"
7 First of all, it's very bad psychology, and it
8 causes a backlash. And secondly, it is just
9 very bad for voir dire purposes, both
10 procedurally and psychologically.
11 But what I do hear often, and I'm not
12 sure if this is what -- I don't know -- the
13 bottom line is I'm not sure really why you
14 want this. But if you feel like you do want
15 this, then I'm concerned about what we're
16 trying to eliminate, because if, for example,
17 a question goes to a juror like "How do you
18 feel about punitive damages," everybody I
19 think here agrees based on the consensus I've
20 seen so far that that's okay.
21 On the other hand, if both lawyers have
22 done substantially all their voir dire and the
23 defense lawyer stands up and says, "Now, at
24 this point Mr. or Mrs. so and so have told you
25 what the plaintiff's case is all about. We've

1 told you what the defense case is all about.
2 Is there anybody at this point who is leaning
3 one way or the other?" I'm not as clear about
4 what you're saying as if you're trying -- if
5 you think that should be eliminated or
6 prevented or not. I feel like if you're
7 trying to eliminate bias, then that is clearly
8 a way that should be allowed just in terms of
9 uncovering it. If, on the other hand, you're
10 trying to commit a juror, that's a different
11 process.
12 CHAIRMAN BABCOCK: Buddy, then
13 Steve, then Bill.
14 MR. LOW: The way this reads, a
15 party may not inquire as to a panelist's
16 probable vote. Now, under Mike's scenario, if
17 you ask him about punitive damages and he
18 says, "I just can't award them," if that's not
19 a probable vote, I don't know what would be.
20 I mean, that would be prohibited, because he's
21 certainly not going to vote for them if he
22 tells you he's against them.
23 CHAIRMAN BABCOCK: Steve, then
24 Bill.
25 MR. SUSMAN: What happens if at

1 the end of plaintiff's voir dire I get up and
2 say, "You just heard Mr. Low and he was really
3 eloquent. Is there anyone who just has
4 already made up their mind in favor of the
5 plaintiff without even hearing what I have to
6 say?" I mean, you haven't said a thing, but
7 what you're trying to identify is those people
8 on the panel who tend to prejudge quickly, who
9 in fact have made up their mind before they've
10 even heard what you have to say. What's
11 impermissible about that? I think that would
12 be a very valuable thing to ask, "Which of you
13 have already made up your mind, you've heard
14 one side, before I even stand up?" Why can't
15 we ask that question? Does that run afoul of
16 the rule?
17 HON. DAVID PEEPLES: Well,
18 that's certainly not what's intended, nor is
19 the punitive damages there. The heart of it
20 is trying to commit people; you know, if we
21 prove this, will you do so and so? It ought
22 to be out of bounds.
23 MR. YELENOSKY: Well, isn't it
24 kind of insulting to do anyway?
25 HON. SCOTT A. BRISTER: Nobody

1 even objected. We're just asking this guy
2 whose side makes the more sense. And I think
3 that's because attorneys and judges don't -- I
4 mean, the problem is -- I agree, commitment is
5 a specific thing. Commitment is "If I do
6 this, will you do that?" I don't think
7 commitment is the right -- if you ask the
8 question, "How many of you are going to vote
9 for the other side?" I don't think that's a
10 commitment question. I don't think under
11 Texas law there is an objection. There's not
12 a case that says what your objection is to
13 that. But surely all of us agree -- maybe
14 there are some in this room that agree with
15 those handful of the judges -- surely all of
16 us agree this is silly, if we're just going to
17 tell everybody in the voir dire "Who are you
18 going to vote for?" and strike people for
19 cause. Surely we're not. But what's your
20 objection? I'm really not committing them.
21 You're really not committing them.
22 CHAIRMAN BABCOCK: Bill
23 Dorsaneo wants to make that point.
24 HON. SCOTT A. BRISTER: That's
25 the form of the question. Surely that's not a

1 proper question, is it?
2 CHAIRMAN BABCOCK: Dorsaneo
3 wants to make your point.
4 PROFESSOR DORSANEO: I really
5 have three little points. One is that this
6 distinction between qualifying and committing
7 is really in terms of the way people think
8 about it, the difference between asking
9 whether they will do something or they would
10 do something rather than whether they could do
11 it.
12 HON. SCOTT A. BRISTER: It's
13 the form of the question.
14 PROFESSOR DORSANEO: And that
15 is a gossamer distinction that may be lost on
16 people, but it really is a key difference.
17 And the law is, and has been, that you're not
18 supposed to commit them in advance to a
19 particular finding or verdict. Many extremely
20 successful trial lawyers do try to do exactly
21 that. And it is in fact the case that that's
22 bad psychology when it does cause an adverse
23 reaction. But it also can cause $11 billion.
24 You know, you win some, you lose some. But
25 there are more, they are doing more than one

1 over a period of time, and that's just the
2 risk involved in doing the thing.
3 The third matter, I really do think that
4 the other language at the beginning is an
5 entirely different matter. "May not inquire
6 as to a panelist's probable vote," I'm not
7 altogether sure what that means, but I'm
8 pretty sure I don't like it. But I see it as
9 a separate matter from committing.
10 MR. LOW: It's got two prongs.
11 CHAIRMAN BABCOCK: Steve, then
12 Paula.
13 MR. SUSMAN: Yeah. Again, I
14 think one of the problems here is that Judge
15 Brister again -- I mean, I agree with you.
16 That should not be reason to strike a juror
17 for cause. But there are two different things
18 we're talking about here. One is what's a
19 ground for striking for cause. And I don't
20 think a question at the end of the defendant's
21 voir dire, "Who do you agree with now, the
22 plaintiff or the defendant?" and they say,
23 "Well, based on what I've heard, I agree with
24 the plaintiff," that should not be grounds for
25 striking a juror for cause.

1 But what's wrong with using one of your
2 peremptories to strike that juror? I mean,
3 I've got three peremptories. Now, it may be a
4 stupid use for a peremptory, because that kind
5 of information may just be as reliable as the
6 question was reliable. I mean, if you ask at
7 an early time, how do you know what that
8 person would do? You may waste a peremptory
9 striking a person who at the end in response
10 to that question says, "Well, I think he's
11 ahead right now." But I don't see the harm in
12 it. Again, I'm not seeing the harm in it.
13 HON. SCOTT A. BRISTER: No, I
14 understand the argument, and I think you've
15 probably got a good ground to use your
16 peremptory. My concern, the harm is when
17 people see the O. J. trial and you in effect
18 ask that question and get rid of all those
19 people, the impression I think most people
20 have is "We're just involved in a game which
21 is just trying to stack the jury. That's what
22 you all do. That's what voir dire is. That's
23 what you all do in voir dire. You go and just
24 stack the jury." That's what all of the panel
25 out there thinks voir dire is for. I just

1 think letting them ask the question, even if
2 you're not going to use it for strike for
3 cause, gives jurors that impression. We're
4 just here trying to get rid of people that we
5 don't like.
6 And most attorneys now don't even go
7 through the charade of standing up to say,
8 "We're trying here to get fair and impartial
9 jurors." One says, "I'm just trying to get
10 the most," because that's what all the jurors
11 already believe. And allowing them to ask
12 this question, "Who are you going to vote
13 for?" just adds to that. It just makes the
14 whole process stink.
15 CHAIRMAN BABCOCK: Okay. Last
16 word from Paula, the chair.
17 MS. SWEENEY: This rule doesn't
18 say you can't ask who are you going to vote
19 for. The rule says you can't ask -- what it
20 says. If we want to say, "You can't ask a
21 party who you're going to vote for," then let
22 us put that in here. But to put this in here
23 and have as much debate as we've had about
24 what it might possibly mean, does it mean I
25 can't ask somebody, "Are you able, ma'am, to

1 write 'yes' in that line? Can you do that?"
2 and I have my commitment? Probably? Maybe?
3 I don't know. But I'm entitled to do it. The
4 whole point of doing voir dire is to find out
5 can she physically, constitutionally do this
6 thing and sit in judgment on these people. So
7 if we want to write a rule that says you can't
8 ask them who you're going to vote for, let's
9 put that in there. But I don't think this is
10 the way to do it.
11 Another thing is Shoukfeh keeps getting
12 held up here as an example that we should be
13 following. Shoukfeh was a peremptory
14 challenge Batson case involving
15 attorney-client, work product privilege on
16 their notes and whether the other side could
17 get into them. It's not apposite to this at
18 all, so I don't think that we should be
19 holding it up.
20 HON. SCOTT A. BRISTER: A
21 different round of the Shoukfeh case.
22 MS. SWEENEY: Well, I don't
23 think we should be holding it up as an example
24 under the circumstances.
25 CHAIRMAN BABCOCK: Okay. We're

1 going to vote on this general proposition and
2 then we're going to take a break, but --
3 PROFESSOR DORSANEO: Could you
4 split it in two?
5 CHAIRMAN BABCOCK: Yeah.
6 HON. DAVID PEEPLES: That's
7 what I want to do. I'd like to take out the
8 words "inquire as to a panelist's probable
9 vote or," so it would read, "A party may not
10 attempt to commit."
11 CHAIRMAN BABCOCK: Okay. You
12 want to split it into two, the first one being
13 "A party may not inquire as to a panelist's
14 probable vote." And the second would be "A
15 party may not attempt to commit a panelist to
16 a particular verdict or finding." Is that
17 correct? Is everybody okay with that?
18 Okay. Let's vote on the first now up or
19 down. Everybody in favor of the general
20 proposition, "A party may not inquire as to a
21 panelist's probable vote," raise your hand.
22 Everybody against. That fails by a vote of
23 three to 24.
24 All right. The second part, "A party may
25 not attempt to commit a panelist to a

1 particular verdict or finding," everybody in
2 favor raise their hand. All against. That
3 one passes by a vote of 18 to nine.
4 We'll be in recess for 15 minutes.
5 (Recess.)
6 CHAIRMAN BABCOCK: Okay. Let's
7 get back on the record. All right. No. 7.
8 Panelists may not be asked how much weight
9 they would give to certain evidence. I feel
10 like we're in the Letterman Top 10 list.
11 MS. SWEENEY: It's more like
12 "Survivor."
13 CHAIRMAN BABCOCK: Who wants to
14 say something about this? Skip? Yeah,
15 because you weren't listening. Steve.
16 MR. SUSMAN: Well, if the first
17 part of No. 6 failed by a vote of 24 to three,
18 this sentence should fail by a unanimous vote
19 because it's worse.
20 HON. SCOTT A. BRISTER: It has
21 been the law for 100 years.
22 MS. LOPEZ GARCIA: Exactly. I
23 don't know why we need it.
24 CHAIRMAN BABCOCK:
25 Notwithstanding that, Susman says --

1 PROFESSOR DORSANEO: What does
2 it mean?
3 HON. DAVID PEEPLES: Steve,
4 what do you want to do that would prohibit --
5 what I read that to say is "We're going to
6 prove so and so. Can you give that weight?"
7 MR. SUSMAN: What do you think
8 or what weight would you give to the fact that
9 my client is a homosexual in a breach of
10 contract case?
11 HON. JAN P. PATTERSON: Or is
12 it important to you? Is that weight?
13 MR. SUSMAN: What's wrong with
14 that? I mean, it's an open-ended question.
15 What weight would you give to the fact that my
16 client is Jewish?
17 HON. JAN P. PATTERSON: But I
18 don't know what it means either.
19 HON. HARVEY G. BROWN, JR.:
20 Well, I can see that for things they shouldn't
21 give weight to, we would agree they shouldn't
22 give weight to. Those are easy. The harder
23 cases, Paula's example, I've got a
24 chiropractor; they've got the leading
25 orthopedist in the country. Is anybody going

1 to give more weight to their doctor than my
2 chiropractor? And I suppose you might say, "I
3 want to know that for making my strikes." It
4 may be fair. I don't know. But certainly to
5 say that's for cause, that seems somewhat
6 problematic to me.
7 MR. SUSMAN: Again, I think we
8 should not get confused about when a person is
9 stricken for cause. We seem to have gotten
10 into this with the issue of whether you can
11 even ask the question.
12 HON. HARVEY G. BROWN, JR.: I'm
13 agreeing with you. We should separate those
14 things because that's going to make a lot of
15 people think that is a challenge for cause.
16 HON. SCOTT A. BRISTER: But
17 you're not going to agree to a rule setting
18 out what we strike people for cause for, are
19 you?
20 MR. SUSMAN: I might.
21 HON. SCOTT A. BRISTER: I
22 guarantee there will be a bigger hubbub about
23 that than there will be about what questions
24 you can ask in voir dire.
25 CHAIRMAN BABCOCK: Cindy.

1 MS. LOPEZ GARCIA: The fact
2 that there's going to be a police officer
3 testifying in this case, you always ask the
4 question, "Are you going to put more weight on
5 what that police officer has to say versus
6 what my client has to say as to how the
7 accident happened?" I don't think we ought to
8 have that in there.
9 CHAIRMAN BABCOCK: Judge
10 Schneider.
11 HON. MICHAEL H. SCHNEIDER: I
12 was just moving.
13 CHAIRMAN BABCOCK: Just
14 exercising. Any more discussion on this one?
15 HON. DAVID PEEPLES: Does
16 anybody think that if someone tries to answer
17 that question candidly and says, "I might give
18 a police officer more weight than some person
19 who was just passing by," does that get them
20 extracted and excluded for cause?
21 MS. LOPEZ GARCIA: No. It
22 gives me the answer. Now I can ask, "Well,
23 tell me why you feel that way."
24 HON. DAVID PEEPLES: Okay.
25 That's totally different. Does anybody think

1 that if you answer that question it's going to
2 get you excluded for cause without more?
3 That's very comforting to me.
4 CHAIRMAN BABCOCK: Any other
5 discussion about No. 7? Everybody in favor of
6 No. 7 raise your hand. Everybody against
7 No. 7 raise your hand. It fails by a vote of
8 one to 24.
9 MS. LOPEZ GARCIA: You were
10 right, Steve. It was a bigger vote.
11 CHAIRMAN BABCOCK: Close to
12 unanimous. All right. No. 8. The court may
13 not examine nor allow any party to examine any
14 panelist for the purpose of rehabilitation
15 once a clear statement indicating inability or
16 unwillingness to be fair and impartial has
17 been made by the panelist. If such bias or
18 prejudice is not clearly established, the
19 court may examine or shall allow any party to
20 examine a panelist for the purpose of
21 clarification or reconsideration of a previous
22 answer given by the panelist.
23 Discussion. Bill.
24 PROFESSOR DORSANEO: Well, this
25 area under the case law is -- well, it's

1 pretty clear to me what the law is or ought to
2 be about rehabilitation, but I think there's a
3 lot of disagreement about what the law is. It
4 doesn't make any sense to me to say that
5 somebody can't be rehabilitated by taking an
6 answer back or changing a position that they
7 asserted previously. I've changed my position
8 three or four times on an issue just here in
9 the course of our meeting this afternoon. It
10 does make sense to me that somebody can't be
11 rehabilitated by a general affirmation that
12 they will decide the case on the basis of the
13 court's instructions and the evidence if
14 they've already answered a question indicating
15 that they have a bias or worse than that, a
16 prejudice.
17 My own view of the case law is that
18 probably it started out to be that you can't
19 be rehabilitated by a general affirmation, et
20 cetera, but now it's kind of taken on a larger
21 life than that, at least in the view of some
22 of the people who read the cases.
23 I think this rehabilitation issue is an
24 important issue to be in the rule from the
25 standpoint of procedure, number one. And

1 number two, I think there ought to be the
2 right to rehabilitate through clarification or
3 whatever other language we want to put in
4 there that indicates when you can
5 rehabilitate. And if we wanted to say, "But a
6 general affirmation doesn't do it," that would
7 be fine too.
8 CHAIRMAN BABCOCK: Yes, Steve.
9 MR. TIPPS: I have a question.
10 Basically is it the intent that the concept of
11 bias or prejudice being clearly established is
12 the same concept as referred to earlier, a
13 clear statement, or are those intended to be
14 different things?
15 MS. SWEENEY: If I might, here
16 is what the discussion was, and you all
17 correct me that were there. What we were
18 trying to put in here was, A, once someone
19 says, "I can't be fair," we believe that the
20 law is, once they say they can't be fair, then
21 you can't come back and say, "Well, now, if I
22 told you to be fair, couldn't you be?"
23 But the corollary sentence, the second
24 sentence -- and I think everybody agreed that
25 was the law. The corollary sentence was,

1 well, what if they say something kind of
2 indistinct? They might say, "Well, I don't
3 know, that might not be fair," or they say
4 something that's not an absolute indication.
5 Is it still, if they have said the word
6 "unfair" or they have said the word "biased,"
7 is that it? Does that mean you can't say a
8 whole other word to them, period? Or can you
9 get back in and say, "Well, what do you mean
10 by that?"
11 And some folks say you ought to be able
12 to go back in and say, "Well, what do you mean
13 by that?" Others say that if you put this in
14 a rule, then there's going to be extensive
15 cross-examination of any panelist that says,
16 "I can't be fair," for purposes of
17 clarifying, which in fact is instead more the
18 heavy-handed rehab, "Well, you can be fair
19 under these circumstances. Do you really
20 understand that this is the law? What if I
21 told you what the law is, will you change that
22 position if I give you the correct judge
23 definition of the law, which is this?" And
24 then you essentially eviscerate the first
25 sentence, which is the law, with the second

1 sentence, which is meant simply to clarify the
2 law.
3 So this is marrying two concepts, A, that
4 don't go together; and B, I think the second
5 one, the guppy, swallows the first one, the
6 whale, and we shouldn't do it. But the idea
7 was to try and allow clarification of a
8 panelist's statement of prejudice and bias to
9 see if they really mean it.
10 CHAIRMAN BABCOCK: Bill.
11 PROFESSOR DORSANEO: The
12 difficulty is, having thought about it, the
13 idea about asking whether somebody can be fair
14 or not if somebody said they can't be fair and
15 admitted that, well, that may have some
16 independent significance. If you ask me
17 whether I can be fair, I will always tell you
18 I can be fair because I'm going by what I
19 think is fair, which might be, you know, your
20 client recovers nothing and I've already
21 decided that. I believe that to be the fair
22 result.
23 Now, if you're asking me -- let's say I
24 take a case and I do think, it is my opinion,
25 and yes, I do have the opinion that it's

1 impossible to keep a construction site clean.
2 I just don't think that's possible. Now, I
3 might take that back. I might take it back
4 after somebody talking to me after a while. I
5 might say, "No, as a matter of fact, I didn't
6 really mean that. That's not what I meant."
7 Now, I said it, and it has some significance
8 in context, but I think somebody ought to be
9 able to take it back even if you think that's
10 not clarification.
11 Now, I think the argument could be made
12 that that's clarification and I'm now
13 clarifying what I really meant all along by
14 saying something that appears to be
15 inconsistent with what I said earlier. So if
16 we're trying to get to what people really
17 think rather than play some sort of gotcha,
18 you're out of bounds, game over, you're off
19 the mat, it's sumo wrestling, then I think we
20 could accommodate both things.
21 CHAIRMAN BABCOCK: Judge
22 Patterson.
23 HON. JAN P. PATTERSON: This
24 one strikes me as peculiarly susceptible to
25 making new law, however we word it. And I'm

1 wondering if it's not more susceptible to
2 common law development for all the reasons
3 that Bill suggests, but also because it
4 completely ignores the whole area of the law
5 that talks about judicial discretion and tone
6 and demeanor and the other aspects of
7 evaluating testimony other than how it appears
8 on the page.
9 CHAIRMAN BABCOCK: Judge
10 Brown.
11 HON. HARVEY G. BROWN, JR.: I'm
12 not sure about whether it's going to change
13 the law. To me it seems that this is pretty
14 much the law now; that if it's not clear, you
15 can ask questions about it. What I'm most
16 troubled about, when I read these cases, is
17 when a judge brings somebody up to the bench
18 and asks very direct, leading questions
19 designed to get the panelist to say, "Yes, I
20 can be fair." I think that's totally
21 inappropriate.
22 But I think that sometimes you need to
23 ask follow-up. Jurors say sometimes, "I can't
24 be fair," because they have these concepts of
25 what fairness means that are not the law, like

1 "I'm sympathetic; therefore, I can't be
2 fair." Well, that's not the law. You can be
3 sympathetic and be fair. It's whether you can
4 set it aside. So I think what we should do is
5 leave something like this, but add a sentence,
6 something along the lines of general
7 questioning that's rehabilitation in nature
8 should be open-ended. It should not be
9 leading. Some people suggested that lawyers
10 shouldn't ask leading questions of jurors.
11 Well, if lawyers shouldn't, judges shouldn't
12 in my view. So I think we should have a
13 provision that rehabilitation should be
14 open-ended questions.
15 CHAIRMAN BABCOCK: Elaine.
16 PROFESSOR CARLSON: Just to
17 follow up on what Bill said, I understand the
18 case law to say that when a venire person's
19 answers indicate as a matter of law their bias
20 or prejudice, then rehabilitation is not
21 allowable. To me that's a very different
22 statement than saying when the venire person
23 makes a clear statement indicating they can't
24 be fair and impartial. I think the language
25 of the rule or of this proposal is loose. I

1 wonder at the wisdom of putting the standard
2 in the rule when the case law defines what
3 matter of law is and really it is determined
4 in fact case by case. I guess my inclination
5 would be not to favor No. 8.
6 HON. HARVEY G. BROWN, JR.: If
7 you put in the word "bias" from the statute,
8 would that fix that or would that not fix it?
9 PROFESSOR CARLSON: Well, I
10 also have a problem, Judge, with the idea of
11 putting in a rule something that is a matter
12 of law that's subject to case law. That
13 muddles it. I'm just philosophically opposed
14 to it.
15 CHAIRMAN BABCOCK: Judge
16 Brister, then Buddy, then Paula.
17 HON. SCOTT A. BRISTER: Well,
18 there is no case law from the Texas Supreme
19 Court, and the leading case is from Beaumont
20 30 or 40 years ago. This leads to problems
21 for a trial judge. Trial judges -- you know,
22 what is the rule? And lawyers vigorously
23 fight over this. Some lawyers definitely
24 feel, if you say how many of you feel like the
25 person behind is always at fault and that's a

1 bias you hold, yes, and then will vigorously
2 object to anybody asking that juror any other
3 question, making any other statement to them
4 of any kind, even if the real facts are I
5 thought that was what the law was. If you
6 tell me that's not the law, come to think of
7 it, no, I can think of certain situations. In
8 other words, it has become a very formalistic
9 practice in many attorneys' and some judges'
10 minds that apparently the Supreme Court has no
11 interest in getting involved in, but for a
12 trial judge, you know, do I follow Beaumont or
13 Corpus Christi? Who knows?
14 If we're not going to say about these
15 other questions, you know, about what kind of
16 questions you can ask, that kind of stuff,
17 this is a big confusion among lawyers, some
18 judges, and I do think we need to -- the
19 principle, it seems to me, is pretty easy.
20 Surely everybody has to agree if, given a
21 proper explanation of the law, the juror would
22 say, "I'm not biased," do we want a rule or a
23 practice where we go ahead and strike them
24 because they said they were biased earlier on
25 and we don't let anybody ask any questions

1 about it? That's exalting form over
2 substance. I agree it may be complicated
3 drafting a rule to say that, but it would be
4 no more complicated than trying to figure out
5 what the law is by comparing cases from
6 Beaumont 30 years ago.
7 CHAIRMAN BABCOCK: Buddy, then
8 Paula, then Bill.
9 MR. LOW: Apparently the
10 Beaumont law was so good the Supreme Court
11 decided nobody can tangle with it, so I go
12 along with it. But it's always been clear to
13 the judges I've been before that if you use
14 the word "bias" or "prejudice," that's the key
15 word, not "unfair." And when you start
16 letting lawyers, after they've said that, you
17 start letting lawyers say, "Oh," and they get
18 them to say, "Well, no, I didn't mean that,"
19 and the other lawyer -- once they say that,
20 it's pretty clear there shouldn't be any
21 rehab. That's it. That's just a juror gone.
22 If he should have been there, we've got plenty
23 of others. So I don't think we ought to put
24 "fairness," I don't think we ought to have a
25 rule like this, because the judges are

1 understanding it and the law that's been there
2 40 years is good. Enough said.
3 CHAIRMAN BABCOCK: Paula.
4 MS. SWEENEY: What Judge
5 Brister said, we're putting form over
6 substance, I think that's true, but exactly
7 the opposite way. Why are we trying so hard
8 to save the guy who says, "I can't be fair"?
9 He said it. He can't be fair. Move on and
10 use one of the other 40 people that are
11 there. Once they've self-identified as being
12 unfair, biased or prejudiced, it makes zero
13 sense to expend energy writing a rule about
14 how you can shove them back on the panel.
15 Once they've said it, I think we need to stay
16 with the existing law and they're gone and we
17 move on.
18 CHAIRMAN BABCOCK: Bill, then
19 Judge Brown.
20 PROFESSOR DORSANEO: Again,
21 they may be two different things, but the idea
22 from Swap Shop vs. Ford from the days of
23 yesteryear, somebody biased or prejudiced as a
24 matter of fact is disqualified as a matter of
25 law. That keys into the bias or prejudice

1 concept, not some general idea of fairness.
2 Now, generally speaking, we let people
3 testify in two different directions. They may
4 not plan on it, but once you say one thing,
5 you're not precluded from changing your mind
6 or in fact saying the opposite 10 minutes
7 later in connection with further questioning.
8 Now, if we let that happen with respect to
9 regular witnesses, why wouldn't we let that
10 happen in the context of the examination of a
11 juror in order to determine whether somebody
12 is biased or prejudiced as a matter of fact?
13 And if they take it back or clarify it, you
14 know, then why would we conclude that they're
15 biased or prejudiced and not allow the matter
16 just to be handled in the ordinary way? The
17 idea that you can't be rehabilitated by a
18 general affirmation that you'll follow the law
19 or the evidence just simply means that that
20 statement doesn't have probative value. It
21 doesn't do the job of retracting the fixed
22 opinion or the bias or prejudice. It just
23 doesn't accomplish that result under
24 evidentiary principles applied in this
25 context.

1 That's a far different thing from
2 somebody saying, "Now that I understand your
3 question, now that I've thought about it some
4 more, I do think you can keep the place clean
5 or reasonably clean in the context of the kind
6 of construction we're talking about." And
7 that would be a whole different thing.
8 CHAIRMAN BABCOCK: Bobby
9 Meadows.
10 MR. MEADOWS: I believe this is
11 the most misunderstood part of jury selection
12 by judges and trial lawyers, this whole idea
13 about what you do with someone who has
14 expressed unwillingness to follow the law,
15 when they've been exposed to only an incorrect
16 statement of the law, or where they've been
17 misled or led into a statement of a certain
18 feeling about the case or about their ability
19 to preside as a juror in the case, only to
20 have it explained that the law is different or
21 there's another side to the case and in light
22 of that, they can be fair.
23 And to not allow that to occur just seems
24 to me to be completely wrong headed and to
25 allow a problem to exist that really shouldn't

1 because of what I think has been articulated
2 as a pretty correct view of the law, and that
3 is that just saying it doesn't make it so.
4 Someone who says they can't be fair or can't
5 follow the law, it may turn out that that's
6 not really the case and the fact that they've
7 uttered those words shouldn't change it and
8 place it in concrete.
9 The language could surely use some work,
10 but the whole idea, if someone has expressed
11 clearly on the record that they cannot be
12 fair, they're biased or prejudiced, they
13 shouldn't serve. I don't think anyone would
14 disagree with that. But someone who has been
15 led into that because of their earnestness or
16 their haste or their confusion shouldn't be
17 trapped there, and that's why I think this
18 second sentence makes more of a distinction.
19 And for those trying cases around the
20 state, this truly happens. You run into a
21 situation where a lawyer, a good lawyer on the
22 other side understands this aspect of the law,
23 forces this point with the judge. The judge
24 feels just like Steve or as someone else said,
25 there are a lot of jurors here, but the

1 litigants care. And the juror who should be
2 able to serve on the jury or should be removed
3 by a strike should not be taken off in this
4 way.
5 CHAIRMAN BABCOCK: Skip.
6 MR. WATSON: I agree with what
7 Bobby is saying. My problem is that, as
8 articulate as that enunciation was, it doesn't
9 appear to me to be susceptible of being
10 codified into a rule. I keep coming back to
11 where Jan was. To me this is -- I can't tell
12 you why it's different, but the trouble we're
13 having grasping between when it's absolute and
14 when it ought to be correctible is not the
15 kind of thing one can say in two sentences.
16 It's the kind of thing that requires case
17 law. And I'm sorry that the courts have not
18 for 30 or 40 years dealt with it, but I'm not
19 sure the right thing to do is for us to
20 recommend that the Supreme Court try to solve
21 that problem in a sentence or two sentences by
22 a rule.
23 CHAIRMAN BABCOCK: Judge Brown,
24 you had your hand up a minute ago.
25 HON. HARVEY G. BROWN, JR.: I

1 was going to say my problem is that I don't
2 think the word "bias" should be a magic word.
3 Jurors do use that word sometimes in ways
4 different than case law defines it. So if you
5 get a juror to say, "I'm sympathetic because I
6 had a similar injury" or "I'm sympathetic
7 because I was sued," and then the lawyer turns
8 to them and says, "So you're a little biased?"
9 and they say, "Yes," well, I don't think
10 that's the law. I think you need to go
11 further. A follow-up question to that to me
12 is not a rehabilitation of a clearly
13 established bias.
14 CHAIRMAN BABCOCK: Judge Rhea.
15 HON. BILL RHEA: Addressing
16 Skip's comments, it seems that we may or may
17 not be able to successfully codify this, but I
18 agree that it's probably the most prevalent
19 problem during the voir dire and the most
20 misunderstood problem, perhaps because of this
21 30-year-old case law. I think it would be
22 very helpful to at least make an attempt to
23 put it in language that we can possibly agree
24 on. Maybe we can't get there, but I say let's
25 try.

1 CHAIRMAN BABCOCK: Buddy.
2 MR. LOW: Skip, it's one thing
3 if the judge thinks a juror can't be fair. He
4 doesn't have to say, "I'm biased." The judge
5 has the right under the rules to excuse that
6 juror. He can do that, and nobody can
7 complain. So we're talking about when one
8 should be and there is no clear line. I mean,
9 the cases talk about being biased, and I
10 totally agree with Skip that it's going to be
11 hard to put it into a rule.
12 CHAIRMAN BABCOCK: Dr. Waites,
13 do you have something?
14 DR. RICHARD WAITES: I agree
15 with that for a different reason. And the
16 reason is that once a juror has freely said
17 that they cannot be fair, that they are
18 biased, to keep them on the grill for any
19 reason whatsoever, to rehabilitate them, to
20 try to clarify, one lawyer says, "Well, it
21 wasn't clear to me he said that, so let me ask
22 him 10 more questions," that's just playing
23 games. And the sensitivity for me is on the
24 part of the juror, because they are just
25 constantly grilled because one lawyer or the

1 other lawyer wants to play games with them.
2 I sat through a five-day jury selection
3 in the Valley recently that was just
4 pathetic. There were probably 10 or 15 jurors
5 who said they couldn't be fair to Coastal
6 Corporation, who was the client I was working
7 with. The opposing attorney convinced the
8 judge that that was not clear to him that they
9 actually said that, so the judge let this voir
10 dire go on for days where the jurors
11 individually were called into the courtroom
12 and grilled for hours each individually. Some
13 of them were crying, wanting to leave and go
14 home, and it was just a never ending battle.
15 And I feel like something -- I think, from
16 what I can tell, if there is a rule and it's
17 in the common law and the judges adhere to it,
18 it should solve the problem and let jurors off
19 the hook.
20 CHAIRMAN BABCOCK: Paula, then
21 Steve.
22 MS. SWEENEY: Yeah, but let's
23 not forget -- what Dr. Waites just said is
24 important. These are the folks at the extreme
25 who have gone to the point of saying, "I can't

1 be fair," and they've admitted they can't be
2 fair and they have a bias. These aren't all
3 the people in the middle who are saying things
4 that indicate a bias that might support a
5 challenge for cause without the overt
6 admission. These are people who have gone so
7 far as to admit, "I can't be fair," not just
8 in shades and nuances where we're asking the
9 judge to make some kind of a judgment call.
10 And to allow them to be rehabbed even a little
11 bit, much less abused, but to allow any
12 additional pushing on somebody who has gone
13 that far to me seems outrageous.
14 CHAIRMAN BABCOCK: Okay.
15 Steve, then Judge Peeples, then we're going to
16 vote.
17 MR. SUSMAN: It seems to me
18 that jurors a lot of times say things in
19 response to questions that they do not mean.
20 They may say they're going to be fair when you
21 know, from whatever else they say, they can't
22 be fair. And the judge ought to have the
23 discretion to spot that and strike them for
24 cause. To the contrary, they may say they are
25 biased and can't be fair when everyone knows

1 all they're trying to do is get off this jury
2 panel.
3 PROFESSOR DORSANEO: I'm a
4 legal secretary. I know too much.
5 MR. SUSMAN: If that statement
6 comes up early in the game and there are
7 plenty of jurors sitting out there in the
8 panel that have not been used, why take a
9 chance? Let them go. But let's suppose that
10 you have run out of jurors and it's towards
11 the end and someone has figured out, "If I
12 just say I can't be fair, I'm going to be out
13 of here." I don't know why a judge has to be
14 bound by that. Why can't we give the judge
15 the discretion? I think they exercise that
16 discretion in any event to find out whether
17 they really mean what they say, whether they
18 understand the importance of their answer.
19 The problem to me with writing this rule
20 is, how do you contemplate all of these
21 different circumstances? That's the problem
22 for a rule, because I think it varies. I
23 mean, I agree with you 100 percent, if you've
24 got plenty of jurors out there and one of them
25 says, "I'm not fair," why waste time trying to

1 persuade them that they don't mean that or
2 make a record that they don't mean that?
3 CHAIRMAN BABCOCK: Judge
4 Peeples.
5 HON. DAVID PEEPLES: To those
6 of you who have said you don't think we can do
7 the job, I think the last sentence in No. 8
8 will help clarify and maybe modify some of the
9 cases and make sure that the judge has the
10 discretion to allow what we would call
11 rehabilitation under some circumstances.
12 Let me tell you about a real case in
13 which 76 out of an 80-member panel were
14 disqualified, quote. A guy got hurt on the
15 Gulf of Mexico and then later on injured
16 himself driving while drunk. The suit was
17 about the injury on the Gulf of Mexico, but
18 the jury panel was told that there is going to
19 be evidence that he injured himself again
20 driving while intoxicated. And because of the
21 way the question was worded, that judge
22 excused 76 people for cause because they
23 thought they couldn't be fair.
24 Now, of course, I wasn't there and didn't
25 get to question anybody, but I have seen it

1 happen so many times that people during voir
2 dire will say something like "I'm biased" or
3 "I can't be fair," but really, when they find
4 out what the jury question is going to be or
5 that they have some discretion in answering
6 the questions, they say, "Oh, gosh, I didn't
7 understand that."
8 So for example, I think that many of
9 these 76, if they had been told, "You're going
10 to be asked to decide about how much of his
11 injuries happened on the ocean and how much
12 happened in this driving accident," most of
13 them would say, "Oh, I can do that. I thought
14 you were saying can I disregard the drunk
15 driving accident."
16 The failure to understand happens all the
17 time. It happens also with damages. Somebody
18 says, "I can't award damages for so and so,"
19 and if they're asked something like this,
20 "Now, Mr. Juror, you're going to be asked
21 what sum of money, if any, would fairly and
22 reasonably compensate" -- "Oh, oh, I can do
23 that. I didn't know I had some discretion in
24 deciding what sum of money would fairly and
25 reasonably compensate."

1 And so really when they hear the whole
2 case and understand everything in context,
3 what they said before, they do want to take
4 that back, as Bill Dorsaneo said, and it was a
5 misunderstanding. So I think this last
6 sentence of (8) would simply give judges the
7 discretion to listen to all of this and decide
8 that this person really didn't know what he or
9 she was saying when they used the word "bias"
10 or "unfair" 45 minutes ago.
11 CHAIRMAN BABCOCK: Steve.
12 MR. SUSMAN: I have a
13 question. Do you not have that power today?
14 HON. DAVID PEEPLES: I do,
15 Steve, because I've read the cases. There are
16 cases that go one way and cases that go the
17 other way. And I'm confident that the law
18 is -- if it ever got to the Supreme Court, if
19 they would ever take the case -- that it would
20 say that you can consider everything in
21 context just like this last sentence says.
22 But there are judges who think magic words
23 were said, you can't rehabilitate, I'm sorry,
24 excused. I don't have a problem, but this guy
25 down on the Gulf did.

1 HON. SCOTT A. BRISTER: Just
2 briefly --
3 CHAIRMAN BABCOCK: Well, Judge
4 Lawrence had his hand up first, and we're
5 going to take more.
6 HON. TOM LAWRENCE: I think
7 Rodney had a good point. We do have a lot of
8 pro ses, and the pro ses do not know that the
9 question that has been phrased and elicits a
10 response from a juror about bias or prejudice,
11 they don't know to object to that question.
12 And if jurors are prejudiced, jurors, when
13 they answer these questions, probably 75
14 percent of the time, once you get them up to
15 the bench to explain, they didn't really mean
16 to say they were biased or prejudiced. They
17 don't understand the terminology. It's not
18 explained to them because there are so many
19 pro ses. So I think to have, you know, the
20 words "clearly established" or "a clear
21 statement" is not really all that clear, once
22 they understand what the question is. And to
23 have some magic word or phrase that says, "I'm
24 biased or prejudiced," and then you can't
25 examine that, I think that is going to exclude

1 a lot of jurors who really should not be
2 excluded. So I think you need to give the
3 judge that ability.
4 CHAIRMAN BABCOCK: All right.
5 Judge Brister. Really short.
6 HON. SCOTT A. BRISTER: Two
7 things. One, I do think probably most of us
8 would agree that that rehabilitation ought to
9 be very short. I agree, that should not be an
10 hour rehabilitation. I'd say you get a minute
11 or two to ask questions to see if this is
12 clarification or if this is just abuse.
13 Second, the problem with letting it work
14 out in cases is, if the judge leaves the
15 person on, then it's easier to preserve error
16 and get some review of that. If the judge
17 leads him on to get some little admission,
18 okay, maybe I can, if you order me to and say
19 I'll throw him in jail if not, maybe I'll
20 follow the law, and you leave them on, it's
21 easy to get that reviewed.
22 But if the judge just says no, shuts it
23 down and throws out 76 out of 80 people, so
24 that what you're guaranteed to get is an
25 unrepresented sample of the community only

1 made up of people who are not paying
2 attention, who didn't hear the question,
3 because everybody that heard the question
4 raised their hand and were struck for cause,
5 how do you preserve error? In Texas cases you
6 can't. You can't get that case up, because
7 somebody who didn't serve on the jury, how do
8 you show you were harmed? I think most courts
9 are hesitant -- the appellate court is going
10 to be hesitant to say, "Oh, well, it's
11 reversible error if you struck one too many.
12 Do it all over again." But what else are you
13 going to do? I think it's something that
14 needs to be addressed by a rule.
15 CHAIRMAN BABCOCK: Okay. Let's
16 vote on this. Everybody in favor of No. 8 as
17 a general proposition, although not a
18 principle, raise your hand.
19 PROFESSOR DORSANEO: Can we
20 break it down?
21 CHAIRMAN BABCOCK: No, we don't
22 need to break it down. Everybody raise your
23 hand if you're in favor of this one.
24 HON. TOM LAWRENCE: You mean as
25 written?

1 CHAIRMAN BABCOCK: No, as a
2 general proposition.
3 HON. TOM LAWRENCE: Well, I
4 could vote for every one of these things if we
5 said --
6 CHAIRMAN BABCOCK: All right.
7 Keep your hands up. Let me get the vote. All
8 right. Everybody against. It fails by a vote
9 of 10 to 15. No. 9.
10 HON. DAVID PEEPLES: Chip,
11 before we go on, somebody had problems with
12 the wording. I'd like to know what the
13 problem was.
14 HON. TOM LAWRENCE: I'm not
15 exactly sure. We all made a lot of comments
16 and nothing changed in the phrasing, so none
17 of the comments we're taking into
18 consideration? Is that what I understand? I
19 guess I'm not sure what I just voted on.
20 CHAIRMAN BABCOCK: Well, what I
21 think we're trying to do, Judge Lawrence, is
22 to vote on general concepts. And if we were
23 voting in favor of this, then the subcommittee
24 would take our discussion in hand and try to
25 come up with specific rules or a specific rule

1 that would take all the comments that we made
2 into account. But there are some people, and
3 I hope it's the 15 that voted against it, that
4 say, "We don't care what you say about this
5 general concept, we don't think it ought to be
6 in the rule." That's what a no vote, that's
7 what an against vote meant. And if anybody
8 wants to switch their vote, speak now.
9 HON. TOM LAWRENCE: I want to
10 switch my vote.
11 CHAIRMAN BABCOCK: So you want
12 to go from a no vote to a yes vote?
13 HON. TOM LAWRENCE: I want to
14 go from a yes to a no.
15 HON. MICHAEL H. SCHNEIDER:
16 He's already disqualified.
17 MS. LOPEZ GARCIA: He already
18 said he's biased.
19 CHAIRMAN BABCOCK: So it fails
20 by nine to 16. Carl.
21 MR. HAMILTON: Can I ask a
22 question for clarification? It seems to me
23 that we ought to be voting on two concepts.
24 One concept is do we want to rehabilitate a
25 juror or not. The second concept is, if we

1 want to have some rehabilitation, do we want a
2 rule that says how we do it, or do we just
3 want to leave it up to the present common law
4 rules?
5 CHAIRMAN BABCOCK: I think,
6 Carl, the vote we just took is a vote to leave
7 it up to the common law.
8 HON. MICHAEL H. SCHNEIDER:
9 That's correct.
10 CHAIRMAN BABCOCK: Is that
11 everybody's understanding of what we just
12 did?
13 MS. SWEENEY: That's correct.
14 CHAIRMAN BABCOCK: Okay. Then
15 let's move on to No. 9. A panelist's general
16 philosophical opinions and predispositions
17 about a cause of action, a defense, or the
18 relief sought, are not a basis for challenge
19 unless the panelist will be unable to consider
20 the facts of the particular case and make a
21 decision based on the credible evidence
22 admitted at trial and the law given in the
23 court's charge.
24 Discussion on No. 9.
25 MS. SWEENEY: And Chip, if I

1 might, as far as these were concerned, the
2 concept here is if a panelist on No. 9 says,
3 "I hate lawsuits and I hate mental anguish
4 and I hate damages and I believe in tort
5 reform and I late lawyers and I don't like you
6 either, Judge," could you then come back --
7 "and I don't think I could be fair" -- could
8 you then come back and say, "Well, yeah, but
9 could you consider the facts of this
10 particular case and make a decision based on
11 the credible evidence?" And if they were to
12 say yes, then that panelist, despite all those
13 other statements, attitudes and
14 predispositions, could not be struck for
15 cause.
16 CHAIRMAN BABCOCK: Bill.
17 PROFESSOR DORSANEO: This, like
18 one of the earlier ones, is about challenges,
19 a basis for a challenge for cause. I don't
20 know exactly why it's in the voir dire
21 section. But aside from that, we already
22 voted about allowing somebody to ask about,
23 you know, qualifications, attitudes. I think
24 we already decided this, not in the context of
25 what makes somebody subject to a challenge for

1 cause, but in the context of what you can ask
2 about.
3 CHAIRMAN BABCOCK: Does anybody
4 who was on the subcommittee want to speak in
5 favor of this?
6 HON. DAVID PEEPLES: I do. I
7 think Paula gave a partisan summary. What
8 this is designed to do is this: Take a
9 criminal case. There may be a juror who says,
10 "I hate crime and I want criminals put in
11 jail, but I don't know if this person is
12 guilty, and I can listen and decide if this
13 person is guilty, and I can decide it beyond a
14 reasonable doubt. So my philosophical outlook
15 is I don't like crime, but I can decide this
16 case based upon the credible evidence admitted
17 in trial and the law," and so forth.
18 Or in a civil case, "I think there are
19 too many lawsuits," or "I think corporations
20 give people the shaft, but I don't know in
21 this case what the facts are. I can listen to
22 all that."
23 So this No. 9 is designed to tell judges
24 that if that's the state of the record on a
25 given panelist, that person, you've got to use

1 a strike on them. Just because they've got
2 some philosophical leanings, if they can
3 decide this individual case based upon the law
4 and the facts, they're okay and you've got to
5 strike them. They don't get excused for
6 cause. That's all it's designed to do.
7 CHAIRMAN BABCOCK: Judge, does
8 this belong in this rule, though? Aren't we
9 talking here about what is a basis for a
10 challenge as opposed to what you can say or
11 not say in your voir dire?
12 HON. DAVID PEEPLES: Well, if
13 it needs to go in a different rule, that may
14 be true.
15 CHAIRMAN BABCOCK: It just
16 seems to me like it's apples and oranges, but
17 I may be missing something. I probably am.
18 HON. DAVID PEEPLES: Well,
19 challenges for causes happen during the voir
20 dire process, so I for one thought that this
21 was a proper thing to talk about.
22 CHAIRMAN BABCOCK: Well, it's
23 obviously a proper thing to talk about.
24 Steve.
25 MR. SUSMAN: David, I would

1 feel much more comfortable if it were worded
2 that a panelist's general philosophical
3 opinions, blah-blah-blah, shall not be, you
4 know, a basis for challenge unless they will
5 interfere with his ability to consider, et
6 cetera, et cetera. I mean, unable? Anyone is
7 able to. I mean, that's kind of an oxymoron
8 the way it's worded. Really it's the
9 interference.
10 HON. DAVID PEEPLES: That's an
11 improvement in the wording.
12 MR. SUSMAN: I mean, when
13 somebody needs to make a judgment call, you
14 know, I'd say in Paula's case where someone
15 says, "I hate lawyers, I hate tort reform, I
16 hate this and that," yeah, that's going to
17 interfere and someone has got to make a
18 judgment call that's going to interfere with
19 that person's ability to decide the case.
20 But again, I do agree with you that I
21 don't know why it's here in this rule. I
22 mean, maybe we ought to have a separate rule
23 on what the challenges for cause should be.
24 CHAIRMAN BABCOCK: What else?
25 Any other discussion? Judge Schneider.

1 HON. MICHAEL H. SCHNEIDER:
2 Again, if I can get somebody to clarify, on
3 all the others we've been talking about what
4 you can ask, but on this one we're talking
5 about for cause. Should that be mixed up in
6 this rule?
7 CHAIRMAN BABCOCK: Well, I
8 personally don't think it should be, but
9 people may disagree. Obviously some do.
10 HON. MICHAEL H. SCHNEIDER: I
11 was hoping somebody could address that.
12 CHAIRMAN BABCOCK: Judge
13 Brister.
14 HON. MICHAEL H. SCHNEIDER: I
15 agree with the statement here, but I just
16 don't know whether that should be in what you
17 can do on voir dire.
18 HON. DAVID PEEPLES: Can we
19 have two different rules, 226(c)?
20 CHAIRMAN BABCOCK: If the Court
21 is interested in that, we certainly can.
22 MS. SWEENEY: That's not my
23 job.
24 CHAIRMAN BABCOCK: Judge
25 Brister.

1 HON. SCOTT A. BRISTER: I don't
2 have a problem putting it in a separate rule.
3 Given the opposition to having any voir dire
4 rule at all --
5 CHAIRMAN BABCOCK: The chances
6 are not major.
7 HON. SCOTT A. BRISTER: If you
8 just don't want the rule, just vote I don't
9 want the rule. Let's not talk about putting
10 it in a separate rule. That's just a ruse for
11 we don't want it at all.
12 I think this is a big problem. We're
13 about -- I mean, to put it in, for instance,
14 the Harris County context, which is what I
15 know, as you know, Harris County has gone from
16 a democratic to a republican county. I don't
17 know how to explain it other than this. To a
18 plaintiff's attorney in Harris County, that's
19 obviously troubling because the county has
20 become more conservative. The answer to that
21 is not in my view what a lot of people want to
22 do in that context, and it could happen to
23 defendants in other counties, it may happen to
24 defendants in Harris County very soon, is if a
25 plaintiff's attorney wants the verdict in 2000

1 to be like they were in 1980, because those
2 were more helpful for me and my client, that's
3 illegitimate. That is not what reasonable
4 care, reasonable and necessary expenses or
5 democracy or justice is about.
6 If the society becomes more conservative
7 in regard to crimes, the verdicts ought to get
8 longer. It's not right to say, well, that
9 must be biased. It's not right to say
10 that's -- that is us being a part of society.
11 The risk, if we set up a system that says, no,
12 we're going to keep things like they were and
13 we're going to stand in the face of change,
14 and I understand sometimes the law needs to do
15 that, but a lot of the common law is aimed to
16 be democratic, to go with what the general
17 impression of society is. And the risk courts
18 run if you don't do that is they put
19 arbitration clauses in and no-fault insurance,
20 and all of us are going to be out of a job.
21 If we -- that's why people put arbitration
22 clauses in contracts, because they do not --
23 they think we're going to jimmy around the
24 process to get some favorable process. I
25 think this is key. I don't have --

1 HON. JAN P. PATTERSON: Boy, I
2 better read this again.
3 HON. SCOTT A. BRISTER: I want
4 to warn you, this stuff about, you know, we're
5 going to get rid of people because they're too
6 conservative, that's good for you, maybe you
7 in your particular case, or they're too
8 liberal, something like that, that's going to
9 end up being a problem before too long. We
10 don't need to be eliminating people because
11 they're too republican or too democrat. We
12 need, I want republicans -- especially on a
13 civil case where it doesn't have to be
14 unanimous -- I want the whole gamut, black and
15 white, large and small, conservative and
16 liberal, and anything we can do to send a
17 message to the bar that that's what juror
18 selection is about, not this trying to craft
19 stuff.
20 I sense from the discussion, and I'm in a
21 small minority on that, but I do think about
22 this. We have no rule on this. We need to
23 think about this before all -- literally in
24 Harris County our cases are disappearing,
25 because people -- you don't have to repeal the

1 seventh amendment for jury trials to
2 disappear. You can put it in the contract.
3 You can pass no-fault insurance. We will be
4 out of work.
5 CHAIRMAN BABCOCK: Judge
6 Brister, can I ask you two questions: One, do
7 you think that this Paragraph 9 is an
8 embodiment of the current common law? And
9 two, what did the task force say about it?
10 HON. SCOTT A. BRISTER: A lot
11 of people disagreed. I don't know that the
12 common law is clear on that. The Goode vs.
13 Shoukfeh case shows that we're not even
14 thinking about this. We're asking the guy
15 whose case do you think makes sense, talking
16 about whether it's a little or a small bias,
17 whether we really think he's telling the
18 truth, when the question is, that has nothing
19 to do with whether he's a fair juror. Nobody
20 is even thinking about this. And for crying
21 out loud, we need to do something to think
22 about it.
23 CHAIRMAN BABCOCK: What about
24 the task force, what did they say about that?
25 HON. DAVID PEEPLES: It didn't

1 deal with this.

2 CHAIRMAN BABCOCK: They what?

3 HON. DAVID PEEPLES: I don't

4 think it dealt with this.

5 MS. SWEENEY: I don't think it

6 did either. I haven't seen it in that.

7 HON. SCOTT A. BRISTER: Well,

8 it's related to, as somebody said earlier,

9 it's related to that earlier issue about

10 asking somebody about how they think they're

11 going to vote in a case.

12 CHAIRMAN BABCOCK: Steve.

13 MR. SUSMAN: It just seems to

14 me so difficult. I agree with you, Scott, our

15 notions of what fairness is have got to

16 change. They're the same, but they change.

17 It seems so hard to me to write a rule when

18 the ultimate question for the judge is, is

19 this person going to be a fair juror? And how

20 do you write a rule? Well, if they say

21 something, you can't consider that. If they

22 say something else, you can consider, when

23 it's everything you ought to be considering.

24 I mean, this is a fair jury in Harris County

25 in 2001, or wherever it is, given the case,

1 given what they look like, given their
2 background. I don't see how you write a rule
3 that codifies what a court can consider in
4 making or in using that judgment.
5 CHAIRMAN BABCOCK: Okay. I
6 think we fairly discussed No. 9. Everybody in
7 favor of No. 9 raise your hand. Everybody
8 against raise your hand. It fails by a vote
9 of three to 23.
10 No. 10. Panelists may not be
11 disqualified because of their reaction to
12 statements about he evidence -- it should be
13 "the" evidence.
14 MS. SWEENEY: Sorry.
15 CHAIRMAN BABCOCK: -- that will
16 be presented. Did everybody hear that?
17 Panelists may not be disqualified because of
18 their reaction to statements about the
19 evidence that would be presented. Steve.
20 MR. SUSMAN: That's
21 ridiculous. Now we have gone to the truly
22 ridiculous. A panelist gets up and says, "I
23 hate that plaintiff's lawyer. I can't stand
24 the way he looks. He is the biggest sleaze
25 bag. I know his client doesn't deserve a

1 thing." And the judge can't consider that and
2 disqualify him?
3 HON. DAVID PEEPLES: Steve,
4 about 30 minutes ago you said something that
5 really this is designed for. You said you
6 thought it would be ridiculous or it shouldn't
7 be a ground for challenge if someone has heard
8 the plaintiff's case and the defense case, the
9 lawyer says, "Who is ahead?" and they say,
10 "Well, you seem to be."
11 And I think you said, and I agree with
12 you, that that shouldn't be a ground for
13 challenge. This is designed for that, and the
14 wording is not great because it was late in
15 the conference room, but that's what we're
16 getting at. If we can do that, we would make
17 major progress here.
18 MR. SUSMAN: Well, this is way
19 off the mark because I can't even tell that's
20 what you were driving at.
21 HON. DAVID PEEPLES: Okay.
22 Well, are you in favor of what you said
23 before?
24 MR. SUSMAN: Yeah, I'm in favor
25 of --

1 HON. DAVID PEEPLES: Can we
2 word something that would say that?
3 MR. SUSMAN: Wording something
4 like -- yeah, I think that's fine.
5 HON. DAVID PEEPLES: How do we
6 do it?
7 HON. HARVEY G. BROWN, JR.: How
8 about we use old No. 7 that was rejected
9 because it was saying that you can't ask it,
10 and just say panelists are not disqualified
11 based solely on how much weight they would
12 give to certain evidence.
13 CHAIRMAN BABCOCK: I think
14 you're getting, again, outside the scope of
15 this rule.
16 MS. SWEENEY: The problem with
17 No. 10 is the whole --
18 MR. SUSMAN: Wait a second,
19 guys. It's Part 6 that we rejected, the first
20 phrase of (6). Remember that? That was the
21 one about a party may not inquire as to a
22 panelist's probable vote.
23 CHAIRMAN BABCOCK: We also
24 rejected (7).
25 MR. SUSMAN: But my comments

1 were in connection with at the end of voir
2 dire, one lawyer says, "All right. At this
3 point, who are you in favor of? Who are you
4 going to vote for, the plaintiff or the
5 defendant?"
6 HON. DAVID PEEPLES: Or which
7 way are you leaning.
8 MR. SUSMAN: And my argument
9 was you ought to be able to ask the question
10 for whatever it's worth. And the guy at that
11 time says, "Well, based upon what I've heard,
12 I'm in favor of the plaintiff." That should
13 not be a cause for disqualification.
14 HON. DAVID PEEPLES: I'd like
15 to see if the house agrees with Steve, and if
16 we do, draft for it, because we can spend a
17 lot of time drafting here and there.
18 MR. MEADOWS: This is the whole
19 notion of acquired bias. You react to what's
20 happening before you from the lawyers.
21 CHAIRMAN BABCOCK: Let me say
22 it again, maybe I'm just dense and missing it,
23 but (9) and now (10) --
24 PROFESSOR DORSANEO: And (11).
25 CHAIRMAN BABCOCK: We haven't

1 got to (11). But (9) and (10), it seems to
2 me, are going afield from what the rule is
3 that we were charged to draft and into a
4 different area. And I'm not saying that that
5 area is not legitimate. I'm not saying that
6 area is something we ought not to look at and
7 draft, but it's not what we were asked to do
8 and it's not in the task force rule. I
9 haven't read the whole report, so that's why I
10 asked Judge Brister a minute ago about that.
11 This may be a fine idea, but it does seem to
12 me it's outside our scope. I may be wrong.
13 MR. LOW: But you've got to
14 look at it the way it's written. It says a
15 panelist may not be disqualified because of
16 their reaction to statements about the
17 evidence. He tells me the evidence is going
18 to be this. My reaction is I'm biased and I'm
19 prejudiced. And oh, wait a minute, you can't
20 disqualify me because I just gave you my
21 reaction to your statement about the evidence.
22 CHAIRMAN BABCOCK: But you're
23 meeting the rule on the merits.
24 MR. SUSMAN: I think the
25 sponsor of the rule has already agreed that

1 the way it's worded is too broad. The
2 question is, would you accept a rule that says
3 you can't be disqualified by your indication
4 of how you would vote on the ultimate decision
5 or something like that.
6 MR. LOW: But we can't ask
7 that. We prohibited it.
8 CHAIRMAN BABCOCK: Judge Rhea.
9 HON. BILL RHEA: I think it is
10 the issue of acquired bias. I think that's
11 the intent of the drafters. It's the issue of
12 acquired bias. I've always called it "created
13 prejudice." You've created prejudice. It's
14 the drunk doctor cutting off the wrong leg.
15 Are you biased against my client now because
16 you've got these bad facts in front of you?
17 To me, it's obviously not a basis for striking
18 for cause, but again, one of the things a lot
19 of people are confused about. And it would be
20 helpful to have another rule, if I'm hearing
21 Steve right, what he's saying, and I agree
22 with that, and I think most of us in this room
23 would agree. It's created prejudice. It's
24 not a basis for striking for cause. So I
25 think it would be helpful to have it in the

1 rule whether it's in this rule or another
2 rule.
3 HON. SCOTT A. BRISTER: And the
4 relationship is because -- we got here because
5 if you say -- you can do it either way. You
6 say you can't ask that question. To me, it's
7 a bit unfair to say you can't ask that
8 question. We don't need that because we'll
9 deal with that. You can ask it, you just
10 can't strike him for cause. But we're not
11 going to address whether you can strike him
12 for cause, because that's outside our scope.
13 What you're saying, if you do that, is you're
14 saying, well, just keep doing it. You can
15 say, okay, you can't strike for cause or you
16 can say, look, you can't ask that. But it's
17 okay for people to keep asking, "How are you
18 going to vote?" That's fine too.
19 CHAIRMAN BABCOCK: Well, the
20 task force says each party may examine any
21 prospective juror concerning matters
22 reasonably related to the exercise of
23 challenges for cause or peremptory
24 challenges. Now, how does No. 10 relate to
25 that?

1 HON. SCOTT A. BRISTER: Well,
2 it says you can't inquire as to their probable
3 vote. We're not going to say you limit that,
4 but you can do that and you can keep them from
5 getting struck for cause.
6 CHAIRMAN BABCOCK: But No. 10
7 says they can't be disqualified because of
8 their reaction, or even with the friendly
9 amendment, it's talking about disqualification
10 as opposed to what you can or can't say.
11 HON. DAVID PEEPLES: Chip, the
12 reason we need to deal with this now --
13 CHAIRMAN BABCOCK: I apologize
14 if I'm being dense, I just haven't gotten it
15 yet.
16 HON. DAVID PEEPLES: When we
17 dealt with Paragraph 3, we took out "state
18 briefly," and I think it was the consensus
19 that we don't want this to be like the
20 statement of the nature of the case in the
21 appellate court, one sentence. In other
22 words, you get to say something about the
23 facts of the case. I mean, I think that's
24 what we decided about two hours ago. Now, if
25 that's allowed, as it's going to be, there are

1 going to be times when jurors have heard what
2 amounts to a summary jury trial. And if they
3 say, "I'm leaning" or "Gosh, if I had to
4 decide right now, I think your case is better
5 than yours," and that person is excused for
6 cause, we're going to lose a lot of jurors
7 because we've allowed factual statements, as
8 we voted to do, I mean, a lot of it, not just
9 two or three sentences. So if it amounts to
10 almost a summary jury trial, gosh, it's human
11 nature to think one side seems a little bit
12 better than the other when really all they're
13 saying is "I'm going to listen to the
14 evidence, but if this is what the evidence is
15 going to be, it sounds like one side is ahead
16 of the other."
17 And what Steve said and I thought was
18 wonderful is that if that's the state of mind,
19 that shouldn't get you excused for cause. I
20 think we need to say it. Otherwise, people
21 are going to be excused for cause and you'll
22 have to bring in panels of 75 and 80 and 100
23 in a small case.
24 MS. SWEENEY: It's not
25 happening now.

1 HON. DAVID PEEPLES: It is some
2 places, Paula.
3 MR. SUSMAN: Obviously, these
4 things about what lawyers can ask during voir
5 dire are different than what constitutes
6 grounds for striking a juror for cause. But
7 there is a relationship because obviously
8 there are judges who are members of this
9 committee who think there are some abuses.
10 And we've used the arguments as we have gone
11 through this afternoon saying, well, let us
12 ask the question as long as it doesn't have
13 any consequences except on how we're going to
14 use our peremptories. And I think we've
15 gotten some votes around the room that
16 basically allow lawyers to have a lot of
17 freedom of what they can ask.
18 I think it's fair to now say, come to now
19 and say, well, let's agree that the
20 consequence of these answers will not be
21 striking a juror for cause. I don't have any
22 problem with discussing that, and I think
23 that's a fair discussion. Now, my view on
24 this, as I've said before, is the lawyers
25 ought to be able to ask at the end of voir

1 dire or at any point, "Who are you in favor of
2 now?" for whatever it's worth. And the answer
3 should not be a ground for cause, because they
4 haven't heard the evidence. They haven't
5 heard the whole case. But the question should
6 be askable.
7 CHAIRMAN BABCOCK: Elaine.
8 PROFESSOR CARLSON: We're
9 looking at this rule because we're trying to
10 mend some legislative fences, and the grounds
11 for disqualification are a matter of statutory
12 provision. It would be an interesting end of
13 the day if we ended rewriting the legislative
14 statute on this. I think that's problematic.
15 CHAIRMAN BABCOCK: Bill.
16 PROFESSOR DORSANEO: Aside from
17 that very good point, I do think we probably
18 ought to keep these things separate, the
19 challenge for cause part and the voir dire
20 part, even though obviously they are very
21 tightly connected. And really (5) we didn't
22 deal with before. We discussed it. Part of
23 the reason was because we thought, well, it
24 either has to do with rehabilitation or it
25 really has to do with the subject of whether

1 somebody could be challenged for cause if they
2 weren't given the right information or enough
3 information. I think we should consider 9, 10
4 and 11, but I have the same reaction, 5, 9, 10
5 and 11, to see if we want to do anything with
6 the challenge for cause rules.
7 There is that one, and then Buddy just
8 pointed out to me that there is also a
9 separate rule in the statutory challenge for
10 cause which says if there's anything in the
11 opinion of the judge that makes the juror
12 unfit or giving some discretion there, and
13 that would bring it more within the purview of
14 this Committee just focusing on the rules.
15 CHAIRMAN BABCOCK: Don't get me
16 wrong. I'm not against studying the issue of
17 challenges for cause, and if it's appropriate
18 to recommend a rule to the Court, then doing
19 so. But I don't think that's our charge. I
20 don't know that's what we studied. I don't
21 think the task force addresses it, and I don't
22 think any of the materials address it. So to
23 just delve into that at this stage at 4:45 I
24 don't think is a good idea. But I've only got
25 one vote.

1 Has anybody got anything else? We're
2 almost at the end, but as Paula has reminded
3 us several times, we are going to talk briefly
4 and then vote on whether or not there's going
5 to be a separation between No. 1 and 2 and the
6 others that we have voted in favor of.
7 So on No. 10, everybody who is in favor
8 of the general proposition, recognizing that
9 Judge Peeples has already talked about
10 reworking the wording, everybody that's in
11 favor of No. 10 raise their hand.
12 HON. DAVID PEEPLES: Steve,
13 this is your motion. I'm for whatever Steve
14 was for. Can we vote on that?
15 CHAIRMAN BABCOCK: You just got
16 yourself an extra vote. Everybody against.
17 HON. JAN P. PATTERSON: We're
18 going to have to rehabilitate Steve Susman.
19 MR. SUSMAN: I'm voting in
20 favor.
21 CHAIRMAN BABCOCK: It fails by
22 a vote of six to 19.
23 No. 11. In determining challenges for
24 cause, the court shall consider the panelist's
25 entire examination in context after the

1 parties have had a reasonable opportunity to
2 examine the panelist as to the ground of
3 challenge. Discussion on this.
4 HON. DAVID PEEPLES: Chip, as I
5 recall, this is basically my wording of the
6 rehabilitation issue, which I can't remember
7 how we came up with (8).
8 MS. SWEENEY: We did it twice
9 and I'm not sure why. The concepts are
10 supposed to be the same, and I think basically
11 the discussion would be the same.
12 CHAIRMAN BABCOCK: No. 8 failed
13 by a vote of nine to 16.
14 HON. DAVID PEEPLES: I'd like
15 to get the sense of the house on this. I
16 thought Bill Dorsaneo made a good point when
17 he said that surely we're not in favor of
18 general comments by the judge, "You'll follow
19 my instructions, won't you?" Nobody thinks
20 that should rehabilitate someone, and I think
21 that should be clear. That's not stated in
22 (11), but it's implicit. I would like to see
23 what people think about this language, and I'm
24 not wedded to every word of it, but the idea
25 that you can look at things in context, not

1 questions by the judge, certain leading
2 questions, "You'll follow my instructions,"
3 that wouldn't rehabilitate. But in looking at
4 the whole thing, if the judge in his or her
5 discretion thinks this person can be fair, I
6 think that person ought to be considered
7 rehabilitated, even though they might have
8 used the magic word wrongly before.
9 MS. SWEENEY: And I say that
10 changes existing law. It's well outside the
11 purview of this rule. It's something that we
12 would be doing perhaps unintentionally. If
13 it's intentional, it's a change in existing
14 common law. Once someone has indicated they
15 can't be balanced, they can't be fair, they're
16 biased or prejudiced, then it doesn't matter
17 what the context of the rest of the
18 examination is under current law, which I
19 don't think it's this Committee or this time
20 for us to be changing the common law of our
21 rule.
22 HON. DAVID PEEPLES: I think
23 it's the Glen Abrams case and Garcia vs.
24 Tanner, two cases that say this.
25 CHAIRMAN BABCOCK: Any other

1 discussion? Steve.
2 MR. SUSMAN: Well, I mean, I
3 think this makes sense. I mean, we consider
4 everything else in a trial on the basis of the
5 entire record. Whether a person is going to
6 win or lose, we consider everything, the
7 plaintiff's case, the defendant's case. Why
8 on this one issue of whether a juror is going
9 to be fair you capture one little moment in
10 time when they whisper some magic word and we
11 say forget everything else? Doesn't this
12 accord with common sense? I mean, I don't
13 understand what the problem is.
14 MS. SWEENEY: Well, I think
15 once someone has said that they can't be fair
16 to a party, that indicates that they can't be
17 fair to a party. And unless you're positing
18 that they made a mistake, didn't understand
19 the language or that there was some sleight of
20 hand being used, we're talking about folks who
21 have disqualified themselves, who have
22 self-admitted bias or prejudice, who have
23 said, "I can't be fair to doctors because my
24 mother was abused in a nursing home, but yeah,
25 sure, if you want to rehabilitate me, I'll sit

1 here and try real hard to listen to the
2 evidence about this nursing home case."
3 Are you going to take all that in context
4 if they say they'll try real hard? I don't
5 think we can do that. And if we adopt this,
6 we're changing the law.
7 CHAIRMAN BABCOCK: I think
8 frankly judges do do that, though. Buddy.
9 MR. LOW: So a panelist that
10 does that, usually the judge will tell them to
11 be seated. Here you have to wait until the
12 other side examines them, and you're saying
13 you can't do it until the end. They're going
14 to sit there and waste more time. They're
15 disqualified clearly.
16 CHAIRMAN BABCOCK: Any other
17 discussion about No. 11? Everybody in favor
18 of No. 11 raise their hand. Everybody
19 against. It fails by a vote of 10 to 16.
20 All right. The next issue, the last
21 issue we have to do today, but I've got some
22 kind of announcements at the end of the day,
23 is with respect to the matters that we have
24 approved.
25 Is the sense of this Committee that we

1 should approve only No. 1 and 2, and having
2 created a record with respect to 3 and 4 and a
3 portion of 6, should we tell our subcommittee
4 to only come back with language as to 1 and 2,
5 or should we tell our subcommittee to come
6 back with language as to 1, 2, 3, 4 and the
7 second half of 6?
8 Again, would anybody like me to read the
9 ones that we have approved? It's probably a
10 good idea. Again, these are general concepts,
11 not the exact language, because we've
12 discussed modifications.
13 Attorneys for the parties have a right to
14 a reasonable time for voir dire.
15 No. 2, judges may set reasonable time
16 limits on voir dire, but such time limits
17 shall not unreasonably abridge the time for
18 voir dire.
19 No. 3, the court shall permit the parties
20 to state briefly the nature of the case and
21 the relief requested and to question the
22 panelists about their qualifications,
23 backgrounds and expertise for a reasonable
24 period of time.
25 (4), the court shall prevent any

1 examination that is unduly invasive,
2 repetitive or argumentative, again recognizing
3 that we have modified all of these.
4 And finally, the second half of No. 6, a
5 party may not attempt to commit a panelist to
6 a particular verdict or finding.
7 Discussion on whether or not we should
8 break out 1 and 2 and not come back with
9 language on 3, 4 and part of 6. Does anybody
10 want to talk about that?
11 MR. HAMILTON: Why don't we put
12 them all in?
13 CHAIRMAN BABCOCK: Carl says we
14 ought to put them all in there. Anybody
15 else? Buddy.
16 MR. LOW: There at least might
17 be one person here who believes we ought to
18 just go to 1 and 2 and stop. Now, whether or
19 not -- I have no objection to the Supreme
20 Court having the subcommittee's views on an
21 alternate if that prevails, but I think there
22 are some of us here that don't believe that's
23 necessary.
24 CHAIRMAN BABCOCK: And that's
25 what we're trying to get a sense of.

1 MS. SWEENEY: I move that we
2 stop at 1 and 2, and I'd like to vote yes or
3 no on --
4 CHAIRMAN BABCOCK: That's where
5 we're headed, Paula.
6 MS. SWEENEY: That's why I'm
7 making a motion, so we'll have us a record. I
8 move that we have a rule that is just 1 and 2
9 as drafted or as we may need to draft it.
10 CHAIRMAN BABCOCK: And we're
11 going to talk about that.
12 MR. LOW: I'll second it.
13 CHAIRMAN BABCOCK: Okay.
14 You're seconding it. Now we're going to talk
15 about it. Has anybody got anything to say
16 about it? Judge Peeples, do you have anything
17 to say about that?
18 HON. DAVID PEEPLES: Well, I
19 think that 3, 4 and 6 help a little bit, and
20 half a step toward reform is better than no
21 steps, although I do have some concern that to
22 start stating things in a rule might freeze
23 the law and make it harder for the Supreme
24 Court to clean up the law later on. But
25 that's a question as to whether to have a rule

1 or not. But as to whether to have 1 and 2 or
2 1, 2, 3, 4 and 6, I think it's better to have
3 them all.
4 CHAIRMAN BABCOCK: Okay. Judge
5 Brister.
6 HON. SCOTT A. BRISTER: If all
7 you're going to have in a rule is that you're
8 going to have reasonable time limits, that's
9 not a voir dire rule. We ought to just have a
10 time limits rule for all aspects of the trial,
11 closing arguments and something else. That
12 ought to be -- if all this is about is time
13 limits and no other matters, that seems kind
14 of silly, because at some point you're going
15 to address whether there should be time limits
16 on the other parts of the trial. So I would
17 vote to have -- if this is going to be a voir
18 dire rule -- to have something in it besides
19 just time limits.
20 CHAIRMAN BABCOCK: Bill.
21 PROFESSOR DORSANEO: I would go
22 further and at least do 3 and 6. It's
23 problematic as to whether we could ever agree
24 on what 4 -- 4 is kind of -- we may have an
25 agreement on some kind of language.

1 CHAIRMAN BABCOCK: Are you on
2 the subcommittee?
3 PROFESSOR DORSANEO: No, thank
4 heavens. 3 and 6, though, I think are as
5 important as 1 and 2.
6 CHAIRMAN BABCOCK: Okay.
7 Anybody else? Elaine, what are your views?
8 PROFESSOR CARLSON: I'm leaning
9 toward including 1, 2, 3 and 4. And the
10 reason I'm not leaning toward 6 is I think
11 that gets into the particular voir dire
12 questioning, the nature of the questions.
13 CHAIRMAN BABCOCK: We're not
14 going to have a series of votes on 1 and 2
15 versus 1, 2, 3 and 4, but I hear what you're
16 saying. Judge Brown.
17 HON. HARVEY G. BROWN, JR.: I
18 still maintain that the amount of time is
19 somewhat related to the types of questioning
20 you're allowed, so we do need that. And it
21 seems we're being a little inconsistent in our
22 arguments. I've heard a lot times, "Well,
23 there's already case law on that so we don't
24 need it." I am firmly of the belief that
25 there's case law on you have a reasonable time

1 for voir dire, and I would be happy to bring
2 those cases to the next meeting. So if we're
3 saying we trust the judges to follow the
4 common law, then I say if you're going to take
5 that position, take it consistently, and we
6 don't need any rule on it.
7 CHAIRMAN BABCOCK: And I think
8 that we must keep in mind that even though all
9 of us here probably believe that, in fact, I
10 think all of us here probably believe that no
11 rule is necessary, a lot of us here believe
12 that, there are people in the Legislature who
13 think there's a problem on the right to
14 conduct voir dire.
15 HON. HARVEY G. BROWN, JR.: To
16 restate it a little better in response to
17 that, since we're making the argument with
18 Parts 1 and 2 that it doesn't matter, that
19 there's already cases, I think we should make
20 the same argument for 3, 4 and 6, and
21 therefore, I think we should do the whole
22 thing.
23 CHAIRMAN BABCOCK: Okay.
24 Anybody else? Joe Latting is back
25 fortunately, and he is going to get us all CLE

1 credit for all the hours that we've put into
2 this.
3 MR. LATTING: That's where I've
4 been.
5 CHAIRMAN BABCOCK: That's where
6 he's been doing this. Okay. Everybody --
7 yes, Cindy.
8 MS. SWEENEY: Do we get credit
9 for this?
10 MS. LOPEZ GARCIA: I just have
11 a question. So the idea is we're going to
12 vote on 1 and 2, or including 1 and 2 and the
13 rest of them or some of the remainder. And if
14 we vote yes for the remainder and it passes
15 for all of it to go in, then the subcommittee
16 is going to go back and draft something and
17 bring it back to the Committee?
18 CHAIRMAN BABCOCK: Right. That
19 doesn't mean that --
20 MS. LOPEZ GARCIA: That doesn't
21 mean it's a done deal?
22 CHAIRMAN BABCOCK: -- that
23 we've committed to any language, right.
24 So everybody who is in favor of, as Paula
25 says in her motion, stopping after 1 and 2 and

1 not including 3, 4 and part of 6, raise your
2 hand. Everybody who is opposed to that raise
3 your hand.
4 MS. SWEENEY: Well, wait, are
5 they opposed to it, or do they want 1 through
6 6?
7 CHAIRMAN BABCOCK: They are
8 opposed to that. That, Paula, fails by a vote
9 of nine to 17. So your subcommittee will come
10 back to the October meeting with language for
11 1, 2, 3, 4 and the second part of 6.
12 And if you could, I know there's not a
13 lot of time between now and the October
14 meeting, but if you could try your hardest to
15 get the full committee language at least one
16 week before the October meeting so that we can
17 look at it and think about it ahead of time,
18 we would be very appreciative.
19 MS. SWEENEY: 1, 2, 3, 4,
20 part two of 6, with the modifications that we
21 sort of dictated earlier that I was reading
22 back?
23 CHAIRMAN BABCOCK: Right. Now,
24 we're going to start at 8:30 tomorrow, and
25 Judge Peeples is going to be up with the

1 summary judgment modifications. Now, that
2 material is in your book with the exception of
3 a very important letter from Representative
4 Bosse. That letter is dated January 20,
5 2000. It's over on the side, so be sure to
6 pick that up before you go and look at it,
7 because Representative Bosse is very, very
8 concerned about this issue and he articulates
9 well what his concerns are. Be sure to sign
10 in at the back of the table, if you haven't.
11 And tomorrow, after we finish the summary
12 judgment, and we will finish that tomorrow,
13 we're going to have reports from the chair or
14 vice chair of the various subcommittees, so if
15 you're a chair or a vice chair, be ready to
16 report on what, if anything, your subcommittee
17 is doing. And if we have time, in connection
18 with Justice Hecht's advice and direction,
19 we'll try to determine what our next priority
20 is beyond the voir dire and the summary
21 judgment.
22 MR. ORSINGER: Chip, we were
23 also going to have some revisits on the
24 recusal rule language.
25 CHAIRMAN BABCOCK: That's

1 right. We'll also do that tomorrow. Richard
2 and Judge Peeples and others are meeting on
3 that right now. So if there's nothing
4 further, we will be adjourned.
5 PROFESSOR DORSANEO: And if the
6 TRAP Committee people are here, I've brought
7 written copies of the report that was emailed
8 to you.
9 (MEETING ADJOURNED AT 5:00 P.M.)
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2 CERTIFICATION OF THE MEETING OF
SUPREME COURT ADVISORY COMMITTEE

3

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4

5 I, WILLIAM F. WOLFE, Certified Court

6 Reporter, State of Texas, hereby certify that

7 I reported the above meeting of the Supreme

8 Court Advisory Committee on August 25, 2000,

9 Afternoon Session, and the same was thereafter

10 reduced to computer transcription by me.

11

12 Charges for preparation

13 of original transcript: $1227.00.

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

15

16 Given under my hand and seal of office on

17 this the 7th day of September, 2000.

18

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