* *

MEETING OF THE SUPREME COURT ADVISORY COMMITTEE

January 25, 2002

(MORNING SESSION)

* *

Taken before *D'Lois L. Jones*, Certified Shorthand Reporter in Travis County for the State of Texas, reported by machine shorthand method, on the 25th day of January, 2002, between the hours of 9:06 a.m. and 12:12 p.m., at the Texas Law Center, 1414 Colorado, Room 101, Austin, Texas 78701.

--*-*-*

CHAIRMAN BABCOCK: I guess we'll start out with a status report from Justice Hecht, who, along with his colleagues, have been very busy the last couple of weeks with our TRAP rules.

JUSTICE HECHT: Well, we have done some work on the TRAP rules, and I hope to get your comments on those today. They have been delivered to the Court of Criminal Appeals for its review, and Judge Womack indicated that they would get right on it, so we should know something from them before too long. About half the changes -- I didn't count them up, but it seems like about half of them affect criminal cases.

And then we're about to turn to a number of civil rules, including the recusal rule, before we are kind of -- or along the same time that we look at the complete revision project that Professor Dorsaneo will be happy to know is finally coming to the head of the list, and that's about it from our shop on those rules.

We are going to experiment with electronic filing of briefs in cases that are going to be argued, and I'm not sure -- Chris isn't here -- if we're going to do cases -- every case in which a brief is requested. I don't remember what we decided about that. Yes, Pam.

MS. BARON: Deborah Hankinson spoke at the

Travis County Bar qualification, and she said it was only cases once they were granted. It was hopeful that they would be expanded later, but right now the computer capacity just isn't there.

JUSTICE HECHT: Yeah. And so you'll be getting a letter from us that's new from now on that says if your case has been granted, would you please submit the brief on a diskette, and we'll post those to the website and see how that works and see whether we can expand it. We'd like to do everything that's filed, but there are lots of problems with that right now, but we're -- we'll try this and see how that works.

Then I just attended a meeting of the Federal rules committee, and their principal effort this cycle is going to be Rule 23, the class action rule. They have a number of changes, none of them very -- the ones that they're really talking extensively about are not very wide range or have dramatic effects, I don't think, on the rules, but may make some improvement in that procedure; and the last thing is our Task Force on Civil Justice Improvements, chaired by Mr. Jamail in Houston, is working away, and Chip's on that committee and Elaine Carlson and Tommy Jacks from this group. I think that's it, and a bunch of other people, and they're working on a settlement rule, fee shifting among lawyers, ad litems, and some way

to streamline or make more economic, efficient, mass tort litigation. So that's the charge of that committee, and they're supposed to have a report out in May, some of which, like the settlement rule, will come to this committee.

CHAIRMAN BABCOCK: Okay. All right. Well, in deference to her hard work but also to her son's 16th birthday today, Justice McClure has moved to the very top of the list today, and so she's going to talk about the parental notification rules.

HONORABLE ANN McCLURE: Don't say I didn't warn you, but my son will be driving on the streets of Texas.

CHAIRMAN BABCOCK: El Paso, though.

HONORABLE ANN McCLURE: Needless to say, it's been a couple of sleepless nights for me, bouncing off the ceiling anxious to drive this new truck.

We have basically five recommendations to present to you this morning. Two I think are noncontroversial. Three are what I would describe as hot potatoes that have generated a great deal of controversy among members of my subcommittee, and in fairness to everyone, I will present both sides of the debate so that you can have the benefit of what the respected concerns are. Also, I would tell you that if you haven't read this

morning's AUSTIN AMERICAN-STATESMAN, Frank Gilstrap brought this to me because I haven't read the paper yet. The state has been sued over enforcement of the abortion law now claiming that clinics are performing abortions without complying with the rules on notification of parents. So it is obviously a hot topic, and given that this is a political year, it's likely to stay that way.

If you have the benefit of the report, the first item is a new form. We were requested to draft language for that form. You should have a copy of the form. What it does is put control of the timetable on the filing of an appeal in the hands of the minor's attorney. Under the existing rules once the notice of appeal is filed, at that point the clerk and the reporter are to begin the preparation of the record. Because of the rocket docket and the requirement that the appellate court dispose of the matter within roughly 48 hours -- it's 5:00 o'clock of the second business day -- there is very little opportunity for the minor's attorney to get the reporter's record and do any briefing. It puts that attorney in the posture, if a brief is thought by the attorney to be beneficial, to have to ask the appellate court to allow additional time.

We don't have any anecdotal information since we are not really reporting statistics on these

cases, but I can tell you that of the cases that have landed in my court, we have not granted additional time for briefing. So they are proceeding without the benefit of briefing. This new form allows the minor's attorney to file a notice with the clerk and the reporter that they want the record prepared as quickly as possible because they intend to file a notice of appeal, and it allows for designation of the time of day and the date that that notice is filed, requires that the record be prepared instanter, requires that the clerk then notify the minor's attorney when the record is available so that it can be picked up and briefly condensed. At that point the attorney can file the notice of appeal and the brief simultaneously, and the 48-hour rocket docket kicks in at that time.

That was not subject to any great controversy, other than there are members of the subcommittee, really one member of the subcommittee, who thinks that the guardian should also be provided with a copy of the record rather than just the attorney, and I will detail that a little bit more when we talk about the amendment to the rules, but we would recommend that you adopt the form language of the notice to the clerk and the court reporter to prepare the record.

Secondarily, we have recommended an

amendment to Rule 2.4(d) that folds this new rule -- or this new form into the rules that indicates that if there is evidence of past or potential abuse of the minor, the hearing must be transcribed instanter. If the minor files the notice, the hearing must be transcribed and the record compiled and the reporter shall immediately upon completion provide the original and one copy of the reporter's record to the clerk. The clerk's record and a copy of the reporter's record will be delivered by the clerk to the minor's attorney.

Once again, a member of the subcommittee thinks that the record should likewise be filed or afforded to the guardian ad litem. We have anecdotal information from Jane's Due Process in Dallas that there have been problems with appointments of the guardians in these cases who have taken rather staunch positions that abortions should not be afforded to a minor in any circumstance and that allowing the guardian to have access to that record only puts their situation in the appellate court of additional amicus briefing, which has complicated the situation considerably. The subcommittee voted three in favor of the proposed rule you have, one in opposition, that only the minor's attorney be provided with the record.

They have attempted to work out among

themselves some language that would provide for an exchange of briefing in these cases. That has not been contemplated by the forms or by the rules since their adoption originally almost two years ago. That language has not been worked out completely. To the extent we're able to come to an agreement on that, you'll be provided with that at a future meeting, but because we do not want to hold up the process of these additional amendments any longer we recommend that this rule be adopted in the meantime.

The current rule on amicus briefing, 1.10, section (b), contains an error that we want to correct. It currently provides that when an appeal of the proceeding is filed the clerk of the court of appeals or the Supreme Court must notify the parties to the appeal. That should refer simply to the minor because these are nonadversarial proceedings and there is not an opposing party. The guardian does not represent the fetus. The guardian represents the best interest of the child. The guardian is not a party to the proceeding, and so we recommend that that be changed from "the parties" to "the minor."

We also recommend that the requirement that the existence of the brief and that the brief be made available for copying and inspection be done instanter.

We have had some problem with getting the briefing posted to the website immediately, and we would recommend that it be clear that that's to be done as soon as practicable, although we prefer the language "instanter."

Those are the fairly noncontroversial ones. The really controversial arguments deal with the court's ability to remand, the intermediate court's ability to remand. This committee asked my subcommittee to revisit that issue, and we have done so. I can tell you that our review of the statutes of the other states, none of the statutes specifically provide for remand, nor do they specifically preclude remand. There are six states that have a body of case law that address the issue of remand. Three of them are consent states; three of them are notification states. Ohio has reference to both "reverse and grant without remand" and "reverse and remand with instruction to grant." It was not a remand for further factual development or additional evidence.

Nebraska is a notification state. There is reference in a dissent to "reverse and remand with direction to dismiss as the case presented no justiciable case or controversy." Alabama provides for a remand for specific fact findings, as does Kansas. Florida allows for a remand with instructions to issue a certificate of degranting. None of them specifically refer to additional

evidentiary hearings, but they do evidently allow for a remand in some circumstances.

By way of a history lesson, you may recall that the original rule that was adopted by the Court specifically stated that if an appellate court, an intermediate court, were to reverse, that it was required to grant the minor's petition. It specifically did not authorize a remand. Last March when the rules were amended that sentence was deleted. We know by the Supreme Court's decisions that have come down that the Supreme Court has remanded, but the appellate courts were not in a posture to remand. When that sentence was deleted it left it open to each individual court as to whether they would remand or not.

Our subcommittee has some reservations about whether we ought to be remanding on an intermediate basis. We have had expressed some concerns about the time frame, that if this is bouncing back and forth between the intermediate court and the trial court that we're going to run up against the constitutional prohibitions of allowing too much time to expire before the minor has the opportunity to get the notification requirement bypass.

The vote was three to one by the subcommittee to recommend that that language prohibiting remand be reinserted, the thinking being that if it

percolates its way to the Supreme Court we know that they believe they have the power to order a remand for an additional hearing if necessary, but to preclude the intermediate court from doing that in order to expedite things as much as possible.

Lastly, we have had a debate over records retention. You may recall the subcommittee originally recommended a ten-year retention period. This subcommittee, particularly Judge McCown, had some reservations about that. We were asked to revisit that as well. I do want -- Judge McCown couldn't be here this morning for this discussion. He sent an e-mail that he wanted read into the record, and so I will do that for him.

"Right now a court reporter has to keep his or her notes for three years by statute. I question whether the Supreme Court has authority to make a shorter or longer rule for any class of cases. Even assuming that it does, I question the need for a specific rule for this class of cases. The subcommittee has gone back and forth between one and ten years, so why not just stick with the general rule of three years? Finally, we should have special rules only in compelling circumstances, and this is not a compelling circumstance. Part of the problem with our rules generally is that they are replete with

special rules and exceptions, like the Tax Code, which makes it difficult for those governed by the rules to keep track of them all. Unless a strong case can be made against the general rule of three years, which is, after all, provided by the statutes, we should just leave it at that."

Let me tell you part of the problem that we're having with this. Under the statute, not the rules but the statute, this petition can be filed either with the county clerk or the district clerk. There are different retention provisions for county clerks and for the district clerks. County clerks in contested cases are required to keep them for 12 years, district clerks generally for 20. Specific family law cases are required to be kept for longer periods of time. They are identified in the statute as certain cases involving custody, child support, as you might expect, to allow the time for two years plus the attainment of majority.

Although the parental notification statute is contained within the Family Code under the retentions provision and the Government Code, it is not a denominated family law case, so it would be on the general 20-year provision. We have had concerns expressed by some of the district clerks and some of the reporters that the longer these records are kept, there is a greater likelihood or

possibility of a breach of the confidentiality restrictions on these types of cases, and Trudy had a couple of comments that she wanted to make on the subject as well.

MS. WOLBRUECK: Bonnie.

HONORABLE ANN McCLURE: I'm sorry. Bonnie.

MS. WOLBRUECK: It's okay. After Judge McCown's e-mail I hesitated over the clerk's record versus the court reporter's record. I understand the statutory provisions on the court reporter's record, but I would recommend that the clerk's record possibly be retained for the one year. We do have different records retention periods, but we also have -- and our expunction records are required to be kept one year, which remain confidential also. So the clerk could track these along with those records in that same one-year time period.

So I would feel that the clerks would recommend maybe the one-year retention would be an easier monitoring of these records.

HONORABLE ANN McCLURE: I will tell you also that we had a court reporter who was a member of the original subcommittee, and she had initially expressed some concerns about the reporters being required to keep these records for a long period of time. We have not been unanimous by any means, and I understand that this

subcommittee and the Court have a job to do as far as trying to figure out the best way to approach these cases. We have had a number of -- I won't say angry discussions, but highly emotional discussions, most of which were via e-mail, and I recognize it's easier for tempers to flare when you're not staring somebody else in the eye, but I feel it's my responsibility to draw both sides of the debate to your attention because we are not unanimous. I can tell you that we have struggled with all of the implications of whatever decision is made.

I have also had great difficulty in getting anyone other than the attorney members of the subcommittee to take any great interest in the remand issue and the retention issue, which are inherently judicial in nature and sort of separate and apart from their concerns from the medical community. It is a three to one vote of the members of the subcommittee that were voting on both our recommendation on remand and retention, and I'd be happy to answer any questions that any of you have as to any other issues that pertain to that.

CHAIRMAN BABCOCK: Justice McClure, I've got one question, and I probably should know the answer, but I don't. What is the impetus for these proposed amendments? I mean, it seems like we've had rules for a short period of time and then we recommended some amendments and now

we're going back with more amendments after another relatively short period of time, undoing what we did last time which undid what we did the time before. What's the impetus for that? Is it just people changing their mind or is there a real problem there?

HONORABLE ANN McCLURE: No, there was an impetus. We were asked by the Court to revisit these issues, and my subcommittee was reconstituted by request of the Court. When the March amendments from last year were approved by the Supreme Court they were posted for public comment. There was a very short time fuse between the time that they were posted for comment and the time that they were adopted and implemented. We received information from Jane's Due Process in Dallas by way of a very lengthy letter that raised a number of concerns with the amendments. We also received communication from a group in -- on the east coast that raised a number of suggestions, comments, complaints, about the amendments. None of those comments were received by the Court, by this committee, by the subcommittee until after the March amendments were adopted.

They raised a number of good questions, I thought. Their comments were forwarded to me. The Court asked me to comment on them, and I did so, pretty much unilaterally, and I suggested that some of the issues had

been debated in the Supreme Court and some of them hadn't. Some of them were things we hadn't thought of, and they were good points and that we recommended that those be further explored. The Court then asked us to reconstitute the subcommittee, make recommendations on those comments, and bring those comments back to you. You-all are the ones that asked us to revisit the remand issue again at the September meeting, and we did that again based on your request.

CHAIRMAN BABCOCK: Okay. How do you think is the best way to proceed? Just go in the order that you've got it on the report?

HONORABLE ANN McCLURE: I think so. I think that we can take the form issue first. The rule change on 2.4 implements the form change. The rule on the amicus brief is separate and addresses, really, who gets the record, and then the hot potatoes are the remand and the record retention.

CHAIRMAN BABCOCK: Okay. Well, let's talk about the forms first then. Anybody have comments on the recommendation of the subcommittee?

HONORABLE SCOTT BRISTER: Remind us once again what it does.

HONORABLE ANN McCLURE: This allows the minor's attorney to control the time frame for filing the

notice of appeal and having the benefit of the record so that briefing can be done if the attorney feels briefing would be beneficial to the court. It puts the power of control on timing with the minor rather than the court.

CHAIRMAN BABCOCK: Okay. Any comments on the form? You just really love it or is everybody being shy today?

All right. No comments on the forms, and this Rule 2.4(d), is that implementing of the form?

HONORABLE ANN McCLURE: Yes.

CHAIRMAN BABCOCK: Okay. Anybody have any comments on Rule 2.4(d)? Yeah, David.

MR. JACKSON: I've got a question on the first sentence there, "If there is evidence of past or potential abuse of the minor, the hearing must be transcribed instanter." Does that mean the court reporter determines there's evidence or the judge or the lawyers, or who tells the court reporter to do this? I mean, that's kind of --

HONORABLE ANN McCLURE: Both the minor's attorney and the judge have an obligation to report it.

MR. JACKSON: But they're -- they will direct the court reporter then?

HONORABLE ANN McCLURE: They will direct the court reporter to prepare it.

CHAIRMAN BABCOCK: Anybody else? Anybody opposed to either the --

MR. EDWARDS: Maybe we ought to put in there, since that question was raised, it says, "If there is evidence." Maybe we should put in there "if the court or the minor determines there is evidence."

CHAIRMAN BABCOCK: Would it be limited to that? I mean, couldn't anybody -- the judge could decide there was evidence, right?

MR. EDWARDS: That's what I said. "The minor or the judge," whoever it is that makes the determination or "if anybody determines." I don't know how you -- it's just kind of hanging out there.

CHAIRMAN BABCOCK: What do you think, Justice McClure?

HONORABLE ANN McCLURE: I don't have an objection to putting in there "if the judge or the minor's attorney determines that" --

MR. EDWARDS: Right.

MR. JACKSON: Just so it's not left up to the court reporter to decide.

MR. EDWARDS: Yeah. That's what I was suggesting.

CHAIRMAN BABCOCK: What's the precise language you would put in there?

MR. EDWARDS: "If the court or the minor's attorney determines that there is evidence of," is what I would suggest.

HONORABLE ANN McCLURE: I don't have any objection to that.

MR. ORSINGER: Do you want to say that the court finds there's evidence of it or that the court finds that it occurred?

HONORABLE ANN McCLURE: Evidence of it.

MR. ORSINGER: Well, I don't know. We don't define "abuse," but are there going to be -- I mean, I can imagine there will be a lot of cases that are marginal --

JUSTICE HECHT: Yeah.

MR. ORSINGER: -- that there might be some evidence that someone might interpret. Is there anything wrong in saying that the court should find that?

JUSTICE HECHT: I think -- I don't have the statute, but there's a provision on Chapter 33 that says the trial court must make some sort of determination if he or she thinks that there is abuse going on, but you're exactly right, Richard. I mean, it can be as -- I mean, the testimony from the minor could be anything like, "Yes, I'm being abused all the time. Look at these bruises" to, "Yeah, you know, I'm scared to death. I'm not sure

exactly what to do." I mean, it can just be a wide range of testimony.

CHAIRMAN BABCOCK: Buddy Low.

MR. LOW: Chip, you could also get into the question, you know, they say they're -- you know, you have some slight evidence, but that's not really sufficient legal evidence. Are you just talking about any evidence or what standard of evidence? I mean, just any, I mean, until -- because that's no evidence, so what is the standard of determination of evidence? Does it have to be --

CHAIRMAN BABCOCK: Well, we're just talking about a trigger to have a record transcribed.

MR. LOW: No, I understand, but when you start defining and saying what it is, then, I mean, that term means something.

CHAIRMAN BABCOCK: Yeah. Yeah. There could be certain stigma from the court reporter having being asked to provide a record. Bill.

PROFESSOR DORSANEO: I agree. I think the trigger is too complicated. What's the simplest thing we could say, the meaning of that sentence in there?

HONORABLE ANN McCLURE: The simplest thing you can say is to leave it the way it is, "if there is evidence of past or potential abuse." Each judge is going

to have to make the determination of whether to report. The judge has an obligation to report the existence of abuse. I don't have the statute in front of me either. Chris, do you have a rule book? I could read you what it says about --

JUSTICE HECHT: He went to get one.

HONORABLE ANN McCLURE: Okay. I mean, it's fuzzy. It's been fuzzy from day one as to at what point that obligation triggers.

CHAIRMAN BABCOCK: Frank.

MR. GILSTRAP: This may make it too easy, but wouldn't it be simpler to say "If the court or the minor requests, the hearing must be transcribed instanter"?

PROFESSOR DORSANEO: I'll vote for that.

MR. GILSTRAP: And then that way we don't have to worry about it. I mean, if they want it transcribed instanter, they get it.

CHAIRMAN BABCOCK: Okay with you, David?

MR. JACKSON: As long as I'm not making any decisions.

PROFESSOR DORSANEO: I have a question about how fast instanter is, too. I mean, it has a nice cache to it, but I'm not exactly sure how fast that is. That would seem me to me like forthwith. It's forthwith once

you get notice. Okay.

JUSTICE HECHT: In all the cases that have come to us, which is only six, the court reporter made the record the same day that the hearing occurred unless the hearing occurred at night, in which case -- I mean, the court reporter made the hearing -- made the record, and so did the clerk, within hours of when they were asked to do so.

PROFESSOR DORSANEO: Well, it's when they're asked to do so, I think is the point I'm getting at. It's instanter, once you're asked you're supposed to get right to work on it. I mean, but I think it should say -- I would prefer "immediately," you know, rather than "instanter," and I would prefer "immediately after receiving notification."

CHAIRMAN BABCOCK: So there's two proposals here. "If the court or the minor or the minor's attorney requests, the hearing must be transcribed immediately upon notice"?

HONORABLE ANN McCLURE: Well, if you want to do that, you can delete the first sentence entirely because the second sententce is "If the minor files a notice to the clerk and the court reporter to prepare records, the hearing must be transcribed instanter."

PROFESSOR DORSANEO: Except it leaves the

judge out, the second sentence.

HONORABLE ANN McCLURE: Well, you could change it to "upon request of the judge or if the minor files it."

PROFESSOR DORSANEO: Why don't we do that? And then change all the "shalls" to "must."

HONORABLE ANN McCLURE: I hesitate to utilize a word different from "instanter" because we have uniformly used that throughout the rules.

PROFESSOR DORSANEO: Well, did you ever define it?

HONORABLE ANN McCLURE: No. We specifically chose not to because everyone from the court reporter to the clerk recommended use of that word because it was one they all understood and it meant "Do it right now."

PROFESSOR DORSANEO: Well, I'm sure it means different things to different people, but if that's okay, I'm okay with it.

CHAIRMAN BABCOCK: Paula, what do you think about adding the phrase in the second -- before the second sentence "upon request by the court or if the court supplies the notice to the clerk, the court reporter to prepare a record." Doesn't really parallel it very much, but --

HONORABLE ANN McCLURE: That's acceptable to

me.

CHAIRMAN BABCOCK: What does everybody else think about that?

MR. ORSINGER: The -- in the second sentence the hearing has to be transcribed instanter, but it doesn't say how quickly the clerk's record has to be compiled. It seems to me like you might ought to say both of them have to be done instanter, although I'm sure the clerk would do it instanter.

HONORABLE ANN McCLURE: Well, we can move "instanter" to the end of the sentence. "The hearing must be transcribed and the clerk's record compiled instanter."

PROFESSOR DORSANEO: Good. Why don't we say "record of the hearing" instead of "the hearing"? The hearings are not going to be transcribed.

MR. LOW: Right.

CHAIRMAN BABCOCK: Picky, picky, picky. The record or --

HONORABLE SCOTT BRISTER: But we're trained to be picky.

HONORABLE DAVID PEEPLES: For abuse it could be either physical or emotional abuse?

HONORABLE ANN McCLURE: Pardon me?

HONORABLE DAVID PEEPLES: Do you mean "abuse" on the first line, physical abuse and mental

or emotional abuse?

CHAIRMAN BABCOCK: The proposal is to drop that sentence.

HONORABLE ANN McCLURE: We took it out.

HONORABLE DAVID PEEPLES: Oh, have we done that already?

MR. ORSINGER: The proposal now is that "upon the request of the minor or the court," and you don't have to have any rationale in particular.

CHAIRMAN BABCOCK: Right. What we have on the table, I think, is "upon request by the court, or if the minor files a notice to the clerk and court reporter to prepare records, the record of the hearing must be transcribed and the clerk's record compiled instanter."

HONORABLE ANN McCLURE: We could just simplify it and say "the reporter's record must be transcribed and the clerk's record compiled instanter." Maybe we should insert the word "both." "Both the reporter's record and the clerk's record."

CHAIRMAN BABCOCK: Okay.

PROFESSOR DORSANEO: I don't know how to turn that off.

CHAIRMAN BABCOCK: It's a nice comment on the last proposal, though. Richard.

MR. ORSINGER: Ann, can I ask, we have

uncoupled the request for a record from the giving of a notice of appeal, right?

HONORABLE ANN McCLURE: Right.

MR. ORSINGER: And in ordinary appeals it's the notice of appeal that triggers the record. So we're doing that because there may be instances where someone wants a record even though they don't want to appeal?

HONORABLE ANN McCLURE: No. The purpose of it, Richard -- and I think you came in late, but --

MR. ORSINGER: Sorry.

HONORABLE ANN McCLURE: -- the purpose of it is to allow the minor's attorney to have the record for briefing purposes before the notice of appeal is filed because the appellate court's rocket docket is triggered upon filing of the notice; and if the minor wants to do briefing at that point, it's pretty much going to be put in a posture of requesting that the appellate court delay the timetable and allow briefing; and anecdotal information has suggested that the courts aren't granting that opportunity for briefing.

MR. ORSINGER: Are or are not?

HONORABLE ANN McCLURE: Our court is not.

MR. ORSINGER: Whoa. Okay.

CHAIRMAN BABCOCK: I'm trying to write down where we are in the -- on the proposal. Have you written

it down, Ann?

HONORABLE ANN McCLURE: Yeah.

MR. GILSTRAP: Can I give it a try?

CHAIRMAN BABCOCK: Yeah.

MR. GILSTRAP: "Upon request of the minor or the court, both the reporter's record and the clerk's record shall be prepared instanter."

PROFESSOR DORSANEO: Will you accept "must"?

CHAIRMAN BABCOCK: "Must" is used all over the place.

MR. GILSTRAP: Fine. "Must be prepared instanter."

HONORABLE ANN McCLURE: Uh-huh. I would recommend that we not just put "upon the request of the court or the minor," because I wanted it to specifically refer to the form so that by filing the notice, that's the trigger, and we have the form necessary to make the trigger so that there is a document in the record that indicates that that request was made.

MR. GILSTRAP: Yeah. I understand why the word "notice" is in there now. I didn't see it before.

CHAIRMAN BABCOCK: Okay. You want to read it again with that change, Frank?

HONORABLE ANN McCLURE: The language that I have is "Upon request by the court or if the minor files a

notice to clerk and court reporter to prepare records, the reporter's record must be transcribed and the clerk's record compiled instanter."

MR. GILSTRAP: Sure.

CHAIRMAN BABCOCK: All right. How does that sound to everybody?

MR. HAMILTON: If the court just requests it, who prepares the notice then?

HONORABLE ANN McCLURE: There is no notice.

MR. HAMILTON: No notice if the court requests it?

HONORABLE ANN McCLURE: Uh-huh.

CHAIRMAN BABCOCK: That's right. Any other proposed revisions? Anybody opposed to the revision as read? You want to read it one more time, give it a second reading?

HONORABLE ANN McCLURE: See if I can do it exactly the same way the second time. This is a test, right?

CHAIRMAN BABCOCK: That's right.

HONORABLE ANN McCLURE: "Upon request by the court or if the minor files a notice to clerk and court reporter to prepare records, the reporter's record must be transcribed and the clerk's record compiled instanter."

CHAIRMAN BABCOCK: Anybody opposed to that?

MR. DUGGINS: I thought you were going to insert the word "both" in there.

CHAIRMAN BABCOCK: Excuse me?

MR. DUGGINS: I thought you were going to insert the word "both."

HONORABLE ANN McCLURE: My original comment was just to refer to the reporter's record and the clerk's record being compiled, but we need to put the word "transcribed" in there; and grammatically I could not fit the word "both" in there where it read smoothly. But I will welcome any changes that you want to suggest.

CHAIRMAN BABCOCK: Any other comments? Yeah, Richard.

MR. ORSINGER: Yeah. So that I can understand, we would expect the trial judge would not designate this probably unless there was some prospect of either a prosecution --

HONORABLE ANN McCLURE: Right.

MR. ORSINGER: -- or of child welfare becoming involved?

HONORABLE ANN McCLURE: Right.

MR. ORSINGER: Okay.

HONORABLE ANN McCLURE: And the judge already has a duty under the statute to implement that and report it and refer it if there is evidence.

MR. ORSINGER: Okay.

CHAIRMAN BABCOCK: Any other comments? Anybody opposed to this language that Justice McClure has just read? All right then that will be approved by unanimous vote with no opposition.

What's next on this rule? Any other comments about Rule 2.4(d)?

HONORABLE ANN McCLURE: No.

CHAIRMAN BABCOCK: Any other comments about 2.4(d)? Anybody opposed to 2.4(d) as amended, as we've just amended it?

Nobody has raised their hands, so that will pass unanimously without opposition.

What about 1.10(b)? Is that what's next on the agenda?

HONORABLE ANN McCLURE: Yes, sir. The first change is "When an appeal of a proceeding is filed, the clerk of the court of appeals or the Supreme Court must notify" -- it currently says "the parties." We would like to change that to "the minor to the appeal of the existence of any brief filed under this subsection."

CHAIRMAN BABCOCK: Okay.

HONORABLE ANN McCLURE: Remember that we have two types of amicus briefing permitted under the rules. One is a generic non-case-specific amicus, and

frequently those address simply constitutionality of various provisions. There have been some filed with all of the intermediate courts. There have been some filed -- six I think was the last court that are on file with the Supreme Court that are available for consideration in any of these cases. They don't apply to any particular Jane Doe. They apply to the provisions of the statute generically. We need to have a mechanism by way of notifying the minor that those amicus briefs have been filed, and this makes that available on public or general briefs, that when one is filed then the minor is notified.

The second change to this rule changes the language that the clerk is required to have it posted on the website, current language is "as soon as practicable." In order to expedite the process and to create some uniformity among the rules, we would request a change in language to "instanter."

CHAIRMAN BABCOCK: Yeah, Scott.

HONORABLE SCOTT BRISTER: Did I understand you to say changing this to "the minor" would mean the ad litem would not get to see them?

HONORABLE ANN McCLURE: Well, it specifies now "parties," and the ad litem is not a party. So we want the notice to go to the minor. Now, we have treated the minor as the only party to the appeal. It's clear

from the rules that the ad litem is a representative of the minor but is not a party and does not represent the best interests of the fetus; and that's the ongoing debate, Scott, in all of these rules, is the extent to which the guardian is to participate.

HONORABLE SCOTT BRISTER: In other words, will this change -- I mean, if the only party is the minor, I don't know why we're changing it, but is the change intended to make sure the ad litem doesn't see these amicus briefs?

HONORABLE ANN McCLURE: No. The change is to ensure that someone doesn't construe the ad litem as being a party.

HONORABLE SCOTT BRISTER: Oh. But they're on the website or something like that so anybody can see them?

HONORABLE ANN McCLURE: Right. Anybody can get them.

CHAIRMAN BABCOCK: Okay. Anymore discussion about this proposal? Yeah, Richard.

MR. ORSINGER: The minor will always have an attorney, right?

HONORABLE ANN McCLURE: Right.

MR. ORSINGER: It's required appointed by --

HONORABLE ANN McCLURE: Right.

MR. ORSINGER: Okay. So it seems wiser to me that we would have the rule say that the notice would be given to the minor's attorney. Even though we may all assume that that's what's going to happen, literally this would require that the notice be given to the minor and no requirement that it be given to the minor's attorney.

HONORABLE ANN McCLURE: That's acceptable.

CHAIRMAN BABCOCK: What was your response to that, Judge?

HONORABLE ANN McCLURE: That's acceptable. I think that emphasizes the disagreement. Technically the ad litem represents the child, too, and so if you're designating that the record is made available to one representative but not the other, I think you're asking for trouble.

CHAIRMAN BABCOCK: Bill.

PROFESSOR DORSANEO: You may have explained this, I may just be thick-headed, but why does -- what's wrong with the word "parties"?

HONORABLE ANN McCLURE: Because the minor is the only party. It is a nonadversarial proceeding. There is no other party.

MR. ORSINGER: Well, I mean, the argument -- some ad litems are trying to argue they're parties, right?

HONORABLE ANN McCLURE: Right. But they're

not. See, there's no notice mechanism anywhere in the statute or in the rules that requires notice of anything to the guardian. The guardian's role has been to participate in the proceeding and to ensure that all evidence concerning the best interest of the child is presented to the court. The statute hasn't really contemplated participation of the guardian in any appellate process.

We implemented the amicus briefing rules because we had a situation arise after the first Jane Doe case went up and the Supreme Court remanded back to the trial court that it was pretty clear to these people it was going to percolate back through the intermediate appellate courts again, and they wanted intermediate courts to have the benefit of their briefings, so they filed these amicus briefs everywhere, in all courts, because they didn't know which court was going to get it, and they were on file with the Supreme Court, and we had no mechanism to know what to do with them. So this rule was created as some sort of a parameter on, yes, we'll accept them, but we've got to find a way to make them available, and some of them are generic, and some of them may be case specific.

Actually, the case-specific brief contemplates that a guardian may want to file an amicus

and further explain why the judgment of the trial court in denying the bypass should be affirmed. They have the ability under that statute to do it. The question is notice, whether we're going to require notice to the guardian of everything when they're not a party. That's the internal debate that's been going on.

MR. LOW: I mean, isn't it true any guardian ad litem is not really an attorney, but we keep them posted on -- as the case goes up on appeal and everything, don't we?

HONORABLE ANN McCLURE: I can't hear you, Buddy. I'm sorry.

MR. LOW: Oh, no. What I'm saying is that the guardian ad litem is not, quote, the lawyer for the party. He's just a lookout --

HONORABLE ANN McCLURE: Right.

MR. LOW: -- for --

HONORABLE ANN McCLURE: Well, it could be. I mean, the court has the --

MR. LOW: In any minor case, even on personal injury, that's what they do, but they get copies of everything. On appeal they keep up with it because they follow the interest, so are we saying here that the interest and the right or duties of the guardian are cut off at the trial and that's it? He doesn't get notice of

anything and that stops? Is that what our purpose is?

HONORABLE ANN McCLURE: Under the current rules there is no notice requirement.

PROFESSOR DORSANEO: Well, should there be notice given? I don't care what the rules say. Would it be a good idea to give the guardian ad litem notice or not?

HONORABLE ANN McCLURE: I can tell you the majority of the subcommittee thinks that we ought not. And I can also tell you that the rules allow and the statute allows the court to appoint one person to serve as both the attorney and the guardian ad litem, and to the extent that that individual determines that a conflict of interest exists then they are required, in my view anyway, by the rules to withdraw as guardian and proceed as attorney and have a new guardian appointed.

CHAIRMAN BABCOCK: Linda.

MS. EADS: I think we have to be really careful going down this road I think we're going down, which is why can't we just use the procedures we always use because there's constitutional limitations on what procedures we can use in terms of being an undue burden on the right to have an abortion. So while in normal personal injury cases we provide notice and the guardian is involved and it has all the full panoply of what we

give, this is not the normal case; and so we have other legal restrictions on us, which -- and, also, we have some feelings, I'm sure, from the subcommittee on what kinds of additional notice should be provided in terms of delaying the abortion which could have medical consequences in addition to the legal consequences. So I think we always have to keep those parameters in mind when we are discussing what process, what procedure we're going to provide, that this is somewhat a unique situation.

HONORABLE ANN McCLURE: It is definitely a unique situation.

CHAIRMAN BABCOCK: Is that behind -- is the constitutional limitations behind the reason for not giving notice?

HONORABLE ANN McCLURE: Not to the people on the subcommittee that have expressed an opinion. The concern has been with complicating the right of the minor to appeal the decision that if it has been denied, obviously the guardian successfully presented some sort of a factor to the trial court in ensuring or facilitating the court to deny it.

There has been anecdotal information gathered that suggests that there are some courts that are appointing individuals as guardians that have a preconceived idea that the abortion should not -- be

denied without regard to any particular individualized factors that may apply to this Jane Doe. There have been concerns expressed that if we get into the process where the appeal becomes an adversary proceeding, that that is going to further complicate the situation.

The way I tried to resolve it, frankly, was to get the competing factions on the subcommittee together to come up with some language for an exchange of briefing and information regarding the appeal, and they agreed to do that at the September meeting, and despite -- how many e-mails, Chris, from me, from him, we haven't gotten them together to come up with some draft language that would allow for that exchange.

Theoretically I have no problem with giving notice to the guardian that the appeal is going forward. I have no problem with the guardian getting a copy of the minor's brief, but I only got one vote on that subcommittee; and, good mediator that I am, I haven't been able to get them off dead center on coming up with that exchange language. Now one of my subcommittee members is places where I don't know and my e-mail is being returned as not known, so I'm having trouble tracking where my people are.

We pulled this off of the agenda in November because of this problem. I wanted to be able to present

to you a complete package and have that language, because I understand your concerns about it. The existing rules don't provide notice. My thought in presenting it -- piecemealing to you is this at least alters the problem with plural "parties" because there is only one party and that we can address the representatives of the minor separately. If you don't want to do that then I recommend you table discussion of this rule until I can get the members of that committee working more diligently on providing me draft language.

CHAIRMAN BABCOCK: All right. Alex and then Richard.

PROFESSOR ALBRIGHT: Ann, if the guardian is going to file a brief in one of these appeals, it's an amicus brief, right?

HONORABLE ANN McCLURE: Right.

PROFESSOR ALBRIGHT: Okay. So it's likely that one of the -- one thing this does is make sure that the minor gets a copy of the amicus brief filed --

HONORABLE ANN McCLURE: Right. Right.

PROFESSOR ALBRIGHT: -- by the guardian.

HONORABLE ANN McCLURE: Although this change only deals with the public and generic briefs. Okay. We're not suggesting an amendment to the case-specific briefs, which already requires notice to the minor of that

brief. These are for people that are just putting it up on the Supreme Court's website. This is a trigger that says, "When we get one in the Supreme Court or in the intermediate court the clerk has to notify the minor that that's been filed."

PROFESSOR ALBRIGHT: So there's some of these briefs that just somebody has just a brief they file in every one of these cases that just addresses the issue of parental notification.

HONORABLE ANN McCLURE: They're not even filed in a case because they don't know when the case is filed.

PROFESSOR ALBRIGHT: So they're just --

HONORABLE ANN McCLURE: They're generic briefs that were filed back when all of this started.

PROFESSOR ALBRIGHT: So if I represent a minor and I'm appealing a case then this is a way to tell me, "You need to know that there are 25 briefs on file."

HONORABLE ANN McCLURE: And we're going to look at them maybe, but they're here, and we can look at them and you might want to look at them, too, in case you want to respond in your briefing to any issues that are raised. So the individual guardian is not going to be filing, in my view, a public or generic non-case-specific brief. They are going to be filing in this particular

case based on these particular facts. That's not the section of the rule that we're changing.

PROFESSOR ALBRIGHT: So the issue is, is whether the guardian in every case gets the notice of these 25 briefs that are on file --

HONORABLE ANN McCLURE: Right.

PROFESSOR ALBRIGHT: -- in all the cases.

HONORABLE ANN McCLURE: Right.

PROFESSOR ALBRIGHT: But guardians, are they generally professional guardians or --

HONORABLE ANN McCLURE: Some of them are.

PROFESSOR ALBRIGHT: Some are and some are not.

HONORABLE ANN McCLURE: It depends on the court.

CHAIRMAN BABCOCK: Richard, can I butt in for a second? Ann, did I hear you say that while this particular change may not be all that big a deal, if we make a decision here to either provide notice to the guardian or not provide notice to the guardian, that's going to affect a whole bunch of other rules which are still being hotly debated in the subcommittee?

HONORABLE ANN McCLURE: It will affect -- yes, it will affect them, but we are not making any recommendation now as to a change in the case-specific

briefing, which involves an individual guardian.

CHAIRMAN BABCOCK: Okay. What's the status of that in your subcommittee? Are you still debating it? Have you been asked to look at it and come up with a recommendation?

HONORABLE ANN McCLURE: There was a request for language that would facilitate the exchange of briefing between the attorney and guardian, and we are -- they are supposedly drafting that language, but it has not been completed, so that will be brought forward at a point in time where they are able to reach agreement. If they can't reach agreement, we are not going to recommend any change at all.

CHAIRMAN BABCOCK: Would it be helpful to your subcommittee if there was a sense of this committee as to what -- which way we think it ought to turn out, or would that just further complicate your job as a mediator?

HONORABLE ANN McCLURE: No, I can't say it would further complicate it because I really think the more opinions that we have, the better the resolution process will be, whichever way it comes out. I know you-all can't possibly understand how complicated the interchange on this has been. I would like to know whether the consensus of the committee is that there ought to be a notice requirement to the guardian, and we can

address that issue, and it may be that that will facilitate the drafting of language that everybody can live with.

It has become far more contentious, I think, as we begin to gather anecdotal information of what is happening in various cities. It's been a problem in Dallas. I haven't heard of a lot of problems coming out of Houston.

CHAIRMAN BABCOCK: And the guardian, as I understand, the guardian does participate or has the right to participate at the trial court level?

HONORABLE ANN McCLURE: Right. Right. It -- depending on the nature of the appointment, if it is an attorney who is appointed as the guardian then the attorney has the right to participate in examining, cross-examining the minor to elicit information, has the ability to request information on medical situations and to bring all other information involving the best interest of the child to the trial court.

If it is a nonattorney guardian, and that's happening in Dallas, then that person has the ability to offer sworn testimony as a fact witness as to information relating to the best interest of the child. So a lot of it hinges on what the nature of the guardian's role is, and some courts are appointing one person to wear two

hats.

CHAIRMAN BABCOCK: And the rationale for allowing that person to participate at the trial court but not allow them even notice for further proceedings is what?

HONORABLE ANN McCLURE: The fact finding has been done and the information has been brought to the attention of the court, and at that point in time it is purely a review of the record as to whether sufficient evidence has been brought forward by which the minor has established entitlement to a judicial bypass of the notification rule.

CHAIRMAN BABCOCK: Okay. Buddy.

MR. LOW: Chip, I want to ask one question. In other words, the harm, as I understand it, in notifying the guardian is that it will complicate other rules if we were to do that here. Is that the damage or harm?

HONORABLE ANN McCLURE: That is the perceived harm.

MR. LOW: Now, what else is their argument? That's one, and I understand that, but what else do they argue will do damage by including them?

HONORABLE ANN McCLURE: Part of the concern is that if the guardian is going to be given notice and chooses to do briefing and file a brief that there is some

concern whether a request by the ad litem for a continuation of the rocket docket to allow additional briefing would be appropriate. There is some concern expressed about that. Whether the appellate courts would be inclined to grant that or not is another story.

MR. LOW: All right. I just wanted --

HONORABLE ANN McCLURE: And understand also that realistically the only information we get is what we are told by people because we don't have any official documentation on any of this because the records aren't kept.

MR. LOW: All right. You've answered my question. Thank you.

CHAIRMAN BABCOCK: Carl.

MR. HAMILTON: If this is just to give notice of public or general briefs that are on file, why can't we just give them the notice in the rule and say that there are public and general briefs on file which shall be made available by the clerk to anybody that wants to look at them? Why do we he have to send a special notice? Can't we just say that in the rule that they are there and anybody that wants to can come look at them?

HONORABLE ANN McCLURE: Well, it's a way of making that information available to the individual minor. I mean, that much is in the rule now. That was done last

March. I mean, we can -- frankly, we could delete the whole section, but it -- you know, I don't think -- Chris, how many have been filed in the Supreme Court since the last Jane Doe went up?

MR. GRIESEL: Since the last Jane Doe, none. Since the March rule changes, none. In fact, all of the briefs, generic briefs, have been filed before the March 2000 rule changes.

HONORABLE ANN McCLURE: I mean, this was done in an effort to come up with a parameter for what we're supposed to do with them because we're getting them. I mean, we can't -- they're not filed per se as part of any court's filing. We keep separate statistics for reporting purposes on these cases.

This is such an anomaly that the courts were really having trouble deciding what they were going to do with them, and the intermediate courts were in complete disarray as to what we do with them. So the concept was if we put it in the rule and we have some mechanism by which people get notice that one's been filed so they know to log onto the website because there's no way for the minor to get notice by the people filing these briefs because they don't know who the minor is, they don't know what court is considering it, and it was just done really for the benefit of the clerks to know what to do with them

when they get them.

CHAIRMAN BABCOCK: Well, but Carl's point, though, is that -- excuse the pun. This proposed change here in 1.10(b) is a relatively minor change, and it's not a big deal because it's going to be on the website anyway, etc. And so this taken by itself isn't a very big deal. It's just that it may be a comment on these other issues that are percolating.

HONORABLE ANN McCLURE: That's right.

CHAIRMAN BABCOCK: Okay. Now I understand. It took me a while.

MR. EDWARDS: Does this apply to case-specific briefs at all?

HONORABLE ANN McCLURE: This subsection (b) does not.

MR. EDWARDS: Okay.

CHAIRMAN BABCOCK: Richard.

MR. ORSINGER: I have some questions I want to ask, but I think Carl's suggestion is a legitimate one. Can't we just put the minors on notices through the rules, through their lawyers that you are on notice that public briefs have been filed and you can obtain them upon question and then we don't have to even fight this fight?

I kind of second that sentiment, but it seems to me like we're having an extraordinarily

convoluted argument over a pretty simple question. The question is can the guardian ad litem go into the appellate court and try to defend the trial judge's decision to deny the bypass?

HONORABLE ANN McCLURE: Well, no, they can't. The question is does the minor have to give them notice that they're doing it?

MR. ORSINGER: Does the guardian have to give the minor notice or does the minor have to give the guardian notice?

HONORABLE ANN McCLURE: That's the question.

MR. ORSINGER: Okay. I'm confused. This rule has to do with telling the minor about generic briefs that have been filed in the past. It really doesn't have anything to do with whether a guardian can interfere with the appeal.

HONORABLE ANN McCLURE: That's right.

MR. ORSINGER: But I feel like the argument over the term "minor" and "parties" has been invested with all this pregnant meaning because those people who want --

CHAIRMAN BABCOCK: Excuse the phrase.

MR. ORSINGER: -- the guardians to be involved in the appeal want to be called "parties" that are entitled to notice of something they already know anyway.

HONORABLE ANN McCLURE: Right.

MR. ORSINGER: And then if they can somehow insinuate themselves as parties for the purpose of being notified that something is on file then that strengthens their argument that they can somehow be involved in the appeal itself. Is that really an underlying issue here?

HONORABLE ANN McCLURE: Sure. Sure.

MR. ORSINGER: Okay. So this is the strangest place to fight this fight.

HONORABLE ANN McCLURE: Well, that was my thinking, too.

MR. ORSINGER: Yeah. We ought to fight that fight in the rule that says that either they can or they can't participate in the appeal.

HONORABLE ANN McCLURE: That's why I haven't brought you that -- the change to that provision yet.

MR. ORSINGER: I kind of feel like people are jockeying for position.

HONORABLE ANN McCLURE: They are, Richard.

MR. ORSINGER: Okay. Well, this is not --

CHAIRMAN BABCOCK: Light bulb moment.

MR. ORSINGER: We can struggle with that, we can struggle with this concept and with this language, but in reality what we ought to do is we ought to go to the core. There's not going to be an appeal unless the minor

lost. The minor will not have lost unless the guardian opposed the minor, and the question is can the guardian's opposition to the minor be perpetuated on the appeal. Is that not the underlying issue?

JUSTICE HECHT: Well, it may not be true that the minor lost because the guardian spoke against the granting of the notification.

MR. ORSINGER: Well, I'm getting the feeling here it's expected the guardians will only participate on the appeal to stop the abortion and not to somehow get it granted by the appellate court.

JUSTICE HECHT: Well, I don't know. Again, Ann is right. There's no way to know because everything is secret, so all you know is what people tell you has happened in their experience. And in the cases that we had, what we said in the reports is public, but I don't recall it always being the case that the guardian opposed the granting of the permission. It would say in the opinions, but I don't recall if that was the case, but in any event, it wouldn't have to be that way. It could be that the guardian and the attorney and the minor come in of one mind and the judge just says "no."

MR. ORSINGER: Well, okay. Then I will make my statement more generic. If we make the underlying decision that the guardians should have a role in the

appeal, we ought to let them have notice, give notice, file briefs, or whatever they want to do. If they don't have a role in the appeal then they shouldn't be filing briefs and we shouldn't have to be giving them notice of filing briefs, and it seems like if we can decide the underlying question the rest of this falls in place.

CHAIRMAN BABCOCK: Ann, what -- yeah, go ahead, Jan.

HONORABLE JAN PATTERSON: Just a general question, is there any other area where we allow a brief addressing any matter relating to any proceeding under a code, or is this a proceeding unique to this?

HONORABLE ANN McCLURE: Jan, I'm having trouble hearing you. Was the question is there any other place where we have generic amicus filings? I don't think so. I'm not aware of one.

HONORABLE JAN PATTERSON: Because this whole rule strikes me as fairly bizarre. I mean, why wouldn't we then say in any question relating to the Tort Claims Act a general brief can be filed? I mean, don't we bring this problem upon ourselves and really upon the Court, and does this rule not simply pander to any variety of concerns that we simply may not want to be a party to?

It just strikes me that this is a bizarre rule and doesn't foster justice for anyone. I mean, I

gather anybody can write a column, an editorial, submit a brief to the court; but, I mean, this doesn't mean that the court is considering these briefs or that they're even before the court. I gather these are on the website and --

HONORABLE ANN McCLURE: They're posted.

HONORABLE JAN PATTERSON: -- filed generally, and at some point I think we need to question and particularly before we get bogged down too deeply into these minutia, and I just -- I guess I just don't recall us discussing this before.

CHAIRMAN BABCOCK: Bill and then Alex.

PROFESSOR DORSANEO: Jan, I was thinking about that exact point. It seems to me that the policy choice is whether we're going to encourage the courts to do what I think they have been doing and tell the courts it has to receive these amicus briefs, if that's what they're denominated or not, and to not send them back because they're not in the right form or they don't have the right color or any of those kinds of Federal practices.

I think it's a good thing for the court to receive these briefs and to make whatever use of them, but that does raise the issue of perhaps that brief having some influence on the determination and would indicate to

me that they ought to go out to the people who are the correct people to participate in the resolution of the matter on appeal.

HONORABLE JAN PATTERSON: Well, to some extent all briefs submitted to the court are case-specific, and they are not lobbying instruments. Lobbying instruments are generally directed to another body.

PROFESSOR DORSANEO: Uh-huh. But amicus briefs fall into two categories. Many of them are lobbying briefs.

HONORABLE JAN PATTERSON: Well, and they -- but they still are in the -- the mechanism by which we listen to them is case-specific and whether -- I mean, you know, lobbying takes many different forms, and the separation of power implication of all of this takes different forms, and amicus briefs sometimes are general and sometimes specific to a case, but the mechanism by which the court hears them is case-specific.

CHAIRMAN BABCOCK: Alex.

PROFESSOR ALBRIGHT: Well, I agree with Justice Patterson completely. I think it's really bizarre that we accept these general briefs and they are seen as part of what the court is supposed to consider and what this minor is supposed to reply to in these two days she

has to write this brief, and we could have -- you know, think 15 years from now. We have 15 years worth of general briefs and somehow her lawyer is supposed to read all of these briefs and download them from the internet in two days and reply to them. That's just not the way our civil justice system operates.

HONORABLE JAN PATTERSON: Or know whether or not the court is even considering this large body.

PROFESSOR ALBRIGHT: Sure. It's just bizarre, and how did we even develop this practice other than groups of people deciding they wanted to do it? Now we are incorporating this bizarre thing they started doing into our rules and making it acceptable, and I agree. Does that mean -- you know, I can see at the Supreme Court there are all these Tort Claims Act cases and immunity cases. Well, heck, why should I go to the trouble of finding what case concerns particular issues? Why don't I just file general briefs on what I think about the Tort Claims Act?

CHAIRMAN BABCOCK: Justice Brister.

HONORABLE SCOTT BRISTER: Because it's the only secret cases we have. Let's don't go back over this. Every other case you can find out something about the case. They're our only secret, in chambers, death to you if anybody finds out anything about it. I mean, what else

are you going to do? It would be the equivalent of saying in another case that everybody could find out about it and nobody else could intervene or be heard or make -- you know, there are other constitutional problems if you tell people who want to contest these for right or wrong, silly or good reasons, "Not only are we not going to tell you when we're filing, we're not going to tell you where the courts are or what you can do with -- you are just shut out of the courts." It would be a big problem.

CHAIRMAN BABCOCK: Frank and then Linda.

MR. GILSTRAP: Not surprisingly, the apparently minor proposal to amend this rule in a minor way has provoked two very large questions, neither of which are before us today. The first one is Richard's point that the use of the word "parties" or "minor" is really raising the question of should the guardian participate in the appeal and if we decide that then somehow maybe, you know, sub silentio we are influenceing that debate, but that larger question is not here today.

Second, Justice Patterson says -- is, you know, questioning the whole advisability of this form of briefing we're doing. Another larger question which isn't before us today. Frankly, I don't think we ought to pass on this second question. It's -- you know, I think Richard is right. Let's come back to it after the larger

questions are decided, if they are going to be decided, but we shouldn't be making a minor decision that somehow influences a larger decision that's not before us.

PROFESSOR DORSANEO: Justice McClure invited the motion to table on this issue. I'll make it.

HONORABLE JAN PATTERSON: I'll second.

HONORABLE ANN McCLURE: Before you move on, let me just make one comment. This was some effort by the subcommittee to finesse at this point a change we thought was necessary until we get to the broader scheme. By changing "parties" to "minor," we're not addressing the question of who the proper representatives of the minor are. Reference to the minor rather than to the parties would be subject to an interpretation that it might potentially include both the attorney and the guardian, and it certainly doesn't specifically address the broad debate that we're having. You can finesse it that way or you can table it, and either way is okay with me.

HONORABLE SCOTT BRISTER: But I think it's a good -- I mean, technically there's only one party here, right?

HONORABLE ANN McCLURE: Right.

HONORABLE SCOTT BRISTER: There's just no other way to have another party. Who should give notice and everything else is fine, but I think this is a

technically correct amendment, which is not "parties."

HONORABLE ANN McCLURE: Thank you.

MS. EADS: Being from Dallas and having talked to a number of people who are involved in the process of getting judicial bypasses, it is -- it's so counterintuitive that this little change and this little change in the language is so vital to what they perceive to be the need for less controversy at the appellate level because people who are guardians, appointed as guardians, there are judges in Dallas who are appointing people who are not attorneys as guardians who have a political agenda who are delaying or causing -- are using this language to point to the fact that they should get all kinds of notice.

So we can table it, but there's a price we pay when we table that in terms of whether we think that's the right procedure. I mean, we might think that it is. I'm not saying that, but I'm saying there are things going on in Dallas that make it not just an easy tabling decision to make. There's consequences, and the other thing that strikes me in terms of this -- going back to this question of why we get this procedure where you get to file amicus not related to a case and the response because it's the only secret procedure.

The reason it's secret is the Constitution

mandates it to be secret, and the Legislature when they passed the parental bypass or this judicial bypass took into consideration whether that statute could be upheld constitutionally without it. So, you know, then to create a procedure that now for years will create amicus briefs that attorneys representing a minor are on notice of having them be there and they are going to have to respond to them or worry about them seems to me to be punishing the attorneys who are trying to get this procedure for the minor because of what we say is secret -- and we say that in a rather pejorative way -- when the reason it's secret is that there's a legal reason for it. So, I mean, we're creating a procedure that -- it's not because we're doing anything wrong. We're trying to follow what the Legislature wanted us to do in this situation.

CHAIRMAN BABCOCK: There's a motion which I think was just spoke to table. Does anybody want to second that or not?

MR. GILSTRAP: I'll second it.

CHAIRMAN BABCOCK: All right. Frank seconds it.

PROFESSOR DORSANEO: Let's discuss that -- some points --

CHAIRMAN BABCOCK: Huh?

PROFESSOR DORSANEO: Well, you can go by

whatever rules you want.

MR. ORSINGER: We follow Chip's Rules of Order.

CHAIRMAN BABCOCK: You want to table the discussion on the table motion?

PROFESSOR DORSANEO: I mean, you're the chairman, so you do whatever you want to do.

CHAIRMAN BABCOCK: Well, it's somewhat flexible. But Judge Brister makes the point that technically this change is accurate, and Linda says that it has consequences for what's happening at least in one populous county, so that's a discussion about why we shouldn't table it. So anybody else that wants to speak on -- you know me, I like to speed things along.

PROFESSOR DORSANEO: I would be ready to vote, but I'm not willing to assume without benefit of, you know, a lot more information than I have or I'm likely to get here that giving some people notice would mean that they would abuse the information. I know when you don't give people notice, I mean, they don't have an opportunity to do anything. I'm not willing to assume that all of these people are in some, you know, category that would make me want to not give them notice, like they're nuts or have agora or something like that. I can't make that assumption.

CHAIRMAN BABCOCK: So you would be in favor of your motion?

PROFESSOR DORSANEO: I'm in favor of my motion. And you tell me the only one who could ever be a party is the minor, well, I have to take that on faith, and I'm inclined to think that somebody else is at least arguably a party or might have an argument that they have some interest, so that's the trouble I'm having.

CHAIRMAN BABCOCK: Buddy.

MR. LOW: Could I ask one other question? How do these generic briefs -- are they filed with a cause number or they just come to the court --

HONORABLE ANN McCLURE: They come to the court.

MR. LOW: -- not under any cause number? They just automatically come to the court.

HONORABLE ANN McCLURE: Right. Right.

MR. LOW: That's what I thought, but -- okay. Otherwise --

HONORABLE ANN McCLURE: They have no way of knowing a cause number.

CHAIRMAN BABCOCK: Okay. To table or not to table? Justice Hardberger.

HON. PHIL HARDBERGER: The change is simply a technical one and a correct technical one. We've talked

about it. Granted, there are larger issues, but I don't see why we should table it. Why don't we make the correction to make it technically correct, move on, and take up the larger issues at some other time?

CHAIRMAN BABCOCK: Okay. Anybody else? Okay. Let's vote on this one. All those in favor of tabling this to a later meeting, probably the next one, raise your hand.

David, do you have yours up, Peeples?

HONORABLE DAVID PEEPLES: Yeah.

CHAIRMAN BABCOCK: All those who are opposed to tabling it, raise your hand. The motion to table fails by a vote of one to seven.

HONORABLE JAN PATTERSON: I move to accept the change.

MR. LOW: I move what Judge Hardberger said.

CHAIRMAN BABCOCK: So there's two similar motions, so I will take Judge Patterson as the motion and --

MR. LOW: I'll second.

CHAIRMAN BABCOCK: -- Buddy's as the second. Any further discussion on that? Richard.

MR. ORSINGER: I'm still concerned that we're giving notice to a child at an address at least not in the record instead of to the child's lawyer who is --

HONORABLE JAN PATTERSON: I think she accepted your change.

MR. ORSINGER: Oh, we did?

HONORABLE JAN PATTERSON: Don't we currently read the change "the minor's lawyer"?

HONORABLE ANN McCLURE: Well, if you're going to make that change, you're opening up the debate again as to who the representative of the minor is.

MR. ORSINGER: But, Ann, it doesn't make any sense to mail notice to a child who we don't even know what they're address is. How are you even going to do that? We always give notice to people's lawyer. I think it's a bad policy to try to cut the lawyer out of the process, and am I not right, the address of the child is not in the appellate record, is it?

HONORABLE ANN McCLURE: That's right.

MR. EDWARDS: More important, the address of the child may be at home, the very place they don't want to give notice.

MR. ORSINGER: We cannot literally require that we mail this notice to children. Come on now. Let's make this change.

HONORABLE JAN PATTERSON: To clarify my motion, I thought that had been accepted, but whether or not it has, I move "the minor's attorney."

CHAIRMAN BABCOCK: Bill.

PROFESSOR DORSANEO: Maybe I heard Justice McClure speak differently than what I heard, but I thought I heard her say that the use of the word "minor" would preserve the ambiguity about who the minor is.

CHAIRMAN BABCOCK: Well, she's here. Why don't we listen to her?

PROFESSOR DORSANEO: That's what I heard, if that's what I heard, and that's what I don't like. I mean, you know, it means the minor child to Richard. It might mean the guardian ad litem. It might mean the lawyer for the minor child. I prefer "parties" to that.

CHAIRMAN BABCOCK: All right. Justice McClure.

HONORABLE ANN McCLURE: But there is only one party. That's the problem. The minor is the party, and we can debate who the representative of the minors are or who the representative of the minor is. That's the debate that's before you.

CHAIRMAN BABCOCK: Okay. Pam.

MS. BARON: Richard, under your view if we say "service on parties," that means you have to go serve the individual parties and not their counsel and that's not how our rules work.

PROFESSOR DORSANEO: No, it doesn't. I have

a rule that tells me not to do that.

MS. BARON: Right.

PROFESSOR DORSANEO: I have a rule that tells me that "party" means their counsel if they are represented by counsel.

MR. ORSINGER: I'm not saying "parties" here. That's what it says now, and now we're talking about minor. There's only one minor in these proceedings.

CHAIRMAN BABCOCK: There's only one party, too.

MS. BARON: Yeah. There's --

MR. ORSINGER: Well, I know. That's why this is a dumb debate, but we're really fighting another fight, but all I'm saying is we are now going to have a rule that requires you to mail something to the child, which, if Bill's right and they do find the address and they do mail it and the mother opens it then we have defeated the whole purpose of this.

CHAIRMAN BABCOCK: Judge Patterson had a motion that -- but I don't know if you want to withdraw it or not. The motion, as I understood it, was to accept the change to 1.10(b) as written, and so the question is do you want to pursue that motion or withdraw it?

HONORABLE JAN PATTERSON: I thought that Judge McClure had accepted --

CHAIRMAN BABCOCK: Objection, nonresponsive.

MR. ORSINGER: I can ask you to amend your motion. I think you have the power to do that.

HONORABLE JAN PATTERSON: I do amend the motion to read "notify the minor's attorney."

CHAIRMAN BABCOCK: Okay.

MR. LOW: And I would second that. Yeah.

CHAIRMAN BABCOCK: Okay. "Notify the minor's attorney" is the proposed amendment. Justice McClure, how do you feel about that?

HONORABLE ANN McCLURE: I think that invites the broader debate now that we don't need to have.

HONORABLE JAN PATTERSON: Well, generally we don't amend something to preserve ambiguity. We tend to --

MR. ORSINGER: The Legislature does that.

CHAIRMAN BABCOCK: Now, now.

HONORABLE JAN PATTERSON: So I think we ought to -- we owe it, if we're going to amend it, to have some precision, and I agree with the wisdom of others that we can discuss other issues at a later time and that this does not resolve those issues or speak to it.

HONORABLE ANN McCLURE: If you want my response on the basis of the subcommittee, I can tell you that if that issue were put to the subcommittee the vote

would be three to one to insert "attorney," if that helps you in your deliberations.

MR. LOW: What about "lead counsel"? Lead counsel is defined in the first person. You don't have to notify all the lawyers, but lead counsel. Then how does that accomplish the ambiguity?

CHAIRMAN BABCOCK: Yeah. We have got a motion -- we have got a motion on the table which has been seconded by you, Mr. Low, that is to adopt --

MR. LOW: All right. Let's do it.

CHAIRMAN BABCOCK: -- but it's amended to say, "minor's," apostrophe s, "attorney." Any further discussion on that? All right. Everybody in favor of adopting the change to 1.10(b) with the language "minor's attorney" and then the two other changes where the word "instanter" is inserted, in one instance as a new word and in the second instance as a substitute for "as soon as practical." Everybody in favor of that motion raise your hand.

Everybody opposed raise your hand. Am I missing anybody? That passes by a vote of 23 to 0.

HONORABLE JAN PATTERSON: May we delete the commas after the second "instanter"? Is that controversial?

CHAIRMAN BABCOCK: Ann, I think that's

probably right, don't you?

HONORABLE ANN McCLURE: I didn't hear her.

CHAIRMAN BABCOCK: The commas after the second "instanter," the comma that proceeds and follows the second "instanter."

HONORABLE ANN McCLURE: Yes.

MR. EDWARDS: Well, if you want to be grammatically correct, you put "instanter" after "posted."

CHAIRMAN BABCOCK: "Must have the briefs posted" --

HONORABLE ANN McCLURE: "Instanter." That's fine.

MR. EDWARDS: If you want to have it grammatically -- syntactically and grammatically correct.

CHAIRMAN BABCOCK: Well, that would be a first for us, but I think that's a good idea.

Okay. Let's take a break. Back in ten minutes.

(Recess from 10:28 a.m. to 10:44 a.m.)

CHAIRMAN BABCOCK: All right. We are back on the record, and the happy news is that we have just gone over the noncontroversial part of these rules, so now we're into the heavy sailing on remand. To refresh your recollection, Justice McClure, what's at issue on remand again?

HONORABLE ANN McCLURE: Can I resign now, Chip? All right. Originally the rules provided that if an intermediate appellate court reversed the trial court's decision, that it was required to grant the minor's petition, and by that language it foreclosed the opportunity for the appellate court to remand.

There were a couple of reasons for that. One was we have constitutional guidelines on how long these cases can be in the process, and the Supreme Court of the United States has indicated that we have to expedite these as much as possible, and we did not want to be in a situation that these cases were in an appellate orbit bouncing back and forth between the trial court and the intermediate appellate court. So there were some constitutional concerns expressed.

Number two, it was somewhat an anomaly that if an intermediate court is not required to write an opinion that there would be very little guidance to the trial court as to why the case had been remanded. If all the judgment said, the order said, was "reversed and remanded" without a written opinion explaining why, that we really weren't accomplishing anything but delaying the process; and as the cases have developed the Supreme Court of Texas has remanded to the trial court where they felt that an additional evidentiary hearing was necessary. The

remands were done, you will recall, because the rules had just been implemented and we had no guidance in Texas over what is the proper standard of review, what does a minor need to show in order to establish that she is sufficiently mature and well-educated to make this decision. So there were some specific purposes for remand in the beginning.

We haven't had a Jane Doe case come down in -- it will be two years I guess was the last one that came down from the Supreme Court, but those were some of the original reasons why that remand language was in there. When the rules were amended last March that sentence prohibiting remand was deleted. We debated it at subcommittee level; we debated it here. I suspect the Supreme Court debated it as well, and it left to the intermediate courts the decision whether they wanted to remand for some specific purpose.

We have no way to gather anecdotal information or any sort of statistical information to tell you whether since last March cases have been reversed and remanded. I honestly don't know. We haven't had one since the rule change came through, so we are a little bit shooting in the dark as to whether this is really a problem, whether it's not a problem. I honestly can't tell you. It is the feeling of the subcommittee that

allowing for an intermediate remand serves no useful purpose, and to the extent that the issue is going to go up to the Supreme Court then it does have precedent established by which it remands, because that language applied only to the intermediate appellate courts. It does not encompass review by the Supreme Court.

So at our last subcommittee we voted to encourage this committee and the Court to reinsert that language. We had a discussion at this meeting, at this level, in September, and you asked us to revisit it again. Nina Cortell specifically asked what other states were doing. We have tried to gather some of that information. You'll remember, as I started my comments earlier this morning, there are six states that we have been able to locate that have some reference in the case law, not in the statutes but in the case law, to remand. None specifically reference an additional evidentiary hearing. Some reverse and remand with instructions to dismiss. Some reverse and remand with instructions to grant. Two have requested further specific findings of the trial court, which did not contemplate an additional evidentiary hearing.

What we have done is, at your request, bring you back a recommendation as to what we ought to do, and we had three options, you have three options. You can do

nothing, in which case the rule stays as it is and each court can do what it wants to do, either reverse and grant or reverse and remand or affirm. We can put specific language back in that prohibit remand, or you can specifically authorize by rule that the court has the ability to remand.

CHAIRMAN BABCOCK: Discussion? Richard?

MR. ORSINGER: Whatever the committee wants I'll go with.

CHAIRMAN BABCOCK: A first. Maybe this won't be so hard. Buddy.

MR. LOW: No, I just wanted to be sure I heard right.

CHAIRMAN BABCOCK: Any other discussion about this? Judge Brister?

HONORABLE SCOTT BRISTER: Well, I don't have much experience with these, but I sure would just hate to ban remands. That may be something we don't anticipate when it will be a -- not just a prudent, but perhaps even a constitutional thing to do it and if we put it back in then we have banned that option.

CHAIRMAN BABCOCK: Elaine.

PROFESSOR CARLSON: Could I ask you a question, Judge McClure? I have no familiarity with these proceedings. When review is complete at the court of

appeals, if remand was prohibited, what is the obligation or not of the Supreme Court to further review? Is it totally discretionary?

HONORABLE ANN McCLURE: Well, see, what happens is the statute provides for appellate review only if the request has been denied. If an appellate court reverses and grants then there is no Supreme Court review.

PROFESSOR CARLSON: Okay.

HONORABLE ANN McCLURE: So the only way it gets to the Supreme Court is upon affirmance by our court. Affirmance of the denial.

PROFESSOR CARLSON: And then is it obligatory?

HONORABLE ANN McCLURE: Well, they have taken them all. Let's put it that way. They have -- I mean, it's not really where they refuse to hear it. It's a question of whether they're -- they will review it and either reverse and remand, reverse and grant, or affirm.

PROFESSOR CARLSON: And your subcommittee is not suggesting that the Supreme Court be prohibited from remanding?

HONORABLE ANN McCLURE: No.

PROFESSOR CARLSON: Just the court of appeals?

HONORABLE ANN McCLURE: Right.

PROFESSOR CARLSON: To expedite the --

HONORABLE ANN McCLURE: Right.

CHAIRMAN BABCOCK: Any other comments? Anybody want to make a motion to adopt the subcommittee's proposal?

MR. EDWARDS: So moved.

CHAIRMAN BABCOCK: Bill Edwards moved. Second? Linda seconds. All of those in favor of adopting the subcommittee's proposal raise your hand.

All opposed? By a vote of 19 to 1 the motion carries and the subcommittee proposal is adopted. See, that wasn't so hard, Ann. Let's go to the next one.

HONORABLE ANN McCLURE: The last one is records retention. The proposal originally that was made by the subcommittee was to adopt a 10-year retention provision. That is less than the statutory provision. It is longer than evidently the clerks and the court reporters want to keep these around. We have had problems at some of the subcommittee levels gathering everybody together at the same time so that all points of view can be stated and debated.

The person who is most in favor of a lengthy retention period was not able to come to the early part of the meeting at which it was discussed, so the original recommendation of the subcommittee was 10 years. We have

revisited that. It is now three to one of the subcommittee that it be reduced to a one-year retention period, and I agree with Bonnie in the distinction between the reporter's record and the clerk's record. Her recommendation was that we retain the clerk's record for one year and that the reporter's notes by statute are required to be kept for three years.

The debating philosophies here is the record may be helpful if we have situations of abuse, physical or sexual abuse of the child, and there is a prosecution. There was also concern expressed by this particular subcommittee member that information from other states indicates that civil suits have been brought by the minor and that we ought to preserve the records until her age of majority or two years past majority to allow her the opportunity to utilize those records in a civil suit that she may have.

Realistically I think at least from the information I have gathered the only testimony that is offered at these proceedings is the testimony of the minor, and there is very little other information that will be available in terms of the record, and certainly the minor will have that ability of information at her disposal via her own testimony at any future proceeding.

The options are, obviously, we say nothing

and let the Government Code control; and to the extent that local clerks offices have gotten approval for a longer retentions period, that's certainly permissible in the statute. We can keep it silent. We can specify a particular period of time if you choose to.

CHAIRMAN BABCOCK: Well, what about Judge McCown's point that three years is what's standard?

HONORABLE ANN McCLURE: Well, it's not -- it's standard for the court reporters. It's not necessarily standard for the clerks because in civil cases the county clerks are required to preserve the records for 12 years; district clerk -- correct me, Bonnie, if I'm wrong -- is 20 years; and then there are certain family law cases where it's 20 plus 2 for lawsuits to be brought within the 2-year statute of limitations after the minor obtains majority.

So we're not dealing with just one rule that's going to automatically apply, and we can make distinctions between clerks' records and reporters' records. We can make a generic rule that applies to everybody. We could be totally silent and let it be decided based on the statutes or the local archive decisions that are made.

CHAIRMAN BABCOCK: Okay. Judge Patterson, then Carl, then Richard.

HONORABLE JAN PATTERSON: I think you may have covered mine. I was trying to recall Judge McCown's proposal, and his proposal was sympathetic to me that we ought to go with whatever the existing scheme is, but I hear from you there is not a clear existing scheme. Are you revising this to recommend three years for the reporter's record and one year for the clerk's record? Is that the new recommendation, or is it 10 years?

HONORABLE ANN McCLURE: Well, I wish I had had the benefit of the judge's e-mail before I left El Paso, but I didn't. I didn't get it until this morning. I have been down here on other business the last several days. I have not looked at the court reporter statutes, so, Bonnie, perhaps --

MR. JACKSON: I don't know. I'd have to look. It's three years, I think.

HONORABLE ANN McCLURE: You think that it's three years. I am not opposed to making it the same statute for consistency purposes, but Bonnie has explained that they are already doing things differently as far as the expunction records are concerned.

MS. WOLBRUECK: That's right.

HONORABLE ANN McCLURE: I think there is a real concern among the clerks they don't want to keep these hanging around any longer than is absolutely

necessary and that because of the peculiarities of it and the storage problems and ensuring confidentiality and anonymity, that a shorter period is better.

HONORABLE JAN PATTERSON: So is the shorter period the three and one or --

HONORABLE ANN McCLURE: I understood Bonnie to say that that's what she would prefer.

CHAIRMAN BABCOCK: Carl.

MR. HAMILTON: You mentioned an option of doing nothing and letting the Government Code control. What does that provide?

HONORABLE ANN McCLURE: The Government Code provides that cases filed in county court with the county clerk, those that are dismissed either at the request of the plaintiff or for want of prosecution are retained for three years. Others are retained for 12. In district court it's 20 years. In certain denominated family law cases, child support, conservatorship, paternity actions, that are specifically enumerated in the code it's 20 plus 2.

Now, remember that these cases by statute can be filed either in county court or district court. It is not a specifically denominated family law case for purposes of a longer statute, and each individual government unit, either the county clerks or the district

clerks, are specifically empowered to provide for a longer retention period but not a shorter one. So I don't have any statistical information to give you as to what they're doing across the state. I mean, if you want us to try to gather that information, we can do that; but I think it's going to be vastly different in the rural areas and in the larger metropolitan areas.

What are you doing now with these?

MS. WOLBRUECK: As far as these are concerned?

HONORABLE ANN McCLURE: Uh-huh.

MS. WOLBRUECK: At this time since it's silent, well, you know, we haven't gone through a 10- or 20-year period, so --

HONORABLE ANN McCLURE: You're retaining them.

MS. WOLBRUECK: We would retain them at least for our 20-year period.

CHAIRMAN BABCOCK: Okay. Richard, then Bill.

MR. ORSINGER: I have a series of questions, so I hope I can get through them.

CHAIRMAN BABCOCK: You're making up for the last one, huh?

MR. ORSINGER: All right. There isn't

anyone here advocating the view of people that might get sued after the fact, so I want to ask some questions about that so I can understand it. You mentioned one rationale for preserving is to make a case either criminally or for child welfare purposes of abuse. We previously had a rule that mandated upon evidence of abuse there has to be a transcription, and so the people that are parties to the proceeding would presumably keep one in their file, but we have now amended that, and it's only upon the request of the trial court or the minor's attorney that a transcription is made, right?

HONORABLE ANN McCLURE: Uh-huh.

MR. ORSINGER: Should we assume that in every case of suspected abuse that a record will be ordered by the judge --

HONORABLE ANN McCLURE: I would hope so.

MR. ORSINGER: -- and then forwarded to some government agency, and it will be on file with the government agency?

HONORABLE ANN McCLURE: Right.

MR. ORSINGER: Okay. Now then, as far as civil suits are concerned --

HONORABLE ANN McCLURE: Why do I feel like I'm being cross-examined here?

MR. ORSINGER: I don't understand how the

process works, but I'm concerned about -- I'm concerned about who gets sued and who has --

CHAIRMAN BABCOCK: Be respectful of the witness, please.

MR. ORSINGER: Okay. I guess we don't have any track record on civil lawsuits yet, right?

HONORABLE ANN McCLURE: No.

MR. ORSINGER: Around the country are we finding that it's parents of the girl that are filing the lawsuits, or is it the girl that's filing the lawsuit later, or do we not have a track record?

HONORABLE ANN McCLURE: Well, this lawsuit that is reported in the AUSTIN AMERICAN-STATESMAN today, evidently the mother is one of the plaintiffs in that case complaining because her daughter had a history of manic depression and bipolar disorder and was granted the right to have the abortion without parental notification.

MR. ORSINGER: And who did she sue?

HONORABLE ANN McCLURE: The Department of Health and various other state agencies.

MR. ORSINGER: But she did not sue the attorney ad litem or the guardian ad litem?

HONORABLE ANN McCLURE: It is not reported as such. I don't know.

MR. ORSINGER: Okay. Well, I'm a little bit

worried. I mean, a 10-year retention statute protects us against limitations -- or limitations would expire against the parents of the child and then assuming that a girl is not younger than 12 when she comes in for this legal procedure, she has another 8 years to majority and another 2 years to file a negligence claim beyond that. That's relatively safe for the participants or even for the minor; but if we have a very short retention period, first of all, the minor may not be mature enough to know to request a record because she might have grounds to sue later; and, secondly, the -- I don't see that the guardian ad litem even has the power to get a record if they want to put it in a file to protect themselves, because we are only allowing the attorney ad litem -- or should I say the attorney for the child and the court to direct the transcription of the record; is that right?

HONORABLE ANN McCLURE: That is the rule that was adopted, but I would caution that a guardian also has a duty to report any abuse.

MR. ORSINGER: Well, what I'm thinking now is the potential defendants are the attorney and the guardian and then possibly the government and the potential plaintiffs are the pregnant mother and basically members of her family, like her parents. The attorney under our rule has the authority to request the reporter

to prepare the evidence, and the attorney can put it in their file and stick it in the bank vault or the safe and it will be there in 8 or 10 years if and when a lawsuit is filed.

If the guardian ad litem wants to protect him or herself by making a permanent copy of the record, do they have the authority to require a transcription of the evidence?

HONORABLE ANN McCLURE: Say that again.

MR. ORSINGER: Yes. Can the guardian ad litem require a transcription of the evidence to put in their file to protect them from a lawsuit later, or can only the attorney do that?

HONORABLE ANN McCLURE: Well, we have specifically authorized the attorney and the judge to do it. We haven't forbidden the ad litem from doing it.

MR. ORSINGER: Well, if the ad litem does it, is the court reporter obliged to prepare it?

HONORABLE ANN McCLURE: I would imagine the reporter would.

MR. ORSINGER: Okay. Well, I'm worried that --

HONORABLE ANN McCLURE: I can't tell you whether or not that has happened. That was not specifically debated at the subcommittee as to whether the

guardian ought to have the power to do that. Judging from the debates on the powers of the guardian, I would imagine if that were put to a vote it would fall equally along the lines between previous distinctions between the guardian.

MR. ORSINGER: Meaning that the guardian might not have the authority to require it? Okay. Then I feel they are vulnerable to being sued and not having a record of what they did, and I'm worried if we're going to --

HONORABLE ANN McCLURE: Well, now, there is immunity, limited immunity, under the statute for the guardian. That's the only immunity that is afforded under the statute.

MR. ORSINGER: But then there are parameters on that, right?

HONORABLE ANN McCLURE: It is limited. Anything that is done in good faith, that is not malicious, willful, that sort of definitive language that we find elsewhere in the Family Code on the limitations of guardian ad litem about liability.

MR. ORSINGER: Okay. Well, I have a concern about the potential liability then if we have a destruction limit of one-year or three years. The guardian ad litem did whatever they did. The trial judge permitted the bypass. Four years later the mother decides

to sue the guardian ad litem, and the guardian ad litem has no record of what the testimony was or what was presented to the court, and the government has destroyed the only record, and we haven't allowed the guardian the power to protect themselves by creating a record that they can retain themselves and move the burden off of the government to themselves.

HONORABLE ANN McCLURE: Right.

MR. ORSINGER: So I feel like before -- we shouldn't just look at the -- from the point of view of the district clerk and the court reporter. We also ought to look from the point of view of the participants and be sure that people can protect themselves, and also the minor, because we don't say the minor can request the transcription. We say the minor's attorney and the judge. The minor may not be mature enough to know that she wants to make a record, and then if she decides to sue after three years, you know, it went by; and so I think there are implications for civil liability that we ought to be considering.

CHAIRMAN BABCOCK: Richard, can I interrupt your cross for a second? Judge Patterson wanted to say something.

HONORABLE JAN PATTERSON: But while you're considering the various scenarios, I would think that the

more likety scenario would be in a prosecution against a parent for abuse since there are all kinds of disclosures required, and the parent who is accused of abuse may want the transcript for a consistent or inconsistent statement, and it's much more likely to me to be used in a prosecution.

MR. ORSINGER: I feel like our retention policy is probably not implicated because the judge is supposed to send the transcript to the government if there is evidence of abuse. So if we can rely on the judges to exercise their discretion properly then if there is an abuse case there then the judge is going to be ordering that it be transcribed and then turning it over to the D.A. or child welfare, in which event it will be a record of the D.A. or a record of child welfare, and we don't need the court reporter to retain the record. So my concern, really, I feel like the criminal side will take care of itself, but I'm worried that nobody is taking care of the civil side.

CHAIRMAN BABCOCK: Wendell.

MR. HALL: I don't think we can foresee the need for these records and who is going to need the records, but I do think a 10-year retention policy would make sense. Not many young women can conceive before the age of 10, although it's happened, certainly plenty are at

the county hospitals at age 11 and 12 conceiving, and so I think if it was a 10-year policy for both reporter's record and clerk's record that would probably take most of these young women to age 20 and give them to 2 years past 18 to prosecute any lawsuit that they might wish to do or that their family might wish to do.

CHAIRMAN BABCOCK: David.

MR. JACKSON: To throw another wrinkle in here, are we talking about retention of the expunged record, or are we talking about record of the real record? Because when the court reporter prepares the transcript there's no names in the transcript, so it's Jane Doe.

MS. EADS: Right.

MR. JACKSON: So in the courtroom a court reporter can't help but write -- if I say, "David Peeples," "David Peeples" goes on that piece of paper, but when they transcribe those notes they are instructed to change that to "Jane Doe."

HONORABLE ANN McCLURE: And to the extent they don't do that -- we have had a record come up that actually had the child's name in it, which is a violation of the provisions, and we actually sent instructions to the court reporter to do a redacted record and then shredded the record.

CHAIRMAN BABCOCK: Linda.

MS. EADS: Because of the confidentiality questions here, how -- what does the clerk's office do and how difficult does it become to maintain the confidentiality?

MS. WOLBRUECK: All of the clerks offices I'm sure handle it differently, but we have a lot of confidential records and, of course, these are high priority confidential records. Most of them are probably kept in a sealed cabinet, locked for no one to get access to except clerk members.

CHAIRMAN BABCOCK: Bill.

MR. EDWARDS: I had some of the same kind of questions that Richard raised about the medical community. Do they have any interest in this; and, if so, what is their position?

HONORABLE ANN McCLURE: Well, they have not taken a position on the records retention, you know. Their interest in it is having documentation by which they can match the identity of Jane Doe that has received the bypass with her identity when she appears for abortion services; and to the extent that they are able to satisfy themselves with the identification issue, they have not expressed an interest in the retention policy.

MR. EDWARDS: I can see where they're -- the medical community is a more likely civil defendant than

the ad litem or the government or somebody else, if somebody changes their mind between the age of 13 and 18.

HONORABLE ANN McCLURE: There is no -- certainly no requirement in the petition or in any of the filing information by which the abortion provider is identified so that it is unlikely that the record is going to contain any information as to who that provider is, and certainly the minor is under no obligation if she has sought information from a particular provider to return to that provider for the performance of the abortion. She could take the bypass and go to anyone.

MR. EDWARDS: But has the medical society ever been asked what their position is?

HONORABLE ANN McCLURE: I have representatives on my subcommittee, and there was a representative at the September meeting that the e-mails that have gone back and forth trying to generate discussion on the subject, they have not participated in the discussion.

CHAIRMAN BABCOCK: Richard.

MR. ORSINGER: In response to Bill's inquiry, I would think that the medical community wouldn't care what the evidence was. All they want is a piece of paper signed by a district judge saying it's lawful to perform an abortion, and their attitude would probably be

"If that was a bad judgment, that's not my problem. I'm a doctor, and I had the legal authority of a district judge at the time." So I don't really think the medical community cares so much about what led to the issuance of the order.

CHAIRMAN BABCOCK: Yeah, Andy.

MR. HARWELL: I just wanted to clarify something with the retention time period. And I know most of these cases are sent to the district clerks, but just because a record has -- like our criminal records are five years from last disposition, but civil records have documents in them that have varied retention limits. Just because you set a limit at a specific time frame doesn't mean that the clerks are going to get rid of those records at that -- when I came into office in '94 the clerk, my predecessor, had a permanent retention on everything, so I don't know if that's an issue. If we set it at a year, is it going to be that that is when we are to do away with those records, or is that just when we can do away with it?

HONORABLE ANN McCLURE: Well, I think it's when we can do away with it because I don't -- unless -- we are permitted by the Government Code, the way I read the statute, that the Court can by rule mandate a specific retention period. I have not researched the question of

whether that's ever been enforced against a clerk who wanted to hang on to them for a little bit longer than that. You may know.

CHAIRMAN BABCOCK: Bonnie.

MS. WOLBRUECK: Andy brought up a good point, because there are records that -- we do have a statute, district clerks have a statute on expunction records that say that they shall be destroyed after one year, so I think if a determination here is made, it needs to make that determination as to "shall."

MR. HARWELL: There is a difference between retention and expunction.

MS. WOLBRUECK: Yes. Yes. That's the issue that I think needs to be noted in the rule as far as being destroyed or not.

CHAIRMAN BABCOCK: What's your subcommittee say about that, Ann?

MS. WOLBRUECK: Not just the retention, but if the records shall be destroyed.

HONORABLE ANN McCLURE: We haven't debated that.

CHAIRMAN BABCOCK: Have not?

HONORABLE ANN McCLURE: Have not.

CHAIRMAN BABCOCK: Okay. Anybody else? Okay. The subcommittee -- well, here are our choices, as

I understand it. We can be silent, we can go 10 years, we can go 3 years, we can go 1 year. Three years being the Judge McCown thought. The subcommittee recommends one year, so I recommend we vote first on one year since that's the subcommittee's proposal. Anybody opposed to that, voting on that first?

HONORABLE JAN PATTERSON: Is that with respect to both the reporter's record and the clerk's record? Are we treating them the same?

CHAIRMAN BABCOCK: Justice McClure, can you hear that?

HONORABLE ANN McCLURE: Well, what I had said about that was I did not have the benefit of Judge McCown's e-mail before I left El Paso. I have not researched whether the Court has the ability by rule to alter the retention period for the reporters. The Government Code provisions that I have researched is with regard to the clerk's record. To the extent that the Court has the ability to alter that schedule, it would seem to me that we might want to be consistent with the retention period.

CHAIRMAN BABCOCK: You know, since we haven't -- since your subcommittee hasn't talked about this expunction issue and the "shall" versus "may" issue and since Judge McCown's proposal came up after you left

El Paso, is it appropriate to remand this for further discussion?

HONORABLE ANN McCLURE: We'll be glad to look at that if you would like us to.

CHAIRMAN BABCOCK: Table is another way, if there is any tabling motions left on the table. Yeah, David.

MR. JACKSON: And can we maybe if we do table it get it clear what the court reporter is supposed to keep? Because I could see a problem with a court reporter hanging on to their notes that has everybody's full name in it and causing all sorts of problems in this retention effort five years down the road and everybody knows every name, and it is on the paper notes. It won't be in the transcript; and that's, you know, what the lawyers will have and everybody will have.

HONORABLE ANN McCLURE: Well, it ought not even be on the paper notes.

MR. JACKSON: It's got to be. There is no way a court reporter can sit in this room and not write down the words that are said. The mind doesn't work that way. I can't -- if I hear the name "David Peeples," my hands write "David Peeples," and it's in ink on that paper, and another court reporter could read that. I can't --

HONORABLE ANN McCLURE: Well, what I'm saying is they're not supposed to ask her her name.

MR. JACKSON: Well, that's great if they don't.

HONORABLE ANN McCLURE: Yeah.

MR. JACKSON: But if they do, it's on there.

HONORABLE ANN McCLURE: Right.

MR. JACKSON: And if I retain it, it's known.

MR. EDWARDS: Some court reporters do it by recording.

MR. JACKSON: That's true, too, and you can't change that.

MR. EDWARDS: You can't change what you say in a recording.

HONORABLE ANN McCLURE: I understand that, but all I'm saying is that if we are -- I think there is a danger in our assuming that we can draft rules that are going to encompass people not following the procedures that are outlined. The way it was envisioned that this would proceed is that the minor would not be asked in the course of the hearing to identify herself so that there should not be a statement as to her name, nor should there be any transcription taken of her name.

CHAIRMAN BABCOCK: Okay.

HONORABLE ANN McCLURE: Now whether that is commonplace or not, I can't tell you.

CHAIRMAN BABCOCK: Is anybody opposed to tabling this so that Justice McClure's subcommittee can consider these other issues that have been brought up today by Judge McCown? Anybody see a pressing need to vote on this today? Since we're coming back anyway on the parental notification rules regarding the status of the guardian ad litem I don't see any reason why we shouldn't discuss this at our next meeting. Everybody okay with that? Ralph, you're saying "yes"?

MR. DUGGINS: Yes.

CHAIRMAN BABCOCK: Okay. Is that okay with you, Justice McClure?

HONORABLE ANN McCLURE: We will do that.

CHAIRMAN BABCOCK: Thank you. So at the next meeting parental notification will be on the agenda, and we will talk about, a, records retention and, b, status of guardian ad litem. Right?

HONORABLE ANN McCLURE: Yes, sir.

CHAIRMAN BABCOCK: Anything else?

HONORABLE ANN McCLURE: That completes our report.

CHAIRMAN BABCOCK: Great. Okay. Let's move smartly along to Professor Dorsaneo and Justice Hecht and

Chris and the TRAP rules. Who wants to lead off the discussion?

JUSTICE HECHT: Well, let me say at the outset just simply what I said at the beginning by way of a status report; and that is that the Court has gone through the recommendations that the committee has sent over on the changes in the Rules of Appellate Procedure and, in doing that, studied those recommendations in some depth, both as to the history of the rules and the policies that are involved; and whenever we do that we come up with some other ideas along the way that look like problems; and so there are things in the Court's response that are totally new and were just suggested in the process of looking through recommendations or maybe even more tangential than that, things where the Court has just made editorial changes, things where the Court has decided that the rule should be substantively different from the recommendation that the committee has made.

So I hope you have a chart, which is dated January 14th of this year; and on the left-hand side of the chart is the committee's recommendation; and on the right-hand side is either new language, which is redlined or struck out, or a comment in brackets to the effect that the Court agrees, totally agrees with the recommendation and will take it just as it is, or disagrees with it and

wouldn't make any change at all for reasons that are just very briefly summarized.

And Bill and I have talked and I think he wants to go through them one by one, which I agree is the way to do it; and if there are questions along the way, I will try to explain what I understand to be my colleagues' position or positions in some instances, as usual, on these rules without identifying them specifically or attempting to restate their views, which I don't purport to be able to do. But I will try to explain to you as best I can the Court's thinking along the way to the extent that that's useful; but even though the committee has debated some of these things at length, and just as an example is TRAP 47, without overlooking all of that debate, to which the Court has access and which it has looked at, to the extent any member wants to, we would like to have any specific reactions of the committee to these very definite set of proposals.

Then what we're going to do is take those reactions, reconsider, wait on the Court of Criminal Appeals to finish their review, hope that theirs is not so far different from ours. If it is then we'll have to come back again. If it isn't then we will proceed to publication and effectiveness. That's the plan.

PROFESSOR DORSANEO: All right. I'm going

to take them one by one, and I think we need to give each one of these proposals as either approved or disapproved by the Court or changed by the Court our professional review, even though we've been through these before, and I think it would be very helpful to the Court if the appellate lawyers particularly would read closely to the page each one of these drafts to see if there's some flaw or problem as we're going through these things, because that can happen.

Some of these will go very quickly and some of them will take more time. The first one is Rule 4.5, which has, you know, one significant change made in it as recommended to the Court; and the Court would make this change as recommended; and that's the addition of the words, "or order," at the pertinent places to deal with the problem that the current rule has in not providing for the opportunity to get additional time when there's no notice of an order such as an order denying a motion for rehearing in the court of appeals, which is a trigger point for further appellate action in the court of appeals or in the Supreme Court.

Frankly, this problem is one that makes it plain that we need to give each of these rules our undivided attention before they finally get down the road because if that had happened before we wouldn't be

considering this now in all probability. So I have nothing further to say about that, about Rule 4.5. I've looked at it. It looks like our original proposal and the Court's action is appropriate. Anyone have anything to say about it?

CHAIRMAN BABCOCK: Well, they had a comment, and the comment looks fine, but Buddy.

MR. LOW: Chip, some of -- these rules I ran by -- had our court of appeals in Beaumont to look at them and see if they felt there was anything because I felt they probably knew more about appellate rules than I did and -- which is undisputed, and the question they raised on this one was whether or not we should specify "final order" rather than just any order; and from what Bill tells me, a motion to overrule might not be considered a final order, so I don't know that that would be appropriate. But they did raise the question, and I would ask Bill whether it should be, quote, "final order" rather than just any order?

PROFESSOR DORSANEO: Well, I don't think it should be "final order." I think "order" is appropriate. An order denying a motion for rehearing --

MR. LOW: Right. Right.

PROFESSOR DORSANEO: Not really a final order in the sense we normally use that adjective.

MR. LOW: I agree with that. I just wanted to raise it.

CHAIRMAN BABCOCK: Okay. Next rule.

PROFESSOR DORSANEO: And the Court's comment -- this comment, as Chip indicated, does look fine to me, and the reason it's a decent comment is that it clearly identifies "such as one denying a motion for rehearing," which is helpful, okay, which is helpful for someone reading the change to see, you know, what in the world they're actually changing.

9.5. Now, here we recommended to the Court that -- the significant change was to change 9.5, and the discussion was whether we should change 9.5 or 50 -- what number is that -- 52, or both -- and 52 has to do with original proceedings in appellate courts -- to say a party must serve a copy of the record in an original proceeding; and that was our recommendation to the Court, was to make it clear that if it's an original proceeding as distinguished from an appeal, a party must serve a copy of the record and an original proceeding.

All the appellate lawyers know, and maybe the trial lawyers don't know, or maybe they do, the record is prepared by the petitioner or by the parties, you know, rather than -- you know, rather than by court personnel; or at least the final version of the record is prepared by

the parties.

The Court has changed or modified our recommendation or not accepted our recommendation and done something else. First, they've changed the words "appeal or review" to "proceeding" in 9.5(a). Now, the words "appeal or review" are words that came from either the committee work or the Court. I'm seeming to think that maybe even Lee Parsley and Justice Hecht came up with those words that explained that we were talking about appeals and on some other occasions we are talking about things that aren't appeals that would involve appellate review. So the words "appeal or review" are -- you know, have that pedigree.

Changing the words "appeal or review" to "proceeding" doesn't bother me a great deal. There is no definition in Appellate Rule 3, particularly 3.1, "definitions," of any of those words, "appeal," "review" or "proceeding." That doesn't trouble me either. It seems to me that "proceeding" is fine. The Ninth Court has something to suggest about that, too. I can tell that by looking over Buddy's shoulder.

MR. LOW: Well, what they're talking about, the "proceeding" and should you clarify it by saying "proceeding in the appellate court" because there might be other parties to proceedings below that aren't parties to

the appellate process, and do you serve -- or is it implicit that it means proceedings in the appellate court only?

PROFESSOR DORSANEO: It may be -- my response to that would be it may be implicit because we're talking about the appellate rules. Rule 9, papers generally, frankly, contains that overall ambiguity because some of these papers are things that are done in the trial court or some of the things that the appellate rules talk about are things that are done in the trial court. So we have that problem. The words "appeal or review" are better than "proceeding" in terms of making it clear that we're talking about proceedings in the appellate court.

"Parties to the proceeding" language raises the other issue that we dealt with in the past with respect to who is supposed to get notice and the like because we could be talking about somebody who is a party to the trial court's judgment, maybe not even identified in the trial court's judgment as a party to the judgment, rather than somebody who is a party to the appeal or review.

Probably, thinking about it for just two minutes, proceedings -- "proceeding in the appellate court" is more informative. Probably "proceeding" is good

enough. Probably "appeal or review" wasn't a bad idea to begin with. Sort of like angels on the head of a pin issues to a certain extent.

Justice Hecht, why do you want to change it to "proceeding" anyway? Just because it's one word rather than three?

JUSTICE HECHT: No. The concern was that an original proceeding is not an appeal or a review.

PROFESSOR DORSANEO: It's not a review?

JUSTICE HECHT: Well, I mean, a habeas maybe is a review. It's just not clear whether -- it just seemed clearer to the Court that we use a generic word rather than trying to describe the various proceedings that might be there.

PROFESSOR DORSANEO: I guess it's conceivable that not every request for a writ from a court of appeals would involve a review. Most of the mandamuses, you have a target that's a review of somebody's failure to take, you know, action or taking inappropriate action that's an abuse of discretion. I would think almost -- an injunction, injunction, maybe that wouldn't be a review, to the extent you could ask for injunctive relief from the appellate court in the first instance to protect the subject matter of the appeal, so maybe everything isn't a review. I think that is right.

MR. EDWARDS: If you just put "appellate" before "proceeding," don't you limit it to the appellate court and anything that happens -- satisfy all that argument? "To the appellate proceeding."

PROFESSOR DORSANEO: I don't see any harm in putting the word "appellate" in there, and it does make it clearer, so why don't we recommend that? And then proceedings -- "proceeding in the appellate court" is less congenial to me than "appellate proceeding" because it has fewer words.

MR. LOW: It has the same meaning, but yeah.

CHAIRMAN BABCOCK: So you want to say "appellate proceeding"?

PROFESSOR DORSANEO: Yes.

CHAIRMAN BABCOCK: Okay.

PROFESSOR DORSANEO: Now, the larger issue is the elimination of the last sentence that we recommended. "A party must serve a copy of the record in an original proceeding," as we recommended. It is replaced in the Court's recommendation with an adjustment to subdivision 52.7, which I'll ask you to locate.

MR. GRIESEL: Page 15. 15 and 16.

MR. WATSON: It's really 16.

PROFESSOR DORSANEO: It begins on page 15. The change, which I think you can isolate and look at on

page 16, provides not for the provision of a copy of the record in an original proceeding on other parties by the petitioner, but the service on all other parties of an index listing the materials filed and describing them in sufficient detail to identify them in the underlying proceeding, and that's better than getting nothing, but it's not getting the entire record. I'll ask Justice Hecht to explain the Court's reasoning on that rather than me trying to do it.

JUSTICE HECHT: Yeah. The Court agrees that you should -- that the parties are entitled to know what's in the record at the time that the relator files it, but one judge suggested, and several agreed, that because we get records in original proceedings that are hundreds of hundreds of pages long and consist almost entirely, 99 percent of the time, of papers that were filed in the underlying proceeding, pleadings and motions and responses and transcripts of hearings and all sorts of those things, does it just needlessly multiply paper in those paper -- in those proceedings to require that they be served on the other side, particularly if there are a whole bunch of people who are real parties at interest?

My own view is the Bar and the appellate judges ought to just call it, whatever works the best. The only reason this is in here as it is is because at

this point a majority of the Court is leaning toward this view, but I think they would welcome the view of the people that have to live with it.

CHAIRMAN BABCOCK: Yeah, Wendell.

MR. HALL: Since I do file a number of original proceedings from time to time, I welcome this change. I think most of the trial lawyers that we might serve, whether they're real parties in interest or just interested parties, and certainly the respondent trial judge who probably doesn't even want the record in the first place, I think this would be a really helpful change. I think as long as you send them a copy of the index of the documents that you've filed as your clerk's record or reporter's record, or however you denominate the documents as exhibits to your mandamus proceeding, along with anything that might not already be on file or served on the parties, then I think that's more than sufficient.

CHAIRMAN BABCOCK: Bill then Skip then Pam.

PROFESSOR DORSANEO: Please note that he just made a change. He said "anything new."

MR. HALL: Yeah, because occasionally sometimes there will be affidavits attached to a mandamus proceeding that weren't filed at the time.

PROFESSOR DORSANEO: Or legislative history.

MR. HALL: Or legislative history or things

of that nature. I think those do have to be served on all parties but not anything that they already have a copy of.

MR. EDWARDS: Most of the original proceedings that I see are done under emergency conditions where you may be in trial or going to trial and you have a very short period of time to respond without having a lot of serious consequences involved, and particularly if you're not in the same community where the records would be. For example, if somebody is in San Antonio and the proceeding is in Corpus Christi or Houston, to not have those things available to you to respond promptly is a really inconvenient and impossible situation to deal with.

CHAIRMAN BABCOCK: Skip and then Pam.

MR. WATSON: Justice Hecht, I was just curious if there was any discussion about how this is going to enable the filing of more mandamuses or filing them more quickly. At what point, if any, did the logistics of the process come into play in the Court's reasoning?

JUSTICE HECHT: That wasn't an issue, and we didn't think it would affect -- nobody thought it would affect it one way or the other.

MR. WATSON: Well, the comments here are the exact comments I had; and the ones on filing, getting together that tabbed record is time-consuming, expensive,

and delays the filing of the mandamus. From the standpoint of the party filing it this is a wonderful change. Bill is absolutely correct. From the standpoint of the party on a short fuse to respond it's a terrible change, but it certainly moves to the favor of the filing party and will create more.

CHAIRMAN BABCOCK: Pam.

MS. BARON: The biggest gap here is the reporter's record, which is usually ordered by the relator. It is not provided at that time to the real parties in interest. It's filed as part of the record in the mandamus proceeding and it's absolutely critical for the real party in interest to have immediate access to that and contesting the right to relief in the mandamus proceeding.

So echoing what Wendell said, there are certain things that aren't going to be included in the record that the other side just has never possessed or seen, and there's got to be a mechanism for those materials to be provided immediately, and I think this is a good idea in the abstract, but when it gets down to actually getting the work done on both sides quickly and fairly, maybe it doesn't work, because it's important to be able to give specific cites to what the other side has filed, particularly with respect to these new documents,

and have them immediately available; and if we don't require that then we are going to have people who don't and just say "reporter's record of hearing of April 12th." Then you're going to have to request that they get it to you, and by the time you get it the court may have already acted on some kind of emergency basis.

MR. HALL: Well, I think typically the court will -- on an emergency basis the court will have already acted before the real parties in interest have an opportunity to respond anyway, so I don't think that's a real problem, but -- and perhaps as an alternative what you could have is some sort of provision that unless the party requests a copy of the record then you may serve them with a copy of the index of the documents filed or the exhibits filed, you know, plus anything that they wouldn't already have. I mean, I am not articulating very well, but anything that wasn't already filed in the case, you know, new documents. But it's just such a -- sometimes you just create, as Justice Hecht said, these records that are sometimes a foot tall or two feet tall, and it's just an incredible waste of paper because you serve them on a lot of parties who don't even want them, and oftentimes the trial judge sure doesn't want them.

CHAIRMAN BABCOCK: Richard.

MR. ORSINGER: To me the issue isn't

clear-cut because I agree it's a waste of time to people that already have them, but I get involved in mandamus cases where I wasn't involved in the trial court, and I get involved in cases where the trial lawyers are maybe not as organized and orderly as the cases that Wendell gets involved in, and I can never rely on the trial lawyer for anything really. I can't rely on them to find out whether somebody testified, whether something was marked as an exhibit; and if you're on a short fuse responding to a mandamus request with no exhibits and you can't get a hold of your trial lawyer and your trial lawyer doesn't have a copy of some of the exhibits that were submitted and you're trying to chase the court reporter down and all you get is voice mail and they may or may not call you back three or four or five times, it really does put a burden on the party that's responding to have to do a lot of work in a very short period of time.

Now, the person who is putting the mandamus position together has as much time as they need to put their mandamus position together. It may take them three days. It may take them three weeks, but frequently when you're responding you sometimes have to respond quickly, and I think it really is an imposition on the responding party to have to go out and get a hold of people just to even find out what the basis of the mandamus is. So I

really think in weighing the two that, you know, unless you have an agreement between the parties or something that you really should require the parties seeking the relief to deliver all of the information that the appellate court is going to be asked to review.

CHAIRMAN BABCOCK: Bill.

PROFESSOR DORSANEO: I'm in favor of the original committee recommendation, and I have several reasons for that. First, although mandamus records can be voluminous, many of them are not voluminous. Second, many times when I'm reading mandamus petitions prepared by very honest and forthright people, when I review -- and I mean that sincerely. When I review the record it doesn't look exactly like that. It was a little bit different from that or there was more to it or the like.

Third, it is absolutely true that you cannot rely upon the firm that handled the case and the court below to be able to provide you with duplicate information. There might, in fact, be some question as to what happened, what the order was, what pleadings are pertinent or the like. And, fourth, if we do say that the entire record doesn't need to be provided, I think we will be heading down the path of trying to decide then what should be included in an appendix to the mandamus petition that is really at a minimum what should be provided.

When I started practice that's how mandamus petitions were done. That was the record, the appendix, and then we switched later to a record, and I don't see it as that big of a -- I see on balance it not being that big of a problem to serve the record. I see it as a larger problem if the record is not served for all the reasons I mentioned.

CHAIRMAN BABCOCK: Buddy.

MR. LOW: Chip, I think I'll agree. It makes it easier to file a mandamus, which is a proceeding that has no outline. You get a mandamus if you're on discovery issue, you get it here. We don't outline that. Lawyers now are using it more and more and courts are taking it more and more to give preliminary reviews, and I don't see the favor of making it easier. If the person wants to file it, make him put all of his stuff together and have it there.

CHAIRMAN BABCOCK: Okay. Yeah, Skip.

MR. WATSON: Well, the only reason that I could think of that the Court would want to do this, given what I thought was, you know, a relatively close-the-floodgates-on-mandamus philosophy, would be the hope that the relators that are going to be filing them, if they didn't have to put all the documents together would file them on Thursday afternoon rather than Friday

afternoon, and that ain't going to happen. We're going to procrastinate anyway. I mean, there's no question that this is tilting pro-mandamus. I mean, I know it's not intended that way, but the effect that the Court should be getting from this room is that it's pro-mandamus.

JUSTICE HECHT: Well, that may be the case, but -- and, again, I don't know what they will say, but I will be surprised to think that the Court wanted or any Court wanted to discourage mandamus filings by just making it physically harder, like you have to -- you can only file them in Matagorda County or something.

MR. WATSON: That's a thought.

JUSTICE HECHT: So that you've really got to mean business to get there. I mean, that was not the consideration.

MR. EDWARDS: No, I don't think this makes it more difficult to file. I think it just makes it more difficult to respond.

CHAIRMAN BABCOCK: Nina.

MS. CORTELL: I very much appreciate what the Court is trying to do. We had a case where the judge took judicial notice of 12 other files, 12 other cases, and then the appellate court took the position that we needed to bring all of the other 12 files up in mandamus, which was, of course, prohibitive. Nevertheless, I weigh

in favor of the originally proposed rule because I think overall it achieves the greater due process, and I think that the advocates need to know what's on file and an exact duplicate of what's on file and because time is of the essence I think we need to impose the requirement that the entire record be served.

CHAIRMAN BABCOCK: Wendell.

MR. HALL: The more discussion I hear I guess the more I tend to agree with that. I don't think, however, that if you do eliminate serving the record on everybody it's going to encourage the filing of mandamus. If your client has decided to go to the expense of filing a mandamus petition, I don't think copying a couple extra records is going to make any difference. I mean, that's not the big cost involved, but perhaps there could be a -- and I'm going off in another direction now. There could be a separate rule that once you go from the court of appeals to the Supreme Court, because truly then the only -- typically the only record difference would be the order of the court of appeals, either denying, granting, or whatever, mandamus relief, and it really does seem duplicative and a waste of paper to refile that entire record again on all the parties and the Supreme Court when they've already got the identical record from the court of appeals file.

CHAIRMAN BABCOCK: Justice Hecht, I think to get a sense of where everybody's going, would it be helpful if we took a formal vote on the issue of whether or not we think we were right?

JUSTICE HECHT: Yeah. Yes, or even on Wendell's -- I mean, there's a lot of middle ground here.

CHAIRMAN BABCOCK: Right.

JUSTICE HECHT: I doubt -- most of the time, I think Wendell's right, the respondent does not want the record or any part of it and -- but that's not always true. Sometimes in habeas cases or prohibition cases the -- they don't come up very often, but the respondent is deeply concerned about what is being said, and I agree it seems silly to multiply the paper just because the proceeding in our court is a new proceeding.

I don't know how you describe that differently than what happened in the court of appeals, though, because sometimes the court of appeals changes a little part of it or maybe not or maybe they write an opinion, maybe they don't, or maybe you think of a different argument when you lose there and you want to put in another piece paper that you hadn't thought about, but maybe you can do that or not. It would be kind of hard to describe.

CHAIRMAN BABCOCK: Yeah, Wendell.

MR. HALL: We may not be complying with the rules when we do this, but typically what I do is if we're going from the court of appeals to the Supreme Court I will fax a letter to all the parties saying "The identical records have been filed in the Supreme Court, with the addition of Tab 15, which is the court of appeals opinion. Unless you want a copy of that record, I am not going to forward one to you, unless you request one, because it's the identical record, it's all numbered the same, and you've already got it," and that usually takes care of it and no one ever wants another copy of the record because it is just a big waste of paper and time.

CHAIRMAN BABCOCK: Richard.

MR. ORSINGER: I don't have really a problem with that concept right there because I think that if you have the packet delivered to a lawyer, even if they don't know what they're doing they can usually find that packet and it will contain what the court of appeals looked at; and if all you're required to deliver is what's new, I think from a respondent's standpoint that's a reasonable compromise. So, to me, I would feel differently about going from the court of appeals to the Supreme Court than going from the trial court to the court of appeals.

HONORABLE JAN PATTERSON: I do think the issue is what Bill stated, though, and that is that you

could ask two lawyers to put together an identical record, and it would vary in some respect. So I think it is a matter of precision and notice to make sure everyone is on the same page.

The other wrinkle I throw in this, and I don't think it affects either draft, but we're now the recipients of this wonderful vehicle called the direct appeal, and I think that it can be treated just like any other appeal, but I am not sure. It's a little bit of a hybrid proceeding between mandamus and appeal, but I just call it to everybody's attention because it is not really one or the other.

CHAIRMAN BABCOCK: Yeah. Okay. Richard.

MR. ORSINGER: Well, now I've become worried about the possibility that somebody may not be attaching official exhibits, and so if somebody says "attached is a true copy of the so-and-so" and it wasn't what was marked and offered and received, then that puts the burden on me as the respondent to check out the record and be sure that the copy that they've marked, which is not an official copy, actually comports with the official copy. And those are sloppy records that are put together, and frequently people will say, "This is a copy of the exhibit," and it's not the official exhibit, and now I'm beginning to worry that the respondent has an extraordinary burden to verify

line by line whether what's attached to the petition and that's been filed with the court and the court is going to rely on is, in fact, what was in the trial court.

CHAIRMAN BABCOCK: Okay, Wendell.

MR. HALL: At this point I'm convinced that at the court of appeals level I think everybody needs to receive the record, everybody who's a real party in interest, not just the respondent. You just don't know if they want it or not. But I do think going from the court of appeals to the Supreme Court, unless there are -- I just think you should have to serve additional documents in addition to the record that was filed in the court of appeals because I think that is a tremendous waste of paper and time.

PROFESSOR DORSANEO: And I think if we did that the place to put it would be 52.

MR. HALL: Right.

PROFESSOR DORSANEO: So we could go past, you know, this place --

MR. HALL: Right.

PROFESSOR DORSANEO: -- on the chart and do some drafting, if that's what the Court wants.

CHAIRMAN BABCOCK: Well, if Wendell's thought is followed up on, Bill, would you say then you would give up on that last sentence in 9.5 and just deal

with the problem in 52?

PROFESSOR DORSANEO: Yes. We discussed it last time. It's always a question as to whether you put it in the general rule or you put it in the specific rule, and I think it was a close question last time. If we're going to make it a more complicated procedure, it probably ought to go in the specific rule.

CHAIRMAN BABCOCK: Okay. Well, regardless of where it goes, how do people feel about what -- Bill, what you say and what Wendell says is that with respect to proceedings in the court of appeals that the party should serve a copy of the record in an original proceeding. Is there consensus on that, and do we want to take a vote?

MR. EDWARDS: You know, if what goes -- if there's a procedure for the record or whatever has been filed in the court of appeals to simply be transferred from that court to the Supreme Court where it is the record --

CHAIRMAN BABCOCK: Right.

MR. EDWARDS: -- then I don't have any problem with it, but if it is a new set of documents that's filed with the Supreme Court rather than simply moving the record from the court of appeals to the Supreme Court then I think it ought to be served.

CHAIRMAN BABCOCK: Yeah. Wendell, what do

you think about that?

MR. HALL: Well, I mean it is an original proceeding, so it's not going to be transmitted from the court of appeals to the Supreme Court.

MR. EDWARDS: Well, it could be.

MR. HALL: I guess it could be, but, again -- and if you could do that, that would be terrific because then all you would have to do is a supplemental exhibit, which would probably just be the court of appeals order and opinion if the court of appeals didn't send it on itself, but I still would like to come up with a mechanism for avoiding having to serve the entire record in the Supreme Court in the end.

CHAIRMAN BABCOCK: Well, is it fair to say that our sense is that certainly in the court of appeals we think that a copy of the record in an original proceeding --

MR. HALL: Right

CHAIRMAN BABCOCK: -- ought to be served?

MR. LOW: Right.

CHAIRMAN BABCOCK: Anybody disagree with that?

MR. HALL: No.

CHAIRMAN BABCOCK: And now the issue is between the court of appeals and the Supreme Court,

whether or not there should be some modification.

MR. LOW: Right.

MR. EDWARDS: Why can't there be a transfer of that record from the court of appeals to the Supreme Court? It's a simple little thing --

CHAIRMAN BABCOCK: Yeah.

MR. EDWARDS: -- and it's over with in the court of appeals.

CHAIRMAN BABCOCK: Yeah.

MR. EDWARDS: There's no appeal from a mandamus.

CHAIRMAN BABCOCK: Justice Hecht, would you like Bill's subcommittee to come up with some language, probably for Rule 52 to --

JUSTICE HECHT: Yeah. If possible.

CHAIRMAN BABCOCK: -- address that?

MS. BARON: Chip, can I make one more comment?

CHAIRMAN BABCOCK: Yeah.

MS. BARON: In terms of transferring the record from the court of appeals to the Supreme Court, if you are in an emergency situation where you have to have the record transferred from other parts of the state, there is no way that's going to work; and if you look at, my understanding from the clerk's office of the Supreme

Court, is that the transfer of records can take anywhere from a day or two to several weeks to come from -- depending upon what part of the state its's coming from and how busy the court of appeals is.

CHAIRMAN BABCOCK: Richard.

MR. ORSINGER: I would make the suggestion that you allow that election that if you -- if the only record you filed with the Supreme Court is the one you filed in the court of appeals then permit them to request that and then not have to give copies, but if they are going to go to the Supreme Court for emergency relief, you're going to have to take your own copies because of what Pam said. You don't have two or three weeks to wait, and if you choose that then you ought to give copies of that to the other litigants.

CHAIRMAN BABCOCK: Okay.

MR. HALL: Very rarely do you have the luxury of two or three weeks; and if you do, the other side will usually oblige you, so...

CHAIRMAN BABCOCK: All right. Any other comment? Well, with that then, Bill, if your subcommittee could come up with some language.

PROFESSOR DORSANEO: We will try to do it, and I will try to draft something up so we can take it up again tomorrow, if that's --

CHAIRMAN BABCOCK: That will be fine.

PROFESSOR DORSANEO: If that's possible. It's going to be more complicated --

JUSTICE HECHT: Or even the next meeting I suspect.

PROFESSOR DORSANEO: All right.

CHAIRMAN BABCOCK: Yeah. I'm penciling it in here for the next meeting, but we'll see if we can get it done quicker than that.

HONORABLE JAN PATTERSON: And you're referring Judge Hecht's Matagorda County proposal as well?

CHAIRMAN BABCOCK: Everything's on the table. 9.7, Bill, looks like it's --

PROFESSOR DORSANEO: The Court would make this change as recommended. We discussed the adoption by reference. We modified the language and voted on it. The Court has a comment. This comment I think, unlike the earlier comment, from my perspective, it seems debatable about whether it adds anything.

Subdivision 9.7 is added to clarify what it says, except it doesn't say "in the same case." So I don't like this comment. I would like to say "in the same case," but then if it says "in the same case" it says the same thing as the rule, so what's the point?

JUSTICE HECHT: Well, we might only just

say -- I think the only point is to have a comment identifying the change. So we might just say "Subdivision 9.7 is added."

PROFESSOR DORSANEO: Good.

JUSTICE HECHT: So that people will, as they're reading along, will see that this change was made in 2002, because otherwise you can't tell.

PROFESSOR DORSANEO: Okay.

JUSTICE HECHT: Unless you go back and look at the order.

PROFESSOR DORSANEO: Yeah. The rule book should say that, and the codifiers might or might not pick it up. Probably a good idea.

CHAIRMAN BABCOCK: Buddy.

MR. LOW: Should the rule state that the incorporated pages will be included in the page limit?

PROFESSOR DORSANEO: No.

JUSTICE HECHT: Well, let me tell you that --

MR. LOW: Do you want to think about that?

PROFESSOR DORSANEO: No.

JUSTICE HECHT: This is the rule in the Federal rules, or it's essentially the rule, but one need not think too hard about this to realize that there is some concern that you could just adopt pieces of people's

briefing and multiply the page limits a good bit, but that problem doesn't exist presently, so we're not going to address it.

MR. LOW: Okay.

PROFESSOR DORSANEO: And it doesn't increase the number of pages that the Court is made to read anyway.

JUSTICE HECHT: Well, it might. I mean, if you had five people who are aligned on the same side who would ordinarily file one thing, now they are sure that they can file separate things and adopt each other's without waiving anything, they will file five of them and get five times the pages. I'm sure that's occurred to Richard. I don't know if it's occurred to --

MR. ORSINGER: You know, what occurs to me is that you can't incorporate a 50-page brief because you have a 1-page brief incorporating a 50-page brief, you have 51 pages.

JUSTICE HECHT: Well, it doesn't say that.

MR. LOW: If you had multiple parties that had the same interest, they can get together when they file their briefs, and they can say, "Okay, I'm going to incorporate your -- you do 30 pages of this and you do 30 pages of that, and you do" -- I mean, you could do --

CHAIRMAN BABCOCK: We're creating a record for mischief here. Pam, did you have your hand up?

MS. BARON: Well, I apologize. I'm a little behind the curve here, but on 9.5 we approved the Court's language with the word "appellate" before "proceeding," and then the next part is highlighted, but it doesn't say it's a comment.

JUSTICE HECHT: It should have been.

MS. BARON: And did we say that's okay? Did anybody look at that?

PROFESSOR DORSANEO: Uh-huh. I looked at it.

MS. BARON: Okay. That's fine.

CHAIRMAN BABCOCK: Okay. Let's move on to 10.1, which, Bill, the Court has -- the majority of the Court is -- we don't know what the vote is here, but the majority of the Court is inclined not to make this change.

PROFESSOR DORSANEO: Well, I guess the Court's comment explains it, that it may elicit agreement on some aspects of a motion. That's a very optimistic view. Like most appellate lawyers, I think -- and I may be projecting, I'm obviously projecting -- a certificate of conference for a motion for rehearing seems to be a silly idea.

JUSTICE HECHT: Well, we get a number of petitions where the motion for rehearing says "change this fact, this is just -- the number is wrong, the date is

wrong." We get a number of -- we get probably half a dozen a year where it says, "The judgment should not have been rendered against this party by the appellate court, and we pointed that out," and it's a simple matter, and so you wonder when you see those things what is that? What's the short answer to that?

PROFESSOR DORSANEO: Yeah.

JUSTICE HECHT: And in the greater scheme of things, it's not a lot of cases, but I think the last sentence is where the Court really is, which is that they just hate to make exceptions to a standard requirement.

CHAIRMAN BABCOCK: Bill, the case for making an exception to a standard requirement, which we all know Judge McCown is in favor of?

HON. F. SCOTT McCOWN: I have been here all morning and haven't said a word, was wondering when we were breaking for lunch.

PROFESSOR DORSANEO: Well, I'm glad to know you're here because 13.1 is coming up.

CHAIRMAN BABCOCK: Bill, is there a case to be made for an exception?

PROFESSOR DORSANEO: I won't make it.

CHAIRMAN BABCOCK: Well, we have Hatchell who's --

MR. HATCHELL: Well, I just want to state

for the record that there's a very strong argument that a certificate of conference is not required in a motion for rehearing in any event because Rule 10.1(a) says that the certificate of conference rule requires -- unless these rules prescribe another form and the rules of appellate procedure describe in explicit detail the form for a motion for rehearing.

CHAIRMAN BABCOCK: Do we want to let this comment settle for a second?

MR. HATCHELL: I just want to create more mischief.

HON. F. SCOTT McCOWN: Maybe we could visit about it over lunch.

CHAIRMAN BABCOCK: We're going to break for lunch shortly. Judge Patterson.

HONORABLE JAN PATTERSON: I have brought that rule to our court's attention on a prior occasion, but all of the courts of appeals construe the rule as requiring a certificate of conference; and I believe, as Bill does, that it's -- I really do think we can make a case for an exception here because it's generally counterintuitive; and what it does is delay motions for rehearing more often than not, because it's the last thing parties think about conferring on and it requires the clerk's office to then solicit a certificate of

conference; and so I think it really generates more legal fees and lawyer activity than it's worth -- than it generates agreement on small issues, which they tend to confer on and then they will say, "We've conferred on this small issue and we think that you can go ahead and make the change."

But I would say every week we have at least a couple of motions for rehearing that do not include them and that that then builds in almost another two weeks while the process is accomplished for that kind of motion, and I've always -- I think in a way this is a service to lawyers, and I'd like the -- I mean, the good appellate lawyers who are here know the rule and can jump through the hoop very easily; but those who do the occasional appeal, I think it is a little counterintuitive trap; and I think it would be a service to lawyers to drop that requirement.

CHAIRMAN BABCOCK: Pam.

MS. BARON: I agree. I think I may have been the person who initiated this change, because I've never had a person agree to my motion for rehearing once. It is a useless act. It does take a lot of time. In those rare instances where there is a mistake in the court's opinion, I think the parties can go out and get people to join their motion for rehearing, if that's the

situation, or in that case represent that they have contacted the other side and they have no opposition to the change, but that that shouldn't be the default rule in 99.9 percent of the cases when it's going to just be a waste of time.

And if my recollection works or my experience in the Supreme Court works, is they don't require a certificate of conference on a motion for rehearing in their court, and this is basically requiring it in all the courts of appeals.

JUSTICE HECHT: Well, no, it would just leave the rule --

MS. BARON: As ambiguous as it is now.

JUSTICE HECHT: -- subject to Hatchell interpretation. But I think as a practical matter -- I don't have any idea what my colleagues think about this, but I wouldn't hold up denying a motion because it didn't have a certificate of conference on it. I probably would hold up granting a motion that didn't have a certificate.

MS. BARON: It's not usually the court that has that choice because you can't get through the clerk's office first.

HONORABLE JAN PATTERSON: I mean, if we include it in the comment, the Hatchell interpretation, that would take care of it without amending the rule.

CHAIRMAN BABCOCK: Only if we can call it that. Phil.

HON. PHIL HARDBERGER: I just wanted to add that our court has had the same experience as Justice Patterson. It just causes delays and things get kicked back. It's really a useless act.

HONORABLE JAN PATTERSON: I think our clerks would actually feel more strongly about it than any of us because we just don't see the useless energy that goes on below the radar screen.

CHAIRMAN BABCOCK: Yeah. Any other comment? Well, to give the Court a sense of our committee, how many people are, after hearing this, inclined to tell the Court, that we do, too, want this? Everybody that wants this sentence or wants to advise the Court that we still think it would be appropriate to have this sentence, raise your hand.

Anybody opposed? No hands up, so by a vote of 26 to nothing the advisory committee advises the Court that, uh-huh --

HONORABLE JAN PATTERSON: If it would help for us to gather a little statistical information from the courts of appeals to bolster our position for the Court, we certainly would volunteer for that, or I'll volunteer Judge Brister.

CHAIRMAN BABCOCK: Okay. 12.6 looks like it's okay. Any problem with the comment, Bill?

PROFESSOR DORSANEO: I like that "12.6 is added," or "amended" would be better. I don't know. I don't have have a great big problem with it.

CHAIRMAN BABCOCK: Okay. Any other comments about the comment to 12.6?

13.1?

PROFESSOR DORSANEO: Here is a controversial one.

MR. GILSTRAP: Why don't we take that after lunch? I need to look at something on it for sure.

CHAIRMAN BABCOCK: Okay. 13 point -- we've hit a bump in the road, so why don't we take about an hour for lunch, come back at 1:15, and we'll take up 13.1.

(A recess was taken at 12:13 p.m., after which the meeting continued as reflected in the next volume.)

* *

CERTIFICATION OF THE MEETING OF
THE SUPREME COURT ADVISORY COMMITTEE

* *

I, D'LOIS L. JONES, Certified Shorthand Reporter, State of Texas, hereby certify that I reported the above meeting of the Supreme Court Advisory Committee on the 25th day of January, 2002, Morning Session, and the same was thereafter reduced to computer transcription by me.

I further certify that the costs for my services in the matter are $ 978.00 .

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

Given under my hand and seal of office on this the 6th day of February, 2002.

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
Certificate Expires 12/31/2002

#005,076DJ/AR