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MEETING OF THE SUPREME COURT ADVISORY COMMITTEE

August 26, 2000

(SATURDAY SESSION)

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Taken before *D'Lois L. Jones*, Certified
Shorthand Reporter in Travis County for the State of
Texas, reported by machine shorthand method, on the 26th
day of August, 2000, between the hours of 8:30 a.m. and
11:42 a.m., at the Texas Law Center, 1414 Colorado, Room
101, Austin, Texas 78701.

COPY

INDEX OF VOTES

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

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1 the best thing to do was to say that local rules could not
2 suspend or moot the recusal process, that on the second
3 point --

4 MR. HAMILTON: Well, and after a judge is
5 reassigned after the recusal process.

6 MR. ORSINGER: Okay. Then the presiding
7 administrative judge could not reassign it without a
8 hearing because of the due process implications, that the
9 presiding judge would be making the decision based on a
10 verified motion, but the other party wouldn't have the
11 opportunity to challenge the motion or cross-examine
12 witnesses and maybe establish the recusal was no good, so
13 we finally concluded that you would -- the presiding
14 administrative judge could not just quietly do the
15 reassignment because that's not fair to the party
16 defending the recusal; and then, thirdly, that if the
17 recusal goes all the way up and is granted, the presiding
18 administrative judge can either make the appointment
19 himself, or he can refer it to be handled through a local
20 process. Isn't that the way we put it?

21 MR. HAMILTON: Well, without his consent.
22 He is the only one that can appoint.

23 MR. ORSINGER: Okay. So we have got
24 proposed language on those theories, and so we'll take the
25 first one, has to do with notwithstanding any local rules

1 to the contrary.

2 MR. HAMILTON: Yeah. The first one is on
3 page four, and it's the bottom of the page where it says
4 "Option 2," crossed out. At the end of the third line
5 where it says, "presiding judge of the administrative
6 region," we need to add to that, "Notwithstanding these
7 rules or any local rules, the case cannot be reassigned to
8 another judge, pending the ruling on the recusal motion."

9 MR. ORSINGER: The purpose of that is to
10 keep any kind of local rule from allowing a reassignment
11 just because a motion to recuse has been filed and before
12 it's processed through to the presiding administrative
13 judge.

14 CHAIRMAN BABCOCK: Carl, would you read that
15 language again, "Notwithstanding these rules or any local
16 rule..."

17 MR. HAMILTON: "...or any local rule the
18 case cannot be reassigned to another judge, pending the
19 ruling on the recusal motion."

20 CHAIRMAN BABCOCK: "Cannot be assigned"?

21 MR. HAMILTON: "To another judge."

22 CHAIRMAN BABCOCK: "To another judge."

23 MR. HAMILTON: "Pending the ruling on the
24 recusal motion."

25 CHAIRMAN BABCOCK: Okay.

1 MR. HAMILTON: Now, that takes us through
2 the recusal motion now, and it prohibits local rules from
3 taking it out of the system. Then on page six, paragraph
4 (8), "The disposition is that if a judge is disqualified
5 or recused, the regional presiding judge must assign
6 another judge to preside over the case." There we want to
7 add, "and notwithstanding these rules or any local rule,
8 the case shall not be reassigned to another judge without
9 the consent of the regional presiding judge."

10 CHAIRMAN BABCOCK: Read that again, Carl.
11 "The case may not be assigned"?

12 MR. HAMILTON: "Notwithstanding these rules
13 or any local rule, the case shall not be reassigned to
14 another judge without the consent of the regional
15 presiding judge."

16 MR. WATSON: Carl, does that mean except by
17 order of the regional presiding judge or -- I mean, is
18 telephone consent good enough?

19 MR. ORSINGER: We were anticipating
20 something along the lines of, "Okay, I've granted the
21 recusal. Reassign this to another judge." Like in San
22 Antonio we have a local presiding judge that handles
23 assignments.

24 MR. WATSON: No, I was just trying to
25 clarify.

1 MR. HAMILTON: I guess it could be either
2 way, by an order, but I would envision that if the
3 presiding judge is going to change someone he's already
4 assigned, he ought to do it by order, by written order;
5 and if he's -- if he wants to refer it to the local
6 administrative judge for random assignment, then I think
7 he could just send an order to that effect. It's referred
8 to the local administrative judge of Bexar County for
9 random assignment, something like that.

10 MR. WATSON: Thank you.

11 HON. F. SCOTT McCOWN: Carl, could we say
12 there "without the agreement of the parties or the consent
13 of the local administrative judge"? Because if the
14 parties come in and one side moves to recuse a judge and
15 that judge, for example, says, "Well, you know, you're
16 right. I need to step aside," and the parties are really
17 happy to go down the hall to Judge Smith or go down the
18 hall to Judge Jones, the local administrative judge, to
19 get an assignment to some other judge, it can be quite a
20 bit of bureaucratic work to find the regional judge and to
21 get that judge's consent or order.

22 MR. ORSINGER: Scott, if you turn that kind
23 of power over to the local lawyers, they may boycott
24 judges that are unpopular. In other words, they may agree
25 -- they may -- say you have a judge in the community that

1 people don't like to appear in front of. Then somebody
2 makes a motion to recuse. Even if the trial judge says,
3 "I'm not going to recuse" then the other lawyer can agree
4 to it, and so you're allowing the lawyers by agreement to
5 reassign the case.

6 HON. F. SCOTT McCOWN: No, no. You're not
7 allowing them by agreement to reassign it. You're
8 allowing them by agreement not to have to go to the
9 regional judge.

10 MR. HAMILTON: Scott, we had that in
11 paragraph (8), if you'll look at the very next sentence.
12 We had that in there, and I don't recall --

13 HON. F. SCOTT McCOWN: No, no. I'm not
14 talking about them agreeing on another judge. I'm talking
15 about them agreeing --

16 MR. ORSINGER: To the recusal.

17 HON. F. SCOTT McCOWN: No. Let me restate
18 this. If I file a recusal motion and the judge I'm moving
19 to recuse says, "You know, if you-all have any questions,
20 I'd just as soon you go somewhere else." Particularly on
21 a central docket, but really anywhere, if everything is on
22 the up and up, I might be happy not to waste any time or
23 money and just go back on the central docket in front of
24 some other judge or let the local administrative judge
25 pick a judge or let the random assignment system pick a

1 judge, but if you say I have to get this consent of the
2 regional presiding judge then I have to find the regional
3 presiding judge, and the regional presiding judge has to
4 be briefed and the regional presiding judge has to give
5 consent.

6 MR. ORSINGER: But in that scenario you just
7 gave the trial judge voluntarily took himself out of the
8 case. No problem. No problem.

9 HON. F. SCOTT McCOWN: Well, if that's
10 true --

11 MR. ORSINGER: No. If they voluntarily take
12 themselves out of the case, you go back for a new
13 assignment. We're talking about when they refuse to take
14 themselves out of the case.

15 HON. F. SCOTT McCOWN: Well, if that's true,
16 then I don't think your rule solves its intended problem,
17 because if what you're worried about is being in a
18 jurisdiction where the game is rigged and you come in and
19 you move to recuse Judge Smith and he knows that if he
20 doesn't recuse himself voluntarily that there's going to
21 be a hearing and then it's going to go up to the regional
22 presiding judge, Judge Smith just steps aside. And then
23 if you're saying the game is rigged, it gets assigned by
24 Judge Jones to judge no good. If the problem you're
25 trying to solve is the manipulation of the system, then I

1 think you have to cover voluntarily stepping aside, which
2 is a recusal. When I read this rule I thought it did
3 cover voluntary stepping aside, which is a recusal.

4 MR. ORSINGER: No. If the judge voluntarily
5 steps aside, you don't have a recusal process after that
6 point. It's over.

7 CHAIRMAN BABCOCK: That's right.

8 HON. F. SCOTT McCOWN: But how does the case
9 get reassigned?

10 MR. ORSINGER: That depends on the local
11 rules.

12 HON. F. SCOTT McCOWN: How do we know that
13 from looking at this rule?

14 HONORABLE SCOTT BRISTER: Just because if
15 there's no motion ever filed the rule doesn't apply.

16 HON. F. SCOTT McCOWN: No, suppose there's a
17 motion filed and I voluntarily step aside.

18 HONORABLE SCOTT BRISTER: Our practice
19 certainly is if a motion has been filed then it goes under
20 the rule and the regional judge has to make the
21 assignment, even if the judge grants it.

22 HON. F. SCOTT McCOWN: Right. I'm saying
23 that's a recusal.

24 MR. ORSINGER: Okay. Well, this rule does
25 not say that if the trial judge voluntarily recuses that

1 you have to go to the administrative regional judge for a
2 new judge.

3 HON. F. SCOTT McCOWN: Well, I think
4 inadvertently that is what it says.

5 MR. ORSINGER: Well, okay. Where?

6 HON. F. SCOTT McCOWN: It says in (a) "if a
7 judge is recused."

8 CHAIRMAN BABCOCK: In what section, Scott?

9 HON. F. SCOTT McCOWN: (8), I'm sorry.
10 Disposition, "if a judge is recused." If I voluntarily
11 recuse I am still recused. If you want to say "if a judge
12 is involuntarily recused" it would cover what you're
13 talking about, but if you just say "if a judge is
14 recused," me voluntarily stepping aside is a recusal.

15 MR. ORSINGER: Well, that's not our
16 intention to preempt the local reassignment system, unless
17 the committee wishes to do that. I think we ought to make
18 it clear that if the judge voluntarily steps down you go
19 back for reassignment according to the local rules.

20 MR. WATSON: Richard, are you intending that
21 to be a change? I had always -- and, again, this is just
22 regional differences, but I was always thinking, I think
23 like Judge Brister, that once the motion is filed it is
24 exclusively in the hands of the regional administrative
25 judge.

1 MR. ORSINGER: I'll tell you that's not the
2 way we do it in San Antonio. If somebody recuses a judge
3 there or they recuse, we just send it back to the central
4 docket for reassignment to another judge.

5 HON. F. SCOTT McCOWN: And that's why I
6 wanted to add "by agreement of the parties," because the
7 context that you're in may determine that. If you file a
8 motion to recuse and the judge voluntarily steps aside and
9 everything is on the up and up, you might just want to
10 take five minutes and go back to the local assignment
11 process. If you think it's not on the up and up, then you
12 might want to go to the regional administrative judge.

13 HONORABLE DAVID PEEPLES: Richard, what
14 would be the objection if a person who wanted to recuse
15 the first judge is willing to agree to go back to the
16 local assignment system?

17 MR. ORSINGER: Nothing is wrong with that.

18 HONORABLE DAVID PEEPLES: Why don't we allow
19 it?

20 MR. ORSINGER: If you look at the current
21 rule, I think it supports Scott's interpretation. "If the
22 judge recuses himself, he shall enter an order of recusal
23 and request the presiding judge of the administrative
24 judicial district to assign another judge to sit." So the
25 way it's written right now you can't just go back down the

1 hallway for a new assignment, even though that's the way
2 we do it in Bexar County, isn't it, David?

3 HONORABLE DAVID PEEPLES: Yeah.

4 HON. F. SCOTT McCOWN: Well, we do it all
5 the time.

6 MR. ORSINGER: I'd be happy to say that by
7 agreement you can walk back down the hall, and if you
8 don't agree then you go to the presiding judge, and that
9 way if the local assignment system is corrupt at least you
10 have the opportunity to get to a higher level of pure
11 officialdom.

12 MR. WATSON: I'd sure prefer that. I
13 believe if our system is strong --

14 HON. F. SCOTT McCOWN: Can we just add those
15 words, Carl?

16 HONORABLE DAVID PEEPLES: "By agreement"?

17 HON. F. SCOTT McCOWN: "By agreement."

18 MR. HAMILTON: Where do you want to add
19 that?

20 HON. F. SCOTT McCOWN: In (8) where you said
21 -- in that second sentence, if you could read that again.

22 MR. HAMILTON: The second sentence that we
23 were going to add?

24 HON. F. SCOTT McCOWN: Yeah.

25 CHAIRMAN BABCOCK: "And notwithstanding."

1 MR. HAMILTON: Yeah. "And notwithstanding
2 these rules or any local rule, the case shall not be
3 reassigned to another judge without the consent of the
4 regional presiding judge."

5 HON. F. SCOTT McCOWN: "Or the agreement of
6 the parties."

7 MR. HAMILTON: "Or the agreement of the
8 parties"?

9 CHAIRMAN BABCOCK: Cindy, did you have
10 something?

11 MS. GARCIA: Yeah. What we were trying to
12 avoid in our discussion yesterday, I think, was what
13 happened in the case that we talked about, and that was
14 having a judge that has a pending motion to recuse him and
15 then it getting pawned off to a friendly judge of that
16 judge, understanding the political situation, and that's
17 what we were trying to avoid is one judge assigning it to
18 another.

19 HON. F. SCOTT McCOWN: Well, this would
20 avoid that, though, wouldn't it?

21 MR. WATSON: Right.

22 MR. LOWE: Not necessarily.

23 MS. GARCIA: Well, I believe the local
24 presiding judge in that particular case actually took the
25 case and then assigned it to himself.

1 HONORABLE DAVID PEEPLES: But, Cindy, in
2 that case there was at least one party who would not have
3 agreed to that.

4 CHAIRMAN BABCOCK: Right.

5 HONORABLE DAVID PEEPLES: And they fought it
6 all the way to the Supreme Court.

7 MS. GARCIA: That's true. Yeah. That's
8 true.

9 CHAIRMAN BABCOCK: Yeah. This will fix that
10 I think.

11 MS. GARCIA: Yeah. That's true.

12 MR. ORSINGER: Let me raise a drafting
13 question. Buddy, go ahead.

14 MR. LOWE: I was going to say, what happens
15 in the situation the judge calls the lawyer saying, "You
16 filed this motion, and I've talked to old judge who is no
17 good" -- we don't have any such judges in Beaumont
18 certainly, but you-all are not talking about Beaumont.

19 MR. LATTING: We're talking about San
20 Antonio.

21 MR. LOWE: And says, "I've already talked
22 about judge no good, and he would be glad to take it, and
23 I'm sure you lawyers, now, you're not going to object to
24 that. We can do this by agreement, don't you -- you know,
25 you're down here all the time. Don't you agree?"

1 "Well, Judge" -- you know, what do you do
2 about that situation?

3 CHAIRMAN BABCOCK: Well, if you're so
4 spineless that you let the judge do that --

5 MR. LOWE: You don't know what judge no good
6 will do. You don't have --

7 CHAIRMAN BABCOCK: I know all about judge no
8 good.

9 MR. LOWE: What you do, you say, well, you'd
10 really rather take your chance on just the draw rather
11 than do that, and it avoids that situation.

12 HONORABLE DAVID PEEPLES: Buddy, this person
13 has already tried to recuse that judge, and he's not going
14 to patch up very much by saying, "I'll agree to judge no
15 good."

16 MR. LOWE: No, but let me tell you what.
17 That judge is pretty clear if he's decided he's going to
18 -- I mean, so they haven't said some things about him that
19 he's going to really fight about if he's just going to
20 voluntarily do it, so they are kind of in agreement, but I
21 don't know. I mean, that situation can arise. If it
22 doesn't bother anybody, we can live with it in Beaumont.

23 CHAIRMAN BABCOCK: Well, I think that it's a
24 matter of which is better, whether you have Scott's
25 suggestion that the parties can agree to some things,

1 which will be a benefit in a great number of cases versus
2 whether or not your concern is going to crop up very much.
3 Richard.

4 MR. ORSINGER: On the placement of this
5 thing that Scott has raised, rather than putting it in
6 paragraph (8), which has to do with disposition, which the
7 disposition appears to occur after the referral, the
8 appointment of the reviewing judge, and all of that, I
9 think we ought to put it back in paragraph (3) under
10 "referral" and maybe rename "referral," because paragraph
11 (3) on page four, "The judge in the case in which the
12 motion is filed must promptly sign an order ruling on the
13 motion prior to taking any other action" and then we talk
14 about what happens if the judge refuses to recuse. We
15 don't talk what happens if the judge does voluntarily
16 recuse. It seems to me like we ought to put a sentence
17 right there on page four, paragraph (3) after you rule
18 that if you do voluntarily recuse then --

19 MR. HAMILTON: "The parties by agreement can
20 agree on the replacement judge."

21 HON. F. SCOTT McCOWN: Well, no, no.

22 MR. ORSINGER: On the method or can agree to
23 -- for reassignment under the local rules.

24 HON. F. SCOTT McCOWN: Right.

25 MR. HAMILTON: Reassignment under the local

1 rules or the presiding judge.

2 MR. ORSINGER: Otherwise the presiding --
3 there we go.

4 HON. F. SCOTT McCOWN: Yeah. That would be
5 fine.

6 CHAIRMAN BABCOCK: Okay. Where does this
7 new language go?

8 MR. ORSINGER: That's going to be on page
9 four, paragraph (3), right after the first sentence that
10 ends "action in the case".

11 CHAIRMAN BABCOCK: Okay.

12 MR. ORSINGER: But I think we ought to
13 consider renaming the paragraph from "referral," or is it
14 referral in either instance?

15 CHAIRMAN BABCOCK: It's referral in either
16 instance.

17 MR. ORSINGER: Okay. Then we'll leave it.

18 CHAIRMAN BABCOCK: Okay. So is this the
19 language that we added in (8) that you're going to move
20 over here to the first sentence on page four?

21 MR. ORSINGER: No. Because we still need a
22 change to (8).

23 CHAIRMAN BABCOCK: Okay. So (8) stays.

24 MR. ORSINGER: Yeah.

25 CHAIRMAN BABCOCK: All right. Now, what's

1 the sentence?

2 MR. ORSINGER: It's Scott's new language
3 that would go back here on paragraph (3).

4 CHAIRMAN BABCOCK: Okay. Let's hear what it
5 is.

6 MR. HAMILTON: I haven't written it yet.

7 CHAIRMAN BABCOCK: Oh, okay. While Carl is
8 writing, anything else on this recusal rule?

9 MR. MARTIN: Chip, there are some situations
10 that we haven't talked about here where a judge may be
11 automatically disqualified from hearing any cases from a
12 law firm. Either he or she recently practiced there or
13 may be married to a lawyer in that firm.

14 CHAIRMAN BABCOCK: Right.

15 MR. MARTIN: In Dallas the way that's
16 handled is just through a real quick reassignment process
17 down, I think, in Judge Rhea's court. Is this going to
18 make that a lot more cumbersome just to reassign all those
19 cases automatically?

20 MR. ORSINGER: I don't think so because
21 that's done without the filing of a recusal motion, right?

22 MR. MARTIN: Right.

23 MR. ORSINGER: So this procedure is only
24 implicated if someone has to file a motion to recuse or
25 disqualify.

1 MR. MARTIN: Technically what happens is the
2 judge disqualifies herself.

3 MR. ORSINGER: Or maybe the district clerk
4 disqualifies them automatically.

5 MR. MARTIN: I think the truth is the judge
6 probably never sees it. The clerk just knows that if it's
7 from that court it needs to be reassigned. They send it
8 back down the hall to be assigned. I just don't want to
9 write a rule that --

10 MR. ORSINGER: I don't think that's
11 implicated. I mean, in my view this rule is only
12 implicated if somebody files a motion to disqualify or
13 recuse.

14 CHAIRMAN BABCOCK: Yeah. You have got to
15 refer something.

16 MR. ORSINGER: When you get -- you state out
17 the grounds for disqualification. You state the grounds
18 for recusal, and then you get down to procedure, and it
19 starts out with a motion to disqualify or recuse. So if
20 it all happens without a motion to disqualify or recuse, I
21 don't think that our procedure would be invoked.

22 CHAIRMAN BABCOCK: Carl, you got some
23 language?

24 MR. HAMILTON: Okay. The language would be,
25 "If the judge voluntarily recuses, the parties may agree

1 that the case may be reassigned in accordance with local
2 rules or referred to the regional presiding judge for
3 reassignment."

4 CHAIRMAN BABCOCK: Okay. Go over it again.
5 "If the judge voluntarily recuses, the parties" --

6 MR. HAMILTON: "If the judge voluntarily
7 recuses," comma, "the parties may agree that the case may
8 be reassigned in accordance with local rules."

9 CHAIRMAN BABCOCK: Okay.

10 MR. HAMILTON: "Or referred to the regional
11 presiding judge for reassignment."

12 MR. DUGGINS: Should you make it mandatory
13 if there is no agreement?

14 PROFESSOR DORSANEO: It would change the
15 order probably. Reverse it.

16 MR. ORSINGER: And add "unless the parties
17 agree for the case to be reassigned pursuant to local
18 rules."

19 MR. HAMILTON: If the parties don't agree
20 that it can be reassigned then I guess it's mandatory it
21 would go to the regional presiding judge.

22 CHAIRMAN BABCOCK: You want to switch the
23 order, Carl?

24 MR. ORSINGER: Yeah. We ought to just say
25 the cost for the reassignment unless the parties agree to

1 reassign it under the local rules. We also need to
2 include disqualification in there as well as recusal,
3 recuses or disqualifies.

4 CHAIRMAN BABCOCK: Doesn't that get right
5 into the problem John Martin raised?

6 MR. ORSINGER: No, because it only happens
7 after a motion is filed, but their motions will be a
8 motion to disqualify, and this paragraph wouldn't apply.

9 CHAIRMAN BABCOCK: All right. I'm sorry.
10 Didn't mean to confuse you.

11 MR. HAMILTON: Well, let's switch it around
12 and say, "If the judge voluntarily recuses or
13 disqualifies, the case shall be referred to the regional
14 presiding judge for reassignment unless the parties agree
15 upon reassignment pursuant to local rules."

16 MR. ORSINGER: Okay.

17 HON. F. SCOTT McCOWN: Could I suggest that
18 we add "pursuant to a motion." "If the judge voluntarily
19 disqualifies or is recused pursuant to a motion," to make
20 clear that it doesn't get into the -- if you-all walk into
21 my courtroom and I see that there's a party there and I
22 can't hear this case because of something, and I say,
23 "Fellows, you-all need to go get the court administrator
24 to get you another judge," we want to make clear that this
25 rule is not invoked.

1 MR. ORSINGER: The thing I don't like about
2 that is that in all of my recusal motions if I get the
3 other lawyer to agree I present it privately to the trial
4 court first without filing it of record and give the judge
5 an opportunity to decide to get out of the case before the
6 complaints are made public. If you require me to file a
7 motion before I can have --

8 HON. F. SCOTT McCOWN: I'm not requiring you
9 to file a motion.

10 MR. ORSINGER: I think you are.

11 HON. F. SCOTT McCOWN: No. If you come to
12 me privately and I recuse then it doesn't invoke this
13 procedure. That's what you have been saying.

14 MR. ORSINGER: Well, I'm only permitted to
15 go back to the central assignment for reassignment if it's
16 upon a motion. According to your amendment right there,
17 doesn't it require me to have a motion in order to --

18 HONORABLE DAVID PEEPLES: Huh-uh.

19 MR. ORSINGER: No?

20 HONORABLE F. SCOTT McCOWN: No.

21 HONORABLE DAVID PEEPLES: If he recuses
22 without a motion and just says, "I recognize a party.
23 You-all go back and get another judge," that shouldn't
24 have to invoke any of these procedures.

25 CHAIRMAN BABCOCK: Right.

1 HONORABLE DAVID PEEPLES: You ought to just
2 go back to square one.

3 MR. ORSINGER: Well, I hope that's what it
4 means, because it's not what it means to me.

5 MR. LATTING: What's your concern, Richard?
6 I didn't follow that exactly.

7 MR. ORSINGER: If I understood Scott
8 correctly, he wanted the party's ability to go back to the
9 central docket for reassignment to be only upon a motion.

10 MR. YELENOSKY: No.

11 CHAIRMAN BABCOCK: That's not what he wants.

12 HONORABLE DAVID PEEPLES: I think he means
13 the opposite of that, Richard.

14 HON. F. SCOTT McCOWN: See, look at your
15 language under "referral." It says, "The judge in the
16 case in which a motion is filed must promptly sign an
17 order ruling on the motion prior to taking any other
18 case."

19 MR. ORSINGER: Okay.

20 HON. F. SCOTT McCOWN: "If the judge refuses
21 to recuse or disqualify, the judge must promptly refer the
22 motion to the presiding judge of the administrative
23 region." Now then what's the next sentence?

24 MR. ORSINGER: The new sentence is before
25 that sentence.

1 HONORABLE F. SCOTT McCOWN: And what is it?

2 CHAIRMAN BABCOCK: It says, "If the judge
3 voluntarily recuses or disqualifies pursuant to the
4 motion."

5 MR. ORSINGER: Your language would say
6 "pursuant to the motion."

7 HON. F. SCOTT McCOWN: Right. I want to
8 carry the notion of motion in the first sentence into the
9 second sentence.

10 CHAIRMAN BABCOCK: Yeah. I think that's all
11 right.

12 HON. F. SCOTT McCOWN: This is kind of
13 subtle, but we understand we're talking only about motion
14 recusals, and so I want to carry motion into the second
15 sentence so that somebody who is just reading it doesn't
16 think it applies to nonmotion recusals.

17 MR. ORSINGER: Okay.

18 CHAIRMAN BABCOCK: That's okay, isn't it?
19 "If the judge voluntarily recuses or disqualifies pursuant
20 to the motion, the case shall be referred to the regional
21 presiding judge for reassignment unless the parties agree
22 that the case may be reassigned in accordance with local
23 rules."

24 MR. ORSINGER: And the "regional presiding
25 judge" really should say "presiding judge of the

1 administrative region."

2 CHAIRMAN BABCOCK: Well, get it straight
3 then.

4 MR. ORSINGER: I know.

5 CHAIRMAN BABCOCK: "Referred to the
6 presiding judge of the" --

7 MR. ORSINGER: "Of the administrative
8 region."

9 CHAIRMAN BABCOCK: "Of the administrative
10 region." Okay. Any other comments on this? Buddy.

11 MR. LOWE: Chip, have we compared what we're
12 doing to Section 74 of the Government Code that addresses
13 recusals? Have we looked to see --

14 CHAIRMAN BABCOCK: Not on this little --
15 what we're trying to do, for those of you who weren't here
16 yesterday, was respond to the plea from Judge Hester.

17 MR. LOWE: No. I understand what we're
18 trying to do, and I'm not sure I understand what we're
19 doing, but my question is whether or not -- and we
20 certainly don't want to draw some language that's
21 inconsistent with something I'm not familiar with, the
22 Government Code, Section 74 does address recusals.

23 CHAIRMAN BABCOCK: Oh, yeah. We looked at
24 that way back when, when Richard's subcommittee got
25 started.

1 MR. LOWE: Okay. Then you're way ahead of
2 me, but that's okay.

3 MR. ORSINGER: Well, I mean, you can call
4 out the conflict, but we've even discussed that this
5 morning, and my view is we ought to write a rule that
6 works, and let some court of appeals tell us that it's a
7 violation of the statute because it's very hard to
8 interface the recusal procedure that we have agreed upon
9 is the best way to handle this with the statute, but if
10 you want to lay that issue out, we can look at it.

11 MR. LOWE: There's more than just that
12 involved. The Legislature is involved when you start
13 doing that, and we've had their wrath once before because
14 of something similar to that, and I don't want to get
15 engaged in that again.

16 CHAIRMAN BABCOCK: Buddy's right about that.
17 We have met with Senator Harris about the potential
18 conflict of this proposed rule with the statute that he
19 passed last session, and I assume, but maybe I'm wrong
20 about this, that the subcommittee studied --

21 HON. F. SCOTT McCOWN: Well, we're not going
22 to refer this to the Supreme Court from this meeting, are
23 we? Are we going to look at it once more in final form?

24 CHAIRMAN BABCOCK: No. No. Scott, in fact,
25 this wasn't even supposed to be on the agenda this time.

1 We approved this rule at the last meeting. The reason
2 it's on the agenda is because Senator Harris had three
3 comments --

4 HON. F. SCOTT McCOWN: Right. Right.

5 CHAIRMAN BABCOCK: -- which we dealt with
6 yesterday.

7 HON. F. SCOTT McCOWN: Okay. So we are
8 sending it on to the Supreme Court from here?

9 HONORABLE DAVID PEEPLES: We're not going to
10 get to see a clean copy?

11 CHAIRMAN BABCOCK: You'll certainly get to
12 see a clean copy, but I will put the interlines from
13 yesterday and today and send it to everybody.

14 MR. ORSINGER: Can we confirm that Section
15 74 is Senator Harris' bill?

16 CHAIRMAN BABCOCK: You can't right now, but
17 you can while we're doing other things.

18 MR. ORSINGER: Okay. Well, Buddy just has a
19 cross-reference to it in the annotations, but there is
20 some argument that the statute that allows
21 multi-jurisdiction judges to switch benches and all that
22 may have an impact on this process, but a long time ago we
23 said we're going to write the recusal process in a way
24 that does not contemplate that judges can freely
25 substitute for each other once the recusal process has

1 been invoked.

2 CHAIRMAN BABCOCK: Well, don't you think we
3 ought to know what we're doing to the statute if we're
4 doing something to it?

5 MR. ORSINGER: Well, I mean, Buddy has
6 raised it. We crossed this bridge months ago.

7 HONORABLE DAVID PEEPLES: 74.121 of the
8 Government Code, like Rule 330, allows judges in a
9 multi-court county to exchange benches and to transfer
10 cases.

11 MR. LOWE: What about 74.053?

12 PROFESSOR DORSANEO: Yeah. That's
13 pertinent, too.

14 HONORABLE DAVID PEEPLES: That's an assigned
15 judge, an objection to a visiting judge as opposed to
16 recusal.

17 MR. LOWE: Okay. There are just several. I
18 mean, I have no idea that it addresses anything that we're
19 doing.

20 MR. ORSINGER: Let's make the record clear.
21 I don't think we have a problem with Senator Harris' bill
22 on this one, but he's going to look at this rule anyway to
23 be sure that he doesn't have any heartache over it. The
24 cross-reference that Buddy is making is an issue that Carl
25 raised the first time we ever addressed this, and it had

1 to do with the statutes that govern these multi-county,
2 multi-jurisdictions where the judges sit for each other
3 and all this other stuff, and we decided that our recusal
4 process was going to go into effect and that those
5 statutes would not override the recusal process.

6 Maybe we're wrong, but I think we should
7 wait for the court of appeals and the Supreme Court to
8 tell us we're wrong and not try to cope with all of that.

9 CHAIRMAN BABCOCK: Well, are you saying that
10 the statutes wouldn't override it because they are not
11 inconsistent or --

12 HON. F. SCOTT McCOWN: Well, no. Let me see
13 if I can give a little theory to Richard's position about
14 that.

15 CHAIRMAN BABCOCK: That's what I'm looking
16 for, theory.

17 HON. F. SCOTT McCOWN: Okay. The
18 Constitution itself says that any district judge can swap
19 benches with any other district judge, but I think what we
20 would have to be saying is that once a motion to recuse is
21 filed, under the rule you can take no other action in the
22 case, and that no other action in the case would include
23 swapping your bench or transferring your case, and I'm
24 confident that the Supreme Court would say that that
25 constitutional provision or any statute that says the same

1 thing is not inconsistent with a rule that says that when
2 your impartiality or your qualifications have been called
3 into question you have to stop and you can't transfer or
4 swap your bench, so I don't think they are inconsistent.

5 CHAIRMAN BABCOCK: And that's what we were
6 looking for.

7 HON. F. SCOTT McCOWN: All right.

8 MR. ORSINGER: Thank you.

9 CHAIRMAN BABCOCK: Buddy, does that make you
10 feel better?

11 MR. LOWE: Makes me feel -- I don't know
12 what -- I don't know what the Government Code says. I
13 just don't want to get afoul of the Legislature again.

14 CHAIRMAN BABCOCK: No. I completely agree
15 with that. Here's what we'll do. We'll get this
16 language, and we'll have a new redlined version. We will
17 remove the old redline because we've already approved all
18 that, and we will put in redlines from yesterday and
19 today, and Richard and Carl will go back and look at the
20 Government Code and see if there's anything where Scott
21 McCown's articulation of why it isn't inconsistent
22 wouldn't apply. Is that okay?

23 MR. LOWE: Yeah. That's fine.

24 HONORABLE DAVID PEEPLES: Chip, what about
25 having a brief comment that shows that we're aware of 74

1 and I think it's .121 and .094 and Rule 330 and the
2 constitutional provisions, and I think what Judge McCown
3 says is very valid. It's inconceivable that somebody's
4 integrity could be questioned and they say, "Okay, I'll
5 assign this to my friend down the hall" and exchange
6 benches, and that's a good rationale for why this
7 procedure does not run afoul of those other provisions.

8 CHAIRMAN BABCOCK: Yeah. I think that's
9 great.

10 MR. ORSINGER: We have already fought this
11 fight and crossed this bridge, and we can do all this
12 again if you want to.

13 CHAIRMAN BABCOCK: We don't have to refight
14 the fight. It sounds like everybody is fairly
15 comfortable.

16 HON. F. SCOTT McCOWN: We're just going to
17 do a double-check before we send it on to the Supreme
18 Court to make sure that we are not in any way afoul with
19 the statute, and I'll help you with that.

20 MR. ORSINGER: Okay. And, as I recall, you
21 participated in the very discussion that got us over this
22 hump the first time.

23 HON. F. SCOTT McCOWN: Yeah. We can read
24 over the rule and read over the statute, because Buddy is
25 right. We don't want to send the Court something that

1 inadvertently runs afoul of some statute.

2 CHAIRMAN BABCOCK: And we want to be
3 especially sensitive if there is an apparent conflict with
4 the statute that there's a rationale of record as to why
5 it doesn't -- it's not a conflict after all. Does that
6 make sense, Buddy?

7 MR. LOWE: Yeah. You've said it better than
8 I could. I have been thinking it and didn't say it.

9 CHAIRMAN BABCOCK: Okay. So, yeah, Carl?

10 MR. HAMILTON: Since we added that amendment
11 that Scott wanted, the first amendment we added to the end
12 of the third sentence does not fit now, so we're going to
13 have to move that, and I think we need to move that over
14 to page five at the end of the first sentence where it
15 says "immediately assign a judge to hear it," and then we
16 should say at that point that when the regional presiding
17 judge has assigned a judge to hear the case, that that
18 judge shall not be reassigned pursuant to local rules or
19 something like that.

20 CHAIRMAN BABCOCK: Wait a second. Are you
21 talking about the -- are you talking about the
22 "notwithstanding"?

23 MR. HAMILTON: Yes. Yeah. That doesn't fit
24 there. Really, I guess it really didn't fit there --

25 CHAIRMAN BABCOCK: Why doesn't it fit?

1 MR. HAMILTON: Well, because it really
2 didn't fit there to start with, I guess, because we
3 haven't assigned a judge yet. The judge doesn't get
4 assigned until --

5 CHAIRMAN BABCOCK: I see. Okay.

6 MR. HAMILTON: -- over on page five.

7 CHAIRMAN BABCOCK: Okay. So where do you
8 propose putting that language?

9 MR. ORSINGER: Next to last sentence.

10 CHAIRMAN BABCOCK: After "hear it"?

11 MR. ORSINGER: Yeah.

12 MR. HAMILTON: Yeah. We could still put the
13 same language in there, "notwithstanding local rules the
14 case cannot be reassigned to another judge." That can go
15 in that spot there.

16 CHAIRMAN BABCOCK: Okay. All right. Have
17 we got anything else on this rule? Okay. We will follow
18 the procedure that I outlined, and now we're onto summary
19 judgments. Judge Peeples.

20 MR. ORSINGER: We're not going to take a
21 vote on this language?

22 CHAIRMAN BABCOCK: Hold on. Anybody not
23 want to do this language? So nobody is opposed to this
24 language, let the record reflect.

25 HON. F. SCOTT McCOWN: Did I miss the voir

1 dire discussion, Chip?

2 CHAIRMAN BABCOCK: Yes, you did.

3 HONORABLE SCOTT BRISTER: Boy, did you.

4 MR. ORSINGER: There is no more voir dire.

5 CHAIRMAN BABCOCK: And some would suggest
6 that if you were here it might still be going on.

7 HONORABLE DAVID PEEPLES: Chip, before we --
8 I do have some concern. This is nine pages long. It's
9 got strikeouts galore, and it sure is easier to look at
10 something clean and the way it's going to be in the books.

11 CHAIRMAN BABCOCK: Yeah. That's what --

12 HONORABLE DAVID PEEPLES: And I'm just very
13 concerned that we're going to send it on to the Court and
14 then find something in there that we didn't see with all
15 the strikeouts.

16 CHAIRMAN BABCOCK: Yeah. You're going to
17 get --

18 HONORABLE DAVID PEEPLES: Are we in that
19 much of a hurry on this?

20 CHAIRMAN BABCOCK: You're going to get a
21 clean copy with only the changes from yesterday and today.

22 HONORABLE DAVID PEEPLES: And a chance to
23 talk about it briefly next meeting?

24 CHAIRMAN BABCOCK: I tell you what, why
25 don't we do this. If somebody -- in my cover letter to

1 everybody I will tell you to look at it carefully,
2 quickly, soon, and if somebody sees something that
3 requires the full committee to talk about it then we will
4 get back on it and we will talk about it.

5 HONORABLE DAVID PEEPLES: That sounds good.

6 MR. LATTING: Chip, there is one other
7 point. I understand that this is a -- that we're going to
8 send it on, assuming that there is not a concern raised,
9 and, number two, that Carl and Richard check it against
10 the statute --

11 CHAIRMAN BABCOCK: Yeah.

12 MR. LATTING: -- and are satisfied that it's
13 not in conflict.

14 MR. ORSINGER: And Scott.

15 CHAIRMAN BABCOCK: And Scott.

16 MR. LATTING: But especially Carl, because
17 you don't care if it's in conflict and Scott already says
18 it's not.

19 CHAIRMAN BABCOCK: So there's the swing
20 vote. Judge Peeples on summary judgment.

21 HONORABLE DAVID PEEPLES: Okay. You need to
22 look at the last page in this thing that they mailed to
23 us, the last page in our agenda for yesterday and today.
24 The background on this is that the Legislature passed a
25 law saying you've got to state your grounds or your

1 reasons when you grant a summary judgment, and Governor
2 Bush vetoed it, and several legislators have insisted that
3 they want us to do it, and so the Court asked us to draft
4 a rule on it, and that's why I have done this.

5 It's been quite -- this has been drafted for
6 several months. I can't even remember who was on our
7 subcommittee, but there wasn't any great controversy, and
8 I think we had consensus on the language here, and let me
9 just walk you through it. Subsection (j), "An order
10 granting summary judgment should state the ground or
11 grounds on which a motion is granted." We might want to
12 say "shall," but the reason that I said "should" is that
13 if you tell judges to do something and there is no
14 sanction for it, that just seems kind of incongruous.
15 This is kind of preparatory, but we could say "shall" and
16 then we will have to deal with what do you do if an order
17 doesn't state the grounds, but anyway, that's sentence
18 number one.

19 And then the second sentence, "No judgment
20 may be affirmed on other grounds unless they are asserted
21 by cross-point," and the theory there is if a motion urges
22 grounds A and B and the judge says, "All right, I'm
23 granting it on ground A," and the movant thinks ground B
24 was good, well, the appellant shouldn't have to attack
25 ground B because the judge didn't grant it on ground B;

1 but if the appellee wants to raise that ground, he should
2 be able to do it by cross-point; and then the appellant
3 knows that that's an issue and will need to file a reply
4 brief.

5 And then Comment 1, elaborates upon that.
6 Paragraph 2 in the comments makes clear, as I think it
7 needs to be made clear, that we're talking about grounds,
8 not reasoning. In other words, this does not require
9 trial judges to make findings of fact and conclusions of
10 law or say "Here is my reasoning." It simply says that
11 you're supposed to say in your order granting a motion,
12 "It's granted on no evidence of negligence and
13 limitations" or whatever the grounds are, or "grounds 1,
14 2, and 3 in the motion" or "every ground that was asserted
15 in the motion." That's up to the judge, but you do not
16 have to state reasons. Other than "grounds 1, 2, 3."

17 And then paragraph 3 in the comments simply
18 makes clear that it's all right to say it's granted on
19 every ground that was urged or granted generally on
20 everything. "Grounds 1, 2, and 3" or "every ground
21 asserted in the motion." That's what No. 3 says.

22 One issue that I think we probably need to
23 talk about is whether an appellate court can affirm on a
24 ground that's in the motion but was not relied upon by the
25 judge and is not brought forward by a cross-point. In

1 other words, if they see something that nobody thought was
2 really that plausible in the case but the appellate court
3 thinks is a good ground, can they affirm on that ground
4 even though no one briefed it. This doesn't deal with
5 that. I think it's unfair to do that, but that's an issue
6 that I have heard some appellate judges talk about. So
7 that's just some general issues here, and I guess we throw
8 it open for discussion.

9 CHAIRMAN BABCOCK: Okay. Ralph.

10 MR. DUGGINS: Judge -- I guess this is a
11 question for Justice Hecht. Does the Court want a rule?
12 I mean, I think that's what you said. I'm just trying to
13 get a feel for whether or not the Court is asking us to
14 draft a rule, or is the Court asking us to consider
15 whether such a rule should be proposed?

16 JUSTICE HECHT: Well, we'd like to have your
17 views on both, but I think we do need to see a rule. This
18 was -- this is something that the House Committee has
19 maintained an interest in. They -- if we don't come up
20 with something better, I think the same bill will be out
21 there again next time and it will pass just like it did
22 last time.

23 MR. ORSINGER: And we may have a different
24 governor.

25 JUSTICE HECHT: Right. So but the problem

1 with the bill, of course, was it really doesn't do
2 anything. The judge could just circumvent the bill, and
3 it wouldn't accomplish anything, and the advantage of a
4 rule like this, it seems to me, is it does take the onus
5 off of the appellant from having to brief a whole bunch of
6 points that neither the trial court nor the appellee have
7 entered.

8 MR. SUSMAN: How could a judge evade the
9 bill?

10 JUSTICE HECHT: I'm sorry?

11 MR. SUSMAN: How could a judge evade the
12 bill?

13 JUSTICE HECHT: Just say "I grant them."
14 Just in every motion just say "I grant on all grounds."

15 HONORABLE SCOTT BRISTER: But maybe we
16 should explain. It was -- after the civil practices
17 committee meeting at the State Bar it was clear to me --
18 maybe I misread it, but clear to me Representative Dutton
19 had no intent at all when he introduced this of affecting
20 in any way what happened on appeal.

21 He just wanted the judge to say the ground.
22 He had some client named Mrs. Green, and the judge granted
23 summary judgment against Mrs. Green and wouldn't tell Mrs.
24 Green why, and all he -- he didn't want to limit the
25 appeal in any way, and, you know, as I told him, you know,

1 it's hard to be against that idea, just say the ground,
2 but it's not going to make any difference. You've still
3 got to brief and cover everything on appeal. I'm
4 vigorously against anything that causes things to bounce
5 up and back because even though I got the right summary
6 judgment it was the wrong reason, and so we will just do
7 this two or three times until my order says the right
8 reason.

9 It was unclear to me from that meeting by
10 any means that a majority of the committee wanted to
11 restrict the appeal to the grounds stated in the motion.
12 There was a significant part didn't want -- thought this
13 was a stupid rule and didn't want to do anything at all,
14 others want -- but there was another group that wanted
15 just the order to say that, even if it had no effect.
16 Then there's another group, like Representative Bosse's
17 letter, that wants it also to limit the appeal so you
18 didn't have to discuss in your brief matters that the
19 judge didn't grant.

20 CHAIRMAN BABCOCK: Buddy.

21 MR. LOWE: Well, one of the things that
22 concerns me, sometimes a judge will say, "Okay, I'm really
23 clear on this ground, so I'm not really going to worry
24 about the others," and he grants it. Nobody does -- and
25 it goes up, comes back. He said, "Okay. I've got to

1 consider this now, and I'm going to grant it again but on
2 this ground." You know, it can go up and down, and I
3 don't imagine that's going to happen a lot, but there's a
4 long delay in litigation coming through --

5 HONORABLE SCOTT BRISTER: If you think about
6 it, there's lots of appellate opinions that say, you know,
7 such and such is an issue, but since it wasn't raised in
8 so-and-so's brief we're not going to address it.

9 MR. LOWE: Right.

10 HONORABLE SCOTT BRISTER: If we're sending
11 them up and back, I mean, there's -- it's not --

12 CHAIRMAN BABCOCK: But, Buddy -- Stephen had
13 his hand up, so he'll be next; but, Buddy, if I'm the
14 winner in the summary judgment and the judge only grants
15 it on ground 1, but I think I've got a heck of a ground 2
16 and 3, I'm going to raise that as an appellee.

17 MR. LOWE: I see --

18 CHAIRMAN BABCOCK: Say "an alternative basis
19 for affirming the judge, points 2 and 3."

20 MR. LATTING: That's what --

21 MR. LOWE: I see that David --

22 HONORABLE SCOTT BRISTER: Lots of appellees
23 don't do that. Lots of appellants waive issues because
24 they fail to bring -- the difference in this is you're
25 reversing the summary judgment and sending it back, so

1 it's not like a waiver point where you say, "Well, you
2 know, this is an issue, but since it's not raised, it's
3 waived." You don't have to address it. You're going to
4 be sending it back saying this is an issue, but since they
5 didn't raise it, we may grant it again, and I think there
6 is a potential for waste because people do miss those
7 things, but, you know, we'll just do it again.

8 CHAIRMAN BABCOCK: Stephen.

9 MR. TIPPS: I thought 2186 was a bad bill,
10 and we wrote a couple of letters urging the governor to do
11 what he did. What I don't understand is what is the
12 problem that causes the House Committee to think that some
13 change needs to be made in this Rule of Procedure? I
14 mean, is it some anecdotal experience with a client, or is
15 there some general problem?

16 CHAIRMAN BABCOCK: Steve Susman has got
17 something to say about it.

18 MR. SUSMAN: Well, I mean, it occurs to me
19 that the problem is that some people think that litigants
20 are entitled to an explanation of what the trial judge is
21 doing. It's totally unrelated to this appeal point, I
22 think. Totally should be considered separately. This
23 proposed rule doesn't cut it. I mean, it's not going to
24 help my clients to know granted all grounds, granted
25 grounds 1, 2, 3 and 4, granted statute of limitations, no

1 evidence. That's no explanation. Come on, guys. I mean,
2 you know, if you really try -- if the real purpose is to
3 explain to the litigants why judges do things, which I
4 think is a logical purpose, you've got to have something
5 more than these little grounds stuff. I think that must
6 be what the purpose was, but I mean, I don't know. I
7 think it's a great purpose.

8 JUSTICE HECHT: Well, that's -- I mean, that
9 was -- I think Scott's right. It was Representative
10 Dutton's bill, and he felt that he had one case where the
11 litigant, his client, did not know and he could not
12 explain satisfactorily the legal grounds for the judge's
13 ruling, and he felt like as a general proposition the
14 litigants ought to know why the judge did what he or she
15 did.

16 CHAIRMAN BABCOCK: Frank.

17 MR. GILSTRAP: I think there is a problem.
18 There is a type of case where the defendant moves for
19 summary judgment on maybe 15 grounds and submits four
20 boxes of exhibits, and judges will sometime on that
21 occasion say, "Well, you know, I'm going to go ahead and
22 grant it. I don't have to read all this stuff." I've had
23 judges tell me that, that "I'm just going to let the court
24 of appeals figure it out."

25 It seems to me this can help by, one,

1 requiring the judge to say, "I've read it all and I'm
2 granting it all," and, two, if he does limit it, there is
3 a real savings when you go up on appeal because you don't
4 have to brief those other seven points of error that
5 weren't any good, and you avoid the Maloney Brothers
6 against Napier problem, which still traps people.

7 CHAIRMAN BABCOCK: Richard.

8 MR. ORSINGER: I agree with what Frank just
9 said and would want to point out from the perspective of
10 an appellate lawyer that in a jury trial the grounds for
11 the judgment are apparent from the jury charge, and in a
12 nonjury trial on the merits you can request findings of
13 fact and conclusions of law and you can find out the basis
14 of the judgment through the findings of fact and
15 conclusions of law; but if your case is thrown out on
16 summary judgment and you don't have a jury verdict and you
17 don't have findings and conclusions, then you have no idea
18 why you lost. If there is only one ground in a motion for
19 summary judgment, by process of elimination you know what
20 it is; but if there's five or six grounds in the motion
21 for summary judgment you don't know which one, and
22 therefore, you have to brief all of them, because under
23 the current state of the law the court of appeals can look
24 at all grounds in the motion to affirm; and if all we do
25 is say put the finding or the basis for the summary

1 judgment so that the plaintiff has a better idea of why
2 they didn't have a trial, well, I think that that's maybe
3 good public relations.

4 But from a mechanical and practical
5 standpoint the burden on the appellant and the burden on
6 the appellate court is to look at all of the record on all
7 of the grounds, and so what this does is it says it still
8 permits the appellate court to affirm on some other ground
9 that the trial judge did not rely on, but only if the
10 appellee says, "Hey, I want to invoke this alternative
11 ground. Even though I didn't persuade the trial court, I
12 would like to try to persuade you, court of appeals," but
13 if they don't take the step to invoke these alternate
14 grounds then the appellate court will not consider them.
15 And the fact that some appellees may be incompetent enough
16 not to invoke an alternate ground to me is not a reason to
17 keep the appellate system from briefing all of this stuff
18 that maybe has nothing to do with the case.

19 CHAIRMAN BABCOCK: Judge Patterson and then
20 Bill Dorsaneo.

21 HONORABLE JAN PATTERSON: I do think that
22 the concern of the Legislature is twofold. One is the
23 perception of the client in the public, and the second is
24 the savings of appellate time, but I think that they did
25 get off talking about the concern about the clients and

1 public relations, but I think the point there is an even
2 stronger one, and that is that the current rule has --
3 creates an incentive, an incentive to not state the
4 ground. It is the rare and courageous district judge who
5 states the ground and gives the rationale for the granting
6 of a summary judgment. It is the usual 90 percent of the
7 orders that do not state it.

8 MR. LATTING: The pusillanimous district
9 judges.

10 HONORABLE JAN PATTERSON: As far as the
11 savings of time, I think there is a tremendous savings of
12 time both on the point -- it does create a trap for the
13 appellant. If they fail to address every ground, there is
14 a trap there for them. There is a tremendous amount of
15 energy and time that is wasted on grounds that are really
16 not in contention but have to be addressed by the
17 appellate court; and, finally, I think it's -- the
18 proposed change, I think, I'm not committed to this, but
19 these are my thoughts for the moment, does have "give" in
20 it in the sense that keep in mind that the order in 99.999
21 percent of the time is drafted not by the trial judge but
22 by the parties; and so the parties have control over the
23 form of that order and the appeal; and it has always
24 struck me as odd that in every other area of appeals we
25 have to carefully preserve error, but in this anomaly of

1 summary judgment it only has to be in the motion and then
2 everything else is up for grabs. So there is a
3 preservation aspect of it that is inconsistent with the
4 way that we handle all of our appeals.

5 CHAIRMAN BABCOCK: Bill Dorsaneo.

6 PROFESSOR DORSANEO: Well, a lot of people
7 like summary judgment because it's efficient. I'm not a
8 great fan of summary judgment because it seems a little
9 bit rude to average people that -- especially when there's
10 no hearing that there is -- the day in court is kind of
11 different from a trial. I, therefore, along that same
12 wavelength think that trial judges should state the
13 grounds for the summary judgment. I just think that's
14 basically just fair. I mean, if you're going to get a
15 letter notifying you of the results either holding you
16 very liable or throwing your claim out, I think that ought
17 to be something that a person could read and understand,
18 at least with the aid of his or her or its lawyer.

19 Second point, generally speaking, when there
20 is a judgment as a matter of law if -- the attitude of the
21 appellate courts is to affirm if the judgment is correct,
22 even if it's the wrong ground or the wrong reason. That's
23 how things are done in the context of other motions for
24 judgment as a matter of law. Certainly directed verdict
25 or instructed verdict law is to that effect, and I think

1 that's a good policy.

2 Personally, I believe -- and this is the
3 third point -- that it would be better appellate practice
4 to require cross-points. I don't know whether the summary
5 judgment rule needs to say that because I think the
6 pertinent TRAP rule probably is either adequate as it
7 stands right now or could be so adjusted. And I don't see
8 how it's unfair to an appellee to raise other grounds by
9 cross-point. That's fairly normal, fairly normal
10 practice. So where I would come down is to have the judge
11 state the grounds, have the case be affirmed anyway on
12 other grounds if it should be affirmed, assuming that the
13 appellee raises them by cross-point, and that seems like a
14 better system than the system we have now in the summary
15 judgment context.

16 CHAIRMAN BABCOCK: Buddy.

17 MR. LOWE: I agree with Bill, and as far
18 as -- I don't want to get into like telling them
19 specifically, well, this affidavit says this or findings
20 of fact and conclusions of law because summary judgment .
21 is -- there is no fact issue. Now, as far as procedures
22 and being rude to people and not telling them, we have a
23 procedure now under McGuire vs. Seagrams where you just
24 accept the thing. You just don't state the cause of
25 action. The judge grants it. Everything is up for grabs

1 in the whole pleadings, and so, I mean, there's another
2 procedure that's even -- some people might call worse. I
3 call it better, but I agree with Bill.

4 CHAIRMAN BABCOCK: Stephen.

5 MR. YELENOSKY: Well, if we want to do this,
6 how are we getting there with this rule and this comment?
7 Because based on what Judge Patterson said, I assume if we
8 adopt what's presented here along with Comment 3, what
9 will happen is every order presented to a judge will say
10 it's granted on every ground.

11 HONORABLE JAN PATTERSON: I don't think it
12 will. I don't think it will. I think it will exclude
13 some grounds.

14 MR. YELENOSKY: You think it will?

15 HONORABLE JAN PATTERSON: I think so. I
16 know Scott's will.

17 MR. YELENOSKY: Well, what will prevent the
18 judge who gets 15 points and boxes and boxes from not
19 reading them again?

20 HON. F. SCOTT McCOWN: Could I speak to --

21 CHAIRMAN BABCOCK: Well, wait a second. Joe
22 Latting has been wanting to speak for some time.

23 MR. LATTING: Well, I was going to -- two
24 things. I was going to ask David or just comment that I
25 like your provision (j) and I would vote for it and

1 suggest that we change it to "shall state the grounds"
2 instead of "should."

3 On the appellate issue, the concern I have
4 is this. Let's say you have a complex case and there are
5 twelve grounds for summary judgment. The judge grants the
6 motion on ground one, summary judgment granted. Now, it's
7 appealed. What does the appellee do? Well, if I'm the
8 appellee, I'm afraid not to bring 11 cross-points, and it
9 seems to me that we ought to be able to draft around that
10 but maybe not in this rule. It seems to me that if we
11 want that to be a basis for the appeal, that is, for the
12 appellate court not to be able to go outside of
13 everybody's notion of what was pertinent in order to
14 reverse it, can't we handle that by the appellate court
15 noting or stating to the parties if it's considering a
16 point that has not been brought forward?

17 It seems like that's the solution to the
18 problem, so that -- you're nodding. Does everybody
19 understand what I'm saying, that if you grant it on point
20 one and everybody thinks point one is the point, but the
21 appellate court, the Austin court of appeals says, "Well,
22 we think point six is important," why couldn't we provide
23 that that be -- that the parties be notified and then let
24 them brief it? I'm trying to keep from spending
25 gazillions of dollars briefing points.

1 CHAIRMAN BABCOCK: Can I try to restate what
2 you just said?

3 MR. LATTING: Yeah.

4 CHAIRMAN BABCOCK: The trial judge grants it
5 on point 1, but not on points 2 through 12. On appeal the
6 appellee brings up points 2 through 11 but not 12. The
7 court of appeals says, "Well, 1 through 11 is no good, but
8 we kind of like 12. Judge Brister says they ought to be
9 able to get to it if they're going to affirm on point 12.
10 You say it's not fair for them to do that without telling
11 you, and what the court of appeals should have to do is
12 give notice to the parties that "We're considering point
13 12. You better brief it if you want to be heard on it."

14 MR. LATTING: Well, that's almost right,
15 although what I'm trying to prevent is having the appellee
16 have to bring by cross-point all the points that were
17 raised in the motion as a needless exercise in order to
18 protect the record. I mean, how embarrassing would it be
19 to win a summary judgment and not to brief every point
20 that you raised, even throw away points that you had, and
21 have an appellate court say, "Oh, by the way, you were
22 right, and you should have won, but you didn't brief that,
23 so you waived it."

24 CHAIRMAN BABCOCK: Right.

25 MR. LATTING: That's a total gross waiver.

1 CHAIRMAN BABCOCK: Judge Schneider has had
2 his hand up for a while.

3 HONORABLE MICHAEL SCHNEIDER: I was just
4 going to say, you know, you don't grant -- the summary
5 judgment can't be affirmed if you haven't stated in your
6 motion and you haven't produced evidence.

7 CHAIRMAN BABCOCK: That's true.

8 HONORABLE MICHAEL SCHNEIDER: That's the
9 first thing you need to remember on protection. You've
10 got that.

11 CHAIRMAN BABCOCK: Right.

12 HONORABLE MICHAEL SCHNEIDER: And then
13 basically the same argument goes if -- while ago, when the
14 trial court said, "Well, let the appellate court be our
15 brief." That's what we would be doing if we had to pick
16 through everything, pick out a notice. It would introduce
17 another procedure, I'm afraid.

18 CHAIRMAN BABCOCK: Yeah, Bobby.

19 HONORABLE MICHAEL SCHNEIDER: So I would
20 oppose that.

21 MR. MEADOWS: I think we should separate the
22 discussion in terms of what a trial court must do and then
23 the effect of it on appeal.

24 MR. LATTING: Yeah. I think that's a
25 wonderful idea.

1 MR. MEADOWS: And the first point, which is
2 the only place I'm really focused or concerned, it seems
3 to me to be a good idea to have the reasons stated for
4 granting it, but I hate to see that become another reason
5 for not getting a summary judgment, because if it's going
6 to be granted, which it's hard enough to get them granted
7 anyway, the court of appeals have got to take on the
8 burden of explaining it. So I think the order ought to
9 state the reasons for the grant or the denial. In other
10 words, you shouldn't have a greater burden with getting
11 the motion granted than having it just denied.

12 CHAIRMAN BABCOCK: Mike Hatchell, did you
13 want to say something?

14 MR. HATCHELL: Yes. This would be wonderful
15 if it worked in practice because it would help the
16 appellate practitioner to narrow the grounds argued on
17 appeal, but I think you must -- it's not going to solve
18 Steve's problem at all, and I don't think we'll ever get
19 there. You've got to say "must" instead of "should,"
20 otherwise it's just polite judicial manners.

21 The second thing is about the comments just
22 made, the second sentence says, "No judgment may be
23 affirmed on other grounds." Well, it's got to say "on
24 other grounds in the motion," because this is an open
25 invitation for the court to just simply invent grounds

1 that weren't stated in the motion. And then there is a
2 somewhat debatable question as to whether or not if you
3 do -- if the appellee raises these by cross-points whether
4 or not you file a notice of appeal. Now, most people will
5 say "no."

6 PROFESSOR DORSANEO: Right.

7 MR. HATCHELL: But it's not entirely clear
8 from our two track. I don't think you do, but let's
9 assume that you want to alter -- let's assume as a
10 defendant you want a no cause of action but you also have
11 a limitations point. That alters the tyrannical basis of
12 the judgment, even if the outcome is you get to file
13 another appeal. I don't know.

14 CHAIRMAN BABCOCK: Judge McCown and then
15 Skip Watson.

16 HON. F. SCOTT McCOWN: Well, you can't
17 separate what the trial judge should do from what happens
18 on appeal, because whatever the rule is about what happens
19 on appeal is going to influence what the trial judge is
20 going to do; and while you may have separate issues, trial
21 and appeal, what I do as a trial judge is going to turn in
22 large part on the appellate rule; and my problem with this
23 discussion is that as an empirical matter how many motions
24 are there out of all the motions that have more than two
25 or three grounds? When a trial judge grants a motion --

1 and I'd like to see Mrs. Green's case that Representative
2 Dutton handled. I would like to know how many grounds
3 there were.

4 HONORABLE SCOTT BRISTER: I couldn't find it
5 in Harris County, so it must be somebody else's.

6 HON. F. SCOTT McCOWN: You know, I would
7 like to read those moving papers, because my guess is that
8 you could read those moving papers and know why the motion
9 is granted. I mean, that's the whole point of summary
10 judgment, is that the moving papers are right as a matter
11 of law, and so you grant them, and there is nothing for
12 the trial judge to articulate. That's why you don't get
13 findings of fact and conclusions of law.

14 And I agree with what someone said over here
15 that the judge who says, "Well, there's four boxes. I'm
16 going to let the court of appeals decide it," us passing
17 this rule isn't going to turn him into the kind of judge
18 that goes back into his office, reads the four boxes, and
19 delivers a letter opinion.

20 You know, from a trial judge's point of
21 view, I often write short little letters about why I've
22 granted or I'll tell them at the hearing if we have a
23 hearing why I've granted. I mean, I don't think they
24 leave with a mystery really about what's turned the case,
25 but when it comes to what my order is going to be, my

1 order is going to turn on what the appellate effect of it
2 is and how much work it is; and if it's very much work at
3 all, it's going to be granted on all grounds; or if the
4 appellate rule is that it's going to come back to me, it's
5 going to be granted on all grounds.

6 CHAIRMAN BABCOCK: Skip Watson.

7 MR. WATSON: Just a couple of things. First
8 of all, I agree with what Justice Patterson said on what
9 we're calling the fairness issue. I think the appellate
10 lawyers in the room all work both sides of the docket.
11 We've used it, you know, the current practice, to just cut
12 someone off at the knees, every one of us have when we
13 have been appellees. As appellants we face the situation
14 in which we can tell or if we were at trial we know that
15 there were 15 grounds asserted in the motion, that the
16 trial court focused and requested us to address only one
17 in summary judgment. That's what it was granted on, but
18 then we end up in the Supreme Court with 15 pages and
19 trying to knock down 15 grounds when we know it was
20 granted on one.

21 I sympathize with the trial judges not
22 wanting the things to come back, and that I understand,
23 because I don't want it to come back on my clients when
24 I'm an appellee. On the other hand, I see the perception
25 issue, and I think we need to be cognizant of it. It

1 doesn't look good under present practice.

2 Second, I agree wholeheartedly with what
3 Mike said that we've got to say "on other grounds" -- it's
4 got to be "other grounds in the motion." That does sound
5 like that we're opening it up to just anything that the
6 appellate court can dream up that wasn't in the motion.

7 Third, I was over talking to Mike when you
8 called on him. I am concerned about calling this a
9 cross-point, because it has implications. I understand
10 that a cross-point is requesting relief by saying that the
11 judge erred in the judgment, and while I'm seeking
12 affirmances, the appellee on all my reply points, by
13 cross-point I'm saying he's erred by not doing something.
14 I think this is a cross-point, because the first sentence
15 of the drafting of the new part of the rule is saying you
16 need to state the grounds. If he stated the wrong ground
17 then you are saying the judgment is wrong.

18 I would prefer that it somehow be tied to
19 relief because I can see, as only lawyers could do, going
20 up on one of these and somebody saying, "Okay, this is a
21 cross-point. You didn't file an independent notice of
22 appeal. You are requesting" -- that's a little bit
23 unclear, though most of us think you don't have to. I can
24 see someone just getting gutted and this whole thing
25 coming back. I would tie it to relief requested and

1 perhaps make it that it can be a reply point.

2 CHAIRMAN BABCOCK: You still got something,
3 Richard? Richard, Steve, Carl, Bill.

4 MR. ORSINGER: Okay. Carl, you want to --

5 MR. HAMILTON: That's all right. Go ahead.

6 MR. ORSINGER: Okay. Carl called my
7 attention to Dutton's statute, and Dutton's statute
8 actually is more restrictive on appeal than this proposed
9 language, because in paragraph (b) it stays
10 "notwithstanding any other law, any court hearing an
11 appeal from a grant of a motion for summary judgment shall
12 determine the appeal only on the ground specified in the
13 written findings. So that does not permit any alternate
14 ground of affirmance, which this rule does. So this rule
15 is more liberal to the winner in a trial than the statute
16 was.

17 CHAIRMAN BABCOCK: And that statute I think
18 was seeking to overturn a relatively recent decision of
19 the Supreme Court which changed the law and said the court
20 of appeals could consider something that was not a basis
21 for the trial judge's granting a summary judgment.

22 HONORABLE SCOTT BRISTER: And that was not
23 Dutton's bill. That was added on the floor.

24 MR. ORSINGER: Okay.

25 HONORABLE SCOTT BRISTER: Dutton didn't have

1 anything in his -- he's not worried about what happens on
2 appeal. He just wants Mrs. Green to know where her case
3 went.

4 MR. ORSINGER: Well, wait a minute. Let me
5 get some clarification here. The bill that went to
6 Governor Bush's desk, is that the bill that's in here or
7 is that some other bill?

8 CHAIRMAN BABCOCK: Yes.

9 MR. ORSINGER: Well, I don't care about
10 Representative Dutton, because this bill was voted on and
11 passed by the House and the Senate, so whatever Dutton
12 wanted, we now have 300 and something people that backed
13 it up, right?

14 JUSTICE HECHT: Well, his bill originally
15 did not have that in there, and he asked me when I -- and
16 Judge Phillips when we were at a committee hearing on
17 another matter that we had been summoned over to what we
18 thought of this bill, and there were people for it and
19 there were people against it, and I told him that it
20 wasn't going to do any good if it didn't affect the
21 appellate process because if he just put in there the
22 judge should state the grounds but the court of appeals
23 could rule on any grounds that were in the motion, it was
24 not going to affect anything that he was interested in,
25 except his client getting to know what the ground was.

1 And so he said, "Well, then I'm going to put that in
2 there," but it was not done -- it was not done in such a
3 way that I think people thought very seriously about what
4 it was doing and what effect it had.

5 CHAIRMAN BABCOCK: Okay. Steve had a
6 comment.

7 MR. SUSMAN: Well, having listened to the
8 debate, I mean, I came in here believing judges should
9 explain why they do things, but now I understand that the
10 judges aren't going to do that really because they don't
11 have the resources and the time to write opinions.

12 MR. TIPPS: Steve, we can't hear you down
13 here.

14 MR. SUSMAN: Because they don't have
15 resources and time to write opinions, judges are not going
16 to put in their opinions, write a letter explaining what
17 they do in a satisfactory way, a way that's going to give
18 a client any satisfaction; and the only thing you are
19 accomplishing here is creating a new appellate
20 jurisprudence, which we don't need. So I don't see why
21 we're doing this. I mean, I would be opposed to it
22 because I don't think you are going to accomplish the
23 purpose of explaining to Mrs. Green why the judge did
24 something, and you're going to create this monster that
25 goes along that changes the whole appellate system.

1 CHAIRMAN BABCOCK: Yeah, really, the only
2 thing that I think this rule is going to do is shift the
3 burden on appeal as to who has got to brief it.

4 MR. MEADOWS: It's also going to discourage
5 the granting of motions for summary judgment.

6 CHAIRMAN BABCOCK: I don't know about that.

7 MR. ORSINGER: I disagree totally.

8 CHAIRMAN BABCOCK: Yeah, Bill.

9 PROFESSOR DORSANEO: This is in more general
10 terms, and I'm responding to partially what Skip said. I
11 think we ought to do away in the appellate rules with the
12 term "cross-point" and replace it with, you know,
13 "alternative grounds for affirmance" or some language that
14 more reflects what we're talking about and what we used to
15 be talking about some of the time when we used the term
16 "cross-point." That's a relatively, you know, easy thing
17 to do, I believe; and we'll put that on our agenda as
18 something to talk about for the appellate rules committee.

19 But I do think that, you know, we could
20 write a rule that would at least encourage judges to
21 articulate, you know, the grounds for a summary judgment.
22 Whether it would be necessary to abate the appeal and
23 require the judge to do something would -- you know, would
24 depend, it seems to me, on the nature of the case, etc.
25 This goes in the context of trial judges who don't make

1 findings of fact or conclusions of law. I don't think
2 it's asking too much for the winning lawyer to draft for
3 the trial judge an order that says, you know, "Summary
4 judgment was granted because there's no evidence of
5 causation. Summary judgment was granted because the
6 evidence shows as a matter of law that there was no
7 physician/patient relationship." I don't see that as any
8 great burden on anybody, trial judges or the lawyer who
9 was representing the movant.

10 I just think that would be -- that would
11 just be better than an opaque order that has to be, you
12 know, dealt with on any number of possible hypothetical
13 bases, and it seems fair to me as an appellant if -- I
14 have won a number of summary judgment appeals on the basis
15 that the appellant didn't identify every one of the
16 potential grounds stated in the motion and it was too late
17 for those to be, you know, raised. I was happy to win
18 those cases, but it always struck me as kind of some sort
19 of a rule that would be more appropriate for some, you
20 know, gambling house, you know, than a courthouse.

21 And it seems fairer, you know, to put the
22 burden on the appellee, if there really are alternative
23 grounds, and the appellee wouldn't have to raise every
24 possible argument. You know, maybe for some of your
25 clients you'd have to for fear of being accused of being

1 incompetent, but you'd raise the ones that were pertinent
2 ones. Now, presumably those would be the ones that you
3 put in your motion to begin with, but, you know, I think
4 we will winnow out some things, just drop out of the
5 picket, and it just seems like a fairer and more sensible
6 mechanism to require the appellant to go after the judge's
7 order and then require the appellee to bring up other
8 matters.

9 But, again, I would let the appellate courts
10 affirm if there was a basis for affirmance raised in the
11 motion, even if the trial judge didn't choose it. I mean,
12 even if the trial judge didn't choose it. Again, that is
13 our normal rule.

14 CHAIRMAN BABCOCK: Judge Brister, Judge
15 Lawrence, and then Mike Hatchell.

16 HONORABLE SCOTT BRISTER: I think it is hard
17 to be against something if you just have to state your
18 reason but don't -- it doesn't have any effect on appeal;
19 but if it does, you know, we've tried to limit appeals
20 lots of times, but it just never works, so we tried that
21 with the new TRAP rules; and the reason is because, as has
22 been pointed out, until you know how the court of appeals
23 is going to decide, you don't know how to focus it on; but
24 then, you know, what are we going to do, have the court of
25 appeals has to write their opinion, then we start the

1 briefing and then we start the appeal?

2 I mean, until they have had the full
3 briefing and decided the case we don't know what to limit
4 the appeal to, but that's totally backwards, and so to try
5 to at the front end say, "Well, we will limit the appeal
6 because we all know what it's going to really get down
7 to," I -- from a trial judge's perspective, eleven years
8 on the bench, you have got to be kidding. It is totally
9 unpredictable to me upon what basis the courts of appeals
10 are going to decide cases.

11 We had the recent case of Holder vs. Melon
12 Mortgage where the -- 2:00 a.m. a lady is -- police
13 officer pulls her over, lights flashing, arrests her for a
14 traffic stop. "Follow me up into this abandoned" -- you
15 know, 2:00 a.m. at night -- "parking garage for the bank,"
16 and assaults her. Goes to the big house, so they sue the
17 bank.

18 You know, I grant it because Mr. Nixon,
19 property management, says, you know, because there's a
20 city ordinance that says board up your apartment houses,
21 that creates a duty on apartment house owners, you know,
22 that if people drag you on the property to assault you.
23 We don't have such an ordinance for abandoned bank parking
24 lots, so no duty. Court of appeals says, "No, no, no.
25 This is a implied invitee," and the Supreme Court in four

1 different opinions --

2 HONORABLE JAN PATTERSON: Is this a point of
3 personal privilege?

4 HONORABLE SCOTT BRISTER: In four different
5 opinions --

6 JUSTICE HECHT: Tread lightly here.

7 HONORABLE SCOTT BRISTER: -- with four
8 different reasons, the plurality of which is "No, no, no.
9 This was just all unforeseeable." That's what's
10 unforeseeable, is on what ground the summary judgment is
11 going to be affirmed.

12 HONORABLE JAN PATTERSON: I found them all
13 very persuasive.

14 HONORABLE SCOTT BRISTER: But until that
15 final opinion is written you don't know how to limit the
16 briefing in the appeal, but you can't set up an appeal
17 that way where we wait until the opinion is out to make a
18 brief.

19 CHAIRMAN BABCOCK: Judge Lawrence then
20 Hatchell.

21 HONORABLE TOM LAWRENCE: The JP's opposed
22 this bill for a number of reasons, but one of which I
23 guess I have a question for David. The language in the
24 statute would appear to require a separate written order,
25 and in a lot of the smaller jurisdictions the JP courts

1 are a one-judge shop and there are no clerks, no staff;
2 and by the rules they are permitted to make entries in the
3 docket books for the judgments and orders as opposed to
4 generating a separate written document.

5 The JP's felt that the statute would require
6 this separate written document, but the rule that you've
7 proposed is a little less restrictive, so would you say
8 that there would be no additional burden for JP courts to
9 do anything other than what they are doing now, which is
10 recording in the docket books?

11 MR. ORSINGER: That's right. This requires
12 that the order state the grounds. It does not require any
13 separate document.

14 HONORABLE TOM LAWRENCE: Okay. So they
15 could just make a notation in the docket book as they
16 currently do and that would suffice under this proposed
17 rule; is that correct?

18 HONORABLE DAVID PEEPLES: Well, you've got
19 appeal de novo to, what, county court?

20 HONORABLE TOM LAWRENCE: Yes.

21 HONORABLE DAVID PEEPLES: I, frankly, hadn't
22 thought about appeals from JP court to another trial court
23 as opposed to going to the appellate system.

24 MR. ORSINGER: But this only requires the
25 order to contain the findings, and under the JP rules

1 their order is their docket sheet, so if your order is
2 your docket sheet, why wouldn't you just put the findings
3 in the docket sheet and that's it?

4 HONORABLE DAVID PEEPLES: And it's not
5 findings. It's stating the grounds.

6 MR. ORSINGER: Pardon me. Excuse me.

7 HONORABLE TOM LAWRENCE: It appears to me
8 reading this that that would be sufficient. I just want
9 to make sure about that.

10 CHAIRMAN BABCOCK: Mike Hatchell then Judge
11 Patterson.

12 MR. HATCHELL: I have three quick comments,
13 one to address Steve Susman's suggestion that this rule
14 would create separate appellate jurisprudence. We
15 actually have a common law-like version of this in the
16 Cates decision which allows the court to reach alternative
17 grounds, but the problem with Cates is that it's a
18 discretionary application with the court, and the present
19 rule at least puts some formal structure on this that
20 makes it consistent throughout the appellate courts.

21 The second comment I have is that I think
22 it's essential to this rule that it have waiver features
23 in it. I just don't have much sympathy for Joe Latting's
24 concerns about, you know, the 15-point one and he's lost,
25 affirmatively lost on 14, and yet doesn't want to go to

1 the trouble to even call --

2 MR. LATTING: That wasn't my concern, by the
3 way.

4 MR. HATCHELL: -- the losing points to the
5 court of appeals' attention.

6 MR. LATTING: That's not my concern. You
7 misunderstood what I said.

8 MR. HATCHELL: And the third thing is we
9 have to at least be cognizant of what happens if the trial
10 judges simply don't enter such an order, and I think the
11 way you handle that probably is the way you handle no
12 findings of facts and conclusions, and that is to abate
13 the appeal and send it back with an order. I don't know
14 that you necessarily need to deal with that, but as long
15 as it has all of these formal provisions in it I don't
16 think you are going to be able to get something through
17 the appellate court without a rule, but this rule will
18 work.

19 CHAIRMAN BABCOCK: Judge Patterson, did you
20 still want to say something?

21 HONORABLE JAN PATTERSON: Yes. I agree with
22 Judge Brister that we don't want any change in the rule
23 that's going to cause any bouncing back and forth, and I
24 think Bill has described our procedure very well that when
25 we say it's supported on any theory supported by the

1 evidence and that we can deal with it that way. I do
2 think it's very important that this is -- as far as I'm
3 concerned we don't want to limit appeals and that this
4 rule is not designed to limit that in any way. I think
5 it's just to make them more efficient.

6 I do think that it is -- I really dislike
7 having to dismiss an appeal because it doesn't fully brief
8 all the grounds, and that is a very unsatisfactory
9 problem, and I think it's not a small problem, and it may
10 be that those people shouldn't be practicing in appellate
11 courts, but I don't think that's necessarily the solution.

12 But I will tell you that it's probably -- we
13 actually had to gather statistics on summary judgments, I
14 think for this committee, and my guess was that a third of
15 our cases are summary judgment cases. I was wrong, and
16 it's really more like 40 percent in our court. I don't
17 know, but it's a very substantial amount. So we are
18 talking about lots of cases, and of those cases my --
19 again this would be a guess. I would say 1 in 10 maybe or
20 1 in 15 don't raise all the grounds, so that there is a
21 trap that is -- even after all these years that is not
22 adverted to by the parties, but I think summary -- I
23 actually am probably the most favorable one towards
24 summary judgments in our court; and so there are others
25 who really do not look favorable upon them; but however

1 you look upon them, it is a large part of our docket and a
2 growing part; and so I think it's important that it be
3 perceived as a fair system and not have hidden traps.

4 CHAIRMAN BABCOCK: Okay. It's going to be
5 Bill, Frank, and then Buddy. Did you want --

6 PROFESSOR DORSANEO: No, I'm fine.

7 CHAIRMAN BABCOCK: He yields to Frank.

8 MR. GILSTRAP: I do want to address the
9 notion that somehow this is an imposition on judges.
10 Judges are supposed to have reasons for their rulings. If
11 he reads the motion, satisfies himself that ground 1 is a
12 good reason and that's it, then he should say, "I'm
13 granting on ground 1." If he wants more confidence, he
14 can go and read ground 2 and 3, and he may add those; but
15 I certainly don't think it's right that he reads ground 1
16 and then grants it and requires me to brief grounds 11
17 through 14 before the court of appeals.

18 Insofar as Joe Latting's problem on limiting
19 appeals -- excuse me, limiting my points, appellate
20 litigants do that all the time. You have got your 50
21 pages. You have got your 15 minutes. You've got to pick
22 and choose. If you want to go with point 1 and devote
23 your whole brief to it, fine. If you want to go ahead and
24 brief the other 14, that's fine, too, but you have to
25 reduce the amount that you spend on point 1.

1 And finally, on how we do it, we do have
2 another place in the rules where we have this, and that's
3 Rule 324(c) regarding motions for judgment NOV. In that
4 case, if you win on JNOV and you want to bring forward
5 another ground in the court of appeals, as appellee you've
6 got to file a cross-point. It seems to me if that
7 procedure is good then the procedure we're talking about
8 here ought to be good. If that procedure has a problem
9 then we ought to change both of them.

10 CHAIRMAN BABCOCK: Buddy then Skip and then
11 Judge McCown.

12 MR. LOWE: Let me come back to what brought
13 us here, and that is the Legislature wanted to know the
14 grounds, not findings of fact and conclusions. That
15 brought us here. Okay. Then the next concern we have is
16 we don't want a case going back up and then coming back
17 down. We want to be able for the appellate court to
18 review. So if you look at the act they passed, there's
19 only one bad thing about it. It allows going up and down.
20 It says, "Any court hearing an appeal from a grant on a
21 motion for summary judgment shall determine the appeal
22 only on the grounds specified in written findings."
23 That's the part that's objectionable.

24 It appears that we're in agreement that you
25 ought to not make findings of fact and conclusions, but

1 you ought to specify the grounds. It appears that we're
2 in agreement we don't want it coming up and down, and I
3 think David has done a good job of drawing a rule, and I'm
4 for looking at it specifically.

5 CHAIRMAN BABCOCK: Yeah. Okay. Skip and
6 then Judge McCown.

7 MR. WATSON: I agree with everything that
8 Buddy just said. We are here, I think, to address the
9 concern of the Legislature and the concern that many of us
10 express about lack of fairness in expressing grounds, and
11 Judge Peeples has done that. This is a very good effort
12 at doing that. Comment 2 addresses the issue that Buddy
13 just raised that in no way are we going to the next step
14 of findings of fact. I think that's going to satisfy the
15 Legislature, which is what we're here to do, to address
16 the fairness issue that they feel and we feel.

17 Second, I do think that Judge Peeples'
18 version should be -- it's precisely what we need to do.
19 I'm just requesting two minor wording changes. One is the
20 one Mike raised that we should say "grounds in the
21 motion." No. 2, I'm requesting we change "cross-point" to
22 "reply point" to stay out of the needing judicial
23 determination, and I would point out the case which none
24 of us seem to be able to remember from about three years
25 ago where the Court is already saying it's doing that.

1 I distinctly remember the language in that
2 case because I lost on it with Chip. It was the first
3 opinion construing that where the court did something
4 nobody had briefed after that case came down, and it says
5 that the points can be considered that were not ruled
6 upon. They can be considered if properly preserved; and
7 my point was, "Okay, you know, does two sentences and a
8 footnote in Chip's brief properly preserve it," and I
9 wasn't able to get Justice Hecht's attention on that
10 point. And I personally think from the rather searing
11 experience that we need to be careful in the way we say
12 that needs to be preserved, and I'm suggesting that we
13 avoid a can of worms by saying "reply point" rather than
14 "cross-point."

15 CHAIRMAN BABCOCK: Judge McCown.

16 HON. F. SCOTT McCOWN: Well, I'd like to
17 speak to two points. First is the imposition on the
18 judges, and we haven't had a new district judge in Travis
19 County since 1984. You look at Travis County today and
20 remember how it was in '84. I've got on average I think
21 about maybe 20 minutes a day when I'm off the bench, and
22 what you're asking the trial judge to do in stating the
23 grounds is something fairly sophisticated if it has any
24 appellate ramifications whatsoever, because when I hear a
25 motion with multiple grounds I decide if it's good or bad,

1 and now you're asking me to also make appellate decisions
2 about what should -- how the appellate case ought to be
3 postured in terms of what I want to say is granted and
4 what I want to say is denied. You're asking me to do a
5 whole lot extra in the decision-making process that I'm
6 not having to do now.

7 The second point, there are huge advantages
8 from an efficiency point of view in an opaque order,
9 because lawyers don't do what Bill suggested, which is
10 straightforwardly set out the grounds. The winning lawyer
11 won't do that. The winning lawyer's order is going to
12 say, "There was no evidence and, in fact, it's the most
13 frivolous case I've ever seen and on point 1," and the
14 winning lawyer is going to try to write a summary judgment
15 order with grounds that's favorable on appeal, and so then
16 you have to have a subsequent hearing where you sort out
17 the form of the order, and we're putting a huge emphasis
18 on straightening out this problem for appellate lawyers at
19 the trial court level, and I don't think the game is worth
20 the candy.

21 CHAIRMAN BABCOCK: Let's see, Stephen I
22 think had his hand up first. Then Judge Brister and then
23 Bill.

24 MR. TIPPS: Judge McCown has convinced me
25 that Bobby is right that this amendment really would make

1 it a lot more difficult to get summary judgments granted,
2 and I don't think that's the way we ought to be going; but
3 a technical observation if we decide to do this, I would
4 suggest that in Comment 2 we rework the reference to
5 findings of fact and conclusions of law. Saying that
6 findings of fact are not required has a negative
7 implication that maybe they are allowed when, in fact, you
8 could never have findings of fact in the summary judgment
9 context. So I would suggest that the focus of paragraph
10 (2) be on the fact -- be on the statement that the rule
11 would not require any other explanation or statement of
12 reasons and then just deal with findings of fact
13 differently.

14 HONORABLE DAVID PEEPLES: "Such as findings
15 of fact"?

16 HON. F. SCOTT McCOWN: Say "Findings of fact
17 and conclusions of law are not appropriate."

18 MR. LOWE: "Are not appropriate."

19 MR. TIPPS: Yeah. I would say, "Paragraph
20 (j) does not require any other explanation or statement of
21 reasons." The next sentence and then final sentence,
22 "Findings of fact are not appropriate in summary judgment
23 rulings," or something like that.

24 MR. WATSON: "Does not permit findings of
25 fact."

1 MR. TIPPS: "Does not permit findings of
2 fact," because you would never have that.

3 CHAIRMAN BABCOCK: Judge Brister.

4 HONORABLE SCOTT BRISTER: Just to add to
5 what Judge McCown ably stated, the concern is on the
6 appellate -- again, putting aside the just state the
7 reasons, the concern is the appellate -- you know, our
8 concern is that appellants' lawyers are having to work too
9 hard, right, who are getting paid, maybe in Hatchell's
10 case at least, substantial fees for their time. So
11 because they're having to work too hard, we're going to
12 shift the work to the trial judge or not just -- and even
13 if the work's not that much, the risk of extra work,
14 because if I don't do the order right, it's coming back
15 down on some ground not stated and I get to try it, all of
16 which will be a waste; and, believe me, it is frustrating
17 to all of us when you try a long trial, it goes up on
18 appeal, and the court of appeals says, "You fools, this is
19 easy. There is a limitations issue," and throws it all
20 out. We have wasted everybody's time.

21 Why are we shifting work from appellants'
22 lawyers to trial judges? Now, remember, in the court of
23 appeals you get, how much, 15 minutes? And you have a
24 page limit. We don't have that in the trial court. I
25 have 800 cases filed in my court every year. I have to

1 dispose of 800 a year to keep my head above water. I
2 don't have -- I can -- if you give me all the staff, good
3 luck getting that from the Legislature, sure we can write
4 an opinion on every summary judgment like the Federal
5 judges do, and you will get to see us about as often as
6 you get to see a Federal judge because, of course, those
7 people don't write all those summary judgment opinions in
8 Federal court. They have scads of brand new lawyers to do
9 that for them, and that's who you will get your opinions
10 from.

11 I am happy to say, you know, "I think it's
12 1, 2, and 3." Remember, there is a couple of other things
13 we are not thinking of. No. 1, sometimes, for instance,
14 frequently you get a case where they say, "We're suing on
15 breach of contract," but there's a question about the
16 contract. In the alternative "We're suing quantum merit."
17 Can I grant that on all grounds? It can't be one and the
18 other. It is one or the other. And does it make sense,
19 for crying out -- I mean, I'm not going to be a judge
20 that's just going to grant them on all grounds. Maybe
21 some people will, but if you're expecting me to lie on
22 this so I can avoid future work, I'm not going to do it.
23 I'm going to grant on the ones that I think that are
24 right, and I'm not going to grant when under the law and
25 logic you can't do it on both of those grounds. It's one

1 or the other. Does it make sense to send it back down to
2 me because it's one rather than the other?

3 This is going to shift work to me because
4 appellate lawyers have to do some extra work. That's not
5 fair. Now, if you want to pay me by the hour, that would
6 be a different thing.

7 CHAIRMAN BABCOCK: Bill Dorsaneo.

8 PROFESSOR DORSANEO: Well, the first point
9 with respect to this whole paragraph or subdivision (i), I
10 think appellate lawyers -- it would be better to say
11 "unless they are asserted by the appellee in the appellate
12 court" rather than trying to decide whether it's a reply
13 point or a cross-point or an alternative ground for
14 affirmance denominated as such, and that will work, and we
15 can worry about whether the appellate rules need to be
16 adjusted --

17 MR. WATSON: That's fine.

18 PROFESSOR DORSANEO: -- as TRAP 38.6. On
19 the other point about what trial judges, you know, have
20 the resources to do in this context, here are my thoughts.
21 If as many as 40 percent of the cases that go to the
22 appellate court are summary judgment cases and this is,
23 you know, a very important part of our jurisprudence, the
24 motion for summary judgment has to state the specific
25 grounds, and the Supreme Court has said that that would be

1 a basis for reversal if the motion does not. If it's a no
2 evidence motion, it must state the specific element of the
3 claim or elements of the claims or elements of the claim
4 that are not supported by any evidence. So the motion has
5 to be, you know, nonopaque and articulate with respect to
6 a specification of the grounds upon which the motion is
7 sought.

8 How hard then is it for the trial judge to
9 demand of the movant that the order, you know, replicate,
10 you know, one or more of the things selected by the trial
11 judge from the motion? The fact that it isn't the
12 practice and it seems like it might be a lot of work, I
13 don't think will end up, you know, being what trial judges
14 think when they see it. It's not just shifting work from
15 trial judges to appellate lawyers from my perspective.
16 It's the trial judge doing what Scott Brister said, and
17 that's conscientiously looking at the motion and the
18 asserted grounds, selecting which ones are good and which
19 ones are bad, and then just writing that down in very
20 simple terms.

21 If some trial judges, once they decide that
22 one ground is good, think it's a good idea to grant the
23 motion on all grounds without considering them, or perhaps
24 even if he or she doesn't think that some of them are good
25 in order to get an affirmance, well, I don't think that's

1 -- you know, just one person's opinion, but I don't think
2 that's a good way for trial judges to act; and I think
3 that does shift a lot of work to the remainder of the
4 system, not just appellate lawyers but the appellate
5 courts, and creates a large amount of needless expense.

6 CHAIRMAN BABCOCK: Skip, then Buddy, and
7 then Steve.

8 MR. WATSON: I think that Judge Brister -- I
9 mean, I really do commend him because he's clearly saying
10 that -- Judge Patterson said it's the rare trial judge
11 who, you know, is not going to today sign an order that
12 just says "judgment granted," and a judge who will
13 conscientiously go through and, say, "Okay. I think 1 and
14 2 are good but the rest are bad," I -- frankly, I wish I
15 was practicing before you because I don't see that. For
16 the majority of the judges this isn't going to make a bit
17 of difference because all they're going to write is three
18 words, you know, "on all grounds" instead of "granted."
19 You know, "It's on all grounds," and for the majority
20 they're not going to be drafting their own orders. That's
21 really in a letter, and it's going to be my job as the
22 defense counsel or Chip's job or anyone else's job to
23 draft the order that even if it comes back and says "On
24 grounds 1 and 2," we're the ones that have to do the work
25 of putting that in the order to give to the judge in the

1 proper form, because we're the ones that have to uphold
2 that order, and that's where the work comes in.

3 Second, we're not -- I mean, I think I've
4 just said we're not shifting work from lawyers to judges,
5 but I guarantee you we're not shifting appellate work from
6 the lawyers to the judges because all this thing does,
7 once you get past "granted on all grounds," is shift the
8 workload from the appellant's lawyer to the appellee's
9 lawyer. That's all that's just happened here. No longer
10 does the appellant lawyer have to pick all 15 points,
11 assuming it doesn't say "on all grounds." The reality is
12 most of them are going to be the same, but we've satisfied
13 the appearance problem. We've done it with this, and
14 we've satisfied the Legislature. The workload for most
15 appellants is going to be the same.

16 In Judge Brister's court what's going to
17 happen is if it's on grounds 1 and 2 and I've done that
18 then I'm coming forward with exactly what Bill, Mike, and
19 I have been talking about. As appellee my workload has
20 gone up and say, "By the way, the court erred in not
21 granting on points 3 through 15," and I am going to bring
22 that forward in briefing. That's the only shift in
23 workload.

24 CHAIRMAN BABCOCK: Yeah. Buddy, Steve, and
25 then Judge Peeples. Then we will take a break.

1 MR. LOWE: There is nothing that says that
2 the judge has to show every ground he overrules. It
3 doesn't say that. Judge Davidson in Houston, we had the
4 arson case. We -- Crumbs and I argued about six grounds.
5 He said, "I'm not granting summary judgment on that
6 ground. I'm not granting it on that ground. One ground.
7 Put that in the order." I mean, it just wasn't really
8 difficult. I mean, I just don't think it's that
9 difficult.

10 CHAIRMAN BABCOCK: Yeah, I agree. Steve.

11 MR. YELENOSKY: Well, Judge Brister, as far
12 as shifting the work, you know, yesterday you were talking
13 about people on the other side of the Bar. I don't think
14 people on the other side of the Bar are going to be real
15 sympathetic to us looking at this as whether we're
16 shifting work from trial judges to appellate judges,
17 because if somebody is -- if a client has then lost on
18 summary judgment, the explanation is not, "Well, what
19 happened?" "Well, we just shifted the work to an
20 appellate court." It's not that they're fungible. You've
21 just lost your day in court, and there have been a lot of
22 comments about, you know, we don't want to decrease the
23 granting of summary judgment, but at the same time
24 comments that, well, in granting summary judgment it's
25 pretty clear that the judges aren't necessarily

1 articulating or maybe even aren't clear on the grounds
2 that it's being granted on. That's sort of the tail
3 wagging the dog that we want to make sure we have summary
4 judgment, and even if from some from dispassionate look at
5 the jurisprudence, maybe some of them shouldn't have been
6 granted.

7 CHAIRMAN BABCOCK: Final comment before our
8 break. Judge Peeples.

9 HONORABLE DAVID PEEPLES: Several brief,
10 brief points. First of all, on language changes, I think
11 virtually every language change that's been suggested is
12 good, and let me just tell you the ones that I'm inclined
13 to accept by agreement. On line No. 2, "other grounds in
14 the motion," I think that's fine. That's certainly what
15 we meant. I thought that whatever the TRAP rule is, used
16 to be 52 I think, that says if you don't urge it in the
17 trial court it's waived, I think that would have handled
18 this, but I see no reason --

19 MR. HATCHELL: Probably.

20 HONORABLE DAVID PEEPLES: -- not to add your
21 language, Mike Hatchell. And then "asserted by," we've
22 got "cross-point." I think "by appellee" is a good
23 suggestion and we should do it. There were some
24 suggestions about the comments, but frankly, that's up .
25 to --

1 MR. LATTING: What about "must"?

2 HONORABLE DAVID PEEPLES: Well, we haven't
3 talked about that, but I'm inclined to put "shall" or
4 "must" instead of "should." And then I was persuaded by
5 what Skip or somebody said about Comment No. 2, and then
6 the Supreme Court will have to decide whether they want to
7 use those are not, but I just think it's helpful to have
8 some reasoning.

9 Now, there have been some statements about
10 what the Legislature has done or not done. I think this
11 is my view on everything the Legislature does that we take
12 up. If they're right and they have a good point, we ought
13 to deal with it; and if they're wrong and they don't have
14 a good point, we ought to talk about it and if we decide
15 they're wrong, we ought to stand our ground; and if they
16 want to go forward and criticize the Supreme Court or pass
17 laws, we need to take whatever action we think is
18 appropriate; but I don't think it is our job to just jump
19 whenever the Legislature says, "We want something." Okay.
20 But on this it seems to me that, as Bill said, it's just a
21 fair thing to do, and that's why I'm in favor of it, but
22 not simply because some legislators wanted it.

23 Now, it seems to me that, you know, some
24 judges are going to look at this and think, "Oh, my gosh.
25 What am I going to do," and there are some judges that

1 will have problems with this. That's just the way it is.
2 They still can do a general order. If they want to remain
3 faceless and don't want to specifically sign off on
4 everything, they can do a general order that says "granted
5 on all grounds," which is what they can do now, and that's
6 what they can do.

7 I think a lot of people -- and myself
8 included, and I think I speak for the other trial judges
9 here. You know, I don't want my names in the books as
10 having granted everything if some of them are just
11 ridiculous. And so if I see that, I'm going to have to
12 decide it, to grant them on A, B, and C, and then if some
13 others are maybe plausible but maybe not, that's up to the
14 appellee; and the appellee, you know, if the appellee's
15 lawyer is not smart enough to bring forward additional
16 grounds, that is not my problem; and I don't think it
17 ought to be the problem of everyone in this room.

18 Now, will this discourage the granting of
19 summary judgment? Maybe, but for some judges it will, but
20 think about it. There's a judge who's got a case that has
21 no merit. Is that judge going to say, "I'm not going to
22 grant it. I might get reversed. I'm going to try the
23 thing." No. I don't think that very many judges are
24 going to decide to take on a trial of a case that has no
25 merit rather than say "granted on A and B" or "on all

1 grounds." Now, if judges can't deal with that, again, I
2 just am not going to lose sleep about their problem.

3 And then finally, Judge Brister mentioned
4 the very complicated rape premises case. It seems to me
5 that when we get cases like that in our court, we know
6 that if we make a dispositive ruling this case is going to
7 be taken up, and so you take a little more time with that
8 one, and if there are several grounds that go to the heart
9 of it and you think they are in the ballpark, I would
10 grant on all of those; but if I don't, the appellee ought
11 to be able to say, "As an alternative ground for
12 affirmance, we urge" -- whatever the ones are that you
13 didn't grant. It seems to me that that takes away all of
14 the problems with this rule.

15 CHAIRMAN BABCOCK: Okay. When we come back
16 from break we are going to take a vote on whether we
17 should have a rule or not. Not because I think that's
18 very controversial, but I want a record, and then assuming
19 that if we say we think that there should be a rule that
20 we recommend to the Court, then we're going to go over
21 line-by-line, and we've already had acceptance of some
22 suggestions. We're going to make sure that the rule is
23 the way we want it, and so that's how we're going to
24 proceed. We're in recess for --

25 HON. F. SCOTT McCOWN: Are we going to have

1 no further discussion?

2 CHAIRMAN BABCOCK: No, we're going to
3 discuss it.

4 HON. F. SCOTT McCOWN: Okay. You say we're
5 going to take a vote, but we're going to have a little
6 more discussion?

7 CHAIRMAN BABCOCK: We'll take a vote on
8 whether we have a rule or not. In other words, if people
9 think we don't need a rule at all.

10 HON. F. SCOTT McCOWN: Well, could I make
11 one comment then if you're cutting off debate?

12 CHAIRMAN BABCOCK: I'm not cutting off
13 debate.

14 HON. F. SCOTT McCOWN: Well, if we're going
15 to vote on whether we have a rule or not, there's going to
16 be no more debate on whether we have a rule or not.

17 CHAIRMAN BABCOCK: Well, I don't frankly
18 think that's -- I think the vote will be overwhelming that
19 we're going to have a rule. I just want that on the
20 record.

21 HON. F. SCOTT McCOWN: Well, if I could just
22 make one brief comment.

23 HONORABLE DAVID PEEPLES: I think we ought
24 to hear what he says. This is has been one of the best
25 discussions I've ever been privileged to be a part of, and

1 I think we ought to keep going on it as long as somebody
2 wants to say something.

3 HON. F. SCOTT McCOWN: I'm afraid Judge
4 Peeples was too persuasive, so I would like to make just
5 one more brief comment in rebuttal. This rule is very
6 controversial among the trial judges, and they are going
7 to be very upset about it, and I want this group to
8 understand why, because I think that's kind of
9 gotten lost. The question is not whether I'm a
10 conscientious judge or whether I'm not a conscientious
11 judge. It's if no matter how many duties you give me I
12 can do them all conscientiously. My point is I can be a
13 smart, hard-working, conscientious judge; and you cannot
14 keep piling on duties in cases and expect that I will do
15 everything that the reasonable judge would do with an
16 appropriate caseload and appropriate staff.

17 A judge who has a firm conviction that
18 summary judgment should be granted ought to be able to
19 grant it; and the case and the entire dispute should then
20 move to the appellate court; and if you ask that judge to
21 take the next step and sort out what grounds he's going to
22 grant it on and what grounds he's not going to grant it
23 on, you're asking that judge to do something he doesn't
24 have the time or resources to do; and I do think it will
25 discourage summary judgment because I'm not going to have

1 to try it. I'm going to deny it, and you guys are going
2 to have to go settle it.

3 CHAIRMAN BABCOCK: Okay. When we have our
4 vote on whether we're going to have a rule at all, if
5 anybody wants to amplify what Judge McCown said, we'll
6 discuss that. I wasn't trying to cut off debate. I was
7 just trying to structure debate.

8 (Recess from 10:23 a.m. to 10:37 a.m.)

9 CHAIRMAN BABCOCK: We're back on the record
10 and we're about to take a vote on Scott McCown's motion to
11 not have a rule at all; and Scott, Judge McCown, just gave
12 a statement before we broke about perhaps why we shouldn't
13 even have a rule; and we'll open that up for a brief
14 discussion; and Judge McCown has correctly chastised me
15 for predicting the outcome of this vote as being
16 overwhelmingly in favor of having a rule. So maybe I
17 spoke too soon in light of Judge McCown's eloquence.

18 MR. LOWE: Well, now --

19 MR. LATTING: No, don't say that.

20 MR. LOWE: He practices here in Austin, so
21 he doesn't want me to --

22 CHAIRMAN BABCOCK: Buddy from Beaumont has
23 got an idea about maybe strengthening the rule.

24 MR. LATTING: No, no, no. That was a joke.

25 MR. LOWE: Joe has told me not to do that

1 because it involves such words as judges that are too lazy
2 to do this or that, so I would never say -- so just forget
3 that.

4 MR. LATTING: Thank you very much, Buddy. I
5 really appreciate that. I didn't say that.

6 CHAIRMAN BABCOCK: The proposal maybe just
7 was that there be a comment condemning any judge who
8 didn't state the grounds.

9 HONORABLE JAN PATTERSON: Sanctions.

10 MS. GARCIA: Sanctions. That's it.

11 MR. LATTING: I sense an outrage in the
12 committee.

13 HONORABLE JAN PATTERSON: The record reflect
14 that those were not serious comments.

15 CHAIRMAN BABCOCK: That was made in good
16 humor and jest. Now, back to serious business, does
17 anybody want to speak on the issue of whether or not we
18 should have a rule at all? I mean, there's a body of
19 opinion that says we should not. John Martin.

20 MR. MARTIN: Chip, I realize the political
21 expediency that we may need to have a rule, and I have
22 heard what Judge Hecht says, but philosophically I'm
23 against having a rule. I think it's nice to say that
24 judges need to articulate their reasons for their rulings,
25 but there's lots of other examples of where they don't and

1 they probably never will. One good example is granting a
2 new trial after a six-month jury trial. They can grant a
3 new trial without articulating the reasons, so I don't see
4 any reason why they ought to have to articulate the reason
5 for this.

6 CHAIRMAN BABCOCK: Okay. Judge Brister.

7 HONORABLE SCOTT BRISTER: Yeah. That's a
8 good point. Why is the Legislature -- is it politic for
9 us to ask why is the Legislature worried only about
10 reasons for summary judgments being granted but not
11 concerned at all about throwing out verdicts, after a jury
12 has reached a verdict, throwing it out and saying, "We're
13 going to do it all over again."

14 MR. MEADOWS: They probably haven't
15 gotten to that yet.

16 PROFESSOR DORSANEO: Well, it's not
17 reviewable. That's why.

18 HONORABLE SCOTT BRISTER: If the answer is
19 because of politics, because it's plaintiffs versus
20 defendants issue then I want no part of it, and I don't
21 think we should have any part of that. I don't think we
22 should get involved in that. That's why this committee is
23 balanced, and I sure don't want to get into a
24 plaintiffs/defendants thing. If all the rule says is the
25 first sentence "judges should state," on the one hand I'm

1 in favor of that rule, but on the other hand, that's not
2 really a rule. We ought to put that in a comment, the
3 "judges should state".

4 CHAIRMAN BABCOCK: Yeah, we will get to the
5 specifics in a minute if we vote to have a rule. Wallace
6 Jefferson.

7 MR. JEFFERSON: You know, quite apart from
8 the politics, I've always had trouble with a judge who
9 says, "I don't have to tell you why I'm ruling the way I'm
10 ruling," and try to explain that to a client, and I think
11 the issue made about the new trial, same thing. I'm very
12 concerned about that. There have been several cases -- I
13 don't try the cases myself, but you know, I'm ready there
14 to defend the case up in judgment on appeal, and all of
15 the sudden the trial court says, "I'm granting a new
16 trial. I don't have to tell you why I'm granting a new
17 trial. I'm just doing it for whatever reason, and I'm not
18 going to explain it."

19 I don't think this rule will force judges,
20 many of those same judges I'm talking about, to articulate
21 the judges for summary judgment; but I think in terms of
22 what the rules are at least seeking from judges, it's
23 consistent with the way I think judges ought to rule.
24 We're seeking consideration, deliberation, and
25 articulation of the basis for a ruling; and we can't force

1 the judge to do that; but I think it's proper to ask them
2 or to remind them that that's part of their duties sitting
3 on the bench. So I think it's a valid rule, and I support
4 it, and I hope the committee does.

5 CHAIRMAN BABCOCK: Okay. Cindy and then
6 Buddy.

7 MS. GARCIA: If the basis or the purpose for
8 the initial idea for proposing a rule was so that
9 litigants would understand or at least know some basis for
10 the granting of a motion then I'm for it, and for one
11 reason. I represent clients that do business all over the
12 state and may be involved in litigation throughout the
13 state, and they happen to come to a certain jurisdiction
14 where the same basis of as a matter of law the motion for
15 summary judgment is filed and a similar type of cause of
16 action in Dallas County versus Bexar or Hidalgo or Cameron
17 or whatever, and in the other jurisdictions, for example
18 -- and in certain jurisdictions the motion is granted as a
19 matter of law, but in other jurisdictions where summary
20 judgments are not commonly granted, it's just denied. If
21 you get denial after six months to a year where it sits,
22 forcing the issue I heard here earlier in I think some
23 judges' minds that "I'm going to force you to a settlement
24 posture, up the ante a little bit, or make you try the
25 case."

1 So I think when you look at those kind of
2 situations where you have clients that do business all
3 over and they wind up having cases, they're asking us as
4 lawyers, "Why is it that, you know, the same type of cause
5 of action that's being defended by a lawyer in another
6 county, they get a summary judgment, and I come over here
7 and I can't get one?" Well, I can't explain that to them,
8 but maybe if we had a basis or a reason, whether it's
9 going to happen or not, you know, that's a different
10 issue, but if the purpose and the reasoning behind it is
11 that there be an explanation then I'm for it.

12 CHAIRMAN BABCOCK: Buddy.

13 MR. LOWE: Chip, I don't see this -- today
14 Judge Brister said something about plaintiff/defendant.
15 I'd never even thought of that or heard of that here. I
16 don't see it that way, but I do see it this way. The
17 court is not his court. The court is the people's court.
18 I work for the people, the lawyers do, and apparently
19 through the Legislature some people have spoken and enough
20 of them must have talked to their constituents. They want
21 to know why, and perhaps people are entitled to know, and
22 just because they don't know on other rules don't mean
23 that -- it doesn't mean that we don't do something to this
24 one just because something else is bad. Period.

25 CHAIRMAN BABCOCK: Richard then Stephen.

1 MR. ORSINGER: I think that these other
2 rulings that keep the case in the trial court, we don't
3 have the same compulsion, at least from an appellate
4 standpoint, to require that they articulate the grounds,
5 because they are not reviewable by a higher court; but if
6 you're going to appeal a case that's either been tried to
7 the court on the merits, tried to a jury on the merits, or
8 it's been tried on summary judgment on the merits and if
9 you try it to a court on the merits, you're entitled to
10 findings of fact and conclusions of law. If you try it to
11 a jury you're entitled to a jury charge, but if you try it
12 on summary judgment, you don't know; and I don't see why a
13 final disposition in a case on summary judgment we
14 shouldn't know why somebody lost and somebody won but in
15 the other two areas we should. So to me this is just
16 parody.

17 CHAIRMAN BABCOCK: Stephen Tipps.

18 MR. TIPPS: I just have two points. First,
19 I remain skeptical that there is really a problem, and I
20 remain concerned that we're responding to Mrs. Green's
21 dissatisfaction at the outcome of her case, because I
22 haven't really heard much other evidence that there is a
23 problem.

24 Second, I would essentially point out that
25 if we enact a rule here, we're imposing upon judges a

1 burden with regard to granting summary judgments that they
2 do not have with regard to granting directed verdicts,
3 that they do not have with regard to granting
4 judgments NOV; and in both of those cases you can just
5 grant the judgment, grant the directed verdict without
6 having to state your reasons; and logic, I think if we do
7 this here then we would have to do it in those areas, too;
8 and I just think we are asking too much of trial judges;
9 and I think as a result trial judges are going to be less
10 willing to make the kinds of hard decisions that I think
11 they need to make in order to make the system work.

12 CHAIRMAN BABCOCK: Judge Patterson.

13 HONORABLE JAN PATTERSON: But I'm not sure
14 I've seen a case where they didn't give a reason for
15 granting the directed verdict or NOV. You know, I think
16 that is less of a problem. One consideration that I have
17 is that -- and my concern really is if I can tell a lawyer
18 that he can save his client 10 or \$20,000 by not having to
19 brief then I think that that's a worthy goal for our
20 system. If I thought that we were just shifting that same
21 cost, not to the judges, but from appellant's lawyers to
22 appellees, that would cause me some concern, and I think
23 that that won't happen for this reason. If appellant
24 briefs five extra points, the appellee still has to
25 respond to those points. Even though appellee might have

1 to do something to preserve it under this new rule, I
2 think it's less than they would be called upon and they
3 would have to respond to the appellant's points anyway.
4 so I don't think it's strictly a cost shifting, and I
5 agree that I don't view this as political in any way. I
6 think that the concerns are those of the district judge,
7 and I honor and respect that, and that concerns me a great
8 deal, but I think that in the interest of our system and
9 accessibility and reducing costs and making it a fairer
10 system, I think that the rule works.

11 CHAIRMAN BABCOCK: Yeah, Bobby.

12 MR. MEADOWS: If we really want to reduce
13 the transaction and cost of litigation we ought to
14 encourage the use of summary judgment, and I oppose this
15 rule because it discourages the use of it. Judge Peeples
16 made effective use of the idea that a trial judge which
17 would try a case as opposed to grant a meritorious motion
18 for summary judgment. I'm going to tell you that that
19 happens. It's not that that case actually goes to trial
20 immediately, but a good motion for summary judgment is
21 often ignored or denied to force the parties to settle the
22 case or do something that increases the transaction and
23 cost of litigation. So in my practice I see good motions
24 for summary judgment that are either denied or ignored
25 often.

1 CHAIRMAN BABCOCK: Okay. Yeah, Elaine.

2 PROFESSOR CARLSON: I am in favor of
3 requiring the trial judge to state the grounds for a
4 summary judgment. I mean, this is a final disposition for
5 a litigant and I think -- and I'm really mindful of Judge
6 Brister's comments on litigation resources and that we
7 really ought not to overburden the trial judges
8 needlessly, but I do believe this is an area in which the
9 courts should be burdened. If you're going to dispose of
10 someone's case, finality, I think they have a right to
11 know the reasons, and I also like the idea of it being
12 obligatory, and I like the idea of shifting the burden to
13 the appellee. I think then if hope springs eternal and a
14 trial judge does state a specific ground, that allows the
15 appellant to focus fully in their brief on that ground,
16 which at least intellectually that would lead me to
17 believe the appellate court will have better briefing
18 before it on the ground, and I think it solidifies the
19 basis for the court's order and that that does serve the
20 parties.

21 CHAIRMAN BABCOCK: All right. I think we're
22 ready to vote on the preliminary question of whether or
23 not we should have a rule at all. So everybody in favor
24 of having some rule -- and we'll get to the details in a
25 minute -- raise your hand.

1 And all opposed? It carries by a vote of 19
2 to 8.

3 Okay. Let's go to Judge Peeples' language,
4 and the first sentence says, "An order granting summary
5 judgment should state the ground or grounds on which the
6 motion was granted." Let's have discussion on that. I
7 think there's one person said it ought to be changed from
8 "should" to "must." How do we feel about that? Wendell.

9 MR. HALL: Well, I agree with what Mike
10 Hatchell said that it should say "must" or "shall," and
11 then I would also encourage in the comment that we make
12 sure that if it doesn't state the grounds that this is
13 abated and not reversed and remanded, because that would
14 be a real waste of judicial resources, and I think some
15 courts might think they have to reverse it and remand
16 instead of abating and asking the trial judge to just
17 amend the summary judgment order and sending that order up
18 to the court.

19 CHAIRMAN BABCOCK: Okay. Does anybody have
20 a preference between "must" and "shall"? Judge Peeples?

21 HONORABLE DAVID PEEPLES: I think we ought
22 to make it -- it ought to be mandatory rather than
23 "should," and isn't "must" correct?

24 CHAIRMAN BABCOCK: Okay. "Must." Anybody
25 opposed to inserting "must"? I see no hands, so "must" it

1 is.

2 And what other comments about this sentence,
3 "An order granting summary judgment must state the ground
4 or grounds on which the motion was granted."

5 HONORABLE DAVID PEEPLES: Let me suggest
6 something that was mentioned to me during the break on the
7 issue of whether this would discourage summary judgment.
8 Someone said how about saying "an order granting or
9 denying summary judgment must state the grounds" and that
10 way judges, if they are going to deny that, they have to
11 say something like "All the grounds were no good," I
12 guess. That was suggested somewhere down here. I thought
13 I would throw it out for discussion.

14 CHAIRMAN BABCOCK: Well, let's talk about
15 that.

16 MR. ORSINGER: There's no appellate review.
17 There's no appellate review to the denial of the summary
18 judgment unless you're in one of the statutory areas like
19 1st Amendment or governmental immunity. There it makes
20 some sense, but otherwise, you're going to have a trial
21 process that will sort out for the litigants for what the
22 truth is, so --

23 HONORABLE DAVID PEEPLES: The idea, Richard,
24 was that if the spineless judge thinks, "Gosh, I'm going
25 to deny this because I don't want to have to state the

1 grounds," make him state grounds either way.

2 HONORABLE SCOTT BRISTER: Mrs. Green might
3 be the nonmovant. Mrs. Green might want to know why it
4 was denied. I mean, are all the Mrs. Greens on one side?

5 HON. F. SCOTT McCOWN: Wait a minute. Wait
6 a minute. It's not the spineless trial judge. I may well
7 have a motion for summary judgment, and I'm torn, and I
8 decide I'm going to deny it. I just want to say "denied."
9 I don't want to say, "It's no good," because then when the
10 same issue comes up on directed verdict I may decide I'm
11 going to grant it, and I don't want to have the lawyer
12 that I'm granting it against say to me, "Wait a minute.
13 You wrote your name to this piece of paper that said it
14 was no good and now you're granting it"; or if it's a no
15 evidence summary judgment, I may be denying it because it
16 comes in before the discovery period and granting it after
17 the discovery period. I mean, I --

18 CHAIRMAN BABCOCK: Do we have consensus that
19 we can abandon that as a bad idea?

20 HONORABLE DAVID PEEPLES: If the people who
21 told me that don't want to defend it, I'm not going to
22 push it.

23 One other thing, Chip, on abatement,
24 abatement of appeal, now, how would that work if -- the
25 appellant has to write a brief before it would get to

1 abatement, wouldn't he?

2 MR. ORSINGER: We have the same problem
3 right now.

4 MR. HALL: I would think on an intake
5 procedure when they bring it in and look at it on
6 jurisdictional grounds, if they see an order that doesn't
7 state the grounds, couldn't the appellate court just issue
8 an order abating, sending it back to the trial court,
9 saying, "Trial court, state your grounds".

10 CHAIRMAN BABCOCK: Wouldn't that be in the
11 TRAP rules if it's anywhere?

12 MR. ORSINGER: Yeah. And let me tell you,
13 we have that problem right now where you don't have
14 findings but you have requested and preserved, and it's a
15 problem. I mean, sometimes I file a motion, and sometimes
16 it's my first point of error, and if it's my first point
17 of error and I raise it in oral argument, that's -- it's a
18 problem, but it's no bigger a problem with this rule than
19 it is with a nonjury trial.

20 CHAIRMAN BABCOCK: Let's get through this
21 rule, but let's reserve that issue for the TRAP rules.
22 Don't you think?

23 PROFESSOR DORSANEO: Uh-huh.

24 CHAIRMAN BABCOCK: That's fine. Bill's
25 still got his hand up, so go ahead.

1 PROFESSOR DORSANEO: The only thing I would
2 suggest, we might want to look at the first comment. It
3 matches this idea of changing "should" to "must," and it's
4 the same subject. Say, "New paragraph (j)," you know,
5 "requires courts to specify the grounds." It's the same
6 issue.

7 CHAIRMAN BABCOCK: Gotcha. Okay. On the
8 first sentence, anything else? "An order granting summary
9 judgment must state the ground or grounds on which the
10 motion was granted." Anything else?

11 Okay. Let's go to the next sentence. "No
12 judgment may be affirmed on other grounds" -- and I think
13 Judge Peebles has inserted "in the motion" -- "unless they
14 are asserted" -- and I think Judge Peebles has inserted
15 "by appellee by cross-point."

16 PROFESSOR DORSANEO: Just "by the appellee."

17 MR. TIPPS: "By the appellee," period.

18 CHAIRMAN BABCOCK: "By the appellee," period.

19 PROFESSOR DORSANEO: "In the appellate
20 court."

21 MR. TIPPS: Yeah.

22 CHAIRMAN BABCOCK: "In the appellate court
23 as alternative grounds for affirmance," period. Any
24 further comments on that?

25 MR. LATTING: Well, yeah, I have something

1 on that.

2 CHAIRMAN BABCOCK: Joe.

3 MR. LATTING: I have a rhetorical question,
4 and that is -- well, it's the issue that we have been
5 discussing. Why require the appellee to bring something
6 forward to -- and brief and spend his time, as Jan was
7 saying a minute ago, why require briefing money to be
8 spent in either cross-points or whatever you call them in
9 the appellate court when nobody has -- is contending about
10 that? You file a six-point motion for summary judgment
11 we'll say. The trial judge grants it on ground No. 1. It
12 is appealed on ground No. 1 by the losing party. Now, why
13 should I as appellee have to respond to that appeal and
14 also brief all the other --

15 MR. TIPPS: You're not going to have to.

16 MR. GILSTRAP: You don't have to. It's
17 optional.

18 MR. SUSMAN: If you think the judge was
19 wrong, ruling in your favor but for the wrong reason --

20 MR. LATTING: Yeah.

21 MR. SUSMAN: -- and you have a stronger
22 reason in support of your motion for summary judgment then
23 you ought to raise that as a cross-point as an appellee.

24 MR. LATTING: Well, that's the issue.
25 Should I ought to raise it? Should I have to raise it?

1 MR. SUSMAN: Well, yeah, because otherwise
2 they shouldn't have to reach down and brief -- you know,
3 decide it without briefing. I mean, it's fair notice.
4 You're saying, "I made it on six grounds. The judge
5 granted it on one. I really think another is much
6 stronger. The other four I don't care about at all," so
7 why shouldn't those be the two grounds that are briefed?
8 The one he granted on and the one you think he should have
9 granted on. Forget about the other four.

10 MR. TIPPS: But it's up to you.

11 CHAIRMAN BABCOCK: Yeah. Your call.

12 MR. LATTING: Even though it has not been
13 appealed by the appellant?

14 MR. GILSTRAP: The case has been appealed.

15 MR. LATTING: The case has been appealed and
16 it said -- well, but the appeal says, "The trial court was
17 in error in granting this summary judgment on ground No.
18 1."

19 CHAIRMAN BABCOCK: Right. The appellant's
20 not going to appeal the --

21 MR. LATTING: Yet in order to protect my
22 record I have to defend the trial court's action on
23 something on a basis that he didn't articulate and was not
24 a basis for his granting it and that the appellant --

25 MR. SUSMAN: You don't have to.

1 MR. LATTING: -- has not brought forward.
2 Yeah, but if I don't, I run the risk of a reversal on a
3 point that nobody thought was even at issue.

4 CHAIRMAN BABCOCK: Yeah. You only raise it
5 if you want to maximize your chances of winning.

6 MR. ORSINGER: Well, I would point out --

7 MR. LATTING: That's right, and so I will do
8 so in every case.

9 MR. ORSINGER: Well, fine.

10 MR. LATTING: I will brief every issue
11 whether I need to or not.

12 MR. GILSTRAP: Only if you think it's a good
13 issue.

14 MR. SUSMAN: Why would you do that? Why
15 would you brief stupid issues in the court of appeals?

16 MR. LATTING: Because the horror of being
17 reversed on a point I didn't even brief and nobody has
18 raised. Well, why didn't you brief that?

19 JUSTICE HECHT: That can't happen.

20 CHAIRMAN BABCOCK: That can't happened.

21 MR. HATCHELL: That can't happen.

22 JUSTICE HECHT: The court of appeals can't
23 reverse you on a point that nobody briefs.

24 PROFESSOR DORSANEO: We don't want the court
25 of appeals doing things on its own.

1 MR. LATTING: Okay. All right.

2 HONORABLE SCOTT BRISTER: You can't trust
3 those people.

4 CHAIRMAN BABCOCK: All right, next.
5 Richard.

6 MR. ORSINGER: I don't think it's
7 fundamentally unfair what Joe is saying, because he
8 actually lost in the trial court on these alternative
9 grounds, so if you can't persuade the trial court then
10 what's wrong with having to brief to persuade the court of
11 appeals?

12 CHAIRMAN BABCOCK: Joe is stepping down on
13 his --

14 MR. LATTING: I'm stepping down. It's late
15 in the day.

16 CHAIRMAN BABCOCK: What else on this
17 sentence? Everybody else like this sentence?

18 MR. WATSON: Could you read it one more
19 time?

20 CHAIRMAN BABCOCK: Sure. "No judgment may
21 be affirmed on other grounds in the motion unless they are
22 asserted by appellee in the appellate court as alternative
23 grounds for affirmance."

24 MR. WATSON: I think that "on other grounds
25 in the motion," aren't we trying to -- it was originally

1 to be "on other grounds in the order," right?

2 PROFESSOR DORSANEO: No.

3 CHAIRMAN BABCOCK: No, no, no.

4 PROFESSOR DORSANEO: "In the motion."

5 CHAIRMAN BABCOCK: No, "in the motion."

6 MR. ORSINGER: Maybe it ought to say "stated
7 in the motion."

8 HONORABLE DAVID PEEPLES: "Stated in the
9 motion." Yeah.

10 MR. ORSINGER: "Other grounds stated in the
11 motion."

12 MR. WATSON: Yeah, something like that.

13 CHAIRMAN BABCOCK: "Stated"? Is that all
14 right, David?

15 HONORABLE DAVID PEEPLES: Yeah.

16 MR. ORSINGER: And should we say "no summary
17 judgment may be affirmed" rather than "no judgment may be
18 affirmed"?

19 CHAIRMAN BABCOCK: This is the summary
20 judgment rule, and it's been reduced to "judgment." Okay.
21 Any other comments about this?

22 MR. GILSTRAP: I do.

23 CHAIRMAN BABCOCK: Yes, Frank.

24 MR. GILSTRAP: Mike Hatchell raised this
25 earlier. Do we need to make it clear that if the appellee

1 fails to raise the issue by cross-point or whatever, then
2 it's waived? I think we all agree that's the way the rule
3 should work. My only concern is that in Rule 38(c), the
4 rule expressly says the failure to bring forth
5 cross-points shall constitute a waiver. I don't want
6 someone coming in and saying, "Well, you didn't put a
7 similar provision in this rule. Therefore, we're
8 presuming that the language in 324(c) means something and
9 by inference it's not waived." We either need to put it
10 in here or make it clear on the record that we intend for
11 it to be waived.

12 CHAIRMAN BABCOCK: How could a judgment be
13 affirmed on another ground unless asserted by the appellee
14 and it not be waived? It's not asserted by the appellee.

15 MR. GILSTRAP: No. The point is that if the
16 appellee doesn't bring forth a ground by cross-point, it
17 is waived, and it can't be affirmed on that ground.

18 HON. F. SCOTT McCOWN: Is the case remanded
19 or is the judgment -- I guess that's the issue, isn't it?

20 CHAIRMAN BABCOCK: It's remanded.

21 HON. F. SCOTT McCOWN: If you appeal on one
22 issue, you filed your motion on two. The judge granted on
23 1. You defend on 1. 1 is reversed. Now, does it go back
24 for the judge to then decide 2, or is 2 waived?

25 HONORABLE DAVID PEEPLES: It goes back to be

1 pending on the judge's docket.

2 MR. ORSINGER: 2 is not waived.

3 PROFESSOR DORSANEO: It's not waived in any
4 significant sense. It's still in the case.

5 MR. GILSTRAP: It may be waived on appeal.

6 MR. ORSINGER: But you should have briefed
7 in an appellee's brief, and then you'd have gotten it
8 taken care of the first time.

9 CHAIRMAN BABCOCK: If it's not appealed, the
10 appellate court is not going to decide it.

11 HON. F. SCOTT McCOWN: That's what I'm
12 asking. I'm just trying to get clear that it goes back
13 and the trial judge could, I suppose, grant it on that
14 ground.

15 MR. ORSINGER: Absolutely. Absolutely.

16 HON. F. SCOTT McCOWN: Okay.

17 MR. ORSINGER: But you can pre-omit all that
18 by just raising it in your appellee's brief and let the
19 court of appeals rule on whether the summary judgment is
20 good on the alternate ground.

21 CHAIRMAN BABCOCK: Anything else about the
22 two sentences in proposed subparagraph (j)?

23 MR. TIPPS: Are we going to go to the
24 comment?

25 CHAIRMAN BABCOCK: We are going to go to the

1 comments in a minute, but we're going to try to approve
2 the rule first. Then we're going to go to that.

3 MR. MEADOWS: Let's vote.

4 CHAIRMAN BABCOCK: Okay. Everybody in favor
5 of (j) as amended, raise your hand.

6 All right. Everybody against? By a vote of
7 24 to 2 it passes.

8 All right. Let's go to the comment.
9 Comment 1, "New paragraph (j) requires courts to specify
10 the grounds on which they have granted a motion that urged
11 multiple grounds." Any comments on that sentence?

12 All right. No comments on that sentence.
13 Second sentence, "When an order specifies grounds, the
14 appellant will have to challenge only the grounds on which
15 the trial court rested its ruling." Any comments to that
16 sentence? Yeah.

17 MR. DUGGINS: Won't that create a problem if
18 the appellee asserts other grounds as alternative grounds
19 for affirmance?

20 MR. YELENOSKY: No, next sentence.

21 MR. WATSON: Keep reading.

22 MR. ORSINGER: Couldn't you say, "The
23 appellant need challenge" rather than "will have to"?

24 MR. WATSON: Yeah.

25 MR. ORSINGER: Just say, "The appellant need

1 challenge only" rather than "will have to challenge only."

2 MR. YELENOSKY: You could say "the
3 appellant's brief."

4 MR. ORSINGER: Well, we don't want to force
5 it to --

6 CHAIRMAN BABCOCK: Hold it. Hold it. The
7 court reporter can't keep up on that. Steve.

8 MR. YELENOSKY: Well, I was just going to
9 say, I mean, because of Ralph's point that they may have
10 to respond later and the next sentence addresses that to
11 just say, "When an order specifies a ground, the
12 appellant's brief" so that you're not -- "need challenge,"
13 so that you're not precluding the fact that they may have
14 to respond in a reply.

15 CHAIRMAN BABCOCK: Okay. Stephen Tipps.

16 MR. TIPPS: I would take out the dependent
17 clause because we have required that the order specify
18 grounds, and so in every case the order is going to
19 specify grounds, so we don't need to have "when."

20 MR. ORSINGER: No, no. The judges may
21 disregard it. I don't know. We need to be careful.

22 HONORABLE DAVID PEEPLES: It might be a
23 general order.

24 MR. TIPPS: No.

25 CHAIRMAN BABCOCK: Yeah.

1 MR. TIPPS: Okay. You're right. Withdraw
2 my comment.

3 CHAIRMAN BABCOCK: All right. So we say,
4 "When an order specifies grounds, the appellant's initial
5 brief," is that what you're saying?

6 MR. ORSINGER: No. "Appellant's brief" is a
7 term of art, and it means the appellant's initial brief.

8 CHAIRMAN BABCOCK: Judge Peeples, do you
9 want to add that?

10 HONORABLE DAVID PEEPLES: Fine. Fine.

11 CHAIRMAN BABCOCK: "Appellant's brief need
12 challenge"?

13 HONORABLE DAVID PEEPLES: I don't like that.
14 I'm willing to be persuaded.

15 MR. ORSINGER: You don't?

16 HONORABLE DAVID PEEPLES: What's wrong with
17 "will have to"? We're not saying you have got to appeal
18 the case, but if they do appeal, don't they have to
19 challenge the grounds or lose?

20 PROFESSOR DORSANEO: "Will have to respond."

21 MR. TIPPS: I would say "the appellant's
22 brief must challenge."

23 MR. ORSINGER: I will withdraw it if you
24 don't like it.

25 HONORABLE DAVID PEEPLES: Well, I just

1 didn't like "need challenge."

2 MR. ORSINGER: Well, I just don't like "will
3 have to," but I don't care. Let's move on.

4 HON. F. SCOTT McCOWN: How about "must"?

5 HONORABLE DAVID PEEPLES: "Must." "Must."

6 CHAIRMAN BABCOCK: Everybody okay with
7 "must"? Okay. "Must." Any other comments on this
8 sentence?

9 MR. MARTIN: How about "based" instead of
10 "rested"?

11 CHAIRMAN BABCOCK: What?

12 MR. MARTIN: How about "based" instead of
13 "rested"?

14 HONORABLE DAVID PEEPLES: Yeah. "Based."

15 CHAIRMAN BABCOCK: "Raised"?

16 HONORABLE DAVID PEEPLES: "Based."

17 MR. MARTIN: "Based."

18 HONORABLE DAVID PEEPLES: Good.

19 CHAIRMAN BABCOCK: Okay. "Based its
20 ruling." Any other comments on this sentence?

21 HON. F. SCOTT McCOWN: Because under this
22 rule there will be no rest for the trial judge.

23 CHAIRMAN BABCOCK: That's right. Wait 'til
24 you get to the fourth comment that Buddy wants to put in
25 here.

1 "If the appellee's brief brings forward
2 additional grounds for affirmance, the appellant will be
3 able to address them in a reply brief."

4 MR. ORSINGER: How about "may address"?

5 MR. DUGGINS: I would suggest you use the
6 word "assert" to track the rule.

7 HONORABLE DAVID PEEPLES: "Assert" instead
8 of "address"?

9 MR. DUGGINS: Yes.

10 HONORABLE DAVID PEEPLES: But they are not
11 asserting a ground. They are replying to a ground, aren't
12 they?

13 MR. MARTIN: Well, you're saying if the
14 appellant brief asserts --

15 HONORABLE DAVID PEEPLES: Oh, no, "assert"
16 is right.

17 CHAIRMAN BABCOCK: Okay. Where are we
18 changing?

19 HONORABLE JAN PATTERSON: Instead of "bring
20 forward," "asserts".

21 CHAIRMAN BABCOCK: Oh, okay. Is that all
22 right, David?

23 HONORABLE DAVID PEEPLES: Yeah.

24 MR. ORSINGER: I would move that we say "the
25 appellant may address them" rather than "will be able to."

1 HON. F. SCOTT McCOWN: How about just say
2 "the appellant may respond" or "must respond"?

3 MR. LOWE: What if they don't want to file a
4 response?

5 HON. F. SCOTT McCOWN: Well, "may respond."

6 PROFESSOR DORSANEO: It's "may." They don't
7 have to respond.

8 MR. ORSINGER: I think we ought to say
9 "may."

10 HONORABLE DAVID PEEPLES: "May address"?

11 CHAIRMAN BABCOCK: What are we going to say?
12 "The appellant may address them in a reply brief"?

13 HON. F. SCOTT McCOWN: How about "may
14 respond to them in a reply"?

15 CHAIRMAN BABCOCK: Okay. Is that okay with
16 you, David?

17 MS. BARON: You don't respond in a reply
18 brief.

19 HON. F. SCOTT McCOWN: You don't respond in
20 a reply brief?

21 MR. HALL: You don't respond in a reply
22 brief.

23 HON. F. SCOTT McCOWN: Well, you would here,
24 wouldn't you?

25 MR. ORSINGER: Well, you reply.

1 MR. YELENOSKY: She's saying you reply in a
2 reply brief.

3 MR. ORSINGER: A response is the response to
4 the reply. It's arcane.

5 HON. F. SCOTT McCOWN: "May reply."

6 HONORABLE DAVID PEEPLES: Well, you don't
7 want to say "reply in a reply brief," do you?

8 MR. ORSINGER: That's better than "respond
9 in a reply brief."

10 MS. BARON: Right, it is.

11 MR. YELENOSKY: "The reply brief may address
12 them."

13 CHAIRMAN BABCOCK: "The appellant may
14 respond to them in a reply brief."

15 HON. F. SCOTT McCOWN: Nope. You can't
16 respond, they're telling me.

17 MR. ORSINGER: This is the kind of stuff the
18 appellate rules subcommittee argues over all day long.

19 CHAIRMAN BABCOCK: We're not going to do
20 that.

21 MR. TIPPS: Once you resolve this dispute I
22 have another comment.

23 CHAIRMAN BABCOCK: Oh, really. Okay. Hang
24 on.

25 HONORABLE DAVID PEEPLES: Is "may address

1 them in a reply brief" okay?

2 MS. BARON: Yes. Yes.

3 HONORABLE DAVID PEEPLES: Done.

4 CHAIRMAN BABCOCK: "May address them in a
5 reply brief." Okay. Stephen Tipps.

6 MR. TIPPS: My comment is to conform with
7 the rule we ought to say, "alternative grounds for
8 affirmance" rather than "additional grounds for
9 affirmance".

10 CHAIRMAN BABCOCK: Good point.

11 PROFESSOR DORSANEO: That's a good point.

12 CHAIRMAN BABCOCK: Okay. Any other comments
13 on this sentence? Okay. Let me read -- yeah.

14 HONORABLE TOM LAWRENCE: I want to go back
15 to the first sentence for a second. We say "New paragraph
16 (j) encourages" --

17 HONORABLE DAVID PEEPLES: No, "requires."

18 CHAIRMAN BABCOCK: "Requires."

19 HONORABLE TOM LAWRENCE: Yeah, change it to
20 "requires."

21 CHAIRMAN BABCOCK: Yes, sir. Let me read
22 the whole comment now. "New paragraph (j) requires courts
23 to specify the grounds on which they have granted a motion
24 that urged multiple grounds. When an order specifies
25 grounds, the appellant's brief must challenge only the

1 grounds on which the trial court based its ruling. If the
2 appellee's brief asserts alternative grounds for
3 affirmance, the appellant may address them in a reply
4 brief." Yeah, Steven.

5 MR. YELENOSKY: Well, just back to the other
6 comment about taking out "when an order specifies
7 grounds." Although you can't force a judge to do it, it
8 is kind of incongruous to say in the first sentence they
9 are required to and in the second sentence acknowledging
10 that they may not; and if a judge files a general order, I
11 mean, there's nothing to do but to reply to that.

12 HONORABLE DAVID PEEPLES: I have no problem
13 with taking out that introductory.

14 CHAIRMAN BABCOCK: Well, no, I think you're
15 wrong because I think that the court could grant the
16 motion on all grounds.

17 MR. YELENOSKY: Right.

18 CHAIRMAN BABCOCK: So this is dealing with
19 the situation where he grants it on less -- he or she
20 grants it on less than all grounds.

21 MR. ORSINGER: I don't agree.

22 MR. YELENOSKY: If you take out the
23 preparatory sentence --

24 MR. ORSINGER: What I think the distinction
25 is, if you say -- if the judge says, "I grant it on all

1 grounds," he has specified all grounds --

2 MR. YELENOSKY: Yeah.

3 MR. ORSINGER: -- and the appellant must
4 attack all grounds.

5 MR. YELENOSKY: Right.

6 MR. ORSINGER: It's the order that says a
7 motion for summary judgment is granted that creates the
8 problem because no grounds have been specified, and we're
9 talking about on the appellate rules committee clarifying
10 that that requires an abatement and --

11 CHAIRMAN BABCOCK: All right. I'm with you.
12 So take out that introductory language?

13 HONORABLE DAVID PEEPLES: What does everyone
14 think?

15 HON. F. SCOTT McCOWN: Take it out.

16 CHAIRMAN BABCOCK: "When an order specifies
17 grounds," take it out? Everybody want to take it out?

18 PROFESSOR DORSANEO: Yes.

19 CHAIRMAN BABCOCK: Judge Brister, okay with
20 you?

21 HONORABLE SCOTT BRISTER: Sure.

22 MR. ORSINGER: He's not going to do it
23 anyway.

24 MR. HAMILTON: We're taking out the first
25 sentence?

1 CHAIRMAN BABCOCK: No. "When an order
2 specifies grounds." All right. Let me read it one more
3 time because we're going to vote on it here. "New
4 paragraph (j) requires courts to specify the grounds on
5 which they have granted a motion that urged multiple
6 grounds. The appellant's brief must challenge only the
7 grounds on which the trial court based its rulings. If
8 the appellee's brief asserts alternative grounds for
9 affirmance, the appellant may address them in a reply
10 brief."

11 All in favor of that comment raise your
12 hand. All opposed? By a vote of 27 to nothing it
13 passes.

14 MS. SWEENEY: Chip?

15 CHAIRMAN BABCOCK: Yeah, Paula.

16 MS. SWEENEY: Is this an odd place to be
17 talking about appellants, in the middle of the trial
18 rules?

19 HON. F. SCOTT McCOWN: It's a comment,
20 though. It just clarifies how it interfaces with your
21 appellate responsibility.

22 MS. SWEENEY: It's just I can't think of
23 other places, though, in the trial procedure rules where
24 we launch into discussions of appellants and appellees.

25 MR. GILSTRAP: 324(c).

1 MR. WATSON: You know, a ground is not a
2 relative motion.

3 MR. YELENOSKY: Right.

4 MR. WATSON: A ground is not responding to a
5 motion.

6 MS. SWEENEY: But that's different from the
7 briefing procedure on appeal. That's all I'm raising, is
8 we are suddenly going from trial court, what you can and
9 can't do in the trial court at the summary judgment stage,
10 and then when you get on appeal here's how you handle
11 that, which if you're looking it up during the appeal you
12 probably will be looking at the TRAP rules, not this. I
13 don't feel real strongly about it. I'm just raising it
14 for --

15 HON. F. SCOTT McCOWN: Well, it's a new
16 rule, and this is a comment to a new rule to explain what
17 the appellate consequences of the new rule is.

18 HONORABLE JAN PATTERSON: Well, except that
19 we use "appellee" in the rule itself. Yeah.

20 MR. LOWE: What are you going to call them?

21 HONORABLE JAN PATTERSON: "Loser."

22 MS. SWEENEY: Yeah, "loser."

23 MR. ORSINGER: Can I comment?

24 CHAIRMAN BABCOCK: Yes, you may.

25 MR. ORSINGER: As it presently exists our

1 civil trial Rule 324 on JNOVs says, "When judgment is
2 rendered non obstante verdicto or notwithstanding the
3 findings of a jury on one or more questions, the appellee
4 may bring forward by cross-point contained in his brief
5 filed in the court of appeals any ground." That's an
6 actual Rule of Procedure, not just a comment. So this is
7 not without precedent, and this is a logical place to put
8 it because there's no self-evident appellate rule that you
9 would append this to.

10 MS. SWEENEY: Okay.

11 CHAIRMAN BABCOCK: Comment 2, "Paragraph (j)
12 does not require findings of fact, conclusions of law, or
13 any other explanation or statement of reasons." Comments
14 on that sentence?

15 HONORABLE DAVID PEEPLES: I want to change
16 that to read as follows.

17 CHAIRMAN BABCOCK: All right.

18 HONORABLE DAVID PEEPLES: "Paragraph (j)
19 does not require any explanation or statement of reasons."
20 And then we will just deal with findings of fact in an
21 additional sentence in just a minute, because someone
22 suggested you don't even want to talk in terms of findings
23 of fact because they are not appropriate.

24 CHAIRMAN BABCOCK: Okay. How does everybody
25 feel about that? Any comment on that?

1 MR. GILSTRAP: You say "any other"?

2 HONORABLE DAVID PEEPLES: Well, no, "any
3 explanation or statement of reasons." Can I just -- and
4 then the second sentence, I'm not aware of any need to
5 change it, but I'm certainly open to it, and then there
6 would be a third sentence that would talk about findings
7 of fact not being appropriate in a summary judgment
8 proceeding. Isn't that what somebody suggested?

9 MR. TIPPS: Yeah. That's what I had.

10 CHAIRMAN BABCOCK: Tell me the exact
11 language.

12 HONORABLE DAVID PEEPLES: I don't have exact
13 language on the new sentence.

14 HON. F. SCOTT McCOWN: "Findings of fact and
15 conclusions of law are not appropriate".

16 PROFESSOR DORSANEO: We always say "findings
17 of fact and conclusions of law" as if they're one thing.
18 Really, conclusions of law are very appropriate in a
19 summary judgment. Okay. So it's the findings of fact
20 that we would want to say are not appropriate.

21 CHAIRMAN BABCOCK: Okay. So just "findings
22 of fact are not appropriate"?

23 PROFESSOR DORSANEO: Yeah.

24 HONORABLE DAVID PEEPLES: The reason, Bill,
25 you know, certainly you're making a conclusion that

1 there's no cause of action or whatever, something as a
2 matter of law, but I guess what we were thinking is there
3 is not a formal conclusion of law analogous to a finding
4 of fact in this proceeding.

5 MR. TIPPS: Chip, I would say, "Findings of
6 fact are not appropriate in summary judgment practice,"
7 because that's what we're really saying. You know, don't
8 even think about findings of fact when you're reading the
9 summary judgment rule.

10 HON. F. SCOTT McCOWN: Well, could --

11 MR. SUSMAN: I'm confused by the language
12 because, I mean, a ground is an explanation. I mean,
13 that's the whole reason we're doing this thing, to give
14 explanations to litigants, so I mean, the clearest thing
15 you said this morning, David, was just to give examples.
16 I mean, couldn't we just say, "An example of stating a
17 grounds would be 'point 1 and 2' or 'statute of
18 limitations, no evidence,'" or something like that. I
19 mean --

20 HONORABLE JAN PATTERSON: Or reasoning.

21 MR. SUSMAN: The examples are more helpful
22 than the language on that.

23 HONORABLE JAN PATTERSON: You used the word
24 "reasoning" earlier, which may differentiate it from --
25 well...

1 HONORABLE DAVID PEEPLES: "Reasoning" is
2 better than "reasons"? How would it be to have that
3 second sentence, which starts "it requires only" reworded,
4 you know, say, "Paragraph (j) requires only that summary
5 judgment state the ground or grounds" and then have "It
6 does not require any other explanation or statement of
7 reason."

8 PROFESSOR DORSANEO: That's good.

9 MR. SUSMAN: That will be fine.

10 PROFESSOR DORSANEO: That's good.

11 HON. F. SCOTT McCOWN: So there will be no
12 reference to findings of fact?

13 HONORABLE DAVID PEEPLES: No. I think that
14 let's put that as a third sentence.

15 MR. ORSINGER: I would like to comment on
16 the third sentence.

17 CHAIRMAN BABCOCK: Wait a minute. Let's
18 make sure we know what we have done. "Paragraph (j)
19 requires only that summary judgment state which ground or
20 grounds support the judgment when the court sustains some
21 grounds" --

22 HONORABLE DAVID PEEPLES: "But did not".

23 CHAIRMAN BABCOCK: -- "but did not sustain
24 others," and then what did you want to put after that?

25 HONORABLE DAVID PEEPLES: "It does not

1 require any other explanation or statement of reasoning."

2 MR. YELENOSKY: Then why do we need a third
3 sentence?

4 HONORABLE DAVID PEEPLES: Well, maybe we
5 don't.

6 MR. YELENOSKY: It lists all the other
7 things that it doesn't require.

8 HON. F. SCOTT McCOWN: Yeah. No third
9 sentence.

10 CHAIRMAN BABCOCK: Okay. I think that
11 that's probably right. Okay. All right. So let me see
12 if I can read it. Comment 2, "Paragraph (j) requires only
13 that summary judgment state which ground or grounds
14 support the judgment when the court sustained some grounds
15 but did not sustain others. It does not require any other
16 explanation or statement of reasons," period.

17 HONORABLE DAVID PEEPLES: Do you-all like
18 "reasons" or "reasoning"?

19 HON. F. SCOTT McCOWN: "Reasons."

20 CHAIRMAN BABCOCK: "Reasons" or "reasoning"?

21 MR. YELENOSKY: What about just ending it
22 with "explanation"?

23 HONORABLE DAVID PEEPLES: Well, I think we
24 need to be clear here that nobody is entitled to make a
25 trial judge give reasoning or reasons other than "grounds

1 1, 2, and 3" or "no evidence of causation, limitations,"
2 whatever it is.

3 MR. TIPPS: I think it would make the point
4 more clearly if we say, "It does not require any other
5 explanation or statement of reasons for the granting of
6 that order."

7 CHAIRMAN BABCOCK: You want to add that,
8 David? Or not?

9 MR. TIPPS: Does that help at all?

10 HONORABLE DAVID PEEPLES: No pride of
11 authorship, but I don't think that advances this very
12 much, but if other people do, that's fine with me.

13 CHAIRMAN BABCOCK: Paula.

14 MS. SWEENEY: Is "sustains" the right word
15 or "grants"?

16 HONORABLE JAN PATTERSON: "Grants."

17 MR. YELENOSKY: "Grants."

18 CHAIRMAN BABCOCK: You want to put "grants"
19 instead of "sustained"?

20 HONORABLE DAVID PEEPLES: She's talking
21 about "sustained," the third line of paragraph 2 as it is
22 right now? You're thinking "grant" instead of "sustained"
23 or "sustains"?

24 MS. SWEENEY: Uh-huh.

25 HONORABLE DAVID PEEPLES: Do you grant a

1 ground or sustain?

2 MR. YELENOSKY: You grant the motion on some
3 grounds, but you can't grant a ground, can you?

4 MR. HALL: It seems to me it just ought to
5 say "any other explanation or reasoning."

6 HONORABLE DAVID PEEPLES: "Statement or
7 reasoning"?

8 MR. HALL: Right. Yeah.

9 MR. YELENOSKY: "Explanation."

10 MR. HALL: "Explanation or reasoning."

11 CHAIRMAN BABCOCK: You're going to strike
12 "or statement of reasons" and insert "reasoning"? Is that
13 what we're doing?

14 HON. F. SCOTT McCOWN: I think if you say
15 "explanation," it has to be "reasons" to be parallel
16 grammatically.

17 CHAIRMAN BABCOCK: Yeah, I think that's
18 right.

19 PROFESSOR DORSANEO: Yeah. You don't want
20 to say it doesn't involve any reasoning.

21 CHAIRMAN BABCOCK: Let's get back to Paula's
22 points. What about "sustain" versus "grant"?

23 HON. F. SCOTT McCOWN: I think it needs to
24 be "sustained" because you're talking about a ground on
25 which you're granting.

1 CHAIRMAN BABCOCK: Elaine nods her head, and
2 if Elaine is nodding her head "yes" then it must be right.

3 MS. SWEENEY: So you're sustaining a summary
4 judgment?

5 MR. YELENOSKY: No, you're sustaining a
6 ground.

7 CHAIRMAN BABCOCK: Okay. Anything else?

8 HONORABLE DAVID PEEPLES: I'm inclined to
9 leave it "any other explanation or statement of reasons."
10 We've had a lot of other phrasing kicked around here.
11 What do you-all think?

12 CHAIRMAN BABCOCK: I think that's fine.

13 MR. SUSMAN: Fine.

14 CHAIRMAN BABCOCK: All right. All in favor
15 of Comment 2 as amended? All against? 27 to 0 it
16 passes.

17 No. 3, "Nothing in paragraph (j) forbids
18 general orders or orders stating that the summary judgment
19 was granted on each ground presented." Comments?
20 Richard.

21 MR. ORSINGER: We are now prohibiting
22 general orders, and I would suggest the use of the word
23 "prohibit" rather than "forbid" because it's just a
24 stylistic thing, but we are prohibiting general orders,
25 but we aren't prohibiting the granting on each ground

1 presented.

2 CHAIRMAN BABCOCK: So what's your proposal?

3 MR. ORSINGER: "Nothing in paragraph (j)
4 prohibits orders stating that a judgment was granted on
5 each ground presented."

6 CHAIRMAN BABCOCK: David?

7 HONORABLE DAVID PEEPLES: Fine with me.

8 CHAIRMAN BABCOCK: Any other comments? No
9 other comments then?

10 HON. F. SCOTT McCOWN: I've got my stamp
11 already done.

12 MR. ORSINGER: Be sure it's in red ink, too.

13 CHAIRMAN BABCOCK: "Granted on all grounds."

14 PROFESSOR DORSANEO: I don't know if anybody
15 else thinks the way I do, and they probably don't, but I
16 would leave this out.

17 MR. YELENOSKY: I agree.

18 PROFESSOR DORSANEO: I don't like just
19 saying "granted on each ground presented."

20 HONORABLE DAVID PEEPLES: Bill, how are you
21 going to prevent that?

22 PROFESSOR DORSANEO: I'm willing to -- I
23 think it may be that that's the way it has to be, but I
24 still don't like it.

25 MR. YELENOSKY: You're not going to prevent

1 it, but you don't have to encourage it.

2 HONORABLE DAVID PEEPLES: If you say that
3 then an order is going to say, "Granted on grounds 1, 2,
4 3, 4, 5, 6, and 7." Where does that get us?

5 MR. GILSTRAP: That's still better.

6 PROFESSOR DORSANEO: Still better.

7 HON. F. SCOTT McCOWN: If the rule
8 authorizes it then we ought to say they can do it, because
9 this is going to be very controversial with the trial
10 judges, and the Supreme Court is going to tell them that
11 this is the way it is, and we ought to just make it clear
12 in the comment.

13 PROFESSOR DORSANEO: I'm thinking somebody
14 is going to be talking to the trial judge and saying,
15 "Well, here's what you're supposed to do. Now, the best
16 thing for you to do in order to avoid all this hassle is
17 to say 'granted on all grounds,'" and if I was speaking to
18 the judges I wouldn't say that. I would say, "You could
19 do that, but you should only do that, you know, if
20 conscientiously that's what you've decided, and the better
21 thing to do is to say why you're granting it."

22 HON. F. SCOTT McCOWN: Well, then let's say
23 that. Let's say that "Nothing in paragraph (j) prohibits
24 orders stating that the judgment was granted on each
25 ground presented when appropriate."

1 MR. GILSTRAP: That's better.

2 PROFESSOR DORSANEO: That's better.

3 CHAIRMAN BABCOCK: "When appropriate."

4 MR. LATTING: Which in your case will --

5 HON. F. SCOTT McCOWN: You know, there might
6 be cases where I wouldn't grant it on all grounds
7 presented.

8 PROFESSOR DORSANEO: I know there are cases
9 where you wouldn't.

10 CHAIRMAN BABCOCK: The comment now says,
11 "Nothing in paragraph (j) prohibits orders stating that
12 the judgment was granted on each ground presented when
13 appropriate." Any other comments? Everybody in favor of
14 Comment 3 raise your hand.

15 Anybody against? By a vote of 27 to
16 nothing it passes. Okay. We will write this up.

17 Steve, before you leave, your subcommittee
18 is going to get the next assignment, and that is to
19 consider the disclosure rules that have been drafted or
20 worked on by the family counsel; and, Richard, I assume
21 that you can get a copy to me and to Steve and his
22 subcommittee.

23 MR. ORSINGER: You have copies, and I will
24 send a copy to Steve.

25 MR. SUSMAN: Great.

1 MR. ORSINGER: And it's not just on the
2 request for disclosure. It's also on subpoenaing records
3 from a party on less than 30 days notice for a temporary
4 hearing.

5 CHAIRMAN BABCOCK: Right. Is anybody -- I
6 know that Bill Dorsaneo has got some time problems. Does
7 anybody else have a time problem that wants to get a
8 subcommittee report out of order?

9 MR. LOWE: Let me ask Steve a question, if I
10 may, on disclosure. Have you gotten any requests about
11 following what the feds are doing now, where initial
12 disclosure doesn't include anything that's bad, it just
13 includes what you're going to use in your case?

14 MR. SUSMAN: No.

15 MR. LOWE: Well, you're going to get that.
16 That's a terrible thing the feds have done, but it's not
17 the first, but you'll probably get that.

18 CHAIRMAN BABCOCK: Judge Brister, the
19 subcommittee you're chair of, which is Rules 1 through .
20 14c --

21 HONORABLE SCOTT BRISTER: I'm chair of what
22 subcommittee?

23 MS. BARON: That's mine, Chip.

24 CHAIRMAN BABCOCK: Sorry. Pam.

25 MS. SWEENEY: And where is your report?

1 CHAIRMAN BABCOCK: That was quite a
2 response.

3 MS. BARON: I'm getting it to you.

4 CHAIRMAN BABCOCK: Pam, anything that
5 you-all are working on?

6 MS. BARON: No. Our rules are perfect.

7 MR. ORSINGER: We discussed a problem with
8 Rule 3 yesterday that I don't know if we decided to look
9 at that or not.

10 CHAIRMAN BABCOCK: Well, Judge Hecht, were
11 you here yesterday when we talked about Rule 3?

12 JUSTICE HECHT: Yes.

13 CHAIRMAN BABCOCK: Would you like us to look
14 at that or not?

15 JUSTICE HECHT: Yeah.

16 CHAIRMAN BABCOCK: Okay. Pam, you've got a
17 project.

18 MS. BARON: Okay.

19 CHAIRMAN BABCOCK: Rule 3.

20 MS. BARON: Rule 3.

21 CHAIRMAN BABCOCK: Anything else to report?

22 3a. Pam, it's 3a, I believe. Anything else
23 to report? Okay. Orsinger, you have been a busy little
24 boy. Anything else to report on your subcommittee?

25 MR. ORSINGER: I believe that what had been

1 forwarded to us, other than the recusal rule, was
2 addressed beforehand, but there might have been some
3 correspondence that has come in since then, but we have
4 been so focused on recusal we haven't addressed. I'll
5 double-check, but we have nothing that we're aware of
6 that's still pending.

7 CHAIRMAN BABCOCK: Okay. Susman has got a
8 project now for 166. Bobby, before you leave, are you the
9 chair of 166a, 166 and 166a?

10 MR. MEADOWS: Isn't Latting the chair of
11 that?

12 HONORABLE DAVID PEEPLES: I think I chair
13 that one. That's the summary judgment rule. I think I
14 chair that one.

15 CHAIRMAN BABCOCK: Anything else other than
16 what we've just gone through?

17 HONORABLE DAVID PEEPLES: No.

18 CHAIRMAN BABCOCK: Susman we've just talked
19 to. Joe, you're on 215.

20 MR. LATTING: We haven't done anything.
21 There are no sanctions rules pending or no requests that I
22 know of. If anybody has any, let us no know.

23 CHAIRMAN BABCOCK: Carl.

24 MR. HAMILTON: In this letter from Fred
25 Bosse -- is that how you say it?

1 CHAIRMAN BABCOCK: Bosse.

2 MR. HAMILTON: He has the last paragraph
3 related to Rule 191.

4 CHAIRMAN BABCOCK: What does that --

5 MR. HAMILTON: He's talking about a party
6 being served with discovery before there was ever service
7 on the suit, and he says that under the current rules it
8 appears that admissions can be deemed admitted prior to
9 the date of service or citation are answered.

10 MR. LATTING: That's handy if you're a
11 plaintiff.

12 CHAIRMAN BABCOCK: And that is something
13 that has come up in another letter, I believe, and that's
14 something that we need to deal with. So, Carrie, you're
15 going to have to communicate with Susman and Bobby Meadows
16 about this last paragraph in Bosse's letter to us about
17 Rule 191.

18 Justice Hecht, I believe you asked us to
19 look at that previously, so we have been deficient in not
20 doing that, so let's put that on the radar screen. Paula.

21 MS. SWEENEY: Yo.

22 CHAIRMAN BABCOCK: You have just taken us
23 through the voir dire rule. Anything else that your
24 subcommittee is working on?

25 MS. SWEENEY: I thought it was "voir dire."

1 You had me convinced.

2 CHAIRMAN BABCOCK: "Voir dire." I can't
3 remember. I'm conflicted on that.

4 MR. TIPPS: "Voir dire." It's a French word
5 meaning "to speak the truth."

6 MS. SWEENEY: I don't think there is
7 anything. There may be a few miscellaneous letters out
8 there. There is nothing of huge substance, and I've sent
9 around an email draft to the subcommittee of yesterday's
10 discussions so we can reconvene and get something for the
11 October meeting.

12 CHAIRMAN BABCOCK: Okay. Sarah Duncan is
13 not here.

14 MR. HALL: Sarah asked me to report that the
15 committee is working and will have a report in October.

16 CHAIRMAN BABCOCK: Thank you. What are you
17 working on, or do you know?

18 MR. HALL: Rule 30 -- it's been awhile.

19 MS. BARON: Late notice of judgment rule.

20 MR. HALL: 306.

21 MR. ORSINGER: 306c. Is it c?

22 PROFESSOR DORSANEO: (a).

23 MR. ORSINGER: (a), excuse me.

24 MR. HALL: 306a.

25 CHAIRMAN BABCOCK: Elaine Carlson, have you

1 got anything to report?

2 PROFESSOR CARLSON: No. We're a work in
3 progress.

4 CHAIRMAN BABCOCK: Skip Watson?

5 MR. WATSON: The JP courts committee had
6 three things directed to it. Of course, my file is not
7 with me. The primary one of those that I think we all
8 agree does need to be considered is a problem that Judge
9 Lawrence has brought up several times, and that is that
10 the rule on venue for the JP courts permits an unlimited
11 number of changes of venue that are granted without cause
12 needed to be stated. All a person has to do is request a
13 change of venue and they get it.

14 I was unaware of the problem. He can speak
15 to it better than I can, but we all agree that there needs
16 to be a limit, whether it's one, two, three, whatever the
17 committee chooses, on the number of changes of venue in JP
18 court that are granted without need for cause to be
19 stated.

20 CHAIRMAN BABCOCK: Will you be ready to
21 report by next time?

22 MR. WATSON: I will be glad to. I think
23 it's something you could work in in -- well, I was going
24 to say in ten minutes, but with this committee probably in
25 ten days.

1 CHAIRMAN BABCOCK: Nice.

2 MR. HAMILTON: Chip?

3 CHAIRMAN BABCOCK: Yeah, Carl.

4 MR. HAMILTON: The Court Rules Committee has
5 already amended that rule and sent it to the Court and the
6 advisory committee, so there is a copy of our amendment
7 floating around.

8 MR. WATSON: That's right. On each of these
9 three things the Court Rules Committee has done the
10 amendment. It was sent to me. I was assuming we needed
11 to say "yea" or "nay," and we said "yea" on all of them.

12 CHAIRMAN BABCOCK: That should be relatively
13 short, and Steve Susman's subcommittee is going to need to
14 be ready to report by October, and maybe the Rule 306a or
15 c?

16 MR. ORSINGER: (a).

17 CHAIRMAN BABCOCK: 306a?

18 MR. HALL: 306a.

19 CHAIRMAN BABCOCK: Will you tell Sarah that
20 we need to be ready by October on that one?

21 MR. HALL: I'll do it.

22 CHAIRMAN BABCOCK: All right. Bill
23 Dorsaneo, the appellate subcommittee.

24 PROFESSOR DORSANEO: Well, I have a copy of
25 a report that actually was being sent to the other members

1 of the TRAP subcommittee of this committee, but I think
2 any of you could, you know, take one because it's likely
3 to be substantially in the same form when it comes before
4 this committee; but at any rate, comments were solicited
5 by the Appellate Rules Committee of the appellate section
6 about the appellate rules.

7 In addition to that, a number of suggestions
8 were made by members of this committee or by Justice Hecht
9 to consider making changes in particular appellate rules.
10 As has been the practice, really since, well, 1992, I
11 think, at least, the subcommittee of this committee on the
12 appellate rules and the Appellate Rules Committee of the
13 appellate section have met together and considered
14 proposed suggestions, and we did that again on August 11th
15 of this year, and this report concerns a number of rules,
16 and assuming I don't get a lot of additional input from
17 the TRAP subcommittee, it's probably more or less ready to
18 go forward with a few little additions that involve
19 particular problems.

20 So I would say go ahead and take one of
21 these. I don't know if I have copies for everyone, but I
22 have probably nearly enough, if not enough. The things of
23 significance, particular significance, involve matters
24 such as going to one appellate track rather than having
25 some appeals have to be perfected within 30 days and then

1 others 90 days after the judgment is signed.

2 A larger issue, perhaps, that may need
3 more -- some more work involves the treatment of un --
4 opinions designated not for publication. Justice Hecht
5 gave me some additional material, and I will circulate
6 that to the subcommittee, if not to everybody, to
7 consider; but basically we have a package of things that
8 are ready or nearly ready to be put on the agenda.

9 CHAIRMAN BABCOCK: I asked Judge Schneider
10 to join your subcommittee, so if you could put him on your
11 mailing list.

12 PROFESSOR DORSANEO: How about Mr. Gilstrap?

13 CHAIRMAN BABCOCK: And Mr. Gilstrap as well,
14 so they will both be on that. Okay. We will try to fit
15 you in in October, but it may be the November meeting
16 before we get to you. Buddy Lowe on evidence.

17 MR. LOWE: We have met several times in
18 Steve's office at Baker Botts in Houston, and we have done
19 some housekeeping things. I don't have -- I have made a
20 chart to show who recommended, like we used to do, and
21 what. We don't really have a lot of substance except a
22 couple of things we were working on.

23 We were requested to work on 703 on data
24 behind an expert, and that was taken care of in 1998 by
25 705. We did that. The 701 rule we're working on where a

1 witness -- a lay witness as well as an expert, we're
2 trying to make it clear that if he is going to be also an
3 expert he must qualify under 702.

4 We're working on 702. Harvey Brown and Mark
5 Sales have been drafting, and we have looked at some
6 things. The real issue is whether or not we list each
7 element, and I think Justice Hecht listed all the elements
8 I can think of in Hamp 6, but there may be others. Do we
9 put it in a comment, do we put it in the rule? The
10 uniform rules are going to something kind of brief. The
11 feds have used something more brief, like Kelly vs. State.
12 We're discussing whether or not we should list cases
13 because then they become outdated. Do we have to -- you
14 know, in our comments. So we're working on those and
15 should have something shortly on those.

16 CHAIRMAN BABCOCK: Okay. Well, why don't
17 you aim for the November meeting?

18 MR. LOWE: Okay. We'll be ready. Now, the
19 other thing is we've been requested on a procedural rule
20 and we've drawn two procedural rules, and it's kind of
21 difficult to satisfy everybody with that, and we tend to
22 favor -- and, Elaine, let me get her attention because
23 she's working on this.

24 CHAIRMAN BABCOCK: Elaine.

25 MR. LOWE: Would tend to favor putting a

1 procedural rule that judges -- what is the rule, Elaine?
2 Are encouraged to make these challenges beforehand in
3 keeping with justice, fairness, and comity or something
4 like that?

5 PROFESSOR CARLSON: I think the sense of our
6 subcommittee was that we did not want to have a
7 requirement in every case that the motion be heard
8 pretrial, but that was the preference and ordinarily that
9 should be done, although the court has discretion
10 otherwise.

11 MR. LOWE: And not put it in a rule, put it
12 in a comment to Rule 702, because a procedural rule under
13 702 wouldn't truly belong in the Rules of Evidence. So
14 we'll have plenty, and there will be enough discussion to
15 last a few minutes.

16 CHAIRMAN BABCOCK: You know, it occurred to
17 me we shouldn't have let Dorsaneo get out of here because
18 this summary judgment thing that we just dealt with, there
19 may be some issues under the TRAP rules. So, Frank, maybe
20 you and Judge Schneider could remind Bill that there may
21 be some TRAP rule implications, particularly on this
22 abatement idea.

23 Okay. Anybody else got anything to report
24 on? John.

25 MR. MARTIN: Yeah. Chip, the Court Rules

1 Committee sent over, Carl and I, I think maybe two years
2 ago rules amending Rules 86 and 87, motion to transfer
3 venue to conform with the venue statute that was passed in
4 '95, and since we are now five years after that statute,
5 maybe we could get a rule in the works on that.

6 CHAIRMAN BABCOCK: Okay. Richard, that's
7 your subcommittee. Can you try to track that down?

8 MR. ORSINGER: My goodness. I'm going to
9 have to meet with you privately to get a better
10 description. If you're talking about something --

11 MR. MARTIN: Motion to transfer venue.

12 MR. ORSINGER: Venue?

13 MR. MARTIN: Yeah.

14 MR. ORSINGER: Well, we made extensive
15 proposed changes to venue in the last recodification
16 draft, and so what you need to do, John, is get -- that's
17 the draft that Dorsaneo finalized from the previous
18 committee cycle. You need to get those and look at them,
19 and if you want changes from that, let us know what they
20 are, because we went through a bunch of votes, committee
21 votes, last time on venue changes.

22 CHAIRMAN BABCOCK: Well, but we're trying to
23 get from point A to point B, and the recodification draft
24 is not even on the radar screen for us approving, so if
25 there's something discrete that needs to be done --

1 MR. MARTIN: Was it a recodification of this
2 rule, which applies to the pre-1995 venue statute, or the
3 current venue statute?

4 MR. HAMILTON: It's the '95 amendment, I
5 think, John.

6 MR. MARTIN: Okay.

7 MR. HAMILTON: I think this committee did
8 some work on it and then it got in the recodification.

9 MR. ORSINGER: It's been our view that we
10 don't want to waste all of the work that this committee
11 did in the last committee cycle by going back to the
12 current rules, and refighting the same fights, so what we
13 did with our -- my subcommittee of 15 through 165a is we
14 took the last committee product recodification draft and
15 then edited from that. If we don't do that then we go
16 back to scratch, and we redebate venue, which we debated
17 at least four or five separate committee sessions, so --

18 CHAIRMAN BABCOCK: Yeah. We're not going to
19 do that.

20 MR. ORSINGER: What I would like to do is
21 have you look at what the committee did last time and then
22 if you feel like something needs to be fixed, let us know,
23 and we'll work on it.

24 MR. MARTIN: Okay. I wasn't on the
25 committee.

1 MR. ORSINGER: I know that.

2 MR. MARTIN: Where can I get that? Is it on
3 the website?

4 MR. ORSINGER: It's on the website and Bill
5 has it in electronic form, and I think I may and Chip may.

6 CHAIRMAN BABCOCK: Yeah. Yeah. You can
7 just call Carrie.

8 MR. MARTIN: Okay.

9 CHAIRMAN BABCOCK: We've got it. Okay.
10 Anything else from anybody else? If not, thanks -- oh,
11 Justice Hecht.

12 JUSTICE HECHT: The Court has hired a new
13 rules attorney who will be on deck a week from yesterday.
14 His name is Chris Griesel. He's an honors graduate of
15 Texas Tech and worked awhile at Haynes & Boone and has
16 been a Leg. counsel for several years. So starting next
17 Friday you can also start getting more of your calls
18 returned.

19 MR. HAMILTON: What's his last name?

20 JUSTICE HECHT: Griesel, G-r-i-e-s-e-l.

21 MR. YELENOSKY: I know Chris. He's a great
22 guy.

23 JUSTICE HECHT: 463-6645.

24 CHAIRMAN BABCOCK: Not a moment too soon.

25 Anything else, Justice Hecht?

1 Anybody else? Okay. Thanks very much. I
2 think we had a really productive meeting this time.
3 Thanks, everyone.

4 (Whereupon the proceedings were adjourned at
5 11:42 a.m.)

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CERTIFICATION OF THE MEETING OF
THE SUPREME COURT ADVISORY COMMITTEE

* * * * *

I, D'LOIS L. JONES, Certified Shorthand
Reporter, State of Texas, hereby certify that I reported the
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I further certify that the costs for my services
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