* * * * * * * * * * * * * * * * * * * *

HEARING OF THE SUPREME COURT ADVISORY COMMITTEE

MAY 19, 2000

(MORNING SESSION)

* * * * * * * * * * * * * * * * * * * *

Taken before D'Lois L. Jones, a Certified Shorthand Reporter in Travis County for the State of Texas, on the 19th day of May, A.D., 2000, between the hours of 9:00 o'clock a.m. and 12:45 o'clock p.m. at the Texas Law Center, 1414 Colorado, Room 101, Austin, Texas 78701.

INDEX OF VOTES

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

--*-*-*

CHAIRMAN BABCOCK: All right. Let's get started if we can. Bobby, time to get started. Come on, Nina, quit chatting. Judge Rhea, enough war stories. Come on.

Justice McClure is on the telephone. You can't see her, but she's there, so don't say anything nasty about her. She's agreed to refrain from saying nasty things about us. Right, Justice McClure?

HON. ANN CRAWFORD McCLURE: I appreciate that, Chip. Thank you.

CHAIRMAN BABCOCK: Here's a word about what we're going to do today and tomorrow. As usual, we start on Fridays at 9:00 o'clock in order to enable people to get here, and tomorrow morning we will start at 8:30, and we will quit at noon. There has been a relatively recent addition to the agenda, which you-all have received, which is the proposed revisions to the Texas Parental Notification Rules, and Justice McClure is going to report on that in a minute. There is some tweaking that needs to be done, and the Court asked us to make that the first agenda item today and to deal with that expeditiously and report that out today.

The second item, which is going to, I think, take a substantial amount of our time is the

recusal rule that Richard Orsinger has done a terrific job, along with his subcommittee, in presenting us various options following the discussions that we had and the votes that we took at the last two meetings, and then the -- I think relatively minor issue, and I'm hesitant to predict these things with this group, but the Rule 199.5(f) proposed amendment, Steve Susman is going to report on his subcommittee's work on that. We're going to do that right after lunch, so if anybody is interested in that, don't take a long lunch.

Then if we get to it, and it surely will be by Saturday -- not until Saturday, is the proposed changes to Rule 226b regarding voir dire. I have received a lot of e-mail about that, people concerned that we are going to somehow resolve this whole thing on Saturday when some people for reasons of family or professional reasons can't be here. I have assured everyone that we are not going to resolve this important issue and perhaps controversial issue on Saturday. We are not going to take any votes, but I think it would be worthwhile for us to start the discussion, and so if we have time we're going to do that and start the discussion and then let Paula Sweeney, who is the chair of the subcommittee working on this, take that into account, and then we will take

that up again on Friday of our August meeting and hope to conclude that issue at our August meeting.

So anybody -- and there have been a number of people who are concerned that we're going to somehow in a summary and -- a summary fashion on a day when a lot of people can't be here resolve the voir dire issue. Rest assured we're not going to do that. There have also been proposals made that if you're not here on Saturday you can't vote at the next meeting. I'm a little reluctant at this point to do that, to silence the wisdom of somebody who for valid reasons might not be able to be here on a Saturday, or for even invalid reasons. Obviously, however, we can't get our work done in one day. That was apparent at the last meeting, so if you can be here Saturday, please try to do so. We do dilute the effectiveness of what we're doing if we don't have the full group assembled.

Steve Susman.

MR. SUSMAN: Chip, is a transcript of the proceeding available to us between now and the time of the next meeting?

CHAIRMAN BABCOCK: Yes.

MR. SUSMAN: Can we go on the website? Where do we go to get that?

CHAIRMAN BABCOCK: Call Carrie Gagnon,

my assistant in Houston, and she will get it to you. I think you can e-mail it, can't you? It can be e-mailed to you.

PROFESSOR ALBRIGHT: It's also on the web, isn't it?

MS. GAGNON: We didn't post it. Bob Pemberton might have.

CHAIRMAN BABCOCK: We didn't post it. Pemberton might have posted it. We're not sure.

MR. SUSMAN: Should it not be posted as a matter of course?

CHAIRMAN BABCOCK: Yeah. Yeah. And, in fact, we're working -- unfortunately Bob Pemberton -- I don't know if you-all know -- has resigned from the Supreme Court and is going to work for the Lieutenant Governor, so we have a staff vacancy, and there has been some disconnect between his leaving and today's meeting, but we are going to go to work on making sure the web -- we have a web and it's updated. But anybody who wants a transcript, call Carrie and she can e-mail it to you. So that's it for preliminary matters. Anything else of a preliminary nature that anybody wants to raise? If there are nothing of that type then we will go right in to Justice McClure who is going to take us through the

parental notification issues.

HON. ANN CRAWFORD McCLURE: First of all, let me apologize for not being with you in person. My 14 year old graduates from middle school, and he has to be there at 5:30 my time this evening, so it was going to be impossible for me to get to Austin and back in time, and I hope that this does not dilute the discussion too significantly.

Chip, it's your voice I can hear the best, so if I have difficulty with hearing the comments or suggestions other people are making, I will ask you, Chip, if you would please, to repeat it for me so I can be sure I hear it. Our subcommittee was asked to reconvene to try to make some minor adjustments -- I construe them as minor adjustments -- to the rules that have already been promulgated by the Court. We met in Austin on April the 19th and came up with our proposed suggestions.

There are two documents that you should have in front of you that will facilitate our discussion. One is a memorandum dated April the 19th from Bob Pemberton which discusses the issues that we were asked to cover as well as the recommendations of the subcommittee. Bob then took those recommendations and folded them into actual proposed changes to the

rules and forms, and you have another document that says "Texas Parental Notification Rules and Forms," and it's got a date, not on page one, but on page two, of May the 1st. So that's what we're going to be dealing with first.

One of the primary issues that we have seen develop most often comes out of the clerks' offices, and I don't know if any of the other members of my subcommittee are there in Austin today, but if I didn't state anything or don't cover it sufficiently, I would ask the clerks to chime in and let us know exactly what the concerns are that you have experienced.

First and foremost, Rule 1.4(b), which you'll find on page two of the rule, referred to "all other court documents," and it was the original intention, at least of our subcommittee, that it was supposed to encompass all types of information in whatever form that might be, particularly whether it would be court reporter notes, transcriptions of the notes, docket information, court minutes. All of that was included, in our view, as part of the language of "all court information."

That has caused a problem because people construe that phrase differently, so we were asked to

decide whether or not the rule should be clarified to explicitly cover certain types of information. We decided that it should, and if you'll look at subsection (1) on confidentiality, we've added language to the effect that "any and all information pertaining to the proceedings are, unless expressly exempted by these rules, confidential and privileged."

We were concerned particularly about case management issues, and for those of you who are unaware with the case management software that the courts are using, it requires rather specific docketing information, including the names of the litigants, the names of the lawyer. It has information related to the date of disposition, the nature of the disposition, and we interpreted most of that information as being subject to the confidentiality provision. From the appellate courts' perspective we cannot even dispose of the case through the case management software unless we indicate the nature of the disposition, who authored the opinion, and all of the information that both my subcommittee and your committee had determined was to be confidential, so we've tried to amend the language a little bit to expressly make those provisions.

The reporting requirements also impose a little bit more difficult problem. All of the courts

are required by the Judicial Council to keep statistics on all of the cases that they hear, and they are sorted by the Office of Court Administration into the nature of the case, the disposition of the case, and that sort of information. We, at least in my court, are not utilizing that software in order to track any of the Jane Doe cases. Some of the courts are, but it causes significant problems because we cannot close out those cases and show that they have been disposed of because unless you fill in all the blanks it doesn't track properly.

OCA is trying to develop a new program that will assist us in tracking statistics in terms of the numbers of these cases that are processed through the courts, if for no other reason than the Legislature and the Department of Health need that information for budgeting purposes since the state is going to be paying for all of the attorneys fees and the court costs. So we are having a difficulty in how we go about reporting it.

What the subcommittee recommended is to allow for the time being for the courts to manually report that information so that we can aggregate the statewide statistics, but we are recommending against disclosure of rulings and orders, even if it's

disclosed without reference to a particular court file. The other problem that we have is the Legislature has moved towards performance measures on the parts of individual judges. I know it's under discussion for the trial courts. It's already in place as far as the appellate courts are concerned, and we are monitored for the length of time it takes us from the date of filing of an appeal to the date of disposition and from the date of submission to the date of disposition in order for the Legislature to review our budgeting requests.

If we cannot report in case management the date of disposition then effectively these cases stay on our docket and it ends up skewing our statistics at the end of the fiscal year. So those are some of the logistic problems that we're dealing with, and at this point, Chip, I'd ask whether there are any comments as far as the language in the confidentiality provision or the recommendations on the reporting. I will tell you that Paul Watler, who is a member of the subcommittee -- and I don't know if Paul is there this morning or not, but he was concerned about the change. He thought that it was beyond what was contemplated by the statute and had an effect of a chilling feat that was permissible as long as the identity of the minor

had not been disclosed, so I draw that to your attention. I think your packet of information includes a copy of his e-mail. Are there any comments about any of that or questions I can answer?

CHAIRMAN BABCOCK: Yeah. One thing, Judge. What exactly are the clerks -- and Bonnie is here, although she's been identified on our roster of people as Bonnie Yes. I don't know if you noticed that.

MS. WOLBRUECK: No, I didn't know that.

CHAIRMAN BABCOCK: Bonnie's here. What type of information is being disclosed by the clerks which this rule is attempting to shut off?

HON. ANN CRAWFORD McCLURE: Bonnie, do you want to speak to that from your court?

MS. WOLBRUECK: Yes, I sure can. The issue I think resulted in one county to where the information went into their case management system as an "In re: Jane Doe" case but had pulled up the attorney's name also, and I think that the understanding here was -- the intent I think of the subcommittee was that the attorney's name would also be kept confidential, and because of some issues with local rules regarding the sitting judge for that to clear the case, the judge was also identified because

of it coming up on the index that that case had been filed and, in the two-day period then the press also knew that the judge would be identified, so I think it resulted in some issues that concerned some confidentiality issues.

CHAIRMAN BABCOCK: The Texas Supreme Court, of course, as we all know, has issued a number of rulings under Jane Doe, under the case name Jane Doe, but the judges have been identified as the authors of the various opinions, and I guess I'll direct this to Justice McClure. Why are the judges in the Supreme Court identified and nobody else? What's the reason for that distinction?

HON. ANN CRAWFORD McCLURE: Well, I have to speculate on that. Part of the motivation, I think, behind that was if we do not have any sort of published information on how those trial courts and the intermediate courts are to address these issues both in terms of standard of review, what evidence is sufficient in order to entitle a minor to a bypass, we needed to have access to the highest court telling us how we ought to be reviewing these cases.

They looked carefully at the statute, at least from my reading of the opinion, and determined that they were not precluded from writing a published

opinion on it since the rules that were drafted did not preclude them from doing so, so that they could give that guidance, and without the benefit of that guidance then it was going to be applied perhaps in dissimilar ways throughout the state, and it was done for guidance purposes so we would be able to hopefully at least be applying the same principles for unanimity among all the counties in the state.

As far as identification is concerned, and this relates to another topic that we need to be talking about, realistically, if you will recall when we were first debating these rules, there was a concern -- and, in fact, a minority report out of my subcommittee said only the identity of the minor and the ruling itself should be protected and that the identity of the judges ought not be subject to that protection because of concerns about constitutionality of the court's provisions and all of that. We opted to provide that confidentiality.

If you've been reading any of the media reports on these cases, there are lawyers and judges who have been talking about the proceedings. We have had a number of discussions at CLE programs about these types of cases, at judicial conferences about these types of cases; and somebody actually suggested should

we be perhaps putting some teeth in the confidentiality provision, modify the disciplinary rules, modify the Code of Judicial Conduct to mandate that type of confidentiality; and it was the feeling, I think, of my subcommittee that those were protections that could be waived by individual judges, by individual lawyers, and by litigants. And so I think perhaps the Supreme Court adopted that same philosophy and chose that they would not cloak themselves with that sort of anonimity in order to get these cases made available not only to the lawyers at large but to the litigants at large and to the public and hopefully to the Legislature to the extent any sort of legislative tweaking is necessary.

CHAIRMAN BABCOCK: Richard Orsinger has got a comment.

MR. ORSINGER: I have not read the Doe opinion that Ann talked about as recently as she has, but my feeling of reading it was that the Supreme Court was essentially saying there was a constitutional reason why they were not going to clothe their proceedings in total secrecy. It may have been implicit, and maybe I'm wrong. I haven't read that language that closely recently, Ann, but I got the distinct impression that they said, "We are considering the constitutionality as to this Court, and we are not

addressing the constitutionality as to the courts of appeals and the trial court."

HON. ANN CRAWFORD McCLURE: Well, I certainly didn't interpret it that way.

MR. ORSINGER: Okay. Well, then I better go back and read it because I have a lot of respect for your judgment.

HON. ANN CRAWFORD McCLURE: Are there any other comments on the confidentiality, and I hope I answered that question sufficiently?

CHAIRMAN BABCOCK: Well, you did, although I have in my mind a couple of issues that are raised to me based on what you said. No. 1, I don't see any enough justification in either the rules or the legislation for individual judges to waive the statute or the rule. I mean, I just don't see it there, and our decision, the decision of this committee, based on the subcommittee recommendation was driven, I thought, at our last meeting by the statute which said "all proceedings shall be confidential" and that that's why we did what we did and rejected the minority report that was much more liberal in terms of providing for public information, but since that time I see that the Supreme Court has decided to make public its opinions and the authors of those opinions, and I get back to

the question of is there anything in the statute that distinguishes between judges of the Supreme Court as opposed to judges of any other court?

HON. ANN CRAWFORD McCLURE: Well, I think actually it does. If you look at 33.004(c) it says, "A ruling of the court of appeals issued under this section is confidential and privileged and not subject to disclosure." There is a similar provision for the trial court, but as far as the Supreme Court, the only language -- and in fact, the statute does not name the Supreme Court. What it says is in subsection (f), "An expedited confidential appeal shall be available to any pregnant minor to whom a court of appeals denies an order authorizing the minor to consent to the performance of an abortion without notification," and the opinion that the Supreme Court issued construed that provision as allowing them to publish an opinion provided they issue no information that compromised the identity of the minor, either by naming her or by detailing information by which she could be named. That's the distinction that they made.

CHAIRMAN BABCOCK: Okay. Anybody else have any comments about the confidentiality provisions?

MR. EDWARDS: One thing that we know, in the statute there is no severability provision, so I

presume that if any one item in the statute is unconstitutional, including any of the confidentiality, that the statute falls.

CHAIRMAN BABCOCK: Well, that raises the ante, doesn't it?

MR. EDWARDS: Yes, it does.

CHAIRMAN BABCOCK: Any other comments?

MR. EDWARDS: And I may be corrected on that, but I was told by Representative Dunnam, I believe, that there is no severability clause in that act.

CHAIRMAN BABCOCK: Okay.

MS. BARON: Chip?

CHAIRMAN BABCOCK: Yeah, Pam.

MS. BARON: I don't think that would be a -- the Co-Construction Act has a general severability provision that applies to all legislation, so I think the absence of a severability provision in a statute is not determinative of its severability. Then you get into other issues, but that's not dispositive.

CHAIRMAN BABCOCK: Okay. Any other comments about the confidentiality provision?

All right. Those in favor of accepting the subcommittee's recommendation signify by raising your hand. 22 in favor. Those against raise your

hand. Five against. So it passes 22 to 5.

All right. Ann, Justice McClure, what's next?

HON. ANN CRAWFORD McCLURE: All right. If you'll look on page four of Pemberton's memo, you'll see a bullet title, "Access to Case Files." Rule 1.4(b) --

MS. SWEENEY: We'll see a what? I'm sorry. I'm on the wrong end of your speaker. What are we going to see?

HON. ANN CRAWFORD McCLURE: Look at page four of Pemberton's memo. You will see a bullet item, "Access to Case Files."

CHAIRMAN BABCOCK: It's about the middle of the page, Paula.

MS. SWEENEY: Thank you. Sorry.

HON. ANN CRAWFORD McCLURE: 1.4(b) of the rules provides that orders, rulings, opinions, and certificates may be released to certain enumerated individuals. There were some clerks and attorneys who were concerned that that was a limitation on what could be provided to the minor herself or to her attorney ad litem or her guardian ad litem. For example, her application or her verification page.

What the subcommittee has recommended

that we do is to add a comment clarifying that the lawyers, the guardians ad litems, and the minors could have access to the case file. You'll find the proposed language in Comment 3 to Rule 1. "Similarly, a minor's attorney and guardian ad litem must, of course, have access to the case file to the extent necessary to perform their respective duties."

Also, there had been no provision made when the record goes up to an appellate court to have the appellate judges have access to the verification page. There was some concern that we could not properly address disqualification under the Constitution or recusal under the rules if we did not know whether we had a connection to the minor or not. So what we have suggested in the subcommittee is not that the verification page be automatically forwarded to the appellate court, but that any appellate judge may upon request have access to that verification page, and that is also incorporated into the proposed change to Comment 3.

CHAIRMAN BABCOCK: What page is Comment 3 on?

HON. ANN CRAWFORD McCLURE: It's on page five of the rules, bottom right-hand column. And I would recommend to the full committee that that

addition be accepted.

CHAIRMAN BABCOCK: Okay. Any comment about that? Anybody opposed to adding that comment to the rules? There are no hands raised, so that vote passes unanimously.

MR. ORSINGER: Can I ask a question, Chip?

CHAIRMAN BABCOCK: Wait a minute. Richard was slow to the draw this morning so early, so now he he wants to ask a question.

MR. ORSINGER: Does Comment 3 permit us to have a recusal process if one is filed?

CHAIRMAN BABCOCK: Did you hear that, Justice McClure?

HON. ANN CRAWFORD McCLURE: No, I couldn't hear that.

MR. ORSINGER: Does Comment 3 permit us to have a recusal process? Is the judge -- a judge who's appointed to hear a recusal motion is not really one who's appointed to decide the application and is not really one authorized to transfer the application or assign another judge. That would occur after the recusal is decided, but what about the judge who's assigned to hear the recusal who doesn't have the authority to re-assign if it's granted?

HON. ANN CRAWFORD McCLURE: It's my belief, Richard, that that's covered in 1.6 that deals with disqualification, recusal, and objections. And let me look. There's one other place where that also --

MR. ORSINGER: I think my problem is with the comment because I think a judge who is appointed to rule on a recusal isn't listed in Comment 3, as I read it.

HON. ANN CRAWFORD McCLURE: Well, it was intended to, and that part of the rule has not been changed. Originally it said any judge involved in a proceeding, whether it's the judge assigned to hear and decide the application, a judge authorized to transfer or assign another judge to it, may have access to all information.

MR. ORSINGER: Does the "whether" clause in any way limit the "any judge" clause?

HON. ANN CRAWFORD McCLURE: Was not intended to.

CHAIRMAN BABCOCK: It doesn't cause me any heartburn, Richard. Does it cause you?

MR. ORSINGER: All right. No.

MR. EDWARDS: If there's a problem with getting access to the file, the recusal judge may not

be a judge with authority to transfer all that -- if the person who appoints the recusing judge doesn't appoint himself, he's the one that has the power to transfer, I think. It may be that we need to include in there a statement that would include a recusal, a judge assigned to hear a recusal.

HON. ANN CRAWFORD McCLURE: I could not hear all of that. I would also direct your attention to Rule 1.4(b)(2)(6) that exempts from the confidentiality provisions another court, judge, or clerk in the same or related proceedings; and we had a discussion when these rules were first proposed that related proceedings would involve recusals before another judge.

MR. EDWARDS: The problem that Richard saw, I think, is that the comment deals with access to the records, and there apparently has been some problems with access to the records, and the comment does not specifically include a recusal judge, even though the rule does, and it's access to the records that I think we're talking about.

HON. ANN CRAWFORD McCLURE: I have no problem adding that phrase.

CHAIRMAN BABCOCK: Well, it certainly wouldn't hurt to add the phrase, would it?

MR. EDWARDS: I don't think it changes anything in the overall picture, and it makes it clear that the recusal judge would have a right to access to the record.

HON. ANN CRAWFORD McCLURE: We can add that.

CHAIRMAN BABCOCK: Okay. Tell us the specific language that you would add.

HON. ANN CRAWFORD McCLURE: Are you speaking to me or to the person who made the suggestion?

CHAIRMAN BABCOCK: Well, both of you, but I think you're more familiar with the --

HON. ANN CRAWFORD McCLURE: Well, we could say, "Any judge involved in a proceeding, whether as the judge assigned to hear and decide the application, as the judge assigned to hear and decide any recusal, disqualification, or objection, or a judge authorized to transfer the application or assign another judge to it or an appellate judge." Would that solve the concern?

MR. ORSINGER: Yes.

MR. EDWARDS: I think so.

HON. ANN CRAWFORD McCLURE: All right. I can recommend that.

CHAIRMAN BABCOCK: Okay. Anybody opposed to that?

There being no hands raised then that will pass unanimously, and the language is to insert after "to hear and decide the application," comma -- wait a minute. "Whether as the judge assigned to hear and decide the application, as the judge to hear any disqualification, recusal, or objection," comma. That's the language we're adding.

MR. TIPPS: You want to take out the first "as."

CHAIRMAN BABCOCK: Take out the first "as."

"Whether the judge assigned to hear and decide the application, the judge to hear any disqualification, recusal, or objection, a judge authorized to transfer," et cetera, et cetera. Is that acceptable to everybody? Judge Brown.

HONORABLE HARVEY BROWN: Just a clarification. What do we mean by "objection"? How is that different from recusal or disqualification?

CHAIRMAN BABCOCK: Good point. How is objection different than disqualification or recusal?

HON. ANN CRAWFORD McCLURE: A lot of the local councils of judges have turned to appointing

visiting judges to hear these cases.

HONORABLE HARVEY BROWN: Ahh.

HON. ANN CRAWFORD McCLURE: And we did not want to preclude an objection under the Government Code that a litigant has to complain of the appointment of a visiting judge.

CHAIRMAN BABCOCK: Answers that question.

HONORABLE HARVEY BROWN: That answered it.

CHAIRMAN BABCOCK: Anything else? All right. With that modification then that will be sent to the Court. What's next, Judge McClure?

HON. ANN CRAWFORD McCLURE: I had mentioned when we were talking about confidentiality the question as to whether we should propose amendments to the Rules of Professional Responsibility or the Code of Judicial Conduct to sanction improper disclosures. Again, this is the provision that Paul Watler expressed opposition to. Our subcommittee recommended no such amendment, but I don't know, Chip, if you want to take a separate vote on that separate and apart from the confidentiality discussion.

CHAIRMAN BABCOCK: Well, I think unless anybody wants to dig into that we should discuss first

what you did propose and not what you didn't propose, but this would be a good time to talk about it. Has anybody here got an appetite for strengthening this secrecy thing, which everybody knows my personal views on?

MR. ORSINGER: I'd like to comment that I don't think the Rules of Procedure are the appropriate place to write sanctions against judges acting in their official capacity generally, and I especially feel that that's true on this subject matter.

HON. ANN CRAWFORD McCLURE: It was designed -- Richard, the comment on the disciplinary rules was designed to put sanctions as available against the attorneys ad litem and to the extent the guardian ad litem is a lawyer, not the judges.

HONORABLE F. SCOTT McCOWN: Can you point out that language, Richard?

MR. ORSINGER: There isn't any. They recommended against it, so it's not in here.

HONORABLE F. SCOTT McCOWN: Oh.

MR. ORSINGER: The question is does somebody want to introduce it, and I just want to get on my soapbox for a minute.

HONORABLE F. SCOTT McCOWN: Oh, well,

when you started mentioning sanctions against judges I woke up. I thought I missed that. Okay.

CHAIRMAN BABCOCK: Anybody here interested in digging into that? There are no hands raised, so we will move on. Judge McClure, what's next?

HON. ANN CRAWFORD McCLURE: Amendments to Rule .4 in response to Doe 1. We have already mentioned that the Supreme Court has held that Chapter 33 does not prevent it from issuing opinions so long as the identities of the minor and the court are kept confidential. It was suggested that this may overrule part of Rule 1.4. The subcommittee was asked whether we should make an amendment to the rule in light of the Supreme Court's decision, and the subcommittee voted against making that change, instead relying on the case law to speak for itself.

CHAIRMAN BABCOCK: What part of Rule 1.4?

HON. ANN CRAWFORD McCLURE: Well, I have to find it. Just a minute.

Under the confidentiality provisions of "any information or all other court documents pertaining to the proceeding," which is in 1.4(b)(1).

CHAIRMAN BABCOCK: All right. Anybody

have a view on that? Nobody want to get on their soapbox about that? Was there any dissent to that, Judge McClure?

HON. ANN CRAWFORD McCLURE: No, there was not.

CHAIRMAN BABCOCK: Okay. Anybody opposed to the subcommittee's recommendation in that regard?

There are no hands raised, so that will be adopted by the full committee. What's next, Judge?

HON. ANN CRAWFORD McCLURE: The assignment rule had drawn some inquiries from the constitutional county judges. You'll recall that we had set up a default assignment in order to assist the clerks to figure out where these cases should be assigned. There was a reference in the rule to the judge's presence in the county, and some of the constitutional judges were preferring "presence in the courthouse."

However, we had several representatives of the county -- constitutional county court judges at our subcommittee meeting. Tim Allison was there, and they have recommended to us that we take no action on that proposal at this point, and the subcommittee agreed to defer consideration until a later time. I

don't know if this committee is interested in discussing that change or not.

CHAIRMAN BABCOCK: Anybody interested in discussing that? There are no hands raised, so you're free on that one as well.

HON. ANN CRAWFORD McCLURE: All right. The next one I anticipate is going to generate some discussion on the question of remand.

CHAIRMAN BABCOCK: Don't tell this crowd that.

HON. ANN CRAWFORD McCLURE: The Supreme Court, as most of you know, has remanded several of the Jane Doe cases. First of all, of course, they have decided that with regard to maturity and whether a minor is sufficiently well-informed and as to whether there is a potential or likelihood for physical or emotional abuse, determined that the appropriate standard of appellate review is factual and legal sufficiency. Of course, they have jurisdiction only to address in that context legal sufficiency.

Nevertheless, in several of the Doe cases they remanded in the interest of justice to allow the minor to present her application in light of the guidance that they had given in the opinions. When we approved the rules and drafted the rules we determined

that the intermediate court of appeals could only affirm or reverse and grant and not remand. The question that was raised is this: Since the Supreme Court has at least on a few occasions remanded and since factual sufficiency is an appropriate consideration at the intermediate court level, should the intermediate courts be given the opportunity to remand the application back to the trial court?

The subcommittee recommended against that out of several concerns, not the least of which is we do have some rather strict time constraints on the entire process imposed not by our statute and not by our Supreme Court decisions, but by the United States Supreme Court decisions, and if anybody wants any other background on that, I will be glad to address it or to answer specific questions.

CHAIRMAN BABCOCK: Does anybody have any comment about keeping the status quo in the intermediate appellate courts, and that is not permitting the remand option to the trial court?

MR. ORSINGER: Can I ask Ann a question?

CHAIRMAN BABCOCK: Sure.

MR. ORSINGER: Ann, what does the court of appeals do if the evidence is -- if they're reversing on a factual sufficiency basis but have

rejected a legal sufficiency basis? Are they required to reverse and render in favor of the minor?

HON. ANN CRAWFORD McCLURE: Well, that presents all sorts of wonderful possibilities, and it's one of the problems with the standard of review that's been enunciated. You know, traditionally the point of factual sufficiency review is to analyze the judgment by balancing the evidence that supports it and the evidence that controverts it. This is a nonadversarial proceeding, so the only way you're going to have conflicting evidence to balance is if the minor is inconsistent in her testimony, and I question how frequently that's going to arise, so I'm not sure what we accomplish with the remand, understanding also that we're really not going to be in a position to give a great deal of guidance to the trial court on that issue.

If the problem is factual insufficiency then we're not going to have enough information to be able to direct the trial court how to analyze it differently. Now, I can't tell you whether any of these cases have been reviewed by the intermediate courts on that particular problem because I don't have access to that information, so other than that I don't know how clearly I can answer it.

CHAIRMAN BABCOCK: Well, the appellate judges around the table are nodding their heads I think in agreement. Judge Schneider, what do you think?

HONORABLE MICHAEL SCHNEIDER: I don't think it should be amended. I think we ought to leave it the way it is. We don't need to amend it.

CHAIRMAN BABCOCK: Justice Duncan. Well, you were nodding your head.

HONORABLE SARAH DUNCAN: Well, I can nod it either way.

CHAIRMAN BABCOCK: Well, that's what I'm worried about.

HONORABLE SARAH DUNCAN: On the one hand I don't know how we can decide factual sufficiency points without remand power, but on the other, the constitutional time limitations --

CHAIRMAN BABCOCK: The statutory time limitations you mean.

HON. ANN CRAWFORD McCLURE: And the constitutional time limitations.

HONORABLE SARAH DUNCAN: Constitutional, United States Supreme Court.

CHAIRMAN BABCOCK: Oh, okay.

HONORABLE SARAH DUNCAN: I guess what I would be in favor of is actually removing that sentence

from Rule 3.3(b) that precludes a remand and then let the courts work it out.

CHAIRMAN BABCOCK: Justice Hardberger.

HONORABLE PHIL HARDBERGER: I wouldn't amend it. I think it's simply not practical to remand it, and I would keep it as it is.

CHAIRMAN BABCOCK: Was there any dissent on your subcommittee about this, Judge McClure?

HON. ANN CRAWFORD McCLURE: Surprisingly there was not, and I didn't hear Judge Hardberger's comment.

HONORABLE PHIL HARDBERGER: My comment was that I would not amend it, Ann.

HON. ANN CRAWFORD McCLURE: Oh, okay.

HONORABLE PHIL HARDBERGER: I think it's simply not practical to remand it.

HON. ANN CRAWFORD McCLURE: But let me explain one other problem I had with it conceptually. If we remand we have not technically denied her application under the statute, so I question whether the minor would be able to appeal our remand to the Supreme Court, No. 1, and then we're in an appellate orbit of bouncing this thing back and forth between a trial court and an appellate court, which really can seriously infringe on the constitutional time limits.

I will let you know that there are one or two cases that have said that 16 to 17 days from the date she files the application until the date the highest court rules on it passes constitutional muster, but I haven't seen one that expands it past that timetable. So we're talking about a very short time period.

CHAIRMAN BABCOCK: Richard.

MR. ORSINGER: Well, if the Texas Supreme Court, which is yet a further delay after your court, doesn't have a constitutional problem remanding, why is there a constitutional problem with the intermediate court remanding?

HON. ANN CRAWFORD McCLURE: Well, No. 1, I question whether they're going to continue to do that because now we have the case law out there that tells us what we're supposed to do and what needs to be shown and how they're going to analyze it, so I question whether they're going to be remanding in the future, and certainly they can't remand on a -- for any reason other than in the interest of justice because they don't have factual sufficiency jurisdiction. The only other thing I could think of would be whether they would remand because the appellate court had applied an improper standard of review, but that hasn't been

addressed yet.

CHAIRMAN BABCOCK: Justice Duncan.

HONORABLE SARAH DUNCAN: If I can just lay out the hypothetical just so that we're all -- I'm clear on what we're talking about. The minor comes up. Her application has been denied by the trial judge. The issue is her burden, and so she's going to have to show either "I conclusively established my right to have my application granted" or "The evidence is against the great weight and preponderance, so I get a reversal."

Let's say that she can't show conclusively established but she can show that the trial judge's decision was against the great weight and preponderance of the evidence, and Wendell's here. He can tell me if I'm messing up the standards. If we reverse the trial judge's order under the clause "the evidence is against the great weight and preponderance," we have to grant the application? That's the way the rule reads now. Not because we found that the evidence conclusively established the contrary of the trial court's order, but because the trial court's order is against the great weight of the preponderance of the evidence.

HON. ANN CRAWFORD McCLURE: Sarah, I

don't disagree with anything you said. That's the problem I have with the standard of review that's been enunciated. But I don't know what the solution to it is.

HONORABLE SARAH DUNCAN: I don't either. I'm not saying I do. I just think we ought to all be clear on what this sentence in Rule 3.3(b) means in light of the Supreme Court's holding sufficiency standards apply.

HON. ANN CRAWFORD McCLURE: I agree.

CHAIRMAN BABCOCK: Richard.

MR. ORSINGER: It might be worth us asking the question, and I don't have the answer to this. Is the correlation between factual sufficiency and remand and legal sufficiency and rendition, is that based on Constitution, statute, or tradition? Because if it's based on the Constitution, we can't do this in the rule; and if it's based on a statute that's jurisdictional with the court of appeals, we can only do it if this statute amends or overrides the earlier statute, and I frankly don't know. I just learned it as a tradition, and I don't know whether the source of that distinction was from the Constitution or a jurisdictional statute.

HONORABLE F. SCOTT McCOWN: The source

of what distinction?

MR. ORSINGER: That a legal sufficiency --

HONORABLE F. SCOTT McCOWN: It's constitutional.

MR. ORSINGER: -- reversal is a rendition, and that a factual sufficiency reversal is a remand, and I frankly don't know if that's based on -- that goes back so far in Texas jurisprudence I've never read the first case on it, and I don't recall whether it's constitutional or statutory.

MR. HATCHELL: It's common law, and actually it was reversed previously. All no evidence points were remanded, so the rendition is actually a more modern concept.

MR. ORSINGER: So if it's just court-based then the Rules of Procedure can overturn common law doctrine.

CHAIRMAN BABCOCK: But if Sarah's hypothetical is -- plays out in real life, by rule we've dictated the outcome, which but for this rule that outcome would not have happened.

MR. ORSINGER: Exactly. Exactly. And it's peculiar to this proceeding --

CHAIRMAN BABCOCK: Right.

MR. ORSINGER: -- because I think that the rest of the jurisprudence will continue the way it is.

CHAIRMAN BABCOCK: Skip Watson.

MR. WATSON: You know, I agree with Mike that it's based on case law, but if I understand what Sarah's saying, there may be no option but to affirm or to reverse and render if there is a factual insufficiency finding.

HONORABLE SARAH DUNCAN: Under the rule.

MR. ORSINGER: That is clear. That is what this says.

MR. WATSON: Well, then that basis of the case law interpreting the Constitution is the idea that the court of appeals may not make fact findings, and that's bridging the gap between making a fact finding and saying there ain't no fact to find; therefore, it's a matter of law. So I would then say that although we're starting to stack angels on the pin of a head here, the constitutional point is well-taken that it is a fact finding that's being made by the court of appeals if it's unwise enough to say that it's based on factual insufficiency.

CHAIRMAN BABCOCK: Justice Schneider, you're nodding again.

HONORABLE MICHAEL SCHNEIDER: I incorporate his comments by reference.

CHAIRMAN BABCOCK: Yeah, Luke.

MR. SOULES: It just seems to me like to use the traditional notions of factual sufficiency and legal sufficiency and all this is trying to strain words into something we don't need. What we really are saying is that the court of appeals is going to review the trial court's decision de novo and make a decision, and that's what we ought to say here, and if the Supreme Court of Texass doesn't have the power to do that on appeal from the court of appeals because it's limited to legal rulings, so be it, but at least this person is getting two courts to look at her application, both in effect de novo. One initially and the second de novo. We ought to just say, "The court of appeals shall review the trial court's decision de novo." It has fact finding power.

CHAIRMAN BABCOCK: Skip disagrees with that.

MR. ORSINGER: I disagree with that, too. I think that constitutionally that would turn the court of appeals into a trial court.

PROFESSOR ALBRIGHT: Well, there are lots of situations where there is a de novo review.

The venue statute has a de novo review, and I think what Justice McClure is saying is that this -- since this is not an adversary proceeding it's really rather silly to think about factual sufficiency review because there's no two sides of the facts.

You're not -- you can't balance any facts. You're just saying whether the minor has presented sufficient facts to justify the decision that was made or not. And so I think it is probably more of a de novo review, and it may be that this isn't -- the rule is not the place to put the standard of review. I don't think the Supreme Court was remanding because of any factual sufficiency. I think they were remanding more in the interest of justice because there hadn't been any guidance.

CHAIRMAN BABCOCK: Judge McClure, how did this problem -- did somebody just in your subcommittee notice that the Supreme Court had remanded and said, "Whoa, what about this sentence," or how did this problem arise?

HON. ANN CRAWFORD McCLURE: I don't know who it was that asked us to consider it. It was my understanding it came from the Supreme Court that they wanted us to consider it, but I may be wrong about that.

CHAIRMAN BABCOCK: Well, if it came from the Supreme Court, that makes a difference to me. I mean, if it's just Watson and Orsinger musing about the Constitution that's one thing.

MR. ORSINGER: No, Skip. Everybody that read Doe 1 immediately saw that we had a proposed disposition that was inconsistent with Texas law. I mean, everyone that knows appellate procedure. I mean --

CHAIRMAN BABCOCK: Which includes everybody in this room, I'm sure.

MR. ORSINGER: I mean, really, it became a point of controversy and of interest to the appellate lawyers on how on earth are we supposed to do this?

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

CHAIRMAN BABCOCK: Yeah. Judge McCown.

HONORABLE F. SCOTT McCOWN: I think it would be a mistake to think that all of the different factual scenarios that are ever going to be presented have already been presented and that the appellate courts have already written on them. My experience is that life is constantly changing and bringing you new problems, even after a hundred years; and when the trial court denies an application and it goes up, in

essence the court of appeals or the Supreme Court is going to have to decide either the trial court was right or the trial court was wrong or perhaps that there's something that needs to be considered that wasn't considered or some evidence that ought to be presented that wasn't even presented.

And it seems to me that the problem can be resolved by saying in this last -- in this next to the last sentence that if the court of appeals reverses the trial court order it must also state in its judgment whether the application is granted or whether the trial court should reconsider the application on the same evidence or after hearing additional evidence so that the court then either grants the application or remands it and either tells the trial court to reconsider based on the evidence its heard with the guidance in the court's opinion or tells the trial court to reconsider after hearing additional evidence, presumably evidence called for or discussed in the appellate court's opinion.

HON. ANN CRAWFORD McCLURE: But, see, the problem is there isn't going to be an appellate court opinion probably because the opinions are purely voluntary on the part of the intermediate courts, and I think there's only been one written.

HONORABLE F. SCOTT McCOWN: Well, if a court of appeals was going to take the option of remanding, it doesn't have to be a big published opinion. If the court of appeals is going to take the option of remanding and telling the trial court to reconsider, it may write a very brief opinion, instructions to the trial court about why it needs to be reconsidered and what needs to be reconsidered and whether additional evidence needs to be heard and what that evidence might be.

I have said before I don't think we need to get tied up in constitutional problems and traditional notions because I don't think this is an adversarial proceeding under the Constitution. This is some kind of quasi-judicial or administrative proceeding that the Legislature has assigned to the judiciary, and we just need to come up with the way to handle it, and you might say, well, that makes the whole thing unconstitutional. Well, that's fine. But there are other examples of quasi-judicial or administrative things that judges do, but I just don't think we have to spend a lot of time crossing that bridge or trying to force it into traditional notions.

CHAIRMAN BABCOCK: Judge Rhea.

HONORABLE BILL RHEA: Can I ask, what

are the U.S. constitutional time restrictions that we're dealing with here? I'm not aware of what those are.

MR. EDWARDS: I thought we heard something about 16 or 17 days.

HONORABLE BILL RHEA: Somebody said that passed muster, but that sounds --

MR. EDWARDS: That's all.

HONORABLE BILL RHEA: -- like there's maybe some play in that. I mean, are we dealing with the situation where we can't even consider remand because of that issue, or do we have some flex here?

HON. ANN CRAWFORD McCLURE: Well, we also have a biological timetable that it needs to be completed at least by a point that allows her to obtain the abortion if it's granted.

HONORABLE BILL RHEA: I mean, a court of appeals can remand in two hours, I bet you, if they need to.

HONORABLE F. SCOTT McCOWN: And they can write brief instructions to the trial court.

HON. ANN CRAWFORD McCLURE: If that's the way that -- the direction you want to go then we need to provide in the rules at least that if it's reversed on a factual sufficiency basis that some sort

of memorandum opinion is required because presently there is no requirement for an opinion, and without one there's no ability, or, shall I say, no way to ensure that the appellate court gives the trial court the appropriate guidance for reconsideration.

CHAIRMAN BABCOCK: Well, but Scott's suggestion, it seems to me, is simply that the court of appeals could just instruct, "Look, either we're going to send it back to you. Reconsider it on the basis of the same evidence or take up some new evidence." I suppose there could be additional guidance, but it would be optional, wouldn't it?

HONORABLE F. SCOTT McCOWN: Well, I guess. And let me point out one other thing about how rules affect judges, and maybe the court of appeals judges would say this isn't true, but if you tell a court of appeals judge that if you reverse this then it's automatically granted, you're skewing or biasing the decision making because they may well want it reversed for an additional consideration, and if that consideration is A then they would want the trial judge to say "no." If it's B, they would want the trial judge to say "yes," but if you don't give them any option to get any additional information or have the trial judge reconsider any point but you lock them into

saying "If it's reversed then it's granted," then you're biasing the kinds of decisions you're making.

CHAIRMAN BABCOCK: Justice Duncan.

HONORABLE SARAH DUNCAN: With all respect for Judge McCown, I think that this is too complicated for a rule. The courts, all of the courts, involved in this issue are simultaneously caught between Supreme Court opinions, Texas Constitution, Texas statutes, and United States Constitution and United States case law, and I still propose that we simply take that sentence out of the rule.

I agree with Judge McCown that requiring a court to grant the application if it reverses the trial court's judgment is biasing the decision making in the court of appeals, but if we just remove that sentence then the courts will work it out however they can between the constitutional limitations, the statutory limitations, and Supreme Court of Texas and United States case law.

CHAIRMAN BABCOCK: Bill Edwards.

MR. EDWARDS: I thought that provision was written the way it was to parallel a requirement of the statute. Is there not a requirement in the statute about what the court of appeals can do?

HON. ANN CRAWFORD McCLURE: No, there

really isn't.

MR. EDWARDS: Is that right?

HON. ANN CRAWFORD McCLURE: But we debated it at length about all of these same issues when we were trying to decide how to incorporate it. It just says that we're -- the appellate court is required to issue a ruling.

HONORABLE F. SCOTT McCOWN: Well, and let me add, I don't oppose Sarah's suggestion of taking the sentence out. I mean, I think you could add the language that I've added, and I would be happy with that, too. The one thing I wouldn't want to do is leave the sentence as-is.

MR. ORSINGER: I would like to support Sarah's proposal, too, because then we don't have to solve the problem on this committee. We can let the courts over a period of time solve the problem, and that's a better chance of getting a good result I think.

CHAIRMAN BABCOCK: Yeah, Judge Rhea.

HONORABLE BILL RHEA: And the proposal is to take out this first sentence of 3.3(b)? Is that it?

MR. ORSINGER: No. It's the sentence that reads, "If the court of appeals reverses the trial

court order, it must also state in its judgment that the application is granted."

HONORABLE BILL RHEA: But the first sentence says --

MR. ORSINGER: But you either issue a judgment --

HONORABLE BILL RHEA: Okay. Okay.

MR. ORSINGER: -- affirming or reversing, but you don't indicate what the disposition is other than reversal.

HONORABLE F. SCOTT McCOWN: But the only problem with that, Justice McClure?

HON. ANN CRAWFORD McCLURE: Yes.

HONORABLE F. SCOTT McCOWN: How does that affect the time frames and the minor getting her certificate to take to her doctor? Don't we need to say or does the rule already adequately say, okay, if it's reversed, now what, from the minor's point of view?

HON. ANN CRAWFORD McCLURE: It doesn't say. What it says is that we're required to rule by 5:00 p.m. on the second business day, and if we fail to do so then the clerk is to issue a certificate that the application is deemed granted by operation of law.

HONORABLE F. SCOTT McCOWN: So if it's

simply reversed and rendered then it would be denied. If it was reversed and remanded then presumably the trial judge would be back under the short fuse of the --

HON. ANN CRAWFORD McCLURE: Right. Right.

HONORABLE F. SCOTT McCOWN: Okay.

HON. ANN CRAWFORD McCLURE: My interpretation is that the time frame would start again at the point in time as it goes back to the trial courts.

HONORABLE F. SCOTT McCOWN: As long as the rules make that adequately clear, because I think that would be important.

MR. ORSINGER: Well, I think what you really need is you need to require the immediate issuance of a mandate. You don't require the immediate issuance of a mandate, do you?

HON. ANN CRAWFORD McCLURE: We issue a judgment. We had that debate at length about the ruling and the order and the judgment, all of that. But my understanding is what's actually being done is that an order is being issued, in fact, to the trial court.

MR. ORSINGER: But if you're going to

require the trial court to reconsider the -- at least in tradition, if not in law, the evidence of the court of appeals' judgment is the mandate and not the judgment itself; isn't that right? And there's cases that indicate the trial court doesn't re-acquire jurisdiction --

HON. ANN CRAWFORD McCLURE: That's right.

MR. ORSINGER: -- until it receives the mandate.

HON. ANN CRAWFORD McCLURE: That's right.

MR. ORSINGER: So we ought to have a sentence in here that says that the mandate shall be issued immediately and then maybe even a sentence saying that the trial court shall reconvene the trial within 72 hours or two business days or something like that.

CHAIRMAN BABCOCK: Well, let's stick to deleting or not this sentence before we go writing other sentences, don't you think, Richard?

MR. ORSINGER: Okay.

CHAIRMAN BABCOCK: Shouldn't we get that resolved among us? Judge Rhea.

HONORABLE BILL RHEA: I didn't have

anything, except I was agreeing with you.

CHAIRMAN BABCOCK: Oh, thanks. Judge Schneider.

HONORABLE MICHAEL SCHNEIDER: Just the same.

CHAIRMAN BABCOCK: Okay. Are there any -- particularly any of the judges present who want to weigh in on this any -- or anybody else for that matter, but, well, Judge McClure, what do you think? I'm leaning towards taking this sentence out. It appears to me that it does -- it does skew the result in a substantive nonprocedural way.

HON. ANN CRAWFORD McCLURE: Well, I think the whole statute does that, but, you know, we can handle it either way. I'm not opposed to taking it out. If you want to do that then I think it leaves it to each individual court to figure out how they want to handle it on a factual sufficiency review.

CHAIRMAN BABCOCK: Justice Hardberger, are you okay with that?

HONORABLE PHIL HARDBERGER: Yes. I'm okay with it.

CHAIRMAN BABCOCK: Judge Patterson.

HONORABLE JAN PATTERSON: I favor it for a different reason. I think I agree with the skewing

provided by the second sentence, and I think if you take out the second sentence it will provide you with information over a period of time so we will see whether we have to tinker with it more, but it won't provide you with information if we have skewed results provided by the second sentence, so I favor taking it out.

HONORABLE PHIL HARDBERGER: Yeah. That's an excellent point, too. Let us know what's going on.

CHAIRMAN BABCOCK: Yeah. Okay. All in favor of taking the second sentence out raise your hand. 24 in favor.

Anybody against? Raise your hand. One against. So that will pass. Judge McClure, we will recommend that that sentence be stricken.

HON. ANN CRAWFORD McCLURE: All right.

MR. EDWARDS: Let me raise one thing with regard to this. You-all have been talking about opinions. Look at (e)(2)(a). They don't have to issue an -- no opinion is necessary for ten days.

HON. ANN CRAWFORD McCLURE: Well, no opinion is necessary at all.

MR. EDWARDS: I understand that, but somebody is talking about getting guidance on remand.

There ain't going to be any guidance on remand if an opinion is issued ten days after the ruling.

HON. ANN CRAWFORD McCLURE: Well, actually, I question whether it would be the 10 days or the 60 days, because if we're remanding we're not denying, and it's not going to be going to the Supreme Court, so subsection (b) is going to be the applicable one.

MR. EDWARDS: Either one.

MR. ORSINGER: Well, somebody might take -- if you have a remand, somebody might want to take it to the Supreme Court to get a rendition. I mean, it wouldn't make practical sense. It's probably better just to retry your case better, but theoretically couldn't someone go to the Supreme Court for a rendition?

HON. ANN CRAWFORD McCLURE: I don't know.

MR. EDWARDS: Well, if the remand is in error and on the wrong legal grounds, there is no way to go to the Supreme Court until you're through with the court of appeals, and I can see somebody getting bounced back and fourth between the court of appeals and the trial court, back and forth and back and forth like a ping-pong ball.

HON. ANN CRAWFORD McCLURE: So can I.

MR. ORSINGER: Well, that was a Corpus Christi case.

CHAIRMAN BABCOCK: What's next, Justice McClure?

HON. ANN CRAWFORD McCLURE: There was a concern that grew out of a media account that some minors were having trouble getting their signatures on the applications notarized because the notary publics were requiring some sort of identification, driver's license, which the minor may not have. We were asked whether we should change the form to remove that requirement. We do not believe we should for the simple reason that the statute requires that the application be signed under oath.

CHAIRMAN BABCOCK: You're talking about the Wall Street Journal article?

HON. ANN CRAWFORD McCLURE: Yes.

CHAIRMAN BABCOCK: Everybody familiar with the issue? People shaking their heads, "No, what the heck are you talking about?"

HON. ANN CRAWFORD McCLURE: The statute requires that the application be signed under oath. It does not specifically require that it be the minor's signature that is notarized. Someone -- and our form

specifically says, "Someone may fill this out for you," and if that person has personal information then it can be notarized and filed that way, but evidently there have been instances of minors filing these on their own and not being able to get their signature notarized.

CHAIRMAN BABCOCK: You have to provide identification like a driver's license or something and a lot of these minors --

HON. ANN CRAWFORD McCLURE: Some sort of identification.

CHAIRMAN BABCOCK: -- don't have one, and so an enterprising reporter by the name of Mary Flood went out and found a bunch of youngsters who couldn't get their signatures notarized. Paula Sweeney.

MS. SWEENEY: I'm willing to be ignorant. Does "under oath" equal "notarized"?

HON. ANN CRAWFORD McCLURE: No.

HONORABLE SARAH DUNCAN: No.

MS. SWEENEY: Well --

HON. ANN CRAWFORD McCLURE: That's why we decided that we would leave it alone.

MS. SWEENEY: Why is it then that people are running up against the wall of getting notarized if they don't need to be notarized? I'm sorry. I haven't

been reading the Wall Street Journal, and I don't know.

CHAIRMAN BABCOCK: Yeah, I'm not sure it's a -- well, I think the subcommittee didn't think it was a significant issue, but since we were asked to look at it, we looked at it.

MR. SOULES: Can't we just adjust the form to say, "I, a minor, name and age, under oath make this application"?

CHAIRMAN BABCOCK: I think that's pretty much what it says, isn't it, Sarah?

MR. SOULES: And we may say what the oath is.

HONORABLE SARAH DUNCAN: The form we've got doesn't say. I mean, it doesn't --

MR. SOULES: That would suggest then a cure consistent with Paula's concern.

HONORABLE SARAH DUNCAN: Yeah. I was at my electronic filing training seminar yesterday -- and it was really exciting -- to file contribution reports over the internet, and we're no longer going to have a notary on our contribution reports. All we just say is "I swear or affirm." Why can't these people do that?

HONORABLE PHIL HARDBERGER: Why couldn't we put it in the instructions that it does not have to be notarized?

MR. EDWARDS: Well, you know, if you notarize it and the notary is doing what they're supposed to do, they will have a notary book, wherever it is, at the corner drug store or wherever, in which this affiant's name will be listed with identification, Social Security or a driver's license, and what it was that was notarized. There's a statute that requires that.

HONORABLE F. SCOTT McCOWN: But if there's only certain people that can administer oaths, and you can't just say "under oath I signed this" and have it be under oath, those places like electronic filing or inmates who are allowed to swear to things, I think they all have specific statutes saying that that form places it under oath, but I don't --

MS. SWEENEY: But don't -- I'm sorry, Scott.

HONORABLE F. SCOTT McCOWN: That's my understanding.

HONORABLE TOM LAWRENCE: If it's notarized you have to keep the book and get the notification, but there are a lot of people in Texas that can take oaths other than notaries, and there is no requirement that someone who gives an oath, like the judges or a clerk of the court or anybody else, keep

that book and give that identification.

MS. SWEENEY: And you have doctors certifying on medical records. You know, "I certify under penalties of perjury that these charges are valid" or whatever it says for Medicare.

HONORABLE F. SCOTT McCOWN: Well, there's statutes. There's specific statutes authorizing that form of swearing.

MS. SWEENEY: Well, let's write it. Let's put it in a rule.

CHAIRMAN BABCOCK: Form 2b looks to me like it has a line that says "notary public, clerk, or other person authorized to give oaths."

HON. ANN CRAWFORD McCLURE: And there is a little bit above that, "Important: Please sign your name in the blank below. You must sign your name before a notary public, court clerk, or other person authorized to give oaths."

HONORABLE SARAH DUNCAN: But does the statute, Ann, just say that the application must be sworn?

HON. ANN CRAWFORD McCLURE: No. It says the application must be made under oath and include certain things.

HONORABLE F. SCOTT McCOWN: Is this a

real problem? Because I think most areas have set up some kind of system, and there's lawyers that are handling these, and the judge can --

HON. ANN CRAWFORD McCLURE: We did not perceive it to be a significant problem, and as I recall -- Bonnie, correct me if I'm wrong, but I don't recall the clerks of the subcommittee thinking it was a problem.

MS. WOLBRUECK: No. We did not believe it was a problem.

HONORABLE F. SCOTT McCOWN: I mean, even if they just filled it out and took it up to the courthouse, the clerk could have a system where the clerk takes the oath.

HON. ANN CRAWFORD McCLURE: That's right.

CHAIRMAN BABCOCK: Any more comment about this? All right. Anybody opposed to following the subcommittee, which is to do nothing on this issue?

No hands are raised, Judge, so we're on to the next issue.

HON. ANN CRAWFORD McCLURE: All right. The next one might generate some discussion as well. This is on the subject of amicus briefs. Let me give you a little history as to what happened in Doe 1.

When the Supreme Court remanded it back to the trial court it was anticipated that it might then again work its way back up to an intermediate appellate court, and there was -- actually, I think there were two different groups who prepared amicus briefs to address some of the issues that had been discussed in the Supreme Court opinion. Because the identity of the trial court and the identity of the intermediate court was not public information, they did not know to which court of appeals it would come back up if it worked its way up the appellate ladder again.

So they filed these amicus briefs in all 14 of the intermediate courts. I don't -- I suspect that as all of these cases were remanded that more of these briefs were likely filed. We were asked to try to come up with some sort of recommendation as to how we go about processing the filing of the amicus briefs. The first question, of course, being should we allow the amicus briefs to be filed, and the subcommittee concluded that we should.

And, second of all, we're dealing with two peculiar situations. One is an amicus that isn't directed to any particular case-specific facts, that is more designed to discuss constitutional issues or procedural issues, in which case we recommended one

type of proposal. For those that are case-specific briefs; for example, if the guardian ad litem wants to file an amicus in the case in which that guardian has been appointed, then we need to have another system in place to address that.

So what the subcommittee came up with is a two-tiered procedure. Amicus could submit briefs on general principles of law without reference to any particular case and without including any identifying information, and that brief would be submitted to the Supreme Court. The Court would make these filings public. We would require the amicus to submit briefs on computer disk, and it could be posted to the internet site. This would enable all of the courts, and particularly the minors, the lawyers, and the ad litems in these cases, to get this information and respond to it if they felt they need to do so.

The second procedure we recommend is that those persons who are actually involved in a particular proceeding, like the guardian ad litem, could confidentially submit the amicus to the appropriate court when that case is appealed.

CHAIRMAN BABCOCK: Justice Duncan.

HONORABLE SARAH DUNCAN: I think that's wonderfully creative and a great idea.

CHAIRMAN BABCOCK: Any other comments? Anybody opposed to this procedure? Luke, you okay with this?

MR. SOULES: Fine.

CHAIRMAN BABCOCK: Luke says "great."

HON. ANN CRAWFORD McCLURE: Good.

CHAIRMAN BABCOCK: So that will pass.

HONORABLE F. SCOTT McCOWN: Are we moving from this to something else?

CHAIRMAN BABCOCK: Yes, sir.

HONORABLE F. SCOTT McCOWN: Because I do object to authorizing witnesses to file an amicus brief.

HON. ANN CRAWFORD McCLURE: So do I.

HONORABLE F. SCOTT McCOWN: It's just inconceivable to me that a witness could file an amicus brief.

HON. ANN CRAWFORD McCLURE: I had recommended that it be limited to amicus, and I thought it had been, but I see you're right that it's still on page five, and I would propose that the reference to the witness be deleted.

HONORABLE F. SCOTT McCOWN: Well, and Judge Peeples has just whispered a question to me about this. I mean, I'm not saying that there's not any

situation in the world where some witness might not have a sufficient interest or standing to file an amicus, but I don't think we should have it listed in the rule. We say "such as a guardian ad litem." That leaves it open-ended. I just don't think we should have it in the rule and suggest somehow as a matter of routine or course that witnesses should or could be filing amicuses.

HON. ANN CRAWFORD McCLURE: I see that my comment was put in Footnote 17. I agree with you. I think we should leave it "such as a guardian ad litem," which indicates to me a non-exclusive list but without giving encouragement to others to file one.

CHAIRMAN BABCOCK: Why did your subcommittee think otherwise, Judge?

HON. ANN CRAWFORD McCLURE: I don't recall that there was any other discussion except perhaps that a medical provider might want to weigh in on the subject, and any of my subcommittee members that are there that remember that portion of the discussion better than I do, I would invite them to respond.

CHAIRMAN BABCOCK: Bonnie doesn't remember anything on it. Anybody else that was on the subcommittee?

HON. ANN CRAWFORD McCLURE: We didn't

have the specific draft of the rule in front of us. Obviously we were working off the memo and having our conversations and then it was regenerated into the proposal and circulated to the subcommittee. So the only comments that I got were that other people agreed that that ought to be deleted, but we didn't have a subsequent conversation about it, so the comment was put as a footnote.

CHAIRMAN BABCOCK: Well, you don't have very good control of your subcommittee if you were against it.

HON. ANN CRAWFORD McCLURE: I wasn't going to come to Austin again.

CHAIRMAN BABCOCK: Yeah, Wendell Hall.

MR. HALL: Why not just take out "such as a guardian ad litem or witness" anyway and not identify who might be an example under the Family Code and just leave it open and vague and then not encourage anybody to necessarily file one.

CHAIRMAN BABCOCK: You're not encouraging. You're not discouraging.

MR. HALL: Right. Just leave it.

CHAIRMAN BABCOCK: How about that, Judge?

HON. ANN CRAWFORD McCLURE: I'm not

opposed to that.

CHAIRMAN BABCOCK: Okay. That strikes me as the better way to do it. Everybody okay with that?

All right. Then anybody opposed to that? If you're opposed, raise your hand. Nobody raised their hand, so we're going to strike that clause from Rule 1.10(a), and the language we're striking is in the fourth line, dash, "such as a guardian ad litem or witness," dash. So that's going to be stricken by a unanimous vote.

Okay. Anybody have anything else before we approve this amicus rule?

MR. EDWARDS: Can I --

CHAIRMAN BABCOCK: Yeah, Bill.

MR. EDWARDS: Well, finish the amicus. I wanted to go back because I have got the statute in my hand now.

CHAIRMAN BABCOCK: All right. We're going to finish the amicus rule and then we're going to go backwards.

MR. EDWARDS: Well, I --

CHAIRMAN BABCOCK: No, no, no. We'll do it. We'll do it. Anybody else in this? Okay. Then the amicus rule passes unanimously.

And now Bill Edwards wants to go to something else. What, Bill?

MR. EDWARDS: Going back to this business of the remand or not from the court of appeals.

CHAIRMAN BABCOCK: Yeah.

MR. EDWARDS: Is there anybody who thinks that a remand is not a denial by the court of appeals of an order authorizing the minor to consent to an abortion?

CHAIRMAN BABCOCK: Say that again.

MR. EDWARDS: Is a remand to the court of appeals a denial of an order authorizing an abortion?

HON. ANN CRAWFORD McCLURE: A remand to the court or a remand from the court?

MR. EDWARDS: A remand from the court of appeals to the district court. Is that a denial by the court of appeals of an order authorizing the minor to consent to the abortion?

HONORABLE F. SCOTT McCOWN: No.

MR. EDWARDS: They didn't give it to her.

HONORABLE F. SCOTT McCOWN: No, but they didn't deny it.

MR. ORSINGER: The appellate court's role is to reverse the trial court's denial. They are not themselves denying the request. They are, in fact, granting probably the alternate relief sought by the appellant.

HONORABLE F. SCOTT McCOWN: My little boy has asked me for a puppy every day this week, and I told him we're going to think about it. I haven't denied his request yet.

MR. EDWARDS: Yeah, but he ain't got the puppy.

HONORABLE F. SCOTT McCOWN: That's true. We're taking additional evidence.

MR. EDWARDS: Well, the reason I say that is that's the language used in one of the sections of the statute, that there is an expedited confidential appeal, "shall be available to any pregnant minor to whom a court of appeals denies an order authorizing the minor or consent," and you go to the court of appeals to get the order, and if you don't get it, it's denied.

HON. ANN CRAWFORD McCLURE: I'm not sure I agree with that. That's the comment I made before that we're reversing the denial and sending it back, and I think there's a question as to whether that is then under the statute appealable to the Supreme Court.

MR. ORSINGER: If it was written that they didn't grant it, you would probably be on safer ground, but they didn't deny it.

MR. EDWARDS: They didn't give it.

MR. ORSINGER: Yeah, true. They didn't give it. The statute says "deny it."

MR. EDWARDS: They withheld the order, and if they withhold the order, they deny it. I mean, I'm just --

CHAIRMAN BABCOCK: You're musing.

MR. EDWARDS: As long as everybody realizes it's there, let's go on.

CHAIRMAN BABCOCK: Judge McClure, what is next on the parental notification rules?

HON. ANN CRAWFORD McCLURE: There was a recommendation made by one of the legislative representatives that courts, particularly the more rural courts, might have a greater availability of a pool of attorneys for ad litem appointment if we created some sort of an automatic continuance like we have the legislative continuance to encourage a lawyer to take an appointment if they are involved in trial or some other proceedings and the time frame isn't so short.

HONORABLE F. SCOTT McCOWN: No.

HONORABLE SCOTT BRISTER: No.

(Groaning.)

CHAIRMAN BABCOCK: Well, wait a minute. They didn't recommend that.

HON. ANN CRAWFORD McCLURE: The subcommittee -- you're going to like this -- opted not to do that.

HONORABLE SCOTT BRISTER: Yea, yea.

CHAIRMAN BABCOCK: And from the boos and catcalls I think that's -- probably the group here agrees with that approach.

HON. ANN CRAWFORD McCLURE: Realistically if an attorney is in trial or otherwise preoccupied with something that requires his attention or her attention such that they are not immediately available then we probably need another lawyer.

CHAIRMAN BABCOCK: Is that anything anybody is concerned about? Okay. So the subcommittee's recommendation of no action on that is adopted unanimously. What's next?

HON. ANN CRAWFORD McCLURE: Confidentiality of documents necessary for cost reimbursement. You'll recall that the rules provide and the forms provide that the cost order be directed to the Comptroller for payment. The Department of

Health -- Susan Steague from the Department of Health is a member of the subcommittee, and she had recommended that we provide in the rules that although the reimbursement orders are to be directed to the Comptroller, they are to actually be sent to the Department of Health.

And we recommended some changes and actually Susan is the one that drafted those changes to incorporate the Department of Health into the order and to make it clear to the clerks how these ought to go about being processed, and so you will find in your packet proposals on the changes to those forms and to the rules that so provide and also to make it clear that the confidentiality is attached to these even when they're transmitted to either the Comptroller or the Department of Health for payment.

The other issue that we've addressed there is there was a question about whether interpreters fees could be reimbursed by the state, and it was the opinion of the subcommittee that they could and should be, so we have included reference to the interpreter's fee, and we have created a separate form for that.

CHAIRMAN BABCOCK: Okay.

HON. ANN CRAWFORD McCLURE: Lastly,

there was I guess it was a miscellaneous docket order back in 1994 requiring the court clerks to report ad litem fees in excess of $500. We also wanted to add a clarification that the reporting requirements under the Jane Doe rules supplant the general obligations to report that information. And, finally, to impose at the request of the department a time -- a suggested time limit on when these orders are supposed to be forwarded for payment, and we've created a 60-day period after final judgment for sending the reimbursement order to the Department of Health.

CHAIRMAN BABCOCK: Okay. The rules that are affected is Rule 1.9(e), (f), and (g) and Form 2(d); is that correct?

HON. ANN CRAWFORD McCLURE: Yes.

CHAIRMAN BABCOCK: Is everybody with us on that?

HON. ANN CRAWFORD McCLURE: 1.9(b), (e), (f), and (g), and let me see. I think that does it.

CHAIRMAN BABCOCK: Okay. Any comments about these changes? Nina?

MS. CORTELL: (Shakes head.)

CHAIRMAN BABCOCK: No comment?

MS. CORTELL: No comment.

CHAIRMAN BABCOCK: Nina does not have a

comment. Let the record reflect that.

MR. ORSINGER: This is like law school, huh?

CHAIRMAN BABCOCK: You've got to be on your toes here.

HONORABLE SARAH DUNCAN: It's the first week of law school.

CHAIRMAN BABCOCK: Okay. Anybody opposed to the subcommittee's recommendations in this regard? Nobody is opposed, so that will pass unanimously.

HON. ANN CRAWFORD McCLURE: All right. The next one addresses the trial court's findings of fact and conclusions of law. The Doe cases cautioned the trial courts to make detailed findings on various issues. We were asked to decide whether Form 2(d) should be amended to encourage or provide more room for these findings and conclusions. We found that there was no necessity to do that. However, we recommended that we change it from "comment" to "findings of fact and conclusions of law."

One other thing I found particularly interesting is that there was a reference in one of Justice Hecht's dissenting opinions that perhaps we were not requesting findings when a trial court is

denying, that the structure of the form could be perhaps susceptible to the conclusion that we were only looking for findings if the application is granted. I think realistically if the application is granted we don't need to worry too much about findings because it's not going to be appealed. The time that we need to be concerned about the findings is when it's denied, so I'm not sure that's an overriding concern, but I bring it to your attention.

CHAIRMAN BABCOCK: All right. The basic change recommended here is deleting the word "comment" on Form 2(d).

HON. ANN CRAWFORD McCLURE: Right, and adding "findings of fact and conclusions of law."

CHAIRMAN BABCOCK: Anybody opposed to that? There are no hands raised, so that will pass and will be adopted as the recommendation of this committee.

HON. ANN CRAWFORD McCLURE: All right. There were a few other technical questions that I'll mention briefly. The rules do not make clear in some individual's interpretation as to which clerk is to perform the duties specified in Rule 2.2, the clerk with whom the application is filed or the clerk of the court to which the application is actually assigned.

It was the position of the subcommittee that we didn't need a change because these were basically being addressed at the local level by the various councils of judges and the rule implementations that they are doing.

CHAIRMAN BABCOCK: Okay. Bonnie, are you okay with that?

MS. WOLBRUECK: Yes. We agreed with that.

CHAIRMAN BABCOCK: Okay. Bonnie agrees with that.

HON. ANN CRAWFORD McCLURE: All right. Second of all, does Rule 2.5(e) apply where the trial court denies an application without prejudice because they have not been able to locate the minor, and we found that there was not a necessity for a clarification? If the minor doesn't show up for the hearing or can't be found, it was fairly obvious to us that the clerk would not be required to give her the notice of the right of appeal, and since any dismissal would be without prejudice she would be in a position to refile.

Third, and I mentioned this to you, and I think we've actually voted on this, that we amend Comment 3 to clarify that appellate judges may also

obtain the verification page in order to address recusal or disqualification issues. I don't know, Chip, if you want to have a vote on those suggestions.

CHAIRMAN BABCOCK: Absolutely. Anybody opposed to these suggestions that Judge McClure has just outlined on the technical issues? There's nobody raising their hand as opposed, so that will be approved by this committee adopting the report of the subcommittee.

HON. ANN CRAWFORD McCLURE: All right. Let me mention one other issue, and it was my understanding that Marilyn Shram's letter had been faxed to everybody. She expressed a concern, and I think it's a well-founded concern, concerning Form 2(a) and also the instructions that accompany them, and I'm trying to find it so I can quote it specifically to you.

There it is. We tell the minor, "If you claim that you have been or may be sexually abused, the court must treat your claim as a very serious matter and may be required to refer it to the police or other authorities for investigation." She has a double concern here. One, a threat or a perceived threat of the minor that if she discloses that information she's going to be put in a position of having to go to the

authorities to back it up, and while I am concerned about that and the subcommittee is concerned about that, I think we have to balance the understanding that if the court and the ad litem is under a statutory duty to report it, if it's filed that way, then the child at least needs some warning that there may be an investigation, even though she's also being told that all of these files are going to be confidential.

So I think to that extent the warning is necessary, but she also expressed her concern that we're putting it in language "if you claim that you have been" as if we are predetermining that her claim is merely an allegation and not fact. So I draw that to your attention in case you want to change that particular language for the warning.

CHAIRMAN BABCOCK: Any comment on that?

HONORABLE F. SCOTT McCOWN: Can you identify where that language is again?

HON. ANN CRAWFORD McCLURE: Yes. Form 1(a) to the rules is entitled in bold "Instructions for Applying to the Court for a Waiver of Parental Notification." It's a two-page form. If you look on the second page at the very bottom of the left-hand column, it says, "If you claim that you have been or may be sexually abused, the court must treat your claim

as a very serious matter and may be required to refer it."

The original thinking here was if we're telling the minor that it's confidential, and you'll notice in bold we tell her everything is confidential and private, and then she makes that allegation that requires under the statutes the courts and/or the ad litem to report that to the appropriate authorities, that we at least ought to tell her that there is that requirement.

HONORABLE F. SCOTT McCOWN: Well, I would suggest that we just change the language to say, "If the evidence shows that you have been or may be sexually abused."

HONORABLE PHIL HARDBERGER: I would suggest that we simply substitute "state" for "claim." "If you state."

HON. ANN CRAWFORD McCLURE: I like that.

MS. JENKINS: I think it's a good suggestion.

HONORABLE F. SCOTT McCOWN: Well, the only problem with that is that it suggests to her that she's going to be in control by how she tailors her own testimony when, in fact, the judge may hear all the evidence and determine that a report needs to be made,

and if we want to give her fair warning, it might mislead her to suggest she has that kind of control.

HONORABLE PHIL HARDBERGER: I think it would be more misleading to say "if the evidence." That doesn't mean too much. I think it's much more plainspoken to say "state," "if you state it."

HONORABLE F. SCOTT McCOWN: How about --

HONORABLE PHIL HARDBERGER: That gives her the warning.

HONORABLE F. SCOTT McCOWN: How about if we just say, "If you have been or may be sexually abused" and not turn it on anything? Just say "if you have been or may be sexually abused"?

HONORABLE SARAH DUNCAN: But the next part of the sentence says, "The court must treat your claim as a very serious matter."

HONORABLE F. SCOTT McCOWN: Well, let's change that to say, "If you have been or may be sexually abused, the court must treat this as a very serious matter and may be required to refer it to the police or other authorities for investigation."

CHAIRMAN BABCOCK: Judge McClure, you got any thoughts about this?

HON. ANN CRAWFORD McCLURE: I think that's acceptable. Is Marilyn there today?

MR. ORSINGER: No.

HON. ANN CRAWFORD McCLURE: Oh, okay.

CHAIRMAN BABCOCK: All right.

HONORABLE PHIL HARDBERGER: Chip, I still would like to stick with my "if you state."

CHAIRMAN BABCOCK: All right. Tell me on page two, where are you again?

HONORABLE PHIL HARDBERGER: Page two down at the left-hand column. It says "if you claim."

CHAIRMAN BABCOCK: Right. "If you state." Okay.

HONORABLE PHIL HARDBERGER: All I would do is substitute the word "state" for "claim."

CHAIRMAN BABCOCK: Okay. And, Scott, you want to say what again?

HONORABLE F. SCOTT McCOWN: "If you have been or may be sexually abused, the court must treat this as a serious matter and" -- and let me back up and give a little bit of background to my thinking. The Department of Health right now is under legislative mandate through appropriations rider to develop specific rules that require providers to report sexual abuse, specifically designed to require reporting when there's the necessary age differential between the male and the female such that it's statutory rape, and

there's a big push on to require the system to self-activate and not for it to turn on the woman's choice, and I just think that if we suggest to her that this is going to be totally in her control based upon her perception or how she calls it, we could be misleading her, and you may have a judge who determines that he or she is going to report this or must report this, and I just don't think we're being fair to the minor.

CHAIRMAN BABCOCK: Okay. Scott, let me be sure we're -- you want to delete the phrase "claim that you."

HONORABLE F. SCOTT McCOWN: Yeah. That's kind of insulting.

CHAIRMAN BABCOCK: So "If you have been or may be sexually abused" and then do you want to make further revisions?

HONORABLE F. SCOTT McCOWN: "The court must treat this as a very serious matter and may be required to refer it to the police or other authorities for investigation."

MR. TIPPS: I would suggest an amendment. I suggest if we do that we leave out "the court must treat this as a very serious matter" and simply go directly to the fact that the court may be

required to refer for investigation.

HONORABLE F. SCOTT McCOWN: That's a good idea.

MR. TIPPS: Because the whole proceeding is serious.

HONORABLE F. SCOTT McCOWN: I would accept that as a very good amendment.

MS. SWEENEY: Say it again, please.

HONORABLE F. SCOTT McCOWN: "If you have been or may be sexually abused, the court may be required to refer this to the police or other authorities for investigation."

CHAIRMAN BABCOCK: Okay. Justice Hardberger, the reason you would be opposed to that would be?

HONORABLE PHIL HARDBERGER: Because I think it was the purpose of the committee -- and Justice McClure can confirm this -- is that you are giving fair notice to the girl, "Do not make a false accusation here because it's going to be taken seriously."

With Scott's version that does not do that. You have changed the meaning of it, and in my belief, most kids these days know that if there is sexual abuse it's a serious matter. You're not telling

her anything then. I think you want to bring home the sense of responsibility to the child. "Don't say this if it's not true because we will investigate further."

CHAIRMAN BABCOCK: Okay. David Jackson.

MR. JACKSON: See, I get a -- as a layman I get a gut feeling it's different from that. It's telling me that the lady had better be careful how she words it or it may get out to the public.

MS. SWEENEY: That's what I hear, too. To me the way you've got it, Scott, is almost a threat to her for even coming to the court that, you know, by doing this you may -- in addition to the reason that she's already there, which is serious enough, you may be kicking over this whole other issue of the sexual abuse investigation, which could be a deterrent to her coming in.

HONORABLE F. SCOTT McCOWN: Well, I agree with you 100 percent, but let me point out, though, that the Legislature in this last session in the Appropriations Act said that no public money can go to anybody that doesn't -- and I'm not going to give you the technical words, but the gist of it is "vigorously report statutory rape," which would be like Planned Parenthood, and the argument that Planned Parenthood makes is the same argument you're making,

that discourages people from coming in.

My only point is that if, in fact, a judge is going to take it as his or her duty to report to the district attorney that "I just heard a case between a 16 year old and a 23 year old, if that captures the necessary age difference, where the 23 year old admitted he got the 16 year old pregnant," that's something that she needs to know.

HONORABLE BILL RHEA: Why does she need to know that in the context of this proceeding?

HONORABLE F. SCOTT McCOWN: Because it may -- she may decide she would rather not be in court seeking relief from parental notification if it's going to mean that the man she's living with is going to go to the penitentiary.

CHAIRMAN BABCOCK: Wallace Jefferson, do you have something?

MR. JEFFERSON: I just had a compromise between the former comment by Judge McCown and Judge Hardberger, and that is what if we were to write it like this: "If you state, or the evidence shows, that you have been or may be" and then continue on that way.

HONORABLE PHIL HARDBERGER: I'd accept that.

CHAIRMAN BABCOCK: What about that,

Judge McCown?

HONORABLE F. SCOTT McCOWN: That would be fine with me.

HONORABLE MICHAEL SCHNEIDER: Then let's vote.

HONORABLE F. SCOTT McCOWN: That's a good solution.

CHAIRMAN BABCOCK: Anybody else? Yeah, Judge Rhea.

HONORABLE BILL RHEA: I think I agree with Paula, and I may be going beyond even the way she feels, but it seems to me the whole thing strikes me as heavy-handed, and it's like, you know, anybody could read that as a real, you know, "You better really not do this because this is really serious stuff," and I don't like the fact that people do it, but since we have a procedure I don't think we ought to be throwing up roadblocks or be perceived as throwing up roadblocks. If they're going to do it, the law is what the law is. If the judge or the ad litem gets a hint that there is some appearance or some level of concern about sexual abuse, they have got to do that. There is no obligation to throw that up in front of the applicant. I think we ought to eliminate the whole thing.

CHAIRMAN BABCOCK: Judge Schneider, did you have something? Did you have your hand raised?

HONORABLE MICHAEL SCHNEIDER: (Shakes head.)

CHAIRMAN BABCOCK: All right. Anybody else?

MR. EDWARDS: The use of the word "police" in that little instruction is, I'm sure, in some quarters totally deterrent to ever making an application. I mean, there's a big difference -- people hear that you're going to end up in the hands of the police, that's different than the authorities. They don't know what "authorities" means particularly, but they know somebody might look at it, but when you say "police" that's probably not where it starts anyway.

HON. ANN CRAWFORD McCLURE: I think that's an excellent comment. I would propose that we alter it to "refer it to the authorities" or "proper authorities for investigation."

HONORABLE F. SCOTT McCOWN: How about this? How about if we state, "If you state, or the evidence shows, that you have been or may be sexually abused, the court may be required to refer it for investigation"?

MS. SWEENEY: You know what? Having now listened to all of this, she's not going to think she's been sexually abused by her 23 year old boyfriend, and I think that's actually almost hiding the true facts from her. She's says, "No, I'm not going to say that I've been sexually abused. This is my boyfriend." Whereas the statute -- the affect of what she says may well be to get him arrested, and if we're warning her then there needs to be a more specific -- and, I mean, I don't -- you know, do we have a pamphlet or something that says, "This is statutory rape."

I don't know how you do it, but now that you've elucidated the issue, if what we're really doing is trying to warn the girl, "Hey, look out. What you say has consequences. Don't make unfair or untrue allegations" on the one hand. On the other hand, "What you say may result in a snowballing or a chain of events being started that you're not really intending but that by operation of law may happen." If we're going to tell her those things then we need to accurately do it, and I don't think "sexually abused" does it.

HONORABLE F. SCOTT McCOWN: I agree with you. You've convinced me. Yeah. You're right.

So what would you put? Nothing?

MS. SWEENEY: I'm not that far yet.

CHAIRMAN BABCOCK: Yeah. Raising problems with no solutions is not acceptable.

MR. ORSINGER: There won't be much debate then.

HONORABLE HARVEY BROWN: Well, would a comment save that?

CHAIRMAN BABCOCK: Well, this is a form. This is a form.

HONORABLE HARVEY BROWN: Oh, this is in a form. Sorry.

CHAIRMAN BABCOCK: Comment to a form is --

MR. ORSINGER: Could you speak generically in terms of "if the law was violated"?

HONORABLE F. SCOTT McCOWN: They're not going to know. That's Paula's point. Paula's point is that what I was trying to do this doesn't do, but it may do what Phil was trying to do, so I don't care anymore.

CHAIRMAN BABCOCK: Judge McClure, how did this whole thing start? Was this something the Supreme Court was worried about, or is this somebody else?

HON. ANN CRAWFORD McCLURE: Actually,

where this particular form started was with a form that had been used in a variety of other states that had adopted similar statutes. We gathered all of the forms to try to put this together. I think this one came out of Nebraska.

The problem that the subcommittee saw was this: We're telling this girl, "We're filing it under a pseudonym. You're going to be Jane Doe for these purposes. All of this is confidential." We tell her in bold letters, "Keeping it confidential. Your hearing will be confidential and private. We're limiting the number of people that are going to be there. You already know that your application stays confidential. So will everything from your hearing, all testimony, documents, and other evidence presented to the court and any order given by the judge. The court will keep everything sealed. Nobody else can inspect the evidence," and then to have her list as one of the grounds on her application, "I have been sexually abused," was really not preparing this child for what could happen to her if she signs that and puts evidence before the court, whether it's a boyfriend or her stepfather or her father or whoever is the perpetrator of the sexual offense against her, that we really ought to give her some notice that that is

something that has to be investigated, confidentiality notwithstanding.

CHAIRMAN BABCOCK: Right. So, Judge McClure, if I could interrupt, so that's why the language is in the form to begin with?

HON. ANN CRAWFORD McCLURE: That's why it's there to begin with. I think that -- and I'm able to distinguish some voices but not all. Perhaps it was Paula that's concerned about how she interprets that with regard to an older boyfriend, and I think that's a very valid consideration.

CHAIRMAN BABCOCK: But is there any -- we have had this form in use now for several months. Has there been a problem that has been brought to the attention of either the Supreme Court or the subcommittee that this language is creating? Have we seen any press accounts about it? Has the Court been advised about it? Is there anybody in the subcommittee that has seen a problem with it?

HON. ANN CRAWFORD McCLURE: We have not been aware of anything like that happening, either through discussions I've had with a number of judges across the state, with e-mails that I've seen come through Pemberton's office, or direction from the Supreme Court. I have not seen it. This topic was

brought to my attention by Marilyn Shram who was concerned about perhaps the chilling effect it had on a minor by suggesting it's just a claim and it's going to be discounted, or conversely, "You better be pretty darn sure you want to make this allegation before you use this as a basis for your application."

CHAIRMAN BABCOCK: Right. We need to bring closure to this issue, and I take it that Marilyn Shram was just surfing basically. She didn't have any experience that she was building on, correct?

HON. ANN CRAWFORD McCLURE: She had not had any actual experience with it being a problem, but from her standpoint she was concerned about the impact on the child.

CHAIRMAN BABCOCK: Let me make a suggestion. In light of the fact that this form has been in use for some period of time and there's no concern that the Court has directed to us or that there is any empirical data that this is having a chilling or not chilling effect, why don't we limit ourselves to changing what I think Phil and Scott are both in agreement on? Changing the word "claim" to say "state or the evidence shows," and leave it at that, and then if we have demonstrated problems in the future then we'll get back to it.

HONORABLE F. SCOTT McCOWN: Can we also agree to say "may be required to refer it for investigation" and take out "police"?

CHAIRMAN BABCOCK: Well, the problem I have with that is "police" is a loaded word. There's no question about it, but maybe it ought to be loaded. I mean, a young woman who says, "Wait a minute. I didn't know you were going to the cops. I thought the authorities were like some social worker or something. You're telling me you're going to the cops? Oh, my God."

So I'm sort of a public information kind of guy. This is more notice to them and better notice, and rather than sugarcoating it and saying, "Oh, you know, the appropriate authorities, which by the way, we're not telling you are the cops," so I say let's limit it -- my thought is limit it to striking the word "claim" and putting "state or the evidence shows" in its place.

MS. SWEENEY: And, if I could, then how about if we say, "If you say or there is evidence," which is even less lawyeristic than "state or the evidence shows," just for drafting.

HONORABLE F. SCOTT McCOWN: I agree.

CHAIRMAN BABCOCK: Okay. "If you say or

the evidence shows."

MS. SWEENEY: Or "there is evidence."

CHAIRMAN BABCOCK: Okay. Is everybody cool with that?

MS. SWEENEY: Yeah.

CHAIRMAN BABCOCK: Anybody opposed to that? All right. We will insert -- is that okay with you, Judge McClure?

HON. ANN CRAWFORD McCLURE: That's fine with me.

CHAIRMAN BABCOCK: "If you say," comma, "or the evidence shows."

MR. EDWARDS: No. "Shows" was out. "If there is evidence."

HONORABLE MICHAEL SCHNEIDER: "Or if there is evidence."

CHAIRMAN BABCOCK: "Or if there is evidence." "If you say or if there is evidence." Okay? Anybody opposed to that? Carl.

MR. CHAPMAN: I'm not opposed, but I just want to point out that if, in fact, there is a prospect of a statutory rape investigation and perhaps conviction there is an "I gotcha" here that we are not stating, and I don't think it goes into this phrase or this sentence because it just doesn't fit. It's a

different concept, but if that's going to be the outcome of this proceeding in certain circumstances, we haven't given any notice of that, and that's a real "I gotcha."

HONORABLE SARAH DUNCAN: It's very catch-22.

HONORABLE F. SCOTT McCOWN: Yeah, but I'm going to argue against my earlier position a little bit, but what's important to tell them at this point is what boxes they're going to check. They're going to get a lawyer before any evidence is presented, and the lawyer, if he or she is any good at all, is going to walk them through how they want to tailor their case, and if we say -- if we tell them all of the things that could really happen, it's going to itself be misleading because the chances of any of this happening are going to be slim to none.

CHAIRMAN BABCOCK: Judg McClure, are you finished with parental notification?

HON. ANN CRAWFORD McCLURE: I had one other issue, Chip, that's really just a question. We had approved the change in the rules to provide for the reimbursement of costs for the interpreter. I don't know if you want a separate vote to promulgate the new form that was drafted. It hasn't been assigned a

number. I guess it will be Form 2(g) that you faxed out on May the 10th, "Order Appointing Interpreter for Texas Family Code Chapter 33 proceedings." We have not approved that form.

CHAIRMAN BABCOCK: Anybody have a problem with Form 2(g), what will be Form 2(g), so that the interpreters can get reimbursed? I hear no objections to Form 2(g), so except Orsinger's --

MR. ORSINGER: No, no. If you're about to cut down debate, I have got another issue I want to raise about the rule.

CHAIRMAN BABCOCK: Well, let's finish 2(g). Have you got a problem with 2(g)?

MR. ORSINGER: No.

CHAIRMAN BABCOCK: Okay. 2(g)'s okay. Justice Duncan.

HONORABLE SARAH DUNCAN: Can I just make the comment that at the bottom of 2(g) it says, "Oath for interpreter. I," blank, "do swear or affirm that I'm competent."

CHAIRMAN BABCOCK: Right.

HONORABLE SARAH DUNCAN: Just "swear or affirm." Never mind.

CHAIRMAN BABCOCK: All right. Anybody else on 2(g)? All right. Then 2(g) is approved.

Richard has an overall comment.

MR. ORSINGER: The disqualification and recusal rule provision, which paragraph 1.6(a), is not written to permit someone to recuse if there is a judge assigned to the case other than the judge in whose court the case is filed. In the rule it's 1.6(a). It says, "You must file your recusal or disqualification before 10:00 a.m. on the first business day after the application" and in counties where they assign visiting judges or in San Antonio where you walk into the presiding judge and it may not even be the one who's the presiding judge that month, you won't even know until you walk in.

And so I think we ought to add a clause at the end of that sentence, "or at the time the judge is assigned to the case," or if that's too particular, "the time that" -- don't use the word "assigned," whichever occurs later. So that if you know -- if you're in a county where by filing in a court you get that judge you've got to do it by 10:00 a.m. of the first business day, but if it's in a county where you won't know who the judge is until you walk into the courtroom, you can do it at that time even if it's past 10:00 a.m. on the day after.

CHAIRMAN BABCOCK: Where are you talking

about, Richard?

MR. ORSINGER: 1.6(a).

CHAIRMAN BABCOCK: And where would you propose adding the language?

MR. ORSINGER: At the end of the first sentence there. The first sentence says, "An objection to a judge or a motion to recuse or disqualify a judge must be filed before 10:00 a.m. on the first business day after an application or notice of appeal is filed."

CHAIRMAN BABCOCK: And what would you do?

MR. ORSINGER: I would say, comma, "or at the time that the judge is assigned to the case," comma, "whichever occurs later."

MR. EDWARDS: Well, you can't do it at the time he's assigned necessarily.

MR. ORSINGER: You can do it right away. You can say "I recuse you because" -- well, you don't even have to say why. Just -- well, I guess you do.

MR. EDWARDS: "Promptly on learning of the assignment."

MR. ORSINGER: That would be fine. The point is, is that I want somebody to be able to do it after 10:00 a.m. on the next business day if they won't even know who the judge is until maybe a day after

that.

CHAIRMAN BABCOCK: What's everybody think about that?

HONORABLE F. SCOTT McCOWN: It's a good idea.

CHAIRMAN BABCOCK: So what's the language now?

MR. ORSINGER: Carl says what about "prior to the hearing"? "Or prior to the hearing." Well, that would gut the deadline even if you know it's the judge. I don't mind allowing them to recuse all the way up to the time of the hearing.

CHAIRMAN BABCOCK: Well, no. That's contrary to what the rule -- spirit of the rule that's been passed.

MR. ORSINGER: Okay. Then all I'm saying is if you don't know who the judge is --

CHAIRMAN BABCOCK: Right. So what's the language?

MR. ORSINGER: My language, which isn't very good, is "At the time that the judge is assigned to the case, whichever occurs later." I don't like the word "assigned," though, because there's a special meaning sometimes that that's associated with retired judges. In San Antonio you're not assigned to a case.

You have a presiding docket system, and the presiding judge is responsible for what happens when you walk in that court, but if we can't think of a better way, I would propose that.

CHAIRMAN BABCOCK: Judge McClure, what do you think about this?

HON. ANN CRAWFORD McCLURE: I think it's a necessary addition. I'll let Richard draft the language.

MR. SOULES: Chip?

CHAIRMAN BABCOCK: Yeah.

MR. SOULES: We have got a little different situation here. We're not looking at -- we don't have a situation where somebody is looking for a continuance. We've got somebody who is in pretty compelling circumstances.

CHAIRMAN BABCOCK: Right.

MR. SOULES: So I think to time this prior to the commencement of the hearing is okay for everything because this person is -- they want a judge, and they want a hearing, and they just want a judge that won't be inherently biased, and in which event they might not rather have a hearing. So I don't see a problem with just saying "prior to the hearing."

HONORABLE SARAH DUNCAN: Exactly.

CHAIRMAN BABCOCK: Judge Brown.

HONORABLE HARVEY BROWN: I think it should be done within a reasonable time after you know, not just immediately before the hearing. The judge may do a fair amount of homework, preparation, rereading all the cases. The parties may not like an ad litem that's been appointed and, therefore, think, "Oh, now that I see who the ad litem is I want to try to get the judge disqualified or recused."

HONORABLE F. SCOTT McCOWN: But can't we do both what you're saying and what Luke's saying by just saying that a motion to recuse or disqualify a judge must be filed or made on the record promptly after learning what judge is going to hear the case?

HONORABLE HARVEY BROWN: Right. That's what I was saying. I thought he was saying "at any time."

MR. SOULES: Okay.

CHAIRMAN BABCOCK: All right. So now "An objection to a judge or a motion to recuse or disqualify a judge must be filed" --

HONORABLE F. SCOTT McCOWN: "Must be filed or made on the record promptly after learning what judge will hear the case," to solve this word of art problem, "will hear the case" or "will hear the

application."

CHAIRMAN BABCOCK: How do people feel about that?

HONORABLE BILL RHEA: Chip?

CHAIRMAN BABCOCK: Yeah. Bill.

HONORABLE BILL RHEA: It seems to me that one danger that we're flirting with a little bit here is when you start building in all these procedural niceties to accommodate objections, and we've got a very limited amount of time that we're working with, you know, if we start approaching the deadline and we've got an objection all of the sudden fairly late in the game, it seems to me that you're going to have an automatic grant if all this procedural nicety is going on in the midst of that. It seems to me it would be better just to leave it the way it is and let the courts work out what happens. We can accommodate those things. Courts accommodate those kind of things all the time that aren't clear in the rules.

HONORABLE F. SCOTT McCOWN: Well, but Richard and I come from a central docket jurisdiction, and the way it is doesn't work at all. There's no way to accommodate it. If we go with the "promptly" language then individual docket systems or our system, for that matter, can work it out by just making sure

that we let them know who the judge is going to be at an early point. That's within our control as a system, so I agree with you that the solution can be local, but it can only be local if you change the wording.

CHAIRMAN BABCOCK: Has there been any problem in Bexar County or in Travis County?

MR. ORSINGER: I don't do these, and so I wouldn't know. Judge Peeples might.

HONORABLE DAVID PEEPLES: No.

CHAIRMAN BABCOCK: Judge Peeples says "no."

MR. ORSINGER: But where it's going to happen is if you have a judge that routinely denies all of these, the woman is going to want to -- or should I say the girl is going to want to recuse the judge, but in San Antonio or in Austin if you get a judge that will do that, you won't know it until after the deadline has passed.

CHAIRMAN BABCOCK: Yeah. Well, I think the point is well-taken that this rule is impossible to comply with in Bexar County and Travis County.

MR. ORSINGER: And also where retired judges are appointed even in places like Harris or Tarrant.

CHAIRMAN BABCOCK: So the language on

the floor is, "An objection to a judge or a motion to recuse or disqualify a judge must be filed or made on the record promptly after learning what judge will hear the case," deleting the other "10:00 a.m." language. That's Judge McCown's language that's on the floor.

Judge McClure, how do you feel about that language?

HON. ANN CRAWFORD McCLURE: Excuse me. I think it's acceptable.

CHAIRMAN BABCOCK: All right. Anybody else have a problem with that language? Judge Rhea?

HONORABLE BILL RHEA: Just what I've stated.

CHAIRMAN BABCOCK: Just what -- well, we'll vote, and you can vote against it. All right. All in favor of that language raise your hand. 25 in favor.

All against? Two against. So we will adopt that by a 25 to 2 vote. All right. Judge McClure, anything else?

HON. ANN CRAWFORD McCLURE: That completes it.

CHAIRMAN BABCOCK: All right. Let me summarize then. We have made the -- we have adopted the report of the subcommittee with the following

exceptions. On Rule 1.6(a) we have changed the language in the first sentences. We've just voted on by a vote of 25 to 2 so that the first sentence now reads, "An objection to a judge or a motion to recuse or disqualify a judge must be filed or made on the record promptly after learning what judge will hear the case," period.

We have also made a change to Rule 1.10 subparagraph (a) by a unanimous vote voting to delete the phrase "such as a guardian ad litem or witness" found in the fourth line of that section. We have also unanimously voted to change Comment 3 to the notes and comments by adding the -- by saying as follows: Comment 3, "Any judge involved in a proceeding, whether" -- striking the word "as" -- "the judge assigned to hear and decide the application, the judge assigned to hear or decide any disqualification, recusal, or objection, a judge authorized to transfer the application or assign another judge to it, or an appellate judge," et cetera, et cetera. And that was by a unanimous vote.

We have also voted by a vote of 24 to 1 to in Rule 3.3 subparagraph (b) delete the second sentence which said, "If the court of appeals reverses the trial court order, it must also state in its

judgment that the application is granted," and that sentence we vote to delete, and then we have voted by a unanimous vote with respect to Form 1(a), the left-hand column, last paragraph. "If you" -- striking the word "claim" and inserting "say, or if there is evidence," and then proceeding with the sentence. So that is, I think, an accurate summary of everything we've done except Richard Orsinger wants to say something.

MR. ORSINGER: Yeah. Since we made the change we made on the disqualification, we have to change the following sentence which was set up to give the judge two hours to rule on a recusal, but unfortunately it's -- 10:00 a.m. is the deadline to file. 12:00 a.m. is the deadline to recuse, and we need to change that to something like two hours after the motion is made.

CHAIRMAN BABCOCK: All right.

MR. EDWARDS: Or before the hearing starts, whichever is shorter.

CHAIRMAN BABCOCK: Okay.

MR. ORSINGER: Okay. Or just how about immediately? You know, why not just make it immediately?

MS. SWEENEY: The word "instanter" is used throughout.

MR. ORSINGER: Okay.

CHAIRMAN BABCOCK: Do "instanter"?

MR. ORSINGER: "Must do so instanter."

HONORABLE HARVEY BROWN: From a judge's perspective sometimes you do want to at least think about those or talk with a colleague. I mean, even if it's just 15 minutes. I think instanter is a little burdensome to a judge.

HONORABLE F. SCOTT McCOWN: But instanter would encompass within 15 minutes because instanter means pretty fast. It doesn't mean immediately.

HONORABLE SCOTT BRISTER: Why don't we say "pretty fast" then?

MR. EDWARDS: As fast as GEICO.

HONORABLE HARVEY BROWN: If I want to call you to talk about the motion to recuse me, and you're on the bench, I'd like to have --

HONORABLE JAN PATTERSON: That won't be instanter. As a matter of law we call Scott.

CHAIRMAN BABCOCK: Are we all okay with having "instanter," recognizing that Judge Brown can take as long as he needs to? No, I'm kidding. Judge Rhea.

HONORABLE BILL RHEA: Would you read the

language of the first sentence again?

CHAIRMAN BABCOCK: Yeah. "An objection to a judge or a motion to recuse or disqualify a judge must be filed or made on the record promptly after learning what judge will hear the case," period.

HONORABLE BILL RHEA: Does that mean that I have to inform the applicant who files in my court that I'm going to be hearing the case as the sitting judge?

CHAIRMAN BABCOCK: Well, if you're not going to hear the case, no, I don't think that poses that, but if all the sudden Judge Rhea isn't there and --

HONORABLE BILL RHEA: For all she knows I could have a visiting judge in, and so I have to -- I'm concerned that the language is I might have the affirmative obligation to inform her that indeed I'm going to be the one who hears the case.

CHAIRMAN BABCOCK: Well, in Dallas County if it's assigned to your court the presumption is you're going to hear it, and that applicant may have no objection to Judge Rhea, no grounds to recuse or disqualify, but if they show up for the hearing and Judge Smith is there then it's a surprise to them and they may object, and this rule cures that problem.

Judge Schneider.

HONORABLE MICHAEL SCHNEIDER: What's the number of this one?

MR. ORSINGER: 1.6(a).

HONORABLE MICHAEL SCHNEIDER: 1.6(a)?

CHAIRMAN BABCOCK: 1.6(a).

MR. SOULES: So when you file the case in Dallas and you don't like the judge, you've got to promptly upon filing the case object to the judge.

HONORABLE BILL RHEA: When do they have to do it then since we took out this 10:00 a.m. language?

HONORABLE MICHAEL SCHNEIDER: Now, does this apply to the appellate courts, too?

MR. ORSINGER: Yes, it does.

CHAIRMAN BABCOCK: Yeah.

HONORABLE MICHAEL SCHNEIDER: All right. They're not going to find out who will be the judge most of the time 'til the opinion is issued.

HONORABLE F. SCOTT McCOWN: Well, then why don't we say "the trial judge"?

MR. ORSINGER: Then you have to write a separate rule on recusing the appellate judge then.

CHAIRMAN BABCOCK: Yeah. Well, now we're really messing with the rule.

HONORABLE F. SCOTT McCOWN: Why can't the present rule on recusing appellate judges work, because you're going to know who's on the court and whether you need to move to recuse them?

MR. ORSINGER: Well, they better move to recuse within about 24 hours or else they're going to have a judgment.

HONORABLE F. SCOTT McCOWN: Well, but like Luke said, they're the ones that want to move fast, so --

MR. ORSINGER: I know. We may not even need a deadline for recusal in the appellate court because if they don't recuse before the judgment comes down they have waived their recusal.

HONORABLE MICHAEL SCHNEIDER: Well, not necessarily.

MR. ORSINGER: Not necessarily?

HONORABLE MICHAEL SCHNEIDER: What if you say it's not until they learn it?

CHAIRMAN BABCOCK: I think we have taken out the specific deadline and put the word "promptly" in, but it is in the interest -- as Luke said, it is in the interest of this litigant or this applicant and their attorney to get it done quickly. This is not a dilatory tactic. We don't have to worry about dilatory

tactics.

HONORABLE BILL RHEA: I disagree with that, because if you want to delay until the judge runs out of time then you can do just exactly this sort of thing and then it's granted. You win.

HONORABLE MICHAEL SCHNEIDER: You could always also say that you can recuse after the judgment comes down from the court of appeals, say, "I didn't know who the judge was."

HONORABLE JAN PATTERSON: "May not know."

CHAIRMAN BABCOCK: The problem that we're trying to fix is a small problem.

HONORABLE BILL RHEA: Maybe we ought to refer this back to the subcommittee because it's got a lot of --

CHAIRMAN BABCOCK: Yeah. I'm starting to think we maybe should. Yeah, Carl.

MR. HAMILTON: Do I remember correctly that the applicant here has the right to file in any court they want to? If they file in a court -- let's say they name it a certain number in Bexar County. Does that mean that the clerk has to leave it in that court or can re-assign it?

HONORABLE F. SCOTT McCOWN: But filing

in a court doesn't guarantee you a judge. I sit in every district court in Travis County regularly, and plus you've got visiting judges that sit, and if I call in sick in the morning, they pull a visiting judge in for the afternoon, and the applicant doesn't know who that's going to be.

CHAIRMAN BABCOCK: Okay. Judge McClure, we have -- we are trying to fix a -- I think a relatively two-county problem, so with your permission --

MR. ORSINGER: That's not right. The retired judges all over the state are ruling on these, so it's a problem in Houston and Dallas.

MR. SOULES: We've read about it.

CHAIRMAN BABCOCK: Well, it's not a problem that has cropped up. I mean, this is not something that the subcommittee has been told by the Supreme Court, "Hey, we have got a problem here."

HON. ANN CRAWFORD McCLURE: That's true.

CHAIRMAN BABCOCK: This is just something that you brought up because of the practice in Bexar County.

MR. ORSINGER: But this is a problem -- I don't know that anyone has tried to recuse anybody.

CHAIRMAN BABCOCK: Yeah.

MR. ORSINGER: But this is a problem not just in two counties. This is a problem any time you have a judge that when you walk into the courtroom it's different from the judge whose court your case was docketed in, and that happens all over Texas.

CHAIRMAN BABCOCK: Okay. I'm also persuaded that we're not going to be able to come up with language this morning in the time that we have to adequately and properly address this problem. So, Judge McClure, if they are willing, I'd like to ask Judge McCown and Richard Orsinger to get with you and see if we can come up with a --

HONORABLE F. SCOTT McCOWN: Well, we need Judge Rhea on there since he feels strongly about this.

CHAIRMAN BABCOCK: And Judge Rhea since he opened his big fat mouth. And Judge Rhea, and if you can do it today, great, but if you can't do it today, shortly, because we need to get these rules up to the Supreme Court.

MR. SOULES: Instanter.

CHAIRMAN BABCOCK: Instanter. Is that okay with you, Judge McClure?

HON. ANN CRAWFORD McCLURE: That will be fine.

MR. ORSINGER: Then the full committee will not approve the final language of the subcommittee?

CHAIRMAN BABCOCK: We will somehow get the full committee's input.

MR. EDWARDS: Don't forget that there are statutes on assigned judges, retired or former judges, and also constitutional provisions on disqualification that this rule I don't think can overrule.

CHAIRMAN BABCOCK: Yeah. We'll vote by e-mail or some such fashion if we can't do it today. So 1.6(a) will stand as-is for the moment with this group studying it.

We're going to be in recess for ten minutes. Judge McClure, stand on the phone and Richard and Bill and Scott will huddle around and talk to you.

HON. ANN CRAWFORD McCLURE: All right.

CHAIRMAN BABCOCK: So we'll recess for ten minutes.

(Recess taken from 11:13 a.m. to 11:35 a.m.)

CHAIRMAN BABCOCK: Let's get started again, guys. All right. Here we go, guys. Where did Judge Rhea go?

MR. WATSON: He just now got to use the bathroom.

CHAIRMAN BABCOCK: Okay. Well, Richard's back and Scott's back, so we're just waiting for Judge Rhea; but, Judge McClure, do we have a fix?

HONORABLE F. SCOTT McCOWN: Yes.

CHAIRMAN BABCOCK: We have a fix. So we're now talking about 1.6(a), and the fix that is proposed is what?

HONORABLE F. SCOTT McCOWN: And I think I can report this as the unanimous agreement of your subcommittee, your ad hoc subcommittee.

MR. ORSINGER: Ad hoc subcommittee.

CHAIRMAN BABCOCK: The ad hoc subcommittee.

HONORABLE F. SCOTT McCOWN: We fixed it by having two sentences, one for a trial judge and one for an appellate judge. The trial judge sentence would read, "An objection to a trial judge or a motion to recuse or disqualify a trial judge must be filed before 10:00 o'clock a.m. of the first business day after an application or promptly after learning who will hear the case, whichever is later," and this then addresses Judge Rhea's problem of manipulative delay because if you came in and there was a visiting judge and you

moved to recuse then the case could always be heard by the regular judge who you didn't move to recuse before 10:00 a.m. of the first business day after the application; but on the other hand, it solved Richard's problem because if you come in and there's a visiting judge you didn't know about that you have a ground to recuse for, you have an opportunity.

Then the sentence would be exactly what it is now for an appellate judge, so the present sentence would say, "An objection to an appellate judge or a motion to recuse or disqualify an appellate judge must be filed before 10:00 a.m. of the first business day after the notice of appeal is filed," and then the third sentence would be changed to say, "A judge who chooses to recuse voluntarily must do so instanter."

CHAIRMAN BABCOCK: And the final sentence of 1.6(a) would be the same, unchanged?

HONORABLE F. SCOTT McCOWN: And the final sentence would be unchanged.

CHAIRMAN BABCOCK: Okay.

MR. TIPPS: And for Judge Brown how long is instanter? 15 minutes or 30 minutes?

CHAIRMAN BABCOCK: Instanter is about 25 minutes unless Judge McCown is on the bench, in which case it will be extended over lunch. Judge McClure,

that sit all right with you?

HON. ANN CRAWFORD McCLURE: Yes. I think that solves the problem.

CHAIRMAN BABCOCK: And Judge Rhea apparently has pushed his ejecter seat, so I assume it's okay with him.

HONORABLE F. SCOTT McCOWN: And I think Judge Schneider thought it worked for the appellate portion.

HONORABLE MICHAEL SCHNEIDER: Right.

CHAIRMAN BABCOCK: Okay with you, Judge Schneider? Okay. Anybody opposed to that change as read by Judge McCown? Well, if nobody is opposed then we'll say that that's unanimous and, Scott, just get me that language --

HONORABLE F. SCOTT McCOWN: Okay.

CHAIRMAN BABCOCK: -- so I can be sure to put it in here. Great. Well, Judge Rhea, that's everything okay with you, huh?

He's nodding "yes." Judge McClure, terrific job, as usual, with your subcommittee and your organization.

HON. ANN CRAWFORD McCLURE: Thank you.

CHAIRMAN BABCOCK: Very easy to read, so thanks so much.

(Applause.)

CHAIRMAN BABCOCK: So now we're onto recusal, and, Richard, you're back up to bat with that.

MR. ORSINGER: Okay.

CHAIRMAN BABCOCK: And, by the way, thank you very much for getting your proposed rule out to us in sufficient time so we could all study it.

Just to summarize, we have had now two meetings on this. The votes that we've taken have been summarized and are back on the back table if anybody needs to refer to them. A lot of these votes, in fact all of them, I think, have been faithfully adhered to by Richard and his subcommittee and their proposed rule; but if anybody thinks differently, we can go to the record, which I have here before me.

We also have on the back table the dates of the upcoming meetings of this advisory committee. As you know, we're required to meet six times a year, and so we have added a meeting in the fall to accomplish that. There was a concern that our October meeting is conflicting with the Dallas Bench/Bar Conference. We did not know that at the time we set the meeting obviously. We looked into ways to change it, and because that is the fall and because there's football games and this and that and the other thing,

it was absolutely impossible to change and still have a place for everybody to stay in a hotel room here and for this room to be available in the Bar. So with apologies to the Dallas Bench/Bar Conference, we're going to have to leave the meeting at the same time.

This memo on the back table also tells you the deadline for you to make your reservations at the hotel. Apparently several people missed that deadline this last time, and we were able to accommodate everybody, but that's not necessarily so in the future. So be sure to make your hotel reservations before the deadline as outlined in the memo we have back there.

We've had -- to summarize for people who weren't here last time, we've had meetings of this committee on the recusal motion. We've had a meeting with Senator Harris. We've had numerous meetings with Richard's subcommittee to try to draft this rule, and we are going to at the Court's direction report out this rule to the Court on this meeting, whether it's today, finish today as I hope, or whether we have to spill into tomorrow, Saturday, to discuss it; but we're going to get it done this time. So with that, go ahead, Richard.

MR. ORSINGER: What you will need to

participate in the discussion is the April 20 draft of the recusal rule proposal. You will also need the piece of paper on the table that's entitled "Additional Grounds for Recusal, Option 11 and Option 11a," and the reason you will need that is not because the subcommittee has proposed it, because the subcommittee didn't propose it, but because the committee wanted to see this language and then it's been drafted Option 11 is Scott McCown's proposal, and Option 11a is Carl Hamilton's proposal; is that correct, Carl?

MR. HAMILTON: Yeah.

MR. ORSINGER: We'll discuss that as well. Skip Watson was kind enough to bring the Federal materials that he referred to in the last meeting, which is a compendium of ethics opinions relating to recusal of Federal judges. It is not really a comprehensive statement of a rule. It's more like a summary of different ethics opinions that have been issued in specific fact situations, and some of those fact situations are implicated by our debate about a judge recusing when a lawyer in the proceeding or his law firm, or his or her law firm, is representing the judge in other legal matters, and that's just here for informational purposes.

What the subcommittee did not do,

because we had nobody that wanted to do it, and if we have to, we can make a break and write it, is we did not write a disclosure requirement for a district judge to disclose -- be required to disclose if they know of a potential ground for recusal. There was some discussion about a disclosure rule, some people wanting it in the meeting last time. We have nothing to offer on that, and if there is a real ground swell of support for a disclosure requirement then over the lunch hour or sometime we're going to have to write a short one.

So with that introduction I want to turn it over to Carl to take us through the rule. Yes, Judge Schneider.

HONORABLE MICHAEL SCHNEIDER: Sorry to interrupt. What was the first document you referred to?

MR. ORSINGER: The first document is called "Supreme Court Advisory Committee's Subcommittee Working Draft of Recusal Rule Proposal," dated April 20, 2000.

HONORABLE MICHAEL SCHNEIDER: Okay. Thanks.

MR. ORSINGER: And that is, in fact, the rule we will be looking at today.

MR. TIPPS: What is the second one,

Richard?

MR. ORSINGER: The second document was a single page that was on this table over here called, "Additional Grounds for Recusal, Option 11 and Option 11a."

CHAIRMAN BABCOCK: And, Richard, out of respect for Judge McCown's schedule, I wonder if we could take up 11/11a first.

MR. ORSINGER: Let's take that up right now.

Basically this is something that was created in the last meeting, this issue about ongoing legal representation, and Judge McCown has proposed some language that would require recusal if the trial judge is being represented in an ongoing legal matter by a lawyer in the proceeding. A couple of things to think about when you're considering that, which it's instructive to read Skip's material here because you can see that the Federal people have expanded "lawyer" to include "law firm," that if the lawyer is a member of a law firm who is representing the judge, so technically maybe that lawyer in front of the judge is not representing the judge, but his partner or associate is.

They also in the ethics opinions in

certain circumstances include where the judge's spouse or child is being represented in a legal matter. That is not implicated in Scott's language because Scott's language is only representing the judge, although if it's on a property issue and they're married, it may be independently. Did I misstate that, Scott?

HONORABLE F. SCOTT McCOWN: No, but I'm -- well, I'll let you finish.

MR. ORSINGER: Okay. And then the most probably significant thing that Scott added here was that it would not count if the judge is being represented in their official capacity by a government attorney. Skip's material's have an ethics opinion that makes an allowance for something like that, but it's perhaps a little more stringent in the event there might be -- like the Fifth Circuit judges filed a lawsuit against Congress 20 years, 15 years ago to raise their pay. I don't know.

And then they also in the Federal materials mention a class action suit, which -- in which the judge was a member of the plaintiff's class. Maybe that's too specific for us. I don't know, but at any rate, those are just comments, and, Scott, why don't you defend your proposal here?

HONORABLE F. SCOTT McCOWN: Well, let me

just back up by saying that I think if the judge has some sort of relationship in the case that the general rule already is going to require a recusal in a whole host of circumstances, and if you look at the Federal rule about -- or the Federal annotations about when a judge and a lawyer set up a recusal situation, you see it becomes very difficult to write the rule, because it's a very lengthy rule with lots of fine distinctions, and so one position to take would be that we shouldn't have a rule at all except the general rule, and it ought to be decided on a case by case basis, and I think that's where the subcommittee came out on it, and that's why this proposal is presented separate from the subcommittee, and if that's what people want to do, I'm actually fine with that.

My sense of it, however, from our last meeting was that the full committee wanted a proposal relating to judges recusing when a lawyer in the proceeding had some sort of relationship with them, and so what I have done is write what I think is kind of the narrow rule that we would all agree if it's this then there ought to be recusal, leaving all the other cases to be decided under the general rule on a case by case basis. And leaving out spouse was inadvertent on my part, and I would say if a lawyer in the proceeding

is doing legal work for the judge or the judge's spouse, or we can even add the judge's minor child or if you think it ought to be the judge's child, I don't have any problem with expanding that.

But what I've tried to do is avoid all of the questions about when do you have an attorney-client relationship, when do you not, when is it over, when are you doing legal work, and when is the legal work concluded by just trying to be real practical and saying if you're doing legal work for the judge in an ongoing legal matter or the judge's spouse or the judge's minor child or the judge's child, whatever you want, then in that situation you've got to recuse, excepting out what's done by the county attorney, district attorney, and Attorney General because we're all represented in a slew of cases by them, and so this is here, if you want something like this, for your consideration.

The one problem that I have -- or the two problems that I have with Option 11 is I've tried to avoid "attorney-client relationship" because of the question of when does that end and when does it continue, and I'm also personally very opposed to introducing any concept into the recusal rule that if the lawyer there is adverse to the judge, that the

judge should recuse, and the example that was given was I'm a judge, I got divorced, this lawyer represented my ex-wife in the divorce. That ought to be handled by the general rule. We don't have anywhere in our rules that judges have to step aside because of things that lawyers have done to the judge. The actual remedy in that situation is for the lawyer to say to his client, "I have created animosity with this judge. We've been assigned his court; therefore, I need to withdraw and you need to get another lawyer," and I don't want to introduce the concept in the rules that somehow lawyers by the way they behave can create grounds for recusal.

HON. ANN CRAWFORD McCLURE: I have a question. When you said you didn't mind expanding the language that you drafted to include spouse or the minor child in ongoing litigation, if the ongoing litigation is a divorce case, would that require a recusal if the lawyer is representing the spouse in the divorce?

HONORABLE F. SCOTT McCOWN: I would think so.

HON. ANN CRAWFORD McCLURE: Okay.

HONORABLE F. SCOTT McCOWN: I don't have any problem with that, and that's why I think, though, the word "ongoing" is important. If the divorce has

been in the can and it's been in the can for ten years, I would say "no."

HON. ANN CRAWFORD McCLURE: I agree with that.

MR. ORSINGER: I might point out a response to that last issue that in Skip's materials on what is fax page 17, paragraph 3.6-3, the section entitled "Lawyer Representing Party Opposing Judge in Other Litigation," paragraph (a) does list as a ground for recusal, "A judge should recuse from cases handled by a law firm, one of whose members or associates represents a party adverse to the judge in other litigation." It is not limited to divorces. It's just in this ethics opinion, which is just these people's opinions, that that's a recusal basis in Federal court.

CHAIRMAN BABCOCK: Yeah. We ought to hear from Skip on this a little bit, I would think, because he's the one that raised the issue and got us the materials on the Federal recusal. Skip, you want to tell us what you know about this?

MR. WATSON: I was just surprised at the last meeting when the concept of a judge automatically recusing if he was currently represented by a lawyer that was appearing in an adversarial process before him, that it appeared that no one had ever heard of

that. It is a bit of a mischaracterization to say that what this is is just a bunch of ethics opinions. This is the publication by the Administrator's Office of the United States Courts about how Article 3 judges are to conduct themselves.

Where this came from, it may be opinions, it may be -- I have no idea, but this is the rule book; and when it says, for example, you know, in I believe it's 3.6-2(a), "Where an attorney-client relationship exists between a judge and a lawyer whose law firm appears in the case, the judge should recuse absent remittal." I mean, that's the rule, and that's the way it works. Remittal is waiver, and, you know, it's disclosed, and folks are given the opportunity to waive it, and typically they do.

The problem I see is, is that as you always have in this kind of situation where the Texas judges do not have a 13 volume set of which this is just a tiny part of Volume 5 that immediately answers these questions as they come up, the natural tendency is for any good judge to say, "That's not going to affect my opinion. I can be fair," when that's not the issue. You know, the issue is the appearance of impropriety and that there are rules that are drawn and are clear in other aspects that we don't have reference

to, and I'm not throwing rocks at the judges in this at all. It's just that if something this basic -- and if there's a fiduciary attorney-client relationship that's ongoing, existing between a judge and a lawyer, it does not look good for that judge to hear a case in which that lawyer is an adversary or representing an adversary.

And it's to me that basic, and precisely because it wasn't known to the esteemed judges in this room as being something that's automatic in the Federal system, it occurs to me that maybe it ought to be in black and white, maybe it ought to be part of the recusal rule, but I didn't mean to throw this process off track. I thought it was sort of a given when I brought it up, and obviously whatever we decide to do is fine.

HONORABLE F. SCOTT McCOWN: Well, and I want to clarify because I don't think that the judges were saying at our last meeting that they never thought they should recuse if they had an attorney-client relationship with the lawyer. I think what they were saying is that that covers a whole host of things, some of which you might recuse for, some of which you wouldn't, and I guess my problem is we don't want a 13 volume recusal rule, and so do we want to have this

covered by the general rule, or do we want a specific rule? I'm convinced -- or I guess I should say I lean to thinking that we should have a specific rule, and I don't have any problem with having a specific rule and would amend it, you know, anyway you want, but I don't think we want to get into having a rule that's three or four pages.

MR. WATSON: No, that's not my point. In fact, the things that I was looking at were even more limited, the things that I drafted up and sent to Richard involved representations that involved the direct financial interest or the character of, you know, fortune or name of the judge being involved to try to get it even narrower. Then I finally did find the -- you know, got access to the Federal books and was given permission to copy these sections, and I think that Judge McCown has basically taken the black letter part of the Federal rule, incorporated his concerns about the Attorney General representing judges, and all of which was dead bang on. His language is virtually identical to the Federal language.

HONORABLE F. SCOTT McCOWN: And I would add another amendment to say that a lawyer or a lawyer's law firm, so the rule would read, "A judge

must recuse if a lawyer in the proceeding or the lawyer's law firm is doing legal work for the judge or the judge's spouse or the judge's minor child in an ongoing legal matter, except for legal work arising out of the judge's official duties done by a county attorney, district attorney, or the Attorney General."

MR. WATSON: That's fine with me. That's all I have to say, Chip.

CHAIRMAN BABCOCK: Thanks, Skip, and thanks for doing the extra work to bring this to our attention.

MR. WATSON: Yeah.

CHAIRMAN BABCOCK: I didn't realize, No. 1, they had a 13 volume set.

MR. WATSON: Well, the guts of it is Volume 5. That's the, you know, Canons of Ethics, but, Lord, they have guidance on everything.

MR. ORSINGER: Just so that it's clear on this, and I don't know any more about this than what Skip has laid on the table in front of us, but the introduction says that it's a compendium of published and unpublished opinions issued by the Committee on Codes of Conduct, and it contains summaries of advice given in response to confidential fact-specific inquiries, and they are -- summaries are intended to

provide general guidance and then they encourage the readers to go look at the rules themselves.

I don't think there is a Federal rule that says what our proposed rule says. I think that these are just opinions of a committee, and they are probably waiting, and they may be in practice universally recognized as authoritative, but it's not apparent to me from the sponsoring body or even what they say about their work that it's anything more than just the opinion of a committee given privately to a judge about specific fact situations that are just like ethics opinions from the local bar, ABA, State Bar of Texas.

CHAIRMAN BABCOCK: Okay. Judge McCown's Option 11 now reads, as I understand it, "a lawyer or the lawyer's law firm in the proceeding is doing legal work for the judge, the judge's spouse, or the judge's minor child in an ongoing legal matter, except for legal work arising out of the judge's official duties done by a county attorney, district attorney, or the Attorney General."

HONORABLE F. SCOTT McCOWN: Yeah. I would say "a lawyer in the proceeding or the lawyer's law firm."

CHAIRMAN BABCOCK: Okay.

HONORABLE F. SCOTT McCOWN: You know, and we do have -- just to kind of defend judges here, we do have a Judicial Ethics Committee, and we do have published opinions just like these Federal opinions, and we do have a process where judges can send questions to our ethics committee and get back an answer. Now, it's not five pages or five volumes or even -- it's about an inch thick, but you know, we do have written guidance and a process to get guidance.

CHAIRMAN BABCOCK: Yeah, Wall.

MR. JEFFERSON: On that Option 11, what would happen -- and I think this has happened in Bexar County before where there is a particular ruling at issue on mandamus, a district judge issues some kind of ruling and it's taken up on mandamus. The courts in Bexar County understand that that ruling could have a dramatic effect on the central docket system or some other institutional matter, and they want to get someone -- hire someone on a -- that would donate their time to represent that interest, that institutional interest. Under Option 11 would that person then -- I mean, what is the consequence of that person accepting that request and donating his or her time for that purpose?

HONORABLE F. SCOTT McCOWN: We've had

that come up before, and we've decided that either we have to do our own work and send our own thoughts up under our own name or we've got to get an official county or district attorney, that there's a real ethical problem when you as a judge say to a lawyer, "Would you like to donate $10,000 worth of free legal work to all of the judges of Travis County," that that itself is an ethical problem.

MR. EDWARDS: There are some serious issues in that regard of whether that's a reportable political contribution, or if it's not a political contribution, it could be a bribe, and when you get down to political contributions there are time limitations during which it can be made, and so you have a whole wrath of problems that apply in that case.

HONORABLE F. SCOTT McCOWN: And the truth is even if you say, "Well, that would be ethical. I disagree with you, Judge. I think that would be ethical." Well, fine, but that lawyer who's donating all that free time shouldn't be appearing in front of the judge in a case.

MR. JEFFERSON: I just think it's important to know that that comes up. I don't know if it's just Bexar County, but it has come up at least several times.

HONORABLE F. SCOTT McCOWN: It's come up several times in Travis County.

MR. EDWARDS: It's not just Bexar County. There are lawyers out there who every time a judge gets his foot in hot water runs and says, "Can I help you?" And they do it, and it's part of the program to curry favor with the judges and get a one-up on everybody else, and I know right now that there are lawyers out there that are involved not just where they live but all over the place in several -- one lawyer involved in several of these things.

CHAIRMAN BABCOCK: So you're in favor of Option 11?

MR. EDWARDS: You better believe it. I've been there, and it's impossible to explain to your client why it is that the judge on the -- the lawyer on the other side of the table is representing the judge, and he goes in to discuss his case and how you explain that he's really not discussing our case.

CHAIRMAN BABCOCK: The point Wallace -- just not to leave this point, the point that Wallace raises is that the person who is doing the pro bono work for the judge in sort of a semi-official capacity is akin to the county attorney, district attorney, or the Attorney General, and should we write that into the

rule to exempt them from this rule? And if what I'm hearing Scott and Bill say is, well, no, that we ought not to give them an immunity or an exemption because of the issues. Not saying that it's improper, just that there are issues. Wallace, do you agree with pretty much what I said?

MR. JEFFERSON: Yes, I do.

CHAIRMAN BABCOCK: Okay. Alex.

PROFESSOR ALBRIGHT: And I just want to clarify. So what we're saying is if a private lawyer represents a judge in a mandamus proceeding, someone different from the real party in interest, then that would be a lawyer with -- that is doing legal work for the judge.

HONORABLE F. SCOTT McCOWN: You no longer represent a judge in a mandamus proceeding. They are no longer styled as against the judge.

MR. ORSINGER: Well, the judge could file a brief.

PROFESSOR ALBRIGHT: What if you have a judge who -- you know, I'm thinking about there is a case with Judge Bennett where he got -- this issue came up where there was a lawyer that was representing him in a mandamus case and then there was a motion to recuse in the next case where that lawyer was

representing a different party.

HONORABLE F. SCOTT McCOWN: Well, I guess my thought about that is that if somebody seeks to mandamus me the lawyer representing the real party in interest is not representing me, and my position on mandamus is that it's really improper for a judge to be advocating in the appellate court. It's unseemly. I mean, he's either right or he's wrong. He shouldn't be up there trying to be a litigant preventing him or herself from getting reversed.

PROFESSOR ALBRIGHT: But I think history is that some judges have been interested in particular cases. In the Judge Bennett matter it wasn't an adversary proceeding.

HONORABLE F. SCOTT McCOWN: Well, then what the judge can do is either file it in his or her own name. If it's proper for them to file something, they've got a law license, they know the law, they can file it in their own name, but to go out and prevail upon somebody to do all that work for you free then I think if they're doing that it ought to come under this rule.

PROFESSOR ALBRIGHT: Okay. Or if they're paying them clearly. Whether there's --

HONORABLE F. SCOTT McCOWN: Well, I can

guarantee you no judge is paying them.

PROFESSOR ALBRIGHT: Well, but you could say, well, when it comes back this will be taxable costs.

HONORABLE F. SCOTT McCOWN: Oh, no, you couldn't do it.

PROFESSOR ALBRIGHT: I have a case where it may happen, but it's --

HONORABLE F. SCOTT McCOWN: You mean me hire a lawyer to defend my rulings and tax it as a cost against the party?

PROFESSOR ALBRIGHT: I'll tell you about my case later on, but I think there are ways -- there are lots of ways where private lawyers can represent the interest of the judge in some kind of mandamus proceeding where it ends up they are not being a real party in interest, and I just want to make clear that those lawyers would be covered under this provision.

MR. EDWARDS: In Judge Bennett's case the court of appeals ruled one way, and no party would take the case anywhere, and Judge Bennett wanted to take the case to the Supreme Court and got a lawyer to take the case to the Supreme Court for him, so the lawyer in that case was representing him.

PROFESSOR ALBRIGHT: Him.

MR. EDWARDS: And not the real party in interest. He was the real party in interest.

CHAIRMAN BABCOCK: Judge Brown and then Luke.

HONORABLE HARVEY BROWN: I was just going to point out in Harris County we have an Office of Court Administration, and that has an attorney on staff, and that attorney sometimes appears in recusal hearings, in mandamus proceedings, and Scott's language I don't think quite would pick up that type of government paid-for attorney.

HONORABLE F. SCOTT McCOWN: Well, no, it doesn't -- I think it would because it wouldn't prohibit him from doing that. If that's proper, he can still do it. He just can't represent another party.

HONORABLE HARVEY BROWN: Well, it's a county paid Office of Court Administration, so that would mean that --

HONORABLE F. SCOTT McCOWN: Right.

HONORABLE HARVEY BROWN: -- the judge can't hear any cases involving Harris County anymore.

HONORABLE F. SCOTT McCOWN: Where he was a lawyer?

HONORABLE HARVEY BROWN: The lawyer is paid for by Harris County. The lawyer is on the Harris

County staff but is not part of the county attorney's office, a separate office of Harris County, Office of Court Administration.

HONORABLE F. SCOTT McCOWN: Well, where would that ever come up because I think the answer is, yeah, he couldn't. In other words, he's the judge's lawyer on the judge's staff doing legal work for the judge, having an attorney-client relationship with the judge, and then he's also trying to prosecute, say, a child support contempt in the judge's court?

HONORABLE HARVEY BROWN: I guess I'm concerned that I would be disqualified in the next case involving Harris County or at least the county attorney's office.

MR. WATSON: Not if the representation is over. I mean, it's a current representation.

CHAIRMAN BABCOCK: Luke.

MR. SOULES: It seems to me like we don't need this "done by a county attorney, district attorney, or the Attorney General." If we could just leave in Option 11 and stop it after "arising out of the judge's official duties" and then leave it to the general rule of appearance of impropriety and what have you, the present concepts, anything beyond that. This would be automatic if the representation is beyond the

judge's official -- beyond something that arises out of the judge's official duties then it would be under the general rule. I mean, it would be under the automatic exclusion of Option 11. If it arises out of his official duties then it would be left to the operation of general concepts.

PROFESSOR ALBRIGHT: But, Luke, doesn't that then exclude these mandamus --

CHAIRMAN BABCOCK: Speak up, Alex. We can't hear you.

PROFESSOR ALBRIGHT: That excludes the mandamus situations.

MR. SOULES: That's right. It excludes the mandamus situations, which it should. I mean, it's not true that the judge is not always the target or the named target of a target, to use a word here, of a mandamus. Recently a judge in Harris County received a mandamus to proceed to judgment after three years, three years after the verdict with very little activity, and finally all the parties decided they wanted a judgment one way or the other, and that was directed against the judge, but that does arise out of his official duties, and then someone decides to defend the judge, one party or another, decided to take the judge under the umbrella of his own party, would that

then cause the judge to have been recused?

I don't know, but it seems to me "official duties" ought to just come under the general rule that we have. If there's no appearance of impropriety then the judge ought to be able to go on and not be automatically out because the judge decides to hire a lawyer or there's some other agency that may be providing a lawyer. I don't know how many agencies there are in the state of Texas that may from time to time be in court in effect as an assistant to the court.

CHAIRMAN BABCOCK: Linda.

MS. EADS: Well, on two grounds I disagree with that. First, representing the Attorney General's office, I guarantee you that if you strike out the language that specifies which attorneys will not be disqualified, you will be asking for recusal motions because it's a litigation ploy. You know, we represent the judge on something and then we go into court against that judge all the -- with that judge all the time on other matters, and the opponents are going to try to recuse just to buy time or to annoy us or to win. I mean, whatever happens.

The second reason is I really am -- I really feel very strongly that a judge who is

represented by a private lawyer, even if it relates to official duties, that lawyer should not be representing other litigants before that judge during the pendency of those proceedings, unless of course, it is a state official or county official that has that obligation under law. Otherwise, we run into this problem where it really is hard, and the appearance of impropriety is so astounding to litigants and to citizens that I think it's not wise to open that door.

HONORABLE F. SCOTT McCOWN: And I would add to that, you have to understand how broad a judge's official duties are. I mean, I'm on the juvenile board. I'm responsible for the county auditor. I'm on the purchasing board. We're actually sued fairly frequent on employee/employee matters, and a good example is when we were going through how we're going to elect judges. Judges all over the state were critically interested in voting rights litigation and getting involved in voting rights litigation and prevailing upon private firms to do thousands and thousands of dollars of sophisticated legal work in their behalf, and I don't think those lawyers who are making those donations ought to be appearing in front of those judges in other litigation.

MR. JEFFERSON: I had in mind a broader

question, and that is when a district court's committee, for example, knows that a ruling in that case, in that mandamus, is going to have potentially a dramatic effect on the practice in that county, something -- and the committee is not persuaded that whatever attorney is defending the ruling is adequately going to defend the ruling and they want to, you know, hire or solicit an attorney to defend that ruling, just because of the institutional interest, which is a little different from what we're --

HONORABLE F. SCOTT McCOWN: Well, but, see, they can -- they have got three public alternatives here. They can prevail on the county attorney, the district attorney, or the Attorney General to take their view forward, or they can do it under their own name. The San Antonio court of appeals panel fell into serious error, and the district judges of Travis County along with the district judges of Bexar County filed an amicus brief, and they corrected their error on bond, but we did it under our own name. We did the work. We wrote it, and we sent it in.

CHAIRMAN BABCOCK: Okay. Any more comments about Option 11?

HONORABLE SCOTT BRISTER: I'm --

CHAIRMAN BABCOCK: Yes. Judge Brister.

HONORABLE SCOTT BRISTER: Could you make it just -- just make a blanket exception for government attorneys?

CHAIRMAN BABCOCK: What's the downside to that? Linda, any problems with that?

MS. EADS: No.

HONORABLE SCOTT BRISTER: Because obviously the county attorneys and Attorney General both appear in our courts and represent us, and I'm a little concerned about "official duties." I will spare you the long story about why I put a Ten Commandments up on my wall, but I'm not sure when the Attorney General represented me in the suit thereafter that was really my official duties. I was trying to make a statement about a frivolous lawsuit against another judge. Well, dad-gum, if I can't put something up on my own wall, so all of us got together and we're going to do it, and nobody else did it but me. So I got sued.

CHAIRMAN BABCOCK: You screwed up. You trusted them.

HONORABLE SCOTT BRISTER: It was Judge Wendt's idea and then he quit and then I was left out hanging. But in any event, I'm not sure that was an official duty, but fortunately -- but, you know, but

the point is that's the Attorney General's Office's call. If they have a judgment call, "Is this our job or is this Brister's job he gets to do on his own," and you know, they're pretty careful about drawing that line.

HONORABLE F. SCOTT McCOWN: I don't have any problem with saying "except for legal work done by a county attorney, district attorney, or Attorney General. What about that?

MR. TIPPS: Or "government attorney."

HONORABLE SCOTT BRISTER: Or "government attorney."

HONORABLE F. SCOTT McCOWN: Well --

MR. EDWARDS: But it has to be involved with the judge's official duties because there are counties out there where both county attorneys and district attorneys are allowed to carry on private practice.

CHAIRMAN BABCOCK: Yeah.

MR. EDWARDS: And do it all the time. Do it all the time. You may have the district attorney from Jim Wells County prosecuting a civil case in Nueces County. It happens all the times.

CHAIRMAN BABCOCK: Judge Peeples.

HONORABLE DAVID PEEPLES: There was a

time in San Antonio when the commissioners court bought insurance to protect us against certain kinds of lawsuits, and I think if a defense firm is willing to do that kind of work and therefore represent judges frequently in Federal court, I don't think that the price of taking that kind of business ought to be that they have to be unable to practice before all the judges in the county. In other words, that's the kind of thing that I think now the government lawyers do that, but there was a time when they had insurance policies on it, and it was private lawyers, and if the cost of taking that kind of work is you can't practice before the judges, that's a real problem, I think.

MR. EDWARDS: Well, that's a problem you have every time that a lawyer takes a particular piece of litigation. You're disqualified from taking a whole lot of other activity, and one of the things that goes into determining what is a reasonable fee, if I remember the disciplinary rules, is what legal work you have to give up to accept the one that's being tendered to you.

MR. SUSMAN: So you really stick it to the judge --

MR. EDWARDS: That's right.

MR. SUSMAN: -- when you charge them the

fee.

MR. EDWARDS: Right.

MS. EADS: Well, I've got to say there is not a lot of people using those insurance policies, because we have got a whole lot of cases in Federal court and otherwise in which we defend judges regularly, so I don't think that's -- I'm not sure that's really as actively used as it used to be.

HONORABLE PHIL HARDBERGER: Well, wait a minute. I think it's actually -- it's springing up with new life, certainly in the appellate courts, because right now all appellate judges are considering, all the appellate judges in the state, a policy that would protect them, an insurance policy. It's being promulgated by OCA. I suspect it will probably get down to district judges after awhile, but right now it's for the appellate judges. There is going to be a vote among the appellate judges whether they want to do it, but if they do it, it will cover all the appellate judges in the state, and that is a private insurance company, just like Aetna or whatever it is.

CHAIRMAN BABCOCK: Judge Medina had something.

HONORABLE PHIL HARDBERGER: I think David Peeples' point is very good.

HONORABLE SAMUEL MEDINA: Scott, how about "a lawyer in a proceeding or a lawyer's law firm is doing legal work for the judge, judge's spouse, child, in an ongoing legal matter except for legal work by government attorneys in their official capacity"?

HONORABLE F. SCOTT McCOWN: That's exactly what I have just written. That's perfect. We focus on the government. But let me say one thing about the insurance. If I'm driving down the road and I rear-end somebody and I get sued and my insurance company hires a law firm, should that lawyer be allowed to practice in front of me in my court when that case is pending? I think the answer to that is "no." That lawyer shouldn't be allowed. Because my personal wallet is at stake, he's my lawyer, we have an attorney-client relationship. He shouldn't practice in my court.

Why is it any different if I fire the chief juvenile probation officer, she sues me under some Federal statute that puts my personal wealth at stake, I have an insurance policy that protects my personal wealth and that hires me a lawyer? During the pendency of the case that lawyer should not be appearing in my court on other matters. When the case is over he could come back under this rule if that were

appropriate, and if I have to go to San Antonio to find a lawyer willing to do that because I don't want to be recused, you know, I guess there's a lawyer or two in San Antonio that could represent me.

CHAIRMAN BABCOCK: Yeah, Carl.

MR. HAMILTON: Just speaking to that, I don't think that the lawyer ought to have to stop practicing in the court. I think the judge ought to recuse himself because you have a lot of lawyers that have ongoing clients that you've had for years and years and years.

HONORABLE F. SCOTT McCOWN: Well, but that's what this does.

CHAIRMAN BABCOCK: That's what that does. Yeah.

MR. HAMILTON: Yeah, but you're saying the lawyer ought to have to not practice in your court.

HONORABLE F. SCOTT McCOWN: No.

MR. HAMILTON: It's the judge that ought to recuse himself.

HONORABLE F. SCOTT McCOWN: Right. That's what this does. No, the argument was being made that that burdened the lawyer because practicing in front of me personally is such a great thing that the lawyer shouldn't be punished by losing that

opportunity.

CHAIRMAN BABCOCK: Well, we'll stipulate to that.

HONORABLE F. SCOTT McCOWN: I mean, you know, but --

CHAIRMAN BABCOCK: Somebody else have a comment? Richard.

MR. ORSINGER: I'd like to ask Linda a question. If there's a complaint in front of the Judicial Conduct Commission does the AG provide a defense for the judges?

MS. EADS: Depends.

CHAIRMAN BABCOCK: It depends on what?

MS. EADS: Depends on whether it is a -- what it was based on, whether it was a --

HONORABLE SCOTT BRISTER: If it's campaign, no.

MS. EADS: Right. Official capacity, you know, depending on what the nature of the complaint is, yes.

CHAIRMAN BABCOCK: Steve.

MR. SUSMAN: I think you want to be real careful here about judges who happen to be members of classes. I'm not sure this language cuts it carefully enough. I mean, am I doing legal work for you if you

are a member of a class I represent and haven't opted out of it yet?

HONORABLE F. SCOTT McCOWN: Well, the Federal rule actually speaks to that.

MR. ORSINGER: It's not a Federal rule.

HONORABLE F. SCOTT McCOWN: Okay. Pardon me.

MR. ORSINGER: It's an ethics opinion from a committee that --

HONORABLE F. SCOTT McCOWN: Pardon me.

MR. ORSINGER: -- suggested that a judge recuse when he was a member of a class and a member of the lawyer's law firm was counsel for the class. A group of probably 12, 15 people, maybe 9, but let's not talk about -- these are not rules we're talking about.

HONORABLE F. SCOTT McCOWN: Pardon me. Pardon me. The Federal writings --

CHAIRMAN BABCOCK: Boys.

HONORABLE F. SCOTT McCOWN: -- from who knows where by who knows who actually say that you have to recuse in that situation. Whether you should or not I don't know.

CHAIRMAN BABCOCK: But, Steve, what's your point about that?

MR. SUSMAN: I mean, do we want to make

judges recuse themselves in those situations? I mean, where the relationship is really they just happened to be included in some class action.

MS. SWEENEY: May not even know it.

MR. SUSMAN: May not even know it, that some lawyer filed on behalf of everyone who drives a Ford automobile in some distant jurisdiction. I mean, they're a member of the class.

HONORABLE F. SCOTT McCOWN: Keep in mind, this is waivable. Now, so this is a pretty unlikely scenario you're raising. First, that the judge is a member of a class; second, that he couldn't opt out; third, that the lawyer, some lawyer for tactical reasons would actually raise it and force him to recuse.

MR. SUSMAN: Well, of course a lawyer is going to raise it, I mean, if he knows about it, and if you don't like the judge, you're going to raise it, period. So, I mean, the real question is do you really want to recuse judges because of that tenuous connection. I think that's silly.

MS. SWEENEY: But if it's in the rule you'd arguably have a duty to do it if you're getting a bunch of -- you know, if you know you're -- I agree with you. If it's in the rule --

MR. SUSMAN: I mean, I just think it's silly to have it in the -- to write a rule in a way that makes judges recuse themselves under those circumstances where they are part of a class.

MS. EADS: It depends on the class. I mean, some classes it would be ridiculous for them to be recused because the amount recovered is minimal and the class is huge, but there are some classes in which the judge would have a substantial interest and it would be something that we would not want him to therefore be in a case with the lawyer representing him on a substantial interest. Just because it's a class action, it just depends on the nature of the class, and so to write the rule to exclude classes I think wouldn't work either. It would depend on the circumstances.

CHAIRMAN BABCOCK: Judge Brown.

HONORABLE HARVEY BROWN: I think we should take judges out of the class action for the reason Steve said, and I think we can address Linda's concern by just falling back to the general rule.

MS. EADS: On economics.

HONORABLE HARVEY BROWN: I just got something in an envelope from Southwestern Bell this week on something I had no idea was going on, and what

if that lawyer had a bad ruling from me last week?

HONORABLE SCOTT BRISTER: But, again --

HONORABLE HARVEY BROWN: It will create an incentive for people to search every class action, how big it is, who's a member, to try to get rid of judges they didn't like.

CHAIRMAN BABCOCK: Judge Brister.

HONORABLE SCOTT BRISTER: The problem with appearance of impropriety is that it's so weak. I mean, the Texas law on this is right now. It's fine for me to rule on certifying the class that I am a member of myself. Not some far away class. My class right here that I'm going to get money from, it's fine for me to go ahead and rule because I'm -- and the rationale in three or four appellate opinions in Texas is because I am not yet a member of the class until after certification.

So, you know, keep in mind, appearance of impropriety, you know, has been in Texas just, you know, give 50,000 or $10,000 to the judge, fine, no appearance of impropriety. It has been a very weak standard, and if we all take an oath we're going to be a little tougher about it in the future and be a little more reasonable, that might be fine, but --

HONORABLE F. SCOTT McCOWN: Well, you're

going to be in a position to ensure that.

HONORABLE SCOTT BRISTER: Well, I don't know.

CHAIRMAN BABCOCK: What if we had a comment?

HONORABLE SCOTT BRISTER: And we mean it this time?

CHAIRMAN BABCOCK: No, no, no. That class actions are handled on a case by case. Not automatically in, not automatically out.

HONORABLE SCOTT BRISTER: I don't disagree with that.

CHAIRMAN BABCOCK: Steve.

MR. SUSMAN: I think haven't we really covered the problem if you limit it to situations where the lawyer actually has an attorney-client privilege with the judge? That does not apply to a class.

HONORABLE SCOTT BRISTER: That's right.

MR. SUSMAN: Unless you're a class representative. If you're a class representative you probably ought to recuse yourself, but if you have an attorney-client privilege with the judge, I think that's something -- I mean, how the hell do I know that you aren't "ex parte-ing" him under the cover of an attorney-client privilege.

HONORABLE F. SCOTT McCOWN: But, Steve, the problem with that approach is that an attorney-client privilege lasts forever, even after the relationship has come to an end. That's why I didn't write the rule in terms of attorney-client privilege or attorney-client relationship because that's all kinds of questions about whether it still exists, even after 20 years. Suppose you did my will 20 years ago. I mean, it's still the will I'm relying on.

MR. TIPPS: Couldn't you say "attorney-client relationship as the result of an ongoing legal matter," merge your two concepts?

MR. EDWARDS: Well, a will could be an ongoing matter.

MR. TIPPS: Could be.

HONORABLE F. SCOTT McCOWN: How about if we just said -- how about if we said "a lawyer in the proceeding or the lawyer's law firm is doing legal work for the judge, the judge's spouse, or the judge's minor child in an ongoing legal matter other than a class action, except for legal work done by a government attorney in their official capacity"?

MR. SUSMAN: Okay. That's fine.

HONORABLE F. SCOTT McCOWN: And then we could have a comment that there may be other

circumstances where the general rule requires recusal, but this is just the prima facie presumptive rule.

CHAIRMAN BABCOCK: Would the comment not say that class actions ought to be handled on a case by case basis --

HONORABLE F. SCOTT McCOWN: Yeah.

CHAIRMAN BABCOCK: -- and not revert to what --

HONORABLE F. SCOTT McCOWN: Right.

CHAIRMAN BABCOCK: -- Judge Brister says the law is.

HONORABLE F. SCOTT McCOWN: Yeah. The comment could say, "Other situations may arise under the general rule. For example, there may be certain classes that you should recuse from."

CHAIRMAN BABCOCK: Okay. Steve, does that solve the problem, do you think?

MR. SUSMAN: Uh-huh.

CHAIRMAN BABCOCK: Yeah, Carl.

MR. HAMILTON: Does your word "lawyer" include a lawyer that might be a party such as in a malpractice case?

HONORABLE F. SCOTT McCOWN: I'm not getting that, Carl.

MR. HAMILTON: Suppose a lawyer is a

defendant in a malpractice case in the judge's court.

MR. SUSMAN: Oh, yeah.

MR. HAMILTON: And the judge is being represented by that defendant lawyer.

MR. TIPPS: All the more reason.

MR. HAMILTON: But the word "lawyer" normally implies the lawyer representing parties in the case rather than being a party in the case.

HONORABLE F. SCOTT McCOWN: Well, I was trying to write this on the representational problem. I think your example would certainly fall under the general rule.

MR. SUSMAN: Well, the lawyer -- I mean, we haven't explored the judge's various possible relationships to parties, is what he's talking about.

HONORABLE F. SCOTT McCOWN: Right, but this isn't a party rule.

MR. SUSMAN: I understand that.

HONORABLE F. SCOTT McCOWN: This is a lawyer rule.

HONORABLE SCOTT BRISTER: That's a much more rare situation.

HONORABLE F. SCOTT McCOWN: And I think that would cover the general rule. I think that would be caught up in the general rule, and I mean, I don't

think we want to write a rule for every example. One example that's come up, suppose the doctor in the case is a defendant in a malpractice case, and it's your doctor. I mean, you recuse there, but we don't have a rule in the rule book about it.

MS. SWEENEY: It's also not the universal application of the principle.

No, I'm just telling you, you get into a small community suing a doctor, he is going to be the judge's doctor.

HONORABLE F. SCOTT McCOWN: Well, and that may illustrate why it can't be the universal and we can't write a rule about it, but --

MS. SWEENEY: We ought to get a transcript of what you just said.

CHAIRMAN BABCOCK: Richard Orsinger.

MR. ORSINGER: I think that this debate is exactly why we shouldn't try to write this rule. I think that we have through happenstance and because Skip had the personal experience that he had we have gotten focused on one relationship out of many important relationships that exist in life, that there is currently an ongoing legal representation relationship between the lawyer and the judge.

But I can point out probably an infinite

number of equally important relationships that are not lawyer-client relationships that would affect the judge's judgment just as likely, and when we start writing this rule we have to make a distinction, or are we, because the debate is talking about representing the judge in litigation, but the proposed rule involves giving the -- doing legal work for the judge, and legal work for the judge may mean that you're representing him in a lawsuit. It may mean that you're drafting a real estate deed for him, or it may mean that you're talking to them about whether or not they should file a divorce, which doesn't have any clearly -- it may have even occurred over a lunch table instead of in the lawyer's office.

I think that we have a myopic view that a judge should not hear a case in this one situation and then when anyone tries to generalize the rule, we say, "Well, no, no. We don't want to make the rule too general because it's too complicated to write," but it's also very arbitrary that of all the many relationships that are important and could cause prejudice, this is the single one that we pick out, and it's just I think because we happen to be lawyers and not doctors and not accountants and not professional fiduciaries.

I mean, if somebody is a professional fiduciary nonlawyer for a judge, that bothers me just as much as if they're a lawyer. If they are the trustee of the judge's child's trust, if they are representing the judge's mother in a lawsuit that the results of which will mean whether or not the judge has to support the mother or whether they are going to recover money damages from someone else, it goes on and on and on and on, and I really think that we ought to leave this under (b)(1) where the judge's impartiality might reasonably be questioned and then allow it to develop more or less on an ad hoc basis.

And we're also being, I think, a little selective about the way we use our Federal authority, because this Federal authority just as strongly says that you should recuse when a lawyer is suing you or suing your spouse, and I'm -- actually, I'm more worried about what's going to happen to me if I'm suing the judge than I am what's going to happen to me if the other party is representing the judge.

CHAIRMAN BABCOCK: Well, we haven't gotten to that yet. Scott has got --

MR. ORSINGER: Well, we haven't gotten to that yet, but the proposal is a very -- my point is that we can debate Scott's proposal and we can debate

Carl's proposal or we can look at Chip's proposals, which are even different -- Skip's, I'm sorry, proposals, which are different from these, but in reality, should we really be targeting these relationships and say that this is important enough to have a rule on but none of the other relationships that can exist are important enough to have a rule on? They're only important enough to have this weak protection in (b)(1). I'm just troubled by the whole process.

HONORABLE JAN PATTERSON: Should we have a rule, yes, and I think there is a difference in the relationships for a variety of reasons and because we are lawyers and it goes to our system of justice and our sense of propriety, and I think it's critical that we differentiate relationships. I have an entirely different relationship with a dentist who cleans my teeth twice a year, although I may have respect for him or her, than I do with any lawyer who I might go to.

We are acting as though when judges go to a lawyer it's for some routine will service. That just simply is not the fact. More often than not it is a highly significant and loaded relationship, and that judge has evaluated lawyers in the community and is going to that lawyer because he or she thinks that they

have a special quality and knowledge and for a variety of reasons. It is a special relationship, and I think we have to recognize that; and even if we don't recognize that, I think that our clients and the public believe that, so I think it's for a variety of reasons, and I think very strongly we should have a rule.

CHAIRMAN BABCOCK: Steve Susman.

MR. SUSMAN: I don't see the harm in saying that the judge should disqualify himself on the following 25 circumstances and then have as No. 26 "and any other circumstances in which, you know, he can't be partial" or whatever the general language is. What's the harm in that? I mean, it at least gives you concrete advice in 25 cases.

Now, if any court or judge would say, "Hey, that's it, man. Anything that ain't covered by 25, I'm free," I agree it's harmful, but if it's worded in a way that indicates that we're just giving 25 examples but there may be another hundred that we haven't thought of but we're covering that by paragraph 26, I don't see what the harm in that is.

CHAIRMAN BABCOCK: Judge Rhea.

HONORABLE BILL RHEA: The language we have before us as modified, I'm fine with, but the thought of adding "or a law firm" concerns me. That

would effectively preclude me from going to Jackson Walker or Strasburger Price to hire a probate lawyer to do a will. I wouldn't do it because I would not want to eliminate those lawyers potentially from cases in my court. So I'd go somewhere else, and I think that's just way too broad, and then there are any number of other instances where I might want to hire on the discreet subject matter that I know is going to have effectively nothing to do with whatever comes into my court.

MR. EDWARDS: Well, except as the way it's written it says "is doing work," so if you write the will, if the will is written, then once the will is written there is no "is doing."

HONORABLE BILL RHEA: I expect that lawyer to update me whenever there are changes in the tax law.

MR. EDWARDS: Well, then they're working when they're doing it, but if you're spending three hours a day per week with that lawyer upgrading something, you know, between 5:00 and 8:00 o'clock in the evening, then you go back into court with that lawyer the next morning, it is a very hard deal to explain.

HONORABLE BILL RHEA: Even if it's

limited to that within the two-month period of time that that probate lawyer is representing me, I'm going to have to go track every case in my court to make sure that Strasburger is not doing it and that I disclose that to the lawyer on the other side so that they can file a motion to recuse if they so wish. I don't want to do that.

MR. EDWARDS: It's no big deal in the Federal court. They will tell you a hundred things when you go into Federal court. Let me tell you -- they start off with, "Let me tell you these things," dip, dip, dip, dip, dip. "Anybody have any problem with that?" Nine times out of ten, 99 out of 100 or even more than that, everybody says, "That's no big deal."

HONORABLE F. SCOTT McCOWN: And, you know, judges can control this. Your example, there was a lawyer in a big firm that I wanted to write my will, and I went to a solo practitioner who had nothing to do but write wills and was never going to be in my court. That burdened me a little bit, though that other lawyer was really wonderful, but that burdened me a little bit, but, you know, so what. It's better than having the big firm write my will and be in my court at the same time.

CHAIRMAN BABCOCK: Linda.

MS. EADS: I was going to say that example probably proves why we need to articulate this rule and not leave it to general understanding because I think it does indicate and does put a burden on judges, there's no doubt, but I think it's as clear a statement as to what this committee under the docket of the state wants you to do in those circumstances, which is much more comforting to me as a litigant than to have to worry about how you interpret that under the general proposition.

HONORABLE F. SCOTT McCOWN: May I suggest that we have two votes, one vote would be on who wants a rule and who doesn't and then a second vote on if you want a rule, is this one okay?

CHAIRMAN BABCOCK: We had -- I think we probably are. We've talked enough about this where that would be an okay vote. Everybody who wants a rule raise your hand.

MS. SWEENEY: Who wants a rule and --

HONORABLE BILL RHEA: On 11?

HONORABLE DAVID PEEPLES: Some rule.

HONORABLE F. SCOTT McCOWN: A rule dealing with judges recusing when they're represented --

CHAIRMAN BABCOCK: Along those lines.

MR. ORSINGER: My vote would be conditional.

CHAIRMAN BABCOCK: 31 want a rule. Who doesn't?

HON. ANN CRAWFORD McCLURE: I vote "no."

CHAIRMAN BABCOCK: That would be one. Five do not want a rule. So fairly overwhelming support for a rule. I don't think we're done with this rule yet, Scott. I think we need to keep talking about it a little bit because there is another element to it, which is in your Option 11a and what Richard raised, is what about the situation where there is a lawyer in your court who is representing one of your adversaries in another proceeding. In other words, you're in the middle of a divorce, and this lawyer who is now before you is representing your wife in the divorce proceedings, or you're in some commercial dispute, and the lawyer is representing the adverse party in the commercial proceeding.

HONORABLE F. SCOTT McCOWN: Well, if it was the divorce, it would be covered by my Rule 11 because he would be doing --

CHAIRMAN BABCOCK: Right. You're right.

HONORABLE F. SCOTT McCOWN: -- work for

your spouse. In the second situation, this is just a real philosophical point, but we do not want to set up a system where what the lawyer does independent of the judge becomes a ground for recusal of that judge. The traditional rule is if you are a lawyer and you are going into court and something you have done has created some reason why you think that judge can't be fair to your client then your obligation is to withdraw from the representation and get your client another lawyer. You recuse yourself, and I don't think we want to go there, even if, even if, you can make a case that this exception is justified. I don't think we want to open that door a crack, because then you have lawyers doing all kinds of things to judges and arguing that it creates a ground for recusal.

MS. SWEENEY: So if I've represented the child support lady that you fired in your hypothetical before and she goes and hires me to sue you in Federal court, and I take it on, and I do it, then when I randomly get assigned to your court because of the central docket somewhere down the road, I have to vanish from my own lawsuit that my client has chosen me in because of random luck of the draw that I got stuck with you again after I sued you, meaning this all hypothetically. I would be thrilled to be in your

court, of course.

HONORABLE F. SCOTT McCOWN: Let me see if I understand the facts. There's an unrelated piece of litigation. You are representing somebody who is suing me in Federal court.

MS. SWEENEY: Correct.

HONORABLE F. SCOTT McCOWN: You need to withdraw and get your client a different lawyer.

MS. SWEENEY: Why prejudice my client?

HONORABLE F. SCOTT McCOWN: Okay. I tell you why. You may say -- you may say that's a horrible outcome, and it might be a horrible outcome in that one situation, but there's a policy reason for it. The judge is an elected official who is elected to hear those cases, and we do not want to create a system where lawyers by their -- by what they do to the judge create a grounds to recuse a judge.

CHAIRMAN BABCOCK: Steve.

MR. SUSMAN: I mean, I think Scott's absolutely right. I think it would be unfair. I mean, therefore a lawyer could publish an article in the Texas Bar Journal, a Houston lawyer, saying, "I hate the following -- the following ten judges are really terrible and they're terrible for the following reasons" and then every time he had a case that landed

in their court you say, "You've got to recuse. You can't be fair in a case against me."

I mean, I think a lawyer who does -- I mean, when a lawyer undertakes suing a judge because his house creates a nuisance or violates an easement or whatever it is, I think you have to realize that you are disabling yourself from being an effective advocate in the event you represent a client in the future who has a case that ends up before that judge, and that's just a price of suing a judge. If you don't want to be disabled from being in his court, you better not sue him.

MS. SWEENEY: Well, it depends whether you feel like judges are fungible or lawyers are fungible.

HONORABLE F. SCOTT McCOWN: Lawyers are fungible because --

HONORABLE SCOTT BRISTER: Here, here.

HONORABLE F. SCOTT McCOWN: Judges are elected to hear the case by the people and should not be easily displaced, and let me add, you're assuming that's a meritorious lawsuit.

MS. SWEENEY: I know.

HONORABLE F. SCOTT McCOWN: You can bring a really crummy lawsuit by, as the defense

lawyers say, just paying the filing fee. Nobody screens these. You just pay the filing fee, and you create a ground for recusal against any judge you want.

HONORABLE SAMUEL MEDINA: Judges will eat on this side.

CHAIRMAN BABCOCK: Does it matter if the judge is the plaintiff and sues the client that I represented for 15 years? And the client says, "I want you to represent me in this matter, this frivolous case this judge has brought against me."

HONORABLE F. SCOTT McCOWN: But then it would not be the lawyer. The judge would be disqualified because he sued your client. It wouldn't be because you're representing him. It would be because he sued your client. Traditional recusal rules always focus on the judge's relationship to the party, not the judge's relationship to the lawyer.

CHAIRMAN BABCOCK: Right. Except that I'm in your court with a different client.

MS. SWEENEY: That's right. It's the same.

CHAIRMAN BABCOCK: See, you've sued my client, the XYZ Company.

HONORABLE F. SCOTT McCOWN: Then that would be something that the judge has done. You could

argue that that's something that the judge has done.

HONORABLE SCOTT BRISTER: But the problem is we do get sued by people. In my Ten Commandments case the lawyer -- part of the reason it got thrown out is because it offended him, and he never had any cases in my court and was volunteering to be constitutionally offended, and after he lost that he started trying to intervene in various personal injury cases to be a co-counsel so he could then have standing to complain about the Ten Commandments. It happened in two or three cases.

So the people we're talking about, it is not an uncommon occurrence at all, but then they try to get in just for that reason or to try to volunteer to be offended, and you know, it's really going to be hard to draw a rule other than the general principle, is the lawyer trying to do this or is this something that the judge did that, you know, the lawyer didn't opt in or out of this. It's going to be real hard to write the rule to say, well, it's okay if the client came to you first but not if you're trying to intervene in late.

CHAIRMAN BABCOCK: Okay. Richard.

MR. ORSINGER: The same Federal authority that we were so conveniently relying on to support our last position --

CHAIRMAN BABCOCK: Now, now. Let's not characterize the Federal authority.

MR. ORSINGER: -- is squarely against this proposal. I mean, there is the public policy which Scott has outlined, which I think a lot of people would recognize presents a risk. They feel that the ability of the client to feel like they get a fair shake with the lawyer of their choice is more important than protecting the judiciary against that risk of misuse, and it's something that we need to ask ourselves. It sounds scary, but if this is the way the Federal courts are operating all over the United States of America and that judicial system has not collapsed, then why is it so urgent for us in Texas that we have to have a different rule here or else our system will collapse?

HONORABLE SCOTT BRISTER: No. 1, because Federal judges decide recusal questions themselves. The biggest difference is I don't decide recusal. I grant it or I refer. A Federal judge just says, "No, I'm not recused. Denied." And that's the end of it, and that's a big difference.

HONORABLE F. SCOTT McCOWN: Well, and there's a couple of other differences, and I guess consistency, Richard, is not high on your value here,

but I don't know who wrote this or -- just a bunch of people in a room is what you're telling us, but, you know, the truth is the world of state courts is more rough-and-tumble than Federal courts, and Federal judges are just exposed to a whole lot less than we are, and the client's right to choose a lawyer I think is -- particularly in simple litigation is of far less value than the public's right to say who decides cases, and to displace an elected judge who's supposed to decide a case based on what you the lawyer have done and not what the party has done is not right.

MR. ORSINGER: Yeah, but you're focusing on just one litigant at the expense of the other.

HONORABLE F. SCOTT McCOWN: No.

MR. ORSINGER: It's like in Paula Sweeney's example, if they want to hire Paula because she's the best lawyer, and especially if it's on a random assignment, because in San Antonio she would never know until the day a motion is heard whether or not she's going to be assigned to your court, then you're saying, okay, it's the litigant on the other side has an absolute right to have whatever judge the people elect, but the litigant that had nothing to do with this lawsuit that innocently hired Paula because she's so good, they don't have a right, and so --

HONORABLE F. SCOTT McCOWN: To have the lawyer. To have the lawyer.

MR. ORSINGER: -- you're making an inherent judgment call that some people's position are favored over others.

HONORABLE F. SCOTT McCOWN: No.

MR. ORSINGER: Which by the way, is a different judgment call from the way the Feds have called it.

HONORABLE F. SCOTT McCOWN: It's not an apparent judgment call. It's an express judgment call, and the judgment is that we ought not let lawyers have any way to manipulate the system or take actions that result in the recusal of judges, which is the traditional rule.

CHAIRMAN BABCOCK: Steve, did you have something? Susman.

MR. SUSMAN: No. I mean, it just seems to me that the state court system is so different than the Federal court system. It's just totally different. I mean, you can -- a judge is not recused even though you give him $10,000. Just hand him $10,000 for his campaign, and the other guy supported the opponent, and he's still not recused. Come on. I mean, all of this other stuff is just kind of a joke. I mean, it really

is.

HON. ANN CRAWFORD McCLURE: That's exactly right. If what we're looking at is public perception, this isn't going to do a thing for public perception. I had a doctor tell me yesterday a trial judge ought to be recused for the case he's involved with because he lives across the street from the lawyer on the other side.

CHAIRMAN BABCOCK: Let's get a sense of the committee. Skip, did you want to say -- Skip, last comment then.

MR. WATSON: I was just going to say I think we're ready for a consensus on whether or not to do anything with adversity.

CHAIRMAN BABCOCK: It must be the similar sounding names, Skip and Chip. We both reached the same conclusion --

MR. WATSON: Richard confuses us, so --

CHAIRMAN BABCOCK: -- at the same time. How many people think we ought to try to incorporate into the recusal motion the concept of the adverse -- the lawyer who is representing the adverse party, which is the second part of 11a? So if you're in favor of that, in other words, expanding Option 11 to include that concept. If you're in favor of that, raise your

hand.

If you're against that, raise your hand.

HON. ANN CRAWFORD McCLURE: I vote "no."

CHAIRMAN BABCOCK: 24 to 5 against including the adverse lawyer into Option 11. So with that, let's take a lunch break of 45 minutes.

(A recess was taken at 12:45 p.m., after which the proceedings continued as reflected in the next volume.)

- -

CERTIFICATION OF THE HEARING OF
SUPREME COURT ADVISORY COMMITTEE

- -

I, D'LOIS L. JONES, Certified Shorthand Reporter, State of Texas, hereby certify that I reported the above hearing of the Supreme Court Advisory Committee on May 19, 2000, and the same were thereafter reduced to computer transcription by me.

I further certify that the costs for my services in this matter are $ 1,098.00 .

CHARGED TO: Charles L. Babcock .

Given under my hand and seal of office on this the 30th day of May, 2000.

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

D'Lois L. Jones
D'LOIS L. JONES, CSR
Certification No. 4546
Cert. Expires 12/31/2000

#005,056DJ