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HEARING OF THE SUPREME COURT ADVISORY COMMITTEE

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Taken before Patricia Gonzalez, a Certified Shorthand Reporter in Travis County for the State of Texas, on the 21st day of September, 2002, between the hours of 9:08 a.m. and 11:56 a.m. at the State Bar of Texas Building, 1414 Colorado, Room 101, Austin, Texas 78701.

INDEX OF VOTES

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

CHAIRMAN BABCOCK: Good morning, everybody. Well, we've done forcible entry and detainer. And the next item on the agenda is motion for new trial. Sarah, it's got your name by it, motion for new trial.

HON. DUNCAN: Yes, and we tried to figure out exactly what we were talking about.

CHAIRMAN BABCOCK: Okay.

HON. DUNCAN: And what Debra and I came up with -- Carl's suggestion, about putting in the rule the availability of mandamus after the trial court has granted a motion for new trial.

MR. HAMILTON: And having to articulate the reasons for it.

HON. DUNCAN: We've already -- the reason I was a little confused is, we've already done this, but what our -- as some of you may know, when Bill Dorsaneo redid the Rules of Civil Procedure, in one or another of its incarnations, he put in a long list of reasons a trial court could grant a new trial. And our subcommittee looked at that long list and we could think of reasons that a trial court should be able to grant a new trial that weren't in that list, so we decided, "Forget the list. Just say that the trial court has to state, in its order granting the

motion for new trial, what the reason for granting the motion for new trial is.

And then Carl wanted to also have in the rule that mandamus was available to review as the means to review the trial court's granting the new trial, and what our subcommittee thought was, that wasn't necessary. We don't put mandamus availability in any other rule. It's available simply because the trial court is going to be required to state its reason for granting the new trial, and so we didn't express -- we don't recommend putting an expressed provision saying that mandamus is available.

CHAIRMAN BABCOCK: Okay. Does everybody have this proposal in front of you?

MR. EDWARDS: Which is the proposal?

CHAIRMAN BABCOCK: It would be under Agenda Item 2.4, and it's Rule 102. And there's some --

MR. EDWARDS: I understand. Which proposal are we talking about? There's one paper that I have that has lots of proposals on it.

CHAIRMAN BABCOCK: Okay. The only one I have is a single piece of paper.

MR. TIPPS: Do we have copies of that over here, Chip? I don't have that.

(Simultaneous discussion)

CHAIRMAN BABCOCK: Do we have extra copies of that, Debra?

MS. LEE: No.

HON. DUNCAN: Our starting place was the recodification draft.

MR. EDWARDS: Which -- I've got all kinds of different proposals, and I'm not sure what we're talking about.

CHAIRMAN BABCOCK: This is dated October 19th, 2000. So it's been around for a while.

MR. EDWARDS: There's -- I don't know that I have that one.

CHAIRMAN BABCOCK: It's easy. Under Rule 102, under Subpart (a), it says "Grounds," and they propose striking the language "in the following instances, among others," and then to delete (a)(1) through (11). And then add a Subparagraph (g) which says, "If a court grants a new trial, in whole or in part, it must state in the order granting the new trial or otherwise on the record the reasons for its finding that good cause exists." Right?

HON. DUNCAN: Uh-huh.

MR. GILSTRAP: What rule are we amending?

CHAIRMAN BABCOCK: 102.

MR. GILSTRAP: Of the revised draft or --

HON. DUNCAN: Recodification draft.

MR. GILSTRAP: The codification draft.

MR. EDWARDS: 102, that's not a rule of procedure.

PROFESSOR CARLSON: It's off the recodification draft, in other words.

CHAIRMAN BABCOCK: What's the rule of procedure?

PROFESSOR CARLSON: It's 329B. 329B.

CHAIRMAN BABCOCK: 329B.

MR. HAMILTON: It's 320, isn't it?

PROFESSOR CARLSON: 320. You're right.

CHAIRMAN BABCOCK: 320.

MR. EDWARDS: That's why I wondered what we were doing.

CHAIRMAN BABCOCK: Well, 320, the rule that exists now does not track the recodification rule. Right? The recodification rule is all -- so we're amending a rule that's never been enacted.

(Laughter)

MR. EDWARDS: That's why I asked.

MR. HAMILTON: Well, I think one of the

problems, Sarah, was that at least our judges down there grant new trials "in the interest of justice." I don't know whether this fixes that problem or not. Is that a good cause? Does that tell you anything?

CHAIRMAN BABCOCK: Well, the current rule, 320, has got the good cause requirement in it.

MR. HAMILTON: But is "in the interest of justice" good cause?

MR. GILSTRAP: Can I speak to that? Isn't this inspired, in part, by a dissenting opinion that Justice Hecht wrote in the Bayerische Motoren Werke case?

I thought --

CHAIRMAN BABCOCK: Supreme Court trivia for 20.

(Laughter)

MR. GILSTRAP: I think there might be a more direct inspiration. I think Justice Hecht might have said something about this to inspire this rule. I don't know. I don't know that for sure, but it definitely falls in that category.

That rule had do with new trials following jury verdicts and the concern -- not that rule, that opinion. And the concern was that the situation where the judge simply doesn't like the

outcome and he grants a new trial for, maybe, not a good reason. For example: "Well, you know, this is a career case for the plaintiff's lawyer and I like the plaintiff's lawyer and he got zeroed out and I'm going to give him another chance." And there was concern that, you know, that may be improper. And so the idea was to fix that.

The concern I've got in this area is that I don't have a problem with that, but I think we need to carve out areas which aren't following a jury trial. For example, default judgment. I mean, the court's always had power to set aside a default judgment whether or not you meet the Craddock test. You know, "I'm sorry. The defendant didn't get his date in court. I think he needs his day in court. He might have been negligent. He might not meet the Craddock test, but I've got plenary power in the case. I'm going to set the judgment aside and give him a trial."

I think you also can make a good case for summary judgments. You know, do we really want the court to have to state its reasons to set aside a summary judgment? In my opinion, you can make the same case for bench trials. I mean, why does the judge have to say his reasons for changing his mind?

It's not like he's going in and overruling a jury. It's his own decision and he ought to be able to change his mind. So it seems to me that you can make a good argument that, whatever rule this is, you ought to limit it to jury trials.

MR. EDWARDS: What we're dealing with, we're taking that anecdotal incident that is a very minor part of the incidents coming particularly from the valley where some people are unhappy with the way the judges do what they do on trials, which often result in tremendous citizens against lawsuit abuse campaigns that have been written down there. They find liability where there's clear liability. They find it in 5/0 damages where somebody's got an arm knocked off and they say, that's not -- "In interest of justice, requires a new trial."

It's also stimulated by some -- one or two or three appellate cases that come up where the judges don't have an opportunity to do things, but there -- the appellate judges don't, but there are a lot of times, for example, where things will happen during the course of a trial that may or may not be harmful. There are grounds for a mistrial, but you've spent two weeks in trial. The person who committed the offense is doing it so that -- to get a mistrial

because they don't like the way the case is going and the judge says, "I'm going to take that under advisement. I don't know whether it's harmful until I see what the jury does." Lots of times that happens.

Judge Sears -- Sears McGee, down in Houston, when he was on the trial bench, that was a regular tool in his kit, and it kept the lawyers in line and the stuff didn't happen. They used to say of Shirley Helms that you couldn't tell whether his argument was inflammatory or harmful unless you heard it.

(Laughter)

MR. EDWARDS: If you read it, it was benign. Things like that happened.

When something happens in a trial, it is oftentimes more important on its inflammatory or prejudicial nature than if it happened, and how it happened, the same way. Trial judges are the ones who sit there and they watch that. And what I'm afraid of is that we're going to -- from either side of the V, we are going to make a rule that causes a lot of appeals, a lot of mandamuses, to fix a very few out of a very large number of cases, and I don't think that's the way we ought to operate.

CHAIRMAN BABCOCK: So you think we ought

to just leave it as it is.

MR. EDWARDS: I think we ought to leave it as it is. I've been on both sides -- I've had judges just grant a new trial because they said, "No jury could do that." The biggest verdict I ever got went out the window that exact same way. Okay? God knows how much that cost.

But even though that's the case, I'm still saying, I'll take my risk of losing another case that way that I didn't think I ought to lose than change the rule and have to go time and again to the appellate courts. We find ourselves going there over and over again. I had three mandamuses laying on my desk on Wednesday of this week in three different cases, you know.

CHAIRMAN BABCOCK: That one they took away from you, was that a career case?

MR. EDWARDS: No.

(Laughter)

MR. EDWARDS: It would have been, if I had kept it.

(Laughter)

CHAIRMAN BABCOCK: Well, you know, thank goodness, because you're still here, but --

(Laughter)

MR. HAMILTON: I may be mistaken, but I thought we already voted and it was just a matter of drafting.

MR. EDWARDS: I don't think we voted.

MR. HAMILTON: Well, if we didn't, then I'll restate my pitch.

MR. EDWARDS: I thought we voted it down, but the record will reflect --

CHAIRMAN BABCOCK: Sarah, did we vote one way or the other, up or down?

MR. EDWARDS: If we did vote for it, I move for rehearing.

(Laughter)

CHAIRMAN BABCOCK: Oh, oh. Debra, did we vote on it?

MS. LEE: I don't know. I'll have to look in the transcripts.

MR. HAMILTON: Well, I must disagree with Bill's argument. I think that's like sticking your head in the sand. Not wanting to know why the courts are doing something sounds pretty ridiculous to me. The problems we're trying to fix are the problems where -- it may be jury trials. Maybe that's the main problem, but you have defendants that go through tremendous expense to defend a case, several hundred

thousand dollars, and then -- and even if it's just limited to Hidalgo County, it still needs to be fixed, because you have judges there, that, for political reasons and that alone, because their crony on the plaintiff side didn't win, they grant a new trial. And if you talk to the defense Bar down there, you'll find that many law firms just are prepared to try every case two or three times because that's what happens. If they don't win the first time, they get a new trial. If they don't win the second time, they get a new trial, and that's ridiculous.

The only way to stop that is to require the trial judge to put in his order the reason for granting the new trial and allow that to be tested somewhere. I think it's just ridiculous to say that we don't want that -- we want to continue this line of secrecy and let the judges just grant new trials at will without any reason.

CHAIRMAN BABCOCK: Richard.

MR. ORSINGER: I'm not sure that even requiring the findings is going to set this up for a mandamus. We have a long tradition that the trial court's discretion for granting a new trial in the interest of justice is not repealable by mandamus, and it's not because they didn't know what the trial court

thought was not in the interest of justice, it was because the courts of appeals just didn't interfere with that decision of the trial court.

Now, I agree that requiring findings makes something more subject to review, but I think there's a long tradition that granting "in the interest of justice" is not, and so a possibility, if there is an abuse like this, might be to reduce the number of "in the interest of justice" new trials you can grant down to one so at least you only have to try the case twice instead of three times, but I'm not sure that -- Carl, even if you've got what you wanted, that you're going to get mandamus review of "in the interest of justice" ground for a new trial.

MR. HAMILTON: Well, that's why we put it in the -- in our suggested rule, so that it would be clear that it was subject to review by mandamus.

MR. ORSINGER: Well, see, if you add that language to say "subject to mandamus," then the Supreme Court is overruling its own self-imposed judicial restraint on its mandamus power by adopting a rule that essentially expands its mandamus power --

MR. HAMILTON: That's right.

MR. ORSINGER: -- which they have the power to do. I don't question that, but I'm not even

going to take a position on whether that's good or bad judgment.

I do feel sorry for somebody like Bill that's got to go to the -- he's taken a case on a contingent fee and he's got to go to the appellate court four or five times before he, you know, has the case decided. I think that that's a little bit tilted.

CHAIRMAN BABCOCK: Frank.

MR. GILSTRAP: Well, you know, I think that the abuse is not necessarily limited to cases in which plaintiff gets more than one shot. There are cases in which the plaintiff has hit a home run and the judge says, "Well, I just don't think it ought to turn out that way," and he sets it aside.

Now, I'm frankly -- I'm doubtful as to how effective the rule would operate in the real world. Judges can always find reasons, and maybe that's cynical, but I don't know that the requirement to state reasons is really going to change a lot, but it may have some -- it may at least make them think. But I will say this, I don't think that -- that's all I have to say.

MR. HAMILTON: If the judge states a reason that's not supported by the record, then the

Court of Appeals ought not to allow it.

MR. ORSINGER: Yeah, but the appeals court will send it back down and say, "You've cited a reason that wasn't in the record," so then they're going to be a little more industrious next time and find a reason that is in the record.

CHAIRMAN BABCOCK: Alex.

PROFESSOR ALBRIGHT: In this proposal, is "in the interest of justice" still an acceptable reason?

MR. GILSTRAP: In my opinion -- I think that the idea behind it is to get rid of that. I think that -- and I think the court could well construe it that way, because "in the interest of justice" is basically judicial fiat, whatever the judge wants, and this requires something more than that.

PROFESSOR ALBRIGHT: Well, I think if that's true, we need to state that. I'm not sure I think that's a good idea, but if we need to be explicit about what we're trying to do here --

MR. GILSTRAP: If you leave "in the interest of justice" as a reason for granting a new trial that's acceptable, you've effectively gutted the rule. They always grant it in the interest of

justice. In Carl's situation, "Yeah, granted in the interest of justice three times because I think it's just the plaintiff win."

MR. EDWARDS: If I'm dealing with a judge like Carl's talking about -- I might add, that the only time I ever have seen what he's talking about happening in Hidalgo County, I took over a big plaintiff's verdict for a lawyer that was killed and the judge set it aside and wouldn't state the reason, and we had to try it again in Gonzales County. But I -- you pass this rule, and I'm dealing with a judge that's going to rule for me like Carl is complaining about, no problem. How many discretionary calls are there in a trial? Every jury strike, every questionable evidence thing, the Daubert challenges, and all he has to write down is, "I made a mistake when I exercised my discretion, and I should have done that and it resulted in a bad trial." Now, what are you going to do? Go up on a mandamus or appeal where there's a finding note the judge didn't abuse his discretion -- or abused his discretion when he decided he abused his discretion?

I mean, it just -- you're talking about a problem that has to be dealt with at the ballot -- on a ballot. We're going to upset the entire jury

system messing with a deal like that.

CHAIRMAN BABCOCK: John Martin, have you had any experience in this?

MR. MARTIN: You know, I really haven't. I've heard these stories from lawyers around the state, but I have only been in a couple of cases where a new trial has been granted and it was clear why it happened, going both ways. So I haven't had a problem with it.

CHAIRMAN BABCOCK: How about people around the state? Harvey, have you had --

MR. MEADOWS: I'm like Bill. I've been on both sides of it. And I sort of hold the same view, that a judge is going to be able to state reasons that are going to -- will be able to survive review. I'm most intrigued by this idea that we just get to do it one more time.

PROFESSOR ALBRIGHT: There is a limitation that you can only try for insufficient evidence. You can only have two new trials for insufficient evidence.

MR. GILSTRAP: Where is that?

MR. TIPPS: 326.

CHAIRMAN BABCOCK: Not more than two.

MR. ORSINGER: Now, is that a limitation

on "in the interest of justice"? I don't have my rule book here.

PROFESSOR ALBRIGHT: No. There's no limitation on any interest of justice.

MR. ORSINGER: Well, there ought to be.

PROFESSOR ALBRIGHT: It's just for insufficient evidence.

MR. ORSINGER: Well, there ought to be. I mean, you guys are going to have to try the case a dozen times.

MR. EDWARDS: Yeah. If you can't get a fair trial in two times, they ought to transfer the case.

MR. GILSTRAP: Wait, wait. I think what happens is, after two times, the case is dismissed. I mean, isn't that what happens? What happens after your second trial?

MR. ORSINGER: What if the issue is, if the new trial is granted "in the interest of justice" and not on the grounds of the evidence as factually insufficient?

MR. GILSTRAP: This rule doesn't apply.

MR. ORSINGER: That's what I'm saying, and --

PROFESSOR ALBRIGHT: It's never been

invoked because they're always granted in the interest of justice.

MR. EDWARDS: Most of the time, they just grant it.

MR. ORSINGER: To my knowledge, the only grounds on which you get a mandamus on this right now is where it's, allegedly, because of a conflict in the jury questions -- jury answers, and, in fact, there is no conflict in the jury answers, you get a mandamus; otherwise --

(Simultaneous discussion)

UNIDENTIFIED SPEAKER: Or outside the plenary power.

MR. ORSINGER: Oh, well, yeah, that's a lack of jurisdiction thing. Okay.

So, you know, perhaps one hole we could plug right here now is to put a limit on the number of new trials that can be granted.

MR. HAMILTON: That would help.

HON. BROWN: I think that's a little more interesting. The problem is, sometimes something will happen, like Bill said, where the judge may not actually come out and say it to the litigants but everybody has a sense that the judge decided that was a big enough mistake by the lawyer, that, the only way

this verdict is going to count is if that lawyer loses, you know. You know, "You can't win this case, but you can lose it" is a phrase that I've heard a number of judges say, and you don't want to necessarily grant that mistrial. If it was the second trial, that lawyer could do virtually anything and not worry about it, other than a mistrial, and, you know, into a long trial, two or three weeks, the judge isn't going to want to grant a mistrial.

CHAIRMAN BABCOCK: Boy, that's something you need to worry about. There are some lawyers that will really take advantage of that, if they know that this is the last one.

MR. ORSINGER: Well, then maybe what you ought to do is have Carl's concept, that you have to have a specifically articulable reason if you're going to grant either a second or a third new trial, and then make it clear that that's subject to appellate review.

HON. DUNCAN: Why are we giving the dog one free bite?

HON. BROWN: Because there's so much that happens on the record that is hard to describe as a trial judge, but you think -- you just get a fundamental sense that it wasn't fair. It might be

something that isn't even on the record. You could have done a discovery fight six months earlier; no court reporter. You made a ruling and now you've seen how it's played out at trial and you think "Should have done that a little different."

MR. GILSTRAP: You could articulate that, though.

HON. BROWN: Yeah, but there would be no record support for it.

MR. GILSTRAP: Well, so? That's still your reason. That's still your reason. You know, you're in the courtroom. You knew what happened. And that's your reason for granting a new trial.

CHAIRMAN BABCOCK: Stephen. Then Nina.

MR. YELONOSKY: Well, I have no actual experience with this, but I've had a lot of things I don't have any actual experience with.

(Laughter)

CHAIRMAN BABCOCK: Never slowed you down before.

MR. YELONOSKY: It hasn't slowed me down before. But it does sound a little odd to me, or maybe -- and I don't mean this as a criticism, but sort of cynical. If we're talking about "interest of justice," how could we put a limit on the number of

times? I think what we're saying is that a judge is acting inappropriately, and maybe repetitively, then that seems to be a problem with the judge or maybe the election of judges, generally, but, I mean, maybe the first two times he was acting inappropriately, but there really is a third time, there really is an interest of justice reason setting aside the jury verdict, and because we've written this rule, that would be precluded.

I mean, it just seems to me that that wouldn't -- picking some arbitrary number when we're talking about a concept that at least seems to be a lofty concept of interest of justice is a disconnect to me.

CHAIRMAN BABCOCK: Nina had her hand up. And then Carl.

MS. CORTELL: I really question whether we're trying to fix something that fundamentally is not broken. There may be some bad examples. I understand that. I do a lot in this area and I do not see wholesale abuse of it. There may be some regional variances that I haven't had experiences with, but on a whole -- and I've practiced in a number of jurisdictions -- I have not seen abuse of the rule. And I am concerned that there are these unintended

consequences of some of the suggested rule changes. I don't like the finite number. I do think you're giving license to abuse in the subsequent trial if you know there's no way the judge can undo it. So I would leave it to vote for status quo.

CHAIRMAN BABCOCK: Yeah. Carl, do you want to talk about that?

MR. HAMILTON: Yeah. One of the things we're trying to fix here is the cost problem, and in most instances, at least, it's a lot easier to do some kind of an appellate review by mandamus, and a lot cheaper, than it is to go through a new trial and then there may be even an appeal after that. So it's a cost problem, too, as to whether or not we want to make a vehicle to test the propriety of this ruling before we put the parties through another eight-week trial and another appeal. You know, we're not just trying to do it because the judge did something wrong. We're trying to protect the clients from all of this costly expense.

CHAIRMAN BABCOCK: Bill?

MR. EDWARDS: We haven't saved any money if we have a thousand cases that go on mandamus and one out of the thousand saves one set of litigants one trial. And there are people out there -- clients and

lawyers -- who will do everything that is procedurally possible.

My firm is presently the respondent on a motion for rehearing en banc in the Fifth Circuit following an opinion of the Fifth Circuit denying an appeal on a motion to remand which followed a mandamus on the motion to remand, and the removal was the second removal. So if it's procedurally possible, it will happen. I don't see where we saved any money in that proceeding. And, you know, if we have one out of a thousand new trials that gets set aside on a mandamus, I'll guarantee, if the process is there, it will be done.

CHAIRMAN BABCOCK: Yeah, Harvey.

HON. BROWN: One thing that would be interesting, is, frankly, we find out whether it was anecdotals, not on "evidence is real." I mean, I'd like to know how many times judges grant new two trials in a case. Rather than just talking about it happening, just how often is it happening.

CHAIRMAN BABCOCK: Frank.

MR. GILSTRAP: Well, I don't know about that. I think the idea behind the rule is not two new trials; it's one. I mean, the purpose of the rule is to have this available the first time. And it's my

impression that this is isolated, but when it happens, it's very offensive. I think if you read -- you know, you can read Justice Hecht's dissent in that Bayerische Motoren Werke case, and he's pretty clear about the abuse.

At the same time, I think Bill's comment about satellite litigation gives me pause. I mean, on a mandamus, we're not talking about a cheap record here. If we got a three-week jury trial, I think you got to go up on the whole thing, and it may be that the prospect of satellite litigation here in a case where, you know, clearly there should be a new trial or shouldn't be a new trial, whatever -- where there should be a new trial and you still have to pay for a mandamus outweighs the advantage you get by curing the abuse in a few cases through this rule.

CHAIRMAN BABCOCK: Well, should we vote on whether we ought to retain the status quo?

MR. EDWARDS: I make that motion.

CHAIRMAN BABCOCK: Okay. Does anybody want to second that?

MR. CHAPMAN: Second.

CHAIRMAN BABCOCK: Okay. Any further discussion?

(No response)

CHAIRMAN BABCOCK: Okay. Everybody who is in favor of retaining the status quo; that is, not changing Rule 320, raise your hand.

(Show of hands)

CHAIRMAN BABCOCK: All opposed?

(Show of hands)

CHAIRMAN BABCOCK: By a vote of 14 to 2, the Chair not voting, the motion is carried. So we'll leave the status quo.

MR. GILSTRAP: Chip, could I ask a question?

CHAIRMAN BABCOCK: Yes, you may.

MR. GILSTRAP: One of the things we're doing here, if we had passed this rule -- or recommended this rule, excuse me, then we would have to deal with question of mandamus. And it seems like this frequently comes up, that we want it reviewed, and the only vehicle we have is mandamus. You know, we're not the legislature. We can't amend the interlocutory appeal statute, and yet, it seems like a number of these cases, it really makes more sense to do it by interlocutory appeal.

Has the committee ever addressed that or tried to address, maybe, approaching the legislature about the interlocutory appeal statute?

CHAIRMAN BABCOCK: Sarah?

HON. DUNCAN: The committee has not addressed it. I've been a proponent of an interlocutory appeal procedure for years. I had one conversation years and years ago, now, with Justice Hecht in which he said that he would be interested in seeing a rule. And at a recent seminar, the comment -- there was a presentation on interlocutory appeal statute, and one of the comments that was made was, "We're going to need rules to implement the interlocutory appeal statute."

So if that were assigned to the Appellate Rules Committee -- or whatever subcommittee, that would be a good place to investigate, to research whether the grounds for an interlocutory appeal could be expanded beyond those in the statute.

MR. GILSTRAP: Through, possibly, a rulemaking part of the court.

CHAIRMAN BABCOCK: Yeah, Harvey.

HON. BROWN: I was just going to say, last session, the interlocutory appeal statute was changed. I actually wrote one of the sections in the changes, and if you just get enough people who are interested, we can approach the legislature and they're willing to consider it. It isn't that

difficult.

MR. EDWARDS: But before we start doing any more interlocutory appeals than we're already doing, somebody ought to do an economic impact study on it, because we have escalated the cost of litigation unbelievably.

When I started out, you could try two cases in a week. Each file was about as thick as this and I could carry them both to court at the same time. One of those same cases today takes two to three weeks to try, the number of banker boxes go from here to down there, and at the end of the day, the result is going to be about the same as it was when we were going with a file like this (indicating).

CHAIRMAN BABCOCK: Nina.

MR. MEADOWS: Except for the damages.

(Laughter)

MR. EDWARDS: You can buy about the same number of loaves of bread.

(Laughter)

MR. ORSINGER: Or should you say bars of gold?

(Laughter)

MR. EDWARDS: Gold was pegged at $32 an ounce, yeah.

(Laughter)

CHAIRMAN BABCOCK: Nina.

MS. CORTELL: I'm very sympathetic to Bill's concern, but when it comes to interlocutory appeal, that is a potential money-saver, because there are sometimes very complex cases, where, if you can get one ruling up on appeal and get the appellate court to rule, it can resolve the entire litigation.

I had an extensive case that really worked that way. We jerry-rigged, and an interlocutory appeal, is, essentially, what happened, and it resolved the entire case. I think that is something that could prove to provide great economies.

MR. EDWARDS: There are ways that that can be handled. For example, the Jolema case that people talk about, the way that went up was on a refusal to respond to special exception, and the case was dismissed because the special exception would not be -- the pleadings stood as they were and the complete legal issue was there. The facts were admitted by the pleadings. It was equivalent of a motion for judgment on the pleadings under federal law, and it was clear before the court -- very clear what the issue was -- one issue -- and if it can be done other than by interlocutory appeals, may be a way

to -- if the court, for example, gives permission to take an appeal on a particular issue that will decide the case, there are other ways to do it than just to generally expand the interlocutory appeal.

MR. GILSTRAP: Don't we have a new statute that allows interlocutory appeals with the parties' consent --

MR. ORSINGER: With the consent of the trial court and the consent of the court of appeals. So you got to get everybody to agree.

MR. GILSTRAP: I understand, but it seems to me one way to approach would be, maybe, to expand that statute where you have something like the federal statute where the court -- you know, it's easier to take an interlocutory appeal in the federal statute on a matter that needs to be decided.

HON. DUNCAN: That's what I was referring to, was the certification statute. That's similar to the federal statute.

MR. EDWARDS: If we get the certification in an interlocutory appeal, I don't have near the problems as we're going to give some across-the-board --

HON. DUNCAN: That's what I was afraid of, was, not adding to 51.004 -- 104, whatever it is,

but we need rules to implement the certification procedure, but it does require consent of everybody and their dogs.

HON. BROWN: That was part of the legislative compromise in that, because that wasn't in the first draft that I did.

CHAIRMAN BABCOCK: Interestingly enough, the comment to the TRAP rules, there's some comments along these lines and the court is considering those comments. So we may actually be asked to do something on this by November. So that's of some interest.

Yeah, Alex.

PROFESSOR ALBRIGHT: Well, I think the point that I thought Frank was making is, "Can we, as a body, make a recommendation to the legislature that we think, maybe, some statute should be changed in certain situations?" I think a lot of times we debate whether things are legislative or rulemaking. We think they're good ideas, but we don't think the Supreme Court should be doing it by rule. And maybe when those things happen, maybe we should discuss whether we would like to write a letter to the Supreme Court asking them to recommend to the legislature something.

CHAIRMAN BABCOCK: I think we can

certainly -- you know, if we think so --

MR. EDWARDS: I think that's up to the court.

CHAIRMAN BABCOCK: It's up to the court to ask the legislature.

MR. EDWARDS: Whether we have that power or not, I would not want to take that upon ourselves without the court saying, "Yes, you have that power."

MR. GILSTRAP: The question I had in mind was --

CHAIRMAN BABCOCK: I was about to say that same thing, Bill.

(Laughter)

CHAIRMAN BABCOCK: But thanks for --

MR. GILSTRAP: The question I had in mind is whether it would be possible to change a procedure where the court could decide what could go up on interlocutory appeal as opposed to the legislature. I don't know whether that's possible. They don't do it in the federal rules. It seems like it would make sense.

MR. EDWARDS: It might make sense, but I think it's a practical impossibility.

CHAIRMAN BABCOCK: We'll have that problem to tackle soon enough. We need to talk,

briefly, about the cy pres rules, because Stephen, I think, you still -- you have to leave early, don't you?

MR. YELONOSKY: Well, I have a meeting that starts at 10:00. I'd like to get to it before it's over -- different meeting, but if you can take it up, I'd appreciate it.

CHAIRMAN BABCOCK: Yeah. That's the last item on the agenda, but there's no reason we can't bump it up here in light of the fact that Stephen is co-chair of the Access to Justice Committee, which is a Supreme Court created body that people have been appointed to. And Justice Hankinson is very interested in this issue. The rule -- it would be Rule 42, and that's been referred to Richard Orsinger's subcommittee, but just recently. And I don't know, Richard, if you or Stephen want to talk about it.

MR. ORSINGER: I think it would be good to have Steve lay the background.

MR. YELONOSKY: Well, that's scary.

MR. ORSINGER: Are you willing to?

MR. YELONOSKY: Let me correct the record. First, I think you've overstated my position, Chip. I'm co-chair of the subcommittee of the

committee of the Equal Access to Justice Commission. It's like four levels down, and as you know, you're the co-chair of that subcommittee as well, Chip.

CHAIRMAN BABCOCK: I thought we were bigger deals than you just said.

(Laughter)

MR. YELONOSKY: I thought we were, too, until I followed all that --

CHAIRMAN BABCOCK: You looked at the flow chart.

(Laughter)

MR. YELONOSKY: And the reason it's scary for me to give the background on this is because until, I think, maybe a month ago, I didn't know what cy pres meant. Now I know that it is Old French for "the next best thing."

And this has been proposed -- I think, really, the champion of this -- and Chris could speak to this probably better than I could, was Randy Chapman with Texas Legal Services Center, and I don't know whether -- Chris, was there some impetus prior to that or was it Randy who --

MR. GRIESEL: No. There was some impetus with Randy's intervention in the lawsuit down in the valley on a class action in which the Legal

Services group received a cy pres award that otherwise would have lapsed to a different fund.

MR. YELONOSKY: Okay. Well, Chris, I hope you'll fill in on this, but, basically, the proposal -- and there's a suggested rule here. The goal here is to see if some of the funds that are available and are distributed pursuant to the cy pres doctrine, that, in those instances, the judges might be encouraged to consider whether an appropriate recipient of those funds would be legal services for the poor in the form of an award to the Equal Access to Justice Foundation.

There's a lot of background material here. In California, it was done by statute, I believe. The proposal here is to do by rule, and since it is by rule, it isn't as compulsory, I guess, as it is by statute in California, but, basically, the idea is to give notice to the Equal Access to Justice Foundation that there is a cy pres award under consideration and for the judge acting within his or her discretion to decide if that would be an appropriate recipient.

And, Chris, please pick up from there.

MR. GRIESEL: No. I think that outlines the basis -- It's got, I think, three prongs, one of

which is a requirement that the parties serve notice on the commission of any hearing for preliminary approval of the settlement of judgment and notice of any final hearing to approve settlement or judgment. And then it allows the court to make a finding that the funds should be used to support access to the civil legal services to the poor and it allows the court to direct the appropriate party to remit the undistributable funds to the foundation, with the restriction that it can only be used for legal services. I think that's the three major components of the rule.

MR. YELONOSKY: I think it's worth pointing out that the subcommittee that redrafted the proposed rule as you see it here included Chip, myself, a number of people connected with Legal Services, and also Judge Jake Patterson from Dallas and Mack Kidd from the Third Court of Appeals.

And subsequent to our last meeting, Chris Griesel asked me a question that I think this committee will have the answer and is not answered by this rule, which -- the proposed rule, which is, "What happens if the judge doesn't do what it says here the judge should do?" And since that really wasn't discussed in the meeting, as far as I remember it,

unless Chip knows the answer to that, it may have purposely been left unsaid, largely -- as originally drafted, the rule was even -- didn't even require the judge to give notice, I don't think, to Equal Access to Justice Foundation, just to consider whether an award to the foundation would be appropriate. So there really was no way of telling whether the judge had considered it or not.

The way this rule is proposed, there's a requirement of notice, and, obviously, there would be a way of telling whether that had happened or not, but there's no consequence stated if it's not done.

MR. EDWARDS: Just as a point of information, could we get a show of hands of those here who have been through a fairness hearing on a settlement of a class action?

(Show of hands)

MR. EDWARDS: Because if you haven't been through one, you won't understand what this proposal means -- been through one that is contested in any way. I would assume that the foundation could show up and do something at the hearing. Is that the thrust of it?

MR. YELONOSKY: I don't -- I mean, my understanding, now, of the cy pres doctrine is that

it's really separate from the considerations that are made in a fairness hearing, because the fairness hearing -- and somebody here will correct me if I'm wrong, but the fairness hearing, I would think, is to determine whether or not the interest of the class members have been served, and the predicate for a cy pres award is that there's money that can't be given to either the class members or the intended beneficiary for some reason.

MR. EDWARDS: Yeah. The reason that I raise the issue is that any class actions I've been involved in, the settlement proposal itself determines what happens to excess funds. They go to some specified place. They go to the state. They go back to the person who's putting up the money.

These things are negotiated and they're not -- most people are not very happy with either side with the way they come down. And sometimes, if the class is spread and you're not sure you're going to get all of them and somebody is willing to pay X dollars a head and if you can't find them all, what's not found goes back to the payor. It's not like they're admitting doing anything wrong -- giving up that they did something wrong or anything, but it's just, how the funds are moved, they're usually taken

care of in the settlement. And if you limit this rule to where there's no provision for leftover funds made as a part of the settlement, I don't have any problem with it; although the state might, because you have the escheat statute.

CHAIRMAN BABCOCK: Harvey had his hand up a minute ago, and then Ralph.

HON. BROWN: I was going to say that point, and, additionally, I think giving notice is totally separate from requiring a judge to make a fact-finding about it. I do think there are cases where the leftover money gets distributed to some charity that at least has some connection directly to the case, and that can be a negotiated point over what charity it is. I don't think the judge should have to make a fact-finding, "I think this charity is more appropriate than the Texas Equal Access Foundation in this particular case." I think notice, if they can come in and argue if they want, that's fine, but requiring a fact-finding, I think that's a bit much.

CHAIRMAN BABCOCK: Okay. Ralph had his hand up, and then --

MR. DUGGINS: I'm not sure that notice is not going to make the commission a party to every class action, kind of like TECA did when they said,

"The DOE is going to be a party in every overcharge suit," and it just created a real problem.

I think the concept is great, but it concerns me that you're going to make this commission that -- the commission will be able to inject itself in every class action settlement, and I don't know if that's appropriate.

CHAIRMAN BABCOCK: Frank, and then Richard. And then Stephen.

MR. GILSTRAP: Is it correct that we're just talking about notice? We're not trying to pass the rule that says that the judge, under the cy pres doctrine, has the power to give funds to Equal Access for Justice. Am I correct?

PROFESSOR ALBRIGHT: To make a finding.

MR. YELONOSKY: I think the brief answer is "Yes." And I guess it's "yes" in part because the court, as I understand the cy pres doctrine, already has that power.

MR. GILSTRAP: I think there's got to be some relation between the purpose -- I mean, under the cy pres doctrine, there had to be -- the trust had to be for a purpose. For example, it was to educate Joe Blow's kids and Joe Blow didn't have any kids, so we educated his nieces and nephews. So it was related.

But I think when you come in and you say -- you get to the point that you mandate it, then I think you have some real problems with the doctrine of escheat, and, you know, who distributes the state's money. It seems to me, at some point, that decision goes across the street to the legislature.

If we're not saying that the court has the power, I don't have a problem with it. I mean, if we're just letting people get notice and they can come in and make their case as to why they think Equal Access for Justice should get this money, I don't have a problem with that.

MR. ORSINGER: I'd like to respond to several things that have accumulated. First, to Bill's point, the supporting information for this proposal, which, there's a piece of paper over here that's entitled "Background for Amendments to Rule 42" -- I don't know who authored it, but it's offered up as an explanation for this --

MR. YELONOSKY: I think Randy did. I think Randy Chapman.

MR. ORSINGER: All right. On the second page, the backside, in the middle of the page is the question, "Why will the parties be required to notify the foundation prior to approval of a settlement?"

And this explanation sheet goes on to say, "In class actions, there is a hearing on a settlement in which affected parties may question the fairness of the agreement. With advance notice, advocates for civil justice may work with attorneys in settling cases to recommend how settlements may be structured to meet priority civil justice needs. Conversely, if settlements appear to provide no material benefits to class members (and only benefit plaintiff's counsel), those advocates could appear at a fairness hearing to question whether the agreement should be approved and recommend alternatives to the court."

I'm not a class action lawyer, but that says, to me, that this rule is giving standing to advocates for this foundation to appear and object to a settlement, even though they are not a party to the settlement, in order to get the settlement rejected if they're not satisfied with what's happening to the unclaimed funds.

Another thing I would like to point out is that the California statute, if you look at it, and it's in a packet of materials that I have, and, I don't know if, frankly, if it's over there, but the California statute, I think, probably is a little broader in terms of what it tells the court it could

do with the unclaimed funds than this proposed Rule 42, because the California statute says that the court can consider the money going to nonprofit organizations or foundations to support projects that will benefit the class or similarly situated persons, or that promote the law consistent with the objectives and purposes of the underlying class action to child advocacy programs or to nonprofit organizations providing civil legal service to the indigent.

So the California legislature -- and the sequence of the wording, maybe, is not that significant, but the first two factors they list is more consistent with the traditional cy pres doctrine, that you would try to find a charity that has the same purpose as the original designated beneficiary of the trustee. And I think what's happening, both with this statute and with this rule, is that we are also engrafting on a concept, "Well, even if the intent of the donor was to benefit a certain individual -- certain type of individual, that's no longer possible. We're now going to consider a gift that's for an entirely different purpose that was never manifested as the charitable intent for the person who set the trust aside."

And then thirdly -- and I don't have

authority to read this into the record, so let me just speak generally that we only had time to poll my subcommittee by e-mail. One member of my subcommittee, up until yesterday, was Judge Scott McCown, and he sent an e-mail saying that his wife works for the state comptroller's office and that the comptroller's official position was that unclaimed funds belong to the state. And he said, in so many words, "I'm not taking a position whether this is a good public policy or a bad public policy," but he did refer us to the legislation on unclaimed funds escheating to the state and said, "Take into account the fact that the state may take the position that they control these funds and that we don't have the freedom to do whatever we want with it."

MR. YELONOSKY: On a couple of those points -- on that last point -- and it may be here in the background material, I think there was some attempt to address that particular question, whether the state had a right to the funds, but the examples that I've heard of were that, at least up until now, typically those funds were being distributed by agreement between counsel, and, you know, they may agree on a charity or whatever. So if they're able to do that, then, evidently, the state has been taking

the position that it's entitled to those funds.

An earlier point you made -- I'm actually less familiar about the state's class action than federal class actions, but in the federal context, you know, a fairness hearing, anybody who is a member of the class can come in and object, and entities that have a membership that fall within the class or represent people who fall in the class can come in and object even though they're not named parties to the suit. That's always been true.

And if I understand it correctly, there's a recent US Supreme Court decision saying, "Not only can these individuals do what they've always been able to do and come in and object, but an objector, at a fairness hearing, has a right of appeal." It may be limited, but in any event, in the federal context, it wouldn't be creating any new rights upon people who fall within the definition of the class than we have now in people who represent them.

For example, Advocacy, Inc., has stopped more than one settlement recently on behalf of people with disability. We were not involved in the lawsuit until the point where we got notice of a class settlement that seemed inadequate for people with

disabilities -- or seemed an attempt to settle something nationwide that was beneficial to the plaintiff's counsel and the defendant but not to people with disabilities across the country, and so that, at least in the federal context, happens now.

MR. EDWARDS: Yeah, but that's only with regard to members of punitive class who intervene after the class approval, they can do all sorts of things, according to the US Supreme Court.

MR. YELONOSKY: Right.

MR. EDWARDS: But they still must be members of the punitive class in order to have those rights.

MR. YELONOSKY: Right. That certainly is true, and that's a point well taken. I guess in some of these cases the thought was that if you're talking about injury to consumers, that maybe they are a member of the punitive class, but you're right.

MR. EDWARDS: If they're not members of the punitive class, they don't have standing.

MR. ORSINGER: Well, now, if you look at the logic of it, the logic behind the rule change is to give the Equal Access to Justice Foundation the right to speak because it has a stake in unclaimed funds, but the rationale to support the notice

requirement gives them the right to actually appear and oppose the settlement, insofar as the benefits to the members of the class are concerned.

So their stake is in the unclaimed funds, but at least in the conception of somebody involved in the process, they have the standing to challenge the settlement itself, meaning not just the unclaimed funds, but what's actually being paid to the class members. And so without speaking to whether we should be doing that, I think we should be aware that at least some people who are proposing the rule feel like there will be an expanded role on the part of the foundation to say, "Nobody is being enriched here but the plaintiffs' lawyers. You get some sort of trivial coupon for everybody in the class, and, in reality, it ought to be structured in a different way and there ought to be $1.5 million in unclaimed funds and we ought to get it."

MR. YELONOSKY: I think that's a good point.

Chip, though -- you know, from the meetings that we've had, I guess -- and if you look at the actual language of the rule, other than the notice provision applying, once -- beyond that, it talks about the foundation being involved in which the

actual distribution to each affected class member is not reasonably and economically feasible, which is a subset, obviously, of all class actions, and that's what the discussion of the subcommittee was about, and, frankly, the part that you're talking about really may not have been what everybody on the subcommittee had in mind, because you're talking about an objection to the settlement with respect to the class.

MR. ORSINGER: By the way, the rule doesn't say that, but the interpretation given in support of the rule says that, which means that somebody must intend it, which means that it will be advocated and it may well happen.

CHAIRMAN BABCOCK: Bill?

MR. EDWARDS: Is the problem solved by requiring the court to give notice to the commission if there are unclaimed funds before signing an order distributing the unclaimed funds?

MR. YELONOSKY: It may be.

MR. EDWARDS: I mean, if you limit it to that, I don't have a problem.

CHAIRMAN BABCOCK: Pam.

MS. BARON: Well, I think what I'm going to say is not going to be very popular, but I'm having

trouble with the basic concept here. I understand that we're lawyers and we have an obligation to fund legal services for people who can't afford it, but I'm not sure that that gives us a mandate to give special privileges to organizations that do that as opposed to other organizations that serve equally beneficial purposes in fighting disease or hunger or all of the other needs that are out there, and this whole concept, I'm having trouble just buying into -- I don't agree with it.

CHAIRMAN BABCOCK: That's obviously a threshold issue. Anybody else share that view?

(Show of hands)

MR. DUGGINS: What's the question?

CHAIRMAN BABCOCK: I said, did anybody else share the view that Pam just --

(Show of hands)

CHAIRMAN BABCOCK: So out of the people here, maybe 60 percent share Pam's thinking about that.

MR. GILSTRAP: Chip, I mean, I share the concern, but as I understand, the purpose of the rule is not to say that the judge has power. I mean, the judge may not have the power under the doctrine of cy pres. And I know he has broad power, but, you know,

he may not be able, for example, to give a settlement that benefits people who's had their phone slammed -- long distance phone slammed to schoolteachers. I mean, he just may not have the power, and I don't think that by this rule we're saying that the judge has the power to give to legal services. Legal services just has -- excuse me, Equal Access just has the power to come in and make its case.

CHAIRMAN BABCOCK: Sarah.

HON. DUNCAN: Right. We're being very selective about who's going to get the notice, and having the notice goes a long way towards being able to make an appearance and make a case. And as I understood Pam's point, it was not so much that the foundation would get the money but that the foundation, alone, is singled out to receive this notice.

MS. BARON: Right.

CHAIRMAN BABCOCK: Alex.

PROFESSOR ALBRIGHT: Well, in addition, there has to be a finding -- "The court shall issue a finding of fact as to whether those funds should be used to support access to civil legal services." That means in every order there has to be a finding that justifies whether it's going to this group or some

place else, and that really gives a leg up to giving it to this group as opposed to some other group.

CHAIRMAN BABCOCK: Stephen.

MR. YELONOSKY: Well, I can see, on the surface, those concerns, and, in fact, we talked about the ongoing litigation that is now again at the US Supreme Court about funding for the Equal Access to Justice Foundation, which largely comes from compulsory IOLTA. And the question as to whether or not compulsory IOLTA will continue is being handled by the US Supreme Court on the basis of the property rights or not of the clients, but there hasn't really been any question about the Supreme Court's authority to require the lawyers to provide funds for legal services to the poor through that system, and particularly to go into that entity.

So we're here. We're not talking about property rights of any individual. The funds have been determined to be no longer, I guess, the property of the defendant, and the only question is where they go. You don't have that property interest question and you have the same entity that the Texas Supreme Court has identified as the one that it, ultimately, administers and through which it largely, if not exclusively, dispenses with the profession's

obligation to provide legal service to the poor. I mean, the Equal Access to Justice Foundation is under -- and I'm not sure of the legal relationship. Maybe Chris can say that, but, essentially, under the control of the Texas Supreme Court. Other funds that the Attorney General's Office -- victim of crimes funds that the Attorney General's Office distributes have been delegated to the Texas Supreme Court who then delegated them to the Equal Access to Justice Foundation to distribute. So it's not just "an organization among many."

CHAIRMAN BABCOCK: Richard.

MR. ORSINGER: One of the differences between this proposed rule and the California statute is that the California statute lists their equivalent of Services to the Poor Foundation as one of the possible beneficiaries, and not the first in the list. The earlier part of the list are charities who are more in line with the trust, or, if you will, the class that's being protected. But there is no notice requirement in the version of the California statute that I have. There is a notice requirement in this rule, and I think it implies that there's some standing on the part of the Texas Equal to Access to Justice Foundation, because if you have a right to

notice, presumably, you have a right to show up at the hearing and to speak.

And so we're inferentially giving them standing. But what are we giving them standing to do? Are we giving them standing to argue to the court that instead of a charity for people who have, you know, been injured as a result of a dangerous product or something of that nature or an educational operation to public service announcements for people who are in similar danger -- whatever, are they entitled to say, "We don't believe there's enough in this settlement that's going into the unclaimed fund. We want to oppose what the plaintiff and defendant have agreed on. We have a different structure proposed on the settlement which will result in more money coming"?

If we're going to do this -- and maybe we won't do this, but if we're going to do this, I think we ought to make it clear what they have the standing to do. And then if they do have the standing to come in and fight over more than just the unclaimed funds, I think we have to ask the question, "Well, are other charities entitled to that notice, too, so that they can come in and fight over the class settlement or fight over the unclaimed funds?" And maybe what we should do is, we ought to set up a repository of

notice of settlement of all class actions that all charities could sign on a Web site and monitor closely so that if there's going to be a settlement, maybe they want to send somebody over there and say, "You know, blind children ought to get this money instead of poor people." And is there an equal protection problem?

You know, a lot of questions, but the rule as drafted, I think, creates a lot of unanswered questions for me that should be explicitly discussed and then written into the rule so we know the parameters of what we're implementing rather than just guessing.

CHAIRMAN BABCOCK: Pam.

MS. BARON: I agree with Richard. There's a difference between -- and I think it's fine to say, "This is an option for the court to consider, along with many other options." There's a difference between that and then providing some special notice only to one option in a long list. And then when we cross that line, we're showing a preference for one service over another kind of service, and I don't know that that really reflects what our job is. I think that's, maybe, more a legislative function, would be my view.

Also, I'm concerned, like Richard, too, that this does occur to give them a roving commission to come in and generally object to settlements in which they would otherwise have no interest. And it's one thing if you're there on behalf of a class member who has some interest in the litigation and then just to have a third party who wants to get their hands on unclaimed funds. You know, we could have lines from here to Dallas of people who would want to do that.

CHAIRMAN BABCOCK: Harvey. Then Nina. And then Ralph.

HON. BROWN: Well, the more I've heard, the more I'm convinced that the notice isn't a good idea. It's just too unclear. But I do think listening to the possibilities that the judge could consider in the rule is probably a good idea. It sounds like California does something like that.

Frankly, I had one of these, and we had to figure out where to go to charity and I never even thought about this group.

MR. YELONOSKY: Exactly.

HON. BROWN: Now reflecting on it, they may have been perfectly appropriate to receive some of that money when the parties hadn't worked it out in advance, and, frankly, we were kind of negotiating in

the courtroom what to do with any left over money, what charity should get it. So it wouldn't be bad to list them, I think, but maybe not give notice so that we don't have to go through all of the standing issues of who gets the notice, et cetera.

MS. BARON: I also think that the foundations that are in a particularly good position essentially go out and lobby with class action counsel, people who do this work routinely to say, "Put us on your list. Keep us in mind. We're trying to fund very useful projects." So there is the ability to do that, or speak with trial judges at CLE conferences to give your pitch, whatever.

I think that, actually, the foundations that are in a particularly good position make that request of the people who are engaging in the settlement negotiating process, and so they've got that ability right now. And then reminding them that this is an option would also help that goal of trying to get settlements to include this kind of contribution to that organization, but to give them some special privilege, I just thinks goes too far.

CHAIRMAN BABCOCK: Nina, do you still want to say something?

MS. CORTELL: Well, basically, I agree

with what's being said. It seems to me that a rule is not a proper vehicle, but that the objective is a good one. And I hate, if we do vote down the rule, that -- I don't want to throw out the baby with the bath water, and I would like to see us encourage some process; albeit, not -- my own opinion, not through a rule, whereby notice is given across the board to any charities that want to avail themselves of these funds so that they can make their pitch. I think it's an educational process. I think there is a notice issue, but I don't think it belongs in the rule.

CHAIRMAN BABCOCK: Ralph.

MR. DUGGINS: Just to add to what Pam said, the problem with the rule as written is that it requires this cause to be considered in every situation. It singles it out. And I don't think that's appropriate for a rule or for us to decide. But I do think that the concept of a notice -- follow up on your comment, is good, but so that you don't single out an individual cause, maybe the thing to do is to require some advance notice of any settlement where you've got this trigger on the Supreme Court Web site so that anybody can check it on an ongoing basis and make a determination on whether or not they should make a pitch for the unclaimed funds.

CHAIRMAN BABCOCK: You know, we seem to be having trouble with putting this entity first in line, giving them preferential treatment. Is there an argument to be made that because of the nexus between the work that this group does and our legal system, our judicial system, that it's perfectly appropriate to put them first in line and to give them preferential treatment? I mean, is that something we ought to just, you know, embrace and say, "Yeah. We are about providing equal access to justice, and that's something we ought to embrace and we ought to, frankly, favor?"

Sarah.

HON. DUNCAN: I don't think it's appropriate for us to use the rulemaking process to make that linkage.

CHAIRMAN BABCOCK: You think it's a legislative function.

PROFESSOR ALBRIGHT: Even less than that, I think there are -- people who are on this group can go to talk to judges in groups and say, "Hey, don't forget about this group. It's part of the judicial system. We have this obligation as lawyers and judges to think about these people," and do it, like Pam was saying, educational process, but to stick

it in a rule, it just doesn't make any sense to me.

CHAIRMAN BABCOCK: Well, the argument, I guess, would be that the Supreme Court, as the leaders of our judicial system, feel an obligation to encourage access to justice for people who can't afford it.

PROFESSOR ALBRIGHT: And they have lots of bully pulpits other than the rules.

CHAIRMAN BABCOCK: Yeah. I mean, that's true. They have a bully pulpit -- if that's the right word, but this is one mechanism that they could use, perhaps. I mean, that would be the argument in favor of it, I would guess.

Yeah, Richard.

MR. ORSINGER: Another suggestion that might not meet as much resistance would be for the Supreme Court to issue a comment to this rule in which they point out the special obligation that the law system feels to provide legal services for the poor and that courts should consider that in exercising their cy pres powers, whatever they may be, and that may not be as disturbing to us as having a rule requirement that there be a finding in every settlement that "I have considered your special charity and have decided not to give money to it."

CHAIRMAN BABCOCK: Yeah. Stephen Tipps.

MR. TIPPS: I think that's a far preferable approach to the one that's in the proposed rule. And one thing I like about it is that it explicitly recognizes that the expectation is that the judge, in deciding where these funds go, will follow basic rules of cy pres, which I don't think is clear from this language in the rule. I mean, the language in the rule simply says that the court shall have discretion to make a finding. I'm not sure whether that is intended to modify the basic cy pres rules or not. I mean, I think you could read this to say, "Well, normally, under cy pres, I couldn't direct the funds to go to the poor, but because of this rule, I can." And I don't think that's what we're trying to accomplish, but I'm not sure that the rule is clear in that regard. But I think a comment that simply reminds judges that this organization exists would be an appropriate thing to do.

CHAIRMAN BABCOCK: Carlyle.

MR. CHAPMAN: I think the comment -- the concept is a good one. I would lobby to tie it to the kind of comment or suggestion that Richard has said comes out of the California experience; that is to say, to remind the court that it would be appropriate

to give to charity -- give that to charities and to the foundation, but, also, I think that the comment needs to make it clear that that consideration only comes once the fund has been created and that there are excess funds -- undistributed funds.

The other problem that I see with the proposed rule is that there's some real problems in terms of giving notice before the fund determination has been made as to whether there are excess funds available. That gives some -- this entity an opportunity to appear, and as Richard has suggested, make comments or even give them standing to comment on the settlement itself. I think the comment, if we proceed with a comment or recommend a comment, needs to make it clear that none of these considerations come into play until the fund -- excess undistributed fund is created and is available -- exists.

CHAIRMAN BABCOCK: Okay. Stephen.

MR. YELONOSKY: Well, Chip, I don't know how you want to proceed. I guess from the -- wearing my hat from this Access to Justice Subcommittee, I guess what I'd want to do is call our committee back together with this excerpt of our transcript from this meeting and have the committee meet and discuss what's been said here, which I'm sure they'll take very

seriously and take into account, talk with Richard, whose subcommittee has now been assigned this issue, and take it from there.

CHAIRMAN BABCOCK: Yeah. Let me get a sense of our group. How many people are in favor of a comment as opposed to a rule?

(Show of hands)

MS. CORTELL: What would the comment sound like?

CHAIRMAN BABCOCK: Well, we don't know. In keeping with our protocol yesterday, we don't know.

(Laughter)

CHAIRMAN BABCOCK: Let me get your hands up on that again, on the comment as opposed to rule.

(Show of hands)

CHAIRMAN BABCOCK: How many people would prefer a rule as opposed to a comment?

(Show of hands)

PROFESSOR ALBRIGHT: How about "nothing"? Is that an option?

MR. EDWARDS: I'd like to know what the comment is going to be before I vote.

MR. ORSINGER: That's the way I felt yesterday about a statewide rule on cameras in the courtroom.

(Laughter)

MR. CHAPMAN: Well, if the comment comes back and it's not something that's palatable, we can always vote --

CHAIRMAN BABCOCK: Yeah. You can vote the comment down.

MR. EDWARDS: I would vote for -- if we want to talk concept -- comment or a rule, I vote -- add my vote to comment.

CHAIRMAN BABCOCK: Okay. So that would be 15 to 1 in favor of comment as --

PROFESSOR ALBRIGHT: But nothing is not an option?

CHAIRMAN BABCOCK: How many people want to do nothing.

(Show of hands)

CHAIRMAN BABCOCK: Five people want to do nothing. How many people want to do something?

(Laughter)

CHAIRMAN BABCOCK: Pam doesn't want anymore votes.

(Simultaneous discussion)

MR. CHAPMAN: Is that the same as the call for the comment vote?

(Laughter)

CHAIRMAN BABCOCK: Okay. If we do anything, the preference of the committee of the people assembled here today, by a vote of 15 to 2, is that -- the Chair not voting, is that we have a comment as opposed to a rule. That's the concept today.

Now, as always, if the court wants a rule, then we'll try to do a rule, but, Stephen, I think your method of proceeding is a wise one. Let's get the transcript. Let's go back to the Access to Justice Subcommittee, tell them what the thinking of this group is.

In addition, I think I need to talk to Justice Hankinson who has called me about this, and tell her what our feeling is, what our sense is, and see what the court's thinking is.

MR. ORSINGER: Can I also make a request that if the your committee, Steve, is interested in pursuing a rule route, that I would certainly feel more comfortable if we would define who has what standing to do what rather than leave that ambiguous, because if we more clearly understand who's getting what role, it allows us to make a better decision on whether to recommend it or not.

This has a lot of unanswered questions

that it raises, and you have a lot of fine minds on your committee and they may come up with some solutions that would make people like this better.

CHAIRMAN BABCOCK: Okay. Well, that --

MR. EDWARDS: One other thing. I have a little trouble understanding how there would be anything left over if you're dealing with equitable restitution. You might see if you can come up with a notion on that.

MR. YELONOSKY: As usual, you're way above me, and I'll have to get you to explain that to me.

(Laughter)

MR. EDWARDS: Well, I don't -- I can't explain it. That's why I asked the question.

CHAIRMAN BABCOCK: Okay. Here's what I have that we have left to do today. The Rule 21 amendment to include discovery; that's Richard. The Rule 13 visiting judge peer review; that's Justice Duncan. The Rule 202 issue, which is Bobby Meadows, who just left. And the Rule 76A, which is Alex and Richard Orsinger.

Does that comport with what everybody else thinks?

(No response)

CHAIRMAN BABCOCK: Hearing no dissent, then that's the way we'll go about it. And why don't we take a ten-minute break.

(Recess: 10:24 a.m. to 10:35 a.m.)

CHAIRMAN BABCOCK: Back on the record. We are at -- where did Richard go?

MR. DUGGINS: Restroom, or so he claims.

CHAIRMAN BABCOCK: Well, he's next up on the agenda. So, Richard, we're to Rule 21. Amendment to include discovery is what this is called, Agenda Item 2.5.

MR. ORSINGER: Okay. The origin of this proposal is obscure to the members of my subcommittee.

(Laughter)

MR. ORSINGER: We, therefore, have had difficulty in going to the source to try to explain what the proposal is or what the problem is. We have attempted to look at the listing on the agenda and devine the importance of it, and in support of analysis of this issue, we have a two-page handout that sets Rule 21 out on a page followed immediately by Rule 191.4, Rule of Civil Procedure, trying to see what the correlation between the two might be.

Our best insight at this point is that

there is some kind of interface between Rule 191.4 on filing the discovery materials as materials that are not to be filed and materials that are to be filed, and then under Rule 21, that has to do with service -- filing and service of pleadings and motions. And I think that the line item in the agenda indicates that perhaps Rule 21 should be amended to include discovery. And if you see Rule 21, it appears to relate to pleadings, pleas, motions or applications to the court, which, of course, does not include discovery other than, say, a motion relating to discovery.

And so I suppose the proposal suggests that maybe discovery ought to be listed under Rule 21 about something that should be filed. On the other hand, a contrary argument could be made that discovery materials have different categories and we've made a policy decision to say that some are filed and some are not filed, and maybe the filing requirement on discovery ought to be just in the discovery rules and we shouldn't try to massage Rule 21 to where it's broad enough to restate in some succinct way, or even explicitly, what's already listed in Rule 191.

I'm sorry I don't have a clearer idea of the proponent's view of why this should be done, but

that's the best we could figure.

CHAIRMAN BABCOCK: Okay. Well, the source of this is the court.

MR. ORSINGER: The source of this is the court. Okay.

(Laughter)

MR. ORSINGER: Then, obviously, it's very important and --

(Laughter)

MR. EDWARDS: Would you address it in 21 or would you address it in 21a?

CHAIRMAN BABCOCK: Chris tells me that it was from the 10th justice, Luke Soules, so --

MR. ORSINGER: Okay. So then it's somewhere in there in importance. Right?

(Laughter)

CHAIRMAN BABCOCK: Yeah, Carl.

MR. HAMILTON: Well, I've been trying to figure out why we have in 191.4(b)(1) -- that's the only place that conflicts with Rule 21 as to why we require the discovery requests, deposition notices and subpoenas served on non-parties to be filed with the clerk. And Bonnie says she does get these, but nothing ever gets done with them, apparently, and it seems to me like there was some discussion about that

when we first enacted these rules, but I can't remember what it was, and I don't -- right now, I don't really see any reason why those ought to be filed with the clerk. And if we eliminate that, that fixes any conflict, then, with Rule 21, because then there's no discovery to be filed except in connection with a motion.

PROFESSOR ALBRIGHT: I have a question. I missed the very first part of this -- and I'm sorry. Is the idea that there's something in conflict between these two provisions?

MR. ORSINGER: What I said, Alex, and I don't -- my subcommittee has struggled to find out what the real purpose here is. And I guess we did not realize that this originated with Luke, and, therefore, perhaps, he could have told us.

So we don't know whether it's a perceived conflict or whether there is a gap. It seems to me that Rule 21 has to do with the requirement to file pleadings, pleas, motions and applications to the court, and Rule 191.4 has to do with filing discovery.

PROFESSOR ALBRIGHT: That's right.

MR. ORSINGER: So they both have to deal with what has to be filed.

PROFESSOR ALBRIGHT: But they don't seem to be in conflict to me, but maybe -- how about I make a motion to table it and we find out more about this?

MR. TIPPS: Second.

CHAIRMAN BABCOCK: Yeah. I -- yeah, Frank.

MR. GILSTRAP: Well, it might be a good idea to try to find out more about it, but it certainly seems to me that -- I mean, to say that a pleading, plea or motion is different from discovery is true, but that's really a fine distinction that some lawyers don't understand. You can fix the problem by just, in Rule 21 saying "except as set forth in Rule 191.4(a)," and that fixes that problem, if there is a problem.

MR. ORSINGER: Well, you know, there's not a conflict there either, because Rule 21 has to do with things where you're asking the court for relief, and 191.4(a) really has to do with this discovery process that's going on outside the scope of the court, doesn't it?

MR. GILSTRAP: I understand the distinction, but, you know, to the extent that some people might perceive a conflict, you fix it that way.

CHAIRMAN BABCOCK: Well, Alex made a

motion, which makes a little bit of sense to me.

MR. DUGGINS: I second that motion.

CHAIRMAN BABCOCK: If this didn't come from the court, but rather came from Luke --

MR. GRIESEL: This arose when, as a cleanup matter -- a secondary cleanup matter to when we were looking at the proposed discovery revisions, approximately two years ago.

CHAIRMAN BABCOCK: Well, let's take this off the agenda; not to be put back on, unless, Richard, you find from Luke that there's a serious problem that we need to advise the court about. And if so, you will advise me and we'll put this back on the table, but for now, we're done with it.

CHAIRMAN BABCOCK: Item 2.6 is the ex-parte communications and physician-patient confidentiality, and that's the Evidence Subcommittee that's got this. Buddy Low had a personal commitment today, so he is not able here to discuss it. So we'll move it to November, which is just as well, anyway.

And John Martin pointed out to me that despite the fact that there has been a lot of communication about this proposal, and by that I mean written communications from both sides of the Bar, that we really don't have any language that has been

drafted to look at. And John suggested that, maybe, if we're going to do something, that that would be a good idea.

In addition, apparently, there are -- is it amendments to HIPPA that are going to, perhaps, impact this issue?

MR. MARTIN: Well, HIPPA goes into effect sometime next spring -- March or April, thereabouts, and I'm no expert on HIPPA, but I've been told by people who are that HIPPA will impact this issue in some way, although I think there's some disagreement about how.

CHAIRMAN BABCOCK: Okay. Yeah, Frank.

MR. GILSTRAP: I think there's another problem, in that, aren't the provisions of the physician-patient confidentiality -- I think they're codified in statute. I think they're in occupational code. The reference I've got is 159.002. So, you know, again, there may be a problem with that as well.

CHAIRMAN BABCOCK: Okay.

MR. ORSINGER: Before we leave it, can somebody just, in a nutshell, say what's at issue here or what's at stake?

CHAIRMAN BABCOCK: In a broad, broad way, the issue is whether or not counsel -- primarily

defense counsel -- can make an ex-parte contact with the treating physician for a plaintiff who has alleged injuries as a result of the conduct of the defendant.

MR. ORSINGER: And is the restraint right now is the ethical rule against the lawyer communicating directly with an expert hired by the other side or why is this not permitted?

MR. GILSTRAP: It is permitted now.

(Simultaneous discussion)

MR. ORSINGER: It is permitted. Then somebody wants to prohibit it?

MR. EDWARDS: No. You say it's permitted. There's an argument. It depends. In federal court, in this state, it has generally not been permitted and has been held to be unethical.

MR. ORSINGER: Okay. So should we be talking about changing the Rules of Ethics rather than the Rules of Procedure?

MR. EDWARDS: No. It's a question of whether or not you can make -- what is the method -- where it arises is because of the Rules of Evidence that say that when the physical or mental condition of a person is put in issue, either as a matter of claim or defense, that there is a waiver of privilege. And according to the 13th Court, and apparently by

implication of the Supreme Court, that implies third parties not party to a litigation.

The issue is: Okay. The Rules of Evidence say that the privilege is -- physician-patient privilege is not applicable. And then the question is, "Okay. How do you go about getting the information?" So it's not ethics. It's a question of, "Is it different from" -- I mean, how do you go about getting the information? That's what the issue is. Do you do it by deposition? Do you have to have a release from the patient? How do you do it as a matter of discovery?

MR. MARTIN: It can come up in different contexts. And I think just the regular personal injury case is a different situation from a medical malpractice case. Bill, as the plaintiff's lawyer, may disagree with that, but in a --

MR. EDWARDS: Well, it may or may not be.

MR. MARTIN: Yeah. And there are three Texas Court of Appeals cases saying that it is permissible.

MR. EDWARDS: No, they don't say it's permissible.

(Laughter)

MR. EDWARDS: If you read it -- I'll tell you, I'll give you some pretty well reasoned federal court opinions that say it's never been addressed directly. And the Supreme Court has never addressed it.

MR. MARTIN: It's never been taken to the Supreme Court by the plaintiffs that have been unsuccessful in the court of appeals.

MR. ORSINGER: Frank is saying that there's a state statute that governs privacy, which the Supreme Court has relied on recently in deciding there's no tort duty owed to third parties.

MR. GILSTRAP: There's a statute governing the privilege.

MR. ORSINGER: And then there's a federal statute that's going to go into effect that may privatize or make this information confidential, also.

MR. MARTIN: It may have some impact on it. Again, I'm not an expert.

MR. GILSTRAP: It may preempt the state statute.

MR. EDWARDS: There is already a privacy statute in place, but there's a set of CFRs coming down that greatly expands that the last entry in the

Federal Register explaining what they were doing is about 200 pages long. If anybody can tell what that does, I'd like to have them explain it to me.

CHAIRMAN BABCOCK: You know, this is going to be a good fight, because this whole conversation is in the context of not talking about the issue today.

(Laughter)

HON. PATTERSON: I was going to say, so we can expect a spirited discussion in November.

CHAIRMAN BABCOCK: Yeah, right. Right.

MR. ORSINGER: So in other words, I still don't know what's really going on.

CHAIRMAN BABCOCK: Well, no. I think --

MR. EDWARDS: The question is: How do you go about getting this information that the Rules of Evidence say is no longer privileged?

MR. GILSTRAP: Another thing is, you know, the defense Bar has really weighed in heavily with all of these letters. I suspect we'll see some kind of response from the plaintiffs Bar.

CHAIRMAN BABCOCK: Yeah. I got something faxed to me Thursday from Frank Branson's office, which is a detailed legal memo on the cases, and I think makes some of the points that you were

making about the Texas state court cases, perhaps, not being as broad as some lawyers read them.

Judge Patterson.

HON. PATTERSON: And along those lines, if we could identify the memos or the summaries of discussions, because I started running off the letters, and they seem to be somewhat repetitive.

(Laughter)

HON. PATTERSON: And there was a lot of paper that seemed to come out. So if we could somehow identify some of those, so that if we run them off, we can be efficient about it.

CHAIRMAN BABCOCK: Yeah. I'm going to have Deb get this memo from Frank Branson to everybody. It's got a good discussion of the legal issues. I know that there's another way to read these cases, and probably people on the defense side would read them differently, but this would be one thing that you'd would want to look at.

Pam.

MS. BARON: Well, I wanted the case cites before the next meeting, and I hope that has it and --

CHAIRMAN BABCOCK: It does.

MS. BARON: -- if that's not all the

cases --

MR. GILSTRAP: They're in some of the letters.

MS. BARON: -- if you could --

MR. GILSTRAP: They're in some of the letters.

MS. BARON: Okay. If we could just have all that.

CHAIRMAN BABCOCK: There's a Fifth Circuit case that speaks to the issue. US --

MS. BARON: Okay.

MR. ORSINGER: Is that posted at the Web site or do we need to look at E-mails to -- that's at the Web site?

MS. LEE: Branson's will be. It's not yet because it was just received Thursday, but it will be there.

MR. ORSINGER: And he has case cites in there we could --

CHAIRMAN BABCOCK: That's correct.

MR. ORSINGER: Okay.

HON. BROWN: There are a number of letters written to the committee -- to not this committee, but Buddy's subcommittee by plaintiffs' lawyers.

CHAIRMAN BABCOCK: Yeah. There's a lot of paperwork on this. And John's proposal, I think, is good, that we get some language that we can look at for November. So I'm going to ask --

MR. EDWARDS: Get Buddy to give you that.

CHAIRMAN BABCOCK: Yeah. I'm going to ask Buddy to -- he's the chair of the Evidence Subcommittee. You're on it, I think, Bill, aren't you?

MR. EDWARDS: I don't know. I guess.

CHAIRMAN BABCOCK: I think you are.

MR. EDWARDS: I'm on whatever I'm called on.

CHAIRMAN BABCOCK: Yeah. Okay.

All right. Moving to Item 2.7, which is Rule 13, visiting judge peer review. Justice Duncan has convened her subcommittee on this and is ready to --

MR. EDWARDS: I'm not on that committee.

CHAIRMAN BABCOCK: You're not? Okay.

MR. EDWARDS: I don't believe.

CHAIRMAN BABCOCK: I'm just about to find out.

Judge Brown is on it. Elaine Carlson

is on it. Judge Brister, Tommy Jacks, Judge Medina, Mark Sales, Stephen Tipps.

MR. EDWARDS: I was right. I'm not on it.

CHAIRMAN BABCOCK: You're right. You're not on it.

HON. DUNCAN: There is a packet over underneath the seal of the State Bar of Texas that -- actually, it's now in Chris Griesel's hands. It's a very short report from the subcommittee, one page on visiting judge peer review.

To summarize, I believe we first discussed in our conference call whether having an Administrative Rule 13 providing for peer review of visiting judges was a good thing or a bad thing and whether the Supreme Court Advisory Committee had any business even discussing or considering this. We concluded, that because the Supreme Court asked us to, we had a role to play. And that while there were concerns about how effective would this really be, it's something that we think the court should at least try, that it might, as it becomes more institutionalized, gain effectiveness.

And if I can just read from the report, we thought there were, pretty much, three reasons that

it would be a good thing rather than a bad thing.

"The power of the judiciary derives in large measure from public confidence in its integrity and competence; and it is hoped public confidence in the judiciary would increase if there were a process for reviewing the 'unelected' judiciary;

"Even if a visiting judge peer review process had only a limited positive impact, any level of positive impact would be better than none; and it might be that the positive impact of a visiting judge peer review process would increase as the process became institutionalized."

And finally, "a visiting judge peer review process would afford a presiding judge political 'cover' to refuse to appoint a visiting judge who lacks the requisite competency, judicial temperament, etc."

We next looked at the text of the proposed rule. There really -- there was some cleanup that we thought needed to be done. We pretty much directed our evaluation of the rule to the footnotes that are in the draft that you got -- and I apologize because the draft that you got is not the draft I meant for you to have. What you've got is the draft we considered, but it's easy, I think, to look at the

draft you've got --

MR. HAMILTON: Which one? We got two. One hooked on to your memo and the other separate.

HON. DUNCAN: Yeah. Look at the one hooked on to the memo.

We can just briefly go through the cleanup. There's really only one, I think, controversial issue that we need to discuss, and we'll get there in due course. If you look at Rule 13.2, Subsection (b), Footnote 5 -- whoever drafted these footnotes, and we think it came from the Judicial Council --

MR. GRIESEL: Yes, it did. It was drafted by Bob Pemberton on the direction of the Judicial Council.

HON. DUNCAN: Okay. Footnote 5 asks if the time periods for the evaluation process should be linked to the period for which a visiting judge is certified under Section 74.055 of the Government Code. The subcommittee unanimously concluded that they should not be. The reasoning was fairly simple, it was: The more information you've got, the better. I mean, just because a piece of information was inadvertently not considered in the previous evaluation, shouldn't mean that it not be considered

at the next evaluation.

If you look at 13.3, Subsection (b)(4) -- this lists the considerations that the peer review committee is to consider. What's written in (4) is, "the visiting judge's competence in each of the judge's area of specialization."

We had a spirited discussion over the distinction between competence and performance and there was -- my own view, which was shared by only a couple of members, is that there's a distinction between what you're able to do and what you do do, and so we suggest that that be changed -- where Footnote 8 is in Subsection (4), that it be changed "to the visiting judge's competence and performance."

HON. BROWN: And performance, both.

HON. DUNCAN: "And performance." I mean, really, the fact that someone is able to do something that they choose not to do is not very comforting.

On the next page, Subsection (5), Footnote 10 asks about limiting the sources for information to the region that the judge is being peer reviewed in. We suggest that that's not appropriate, that information is good, whatever its source, or at least should be considered, even if it's not good.

The next footnote, 11, relates to Subsection (d)(1), Right to Response, "A visiting judge need not submit materials to a peer review committee in support of a favorable recommendation." Followed by, "My draft" -- in Footnote 11, "My draft makes such filings optional. Should the rule go farther to prohibit such filings?" The subcommittee's view is that would be terribly unfair if the visiting judge couldn't respond to the information that the subcommittee has received.

Carlyle.

MR. CHAPMAN: Yeah. Justice, did you have some proposed language as to Footnote 10 as opposed to what is there? You say that the subcommittee believed that it should be broader than just the "region where the visiting judge is assigned or has formerly presided."

HON. DUNCAN: No.

MR. CHAPMAN: Okay.

HON. DUNCAN: Short answer is no.

On the next page, Subsection (e)(1), Time, the Footnote 12 asks, "When does a peer review committee 'complete its review'," and what does this mean?

The subcommittee was of the view that we

can't get into this peer review committee's business too deeply. I mean, they have to have the flexibility to conduct whatever review and for however long that they feel they need to do the job adequately, but we do think there ought to be some language that suggests this isn't supposed to take the whole two years that the committee is looking at. So what we suggest is, in Subsection (e)(1), that it simply state "The peer review committee must perform its duties with reasonable promptness to facilitate the presiding judge's appointment process." In other words, not try to set a definitive deadline for completing the review process, but remind the peer review committee that the whole purpose of this is to assist the presiding judge in appointing visiting judges.

On the next page, Subsection (f)(1), "A visiting judge who receives an unfavorable recommendation may submit a written request for reconsideration to the peer review committee not" -- and in the original version, it has "earlier" -- "than the 180th day after the date the committee issued its recommendation. Footnote 14, appropriately asks, should this "earlier" not instead read "later," and we believe that it should.

HON. BROWN: Sarah, when you're making

these comments about what you believe, are these -- am I missing a draft? Is there another written draft of this somewhere or are these -- you're telling us, orally, what your recommendations are?

HON. DUNCAN: There is a written draft, and I don't know why you don't have it. I'm sure it was my fault, but I have --

MR. ORSINGER: Sarah, can I say that I believe that what I printed out from the Web site probably has the overstrike and interlineation, but what's over here on the counter may not.

MR. GILSTRAP: It does. It does.

MR. ORSINGER: Because I have one here that looks like it's pretty heavily edited up.

HON. DUNCAN: Ours is not heavily edited.

MR. ORSINGER: Oh, it isn't.

HON. DUNCAN: In fact, in my redraft of what the subcommittee did, I took out all of the red lining in Pemberton's draft, assuming that we were beyond the Pemberton changes, that we were looking at what Bob had done and responding to what he recommended. So what I have that I don't know that you do have --

MR. HAMILTON: For example, on Page 4,

recommendations to (e)(1), when you told us verbally what the recommendations are, we don't have anything in writing on that. Correct?

MR. ORSINGER: Yeah.

HON. DUNCAN: That's my understanding.

MR. HAMILTON: Okay.

HON. DUNCAN: And that's why I'm going through it orally. I assume we'll get this on the Web site when we-all get back.

But on your Page 5, Footnote 16, is, I think, the one controversial issue, and I will tell you that, on our subcommittee, we invited Judge Peeples -- and Chief Justice Cayce is on the subcommittee -- and they participated in a conference call. They were both on the Judicial Council Committee that worked on this proposal, and we split, I think, fairly evenly down the judge/lawyer line, except for me, and I sided with lawyers, as to whether the peer review committee's recommendation as to favorable or unfavorable should be binding on the presiding judge. Both Chief Justice Cayce and Judge Peeples thought it should not be and the remaining members of the subcommittee and me thought that it should be. And that's, I think, really the issue that we need to put to discussions and discuss.

CHAIRMAN BABCOCK: Okay.

HON. DUNCAN: And it's a significant issue.

CHAIRMAN BABCOCK: Richard.

MR. ORSINGER: In order to address that issue, and I might have misunderstood or missed something you said, but what kind of "due process" is there for the visiting judge to become aware of complaints and to answer them and then what right does anyone else have to see what the answer is and to challenge the veracity or whatever? Is there any kind of process of information going back and forth and somebody reviews what somebody says and has a chance to find some kind of counter evidence or is it really just like it is with specialization, where you send out a series of checklists and you get back three or four, don't say much --

HON. DUNCAN: 13.3(c), "the peer review committee must consider information submitted by," and there is a list beginning with the presiding judge. (d) provides for a response by the visiting judge.

MR. ORSINGER: So that means the visiting judge sees -- no. How do you -- what does the visiting judge see to respond to? Because if there's not confidentiality, nobody is going to be

candid in their complaints, unless they're just so angry at the judge they don't care that they're going to lose every other motion that's ever argued in front of him.

CHAIRMAN BABCOCK: Frank.

MR. GILSTRAP: When they finish? Are you-all finished with that colloquy?

HON. DUNCAN: I'm trying to find -- I believe there's something that says that anything that anybody submits is confidential.

MR. ORSINGER: So, then, how does the visiting judge know what to respond to? I mean, before I decide whether this is binding on a presiding judge, I'd like to find out whether we're going to get legitimate complaints and whether judges are going to have the opportunity to defend themselves against unfair challenges and whether the complaining parties will have any input to the response.

HON. DUNCAN: I think, if you look at (d)(2), the peer review committee can request a response from a visiting judge, and because the recommendation that the peer review committee ultimately makes is either only favorable or unfavorable, they inform the visiting judge that they are proposing to make an unfavorable recommendation or

recommendations and the visiting judge can respond to that. I don't think there is a procedure for providing the visiting judge with copies of the information that's been received so that he or she can respond discretely to those pieces of information. It's simply, the visiting judge would have the right to respond to a proposed unfavorable recommendation.

MR. EDWARDS: What information does the visiting judge have to respond to?

HON. DUNCAN: The proposed unfavorable recommendation.

MR. EDWARDS: How does the judge know what that recommendation is based on? I mean, you know, I say, "Okay. Visiting judge, you stink and you're out of here." Now --

CHAIRMAN BABCOCK: Or more likely that, you know, "You failed to display appropriate judicial temperament in the conduct of your trials, and so" --

MR. EDWARDS: I used "stink" generically, something wrong with your performance.

CHAIRMAN BABCOCK: Right. So he responds, "Well, that's not true. I'm perfectly judicious and very measured and even tempered."

Now, if he knew that the finding was based upon, you know, Elaine Carlson was in court and

he said something that offended her and she wrote him up and that's the basis of the unfavorable finding, I mean, he could respond to that and say, "Well, you know, Ms. Carlson is just a little thin-skinned. I didn't say anything meaner to her than I did to anybody."

HON. DUNCAN: The problem I'm sure the council confronted, as we confront, is the balance between confidentiality for the sources and a due process like concern for the visiting judge, and as Richard says, if the sources are not guaranteed confidentiality, the chances of getting useful information are limited.

MR. EDWARDS: How does the Judicial Qualifications Commission work in that regard, do you know? I'm not familiar with --

MR. LAWRENCE: Well, there has to be a complaint filed with it. And anybody can file a complaint with the Judicial Conduct Commission.

MR. EDWARDS: No. I understand that. I'm talking about the confidentiality of it.

MR. LAWRENCE: Well, everything is confidential unless and until there's a public proceeding.

MR. EDWARDS: Well, is it confidential

from the judge that the complaint is -- I'm talking about "confidential" as to, "Does the judge know what the complaint is?"

HON. DUNCAN: Yes.

MR. LAWRENCE: Yeah, yeah, but -- well, no, not necessarily.

MR. EDWARDS: That's what I'm asking.

MR. LAWRENCE: The commission can look at a complaint, and if they decide there's nothing to it, they may just dismiss is out of hand --

MR. EDWARDS: I understand that.

MR. LAWRENCE: But if there's any substance at all, then the judge has a chance to respond. But the confidentiality applies to the commission. It doesn't apply --

MR. EDWARDS: I understand. I'm not worried about the people outside of the process. I'm talking about the complainant and the judge.

MR. ORSINGER: Does the judge see the complaint?

MR. HAMILTON: Does he know who made it?

MR. LAWRENCE: Well, if it gets far enough down the road, then the judge is going to see the complaint and will be invited to a hearing -- an informal proceeding. And at that point, he's going to

be asked questions. He's not going to be confronted by the person who made the complaint, but he'll be asked questions by the staff. And he'll know who filed the complaint and he'll know what the allegations of the complaint are.

MR. EDWARDS: Why would we be any more worried about visiting judges than about sitting judges in that regard?

MR. DUGGINS: I'm not sure that's right, that they find out who the complaining party is. I'm not saying you're wrong. I just know a couple of cases in Ft. Worth where the complaints were filed but the judges never did find out who the complaining parties were.

MR. LAWRENCE: If it goes to an informal proceeding where the judge actually comes to Austin and sits before the commission, then he's going to know who the complainant is. Now, he may be written a letter. If they decide that there may be some substance, then the judge may be written a letter, and in the letter, he may not necessarily know who the complainant is. In the letter, he may be asked to comment on something. But, generally speaking, it's not going to be a secret to the judge. He's going to know who the complaint came from.

MR. DUGGINS: Well, suppose it's a campaign violation. Somebody just says, "Check this out. He spent money on a pickup truck out of his campaign fund." You're not going to know who, necessarily --

MR. LAWRENCE: Well, yeah, in a situation like that, the staff would not tell him who the complaint came from. You can ask, when you file the complaint, that it be kept confidential. And if you ask that it be kept confidential, then the staff is not going to say. However, if it goes to a formal proceeding and it's public, then, at that point, everything is open to the public.

CHAIRMAN BABCOCK: Judge Patterson.

MR. CHAPMAN: So the judge has the right to ask for this formal proceeding.

MR. LAWRENCE: Yeah, but, generally, that won't happen. Judges are not normally going to ask for a formal proceeding.

CHAIRMAN BABCOCK: Judge Patterson.

HON. PATTERSON: My question is: What is the impetus for this rule? Is it for trial judges or appellate or is it a Houston rule? What is the source and the -- what are we addressing?

MR. GILSTRAP: Let me ask a related

question before you answer that. It's the same -- is there any other body of law -- I mean, we're not talking about judicial complaint. We're talking about peer review. Is there any -- and everybody may know the answer but me -- is there some other place in the rules or statutes where we have peer review of judges?

HON. DUNCAN: Understand, this is an administrative rule. This is not a rule of procedure.

MR. GILSTRAP: I understand. But rules anywhere, is there some mechanism for peer review of judges? And I think Judge Patterson's comment is, you know, "Where does this lead" -- "Is this kind of a pathbreaking thing to review sitting judges?"

HON. PATTERSON: The related background question is -- if I may put it indelicately, do we have -- are the presiding judges and chief judges not doing their jobs or -- we also have the rule where you can object to the first visiting judge. I mean, how does all that play into this problem? Because I would envision that this elaborate procedure where, really, the presiding judge or the chief justice would have to weigh in pretty strongly in order to get this done, that this might create the type of bureaucracy that would make it harder to get a job done that I think is done quiet and efficiently now and I don't understand

exactly what the problem is.

HON. DUNCAN: Chris may know more about this than I do. The little bit I know is that this emanates from the Judicial Council.

MR. GRIESEL: Yes. This emanated from the Judicial Council. It was the result of a study that was, I believe, initiated in response to requests from legislative sponsors. In fact, they have -- they approved, over Friday, another request for a legislative package that included visiting judge review.

They were looking for a system that tested the competence, I think, of and demeanor in response to complaints that had been raised by the Bar, I think, repeatedly about the competency of visiting judges and the qualifications of visiting judges and the ability of the Bar to make a meaningful comment to the Judiciary about complaints about visiting judges other than filling out the 76 -- Section 76 blank form -- strike form of the visiting judge. We don't take those, "How many judges are struck?" We don't track those in any meaningful way, and so this was a method that the Judicial Council spent about two years on, and, I believe, passed unanimously out of the Judicial Council, to create a

peer review system.

HON. PATTERSON: Instead of just sort of doing away with the concept of visiting judges, which, I suspect, is what lawyers would prefer.

MR. GRIESEL: Yeah. I don't think there's any discussion about doing away -- if I hear the OCA's numbers -- statistics right and presiding judges' discussions right, I mean, I don't think there's any clear discussion of doing away with visiting judges because the docket requires their usage.

CHAIRMAN BABCOCK: Richard.

MR. ORSINGER: There's a multiplicity of factors here, but I fundamentally support the idea of peer review. The reason we use visiting judges in urban areas is because we don't have enough courts, and part of the reasons we don't have enough courts is because there's unresolved constitutional issues about the way we select our judges, is what I've been told over the years. But even if the legislature is willing to pay for us to have enough judges, we still have the problem with the Justice Department.

In San Antonio, we rely, extensively, on visiting judges, routinely. That's not so much true in other counties that I practice in, and my practice

is mostly limited to family law, but in the rural areas, my experience is, the judge will not appoint a visiting judge to sit in for the elected judge unless both sides agree on who it is. So it's probably more in the routine situation where you show up for a docket call, and particularly in San Antonio, but also in Austin, if they use visiting judges here, you don't know who your judge is going to be until that morning, and you have a strike, but they've got three visiting judges. They don't have enough district judges to handle your case, so you use your strike on the first visiting judge. And then, you know, you get the second one -- or if the other side uses it on the second one, then you get the third one.

And maybe it's because San Antonio -- a lot of judges like to come and hear cases in San Antonio. It's kind of like a vacation, where they come down from Ft. Worth or over from Houston, or whatever, and so we tend to have a lot of judges that come down there.

And I've had problems with retired judges falling asleep in the hearings in the afternoon after lunch. I don't know what they had to eat or drink during lunch, but sometimes they're handing family law matters because that's a significant part

of the docket but they didn't really have any experience in that on the Bench they had. I mean, it just goes on and on and on.

HON. PATTERSON: But it sounds like there's no tracking of objections that gets back to chief judges or presiding judges or whomever.

MR. ORSINGER: Well, I don't know. I can't speak to that. I will tell you this --

MR. GRIESEL: The OCA doesn't track those.

MR. ORSINGER: There's kind of a market mechanism here, Jan, because if every time you try to assign somebody to a retired judge, somebody strikes them, then there's no point in paying them to come because they're not helping you to move cases. But as a practical matter, you know, sometimes, if you don't take that judge, you can't get your case tried that week, or whatever, and so I think that it's -- especially if the judges perceive it -- the litigants deserve to know that the judges that they're getting are capable. These judges are not elected anymore. They're past election. They're floating around until they're too sick to sit on the Bench.

(Laughter)

HON. PATTERSON: To me, it's not as

though you're able to fill out an evaluation of a judge after a trial. This is a fairly adversarial high-level complaint that's going to take a lot, I would think, to get -- and time to get rid of a visiting judge, and I wonder if there's not another mechanism. I don't want to suggest that I am not in favor of either peer review or evaluation, but this just seems -- this is going to, I think, require the presiding judge and lawyers to weigh in over a period of time and it's going to really take something to get rid of them. And then you're going to have, it looks like a fight, to me, and I wonder whether there's not another mechanism to get this job done efficiently.

CHAIRMAN BABCOCK: Chris.

MR. GRIESEL: And I do think that -- to answer the question about the administrative judges, while I'm certain that the administrative judges didn't welcome the additional work that this envisions, because they already have enough of that, this did go through both the councils of administrative judges at that time and did come out, and that was on the way to the Judicial Council.

So the administrative judges are aware of the output of the rule, which is, they're going to have to make an up or down decision on the visiting

judges within their region based on information that's submitted by all of these people in there on a panel that's going to be composed, not just of judges but also of lawyers and public members.

MR. GILSTRAP: One bit of information. Does Government Code 74.005 -- excuse me, 055 cover only trial judges? I mean, there's extensive use of judges -- visiting judges on appellate courts, and I just wonder if we're talking about: Does this cover that or is that something separate?

HON. DUNCAN: Appellate judges have their own section. That's a good question.

HON. PATTERSON: Procedural could cover both, I would think.

MR. GILSTRAP: I mean, I could see if it applies to trial judges, it would just probably be a question of time till it's expanded to appellate judges because -- I mean, it's just like the trial court. There's some courts of appeal that simply cannot operate without a visiting judge -- visiting justice.

MR. ORSINGER: Well, you know, the difference is that, Frank, you don't really know that you have an incompetent retired appellate judge, because you don't hear them talk. I mean, you don't

see what their first draft looked like.

MR. GILSTRAP: You only have their final draft.

MR. ORSINGER: And that's only if they write the opinion. If all they do is concur with somebody else -- so it's probably not as big an issue in the appellate court.

MR. GILSTRAP: Maybe so.

MR. ORSINGER: But if you've tried a case for two weeks to a retired judge and then he doesn't rule for six or nine months and then forgets the evidence, you know, there ought to be some mechanism for you to complain. And this gives the presiding judge a cover. Instead of saying, "Look, 25 lawyers have come to me and told me that you're the worst judge that they've ever had. You're not going to be able to sit in this area of Texas anymore." He can say, "Hey, you know, there was a committee. It involved all these people. They got all of this information. Sorry, I can't do it."

CHAIRMAN BABCOCK: Sarah.

HON. DUNCAN: If I can respond to that. David Peeples was on our subcommittee, and he's very much in favor of this. And one of the points that he made that I've also seen demonstrated in the other

areas and situations, this is really political, the appointment of visiting judges. There's -- it's like any other job. And David, as a presiding judge, has been subjected to a great deal of pressure from high sources to appoint X or Y or A or B. And the point that he made -- and he's not alone. I mean, this is true all over the state. The point that he made in our subcommittee meeting is, it would be good to have -- to shift to a committee, a peer review committee and so -- sort of protect the presiding judges from this high-level pressure. And I think his view was that presiding judges around the state would appreciate that.

MR. GILSTRAP: They're kind of doing an informal peer review as it is.

HON. DUNCAN: Yeah.

MR. ORSINGER: But they have to take the heat for the decision, if they make it alone.

CHAIRMAN BABCOCK: Carl.

MR. HAMILTON: How does this envision -- and maybe you know, Chris. Does this peer review committee just sit and wait for complaints to come to it like the Grievance Committee does or does it go out and investigate, talk to lawyers, talk to court staff? And if it just sits and waits for the complaints, is

there some place, through the OCA or somewhere, where these complaints come and then go back to the committee?

HON. DUNCAN: My understanding is that this is not -- this peer review committee is not an investigatory body. It does not go out and look for information. It takes information that's submitted to it or to OCA, which I assume would forward to the appropriate peer review committee.

CHAIRMAN BABCOCK: Harvey.

HON. BROWN: With all due respect to Judge Peeples, I mean, I don't think -- I think that's part of the job of being the presiding judge, you take the heat for certain decisions, and frankly, every one of the judges takes some heat for this to some extent.

When I went on vacation, I could pick whoever I wanted in Harris County to be my visiting judge. And I had judges who would tell me they would like to have that position. I would have to say, "No." I had the same heat. Maybe not to the same extent that he had, but it was the same issue.

I just see this as a very cumbersome process that's going to be very uncomfortable to the courthouse. All right. I'm a visiting judge. I know I'm up this year. I turn to Stephen Tipps who just

tried a case in my court and I'm still waiting to enter the judgment. "Would you write me a letter, please, to the visiting judge peer review committee?"

MR. TIPPS: Yes. Whom should I send it to?

(Laughter)

HON. BROWN: I'm allowed to do that. You know, and I think there's going to be this kind of back door, trying to find out who's complained. I think it's a little unfair not to know who complained, frankly, because you can be a good judge and have a bad day. Any judge who's never had a bad day isn't too honest, probably. So I think he should be entitled to know who's made a complaint. You can't respond without that.

HON. DUNCAN: I question whether you could ask.

HON. BROWN: Whether you could ask for what?

HON. DUNCAN: Mr. Tipps for a letter.

HON. BROWN: Well, I don't know. This says a visiting judge can submit materials. What are those materials? Who do they come from?

HON. DUNCAN: I understand, but we each have an ethical obligation not to use our office for

personal benefit. And that sounds to me like a real borderline case, but I think --

HON. BROWN: Then who do you submit it from? Just from me?

HON. DUNCAN: To me, the bottom line is -- and I assume this is some part of the debate in the Judicial Council, is: What else are we going to do? The Judicial Council looked at this for two years, and this is what they came up with. And I am not sitting here and won't sit here and say, "I can think of a better idea."

CHAIRMAN BABCOCK: Elaine.

PROFESSOR CARLSON: Well, I think Judge Patterson raised an interesting idea of allowing the parties of the litigants to submit an evaluation after appearing before a visiting judge, and it could be done on a confidential basis and it could be done on an objective basis. In the academic world, we do it all the time with our students. They're to ask questions -- if you do thoughtful questions, it can really be -- you can get some meaningful advice. Sometimes you get slammed on personalities -- Alex is over there laughing, but you really could end up from full faith protection of the rights of the visiting judge and of the litigants, to me, you would have a

potential body of information that would allow you to tell a judge at the end of the year, like we get at the end of the semester, "Here's your evaluation." And you can go through them and you look at them, "How can you change things?"

HON. BROWN: That's a lot different, though, because that's a process of improving, becoming a better teacher. It's peer review to a law firm, same idea, but this is now going to be a public statement, "You are incompetent." I mean, it won't say that, but that's going to be the way it's viewed. I'd rather have a presiding judge informally tell me, "You know, you've gotten a little old."

HON. PATTERSON: "Isn't it time to retire?"

HON. BROWN: Right. Rather than, there's this formal hearing with five people voting on whether I can proceed as a judge. I just -- and Sarah, to take you back to the question: What does the judge present? Who can he present as his witnesses other than the lawyers? No other judge comes and watches me try cases. All they know is my reputation. So if I have to have somebody with personal knowledge, I'm only going to have one person, myself. Probably not the most persuasive witness.

HON. PATTERSON: And then, Chip, should we have it televised?

(Laughter)

CHAIRMAN BABCOCK: Well, I was going to suggest that, that the peer review ought to be on television. I hear there's some slots open in the afternoon.

(Laughter)

MR. CHAPMAN: While we're taking parting shots, can we have it on information and belief?

(Laughter)

CHAIRMAN BABCOCK: Sarah gets to say something.

HON. DUNCAN: If I can just respond to Elaine's suggestion. I wasn't there for any of these discussions and I can't tell you what members of the Judicial Council thought, but I have been a party to a lot of discussions about Bar polls on judges, and I have -- we actually, in San Antonio, solicited or asked that State Bar -- and I can't remember the man's official job title, to craft questions that would be something more than a popularity poll, and we didn't get anywhere. We ended up -- we don't have Bar polls in San Antonio because they are popularity polls.

HON. PATTERSON: Bar polls are still

beauty contests, really. This suggests an evaluation and not an up or down vote. I mean, I think we would be trying to get feedback, but I'm not unconvinced about this process. Sarah's convinced me.

HON. DUNCAN: I'm not advocating the process. We were asked to look at a recommendation of the Judicial Council with absolutely no guidance or parameters about what we were supposed to even consider. I think our report lays out exactly what we did consider.

CHAIRMAN BABCOCK: Sarah, let me ask you a question. Why did you vote with the lawyers on not giving the presiding judge any discretion but to accept the report?

HON. DUNCAN: We had a lengthy discussion about this, and I -- you know, David Peeples and I went back and forth and I realized that everything I say, you can use to say the exact opposite.

To me, if we are going to create this peer review process, we can't ask people to sit on these peer review committees and not have their recommendation have great import. We decided, unanimously, at least that the peer review committee's recommendation should be considered by the presiding

judge. I don't think the peer review committee -- I think people on peer review committees would take this job very seriously. I don't think they would make an unfavorable recommendation lightly.

If the process is going to protect a visiting judge, and, hopefully, prevent a -- protect the presiding judge and prevent a less than competent visiting judge from being appointed, I think it has to be binding, because all you're going to do otherwise, if it's not binding, is change the types of political pressure that's brought to bear on presiding judges.

HON. PATTERSON: I agree with Sarah's position for another reason, that if you're going to allow and require the presiding judge to weigh in to the committee, he or she has the opportunity to voice then -- and that's taken into account, so it would be double-dipping, essentially -- if you also allow them to veto after the committee considers -- so their opportunity to weigh in in an honest and transparent manner has to be in connection with the committee's consideration. They don't get the second opportunity to second guess. And this causes them, I think, to weigh in honestly early on and not leave it to somebody else.

HON. DUNCAN: And I guess the upshot of

my reason for voting with the lawyers is, if the peer review committee's recommendation can be disregarded by the presiding judge, I think you're going to find that people don't want to sit on these committees. They're not going to take the responsibilities seriously and they're not going to do the work.

CHAIRMAN BABCOCK: Okay. Richard. Then Frank.

MR. ORSINGER: If the recommendation of the peer review committee is to remain confidential, I feel like it has to be binding on the presiding judge, because it doesn't take politics out if it doesn't. If we are not going to make it binding, then I would favor making the recommendations public so that public pressure can be brought on the presiding judge.

The point here is to not have politics decide this, but to have merits. Our elected judges have to stand for election. Visiting judges don't stand for anything.

(Laughter)

MR. ORSINGER: And so it seems to me that there ought to be -- this is apparently an effort coming from within the Judiciary to guarantee some quality for the people of Texas that they're not getting because these are non-elected judges because

we don't have the money or what it takes for the Justice Department to give us enough judges. And so I would say, if you don't make it binding, then make it public so that we can make a public issue with the presiding judge who appoints judges who have been declared to be incompetent or at least not up to quality in the area of them hearing cases.

CHAIRMAN BABCOCK: Okay. A comment from Frank. Then we're going to vote.

MR. GILSTRAP: I understand all that. At the same time, Harvey Brown's example gives me some pause and I think -- I would think hard about simply allowing the presiding judge to stop the process short. If he can handle it without -- if the judge agrees that he's going to step down or he's not going to come back to San Antonio anymore, maybe that solves the problem.

Let me add one other thing, and that's this: Over on 13.4(a), on Page 6, we've got composition of committee. Two active judges, two Bar members and one person who's not a Bar member. And I understand that's -- a lot of people think that we need to have non-Bar members in these type of things. I question exactly how helpful a non-Bar member or non-judge is going to be as the fifth member and

possibly the person casting the deciding vote on this committee. I think we ought to look hard at simply putting lawyers and judges on it. They're the ones that understand it. I don't see why we need "citizen participation" in this particular item.

CHAIRMAN BABCOCK: Okay. We're not going to vote on that just yet, but what we are going to vote on is whether or not the recommendation of the peer review committee should be binding on the presiding judge.

All in favor of that, raise your hand.

(Show of hands)

CHAIRMAN BABCOCK: All opposed to that, raise your hand.

(No show of hands)

CHAIRMAN BABCOCK: That would be unanimous by a vote of 16 to nothing, the Chair not voting.

Okay. Sarah, what else --

HON. DUNCAN: On the next page, Subsection (h), duties of administrative director. "The administrative director of the Office of Court Administration must retain a copy of each recommendation or amendment for public inspection." Footnote 17 asks, "For how long?"

The subcommittee unanimously believes that it should be as long as the visiting judge is eligible to sit. Subsection (i) talks about the presiding -- talks about additional rules and procedures. The last sentence, "The presiding judge may delegate this rulemaking power to the peer review committee." Footnote 18 asks whether these rules should be subject to the Supreme Court's approval. The subcommittee unanimously recommends that they should. And that's it.

CHAIRMAN BABCOCK: Okay. Frank's point about the non-judge members, which is in 13.4(a), I think. Right?

MR. GILSTRAP: Right.

CHAIRMAN BABCOCK: Any discussion on that?

Stephen.

MR. TIPPS: Well, I disagree. This proposal gives non-lawyers only one vote out of five, and I think that a non-lawyer listening to the evidence and reviewing the evidence can certainly become sufficiently informed to cast a knowledgeable vote. And, ultimately, the courts exist for the benefit of the non-lawyers, who are the parties. So I think that provision makes sense.

CHAIRMAN BABCOCK: Bill.

MR. EDWARDS: I have a problem with who these people -- who the lawyers or non-judges are going to be. Are they people who have been in the judge's court who have cases pending to which the judge may be assigned or who are likely to have cases in a court to which they're going to be assigned?

MR. GILSTRAP: They don't even have to live in the district.

MR. EDWARDS: I understand they don't have to -- I'm not worried about the ones that don't live in the district. I'm worried about the ones that do.

Our procedure is adversarial. And you go and you try a case and somebody gets burned and somebody gets a medal, and the person that didn't win may think he was not fairly treated. That person is in a position to make a compliant but shouldn't be on the committee. I just think that if the person has had a case in front of that judge during the period of review that he shouldn't be sitting on the committee that's deciding performance of the judge and it -- maybe we need to have a provision for replacing that person if there's a disqualification of some kind. I don't know what that disqualification ought to be, but

I can see a lot -- you're talking about political pressure. I'm talking about pressure of the rule in one way or another way. I have problems with that.

CHAIRMAN BABCOCK: Yeah, Carl.

MR. HAMILTON: We'd have to have the same thing with the judges, because if you have local judges who regularly hobnob with that visiting judge --

MR. EDWARDS: I agree with that, too.

MR. HAMILTON: -- they're not going to want to say anything unfavorable about him.

HON. DUNCAN: Chip?

CHAIRMAN BABCOCK: Yeah, Sarah.

HON. DUNCAN: One of the things we talked about in our subcommittee, in some detail, is the extent to which we should try to micro manage this process through the rules. The subcommittee agreed that we didn't think we should be trying to do that, and I think there is value to not trying to micro manage the process.

Nowhere in these rules does it say that a visiting judge wouldn't have the ability to move to recuse a lawyer who had lost a case in his court or a judge who doesn't like an active judge who just doesn't like him; nothing in the rule says that he

does. And I assume that's intentional, that we don't -- this is bold. It is not tried before, and maybe we shouldn't try to decide these type of questions beforehand.

I would also like to just state briefly that I am in favor of a citizen member on the peer review committee. I've watched friends sit on the grievance committees who are not lawyers, and they take their job incredibly seriously. They work very hard at it. They are thoughtful about it. And they do have a different perspective than the lawyers, particularly on demeanor and what is an appropriate and inappropriate remark or comment by a lawyer, or, in this case, a judge.

MR. GILSTRAP: I would just say in response to that that when you have a citizen sitting on a Bar committee that's, you know, considering the conduct of a lawyer, or a disciplinary committee, it's usually that lawyer's interaction with citizens -- I mean, that's what's at issue, some client, usually, has brought a complaint. Here, it's almost always going to be the judge's interactions with the lawyers. They're the ones that are going to be raising --

CHAIRMAN BABCOCK: I don't know if I agree with that, Frank. I mean, you've got clients

who don't like the way a judge conducted himself, you've got jurors -- there are lots of complaints from jurors who feel their time is being wasted because the judge gets there late, takes two hours for lunch, you know, has a break in the afternoon that seems to stretch on for, you know, an hour. I mean, it's not just the lawyers, I don't think. Although, I agree that lawyers are a lot of it, but --

HON. DUNCAN: A lot of the complaints to the legislature are, I assume, of the tenor that, "We don't get to elect these people. We don't get to vote. What are they doing sitting in our cases?" And I don't think those are coming, necessarily, from lawyers.

MR. GILSTRAP: Okay.

CHAIRMAN BABCOCK: And I'll say that, just, I guess, again, anecdotally and your own personal experience, but some of the biggest abuses I've seen from visiting judges have been their disrespect for the jury. I mean, it's one thing -- I mean, I'm getting paid to be down there whether -- you know, whether I'm doing anything or not, but the jurors are making, you know, what is it -- how much?

MR. ORSINGER: $5 a day.

CHAIRMAN BABCOCK: $5 a day. And, you

know, you're taking these big, long breaks and you start late and you quit early. I mean, didn't mean to get on my soap box, but -- okay.

Sarah is -- I think you've gone through and spotted all of the items and the subcommittee's recommendations. We voted on the one thing you think needed to be voted on, and you can tell Peeples that he ought to show up if he wants to make his --

(Laughter)

HON. DUNCAN: My proposal is that we bring our rewrite of the proposed Rule 13 to the next meeting and vote it up again.

CHAIRMAN BABCOCK: Okay.

MR. EDWARDS: I still have problems with not -- if the committee is going to give an unfavorable -- peer review committee is going to give an unfavorable recommendation to a judge, that the judge doesn't get to know what the complaint is based on, I think we -- some of these judges are -- you know, particularly the former judges are not 85 years old, they're younger folks. And this particular thing is important to their livelihood and I question due process of taking that ability away from them without their knowing why.

CHAIRMAN BABCOCK: Yeah, Sarah.

HON. DUNCAN: I share Bill's concern, but the nature of the complaint, the particular complaint, may very well tell the visiting judge who made it. And that's a problem. That's a problem in terms of collecting useful information.

MR. EDWARDS: If it's really -- it's not like that visiting judge is assigned -- he or she is not a sitting judge in that county. And if the complaint is serious and not frivolous, but -- at least in the mind of the complainer, they've got the -- you've got the objection provisions that will protect you from that particular judge, in most cases, in the future. So you've got some protection.

HON. DUNCAN: What's your alternative?

MR. EDWARDS: And if it's -- well, to tell them -- you know, at least to the extent that the Judicial Qualification Commission tells who's tattletaling on the judge, I don't see why the visiting judge would be in any different position than a sitting judge in that regard.

HON. DUNCAN: Well, there is a difference. There's a big difference. The Judicial Conduct Commission governs sitting judges who have been elected by the voters in their district, and they had a right to that office, once they are elected.

So there are due process rights attached to Judicial Conduct Commissions involving active, elected judges. There isn't a right -- a property right, I don't think, with a visiting judge -- visiting judges' privilege to sit in cases after that judge is no longer elected a judge.

So I don't -- I don't know this for sure. I haven't researched it, but I would doubt whether due process has the same anomaly of rights for a visiting judge who's given the privilege to sit beyond his or her term that it gives to sitting active judge.

MR. EDWARDS: You've got the problem of whether the right to sit under these circumstances is equal among all that class of people or not. You've got privileges in which due process do apply.

For example, membership on a hospital committee. If the hospital is going to jerk privileges, there's a whole series, in every hospital I've ever seen, a whole series of due process accommodations.

MR. GILSTRAP: Well, let me -- I think it would be a mistake -- I don't think the visiting judge does have a property right.

MR. EDWARDS: I don't think so.

MR. GILSTRAP: But I think it's a mistake to try and analyze that way. I think you've just got to approach it in terms of fairness. I mean, whether or not he's got a property right -- or she has got a property right, you want to be fair. And if your concern is fairness --

MR. EDWARDS: I'm worried about fair.

HON. DUNCAN: I'm always worried about fair. What if we put some kind of requirement that if the committee is going to make -- propose an unfavorable recommendation, that they have to tell the visiting judge not just "We're going to make an unfavorable recommendation," but at least give the judge an idea of whether it's a temperament question or a competency question or a performance question? And maybe go beyond that, like, "We have had complaints about the hours that you choose to hold court" or "We have had complaints about your knowledge of family law," because that's the area that we're looking at, summarize the complaints without revealing the complaint itself.

MR. GILSTRAP: The problem I have is, if you're talking about a mandatory process that's going to go through and result in some type of conclusion, then I think you probably need to make the people

identify themselves that are making the complaint. I don't think you ought to allow that to be done in some type of anonymous or some ex-parte way. If you're talking about a process where the presiding judge could stop it short and say, "Well, okay. I've heard this. I'm going to try to intervene here and the peer review process is not going to go anywhere beyond this because I can resolve it," I think I'm less concerned, but it may be that people who complain about visiting judges have to stand up and be counted.

CHAIRMAN BABCOCK: Okay. Well, Sarah, why don't you take this back to your subcommittee and clean up all the things that we've talked about today and voted on; maybe address that issue, and we'll bring it back and discuss it in November.

I want to talk to Bobby Meadows for a second. Bobby, you're on the agenda --

MR. MEADOWS: Are we taking up Rule 202?

CHAIRMAN BABCOCK: Well, I just -- you know, we're not, obviously, going to finish Rule 202 today, or even get a very big start, but would you just tell me where you are. I have on the materials a letter that Ralph wrote you and then an e-mail that Paula Sweeney responded on. Where are you on 202?

MR. MEADOWS: Well, we had a

subcommittee telephone conference that was attended by a number of the people here -- Harvey just left and he wanted -- I think he wanted to comment on it, but he missed our call.

The problem with the materials is that none of us have the letter that put the question before us, and that is the communication from the Governor's Office. And Chris said he was going to look into it and I think Alex had said that she was going to try to contact Bob Pemberton. It's not on the material. We couldn't find it on the -- with the exhibits or attachments to the rule in question.

CHAIRMAN BABCOCK: Okay. Well, we sort of need that.

MR. MEADOWS: Yes.

MR. GRIESEL: It's a two-paragraph letter. It says, "Dear Justice Hecht, please look into the following issue. This has been an area of concern in medical malpractice cases."

MR. ORSINGER: Can we have a statement of what the problem is, just to concentrate on for the next two months?

CHAIRMAN BABCOCK: Well, I think that -- I remember seeing that letter, so, I mean, I'm wondering why we don't have it in our files. But,

Deb, see if you can find it.

And as I understand it, the problem is the pre-suit depositions, and there is a mechanism for the court, of course, to approve or disapprove of those, but I've seen cases where the approval is routine, to do it, and the discovery is conducted before you've had any opportunity to see the pleadings. And so, basically, they're prediscovering their lawsuit before they file it.

Now, sometimes you're sufficiently aware of the allegations, that it's not a very big deal. In fact, I've got one going on right now where there's a charge of racial discrimination and it's a discrete, you know, incident that happened and you can prepare your witness. But on another one, where I think there were like 10 depositions taken, the judge allowed, it was in a claim of defamation, and we didn't know what publication was defamatory. We don't know what they were saying was false. It's very hard to prepare your witness under those circumstances, and the judge let him do it.

So, you know, is that an isolated problem. Is that just one judge who probably should have supervised the procedure a little bit better or is that something, as the governor suggests, that is

more widespread than that? And if so, you know, is there anything we can do about it? That is one aspect of the problem.

MR. MEADOWS: I think it was the sense of those who participated in the call that we just didn't know enough about the problem. The way it was in front of us was in the context of what we understood about the letter, which was that it was raised in the medical malpractice context, and everybody on the call had some experience with that one way or another.

I think the outcome of our discussion, just in terms as a report was that we just didn't know enough about the problem and felt like we needed to know more to really bear down on change.

CHAIRMAN BABCOCK: John.

MR. MARTIN: I'm not convinced there's a problem. But the issue in medical malpractice cases, as I understand it, is that there's a requirement that the plaintiff file an expert's report within so many days after suit is filed and I've heard some anecdotal evidence that some plaintiffs' lawyers are trying to do a lot of discovery to get around that requirement. They'll do a lot of discovery before the suit. I haven't experienced and haven't really heard anybody

in my firm experience that.

HON. DUNCAN: So they can actually create more than 180 days in which to prepare the report?

MR. MARTIN: Right. That's the --

CHAIRMAN BABCOCK: Clever.

MR. MARTIN: But the other side of it is -- I mean, I'm familiar with situations where doctors have been subjected to pre-suit depositions and the plaintiff's lawyer says, "I obviously don't have a case. I'm not going to sue you." And so the doctor avoids the suit that way. So I -- my own experience and my partner's experience, who does a whole lot more than I do, is that it's actually been used in a beneficial way.

CHAIRMAN BABCOCK: Okay. Well, I don't know, Bobby, other than maybe trying to talk to a couple of lawyers that practice in that field to see if they have any concerns about it. And if not, you know, I think we're all in the "If it's not broke, don't fix it" category, and certainly my one bad experience is not sufficient to amend the whole rule, but if there are other people around the state that are having trouble like that, then, you know, I guess we would have heard about it.

MR. EDWARDS: My firm's one experience with that is that we filed an application to take the deposition of the doctor because we couldn't get information. The court gave us one hour to take the deposition. We took the deposition of that doctor, the family, and we were satisfied that there was no case and it went away. We were covered. The doctor was covered. The family was satisfied. The process worked. One hour.

CHAIRMAN BABCOCK: Bobby, would you -- Steve. I'm sorry.

MR. TIPPS: I was just going to inquire. I got something off the Web site that references a letter from Stephen M. Maloff dated July 23, 2001.

(Simultaneous discussion)

MR. MEADOWS: I couldn't find that letter either. I have seen that letter in the past, but it was not among the materials either. So we were missing the governor's letter and the Maloff letter. We had Ralph's letter and we had a couple of E-Mails from Paula Sweeney who has strong views about this.

CHAIRMAN BABCOCK: All right. Chris said you'll have those letters Monday morning.

Would you do this, Bobby? Would you just kind of look into it, and within the next week or

two, call me. And if we need to put it on the November agenda, we will. And if not, we'll just write the governor a letter and say, "We've looked into it" -- we'll write the court a letter and say, "We've looked into it and we don't think it's a problem."

MR. MEADOWS: All right.

CHAIRMAN BABCOCK: Great. Thanks everybody. We're in recess.

(Proceedings concluded at 11:56 a.m.)

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HEARING OF THE SUPREME COURT ADVISORY COMMITTEE

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I, Patricia Gonzalez, Certified Shorthand Reporter, State of Texas, hereby certify that I reported the above hearing of the Supreme Court Advisory Committee on the 21st day of September, 2002, and the same were thereafter reduced to computer transcription by me. I further certify that the costs for my services in the matter are $ 957.50 charged to Charles L. Babcock.

Given under my hand and seal of office on this the 4th day of October, 2001.

ANNA RENKEN & ASSOCIATES
1702 West 30th Street
Austin, Texas 78703
(512) 323-0626

PATRICIA GONZALEZ, CSR
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