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MEETING OF THE SUPREME COURT ADVISORY COMMITTEE

March 8, 2002

(MORNING SESSION)

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COPY

Taken before *D'Lois L. Jones*, Certified
Shorthand Reporter in Travis County for the State of
Texas, reported by machine shorthand method, on the 8th
day of March, 2002, between the hours of 9:06 a.m. and
12:31 p.m., at the Texas Association of Broadcasters, 502
East 11th Street, Suite 200, Austin, Texas 78701.

INDEX OF VOTES

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2 CHAIRMAN BABCOCK: We're now on the record,
3 and I thought I would -- because we've got some people in
4 the audience who are interested in various topics, there
5 is some slight variation in the schedule due to some of
6 our leaders having conflicts with their time. Frank
7 Gilstrap is going to take over for Bill Dorsaneo on Item
8 2.2, TRAP Rule 11, and 2.3, TRAP Rule 27.1, and then
9 everything is going to proceed until we get to 2.6, which
10 is the Rule 103/Rule 536. Richard Orsinger has a conflict
11 this morning, so we won't take that up until approximately
12 3:00 o'clock this afternoon. Same way with Item 2.7, the
13 Rule 18c coverage. That's an Orsinger matter, and we will
14 take that up this afternoon. Justice Duncan informs me
15 that -- I think it's Item 2.8. Is it the visiting judge
16 peer review that is not ready for discussion today?

17 HONORABLE SARAH DUNCAN: That's right.

18 CHAIRMAN BABCOCK: So we're going to defer
19 that 'til next meeting, and other than that, I think we're
20 all set, unless anybody knows anything differently. So
21 with that having been said, we'll hear from Justice Hecht
22 regarding a status report.

23 JUSTICE HECHT: All I have is that Chris and
24 I have reworked in the recommendations on the TRAP rules
25 from the last meeting that we have, and they are now and

1 still have been for several weeks with the Court of
2 Criminal Appeals, from whom I will respectfully ask a
3 status report after next Tuesday when they are a little
4 more able to focus on these things and --

5 HONORABLE SCOTT BRISTER: I'm sorry?

6 JUSTICE HECHT: Next Tuesday or Wednesday,
7 next Wednesday, Thursday. And then as soon as they're
8 ready to go, we are. So we're just waiting on the Court
9 of Criminal Appeals at this point, and that's all I have.
10 Thank you, Chip.

11 CHAIRMAN BABCOCK: Okay. Great. We are
12 delighted to have a number of representatives of Jane's
13 Due Process, including Diana Philip, the executive
14 director, with us; and that is the first item on the
15 agenda, the parental notification rules; and, Justice
16 McClure, you're up to bat.

17 HONORABLE ANN McCLURE: Thank you. Good
18 morning. Let me apologize that I am not there in person.
19 I had some outpatient work done at the hospital yesterday
20 that has prevented me from traveling, so the best I can do
21 is long distance over voicebox. The full report of the
22 subcommittee should have been e-mailed to you. I hope
23 it's also available there in the room in case any of you
24 left for Austin yesterday before you received a copy of
25 it. I have tried to give you a little bit of historical

1 background in that report as to the role of the guardian
2 ad litem, what the statute does and doesn't do, and what
3 the rules have tried to accomplish, and in some areas
4 where they are silent.

5 The beginning of the report takes almost
6 verbatim language from a LAW REVIEW article that Bob
7 Pemberton and Richard and I wrote shortly after the
8 original rules were implemented with some urging by the
9 Supreme Court to offer guidance to practitioners who were
10 going to be representing the Jane Does in the court. So a
11 lot of it is rather detailed. It is somewhat technical,
12 but I think it does give you a little bit of flavor of
13 what the legislative history was with regard to the ad
14 litem and where we have some work that the subcommittee
15 believes needs to be done to emphasize more clearly what
16 their role is and should be.

17 If you've got the report in front of you, I
18 began with a discussion as to who under the statute can be
19 appointed as a guardian ad litem. Remember that the
20 statute authorizes the minor to ask the court to appoint a
21 particular person, perhaps a grandmother, an aunt, or an
22 adult sibling that she feels comfortable with and would
23 like to have with her as she goes through this proceeding.
24 The statute doesn't make it mandatory for the trial court
25 to appoint that individual as the ad litem, but the court

1 may certainly do so. This provision came about really as
2 a compromise where a number of legislators wanted a double
3 or triple bypass option where a minor could instead of
4 notifying a parent, notify the grandparent, notify the
5 aunt, notify the adult sibling, in order to have the
6 abortion performed. This was sort of a compromise that
7 allowed that person to be involved to perhaps make it a
8 little easier for the minor to navigate the court system,
9 but it would not operate to trump her responsibility to
10 notify her parents.

11 Last thing, if you'll note, the fifth
12 category of individuals that the court may appoint is to
13 be another appropriate person selected by the court, and
14 certainly commentators have suggested that an appropriate
15 person would be one that is unbiased, impartial, and
16 without a personal agenda or a particular position, be it
17 political, religious, or whatever, that might have brought
18 this to a predisposed conclusion before having ever met
19 the minor or discussed the possibilities of an option with
20 her.

21 Beginning on page three of the report,
22 you'll see a discussion which is titled "Duties of the
23 Guardian Ad Litem." It is important that we remember
24 there are significant distinctions between the role of the
25 attorney ad litem and the role of the guardian. The

1 attorney ad litem is to advocate for the client's desires.
2 If the minor wants to obtain an abortion then it is the
3 attorney's obligation to advocate for her to obtain that
4 availability through the judicial bypass system. The
5 guardian advocates for the best interest of the minor,
6 which may be in accordance with the minor's desires or it
7 may not be in accordance with the minor's desires.

8 The statute imposes two specific duties on
9 the guardian. One is the duty to report sexual abuse.
10 Two is a profound duty of confidentiality, and part and
11 parcel of that is to protect the minor's anonymity. Early
12 in the drafting process the subcommittee and this
13 committee were concerned about whether we should
14 articulate somewhere in the rules specific guidelines as
15 to what duties the ad litem should discharge. We opted
16 instead to draft a rather substantial comment that
17 provided certain guidelines of things that a guardian
18 might need to do to discharge their responsibilities.
19 Those guidelines, for ease of reference, you can find on
20 page four and five of the report. There's also somewhat
21 of a disclaimer that says that these suggestions may not
22 be relevant in every case, are not exclusive, and may be
23 insufficient to discharge the guardian's responsibilities
24 in every case.

25 The comment also references Chapter 107 of

1 the Family Code as providing additional guidance. Chapter
2 107 deals with the usage of ad litem in suits affecting
3 the parent/child relationship such as termination
4 proceedings, custody, and visitation cases. The report
5 also makes reference to the ABA standards of practice for
6 lawyers representing a child in abuse and neglect cases
7 and the American Academy of Matrimonial Lawyers standards
8 relating to the appointment of counsel and guardians ad
9 litem for children in custody or visitation proceedings.
10 I think the website to the ABA guidelines you'll find in
11 Footnote 25 on page six. We have the permission of the
12 American Academy to reprint and distribute their
13 guidelines, to the extent that's useful.

14 On page seven in the report you'll find a
15 brief discussion of dual representation. Remember that
16 the statute authorizes the trial court to appoint a
17 guardian, who if that guardian is an attorney, then that
18 person may fulfill both roles, serving as the attorney ad
19 litem and the guardian ad litem. That's being done, as I
20 understand it, significantly in Bexar County where one
21 person is acting in both roles. Most of the other
22 counties that I'm aware of are using two distinct
23 individuals to fulfill those roles. Certainly that is my
24 individual preference, because I think there is a
25 potential for an inherent conflict between the guardian

1 and the ad litem's role if one person is trying to
2 discharge it, but that's really not a subject that we need
3 to be debating today.

4 On page eight you'll see a discussion of the
5 duration of the appointment. This is going to become
6 significant as we start to define what role, if any, the
7 guardian should have in the appellate process. Rule 1.8
8 of the parental notification rules provides that the
9 attorney ad litem must represent the minor in the trial
10 court and in any appeal to the court of appeals or the
11 Supreme Court. A close reading of the rule suggests that
12 the attorney should also participate in any hearing before
13 a judge assigned to consider issues such as
14 disqualification, recusal, or objection as they relate to
15 the proper selection of the judge to hear the bypass
16 proceeding itself.

17 There is no provision in the statute, no
18 provision in the rules on the duration of the guardian ad
19 litem's appointment, and I'll get back to that in a little
20 bit when I start talking about our specific proposals of
21 language that we would like to change. Also on page eight
22 you'll find a discussion of immunity. This is a really
23 critical point. I cannot imagine that guardians and
24 attorneys ad litem are willing to be appointed in these
25 cases without giving some significant pause as to immunity

1 and liability issues. Section 33.006 of the statute
2 provides a qualified immunity for a guardian, basically
3 states that a guardian active in the course and scope of
4 employment is not liable for damages arising from an act
5 or omission committed in good faith unless the conduct
6 relates to a recommendation or opinion that is willfully
7 wrongful, given with conscious indifference, reckless
8 disregard, bad faith, malice, or with gross negligence.

9 Now, it has been suggested by several
10 commenators that a guardian may well face liability for
11 deliberate disclosure of confidential records, which is
12 something we need to be concerned about, but given the
13 potential liability issues, there's good reason for at
14 least the subcommittee to question why the guardian should
15 not be able to obtain the full court record, including the
16 reporter's record, in order to demonstrate if it turns out
17 to be necessary, what steps he or she had taken to
18 discharge their responsibility and what information they
19 were able to glean from the minor or her other witnesses
20 during the bypass hearing itself.

21 On page nine there's a brief reference to
22 other appointments. I must tell you that we have received
23 some anecdotal information suggesting that some guardians
24 have taken the position that by being appointed to
25 represent the best interest of the child they are

1 representing the fetus. One of the proposals that I'll
2 mention in a minute will amend language to alter that
3 misperception. Certainly the position that Pemberton,
4 Orsinger, and I took in the LAW REVIEW article was that
5 the ad litem does not function as the advocate for the
6 fetus, and we have looked at other cases or other states
7 that have parental notification statutes in the Louisiana
8 Supreme Court, as I recall, and I think several others
9 have specifically articulated that the fetus is not a
10 party to the proceeding and the guardian does not act to
11 protect the role of the fetus.

12 So against all of that backdrop, we come to
13 what the subcommittee believes is a fundamental right of
14 notice for the guardian ad litem, and I have to tell you
15 that the first time I think in the two and a half years I
16 have been working with these rules the subcommittee was
17 unanimous in making its recommendation on this particular
18 area. We focused initially on the right to notice of the
19 trial court and expanded our focus from there to a
20 discussion of what role the guardian should have in the
21 appellate court, if any. The rules as they currently
22 exist provide that documents and information may be
23 disclosed when expressly authorized, and an order, ruling,
24 opinion, or clerk's certificate may be released to the
25 guardian ad litem. The anecdotal information suggested

1 that the guardians were not able to get any other
2 paperwork other than the court's ruling itself.

3 We amended one of the comments to provide
4 similarly a minor's attorney and guardian ad litem must,
5 of course, have access to the case file to the extent
6 necessary to perform their respective duties. This
7 amendment which happened last March generated some
8 controversy because it allowed the guardian to obtain the
9 verification page, which is the only document anywhere in
10 the court's file that contains the true identity of the
11 applicant, but it was believed that for purposes as
12 significant as a guardian being able to determine whether
13 he or she might have a conflict, such as the applicant
14 happened to be their next door neighbor's daughter or
15 their best friend's daughter, that before the hearing even
16 ensued and they came face-to-face that the guardian might
17 need to be able to obtain that information and opted not
18 to be appointed in that particular case.

19 Finally, and this is what prompted the
20 request that we reconvene and study this issue. You may
21 recall at the last full meeting of this committee we
22 suggested -- we being the subcommittee -- suggested a
23 technical correction to the rule on the dissemination of
24 amicus briefing, and we asked to change the language so
25 that the clerk would give notice of the filing of the

1 amicus brief to the minor rather than to the party since
2 the minor is the only party to the proceeding, and the use
3 of the plural "parties" was misleading. This committee
4 altered that language further by providing notice would
5 issue to the minor's attorney and by implication
6 suggesting that the guardian would not receive such
7 notice.

8 So against this backdrop we were asked to
9 completely study the proper role of the GAL and to come
10 back at today's meeting and make some recommendations to
11 you. In doing that, we reviewed the Rules of Civil
12 Procedure and interpreted case law involving guardians
13 appointed in friendly suits where the minor is in conflict
14 with the next friend. We also looked to the Family Code,
15 which mandates the guardian in certain suits affecting the
16 parent/child relationship. It actually authorizes it in
17 almost all other ones. Unfortunately suits affecting the
18 parent/child relationship are statutorily defined in the
19 code as far as what is and what is not the SAPCR. Chapter
20 33 proceedings are not SAPCRs so that the provisions of
21 the guardians ad litem contained in Chapter 107 do not
22 specifically apply. Guardians in both the other contexts,
23 either under the Rules of Procedure or under the Family
24 Code, are accorded absolute rights of notice. They're
25 entitled to notices of hearings. They're entitled to

1 notice of the filing of pleadings. They're entitled to
2 notice of appeal when it is taken, and they get copies of
3 all of that information. There is even case law
4 suggesting that the guardian has the right to initiate an
5 appeal on behalf of the minor if the guardian determines
6 that that's in the best interest of the child, even if the
7 parents do not agree and even if the parents are not
8 parties to the appeal.

9 The subcommittee also, having heard
10 additional anecdotal information, recognizes that there
11 are ad litem operating in some areas of the state with an
12 agenda, but the overriding concern is that we must address
13 the rules to the vast majority of the ad litem who are
14 exercising their role appropriately.

15 So we have offered six rule amendments for
16 discussion this morning. The last five are really
17 conditioned upon the first one, which would clearly
18 mandate that the GAL is appointed to represent the minor
19 applicant, which will remove the conflict about which
20 minor is to be represented. If you'll turn to page 11 of
21 the report you'll see the language as we have drafted it.
22 I want to emphasize as we go through this discussion,
23 particularly about identifying clearly that the fetus does
24 not have an advocate in these proceedings, that it has
25 strongly been the position of the subcommittee that it's

1 not our role to debate the religious, moral, and ethical
2 underpinnings of that conclusion. We're simply trying to
3 implement the statute and to make it workable in the court
4 system.

5 So the first proposal is to amend Rule
6 2.3(a), which deals with the court's duties, so that it
7 would read, "Upon receipt of an application from the
8 clerk, the court must promptly appoint a qualified person
9 to serve as guardian ad litem for the minor applicant."

10 Chip, you want to take these one by one or
11 do you want me to give you a highlight of all of them
12 before we start discussing them individually?

13 CHAIRMAN BABCOCK: Ann, I'd prefer to go one
14 by one.

15 HONORABLE ANN McCLURE: Okay. Then I would
16 urge the committee to adopt the amendment to Rule 2.3(a).

17 CHAIRMAN BABCOCK: Okay. Is everybody with
18 us on page 11 of the report? Is there discussion with
19 respect to Proposal No. 1 found on page 11 of the
20 subcommittee's report?

21 MR. LOW: Chip, I have one question.

22 CHAIRMAN BABCOCK: Yeah, Buddy.

23 MR. LOW: When they say "qualified person,"
24 the only people that are qualified are those in the five
25 categories of 33.003(f); isn't that correct?

1 CHAIRMAN BABCOCK: I think that's right,
2 but, Ann, that's right, isn't it?

3 HONORABLE ANN McCLURE: Right. The statute
4 talks in terms of appropriate people. Certainly the case
5 law indicates that it must also be a qualified person.
6 The use of the word "qualified" is already in the rule
7 now.

8 MR. LOW: I understand. But if -- there may
9 be a conflict. Somebody might think -- well, they think
10 they're qualified, but maybe they don't fit in the five
11 categories. Wouldn't you have it a person qualified under
12 -- as outlined under 33.003(f)? Wouldn't you point that
13 out so there wouldn't be a deviation from the statute?

14 HONORABLE ANN McCLURE: I don't think it's a
15 deviation from the statute as it exists. I think if you
16 look at the legislative history the use of the word
17 "appropriate" means that it needs to be a qualified
18 person.

19 MR. LOW: I don't mean that the language is
20 a deviation. I mean the appointment may be. Somebody may
21 say, "Well, I think they're qualified," but they might not
22 be a person under that category. I just -- a lot of times
23 we refer to the qualifications under specific sections,
24 and that's all I'm saying, and you know more about it than
25 I do, so whatever you think.

1 MR. EDWARDS: Well, the fifth category of
2 qualified persons is "another appropriate person selected
3 by the court," and so if the court selects them as
4 appropriate, unless they abuse their discretion, it looks
5 to me like it can be anybody.

6 MR. LOW: Well, it possibly can, but a lot
7 of times when we have a rule we refer to it if there's a
8 statute and we even put footnotes leading to the statute.
9 If that doesn't bother anybody, I probably won't be
10 involved a lot in that, so it won't bother me.

11 CHAIRMAN BABCOCK: Anybody else got any
12 thoughts about that or anything else with respect to this?

13 Yeah, Carl.

14 MR. HAMILTON: There's a typographical error
15 in the word "receive" --

16 HONORABLE ANN McCLURE: It should be
17 "receipt." You're right.

18 CHAIRMAN BABCOCK: Yeah.

19 MR. LOW: You know, I hate to ask, but I
20 have one more question.

21 CHAIRMAN BABCOCK: Have as many more as you
22 want, Buddy.

23 MR. LOW: Was there any discussion -- they
24 say "clergy." I mean, what if you appoint a Catholic
25 priest and he's totally against this? Was there any

1 discussion in that about -- I mean, maybe that's a topic
2 we shouldn't even discuss, and if it is, well, I didn't
3 say it, but --

4 HONORABLE ANN McCLURE: Well, there has been
5 a great deal of discussion in the subcommittee about that,
6 but that's in the statute, and given that it's in the
7 statute, we did not feel it was --

8 MR. LOW: Well, no, I understand.

9 HONORABLE ANN McCLURE: -- appropriate for
10 us to suggest that that would not be an appropriate or
11 otherwise qualified person.

12 MR. LOW: I know you couldn't. I was just
13 curious if I was the only one that thought of something
14 like that.

15 HONORABLE ANN McCLURE: No. No. We have,
16 and as I understand, there has been some anecdotal
17 difficulty with that; but as I mentioned in the beginning,
18 that was part of the compromise, as I understand it, in
19 the Legislature about allowing the minor to consult with
20 someone other than a parent in order to get -- to fulfill
21 the requirement of the notification.

22 MR. LOW: All right. Thanks.

23 HONORABLE ANN McCLURE: Sure

24 CHAIRMAN BABCOCK: Okay. Carlyle.

25 MR. CHAPMAN: Isn't there a veneer on the

1 proposed rule or on the rule --

2 HONORABLE ANN McCLURE: I beg your pardon?

3 MR. CHAPMAN: Isn't there a veneer on the
4 proposed or the rule where we say in No. 5 "another
5 appropriate person" that implies that all persons who are
6 appointed should be appropriate. I mean, it seems to
7 imply that.

8 HONORABLE ANN McCLURE: Yes, I think it is
9 implied. And, again, that language you're referring to
10 comes out of the statute, not out of the rule.

11 MR. CHAPMAN: Thanks.

12 CHAIRMAN BABCOCK: Okay. Any other
13 comments? Discussion?

14 Seeing nothing further, everybody that's in
15 favor of Proposal No. 1 as listed on page 11 of the report
16 signify by raising your hand, please.

17 Everybody opposed raise your hand. Ann, it
18 carries by a unanimous vote of 18 to 0.

19 HONORABLE ANN McCLURE: Thank you. Proposal
20 2 would amend Rule 1.3(d). 1.3(d) now provides that
21 notice is required to the minor's attorney. We would
22 alter this rule to require notice to the minor's
23 representatives, plural, meaning obviously the attorney ad
24 litem and the guardian ad litem. It would require that
25 all service and communications from the court to the minor

1 must be directed to the minor's attorney with a copy to
2 the guardian, copy of any document filed by the minor's
3 attorney with the court shall be served instanter upon the
4 guardian, a copy of any document filed by the guardian
5 with the court shall be served instanter on the minor,
6 recognizing that these requirements can't take effect
7 until all players have been properly appointed by the
8 court.

9 CHAIRMAN BABCOCK: Okay. Discussion about
10 Proposal 2, also found on page 11? Uncharacteristically
11 quiet today, Justice McClure.

12 HONORABLE ANN McCLURE: Is that because I'm
13 not there and Richard isn't cross-examining me?

14 CHAIRMAN BABCOCK: It may be more because
15 Richard's not here.

16 MR. YELENOSKY: Well, I'll take up the
17 slack.

18 HONORABLE ANN McCLURE: I sent Richard an
19 e-mail yesterday of the full report and asked for his
20 input since I knew he wouldn't be there, and my e-mail is
21 remarkably silent from him.

22 CHAIRMAN BABCOCK: Uh-huh.

23 MR. YELENOSKY: Well, I do have a question.
24 I hope it's not because I came in late, but does the term
25 "representatives" need to be defined or replaced with

1 "attorney ad litem and/or guardian ad litem"?

2 CHAIRMAN BABCOCK: Did you hear that?

3 HONORABLE ANN McCLURE: I did hear it, and I
4 was contemplating silently. I'm sorry. I'm not opposed
5 to that if you want to specify it. I imagine that perhaps
6 people thinking imaginatively might want to incorporate
7 some sort of parental right --

8 MR. YELENOSKY: Right, exactly.

9 HONORABLE ANN McCLURE: -- as a
10 representative, so perhaps we could just call it "notice"
11 or "notice required to minor" and delete "representatives"
12 altogether rather than further define it.

13 CHAIRMAN BABCOCK: Why don't we just say
14 "notice"?

15 HONORABLE ANN McCLURE: "Notice" is good.

16 CHAIRMAN BABCOCK: Anybody opposed to that?
17 Good catch, Stephen. Okay. What other comments? I don't
18 see any other hands up.

19 MR. DUGGINS: Chip, let me ask a question.

20 CHAIRMAN BABCOCK: Yeah, Ralph.

21 MR. DUGGINS: We say in the third line "to
22 the minor." To be consistent with the change that we just
23 approved or voted on in 2.3(a) should that be "applicant,"
24 "minor applicant"?

25 HONORABLE ANN McCLURE: I think that's a

1 good change as well.

2 CHAIRMAN BABCOCK: "Be directed to the minor
3 applicant's," apostrophe S.

4 HONORABLE ANN McCLURE: No, it would be
5 "minor applicant."

6 CHAIRMAN BABCOCK: Right.

7 HONORABLE ANN McCLURE: Meaning Jane Doe.

8 CHAIRMAN BABCOCK: Right.

9 JUSTICE HECHT: Well, I think "minor" is
10 used throughout the rules.

11 HONORABLE ANN McCLURE: It is.

12 JUSTICE HECHT: So I wonder if you need some
13 global definition or something rather than -- because I'm
14 just looking down through the rule. You're going to have
15 to change it 50 times.

16 MR. YELENOSKY: There's only one minor in
17 this, right?

18 CHAIRMAN BABCOCK: Excuse me?

19 MR. YELENOSKY: There's not much opportunity
20 for confusion as to which minor. Does it have to say
21 "applicant"?

22 HONORABLE SARAH DUNCAN: Actually when you
23 were gone, apparently some people are interpreting that to
24 mean the fetus.

25 MR. YELENOSKY: To mean what?

1 HONORABLE SARAH DUNCAN: To mean the fetus.

2 MR. YELENOSKY: Oh, I'm sorry. Well, that
3 is something I missed because I came in late.

4 HONORABLE SARAH DUNCAN: Misinterpreting.

5 MR. WATSON: They are interpreting "child"
6 to mean fetus.

7 CHAIRMAN BABCOCK: Well, the issue is
8 whether or not we change "minor" in this proposed Rule
9 1.3(d) to "minor applicant's"; but as Justice Hecht points
10 out, that if we're doing that to conform with the change
11 we just recommended, we're going to have to do it in the
12 whole rule to be consistent.

13 HONORABLE ANN McCLURE: Well, or we could
14 insert one generic rule under the general provisions in
15 Rule 1 that any references to the minor refers to the
16 minor applicant.

17 CHAIRMAN BABCOCK: What's everybody think
18 about that? Judge Brown thinks that's a good idea.

19 MR. YELENOSKY: Or you could replace "minor"
20 with "applicant" without --

21 CHAIRMAN BABCOCK: Yeah. But we don't want
22 to have to --

23 MR. YELENOSKY: Do that.

24 CHAIRMAN BABCOCK: -- dig into the whole
25 rule. What do you think, Justice Hecht? Would that be a

1 way to fix it?

2 JUSTICE HECHT: I think.

3 CHAIRMAN BABCOCK: Okay. Ann, could you
4 draft some language to that effect?

5 HONORABLE ANN McCLURE: Yes. And I think
6 probably the best place to put it would be in 1.1. "These
7 rules govern proceedings for obtaining a court order
8 authorizing a minor to consent to an abortion without
9 notice." We could put it right at the end of the first
10 sentence. "All references throughout these rules to
11 'minor' refers to the minor applicant."

12 HONORABLE HARVEY BROWN: In which case I
13 guess we're going to withdraw the amendment to 2.3?

14 HONORABLE ANN McCLURE: I would specifically
15 like to keep it in there just so it's real clear because,
16 generally speaking, the guardians, some of whom may not be
17 attorneys, are going to be looking at the specific
18 language that's under the guardian provision of the
19 statute. I'd like to have it there as well, but I think
20 that's the only other place it needs to be.

21 CHAIRMAN BABCOCK: Yeah, but if we have the
22 global language you would withdraw the minor's applicant
23 language from 1.3(d), right?

24 HONORABLE SARAH DUNCAN: No. No. That's
25 what Ann was just saying, is that she wouldn't.

1 CHAIRMAN BABCOCK: I'm on 1.3, not 2.3.

2 HONORABLE SARAH DUNCAN: Oh, yeah. Sorry.

3 CHAIRMAN BABCOCK: Leave it in 2.3?

4 HONORABLE ANN McCLURE: Right.

5 CHAIRMAN BABCOCK: Because we just voted on
6 that, but we don't need to revise 1.3. Okay?

7 HONORABLE SARAH DUNCAN: Gotcha.

8 CHAIRMAN BABCOCK: All right. Yeah, Carl.

9 MR. HAMILTON: Is there a rule somewhere
10 that defines what we mean by "served"?

11 HONORABLE ANN McCLURE: No. But there is a
12 rule that says that generic Rules of Procedure also apply.

13 MR. HAMILTON: So you can mail it instanter?

14 HONORABLE ANN McCLURE: Instanter is defined
15 in the rules. "Instanter means immediately without delay.
16 An action required by these rules to be taken instanter
17 should be done at the first possible time and with the
18 most expeditious means available," which to me would
19 indicate hand-delivery or fax if possible.

20 CHAIRMAN BABCOCK: But Carl's point is if
21 the term "served" is defined, you could sprint down to the
22 mailbox and stuff the letter in real quick.

23 HONORABLE ANN McCLURE: But "instanter"
24 modifies "served."

25 CHAIRMAN BABCOCK: Okay. Does that satisfy

1 you, Carl?

2 MR. HAMILTON: It's all right with me if
3 it's all right with Judge McClure.

4 CHAIRMAN BABCOCK: Any other comments? All
5 right. Hearing no further comments, everybody that is in
6 favor of Proposal No. 2, which is to amend Rule 1.3(d),
7 with the modification that we've made here to change the
8 title of this just to plain "Notice," raise your hand.

9 All opposed? It passes by a unanimous vote
10 of 19 to nothing.

11 HONORABLE ANN McCLURE: Terrific. All
12 right. Proposal 3, this is the one that generated some
13 discussion at the last meeting. Last March when the rules
14 were amended we adopted a provision to allow for the
15 filing of amicus briefing. Just as a historical reference
16 for those in the room who may not remember what gave rise
17 to this discussion, after the first Jane Doe case went up
18 to the Supreme Court it was remanded back to the trial
19 court, and it was certainly possible that the case would
20 wing its way through the appellate process again, so there
21 were two groups, to my knowledge, that wanted to file
22 amicus briefs in all of the intermediate courts because
23 they weren't obviously aware as to which of the
24 intermediate courts the case would proceed in the event
25 the trial court denied the application a second time.

1 The rules were designed to allow for two
2 types of amicus briefing. One, which would be generic
3 briefing on such issues as constitutionality of the
4 statute, perhaps addressing the open courts provision,
5 perhaps addressing whether it's a case or controversy, a
6 number of issues that would relate to all of these cases
7 and not a particular fact case; and we also recognized
8 that there may be circumstances in which someone, most
9 likely a guardian ad litem, would want to offer a brief in
10 a particular appeal from the denial. So we created two
11 different mechanisms.

12 Rule 1.10(a) deals with the confidential
13 case-specific brief, and it provides that a nonparty who
14 is authorized to attend or participate in a particular
15 proceeding under Chapter 33 may submit an amicus brief
16 addressing matters specific to the proceeding. The way it
17 was drafted originally, and it was an oversight on my
18 part, but it referred to requiring the clerk of the
19 court -- and this really related to subsection (b) "to
20 provide notice to the parties," plural, and of course, the
21 minor is the only party. So at the last meeting the
22 subcommittee recommended a change from "the parties,"
23 plural, to "service upon the minor," and I suggested to
24 you that we leave it just referencing the minor and not be
25 explicit as to whether it was the attorney ad litem or the

1 guardian ad litem because the subcommittee had not fully
2 addressed the proper role and it had been somewhat of a
3 heated debate as to what that proper role was.

4 This committee opted to only provide notice
5 to the attorney and to leave out any reference to the
6 guardian. So we were at the point when we reconvened of
7 wanting to insert language to allow notice to the
8 guardian. If we're going to allow notice to the guardian
9 of the general generic amicus briefing, there needs to be
10 also some mechanism for them to get a copy of a brief that
11 is a case-specific brief.

12 Now, most of the time the guardian can
13 settle for herself that's going to be the one that's
14 likely to file the case-specific brief, but it's not
15 outside the realm of possibility that there might be a
16 representative of the department if there is a sexual
17 abuse involved, whether a witness or not, would be able to
18 submit a brief is another issue, but subsection (a) has
19 been amended by the subcommittee for your approval to
20 require that a confidential case-specific brief be served
21 on the minor's attorney and the guardian ad litem.

22 Subsection (b), we would recommend that when
23 an appeal of the proceeding is filed, the clerk of the
24 court of appeals or the Supreme Court must notify the
25 minor's attorney and the guardian ad litem of the

1 existence of any brief filed under this subsection. The
2 bold language that you see relating to instanter has
3 already been approved by this committee at the last
4 meeting. I've left it bold since we're still tinkering
5 with the language.

6 CHAIRMAN BABCOCK: Yeah. It's not bold
7 language. It's boldfaced type is what -- small
8 distinction.

9 HONORABLE ANN McCLURE: It's not what?

10 MR. TIPPS: Forget it.

11 CHAIRMAN BABCOCK: Just making a little
12 joke. Stephen.

13 MR. YELENOSKY: Is this a typo? (b) is
14 labeled "public of general briefs." Is that "public or"?

15 HONORABLE ANN McCLURE: It should be "public
16 or." You can tell I was on medication after I had my
17 procedure done.

18 CHAIRMAN BABCOCK: "Public or general
19 briefs." Good catch, Stephen. That's your second today.

20 MR. YELENOSKY: Can I retire?

21 CHAIRMAN BABCOCK: What other comments about
22 this?

23 Well, that's an appropriate period of
24 silence. Are we ready to vote on this?

25 Okay. Everybody in favor of Proposal No. 3

1 found at page 12 of the report amending Rule 1.10 signify
2 by raise your hand.

3 Anybody opposed? That passes by a unanimous
4 vote of 21 to nothing.

5 HONORABLE ANN McCLURE: We keep getting
6 people in because the vote keeps going up.

7 MR. YELENOSKY: Well, people just keep
8 waking up.

9 CHAIRMAN BABCOCK: Yeah. Well, we had some
10 people arrive, and I think there were a couple of
11 abstentions on the first two votes.

12 HONORABLE ANN McCLURE: I see.

13 CHAIRMAN BABCOCK: We're picking up steam
14 here. Let's go to Proposal 4.

15 HONORABLE ANN McCLURE: It's because it's
16 going so smoothly, and in large part I applaud my
17 subcommittee for actually bringing a unanimous report on
18 this aspect to you. It was really a matter of consensus
19 and trading and working together, and they are to be
20 commended for their efforts in doing that.

21 Proposal 4 would amend Rule 2.2(f).
22 Presently the rule provides on orders -- and this is under
23 the trial court provision -- the clerk must provide the
24 minor and the attorney ad litem with copies of all court
25 orders, findings of fact, and conclusions of law. Now,

1 there is another subdivision which I mentioned earlier
2 that says the guardian may obtain that. I think it ought
3 to be clarified here as well that they are to receive
4 copies of that from the clerk, and so the subcommittee
5 would recommend that the clerk must provide the attorney
6 ad litem and the guardian ad litem with copies of all
7 court orders, including findings and conclusions.

8 CHAIRMAN BABCOCK: Ralph.

9 MR. DUGGINS: Is there any requirement about
10 the timing of this, when this must be provided?

11 HONORABLE ANN McCLURE: Yes.

12 MR. DUGGINS: Okay.

13 HONORABLE ANN McCLURE: By statute.

14 HONORABLE HARVEY BROWN: Why do we say
15 "attorney ad litem" here when in a lot of other places we
16 say "the minor's attorney"? I mean, why don't we be
17 consistent?

18 HONORABLE ANN McCLURE: I don't object to
19 that.

20 CHAIRMAN BABCOCK: Okay. So it should be
21 "the minor's attorney"? Is that what we're going to say
22 here?

23 HONORABLE HARVEY BROWN: Uh-huh.

24 HONORABLE ANN McCLURE: I think, let me look
25 real quick that that may be the way the rule reads now.

1 It does. The rule now reads, "The clerk must provide the
2 minor and the attorney ad litem." I am not opposed to
3 changing that.

4 CHAIRMAN BABCOCK: All right. Any other
5 comments? Bonnie, is this okay with you?

6 MS. WOLBRUECK: Yes.

7 CHAIRMAN BABCOCK: Okay. All right.
8 Everybody in favor of Proposal No. 4, the amendment to
9 Rule 2.2(f) found at page 12 of the report, with the one
10 change from "attorney ad litem," changing that to "minor's
11 attorney."

12 MR. HAMILTON: May I ask one question?

13 CHAIRMAN BABCOCK: Yeah, Carl.

14 MR. HAMILTON: It says "all court orders,"
15 and I thought we previously said that there were some
16 court orders with the exception of orders and rulings
17 released under 1.4(b).

18 HONORABLE ANN McCLURE: I could not hear the
19 whole question. I'm sorry.

20 MR. HAMILTON: Are there some orders under
21 1.4(b), whatever that rule is, that don't have to be
22 provided? In your Proposal No. 2 it says "with the
23 exception of orders and rulings released under Rule
24 1.4(b), all service and communications must be directed to
25 the minor's attorney." I don't know what 1.4(b) is,

1 but --

2 HONORABLE ANN McCLURE: 1.4(b) says, "As
3 required by Chapter 33, Family Code, the application and
4 all other court documents and information pertaining to
5 the proceedings are confidential and privileged and are
6 not subject to disclosure under Chapter 552 of the
7 Government Code or to discovery subpoena or other legal
8 process, but documents and information may be disclosed
9 when expressly authorized by these rules and an order,
10 ruling, opinion, or clerk's certificate may be released to
11 the minor or the minor's guardian ad litem, the minor's
12 attorney, a person designated in writing by the minor to
13 receive the order, ruling, opinion, or certificate,
14 governmental agency or another court, judge, or clerk in
15 the same or related proceeding."

16 MR. HAMILTON: So that's not inconsistent
17 with the proposal.

18 HONORABLE ANN McCLURE: It's not
19 inconsistent, and that language, again, is already in Rule
20 2.2(f).

21 CHAIRMAN BABCOCK: Okay, Carl?

22 MR. HAMILTON: Okay.

23 CHAIRMAN BABCOCK: Okay. Anybody else?
24 Okay. Everybody that's in favor of Proposal No. 4, the
25 amendment to Rule 2.2(f) with the change that Justice

1 McClure has accepted here, changing the word "attorney ad
2 litem" to "minor's attorney" signify by raising your
3 hand.

4 Anybody opposed? That passes by a vote of
5 22 to nothing. We're still gaining.

6 HONORABLE ANN McCLURE: We keep growing.

7 CHAIRMAN BABCOCK: Let's go to Proposal
8 No. 5.

9 HONORABLE ANN McCLURE: All right. Proposal
10 No. 5 will deal with the record from the bypassed
11 proceeding. Now, we had proposed some language and
12 changed some language at our last meeting, and it got so
13 convoluted in trying to make it flow so I could accurately
14 relate to you what the history of this rule was that I
15 frankly gave up. Originally, let me read you exactly the
16 language that we had and that might make it easier for you
17 to understand where I'm going. As it exists it says, "If
18 the minor appeals or if there is evidence of past or
19 potential abuse of the minor, the hearing must be
20 transcribed instanter."

21 At our last committee meeting we were
22 debating how much evidence, does it have to be a scintilla
23 of evidence. We opted to delete that language and to come
24 up with language that said "upon request by the court or
25 the minor's attorney or if there is a request for records

1 filed by the minor's attorney then the records shall be
2 prepared instanter." Part of our concern is that that
3 gives no ability for the guardian to request a copy of the
4 record, if they choose to do so, for their own protection
5 in the event of the future liability issues.

6 The rule as it is presented would now allow
7 the court to request it, allow the minor to file a notice
8 to the clerk and court reporter to prepare records, which
9 you'll recall is a new form that we approved at the last
10 meeting. "The reporter's record must be transcribed and
11 the clerk's record compiled instanter. The court reporter
12 shall immediately upon completion provide the original,"
13 and we had originally said one copy of the reporter's
14 record to the clerk. The way it was envisioned to work
15 after our last meeting is that the clerk would have the
16 clerk's record, the reporter's record, call the attorney
17 ad litem, tell them that the record was ready so that the
18 attorney could come and prepare the record. This would
19 allow the attorney to have the record in hand before the
20 notice of appeal is filed so that any briefing that the
21 minor's attorney wanted to do could be done and filed
22 simultaneously with the notice of appeal, because all of
23 the rocket docket timetables in the appellate court are
24 triggered by the filing of the notice of appeal, and I
25 think it's fair to say that there isn't a lot of briefing

1 being done when these cases come up to the appellate
2 court, because the appellate courts are anxious to get
3 this disposed of.

4 What this rule tries to do is to require
5 that the reporter deliver two copies of the reporter's
6 record to the clerk, that a copy of the clerk's record and
7 the copy of the reporter's record shall be delivered by
8 the clerk to both the minor's attorney and the guardian ad
9 litem immediately upon completion. To facilitate
10 delivery, the clerk is to contact the attorney and the
11 guardian at the phone numbers that are provided in the
12 form notice and that once the notice of appeal is filed,
13 that the full record shall be forwarded to the court of
14 appeals.

15 Then I have also added additional language
16 that in the event no appeal is taken, the minor's attorney
17 or the guardian ad litem may request preparation of the
18 court's record and the reporter's record as provided in a
19 second form, which I have drafted. In this limited
20 circumstance the records need not be prepared instanter,
21 and the forms that follow on pages 14 and 15 implement
22 this rule. The first form has been approved already. I
23 have modified it now to include the name and address and
24 telephone number of the guardian ad litem so that the
25 clerk has a duty to notify both the attorney and the

1 guardian.

2 Because we are dealing with situations where
3 sometimes the guardian may not be an attorney, we have
4 added a caution at the bottom that "except as permitted by
5 law, no officials or court personnel involved in this
6 proceeding may ever disclose to anyone that the minor is
7 or ever has been pregnant," et cetera. Just as a caveat,
8 that, yes, you're going to be receiving the full court's
9 record, but, no, you can't disseminate it to anyone and
10 you must adhere to the requirement of confidentiality.

11 The second report -- I mean, the second form
12 deals with those circumstances in which there is not going
13 to be an appeal. There is no necessity in that instance
14 that the clerk and the reporter use break-neck speed at
15 preparing the record since there won't be an appeal, that
16 the record is going to be prepared just so that the
17 minor's attorney and guardian may have the protection of
18 something in their file to show that they have
19 appropriately discharged their responsibilities to the
20 minor; and, again, it contains the caveat of
21 confidentiality.

22 HONORABLE JAN PATTERSON: Ann, on the last
23 sentence of Proposal 5 when it says "in this limited
24 circumstance," does that refer to in the event no appeal
25 is taken?

1 HONORABLE ANN McCLURE: That was my intent.

2 HONORABLE JAN PATTERSON: Why not just say

3 "if no appeal is taken"? Because this seems to be a

4 commentary on appeals.

5 HONORABLE ANN McCLURE: All right. I don't

6 mind that.

7 CHAIRMAN BABCOCK: I think that's a good

8 change. Is that okay with you, Justice McClure?

9 HONORABLE ANN McCLURE: That is fine with

10 me.

11 MR. LOW: Chip.

12 CHAIRMAN BABCOCK: Hang on. Ralph, will you

13 yield to Buddy?

14 MR. DUGGINS: Yes, sir.

15 MR. LOW: This is really a major thing.

16 CHAIRMAN BABCOCK: See, it's a major thing

17 you're yielding for.

18 MR. LOW: Throughout the whole rule we talk

19 about "the clerk," "the court reporter," and so forth all

20 through there, but then we cut it here "or if minor files

21 notice to clerk." I mean, it doesn't change any meaning,

22 but we always call them "the clerk's records" and "the

23 court." I just wonder if there is some reason the word

24 "the" was left out.

25 HONORABLE ANN McCLURE: Because it's a form,

1 and the forms have not used the --

2 MR. LOW: Word "the"?

3 HONORABLE ANN McCLURE: "The."

4 MR. LOW: Okay. Well, you answered that.

5 HONORABLE ANN McCLURE: I just did it that
6 way for consistency.

7 CHAIRMAN BABCOCK: Now Ralph.

8 MR. DUGGINS: Should the word "minor's" be
9 inserted before "attorney" in the fifth line to make it
10 consistent with the fourth line?

11 HONORABLE ANN McCLURE: I only heard the
12 beginning of that. Should the word "minor" be inserted
13 where?

14 MR. DUGGINS: Before the word "attorney" in
15 the fifth line to make it consistent with the immediately
16 preceding fourth line?

17 HONORABLE ANN McCLURE: I don't mind that
18 either.

19 HONORABLE HARVEY BROWN: I had a mechanics
20 question about the mechanism of this. "The court reporter
21 shall immediately provide the original and two copies to
22 the clerk." Well, anecdotally I've heard a lot of these
23 hearings last until somewhat late in the afternoon, so I
24 assume that means the court reporter is preparing this
25 after the court has finished business for the day, may not

1 finish 'til, you know, late at night. Does that mean the
2 clerk is supposed to stay at the court until the
3 transcript is prepared so it can be delivered, quote,
4 "immediately" or that if it's prepared at the court
5 reporter's home she's supposed to have a messenger service
6 come get it? I just wasn't clear what we meant by
7 "immediately" there.

8 HONORABLE ANN McCLURE: I think it's being
9 done differently in different areas, and in large part
10 local rules are controlling that.

11 CHAIRMAN BABCOCK: Is there a problem? Is
12 there anything we need to address? Judge Brown, is there
13 anything you know about that --

14 HONORABLE HARVEY BROWN: No. Just if I was
15 the clerk I wouldn't know what to do, frankly; and then it
16 also says "the clerk shall deliver." Well, what does that
17 mean? I mean, does the clerk have to hire Hot Shot to
18 come deliver it to the attorney's address? I mean, we
19 give the address. That to me would suggest literally you
20 get a messenger service, and I think in the form on the
21 third line we say "deliver," but then in the middle of the
22 form right before the telephone numbers we say "made
23 available." Well, I think we should say which we want.
24 Are we going to say, "Take it to their house," or are we
25 going to say, "Tell them it's here at the court, come get

1 it"? I think we should tell them to come get it.

2 HONORABLE ANN McCLURE: Well, see, that's
3 the intention.

4 HONORABLE HARVEY BROWN: So I don't think we
5 should say "deliver."

6 CHAIRMAN BABCOCK: Okay. Where -- you're
7 talking about the third line in --

8 HONORABLE ANN McCLURE: Are you talking
9 about the rule or the form?

10 CHAIRMAN BABCOCK: Yeah.

11 HONORABLE HARVEY BROWN: I'm talking about
12 both.

13 HONORABLE ANN McCLURE: Okay.

14 HONORABLE HARVEY BROWN: So I would say on
15 the third line of the second page we shouldn't say "shall
16 be delivered by the clerk." We should say "shall be made
17 available by the clerk."

18 HONORABLE ANN McCLURE: All right.

19 CHAIRMAN BABCOCK: Is that okay with you,
20 Judge McClure?

21 HONORABLE ANN McCLURE: It is. That was the
22 intention because it says, "To facilitate delivery, the
23 clerk must immediately contact the attorney."

24 HONORABLE HARVEY BROWN: And then in the
25 form, the third line says "deliver same to." I would say

1 "make available same to," although I don't like "same."

2 HONORABLE ANN McCLURE: Well, then let's say
3 "make available."

4 HONORABLE HARVEY BROWN: Okay.

5 MR. DUGGINS: You need to make the same
6 change to the second form on page 15.

7 HONORABLE ANN McCLURE: Yes. They need to
8 be consistent.

9 All right. Those are fine.

10 CHAIRMAN BABCOCK: Okay. Nina.

11 MS. CORTELL: Judge McClure, this is Nina
12 Cortell. Do you think that the cautionary comment on
13 pages 14 and 15 is broad enough?

14 HONORABLE ANN McCLURE: Do I think the
15 cautionary wording is what?

16 MS. CORTELL: Is it broad enough? It only
17 seems to speak to the fact of the desire for an abortion
18 as opposed to --

19 HONORABLE ANN McCLURE: Well, it comes out
20 of the statute. That's where that language came from.

21 MS. CORTELL: Okay. Is there somewhere else
22 in the rules where it's made very clear that all of the
23 information is to repeat?

24 HONORABLE ANN McCLURE: Yes. Rule 1.4 says
25 -- it's entitled "Confidentiality of Proceedings

1 Required." Subsection (a) generally, "All officials and
2 court personnel involved in the proceedings must ensure
3 that the minor's contact with the clerk and court is
4 confidential and expeditious. Except as permitted by law,
5 no officials or court personnel involved in the
6 proceedings may ever disclose to anyone outside the
7 proceeding, including the minor's parent" -- it's the same
8 language -- "that the minor is or has ever been pregnant
9 or that she wants or has ever wanted an abortion."

10 MS. CORTELL: Is it clear that that would
11 apply to guardians?

12 HONORABLE ANN McCLURE: Yes.

13 MR. EDWARDS: What was the -- what was the
14 purpose of the part of the rule, the old rule, that talks
15 in terms of evidence of past or potential abuse? What was
16 the purpose of that?

17 HONORABLE ANN McCLURE: One of the
18 overriding purposes of the statute was to protect minors
19 from sexual abuse, incest, sexual indecency, sexual
20 assault, and so there is a reporting requirement. There
21 is also a basis in the grounds for obtaining the bypass to
22 parental notification that the minor has or is likely to
23 suffer from sexual abuse as a reason for not notifying a
24 parent.

25 MR. EDWARDS: Well, is there not a

1 requirement if you have evidence of abuse, isn't there a
2 criminal requirement to report it?

3 HONORABLE ANN McCLURE: Yes. And there's
4 also a separate provision in the rule and there's a
5 requirement in the statute that it be reported, and that
6 requirement extends to the court, to the attorney, and to
7 the guardian.

8 MR. EDWARDS: If it extends to the guardian
9 then why is not the guardian's request for a record, if
10 that's the basis for it, not an instanter request?

11 HONORABLE ANN McCLURE: Well, it could be.
12 It could be. The reason I have -- maybe we need a third
13 form that would address that particular situation as well.

14 MR. EDWARDS: I mean, it looks like to me
15 all we've worried about is protecting the guardian ad
16 litem from future litigation and not protecting the minor
17 if the guardian ad litem disagrees with the court about
18 the potential for -- not just the potential but of past
19 abuse and the criminal liability that could attach for not
20 reporting it.

21 HONORABLE ANN McCLURE: Well, we still have
22 in the rules that upon request by the court it shall be
23 compiled instanter, which when we originally had this
24 discussion last month that was intended to allow for the
25 preparation of the record upon the court's request to

1 deliver that to the appropriate investigating authority.

2 MR. EDWARDS: Yeah, but if there's a
3 disagreement between the court and the guardian as to what
4 constitutes abuse then there's no provision for the
5 guardian to get the record instanter in order for the
6 guardian to do whatever the guardian has to do.

7 HONORABLE ANN McCLURE: That's a very good
8 point.

9 CHAIRMAN BABCOCK: Could you fix it in this
10 last sentence by saying "If no appeal is taken, the
11 records need not be prepared instanter unless"?

12 MR. EDWARDS: Something like that. I'm not
13 really familiar with these rules enough to tell you how
14 they play with each other.

15 CHAIRMAN BABCOCK: I was looking at you, but
16 I was talking to --

17 MR. EDWARDS: Yeah. Oh, okay. He's looking
18 at you.

19 CHAIRMAN BABCOCK: Judge McClure, I'm
20 looking at you really. You can't tell that. What do you
21 think about that suggestion?

22 HONORABLE ANN McCLURE: I was trying to see
23 if we could insert something to that effect in the rules,
24 but I think it might just be easier to draft a third form.

25 CHAIRMAN BABCOCK: But Bill's point is

1 you've got to take care of it in the rule because right
2 now it says if no appeal is taken that it doesn't have to
3 be done instanter.

4 MR. EDWARDS: Right. And if you go to
5 construction where you take out the preparation of the
6 record where there's abuse or potential abuse, you know,
7 you get into the construction of things and you say,
8 "Well, we did away with that."

9 HONORABLE ANN McCLURE: All right. Well,
10 let's do it this way. Let's use some of the original
11 language that we've got now. "If there is evidence of
12 past or potential abuse of the minor, the hearing must be
13 transcribed instanter." We could insert that at the
14 beginning and then we could put "upon request by the court
15 or if the minor files a notice." We could insert
16 "guardians" in there, too.

17 MR. YELENOSKY: Chip?

18 CHAIRMAN BABCOCK: Yeah, Stephen.

19 MR. YELENOSKY: Just to help us through this
20 and when we get to the records retention, could we get a
21 clarification on that reporting requirement, because it
22 may affect some of this? My understanding was that any
23 person has an obligation to report when they have reason
24 to believe a child has been subject to abuse or neglect;
25 and, actually, I guess theoretically that could even apply

1 to the judge. Maybe there is case law on that, but -- and
2 secondly, my understanding is that a person could fulfill
3 their obligation by calling DPRS and saying, "This is what
4 I heard today from the ward for whom I'm the guardian ad
5 litem" or whatever. So there can be an instant reporting
6 orally --

7 HONORABLE ANN McCLURE: Yes.

8 MR. YELENOSKY: -- even if there's not an
9 instant transcription, but, Judge McClure, if you could
10 clarify the law on that, because that's just my
11 understanding without having any expertise.

12 HONORABLE ANN McCLURE: Well, there is a
13 general obligation to report. I mean, school personnel,
14 counselors, medical providers, all have a duty to report.

15 MR. YELENOSKY: Isn't it any person?
16 Doesn't it read "any person"? I thought it read "any
17 person" and that's why --

18 HONORABLE ANN McCLURE: Which statute are
19 you talking about?

20 MR. YELENOSKY: Well, I may be talking about
21 a different one, but, for example, I know that attorneys
22 have an obligation to report --

23 HONORABLE ANN McCLURE: Sure.

24 MR. YELENOSKY: -- despite the fact that
25 otherwise it might be client confidential, and so when I

1 was looking at the records retention part there was a
2 reference perhaps that you are referring to some different
3 statute, but if there is an all-encompassing statute that
4 swallows them then that would be the one I guess we would
5 look to.

6 HONORABLE ANN McCLURE: Well, 33.008 imposes
7 a duty on the physician to report abuse of a minor. That
8 one involves physical or sexual abuse. The duty of the
9 court, the guardian, or the ad litem is contained in
10 33.009 entitled "Other Reports of Sexual Abuse of a
11 Minor," which requires the court or the guardian or the
12 attorney to report conduct reasonably believed to violate
13 the three sections of the Penal Code that deal with sexual
14 assault based on information obtained during a
15 confidential court proceeding. They are to report to any
16 local or state law enforcement agency, to DPRS, if the
17 alleged conduct involves a person responsible for the
18 care, custody, or welfare of the child, the state agency
19 that operates, licenses, or certifies the facility in
20 which the conduct occurred or any appropriate agency
21 designated by the court.

22 MR. YELENOSKY: And then the statute that I
23 think I'm referring to, isn't there one that just talks
24 about abuse of children? And if there is, I've always
25 interpreted that to include sexual abuse so that --

1 HONORABLE ANN McCLURE: You've always
2 interpreted it to include what?

3 MR. YELENOSKY: Sexual abuse. In other
4 words, the same law that would require me to report my
5 neighbor if I had seen him or her hitting their child, I
6 thought would require me to report my neighbor --

7 HONORABLE ANN McCLURE: Right.

8 MR. YELENOSKY: -- if my neighbor's child
9 told me that she had been sexually abused by her father.

10 HONORABLE ANN McCLURE: Right.

11 MR. YELENOSKY: And so that seems to me to
12 be a requirement that applies to everyone, and we need not
13 look to these other statutory requirements to figure out
14 what one might have to do, and I don't know that it's all
15 relevant to this, but it might be.

16 HONORABLE ANN McCLURE: Well, I think that
17 the rules need to implement the specifics of the reporting
18 requirement as contained in this particular statute.

19 MR. YELENOSKY: Okay.

20 CHAIRMAN BABCOCK: Ann, what do you propose
21 to do about the issue that Bill Edwards raised?

22 HONORABLE ANN McCLURE: Was that the one on
23 the abuse as far as preparation of the record?

24 CHAIRMAN BABCOCK: Yeah.

25 HONORABLE ANN McCLURE: Okay. I recommend

1 that we insert back in language that is there now, so that
2 it would read -- and I'll read it to you. Subsection (d),
3 "Record. If there is evidence of past or potential abuse
4 of the minor, the hearing must be transcribed instanter.
5 Upon request by the court or if the minor files a notice
6 to clerk and court reporter to prepare records, the
7 reporter's record must be transcribed and the clerk's
8 record compiled instanter," and it will read the same from
9 there on out.

10 CHAIRMAN BABCOCK: Okay.

11 HONORABLE ANN McCLURE: That makes it clear
12 that even if there is any evidence presented that the
13 record is to be prepared.

14 CHAIRMAN BABCOCK: All right.

15 HONORABLE ANN McCLURE: And then it can be
16 relayed to the appropriate authorities.

17 CHAIRMAN BABCOCK: All right. How does
18 everybody feel about that?

19 HONORABLE HARVEY BROWN: Who decides if the
20 evidence creates that? I mean, the court reporter?

21 MR. YELENOSKY: The person requesting.

22 MS. WOLBRUECK: That was my question.

23 CHAIRMAN BABCOCK: Bonnie's got the same
24 problem, I think.

25 MS. WOLBRUECK: I have the same problem with

1 that. Who's going to tell me that there was abuse,
2 possible abuse, that I need to do that instanter?

3 HONORABLE ANN McCLURE: Well, that's a
4 problem that we've got with the rule as it is because
5 that's what the rule says now.

6 MS. WOLBRUECK: That's right.

7 HONORABLE ANN McCLURE: I am not aware of
8 any anecdotal information. I know there are some
9 individuals there at the hearing -- at the meeting today
10 from JDP and maybe some from DPRS. I would ask if they
11 have any information as to any problems we're hearing in
12 that regard.

13 CHAIRMAN BABCOCK: You know, rather than --
14 I want to retreat here. I want to open for discussion
15 anyway the suggestion I floated a minute ago. Rather than
16 putting that language back in at the beginning, the
17 problem we're having is instanter versus noninstanter, so
18 why don't we deal with it in that last sentence, which is
19 the sentence that creates the problem?

20 HONORABLE ANN McCLURE: I'm not following
21 you. Which last sentence?

22 CHAIRMAN BABCOCK: The last sentence of the
23 proposed rule which currently reads, "In this limited
24 circumstance the records need not be prepared instanter."

25 HONORABLE ANN McCLURE: Uh-huh.

1 CHAIRMAN BABCOCK: We've already amended
2 that to say, "if no appeal is taken."

3 HONORABLE ANN McCLURE: Uh-huh. "If no
4 appeal is taken."

5 CHAIRMAN BABCOCK: "If no appeal is taken
6 the records need not be prepared instanter," and you could
7 add a phrase that says "unless anyone thinks that there's
8 abuse," in which case it's got to be done instanter. I
9 throw that out for --

10 HONORABLE ANN McCLURE: What may be a better
11 way to handle it, in my view, is just to put it back at
12 the beginning because I think that needs to be the focus
13 of the rule and not have it buried at the end. Perhaps it
14 should be clarified to say, "If in the opinion of the
15 court, the minor's attorney, or the guardian ad litem
16 there is evidence of past or potential abuse, the hearing
17 must be transcribed instanter," and that could be put on
18 the record.

19 MR. YELENOSKY: What about the minor?

20 HONORABLE ANN McCLURE: That would enable
21 any one of the three and then you can delete this phrase
22 that is at the beginning of my rule, "upon request by the
23 court or," and then begin the next sentence, "If the minor
24 files a notice to clerk and court reporter to prepare
25 records which would relate to the appeal."

1 CHAIRMAN BABCOCK: Stephen raised a question
2 about what about if the minor thinks --

3 MR. YELENOSKY: You have to add the minor
4 under the possibility that she's the only one who thinks
5 it.

6 HONORABLE ANN McCLURE: Okay.

7 HONORABLE HARVEY BROWN: And I think you
8 should also still allow a judge to ask for the record.
9 Sometimes judges want to read a record before they make a
10 final decision. I mean, sometimes you really want to
11 reflect on your ruling a little bit. You might want to
12 read it.

13 CHAIRMAN BABCOCK: And that would be before
14 the decision to appeal is even made --

15 HONORABLE HARVEY BROWN: Right.

16 CHAIRMAN BABCOCK: -- because you don't know
17 what the ruling is.

18 HONORABLE HARVEY BROWN: Right.

19 MR. EDWARDS: It says "upon request of the
20 court."

21 HONORABLE HARVEY BROWN: Yeah, but she was
22 saying take that out.

23 HONORABLE ANN McCLURE: Hold on for me just
24 a minute. I'm drafting some language, and I'll read it to
25 you.

1 CHAIRMAN BABCOCK: See what you started,
2 Edwards.

3 MR. EDWARDS: Sorry. I could go back and
4 come in again.

5 CHAIRMAN BABCOCK: No. That was a great
6 comment. That's why we do this.

7 HONORABLE ANN McCLURE: Okay. Let's try
8 this. "If the court, the minor, the minor's attorney, or
9 the guardian ad litem believe that there is evidence of
10 past or potential abuse of the minor, then so state on the
11 record. The hearing must be transcribed instanter. Upon
12 request by the court or if the minor files a notice to
13 clerk and court reporter to prepare records, reporter's
14 record must be transcribed," et cetera. Does that get it?

15 CHAIRMAN BABCOCK: Sounds good to me. Diana
16 Philip has raised her hand. Diana go ahead.

17 MS. PHILIP: Judge McClure?

18 HONORABLE ANN McCLURE: Yes.

19 MS. PHILIP: This is Diana Philip, Executive
20 Director of Jane's Due Process.

21 HONORABLE ANN McCLURE: Yes.

22 MS. PHILIP: The first line could you insert
23 "sexual abuse" and not just "abuse"? Our minors are not
24 going to come to court if they think that the parent is
25 going to be reported.

1 HONORABLE ANN McCLURE: Well, we don't have
2 a definer in the rule now. You want to put "sexual abuse"
3 in there?

4 MS. PHILIP: Yes. I think that's what
5 everybody is familiar with because if anything is going to
6 be reported then it's going to be the pregnancy came out
7 of a sexual abuse situation.

8 MR. YELENOSKY: Well, this rule, though,
9 doesn't this rule only apply if it's with respect to the
10 reporting requirements that relate to -- that are specific
11 to this statute, but that does not --

12 MS. PHILIP: Right.

13 MR. YELENOSKY: But there's nothing we can
14 write in this rule that will negate the reporting
15 requirements of others, of any statute, and in particular
16 the other statute I referred to. So if -- I mean, I
17 understand your concern, but I'm in a quandary because if
18 a child comes in and says there's domestic violence at
19 home and the child obviously under this rule is a minor,
20 Judge McClure, doesn't everyone who hears that have a
21 reporting requirement to DPRS?

22 HONORABLE JAN PATTERSON: That doesn't
23 negate the reporting requirement, but it does affect the
24 instant request.

25 MR. YELENOSKY: Yes, but what she's

1 concerned about is the chilling effect on minors because
2 -- and I'm concerned that we can't eliminate that because
3 we can't eliminate the reporting requirement.

4 HONORABLE ANN McCLURE: Well, we're already
5 dealing with that to some extent in the instructions that
6 we've got and the information that goes out to the minor.
7 We did amend that last year. Let me see if I can find it
8 and get my finger on it, on the form. We were talking in
9 red language up front to the girls about everything being
10 confidential and then indicating to them elsewhere that
11 information was going to be provided to the authorities,
12 but one of the grounds for granting the application
13 involves physical, sexual, or emotional abuse of the
14 minor. So there is a possibility that there will be
15 testimony about physical abuse as well as sexual abuse,
16 and that was the language that we were having trouble with
17 in terms of the reporting requirement when we were
18 debating the rule originally, as I recall.

19 The statute makes it clear that the
20 physician has to report sexual or physical abuse. The
21 statute requires the reporting by the court, the ad litem,
22 the guardian of sexual abuse, but we've still got to track
23 the language in the statute that physical abuse is a basis
24 for obtaining the bypass; and, Diane, do you remember our
25 having that discussion about how to change the

1 informational packet so that the kids weren't blindsided
2 when they went into court about that?

3 MS. PHILIP: No. No. I'm not familiar with
4 that.

5 HONORABLE ANN McCLURE: Because originally
6 -- and that's in a different notebook that's in my cabinet
7 that's got that language in it, but originally the
8 instruction said, "Everything is going to be
9 confidential," and we amended it to warn them that if you
10 are using that prong as a basis for obtaining the bypass
11 that any information that you give concerning physical
12 abuse, emotional abuse, or sexual abuse, may well have to
13 be reported; and we felt it necessary to warn them up
14 front that "Don't just routinely check these without
15 giving some thought to the fact that an investigator is
16 going to show up to look at this if you make these
17 allegations."

18 So, you know, I understand what you're
19 talking about, but since the statute lists that as a
20 ground I have some concern about limiting this particular
21 rule to just sexual abuse.

22 CHAIRMAN BABCOCK: Any other comments?

23 MR. YELENOSKY: Well, only that I think it
24 is -- I mean, I take you at your word that it has a
25 chilling effect, but -- and there is maybe an issue there,

1 but I don't know that it's one we can resolve because we
2 can't change the statutes, and there's a statute saying
3 that -- as I paraphrased it and nobody's contradicted,
4 that any person would have to report abuse of a child
5 defined as a minor. So even -- no matter what we said
6 here, an attorney ad litem who reads that statute as I
7 think it's interpreted would feel that he upon or she upon
8 potential criminal liability has to report it.

9 MS. PHILIP: It's not being interpreted that
10 way across the board because I think people look at the
11 language of Chapter 33 trumping the other and because of
12 the chilling effect.

13 MR. YELENOSKY: Well, is there anybody from
14 DPRS here?

15 MR. EDWARDS: Is anybody here from the
16 district attorney's office?

17 MR. YELENOSKY: Yeah. That would help.

18 CHAIRMAN BABCOCK: Well, I mean, it seems to
19 me like we're talking about a larger issue in the context
20 of whether --

21 MR. YELENOSKY: Yeah. I guess that was my
22 point.

23 CHAIRMAN BABCOCK: -- or not the clerk's
24 record gets prepared.

25 MS. PHILIP: I just wanted to make it

1 consistent that we're talking about reporting requirements
2 and we're talking about obtaining the record if there is
3 proof of sexual abuse, because that's the way that we've
4 seen it interpreted as such. I just wanted to see that
5 consistency.

6 HONORABLE ANN McCLURE: Well, the reporting
7 requirement does limit it to sexual abuse, so to the
8 extent that we're talking about preparing the record for
9 purposes of reporting, it may be appropriate to limit it
10 to sexual abuse. I'm just saying that because there is a
11 ground which a minor can allege that involves physical
12 abuse that it may well be that that's going to be
13 reported, too.

14 CHAIRMAN BABCOCK: Justice Duncan.

15 HONORABLE SARAH DUNCAN: It seems to me that
16 we need to distinguish between statutes that require
17 reporting of a type of abuse and providing a court
18 reporter's record of a hearing to fulfill that reporting
19 requirement. I don't think there's anything in -- at
20 least the statute I'm most familiar with, that requires
21 that a court reporter's record be provided to substantiate
22 a reporting of abuse; and I don't see why we're picking
23 this particular proceeding to require not only that you
24 report the abuse to the appropriate agency, but that you
25 provide proof of the abuse through the reporter's record.

1 It seems to me that we're mixing apples and oranges and
2 using this proceeding for an illegitimate purpose, which
3 is to prove a report of abuse.

4 MR. YELENOSKY: I thought Judge McClure said
5 that was a requirement of the statute.

6 HONORABLE SARAH DUNCAN: But this statute,
7 Ann, is only limited to providing a copy of the record on
8 sexual abuse, isn't it?

9 HONORABLE ANN McCLURE: Well, it just
10 requires a report.

11 HONORABLE SARAH DUNCAN: It just requires a
12 report. So it doesn't actually require the reporter's
13 record; is that right?

14 HONORABLE ANN McCLURE: That's right.

15 HONORABLE SARAH DUNCAN: Well, then I'm
16 against providing the reporter's record to anyone if it's
17 not required by some statute.

18 MR. YELENOSKY: Well, and I can agree with
19 that, but I don't think it's going to solve the problem
20 for Jane's Due Process, and that I think, as Chip said, is
21 a bigger issue because I would imagine the young women
22 don't distinguish between whether they are going to be
23 reported by a transcript or they're going to be reported
24 by a phone call. So it's not going to solve your problem.

25 MS. PHILIP: Well, anecdotally I want you

1 folks to know that judges are the ones that usually say in
2 a hearing, "I think a report needs to be made" and nods to
3 the guardian ad litem or the attorney ad litem that a
4 report needs to be made. So we haven't really seen a
5 problem. Usually the judges are the ones who say
6 something to actually get out -- to indicate to the minor
7 whether or not a report will be made based upon the
8 testimony.

9 HONORABLE ANN McCLURE: Diane, are they
10 forwarding a reporter's record, or are they just relating
11 to you you need to check this out?

12 MS. PHILIP: They're just saying that this
13 needs to be reported, and from what I understand, the
14 attorney ad litem or the guardian ad litem whom the judge
15 nods to or makes a gesture to goes ahead and makes a phone
16 call either to Child Protective Services or local law
17 enforcement, depending upon the perpetrator. People are
18 sensitively looking at this, is what I'm trying to say, in
19 each hearing.

20 HONORABLE SARAH DUNCAN: I agree with Steve.
21 There's nothing we can do about the statutes independent
22 of Chapter 33 that require reports of abuse.

23 MR. EDWARDS: The whole discussion started
24 with the notion that the guardian ad litem needed some
25 protection and wasn't in a position to get any, and the

1 only thing that I thought we were talking about was if the
2 guardian ad litem decided he needed or she needed the
3 record instanter as opposed to later on, why can't they
4 get it instanter both for their own protection and for
5 anything else they want to do with it?

6 MR. YELENOSKY: Now we've gotten ourselves
7 into a much bigger problem.

8 CHAIRMAN BABCOCK: Yeah. We're debating a
9 much bigger issue.

10 MR. EDWARDS: I understand.

11 HONORABLE ANN McCLURE: We're debating the
12 wisdom of a rule that we've had for two years, because the
13 rule is already there that provides that if there is
14 evidence of past or potential abuse the hearing must be
15 transcribed instanter. Now, nothing is saying that that's
16 going to be turned over to anybody. Nothing in my
17 proposed changes says it's going to be turned over to
18 anybody. We're just saying it must be transcribed.

19 CHAIRMAN BABCOCK: Right, and I guess,
20 Diana, maybe the question is the language that is
21 currently there, I mean, we're -- this Proposal No. 5
22 temporarily at least was going to take that language out.
23 Now there's a motion to put it back in. Are you aware
24 anecdotally or otherwise that the language that's
25 currently there in 2.4(d) is creating a problem for

1 anybody?

2 MS. PHILIP: No.

3 CHAIRMAN BABCOCK: Under the guise of not
4 trying to fix problems that don't exist, which I've always
5 been in favor of that concept, maybe if nobody has got too
6 violent of an objection we could put that language back in
7 to solve the situation that Bill Edwards raised and
8 pointed out, and you're just talking about the timing in
9 getting this transcript. That's all we're talking about.
10 How does everybody feel about that? Bonnie.

11 MS. WOLBRUECK: The only issue that I know
12 of, the current language was a concern for the court
13 reporters because it did not say who has determined this,
14 and it just says that the record should be transcribed,
15 and I know that the court reporters had a problem with the
16 current language.

17 CHAIRMAN BABCOCK: Well, Jackson is not
18 here, so that's waived.

19 MS. WOLBRUECK: Just remember that I spoke
20 up on his behalf.

21 CHAIRMAN BABCOCK: Yeah, on his behalf.

22 HONORABLE ANN McCLURE: Bonnie, would this
23 fix it, the language about "upon request stated on the
24 record"?

25 MS. WOLBRUECK: Yes.

1 HONORABLE ANN McCLURE: Okay.

2 MS. WOLBRUECK: Yes. That was the issue.

3 CHAIRMAN BABCOCK: Yeah.

4 MS. WOLBRUECK: "Stated on the record" will
5 correct it.

6 CHAIRMAN BABCOCK: Well, how does everybody
7 feel then about putting the language that Justice McClure
8 read into the beginning or putting it back into the
9 beginning of the rule? Is that --

10 MR. EDWARDS: Let's hold on a minute on the
11 "stated on the record" thing. That means in open court.
12 You may walk out of the courtroom and in five minutes you
13 want it. How do you do it then? You have "Stated on the
14 record or requested in writing," I would suppose or
15 something. I don't know how you --

16 CHAIRMAN BABCOCK: Judge McClure, what do
17 you think about that?

18 HONORABLE ANN McCLURE: "Stated in the
19 record or requested in writing"?

20 CHAIRMAN BABCOCK: Yes.

21 HONORABLE ANN McCLURE: I don't really see a
22 problem with that.

23 CHAIRMAN BABCOCK: Okay. Edwards, you
24 realize you're going to become the father of this rule,
25 you know.

1 MR. EDWARDS: I believe that it's coming
2 back again. Forget what I said.

3 CHAIRMAN BABCOCK: All right. How does
4 everybody feel about that amendment? We've added a lot of
5 language to this rule from what's been proposed.

6 MR. CHAPMAN: Chip, can we hear it again?

7 CHAIRMAN BABCOCK: Yeah.

8 HONORABLE ANN McCLURE: Well, I'll try. "If
9 the court, the minor, the minor's attorney, or the
10 guardian ad litem believe there is evidence they will
11 either state it on the record or request it in writing"
12 -- that's going to have to get put someplace else because
13 that doesn't fit -- "of past or potential abuse of the
14 minor, the hearing must be transcribed instanter. Upon
15 request by the court or if the minor files a notice to
16 clerk and court reporter to prepare records, the
17 reporter's record must be transcribed and the clerk's
18 record compiled instanter."

19 MR. GILSTRAP: Chip, exactly where is that
20 going to be inserted?

21 CHAIRMAN BABCOCK: Beginning.

22 HONORABLE ANN McCLURE: At the beginning,
23 the first sentence after the subtitle "Record."

24 CHAIRMAN BABCOCK: And we made two other
25 changes that were less discussed, and that is we're going

1 to change "delivered" to "made available."

2 HONORABLE ANN McCLURE: Right. We're
3 inserting "minor" before "attorney and guardian ad litem"
4 in line five, and at the very last sentence we've deleted
5 "in this limited circumstance" and inserted "if no appeal
6 is taken."

7 CHAIRMAN BABCOCK: Yeah. Okay. Carl.

8 MR. HAMILTON: Just typographical, that
9 first line where it says "Notice to the clerk and court
10 reporter" should be in caps to be consistent with the rest
11 of the rule.

12 HONORABLE ANN McCLURE: All right.

13 CHAIRMAN BABCOCK: Yeah. Okay.

14 MR. GILSTRAP: We're just talking about the
15 rule, not the form right now, right?

16 CHAIRMAN BABCOCK: We're talking about the
17 rule, not the form right now. Anybody else?

18 Okay. With those modifications, all those
19 in favor of Proposal No. 5, which is the amendment to Rule
20 2.4(d) found on pages 12 and 13 of the report, raise your
21 hand.

22 All those opposed? By a vote of 17 to 2 it
23 passes.

24 HONORABLE ANN McCLURE: Okay.

25 CHAIRMAN BABCOCK: Okay. Let's go to the

1 forms.

2 HONORABLE ANN McCLURE: The first form has a
3 change, line three, changing it from "appropriate clerk to
4 prepare an instanter record of the trial, proceeding,"
5 we're going to change it to read "and make available to."

6 And I also noticed in looking at it again
7 there is a duplication in the caveat at the bottom.
8 "Except as permitted by law" appears at the beginning and
9 at the end, and I have deleted the one at the end.

10 CHAIRMAN BABCOCK: Okay. Discussion about
11 this form? Yeah, Frank.

12 MR. GILSTRAP: There's a boldface caution at
13 the bottom --

14 HONORABLE ANN McCLURE: Yes.

15 MR. GILSTRAP: -- which says that nobody can
16 ever report that the minor has been pregnant or that she
17 has ever wanted an abortion. Presumably we're talking
18 about this proceeding, but it begins and ends with the
19 phrase "except as permitted by law." Probably one of
20 those ought to be taken out.

21 MR. EDWARDS: She said she did.

22 MR. TIPPS: Done.

23 CHAIRMAN BABCOCK: It's done. Anybody else?

24 HONORABLE ANN McCLURE: I've made that
25 change.

1 MR. EDWARDS: He's now the father of the
2 law.

3 CHAIRMAN BABCOCK: Yeah, the father of the
4 form.

5 MR. EDWARDS: Of the form.

6 CHAIRMAN BABCOCK: Anybody else? Let's talk
7 about the second, the next form. The same change about
8 "deliver."

9 HONORABLE ANN McCLURE: "Make available."

10 CHAIRMAN BABCOCK: "Make available." And
11 the same change --

12 HONORABLE ANN McCLURE: Same change to the
13 caveat.

14 CHAIRMAN BABCOCK: Okay. Any other
15 discussion about either of the forms? Judge Brown.

16 HONORABLE HARVEY BROWN: Frankly, if you're
17 trying to stress the general rule, you should put the rule
18 before the exception. That's just a better stylistic
19 approach, and it puts more emphasis on the general rule,
20 so I would put the "except" at the end, not at the
21 beginning.

22 CHAIRMAN BABCOCK: Buddy.

23 MR. LOW: Chip, kind of in the middle,
24 "immediately upon completion of the record the clerk
25 contact" and so forth, in the other form we put "to advise

1 that the record was available." Here the following
2 telephone number and I guess "to" has been omitted.

3 HONORABLE ANN McCLURE: It has been.

4 MR. LOW: So you could put "advise them" if
5 you want to not put "to," "advise them that the record" --
6 but I think you need to put another word in there.

7 HONORABLE ANN McCLURE: We'll add "to" so
8 that they are consistent.

9 CHAIRMAN BABCOCK: What about Judge Brown's
10 comment about "except as permitted by law" ought to be at
11 the end, not at the beginning?

12 HONORABLE ANN McCLURE: See, I was just
13 trying to satisfy everybody. That's why I put it both
14 places.

15 MR. YELENOSKY: Well, you left it out of the
16 middle.

17 CHAIRMAN BABCOCK: Well, then let's put it
18 at the end.

19 HONORABLE ANN McCLURE: We'll put it at the
20 end.

21 CHAIRMAN BABCOCK: Okay. Anybody else?
22 Yeah, Carl.

23 MR. HAMILTON: Don't the rules allow for
24 someone other than just the attorney to request this, but
25 these forms are limited to the attorney?

1 HONORABLE ANN McCLURE: Doesn't the rule
2 allow what? I'm sorry?

3 MR. HAMILTON: The rule allows the guardian
4 or the minor to request the record, right?

5 HONORABLE ANN McCLURE: Well, not currently.

6 MR. HAMILTON: I thought that was the change
7 you made you were going to add to the beginning of that.

8 HONORABLE ANN McCLURE: The rule as I have
9 proposed it, which you-all just voted for, will allow the
10 guardian to request it as well.

11 MR. HAMILTON: Right. So the form needs --
12 the form only has a place for the attorney to --

13 HONORABLE ANN McCLURE: Oh, for the
14 signature?

15 MR. HAMILTON: Yes.

16 HONORABLE ANN McCLURE: You're right. We
17 need to add "guardian" on the signature blank. Very good.

18 CHAIRMAN BABCOCK: Okay. Any other
19 comments? Good catch, Carl. All right.

20 MR. YELENOSKY: I think he's the king of
21 catch now.

22 CHAIRMAN BABCOCK: Yeah. The forms that are
23 found on pages 14 and 15 with the changes that have been
24 described; that is, insert "make available" instead of
25 "deliver same," strike the preamble to the cautionary

1 phrase "except as permitted by law" and have it at the
2 end, and then have a signature block for the guardian ad
3 litem and then add the word "to advise" on page 15, the
4 second form. With those changes, everybody in favor of
5 these forms raises your hand.

6 Anybody opposed? By a vote of 26 to nothing
7 these forms are approved.

8 HONORABLE ANN McCLURE: Wonderful. That is
9 the conclusion of the discussion on the role of the
10 guardian ad litem. The second issue we were specifically
11 asked to address was the issue of records retention, and
12 there were two subsections here. One, we were asked to
13 also give consideration to retention of the court
14 reporter's records as well as the clerk's file and,
15 secondarily, whether we should not be not only imposing a
16 period of retention, but a mandatory destruction at the
17 end of that period. Beginning on page 16 of your report
18 you'll find a little bit of the history of the debate.

19 CHAIRMAN BABCOCK: Ann, this looks to me
20 like it's going to take a minute or so, isn't it?

21 HONORABLE ANN McCLURE: More than that.

22 CHAIRMAN BABCOCK: Yeah. And there are
23 people that are jumping up and down having to go to the
24 bathroom. So why don't we --

25 HONORABLE ANN McCLURE: Well, me, too.

1 CHAIRMAN BABCOCK: Well, we said we just
2 couldn't see that. Why don't we take about a ten-minute
3 break if that's all right with everybody?

4 HONORABLE ANN McCLURE: That would be great.
5 Thank you.

6 (Recess from 10:36 a.m. to 10:48 a.m.)

7 CHAIRMAN BABCOCK: Judge McClure, are you
8 there?

9 HONORABLE ANN McCLURE: I am here.

10 CHAIRMAN BABCOCK: Okay. All right.
11 Carlyle, come on. Carl. Carl and Carlyle.

12 Okay. We are ready to go again. Back on
13 the record, and we're talking about records retention.

14 HONORABLE ANN McCLURE: Yes.

15 MS. SWEENEY: Woo-hoo.

16 CHAIRMAN BABCOCK: Paula Sweeney is eager to
17 get started.

18 HONORABLE ANN McCLURE: And I recognize this
19 has been a subject of a great deal of controversy, and I
20 doubt seriously it's going to be any less controversial
21 today. Let me back up to the original subcommittee and
22 give you a history of how the debate has focused as we've
23 progressed. I will openly admit that the subcommittee has
24 vacillated from time to time over this issue. A lot of
25 that depends on who has been at the meetings and voted on

1 the various proposals, and as we have revisited them we
2 may have new members in attendance, other members who had
3 been there and vocal before who are no longer there. I
4 have tried historically to circulate comments of
5 everything to those to enable all viewpoints to be
6 expressed.

7 You should have received not only the
8 majority report of the subcommittee, but a minority report
9 written by Teresa Collette, and she has certainly outlined
10 some significant issues, and I understand her point of
11 view on them. So I'm going to try to present both sides
12 to ensure that everyone has the information at their
13 disposal to make an informed decision on this issue.

14 Two years ago the original subcommittee
15 recommended a specific rule to address records retention.
16 I've quoted the language on page 16 of the report. It
17 provided for retention for two years after the date the
18 child reaches the age of majority or one year after the
19 final conclusion of an action arising from the proceeding
20 that seeks to protect the interest of the minor, and also
21 included a paragraph requiring destruction 60 days after
22 the end of the retention period.

23 The Supreme Court ultimately rejected that
24 proposal and instead adopted Comment 7 to Rule 1, which
25 provides that the archival requirements relating to these

1 proceedings were to be governed by the provisions of the
2 Government Code and the provisions promulgated by the
3 Texas State Library and Archives Commission. It also
4 adopted Rule 1.3(c) that indicates that the court
5 reporter's notes, in order to ensure confidentiality, may
6 in whatever form be filed with the other court documents,
7 such as with the clerk's record.

8 The Government Code -- and we've talked
9 about this at prior meetings. The Government Code
10 provides that the commission shall issue records retention
11 schedules for each type of local government, and it has
12 established mandatory minimum retention periods. It
13 enables the local communities to by their own rules retain
14 records for periods longer than the minimum, but in no
15 instance may they be destroyed on a shorter time frame
16 than that mandated under the statute.

17 That complicates things in parental
18 notification proceedings for two reasons. The statute
19 allows that these applications be filed either with the
20 county clerk or the district clerk, and the minimum
21 retention structure is different for county records and
22 district court records. Basically the county clerk's on
23 these types of proceedings would be kept for 12 years. In
24 district court they would be kept for 20 years. There are
25 certain exceptions, one of which is the fact that some

1 county courts have family law jurisdiction. El Paso
2 County does. Other counties don't. So El Paso County
3 family court records are kept under the guidance of the
4 district court requirement, even though they may be filed
5 with the county clerk's office.

6 Additionally, there are certain types of
7 records that must be kept longer than this 20-year period.
8 For example, adoption records are kept for a longer period
9 of time. We were specifically asked to reconsider the
10 issue, I think for the third time, and to also address the
11 issue of the court reporter's notes, which are covered by
12 a separate statute.

13 Section 52.046 of the Government Code
14 provides that "On request, an official court reporter
15 shall preserve the notes for future reference for three
16 years from the date on which they were taken." Despite
17 the language that says "on request" they shall preserve,
18 the case law, including opinions of the Supreme Court,
19 indicate that it is required that they be kept for at
20 least three years and upon request may be preserved for a
21 longer period of time.

22 The majority report takes into consideration
23 the overriding concern in the legislation that because of
24 the anonymity and confidentiality restrictions on these
25 kinds of cases that the shorter the time that they're left

1 lying around the clerk's office the better. I can tell
2 you it was reported at the subcommittee meeting of
3 anecdotal information in one county, which I won't name,
4 that one of the district clerk's -- I mean, one of the
5 district judges is so concerned about the district clerk
6 gathering information on these cases that he takes the
7 file, covers it with two sheets of construction paper. He
8 purchased a laminator for his own use, and he laminates it
9 shut and then attaches to the front of it a warning that
10 "Do not open except upon court order" in order to prevent
11 obtrusive eyes from looking in and getting information and
12 potentially leaking the identity of the minor.

13 Those are extreme stories. As I said at the
14 beginning, I don't think we can be drafting rules that
15 will avoid the extremes in any situation. I think we need
16 to focus on what's happening at least mainstream.
17 However, I do recognize that the longer the records are
18 kept lying around, the greater the likelihood for
19 disclosure. One of the concerns that Richard Orsinger had
20 expressed had to do with the liability and immunity issues
21 and if the records were destroyed within a year or so
22 after the filing of the application that the guardian
23 would not be able to obtain a record in order to properly
24 defend themselves in any subsequent litigation. I think
25 we have addressed that issue by allowing the guardian to

1 go ahead and request and obtain a copy of the reporter's
2 record to keep in their own file in the event a lawsuit
3 should develop down the road. So I don't think that's as
4 much an issue now as it was when we had this discussion
5 two months ago.

6 However, as Teresa Collette points out in
7 her minority view, there are potential claims that may be
8 made with regard to the minor asserting some sort of cause
9 of action against the male who impregnated her for sexual
10 assault. We've got all sorts of other types of criminal
11 issues that may arise in the context of these proceedings.
12 I think Teresa's best argument is that although the
13 guardian and the attorney ad litem may well have copies of
14 the reporter's record and the full clerk's record in their
15 files, the minor five or six years down the line may not
16 even remember the name of the guardian or name of the
17 attorney in order to be able to get in touch with them to
18 be able to obtain a copy of the record should she decide
19 at that point that she wanted to pursue some sort of cause
20 of action.

21 I know that Judge McCown particularly has
22 voiced his concerns about having exemptions and exceptions
23 to the traditional retention policy. So what the majority
24 has recommended is, first of all, that we require that the
25 reporter's notes be filed with the clerk's record. That

1 will at least ensure that everything is in one place and
2 that we can avoid or at least lessen the likelihood that
3 there is going to be inadvertent disclosure so that
4 everything will be kept in one location. You will find
5 the draft of that in pages 18 and 19 in your report.

6 As I mentioned, there is an existing rule
7 that provides that the court reporter's notes may be
8 permitted to be filed with the clerk's record. We think
9 that ought to be made mandatory. I've then gone on and
10 suggested that the clerk must retain the case files,
11 including the reporter's notes, until one year from the
12 date the application is filed. We've also recognized that
13 nowhere in our discussion have we talked about what we do
14 with the appellate court record, and the appellate court
15 record is going to contain everything that the trial
16 court's record does, with the exception, perhaps, of the
17 verification page, although the appellate judges have the
18 ability to obtain the verification page as well in order
19 to address issues of disqualification or recusal. So
20 we've included language that in the event an appeal is
21 taken, the appellate court clerk must retain the case
22 file, including the reporter's record, for one year from
23 the date the notice of appeal is filed and then destroy
24 the case file within 60 days thereafter.

25 It was recommended to us by several of the

1 clerks that there should be a requirement for the
2 mandatory destruction even after the minimum retention
3 period passes so that we can purge the records and
4 eliminate the necessity of allowing them to hang around in
5 the event we have someone who would like to have access to
6 them.

7 I don't think there's any easy resolution to
8 this issue. I suspect a number of you have a lot of your
9 own ideas on the records retention. I do think the
10 statute gives the Supreme Court the authority by rule to
11 specify how these records are to be treated, both as to
12 the clerk's file and to the court reporter's record.
13 52.046(c) allows the Supreme Court to adopt rules
14 regarding the duties, and (c) says the official court
15 reporters in all civil judicial proceedings, and the
16 duties include the duty of retention of the record.

17 I do think, as I mentioned, that Teresa
18 raises some good issues, and so while I voted with the
19 majority on this instance, I want you to have all of the
20 information available so that you can debate it amongst
21 yourselves. I don't know if Judge McCown is there today,
22 but I know --

23 MR. YELENOSKY: You would have heard from
24 him.

25 CHAIRMAN BABCOCK: Yeah, you probably would

1 have heard from him already if he was here.

2 HONORABLE ANN McCLURE: Well, I sort of
3 suspected that.

4 CHAIRMAN BABCOCK: Ann, let me ask you a
5 couple of questions. First, was Teresa the only dissenter
6 from the views of the majority?

7 HONORABLE ANN McCLURE: Yes.

8 CHAIRMAN BABCOCK: And how many people
9 were -- on the committee voted, actually voted on this?
10 On the subcommittee.

11 HONORABLE ANN McCLURE: Five.

12 CHAIRMAN BABCOCK: So it was four to one?

13 HONORABLE ANN McCLURE: Teresa was not at
14 the meeting. She had a conflict and was not at the
15 meeting. I knew of her attentions on this issue, and so I
16 really wanted her to be able to voice her input on it, and
17 when I circulated the draft she prepared the minority
18 report. We had done that in the past, particularly with
19 the open courts provision and open records provision back
20 two years ago.

21 CHAIRMAN BABCOCK: Okay.

22 HONORABLE ANN McCLURE: Teresa was the only
23 voice on the minority. The sides that were at the meeting
24 were Susan Hays of Akin Gump in Dallas, Marilyn Shram from
25 DPRS, Judge Bishop from San Antonio, myself, and Judge

1 DeShazo from Houston participated by conference call, and,
2 of course, Chris Griesel was there.

3 CHAIRMAN BABCOCK: Okay. All right. Let me
4 ask you one other question. The Court, it appears to me,
5 the Supreme Court has voted on this and expressed a
6 preference for the archival requirements in the Family
7 Code and the Government Code. Why do we think that
8 they -- they're going to change their mind or do we --

9 HONORABLE ANN McCLURE: I don't know that
10 they will. I know we were asked to revisit the issue.

11 CHAIRMAN BABCOCK: Okay. And Chris is not
12 here. I'm forgetting who asked us to revisit the issue.
13 Was it the Court?

14 HONORABLE ANN McCLURE: There were some
15 concerns raised last March when we were promulgating the
16 amendments to the rules, and it was about that same time
17 that Jane's Due Process was formed in Dallas, and one of
18 the issues that they raised was not only to comment on the
19 rule amendment but to offer comments on the existing
20 rules, and that was one of the issues that they raised.
21 Diana, is that an accurate recitation?

22 MS. PHILIP: I believe so.

23 HONORABLE ANN McCLURE: Yeah. And I was
24 originally asked individually as chair of the subcommittee
25 to address some of their concerns and as to whether we

1 needed to reconstitute the subcommittee to talk about some
2 of those things, and we did reconstitute at the direction
3 of the Court to address not only their comments to the
4 amendments but certain other issues that they raised.

5 MR. YELENOSKY: What were their comments?

6 HONORABLE ANN McCLURE: Okay.

7 CHAIRMAN BABCOCK: On the record retention
8 issue.

9 MR. YELENOSKY: Yeah. Yeah.

10 HONORABLE ANN McCLURE: Oh, what were their
11 comments on record retention? One year or less.

12 MR. YELENOSKY: That was Jane's Due Process'
13 input?

14 HONORABLE ANN McCLURE: Yes. Yes. And the
15 subcommittee ultimately decided that one year or less is a
16 bit ambiguous, that we would make it one year from the
17 date of the filing of the application.

18 CHAIRMAN BABCOCK: Unless there's an appeal.

19 HONORABLE ANN McCLURE: I beg your pardon?

20 CHAIRMAN BABCOCK: Unless there's an appeal.

21 HONORABLE ANN McCLURE: Unless there's an
22 appeal.

23 CHAIRMAN BABCOCK: Okay. And so the two
24 views we have -- well, we have three views really. We
25 have the Court's Comment 7, which references to the

1 statutes.

2 HONORABLE ANN McCLURE: Right, which is
3 supported by Judge McCown. He has passed and circulated
4 e-mails to that effect.

5 CHAIRMAN BABCOCK: Right. So we have the
6 Court's -- the last expression from the Court; and then we
7 have the subcommittee majority view, which is one year
8 from target dates; and then we have Teresa Collette's
9 until the age of majority plus two years. So those are
10 the three --

11 HONORABLE ANN McCLURE: Those are the three
12 options.

13 CHAIRMAN BABCOCK: -- options. Okay. Since
14 the subcommittee has worked very hard on this, let's go
15 with their majority report first, and the recommendation
16 that they make is found at pages 18 and 19 of their
17 overall report, and what comments do we have about that by
18 anybody? But maybe before we start that, we'll ask
19 Justice Hecht to comment on the last 15 --

20 JUSTICE HECHT: Yeah.

21 HONORABLE ANN McCLURE: Well, that would
22 short-circuit everything.

23 CHAIRMAN BABCOCK: Yeah. Justice Hecht,
24 Justice McClure has just taken us through this record
25 retention matter, and there are three views expressed.

1 One is represented on page 16, the Supreme Court's Comment
2 7, which says the archival requirements relating to the
3 proceedings shall be governed by the Family Code and the
4 Government Code and the schedules promulgated by the state
5 library. The subcommittee was asked to revisit this
6 issue, partly in reaction to comments that Jane's Due
7 Process made, and the majority of that committee came up
8 with a proposal of having the records retained for a year,
9 unless there's an appeal, and then there are some other
10 things.

11 And then there was a dissent by one person,
12 Teresa Collette, who wanted to retain the records until
13 the applicant reached the age of majority plus two years,
14 for reasons stated. The question is, is the Court -- does
15 the Court want a full-blown revisit, revisitation of this
16 issue, or are you-all pretty set on the relying upon the
17 statutes, which is the Judge McCown view of the world?

18 JUSTICE HECHT: Well, we haven't talked
19 about it, that I recall. I suspect, just guessing, that
20 the Court would rather rely on the statutes, as we've done
21 already, rather than worry about whether we've got the
22 authority to change them or not; but, you know, I hear the
23 committee, the subcommittee, saying that there are good
24 reasons to do it, and there may be, and so we're just
25 looking for advice, I think.

1 CHAIRMAN BABCOCK: Yeah.

2 JUSTICE HECHT: But one thing we'd have to
3 think about would be is this the kind of thing that a rule
4 could change. Perhaps it is. I just haven't thought
5 about it.

6 CHAIRMAN BABCOCK: Judge McClure, what about
7 that issue? Is this appropriate rule-making?

8 HONORABLE ANN McCLURE: Well, the
9 subcommittee studied the language in the various statutes,
10 and I think that the Supreme Court does have rule-making
11 authority to implement it. I would understand perfectly
12 well if they chose not to do that.

13 CHAIRMAN BABCOCK: You know, you've got a
14 statute -- you've got statutes in the Family Code and the
15 Government Code that govern record retention. Is there
16 anything in the -- I'm just trying to remember. I was
17 talking outloud.

18 HONORABLE ANN McCLURE: There is language in
19 the statute that allows the Court to further the purpose
20 of the statute.

21 CHAIRMAN BABCOCK: You're talking about the
22 parental notification statute?

23 HONORABLE ANN McCLURE: Well, it doesn't say
24 -- it doesn't reference the parental notification statute,
25 but the Government Code that talks in terms of the

1 retention schedules allows the Supreme Court to exercise
2 its rule-making authority -- if you want me to pull that
3 exact language I can.

4 CHAIRMAN BABCOCK: I think that would be
5 helpful if you have it handy.

6 HONORABLE ANN McCLURE: Well, I've got to --
7 yeah, hang on just a second. I've got so many notebooks
8 of drafts and language.

9 Do you mind going ahead and allowing people
10 the opportunity to debate it while I'm trying to find the
11 specific language?

12 CHAIRMAN BABCOCK: Okay. We will do that.
13 Does anybody -- on this issue of rule-making authority
14 first, does anybody have any thoughts, comments about
15 whether or not we can trump the Family Code and the
16 Government Code? Elaine?

17 PROFESSOR CARLSON: I'd like to hear the
18 statute language. No, it could very well be within the
19 Court's rule-making --

20 CHAIRMAN BABCOCK: You are all-knowing is
21 why I called on you.

22 PROFESSOR CARLSON: It depends, which is
23 always the answer to the rule-making authority.

24 CHAIRMAN BABCOCK: Okay. Yeah, Linda.

25 MS. EADS: I recall the Government Code that

1 way, too, so I will be interested to see what the language
2 says when she finds it; but if, in fact, that's true, I
3 think that adds to the Court's ability in this area to
4 implement the statute, which has strong confidentiality
5 provisions in it and strong legislative history on
6 confidentiality, to allow the Court to change something
7 which is very, very procedural, which is document
8 retention, in order to advance the legislative purpose of
9 the statute. So I think that that would be reinforced
10 once Judge McClure finds that language in the Government
11 Code about the Court's ability to do that, but I think I'm
12 satisfied that the Court could have that kind of authority
13 under its procedures.

14 CHAIRMAN BABCOCK: Yeah. Buddy, then
15 Stephen.

16 MR. LOW: I question what is the difference
17 between implementing something and changing it. I mean,
18 you know, if you have a law, and I have trouble with that.
19 You know, you can call it implementing it, but you might
20 be changing it.

21 CHAIRMAN BABCOCK: Stephen.

22 MR. YELENOSKY: I'm focusing on the court
23 reporter's notes, records, because I think I have a couple
24 of questions related to that, but in doing so I see on
25 page 17 that there's a Government Code provision that

1 relates to court reporters' notes that we probably need to
2 look at.

3 HONORABLE ANN McCLURE: That's 52.046, and I
4 do have that in front of me.

5 MR. YELENOSKY: Because whatever we decide
6 about the other Government Code provisions, we need to
7 decide whether there is discretion within that Government
8 Code provision, which apparently has been interpreted to
9 require court reporter notes to be held for three years,
10 not upon request, but interpreted as --

11 HONORABLE ANN McCLURE: Yes. That was a
12 Supreme Court opinion.

13 MR. YELENOSKY: And then that leads to the
14 other provisions in here that talk about putting the court
15 reporter notes in the court file. It also leads to the
16 draft language that says "court reporter notes in any
17 form." Just coincidentally at the break I was talking to
18 our court reporter about the technology now involved, and
19 in any form, if we use it in the discovery sense I would
20 assume means computer as well. I don't know how you put
21 that in the court record. We also know that court
22 reporters notes are supposed to completely de-identify or
23 not have any identifying information. So do we have the
24 same confidentiality concerns about that as we do about
25 others? Those are the questions I had.

1 HONORABLE ANN McCLURE: Well, let me make
2 two comments, and that's significant as far as the Chapter
3 33 cases are concerned. It is explicit in the statute and
4 in the rules that the minor is not to be identified on the
5 record, which means once the clerk's record is destroyed
6 the court reporter's record has very little value because
7 you can't tell who Jane Doe is, and there will be no way
8 to match it up other than with the final order that will
9 be retained in the court's file. As to the specific
10 language in the court reporter statute, 52.046(c) says,
11 "The Supreme Court may adopt rules consistent with the
12 relevant statute to provide for the duties and fees of
13 official court reporters in all civil judicial
14 proceedings."

15 CHAIRMAN BABCOCK: Could you read that
16 again, please, Ann?

17 HONORABLE ANN McCLURE: Yes. "The Supreme
18 Court may adopt rules consistent with the relevant
19 statutes," plural, "to provide for the duties and fees of
20 official court reporters in all civil judicial
21 proceedings."

22 MR. YELENOSKY: It says "and consistent with
23 the relevant."

24 HONORABLE ANN McCLURE: If you'll hold I'll
25 get the other statutes.

1 CHAIRMAN BABCOCK: And so the statutes that
2 are referenced here in this context would be the parental
3 notification statute? Is that how you read it?

4 HONORABLE ANN McCLURE: Pardon me? I had
5 stepped away to pull a book.

6 CHAIRMAN BABCOCK: The statutes that the
7 Government Code refers to would be in this instance the
8 parental notification.

9 HONORABLE ANN McCLURE: Well, it doesn't say
10 that. I mean, it just says "the relevant statutes,"
11 plural. I mean, obviously it's open to interpretation.

12 CHAIRMAN BABCOCK: Well, what other relevant
13 statutes would there be?

14 HONORABLE ANN McCLURE: For purposes of
15 this, this would be the only one. There are several
16 statutes that deal with responsibilities of court
17 reporters.

18 MR. YELENOSKY: But part (a) is a relevant
19 statute, is it not, 52.046(a)?

20 HONORABLE ANN McCLURE: Which specifies the
21 duties under that, when they allow for the retention for
22 three years, yes.

23 MR. YELENOSKY: Well, it allows for it
24 except that it says "shall preserve the notes for three
25 years on request."

1 HONORABLE ANN McCLURE: "On request."

2 MR. YELENOSKY: But that's been interpreted
3 to mean you've got to keep them for three years to allow
4 for a request to happen.

5 HONORABLE ANN McCLURE: Yeah. That's the
6 interpretation.

7 MR. YELENOSKY: So if you read 52.046(a) as
8 a relevant statute as interpreted by the Supreme Court,
9 what discretion do you have you should under (c)?

10 HONORABLE ANN McCLURE: Well, I think that
11 would be for the Court to decide.

12 CHAIRMAN BABCOCK: Frank.

13 MR. GILSTRAP: I think we're talking about
14 two different things here. We're talking, first of all,
15 about retention, which means how long they have to keep
16 it, and the fact that you have to keep it for three years
17 doesn't keep you from keeping it for 10 years. On the
18 other hand, we're also talking about a mandatory
19 destruction requirement, and is there any other place in
20 Texas law that we have mandatory destruction requirements?

21 MS. WOLBRUECK: Yes.

22 CHAIRMAN BABCOCK: Bonnie.

23 MS. WOLBRUECK: Code of Criminal Procedure
24 has one on expunction records of criminal records, one
25 year after the expunction.

1 MR. GILSTRAP: Okay.

2 HONORABLE SCOTT BRISTER: That's pursuant to
3 court order.

4 MS. WOLBRUECK: Yes.

5 HONORABLE SCOTT BRISTER: The judge orders
6 them -- orders that done. It's not -- clerks just don't
7 do that.

8 MS. WOLBRUECK: No. After the expunction
9 order is entered the clerk shall destroy that file one
10 year according to statute.

11 MR. YELENOSKY: But court reporter
12 transcripts, those are not destroyed?

13 MS. WOLBRUECK: That's the clerk's records
14 regarding the expunction.

15 MR. GILSTRAP: Well, I am not sure that --
16 even if a statute could be construed as giving the Supreme
17 Court the power to, you know, effect the retention
18 requirements, I am not sure if that would also allow it to
19 mandate destruction.

20 JUSTICE HECHT: We did -- we have under
21 consideration and have had for some time requests from the
22 clerks around the state to allow the destruction of trial
23 court exhibits under some scheme, whether they would try
24 to notify the attorneys or send out a blanket notice that
25 if you don't show up in six months anything older than 10

1 years or 5 years or, you know, subject to some parameters,
2 the exhibits would then be destroyed rather than having to
3 keep them forever and ever if nobody wants them.

4 And in the course of that we met with the
5 archives, who really have responsibility, and I think
6 probably glancing at it, as I recall the discussions, I
7 think the archives has responsibility for making those
8 decisions and that they can, in fact, trump anything any
9 of us does. And in the course of that they said, "Well,
10 we'll do whatever you say, because we don't really care
11 about exhibits in old cases," but I do recall that we felt
12 like we needed to at least work with the archives people
13 on that, so I don't know if the statute would be viewed as
14 preemptive or not.

15 HONORABLE ANN McCLURE: There is a statute
16 for destruction of state records. 441.017 of the
17 Government Code authorizes destruction in certain
18 instances, one of which is if it appears that the records
19 retention period has expired, records destruction request
20 is submitted to the state records administration and
21 approved by the director and librarian. The record is
22 exempted from the need to be listed on a records
23 destruction request under rules adopted by the commission,
24 and it provides that the commission may adopt other rules
25 prescribing the permissible means by which state records

1 may be destroyed.

2 JUSTICE HECHT: I don't know.

3 CHAIRMAN BABCOCK: Everybody is shrugging
4 their shoulders here.

5 JUSTICE HECHT: If we could do it, what
6 is -- does the committee have a view on whether it should
7 be one year or a longer period?

8 CHAIRMAN BABCOCK: Well, the subcommittee's
9 view is one year.

10 JUSTICE HECHT: One year, yeah.

11 CHAIRMAN BABCOCK: And there was a dissent
12 that had a considerably longer period of time. Paula.

13 MS. SWEENEY: Judge McClure, it's Paula
14 Sweeney. Question about the one year, what's the reason
15 even for that? Why not have almost an instant
16 destruction if there's no appeal?

17 HONORABLE ANN McCLURE: There was some
18 concern about making sure that there was an adequate time
19 for a report to be generated through the channels of
20 whatever government agency would be doing an
21 investigation.

22 MS. SWEENEY: In the context of an abuse
23 situation?

24 HONORABLE ANN McCLURE: Right. Right.

25 CHAIRMAN BABCOCK: Did somebody have their

1 hand up over here? Nina.

2 MS. CORTELL: What was the view of the
3 majority with regard to the point made by the dissent that
4 you need to keep the records open for future proceedings
5 that the minor might want to bring?

6 HONORABLE ANN McCLURE: I'm sorry. I
7 couldn't hear you.

8 MS. CORTELL: How did the majority react to
9 the point of the dissent that you need to keep the records
10 available for a certain amount of time to be available to
11 the minor should the minor want to prosecute claims later
12 on?

13 HONORABLE ANN McCLURE: Well, the thinking
14 of the majority was that there isn't going to be in all
15 likelihood anything presented during the hearing that's
16 going to have any bearing on that one way or the other
17 other than her own testimony, which she would have the
18 ability to offer again. Ordinarily the only testimony
19 that is given is the testimony of the minor herself.
20 There may be --

21 MR. YELENOSKY: It might be relevant to
22 impeachment.

23 HONORABLE ANN McCLURE: -- some statement
24 made by the guardian depending on whether the guardian is
25 an attorney or not. If the guardian is not an attorney

1 the guardian can offer testimony, but other than that
2 there isn't going to be a -- really a production of
3 documentary evidence or calling of an adverse witness and
4 cross-examination as a purported perpetrator. None of
5 that is going to be happening in this proceeding.

6 MR. YELENOSKY: But it could be relevant to
7 impeachment. I'm thinking from the other end. Suppose
8 she sues saying she was forced into an abortion and the
9 testimony doesn't support -- her testimony at the time
10 doesn't support that.

11 HONORABLE SCOTT BRISTER: I've had one of
12 those cases.

13 MR. YELENOSKY: I mean, I can see -- I'm not
14 sure the one year serves the purposes of -- necessarily of
15 Jane's Due Process in every instance if you look at that
16 perspective, which is where the one year came from. In
17 the example, I guess you had a case of that. I'd be
18 concerned about the need for impeachment.

19 HONORABLE HARVEY BROWN: It could also be
20 helpful as prior consistent testimony in some
21 circumstances.

22 MS. SWEENEY: Is it even available?

23 HONORABLE HARVEY BROWN: "This isn't
24 something I made up now. This is something I've been
25 saying six years. This alleged, you know, fight I had

1 with my parents two years ago didn't affect my testimony.
2 I said this six years ago, too."

3 MS. SWEENEY: But is that record even
4 available?

5 HONORABLE SCOTT BRISTER: There was never a
6 record before. You didn't have to go to court to put this
7 testimony up before.

8 MR. YELENOSKY: Right. There was no
9 proceeding.

10 CHAIRMAN BABCOCK: Yeah, Linda.

11 MS. EADS: I mean, I think it is a hard call
12 on the equity between the two, between wanting to make
13 sure there is evidence available to both protect the girl
14 and for use later on if she needs it and between
15 protecting her confidentiality; and I also think there is
16 a burden on the court reporter's office here that we need
17 to think about in terms of the Draconian penalties that
18 are possible if there's a mistake; and, remember, we're
19 relying -- the longer we have a record retention policy
20 we're relying on institutional memory to know what those
21 records in that file drawer are locked for. You know, and
22 that can change after you get a new clerk. I mean, it is
23 serious in that regard, too, so I think it is a difficult
24 balancing the equities here in terms of how long you
25 require these documents be kept.

1 CHAIRMAN BABCOCK: Judge Brister.

2 HONORABLE SCOTT BRISTER: I'm just hesitant
3 to make an exception, especially one this drastic, from
4 what we do with the rest of the cases. We do make
5 mistakes in stuff that's supposed to be confidential.
6 We're government employees. We're not always the
7 highly -- most highly paid people in town, and we don't
8 always do what we should, but there's just -- when you
9 shred the documents, people presume something, and it's
10 not overcome by telling them, "Oh, well it was just our
11 standard records retention thing."

12 I just -- I'm just -- this just -- somebody
13 is going to argue this looks like not only that we're not
14 going to tell you, but we're going to wipe out the
15 evidence real quick. Just this shredding documents stuff,
16 just I'm nervous of making a special rule for this case
17 because when we start down the road everybody wants it,
18 and I would prefer that we lobby the Legislature for
19 you-all to raise our money to have better records storage
20 places, would seem to me a better use of our effort than
21 let's make sure we shred all of these as fast as we can.

22 CHAIRMAN BABCOCK: Bonnie.

23 MS. WOLBRUECK: I guess I have to put it on
24 the record one more time just for the clerks in the state.
25 The liability issue regarding the confidentiality is of

1 grave concern. You know, you limit access to essential
2 staff to these files, although, you know, I was telling
3 Linda, you know, we keep them in a small locked cabinet in
4 another locked cabinet in a locked vault. I mean, I don't
5 know how many times we can lock something to make sure
6 that nobody gets into it, but staff still has access; and
7 so you have staff that is -- you know, members of the
8 district clerk staff today that leave tomorrow; and
9 although it says "ever," five years down the road when
10 Jane Doe, like Linda says, runs for the Senate or
11 something or 10 years down the road, they're going to
12 remember that person; and that person is long gone from
13 the district clerk's office; and the confidentiality issue
14 just becomes very grave.

15 And I understand -- you know, I can
16 understand the retention for future. The other thing we
17 have to remember is that in that clerk's file and in the
18 court reporter's notes Jane Doe's name is nowhere except
19 on the verification page. That's the only place that Jane
20 Doe's name is, and so if, you know, the orders that the
21 judge has entered, all of that, you know, how can you
22 enter that into evidence. You know, you have to have the
23 verification page and hope that the cause numbers match
24 because that's the only match.

25 CHAIRMAN BABCOCK: Justice Hecht.

1 JUSTICE HECHT: On the legal authority,
2 again, Bonnie, is there a requirement on the clerks that
3 they keep these, keep papers like this for a particular
4 period?

5 MS. WOLBRUECK: Just according to the state
6 library's retention schedule right now.

7 JUSTICE HECHT: Yeah.

8 MS. WOLBRUECK: And it's a "may." I mean,
9 we may keep them forever. It's not a mandatory after 20
10 years that these records be destroyed.

11 JUSTICE HECHT: So just for clarification, I
12 don't think there is any problem with a rule that says
13 what happens to the clerk's record. It's just the court
14 reporter's record that there's a statute on.

15 MS. WOLBRUECK: Which really doesn't -- you
16 know, in reality if the court proceeding was handled the
17 way it was, Jane's Doe's name was not in that court
18 reporter record.

19 CHAIRMAN BABCOCK: But the recommendation
20 here is for records retention, and it says, "The trial
21 court clerk must retain the case file, including the
22 reporter's notes," so that's everything, right?

23 MS. WOLBRUECK: That's everything.

24 CHAIRMAN BABCOCK: Yeah.

25 MS. WOLBRUECK: Yes. Which would be for

1 the --

2 CHAIRMAN BABCOCK: So that's what we're
3 talking about.

4 MS. WOLBRUECK: Yes.

5 CHAIRMAN BABCOCK: See, the thing that
6 troubles me is that it seems to me we have a fairly
7 detailed statutory framework found in many places
8 regarding records retention and, as Frank pointed out,
9 very limited mandatory destruction.

10 MS. WOLBRUECK: And it's usually by statute.
11 I mean, that --

12 CHAIRMAN BABCOCK: And it's always by
13 statute.

14 MS. WOLBRUECK: Yes. It's by statute, so --

15 CHAIRMAN BABCOCK: Never by rule.

16 MS. WOLBRUECK: As I'm sitting here, you
17 know, I'm thinking that I'm sure the clerks association
18 will go to the Legislature and try to get statutory
19 authority maybe.

20 CHAIRMAN BABCOCK: Yeah. Justice Duncan.

21 HONORABLE SARAH DUNCAN: My concern, and
22 people are asking why should there be special procedures
23 for these types of, quote-unquote, "cases." These aren't
24 cases. These aren't cases as we have ever defined case in
25 a judicial system, and to try to make these fit our

1 procedures for cases, we've proved over and over again
2 doesn't work because they're not cases. There's not --
3 there's not a dispute, theoretically, between adversaries.

4 I have tremendous sympathy for the clerks
5 trying to keep confidential any part of their files. We
6 have horrible problems with a trial court sealing a record
7 just under 76a, and by the time it gets to us it's no more
8 sealed than the phone book. So I do think there is a
9 basis for treating these types of proceedings differently.
10 They are not cases as the judicial system has ever known,
11 and I also just want to speak to some of the comments that
12 have been made about using these records for other
13 purposes, either for prosecution of a criminal case,
14 defense of a civil case, or prosecution of a civil case.

15 This statute was enacted, as I understand
16 it, for one purpose and one purpose only, and that is to
17 constrain a minor who wants to get an abortion to not --
18 to not be able to do that without either obtaining
19 parental or judicial approval. The statute was not
20 enacted to enable anybody to make a record of anything for
21 any other purpose, and I -- while I understand Professor
22 Collette's reasoning and some of the comments that have
23 been made, that's not the purpose for the statute and
24 that's not the purpose for the record in this type of
25 proceeding.

1 CHAIRMAN BABCOCK: Stephen, then Judge
2 Brown.

3 MR. YELENOSKY: Well, I agree with you
4 there -- I mean, there could be good reasons for treating
5 it differently, and I don't think it's like a case, but
6 there are a lot of records that we retain and particularly
7 any -- most governmental records are retained. Whether
8 this is a case or not, it's a governmental proceeding. It
9 happened. The fact that it happened doesn't go away
10 because the records go away. Just the most accurate
11 recording of what happened may go away, and just in --
12 just from the fundamental principle that it's probably a
13 bad thing to shred anything that's been produced in
14 government or maybe by an accounting firm, I need a lot
15 of --

16 CHAIRMAN BABCOCK: Had to sneak that in,
17 didn't you?

18 MR. YELENOSKY: I had to get that in. I
19 need a lot of convincing that anything should be shredded,
20 and the precedent that's given is expunction of criminal
21 records. You might even make an argument that that's not
22 a good idea, although it's pretty hard to claim that could
23 ever harm the individual whose criminal record has been
24 expunged, except perhaps for somebody who is very
25 masochistic. I don't know. But in this case you can see

1 arguments how it would harm the individual who's the
2 subject of the records, and you can also see arguments
3 where it might harm the agenda of one side or the other,
4 and later on what actually happened in the most accurate
5 way may be at issue.

6 But with that background, I think Bonnie
7 pointed out there are lots of ways that confidentiality
8 can be breached here, which I think are a lot more likely
9 than somebody getting this record in the court's office
10 and identifying it with an individual, no matter how long
11 it's there. The former employee, somebody who sees
12 somebody come into the courthouse, former employees in the
13 attorney's office. I imagine the attorneys don't lock
14 these things down and laminate them. I mean, that's
15 important, because if we're going to shred something that
16 we have a -- that we'll want to shred because it's
17 produced in some governmental context then we ought to do
18 it because it really is going to assure confidentiality,
19 and if this is really the low risk possibility of
20 disclosure and we can't do anything about the other high
21 risk then it sort of doesn't convince me that it's a good
22 idea.

23 CHAIRMAN BABCOCK: Judge Brown and then
24 Linda.

25 HONORABLE HARVEY BROWN: I just wanted to

1 touch upon the point by Sarah about whether these records
2 are easily obtained by the public. The Rule 76a and how
3 things get out into public and documents submitted in
4 camera, I think those are troublesome and difficult for
5 the clerks; but to me this isn't like that type of record.
6 To me this is more like the adoption record. It's going
7 to be a small record. Everybody is going to know what to
8 do with it. It's not going to be case-specific. It's
9 going to be in one place at the courthouse like all the
10 adoption records are. Those there has never been any
11 problem that I'm aware of, at least in my court and, of
12 course, in Harris County. They are very easily kept
13 confidential.

14 CHAIRMAN BABCOCK: Linda, then Frank.

15 MS. EADS: A couple of points to Steve.
16 Actually, expunging records can later on -- criminal
17 records can have consequences. For example, in Dallas
18 right now apparently the D.A. expunged a criminal record
19 and the allegation is that it dealt with somebody who
20 contributed to his campaign on a domestic violence charge,
21 so any expunging of records can have consequences. So
22 this would not be unusual in --

23 MR. YELENOSKY: Well, that would make my
24 point that maybe that statute is also wrong.

25 MS. EADS: Well, right. Well, exactly. The

1 reason for expunging criminal records is that a judge has
2 made a determination that there is a reason for it, and,
3 you know, I mean, this is a long-valued way of handling
4 the situation in which a criminal record can detrimentally
5 impact a human being's life substantially, and that's the
6 same issue here, is how can this record impact on a young
7 girl's life for the rest of her life.

8 Now, you're right about it's not
9 confidential in the sense that the attorney has it, but
10 those are her attorneys and her guardian. We know there
11 is anecdotal evidence that there are people involved with
12 the courts who are wanting to gather information about who
13 is getting judicial bypasses, not because they want to
14 protect the young girl. So, I mean, there is risk here,
15 and that risk is substantial not just from bad malefactors
16 but because it's an issue of tension in our society, and
17 so the result is people worry about what happens if these
18 records are in the courthouse and not taken care of in a
19 systematic way. I think those are legitimate concerns
20 given the subject we're talking about, just like in
21 criminal convictions. There's a really bad risk if those
22 things aren't expunged. There's a really bad risk, if
23 those records aren't destroyed, to the life of a human
24 being.

25 MR. YELENOSKY: But is that risk because the

1 documents exist or is it that risk is inherent in the fact
2 that this is in some sense a public undertaking where
3 other individuals are going to know, who are obliged to
4 keep it confidential? But, I mean, what is at risk of
5 getting out is the name of the individual, I assume, and I
6 don't know that the most likely or even significant risk
7 of that getting out is in the record that's in double
8 vault or whatever it is Bonnie said.

9 MS. EADS: Except to the extent we can
10 protect it, just like in a criminal record, we have a
11 choice to do that.

12 MR. YELENOSKY: Well, we do, but there's a
13 downside, which is destruction --

14 MS. EADS: Any time that you destroy a
15 record there's a downside.

16 MR. YELENOSKY: Right.

17 MS. EADS: Exactly.

18 CHAIRMAN BABCOCK: Frank, then Paula.

19 MR. GILSTRAP: I think on the one hand we're
20 trying to talk about the need to protect the privacy of
21 the girl who seeks the judicial bypass, and we're all kind
22 of comfortable with -- I mean, we may have different
23 views, but we can kind of deal with that because we're
24 lawyers and we feel comfortable with policy. We're trying
25 to balance that against some kind of practical requirement

1 of keeping records and destroying records, and I'm much
2 less comfortable with that.

3 We all have some kind of, you know, probably
4 justified feel that maybe the recordkeeping procedures in
5 some of the counties aren't very tight, and we're
6 suspicious of whether or not this information can really
7 be kept confidential. I share that. I had a discussion
8 yesterday with a judge in a county. I won't say what
9 county it was in the state, and he was talking at some
10 length that the family law records are not in good shape,
11 and they're struggling real hard to get them sorted out
12 right now, and I am very uncomfortable with turning loose
13 into that setting a requirement to mandatorily destroy
14 records. I wouldn't be sure they wouldn't destroy
15 something -- if you're sending people out and saying,
16 "You've got to find certain records and you've got to
17 destroy them," I am not sure they're not going to destroy
18 something else.

19 CHAIRMAN BABCOCK: Paula. That's a pithy
20 comment.

21 MR. YELENOSKY: She sneezed over it.

22 CHAIRMAN BABCOCK: Oh, I'm sorry. Paula,
23 did you want --

24 MS. SWEENEY: Oh, I'm sorry. I didn't hear
25 you. I was busy sneezing.

1 CHAIRMAN BABCOCK: I said "Paula" and then
2 you went "a-choo."

3 MS. SWEENEY: Sorry. I have to agree with
4 Linda that the risk of having these records hanging around
5 to me is antithetical to the intent of the statute that
6 we're supposed to be effectuating, and all these other
7 concerns are theoretical and almost what you -- you know,
8 a lot of cases we hear about, well, consequential damages
9 are too remote, we're getting too far afield to consider
10 those, and I think we're getting way down the road of
11 consequential issues, so to speak, here; and the heart of
12 the issue is what the Legislature intended, which is
13 confidentiality and protection of the minor; and that's
14 the purpose of the statute in that regard, is if we're
15 going to require this difficult proceeding we're also
16 going to have very strong confidentiality requirements;
17 and I don't see any benefit that serves the statute or the
18 intent to keeping these hanging around.

19 CHAIRMAN BABCOCK: Does anybody know --
20 Buddy, I'll get to you in a second. Does anybody know
21 whether the Legislature in passing the underlying
22 legislation considered the issue of records retentions?

23 HONORABLE ANN McCLURE: It's my
24 understanding they did not. I have talked to Senator
25 Duncan. There was a bill filed in the last legislative

1 session to come up with some sort of reporting scheme.
2 Understand that none of these proceedings are entered into
3 the case management system.

4 CHAIRMAN BABCOCK: Right.

5 HONORABLE ANN McCLURE: They are not
6 supposed to be. There is no attribution to any of the
7 courts that they have had any of these proceedings, what
8 the disposition was. It's just all manually kept for
9 purposes of trying to ascertain budgeting figures for the
10 Department of Health. There's no computer documentation
11 on any of it. There was a bill presented to price and
12 streamline some sort of accounting method so that we could
13 gather statistics for the Department of Health's budget.

14 But Duncan was quite clear that the
15 Legislature was not in the slightest inclined to re-open
16 this statute further for any additional tinkering. They
17 just don't want to go there. Now, whether that will
18 change in the next session, I don't know, but that was his
19 statement during the last session.

20 CHAIRMAN BABCOCK: Okay. Fair enough.

21 HONORABLE ANN McCLURE: And our efforts to
22 try to discover what their intention was on a lot of these
23 issues, they really, really had not addressed some of the
24 more substantive, meaty topics.

25 CHAIRMAN BABCOCK: Buddy Low.

1 MR. LOW: Chip, the judge himself is placed
2 in a great position of having to decide whether to grant
3 this or not. Did you-all consider on the destruction
4 issue the guidelines that the Court recommended with the
5 exception that the record may be destroyed within
6 such-and-such period, provided the trial judge so orders
7 based upon finding, and he could make the decision? So
8 you could get it destroyed. It just wouldn't be
9 automatically, and he could determine whether or not it
10 would be needed and there's an abuse or something like
11 that so that you follow the guidelines that the Court said
12 we should follow but created an exception if the judge
13 found certain things and ordered it destroyed like in a
14 criminal case. Did you discuss that?

15 HONORABLE ANN McCLURE: The subcommittee did
16 not. We were trying to come up with a rule that would
17 apply a deadline.

18 MR. LOW: Okay. Thank you.

19 CHAIRMAN BABCOCK: Skip Watson.

20 MR. WATSON: It sounds to me like that the
21 confidentiality aspect hinges almost entirely on the
22 single piece of paper that's the verification. Everything
23 else is by cause number, and that, following what Sarah
24 was saying, to me that's one of the truly unique aspects
25 of this type of proceeding. It would appear to me that

1 the various concerns could be accommodated by a provision
2 that the verification page would be destroyed immediately
3 upon the conclusion of the appeal or of the case if there
4 is no appeal, designate the person that's to do it. The
5 rest of the stuff remains under ordinary statute so that,
6 you know, if there's a malpractice case or a criminal
7 prosecution or whatever, the people know the cause number.
8 They can go to it, say on personal knowledge, "I know that
9 this was this case," and here we go, but I keep coming
10 back that I think we're talking about the destruction of a
11 single piece of paper and that I see -- as of yet I see no
12 compelling need to keep that one piece of paper ad
13 infinitum.

14 CHAIRMAN BABCOCK: Stephen.

15 MR. YELENOSKY: Paula and I were talking
16 about that very thing, and where I was getting stuck was
17 not wanting, of course, a master list, somewhere that --

18 MR. WATSON: Yeah. Yeah.

19 MR. YELENOSKY: -- decodes those causes of
20 action. You give them the name, you get the cause of
21 action. You don't want that.

22 MR. WATSON: No.

23 MR. YELENOSKY: So it would be dependent, as
24 you suggest, on somebody remembering the cause number.
25 But for that concern, it does make sense to me that

1 destroying that would further confidentiality without
2 significantly injuring the retention of records.

3 CHAIRMAN BABCOCK: Well, I mean, it may
4 help, but, of course, other people are going to have
5 copies of that piece of paper. It's just that they won't
6 be in the hands of government.

7 HONORABLE ANN McCLURE: The other thing you
8 have to remember also is that particularly in some more
9 rural areas, depending on the level of testimony at the
10 hearing, while the minor's name may not be disclosed, in
11 order to give the trial judge some adequate understanding
12 of her background and what she's done, there may be a
13 discussion as to where she goes to school, she's in the
14 Honor Society, she works at Barnes & Noble, or whatever,
15 so that there may be other information that is available,
16 which in a small community would subject her to
17 identification.

18 CHAIRMAN BABCOCK: Well, and take that a
19 step further. In the Texas Supreme Court opinions which
20 were published there was an accusation leveled at one of
21 the either concurring or dissenting justices that too much
22 identifying information found its way into the opinion.

23 HONORABLE ANN McCLURE: Right.

24 CHAIRMAN BABCOCK: And part of the problems
25 -- part of the problem, the fundamental problem with

1 trying to do all of this in secret is that our society is
2 not geared towards secrecy, and things get out. Paula.

3 MS. SWEENEY: The other point that was made
4 earlier is that these records may for some reason be
5 needed by -- either to prosecute an abuse situation or by
6 the minor for some later cause of action, and it bears
7 pointing out that if she or someone in fact needs some
8 sort of evidence, there's always the records from the
9 clinic itself that could be obtained. We don't need a
10 court dialogue that is just some sort of recitation. If,
11 in fact, she really wants to get this proof out for some
12 reason, she knows where she went, she knows what the
13 clinic is, and she can sign an authorization there.

14 HONORABLE SCOTT BRISTER: No, the argument
15 would be the person she's suing. In other words, she sues
16 the doctor and some other folks that forced her to get an
17 abortion, or something goes wrong.

18 MR. YELENOSKY: She alleges forcing.

19 HONORABLE SCOTT BRISTER: Something goes
20 wrong.

21 CHAIRMAN BABCOCK: Justice Hardberger.

22 HON. PHIL HARDBERGER: It seems to me the
23 paramount consideration is to protect the girl. There's
24 always some other things out there that may intrude upon
25 or have some effect on or odd situations that may occur,

1 but the bottom line is we need to protect the girl. If
2 the record is there, it can be found out, period. The
3 quicker you can get rid of it, the better. If you can do
4 it in less than a year, I think that would be good, but
5 the committee has come up with a year as really being the
6 shortest period that you could safeguard the other
7 processes and protect the girl, and I think the committee
8 recommendation of a year is the one we ought to go with.

9 CHAIRMAN BABCOCK: Okay. Yeah, Sarah.

10 HONORABLE SARAH DUNCAN: To follow up on
11 what Phil is saying and my discussion with Mike, is why do
12 we hold it for a year? If there is no appeal, the time
13 for appeal expires. If there's an appeal, a mandate
14 issues, or something equivalent to a mandate. Why
15 couldn't that be the time to destroy the records? I think
16 my question is directed at Ann. Why do we need to wait a
17 year?

18 HONORABLE ANN McCLURE: Well, that was the
19 one we were unable to agree on.

20 HONORABLE SARAH DUNCAN: Oh. Gotcha.

21 HONORABLE ANN McCLURE: You know, and just
22 listening to the discussion, I think you can clearly see
23 that there are a lot of competing interests that are
24 involved in this. Jane's Due Process had recommended a
25 year or less. Unless we quantify it in terms of if --

1 have it be destroyed once no appeal is taken; however,
2 there is no provision in the rule or the statute over what
3 that time period is, so the general rules of appellate
4 practice are going to apply so that the appeal is going to
5 have to be perfected within the 30-day time frame. If you
6 want to detail the language so that 30 days after the
7 judge issues his ruling or 30 days after the appellate
8 process is complete, you could do it that way as well.

9 CHAIRMAN BABCOCK: Let me suggest that we do
10 this. Let's get a --

11 HONORABLE ANN McCLURE: Please don't
12 recommit it to my committee.

13 CHAIRMAN BABCOCK: Well, I wasn't going to
14 do that, but now that you mention it...

15 HONORABLE SARAH DUNCAN: I think Ann's done
16 such a fabulous job we should just give her finality, too.
17 Then she can really be at hell's gate.

18 CHAIRMAN BABCOCK: I'd like to see what our
19 full committee feels about the report of the subcommittee
20 and take a vote on whether or not this, the one-year --
21 the one-year majority view of the subcommittee is
22 preferable to either the dissent or the let's just leave
23 it to what the law is now, whatever the law is. So if
24 everybody understands that, everybody -- and we can get
25 back to talking about the specific language if Ann's rule

1 passes, but --

2 HONORABLE SARAH DUNCAN: Can we also talk
3 about less than one year?

4 MR. WATSON: Yeah. Is the shortest period
5 of time on the table one year?

6 MS. SWEENEY: What's wrong with the
7 instanter provision?

8 CHAIRMAN BABCOCK: Well, we've got a
9 proposal from our subcommittee, and I'd like to vote on
10 that. We can mess with the -- I mean, I think --

11 HONORABLE SARAH DUNCAN: But the time limit
12 is not exactly the language. That's why I'm asking the
13 question.

14 CHAIRMAN BABCOCK: Yeah. Well, I guess I'd
15 defer to Ann on that. Ann, do you want to open up a
16 fourth option of less than one year?

17 HONORABLE ANN McCLURE: I think there's been
18 some interest expressed in that. I don't mind our voting
19 on the four options at all.

20 CHAIRMAN BABCOCK: All right. That's going
21 to diffuse the vote some, but -- because I could see
22 people would vote for one year that --

23 HONORABLE SARAH DUNCAN: What if the way you
24 phrased it was preference between if you only had three
25 choices.

1 CHAIRMAN BABCOCK: Yeah.

2 HONORABLE SARAH DUNCAN: Do you prefer the
3 subcommittee's one year, the statutory time periods, and
4 what was the third?

5 MR. CHAPMAN: The minority report.

6 MR. LOW: Make it one or year or less.

7 HONORABLE SARAH DUNCAN: I think as-is is
8 the statutes.

9 PROFESSOR CARLSON: Oh, Collette.

10 HONORABLE SARAH DUNCAN: Oh, that's right,
11 Collette, the Collette dissent.

12 CHAIRMAN BABCOCK: The minority report.

13 HONORABLE SARAH DUNCAN: Right. And then
14 depending on what the preference is there, we could --

15 HONORABLE SAMUEL MEDINA: I think I hear Ann
16 saying one year or less would be an option.

17 HONORABLE SARAH DUNCAN: Yeah.

18 CHAIRMAN BABCOCK: What about one year or
19 less as an option?

20 HONORABLE SARAH DUNCAN: That's fine.

21 CHAIRMAN BABCOCK: So here's the three --
22 yeah, Judge Brown.

23 HONORABLE HARVEY BROWN: Just a point of
24 clarification. I kind of feel like I like Skip's idea of
25 just destroying the verification, and I might feel

1 differently about the time period for the records, i.e.,
2 the transcript, the court reporter's record versus the
3 verification. Because I think you're going to need the
4 cause number no matter what. Whether you destroyed it or
5 not you would have to have the cause number because
6 there's presumably going to be more than one file, and
7 who's going to go read those files and figure it out, so
8 you're always going to need the cause number. Destroy the
9 verification and it gets the confidentiality but still
10 allows these protections to the minor in the future.

11 CHAIRMAN BABCOCK: Well --

12 MR. WATSON: We can lump that under one year
13 or less and come back and revisit that for the purpose of
14 just paring it down to what we're talking about.

15 CHAIRMAN BABCOCK: Yeah. We could maybe
16 make that under the one year or less and then open the
17 discussion as to what exactly it is we destroy in one year
18 or less. Is that okay? It sounds like we're lumping some
19 popular concepts into one year or less, but we'll see.
20 We'll see. Is that okay with everybody?

21 MS. SWEENEY: Do it.

22 CHAIRMAN BABCOCK: Does anybody care what
23 order we vote on this? Well, since the status quo is the
24 status quo, why don't we vote in the order of the way it
25 is now, where the Court in its Comment 7 talks about the

1 statutes. So everybody who wants to vote for that can
2 vote for that. That will be the first thing we'll vote
3 for. Then we'll vote for the majority report, which is
4 one year or less, plus Skip's language, or we can discuss
5 that; and the third would be the minority report that
6 Collette has provided us. Is that acceptable to everybody
7 if we do it that way?

8 Okay. Everybody who is in favor of where it
9 is now with the Comment 7 and the -- just relying on the
10 statutory scheme that we have now, raise your hand.

11 All right. Everybody that wants to go with
12 the one year or less, plus Skip's language?

13 And the -- everybody for the minority
14 report? Okay. The vote is eight people were for the
15 first option; that is, relying upon the statutory
16 framework as it exists; 15 for the one year or less; and
17 no votes for the minority report.

18 So let's go forward then and take up the
19 specific language that Ann has got on page 18 and 19 of
20 her report and see what we can do to satisfy everybody.

21 MS. SWEENEY: When do we get to go forward
22 and take up lunch?

23 CHAIRMAN BABCOCK: In a moment. It's not
24 even here yet, is it? Is it here?

25 MS. LEE: Yes.

1 CHAIRMAN BABCOCK: Oh, you shouldn't say
2 that. Debra is not sure if it's here. She's checking on
3 it.

4 Yeah, we will finish this issue before
5 anybody gets to eat. Okay. Who wants to open the
6 discussion on this? Nina.

7 MS. CORTELL: I have a question and then a
8 thought. The question is how long do people think we need
9 to have the record available for criminal reference? I
10 mean, is that 30 days, zero days? I mean, I have that
11 concern.

12 The other is if we should decide not to go
13 with Skip's proposal as a committee I would still like it
14 to go to the Court because the Court has already indicated
15 it's interested in going with status quo with the current
16 statutes, but they might be amenable to an innovative idea
17 such as Skip's, so even if we don't go with that as a full
18 committee vote, I would like to at least have it presented
19 to the Court as a minority view.

20 CHAIRMAN BABCOCK: Well, I think the Court
21 and Justice Hecht specifically are going to be aware of
22 what Skip is proposing, but we can give it as a formal
23 recommendation, too, if we want to. Stephen.

24 MR. YELENOSKY: Can we just vote on Skip's
25 proposal?

1 CHAIRMAN BABCOCK: We can.

2 MR. YELENOSKY: I move that we retain the
3 verification page for one year or less, and I don't care
4 what that is, I guess, but to separate out the issue or
5 that we go with some version of what Skip is proposing and
6 then talk about the time period.

7 CHAIRMAN BABCOCK: So you would delimit the
8 proposal under 1.4(c) by adding the subparagraph (d),
9 "Records Retention," and delimit that down just to the
10 clerk's record of --

11 MR. YELENOSKY: Right. And if it's just the
12 verification page, yeah, I might even vote for a much
13 shorter period.

14 CHAIRMAN BABCOCK: Okay. The verification
15 page. Okay. We've got a motion. Nina.

16 MS. CORTELL: The problem I have with that
17 is what Ann said earlier, which is there will be
18 circumstances where the record will be such that people
19 will be able to identify the person with or without the
20 verification page, and we've already had one example of
21 that play out in one of these cases where apparently in
22 Houston they were able to determine who the person was
23 based upon news coverage.

24 MR. YELENOSKY: Well, how would destroying
25 the file have prevented that?

1 MS. CORTELL: I'm just saying you're going
2 to make it more likely you're going to have a file
3 available which will have that other information.

4 CHAIRMAN BABCOCK: So you'd vote against
5 Skip's innovative proposal?

6 MS. CORTELL: Well, no. No, I will, but I
7 am -- that is true, but I think ultimately should we vote
8 on the one year or less, that the Court may view Chip --
9 excuse me, Skip's proposal more generously than what we
10 might come up with, and I think it's better than the
11 status quo.

12 CHAIRMAN BABCOCK: Skip.

13 MR. WATSON: I mean, I think Nina has hit
14 the point that I was trying to make. I think what's
15 likely to get through the Court is the minimum change on
16 what we have now, and what I was trying to do was to pick
17 up or create trifle for what we have now and pick off one
18 piece of paper and have that happen instantly. I realize
19 it's not perfect, but that's the point.

20 CHAIRMAN BABCOCK: Well, people vote however
21 they want to for whatever reasons, but I think that our
22 task is to give the Court our best advice, so if we
23 think --

24 MR. WATSON: No, I understand.

25 CHAIRMAN BABCOCK: If we think our best --

1 and not try to guess what they may be thinking or what we
2 can get through, but that's just my own personal view.
3 Judge Hardberger.

4 HON. PHIL HARDBERGER: If you want to
5 present this in the alternative in the vote the way you
6 did last time, since you have two ways that you can go, on
7 the one year or less, I would propose that we destroy all
8 records, and the reason for that is what I said while ago.
9 If it's there, it can be found out. Maybe now we
10 figured -- or figured out in this case if you destroyed
11 one page. So my thought would be you get rid of all of
12 it.

13 CHAIRMAN BABCOCK: Okay. So what you would
14 propose is -- let's take it one step at a time. Let's
15 vote on getting rid of all records in one year or less and
16 then I guess report to the Court, but if you don't like
17 that one, we'll just -- we'll just destroy the affidavit
18 in one year or less.

19 HON. PHIL HARDBERGER: I don't know that we
20 need to present it to the Court in the alternative. I
21 mean, we give them, as you said, our best advice.

22 CHAIRMAN BABCOCK: Yeah, that's my view.

23 HON. PHIL HARDBERGER: If they want to go
24 to, "Well, we won't do the whole thing. We'll do the one
25 page," well, then I guess they will do that. We don't

1 have to tell them they can do that.

2 MR. YELENOSKY: I think we ought to vote and
3 see how many people agree with Justice Hardberger, and
4 I'll vote against that, and I will vote for the
5 destruction of the verification page.

6 HONORABLE SAMUEL MEDINA: Are we saying
7 destruction immediately of the verification page?

8 MR. YELENOSKY: Well, we hadn't gotten --
9 I'm just trying to separate out those of us who want to
10 separate out the verification page.

11 HONORABLE SAMUEL MEDINA: As opposed to the
12 record.

13 MR. YELENOSKY: Yeah. Because if a majority
14 wants to destroy the whole thing in a year or less, that's
15 a moot point.

16 CHAIRMAN BABCOCK: Buddy.

17 MR. LOW: I just want to comment that, you
18 know, this is a special situation, but I have never seen
19 any rule that says you will destroy one particular
20 document in the record and nothing else. Is there any
21 rule anywhere ever that did that? I have trouble with it.

22 MR. HATCHELL: Rule 14(b).

23 MR. LOW: 14(d)?

24 MR. HATCHELL: (b).

25 MR. LOW: (b). Well, you've got to tell me

1 more than that.

2 HONORABLE SCOTT BRISTER: Translation?

3 MR. LOW: I know the Rule 14(b) of Beaumont,
4 but --

5 CHAIRMAN BABCOCK: Hatchell is just showing
6 off.

7 MR. HATCHELL: Destroying exhibits.

8 CHAIRMAN BABCOCK: In the TRAP rules?

9 MR. LOW: Well, they -- well, you're right.

10 PROFESSOR CARLSON: The regular rules.

11 MR. YELENOSKY: Let's vote.

12 CHAIRMAN BABCOCK: I'd like to -- yeah,
13 Judge Patterson.

14 HONORABLE JAN PATTERSON: I want to speak in
15 favor of Justice Hardberger's proposal for the reasons
16 that have already been stated, in part; that is, the
17 original intent and purpose of this statute; but to me
18 this is also one of those instances of insidious accretion
19 is the only thing I can call it where it seems to me at
20 the beginning of the discussions of this statute there was
21 discussion about whether these records should be
22 transcribed or made and that we have come a long way.

23 MS. SWEENEY: That's right.

24 HONORABLE JAN PATTERSON: And I just despair
25 at the complexities that we have loaded upon this statute

1 to the extent that we may have to now seek board
2 certification for this particular area of the law, and I
3 say that half in jest, but I do think that we always need
4 to look upon these statutes in a fresh manner and envision
5 and look back from whence we've come and what the purpose
6 was, and so for that reason I speak in favor of Justice
7 Hardberger's proposal.

8 CHAIRMAN BABCOCK: Judge Brown.

9 HONORABLE HARVEY BROWN: I just thought of
10 an alternative that may not work, but I'm trying to figure
11 out what the court reporter's record is going to look like
12 in this file. If it's just the notes, i.e., this type
13 thing we see in front of the court reporter, nobody is
14 going to be able to read that unless there is a subsequent
15 request for that in litigation. So preserving that to me
16 keeps absolute 100 percent confidentiality for the minor,
17 particularly with the verification page destroyed.

18 If it's a typed transcript, that's a
19 different issue. I mean, I still think there's enough
20 protection. I'm willing to trust our courts are not
21 willfully violating the law. If they are willfully
22 violating the law, it seems to me they are disclosing it
23 separate and apart from the record anyhow. So I'm willing
24 to give them that level of trust. If some aren't, why
25 don't we just require destruction of any type transcript,

1 but not the notes themselves, just in case there is a need
2 for those notes.

3 MR. WATSON: It's the tape part that -- it's
4 the tape that's the big deal. I understand typed
5 transcript.

6 MS. SWEENEY: You mean the audiotape?

7 MR. WATSON: Correct.

8 MS. SWEENEY: Can other reporters read each
9 others' notes?

10 HONORABLE SCOTT BRISTER: They swear they
11 cannot.

12 CHAIRMAN BABCOCK: Well, our court reporter
13 here is nodding her head she can.

14 HONORABLE SCOTT BRISTER: I have my doubts,
15 but they swear they cannot.

16 THE REPORTER: It depends.

17 CHAIRMAN BABCOCK: Well, let's put her under
18 oath. Carlisle Chapman had his hand up and then Justice
19 Duncan.

20 MR. CHAPMAN: I'm persuaded after listening
21 to the discussion that there's really no good reason to
22 retain these records other than the issue that Nina
23 brought up with regard to the possibility of referral for
24 prosecution; and it seems to me we've made provision for
25 that under the Rule 2.4(d) where we have given the option

1 to the court, the trial court, to give -- to require a
2 record to be produced; and if, in fact, there is a reason
3 to make a criminal referral to the D.A.'s office or to the
4 U.S. Attorney's office, whatever the case may be, then it
5 would seem to me that that could be done under that.

6 I'm persuaded that the confidentiality that
7 is implicit from the entire fabric of the rule as it has
8 com forth from the Legislature is paramount, and we ought
9 to -- we ought to observe that. It also bothers me that
10 after we preserve this record, if we do, that it is really
11 of very little use. I mean, it's going to be hearsay in
12 the hands of anyone who is going to present it against the
13 person who is, quote, "the accused" or the offender; and
14 with regard to the minor, we don't profit anything by
15 saying it can be used to preserve her credibility; that
16 is, to challenge her credibility, because that goes
17 contrary to protecting the interest of the minor at its
18 inception. And so it seems to me that it becomes a
19 tail-chasing matter, and there really is no good gain to
20 be observed.

21 I would destroy the record in order to
22 assure maximum confidentiality for the minor, and all of
23 these suggestions with regard to what the clerks may do or
24 the ex-clerks or the people in the lawyers' offices, we
25 deal with that all the time. I mean, it's called

1 fiduciary responsibility. It's called confidentiality,
2 and we have all kinds of means to enforce that as it
3 already exists, and it seems to me that we really don't
4 have to spend a lot of time being concerned about that.
5 What we are concerned about, it seems to me, is a record;
6 and even though we have only the cause number, once the
7 verification page is destroyed by which to identify this
8 record, that seems to be a hollow argument because if that
9 is such a protection of confidentiality, why preserve it,
10 because it just doesn't flow.

11 It seems to me that the entire record ought
12 to be destroyed, and it ought to be destroyed at some
13 period a year or less, and we could talk about what that
14 period should be, but it just makes more sense to me than
15 to retain the whole thing.

16 CHAIRMAN BABCOCK: Let's talk about whether
17 or not it would be one year or less because it seems to me
18 if we break that lock jam then it's going to be pretty
19 easy to vote on this rule.

20 MR. YELENOSKY: For me it depends on whether
21 you're talking about the verification page or the whole
22 record.

23 CHAIRMAN BABCOCK: Well, this proposal is
24 the whole record, and Justice Hardberger makes a sort of a
25 motion that we start there.

1 MR. YELENOSKY: Okay.

2 CHAIRMAN BABCOCK: Skip.

3 MR. WATSON: I agree with what Carlyle said,
4 personally. I believe sooner is better. I think it's
5 less likely to accomplish what we're going to do, and I
6 personally think we need to factor that in, although I
7 understand their seeking advice.

8 One point. Judge Peeples just came in and
9 asked that we start from the beginning.

10 HONORABLE JAN PATTERSON: Actually, he asked
11 if he missed anything.

12 CHAIRMAN BABCOCK: I see no reason not to --

13 MR. JACKS: And what did you say?

14 CHAIRMAN BABCOCK: We're hungry, and we're
15 going to finish this before we eat, so take that into
16 consideration. Judge Medina.

17 HONORABLE SAMUEL MEDINA: I'm worried about
18 the -- I think Carlyle brought up a very good point. It
19 says -- the statute says "past or potential abuse." Well,
20 if it's past abuse, the D.A.'s office is going to have a
21 name. What do they do with the record once they've looked
22 at it? What do they want to keep it for? And if it's
23 potential, mercy, they know it's potential. Why do they
24 want that record now?

25 MR. YELENOSKY: They might want the past

1 because she may not be willing to say it again.

2 MS. SWEENEY: They can't use it to
3 prosecute, though.

4 MR. CHAPMAN: Well, if you use it as an
5 investigative tool, there's no question about that.
6 That's why Nina's point was a good one, but the judge can
7 take care of that. If it's clear from the record that
8 there's been that kind of abuse then he can request that
9 the record be transcribed and make the referral, but that
10 is not a good reason to retain the record as a rule.

11 HONORABLE SAMUEL MEDINA: Well, I agree.

12 CHAIRMAN BABCOCK: Okay. Let's take two
13 votes. One, less than one year. Everybody that wants to
14 do less than one year, you'll vote for that. Everybody
15 that wants to do one year, that would be the flip side of
16 that vote, and then we'll vote on whether or not we want
17 it to be all the records or whether we want it to be just
18 Skip's affidavit, just one piece of paper.

19 MR. CHAPMAN: I disagree. I think you ought
20 to turn those around. I think we ought to vote all the
21 records or some portion of the records first and then
22 let's talk about periods of time.

23 CHAIRMAN BABCOCK: Fine. That's no problem.
24 Everybody okay with that?

25 MR. YELENOSKY: Yeah.

1 CHAIRMAN BABCOCK: Cool. So then the first
2 vote will be -- Justice Hardberger, that was a motion?

3 HON. PHIL HARDBERGER: That was a motion.

4 CHAIRMAN BABCOCK: Okay. Anybody second it?
5 I'll second it, because I'm the hungriest of anybody here.
6 So we'll vote on everybody in favor of all the records,
7 which is basically what the draft rule is here before us,
8 raise your hand.

9 All right. Everybody against that, who
10 thinks it just ought to be the one?

11 That passed -- Justice Hardberger's motion
12 passed by a vote of 15 to 6, so we will go forward with
13 the concept of all the records as it is in this draft
14 proposal now. The vote will be should it be one year. So
15 everybody who thinks it ought to be one year will raise
16 your hand, and obviously who thinks it should be less than
17 one year, you'll vote against this.

18 MR. CHAPMAN: Can we have some discussion
19 about that before we vote?

20 CHAIRMAN BABCOCK: Certainly.

21 MR. CHAPMAN: And I'm somewhat unready
22 simply because I'm not sure I understand what the
23 committee's thought was, subcommittee's thought was, with
24 regard to one year. I heard previously Judge McClure say
25 that it was a compromise because people couldn't agree,

1 but I'm curious to know, was there some notion about
2 practical things that could occur or would occur in this
3 one-year period that led the subcommittee to adopt one
4 year, or was it merely a fact that that was what people --
5 that was an arbitrary number, a period of time that people
6 could agree to?

7 HONORABLE ANN McCLURE: The proposal stemmed
8 from Jane's Due Process, and their language was one year
9 or less with the one year being an outside limitation and
10 the less being something that would require a greater
11 amount of discussion and drafting in order to craft
12 exactly what we wanted to do.

13 Diana, you may have some thoughts on that as
14 to why JDP's initial observation was one year or less, but
15 at the subcommittee level everyone agreed that one year
16 was a sufficient amount of time that would probably take
17 into account whatever was necessary to get a referral to
18 an agency if that were necessary.

19 MS. PHILIP: My understanding was if it
20 couldn't be immediate, that we should give very clear
21 guidelines to the clerks, and we felt one year was very
22 fair.

23 MS. SWEENEY: But the preference was
24 immediate?

25 MS. PHILIP: Yes.

1 CHAIRMAN BABCOCK: Judge Medina.

2 HONORABLE SAMUEL MEDINA: And I'm having a
3 problem with one year and that's it, or less. "Or less,"
4 I don't know what that means.

5 HONORABLE ANN McCLURE: Right.

6 HONORABLE SAMUEL MEDINA: Or a combination
7 of one year or less, depending on -- I think it was Buddy
8 who said the judge ought to be involved in that. If the
9 D.A.'s office needs a little more time before they are
10 destroyed, I don't mind doing that. If there's no reason
11 to continue it, I don't mind ordering it destroyed.

12 MR. EDWARDS: Can somebody refresh my memory
13 on what the physician gets if the judge approves the
14 bypass of the parent? What does the judge get? I mean,
15 the physician?

16 MS. PHILIP: The verification page and a
17 copy of the order. That way the clinic can actually match
18 the name on the verification page to the cause number on
19 the order.

20 MR. EDWARDS: But that's not -- that's
21 beyond the realm of what we're talking about here, right?

22 MS. PHILIP: Right.

23 MR. GILSTRAP: Does the clinic retain those
24 records?

25 MS. PHILIP: Yes. It's being required for

1 auditing purposes for the Texas Department of Health.

2 MR. EDWARDS: My guess is it's required for
3 the protection of the clinic and the doctor as well.

4 MS. PHILIP: Yes.

5 HON. PHIL HARDBERGER: Mostly.

6 MR. CHAPMAN: It seems to me that Judge
7 Medina make a very good point, and that is that maybe
8 there ought to be some opportunity that we provide for the
9 court to exercise its discretion with regard to the needs
10 of, for example, prosecution or referral.

11 HONORABLE SAMUEL MEDINA: With an outside
12 limit up to a year.

13 MR. CHAPMAN: With an outside limit and with
14 the notion that courts have varying degrees of being busy
15 and varying degrees of difficulty of communication with
16 the prosecutor's office and the like, and so perhaps we
17 ought to try to word it in such a way that the outside
18 limit is a year but leave discretion for the trial court
19 to make it a shorter period of time.

20 CHAIRMAN BABCOCK: Shorter or longer?

21 MR. CHAPMAN: No, I would say shorter.

22 HONORABLE SAMUEL MEDINA: No, not more than
23 a year.

24 MR. CHAPMAN: I would say shorter.

25 CHAIRMAN BABCOCK: I thought your point,

1 Judge Medina, was that --

2 HONORABLE SAMUEL MEDINA: One year or less.

3 CHAIRMAN BABCOCK: Well, then I thought you
4 said if the D.A.'s need more time then --

5 HONORABLE SAMUEL MEDINA: Right. In other
6 words --

7 MR. CHAPMAN: I thought that was in the
8 context of instanter as opposed to one year.

9 HONORABLE SAMUEL MEDINA: One year.

10 CHAIRMAN BABCOCK: I gotcha.

11 MS. SWEENEY: Well, as litigators we all
12 live with the concept of doing things as soon as
13 practicable. If lawyers can figure out what that means in
14 terms of supplementing discovery and we have that burden,
15 I think courts can figure it out, too.

16 CHAIRMAN BABCOCK: Is that the same as all
17 deliberate speed?

18 MR. CHAPMAN: I can tell you it's not.

19 HON. PHIL HARDBERGER: I think you could
20 solve it -- sort of picking up on Paula's -- by simply
21 saying they are to be destroyed within one year or sooner
22 within the course of discretion.

23 HONORABLE SAMUEL MEDINA: Okay.

24 MS. SWEENEY: Okay. How about destroyed
25 within one week unless the court -- or destroyed

1 immediately unless in the court's discretion additional
2 time is needed, not to exceed a year?

3 HON. PHIL HARDBERGER: That's okay with me.
4 Either way.

5 MR. EDWARDS: Immediately after what?

6 CHAIRMAN BABCOCK: Justice Duncan. Uh-oh.
7 I know that look.

8 HONORABLE SARAH DUNCAN: Just for the
9 record, this statute wasn't passed so that we could ferret
10 out who's abusing whom or what young man has violated our
11 state laws by having sex with a minor, and why is it --
12 and why is it that we are now trying to use this
13 proceeding to serve goals unrelated to a minor obtaining
14 an abortion with absolute confidentiality but still have
15 to go through what is generally a public judicial system.

16 You know, from the perspective of
17 prosecuting, I can easily understand that a young woman
18 who goes into court and with a pushy judge has to testify,
19 "Yes, it was my boyfriend, with whom I had sex and who's
20 the father of this child," doesn't want to say that
21 because then her boyfriend is going to get prosecuted in a
22 criminal prosecution for violating Texas law. I just -- I
23 don't -- in my opinion, and I realize I may be in the
24 minority here, whatever happens in this proceeding is
25 absolutely nobody's business except that minor's, and to

1 use it as a tool for prosecution --

2 MR. LOW: That's not right.

3 HONORABLE SARAH DUNCAN: -- it seems me is
4 an absolute betrayal of the purpose for which we've
5 gotten her into court and sworn her to testify the truth.

6 HONORABLE ANN McCLURE: Well, if I can
7 respond, Sarah, I think that's you. There was a great
8 deal of legislative history that one of the main concerns
9 of the drafters of this legislation was to facilitate the
10 reporting of sexual abuse of minors and that there was a
11 great deal of emphasis placed not only on a responsibility
12 of the doctor but the responsibility of the courts to
13 ferret out that information in the context of these
14 proceedings, and so I do think it was a purpose of the
15 statute, whether you or I or anyone may agree with that,
16 that that was absolutely their intent to have that
17 information gathered.

18 HONORABLE SARAH DUNCAN: But at the same
19 time we're going to be collecting information on sexual
20 abuse we're also going to be collecting information on
21 consensual sex between two people, one of whom, the female
22 at least, is a minor.

23 HONORABLE ANN McCLURE: Right. And that, of
24 course, is an affirmative defense, depending on the age
25 discrepancy between the male and the female.

1 HONORABLE SARAH DUNCAN: Right. Right.

2 CHAIRMAN BABCOCK: Buddy.

3 MR. LOW: But, Chip, this is -- we have a
4 record of violating the law. A lot of times you're going
5 to find somebody did violate the law. We're going to say,
6 "Well, that wasn't the intent to ferret, so we're going to
7 destroy a record of violating the law without giving the
8 judge any time to refer," or it's there. I mean, the law
9 wasn't just for that, and you've got a record here in
10 state court, the people's court, where somebody perhaps
11 did violate the law and you're going to close your eyes to
12 any violation of the law and say, "We've got to do only
13 what will protect this girl," when this girl's record
14 we're protecting her from an abortion, and nurses talk
15 more than clerks and everybody else, so to make --

16 HONORABLE SARAH DUNCAN: I'm not talking
17 about closing our eyes to a violation of the law. We've
18 already required by a slew of statutes that there be a
19 report made. I am not saying that a prosecutor in his or
20 her discretion shouldn't pursue that. All I'm talking
21 about is using the record of this proceeding as a basis
22 for a civil or criminal prosecution.

23 MR. LOW: But this is a court record which
24 proves a violation of the law, isn't it?

25 HONORABLE SARAH DUNCAN: No. It's a court

1 record --

2 MR. LOW: It is.

3 HONORABLE SARAH DUNCAN: -- in which it's
4 alleged. There's no process of elimination.

5 MR. LOW: It is not proved beyond a
6 reasonable doubt.

7 HONORABLE SARAH DUNCAN: There's only one
8 party before the court.

9 MR. LOW: But it is proof.

10 CHAIRMAN BABCOCK: Okay. I think maybe -- I
11 may be wrong, but I think we're getting off point here
12 because we're just trying to decide whether we're going to
13 keep these records for one year or less, and if less, how
14 much less, and Paula wants to ditch them right away.

15 MS. SWEENEY: Immediately unless the court
16 in its discretion orders that they be referred or saved
17 for some short period to facilitate whatever in the
18 court's discretion, as appropriate language to be inserted
19 here, but not to exceed one year under any circumstances.

20 CHAIRMAN BABCOCK: Hang on, Buddy. Frank.

21 MR. GILSTRAP: I guess I'm -- the problem of
22 instant destruction is just so troubling to me. I guess
23 it's possible courts can make a mistake. I mean, for
24 example, I could see a scenario where, in fact, they
25 granted the bypass, they signed the document saying it was

1 bypassed, but really they meant to deny it and they
2 appealed it. Well, sorry, the record is gone. I mean,
3 just the notion that you sign the order on Tuesday and the
4 record is gone on Wednesday seems to me just to be a
5 little too swift.

6 CHAIRMAN BABCOCK: Yeah. Okay. Buddy and
7 then --

8 MR. LOW: Could you have in there but he had
9 to give notice? In other words, you know, maybe they're
10 on notice because it says "immediately," but could you
11 tell the people that he could file notice to them or the
12 attorney that he's doing it and when he's going to do it?

13 HONORABLE ANN McCLURE: I had one question.
14 Did I understand someone to suggest that it be a week, or
15 was that language mentioned, or immediately?

16 CHAIRMAN BABCOCK: Immediately was Paula
17 Sweeney's idea.

18 HONORABLE ANN McCLURE: The concern I have
19 about that is if there is a denial of the -- the minor
20 doesn't have to decide immediately whether she's going to
21 appeal or not. You've got to build in enough time to
22 allow the minor to pursue her appellate remedy before we
23 start destroying the record.

24 CHAIRMAN BABCOCK: Okay. Diana Philip had
25 her hand up.

1 MS. PHILIP: I hate to make a suggestion to
2 amend the form, but perhaps something at the end of the
3 hearing, there can be a box that the judge checks off for
4 immediate destruction of the file or not. So that way the
5 clerk has some understanding when he or she receives the
6 file again exactly what should be done with that file.

7 CHAIRMAN BABCOCK: I think once we figure
8 out what the time limit is we can maybe figure out what
9 the forms ought to say, but Justice Hardberger.

10 HON. PHIL HARDBERGER: When Paula made her
11 suggestion it was in the spirit of what I like, which was
12 to get rid of it as quickly as possible, but I do think
13 there is some problems with doing it within a week. I can
14 see lots of things happening. First of all, a judge may
15 never think about it again. The week goes by and it's
16 destroyed and really no decision was ever really made. It
17 just happened. So I think I -- I still believe it should
18 be destroyed within one year or sooner at the judge's
19 discretion, which gives time for deliberation but also it
20 gives an absolute cut-off. So I would stick with that.

21 CHAIRMAN BABCOCK: To implement that
22 suggestion, you could say in this rule, "The appropriate
23 clerk must destroy the case file within 60 days after the
24 end of the retention period or sooner if the judge so
25 orders" or something like that.

1 MR. CHAPMAN: You tie it to retention
2 period?

3 MS. SWEENEY: How long is the retention
4 period?

5 CHAIRMAN BABCOCK: In the rule as proposed
6 it is one year from the date the application is filed or,
7 if there is an appeal, one year from the date the notice
8 of appeal is filed. That's the way it's drafted right
9 now. And if the judge wants to -- if either the judge on
10 his own motion or the attorney ad litem or the guardian ad
11 litem come in and say, "Hey, we don't want to wait a year.
12 We want it done now," the judge could have the discretion
13 to do that. That's kind of your idea, right?

14 HON. PHIL HARDBERGER: That's okay. That's
15 fine.

16 MS. SWEENEY: So that if the ad litem or the
17 lawyer as part of their sort of routine would say at the
18 end of the hearing, "Okay, judge, we move that the record
19 be destroyed in 30 days" or now or in two weeks or
20 whenever the appeal period would dictate, then that would
21 more or less make that automatic?

22 CHAIRMAN BABCOCK: Yeah. And that would
23 solve Frank's problem because if it was the attorney ad
24 litem making the motion, then presumably that attorney has
25 already figured out what the appellate situation is going

1 to be for his client.

2 HONORABLE ANN McCLURE: The other thing I
3 need to caution about, though, if we wanted to allow the
4 guardian to get the reporter's record, which we've already
5 passed the rule on, the way that that is drafted now is
6 that preparation of the record is not instanter in the
7 event there is no appeal. So you don't want to be
8 destroying any of the records before the guardian has had
9 the opportunity or the attorney ad litem has had the
10 opportunity to get the record transcribed.

11 CHAIRMAN BABCOCK: Yeah, but it wouldn't
12 be --

13 HONORABLE ANN McCLURE: Just because the
14 judge wants to get rid of the record.

15 CHAIRMAN BABCOCK: I suppose that's right,
16 if the judge could do it on his own motion.

17 MR. CHAPMAN: What was the language that you
18 proposed, Chip?

19 CHAIRMAN BABCOCK: Well, it was really
20 following what Phil said, but the last sentence of the
21 proposed rule, "The appropriate clerk must destroy the
22 file within 60 days after the end of the retention period
23 unless otherwise" -- or "unless an earlier date is
24 designated by the court or ordered by the court." "Unless
25 an earlier date is ordered by the court." That sets an

1 outside.

2 MR. CHAPMAN: "Unless for good cause an
3 earlier date is designated by the court"?

4 CHAIRMAN BABCOCK: We can put that provision
5 in if you want. That complicates things.

6 HONORABLE SAMUEL MEDINA: It does, because
7 then it's not a true, true mandate.

8 CHAIRMAN BABCOCK: Yeah. Then somebody
9 appeals that. Carl.

10 HONORABLE SAMUEL MEDINA: I would be for
11 leaving it out.

12 MR. HAMILTON: I just have a question. This
13 business of destroying records seems to me that it's not
14 something we're called upon to decide. We're called upon
15 to figure out a way to protect confidentiality. For this
16 committee to go on record saying we want to approve
17 destruction of records doesn't seem to me to be a very
18 good idea.

19 CHAIRMAN BABCOCK: Well, I think there's a
20 difference of opinion about that, but I think that was
21 sort of -- that sentiment was sort of taken into account
22 by the vote that we took, and the eight people that voted
23 for keeping it like it is with the Court's Comment 7 would
24 be an advocate of that position.

25 HONORABLE ANN McCLURE: My subcommittee was

1 specifically asked to address that question after the last
2 meeting.

3 CHAIRMAN BABCOCK: Yeah. So perhaps a valid
4 point, but it didn't carry today here. Judge Brown.

5 HONORABLE HARVEY BROWN: It's probably too
6 late in the day to raise this, and I'm not sure where it
7 fits in the debate, but it just occurred to me we have all
8 these confidentiality rules not only for the protection of
9 the minor but also for courts. If some day those are
10 ruled unconstitutional, there will be no record of
11 anything those judges did if it's now supposed to see the
12 light of day according to Constitution.

13 CHAIRMAN BABCOCK: Another weighty issue,
14 but I'm going to suggest that we vote on the rule as it is
15 advocated by the majority of the subcommittee with the
16 language added to the end of it, "unless an earlier date
17 is ordered by the court." Anybody opposed to voting on
18 that at this point in the proceedings?

19 MR. DUGGINS: I have a question. Is there
20 going to be a minimum period of time that the records have
21 to remain in existence so the court can't order it done on
22 the spot?

23 CHAIRMAN BABCOCK: Well --

24 MR. CHAPMAN: That was the purpose of my
25 "good cause" language or "cause." I was just trying to

1 think about how the court ought to be convinced that an
2 earlier date than the 60 days after the retention period
3 is required, and that's what I was trying to get to.

4 CHAIRMAN BABCOCK: I mean, yeah, and I think
5 what you-all are saying is you want to keep the judge from
6 doing something arbitrary, but aren't they under the duty
7 not to be arbitrary and capricious in any event?

8 HONORABLE SCOTT BRISTER: Yeah, but we
9 finely violate that all the time.

10 CHAIRMAN BABCOCK: Well, certain courts
11 have. I thank God we kicked that guy upstairs.

12 MR. GILSTRAP: Chip, it's going to be hard
13 to show they're arbitrary and capricious if the record is
14 gone.

15 CHAIRMAN BABCOCK: Well, in any event,
16 because as Sarah points out, this procedure is unknown to
17 our jurisprudence. The whole thing. I mean, you don't
18 usually have courts of appeals deciding things in secret.
19 So it's a different animal. I'm willing to change the
20 language, whatever anybody wants to do.

21 It seems to me that -- I agree with your
22 point, Carl, but I don't know that there is anything that
23 you can particularly do. I mean, we could put "good
24 cause" in there, but --

25 MR. CHAPMAN: I certainly don't want to give

1 additional basis for appeal. I think there ought to be
2 some sense of finality that is implicit in this as well as
3 confidentiality.

4 CHAIRMAN BABCOCK: Since it's my language I
5 vote to leave it out. The good cause thing, I vote to
6 leave it out.

7 MR. CHAPMAN: I am not offended.

8 CHAIRMAN BABCOCK: So how about voting on
9 this? If anybody has got any problems with it you can
10 vote against it, but --

11 MR. TIPPS: What is the proposal?

12 CHAIRMAN BABCOCK: The proposal, Stephen, is
13 this. It would be the language as suggested by the
14 subcommittee found at page 18 and 19 of the draft with the
15 phrase added at the end "unless an earlier date is ordered
16 by the court," and so that final sentence would read, "The
17 appropriate clerk must destroy the case file within 60
18 days after the end of the retention period unless an
19 earlier date is ordered by the court."

20 So everybody in favor of that raise your
21 hand.

22 Everybody opposed? It passes by a vote of
23 14 to 9, and with that I'll entertain a motion for lunch.

24 MS. SWEENEY: Lunch.

25 MR. YELENOSKY: Chip, just on the language,

1 did we modify the sentence that ends "from the date the
2 application is filed" or just the last sentence?

3 CHAIRMAN BABCOCK: Just the last sentence.

4 MR. YELENOSKY: Isn't that inconsistent
5 then? "Must return" -- "must retain until one year from
6 the date the application is filed," period.

7 CHAIRMAN BABCOCK: I don't think so because
8 the last sentence is referring to the retention period.

9 MR. YELENOSKY: Well, I don't know. I see
10 those two as inconsistent unless you put an "unless" in
11 that sentence, but if nobody else does, and Justice
12 McClure doesn't...

13 CHAIRMAN BABCOCK: Okay. Lunch. And,
14 Justice McClure, thank you very much. Great work.

15 HONORABLE ANN McCLURE: Do you want me to
16 hang up and you-all call me back after lunch or do you
17 want me to hang on?

18 CHAIRMAN BABCOCK: We will call you back in
19 approximately one hour.

20 HONORABLE ANN McCLURE: That's great.
21 Thanks.

22 CHAIRMAN BABCOCK: Thank you.

23 (A recess was taken at 12:54 p.m., after
24 which the meeting continued as reflected in
25 the next volume.)

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2 CERTIFICATION OF THE MEETING OF
3 THE SUPREME COURT ADVISORY COMMITTEE

4 * * * * *

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6
7 I, D'LOIS L. JONES, Certified Shorthand
8 Reporter, State of Texas, hereby certify that I reported
9 the above meeting of the Supreme Court Advisory Committee
10 on the 8th day of March, 2002, Morning Session, and the
11 same was thereafter reduced to computer transcription by
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13 I further certify that the costs for my
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16 Given under my hand and seal of office on
17 this the _____ day of _____, 2002.

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19 ANNA RENKEN & ASSOCIATES
20 1702 West 30th Street
21 Austin, Texas 78703
22 (512)323-0626

23

24 D'LOIS L. JONES, CSR
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2 CERTIFICATION OF THE MEETING OF
3 THE SUPREME COURT ADVISORY COMMITTEE

4 * * * * *

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12 me.

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14 services in the matter are \$ 1,107.50 .

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19 ANNA RENKEN & ASSOCIATES
20 1702 West 30th Street
21 Austin, Texas 78703
(512) 323-0626

22 D'Lois L. Jones
23 D'LOIS L. JONES, CSR
24 Certification No. 4546
25 Certificate Expires 12/31/2002

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