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MEETING OF THE SUPREME COURT ADVISORY COMMITTEE

April 14, 2006

(FRIDAY SESSION)

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Taken before *D'Lois L. Jones*, Certified Shorthand Reporter in Travis County for the State of Texas, reported by machine shorthand method, on the 14th day of April, 2006, between the hours of 9:03 a.m. and 4:45 p.m., at the Texas Law Center, 1414 Colorado, Room 101, Austin, Texas 78701.

INDEX OF VOTES

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

Documents referenced in this session

06-1 April 14, 2006 Outline - Parental Notification

06-2 Process Server Review Board matters

06-3 Potential Amendment of Rule 21, Judge Sullivan

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CHAIRMAN BABCOCK: Welcome, everybody. This is the 68th year of the Texas Supreme Court Advisory Committee, and it's great to be back together with people who have been on this committee for a number of years, and we have a bunch of new members, which we'll get to in a second. We have a new rules attorney, Jody Hughes, who is on our left here and taking over for the great Lisa Hobbs, who is still with the Court, right?

HONORABLE NATHAN HECHT: Yep.

CHAIRMAN BABCOCK: And you'll get to know Jody. I thought since we do have a number of new members I might go through some of the things that this committee has done and is hopefully going to do. This committee was formed in 1938 by the Legislature, although, as you know, largely appointed by the Court. Angus Winn of Dallas was the first chair of this committee back in 1938.

Although the Court appoints almost everybody on the committee, there are other ex officio members appointed by such people as the Lieutenant Governor, the Governor, the State Bar, the Court of Criminal Appeals. We generally meet six times a year. Every meeting has the possibility of a Friday and Saturday morning meeting, although in this session our agenda does not require us to meet this Saturday. We almost always meet in Austin,

although in past years we have I think on one occasion met in Dallas.

We advise the Court, and our advice is just that, advice. Many years ago I think because of perhaps the longevity of the committee, which has served longer than any then sitting member of the Supreme Court, I think that some people thought that they were the Court, even though they hadn't run in any statewide elections; but the Court is obviously free to take our advice, which sometimes they do, or leave it, which they often do; and nobody should take umbrage if the Court doesn't accept what we think is the right way to go.

We are organized into subcommittees, and I thought I'd just read who those subcommittees are, but the way we operate is that the Court will assign an issue to me that they think should be studied by our group and I'll assign it to a subcommittee, which will meet by itself and study the problem and then come to a meeting such as this and report their findings and their suggestions, and then the full committee will study and discuss what the subcommittee has done.

You know about Jody, who is the rules attorney. I'm the chair. Buddy Low, from Beaumont is the vice-chair of this committee. We have a subcommittee that covers Rules 1 through 14c consisting of Pam Baron, who is

the subcommittee chair. Pam, you're here somewhere.

MS. BARON: I'm here.

CHAIRMAN BABCOCK: Justice Bland is the vice-chair. She's somewhere here, too. There she is. Roland Garcia, who may not be here today. Justice Pemberton is on this subcommittee. Where is Bob? There he is. And Bonnie Wolbrueck from the district clerk of Williamson County down there.

The subcommittee on Rule 15 through -- Rules 15 through 165a, a very active subcommittee with chair Richard Orsinger, to my left, Frank Gilstrap from Arlington, the subcommittee chair, and then Professor Alex Albright down there, Carl Hamilton from McAllen down here, Professor Carlson from South Texas over here, Tommy Jacks, who I don't think is here today.

MR. ORSINGER: No, Tommy is here.

CHAIRMAN BABCOCK: Oh, sorry, Tommy. You came in late. Nina Cortell, Pete Schenkkan, down there, and Bill Dorsaneo. Now, I don't think Dorsaneo is here, is he? His presence usually looms, so -- Bonnie is also on that subcommittee.

The next subcommittee covers Rules 166 through 166a, and here is the looming presence of Bill Dorsaneo, having just walked in. Judge Peeples is the chair of this subcommittee. Richard Munzinger from El

Paso -- is Richard here -- is the vice-chair. Jeff Boyd is on this committee. Professor Carlson, Nina Cortell. Benny Agosto, who is a new member --

MR. AGOSTO: I'm here.

CHAIRMAN BABCOCK: -- right there, is here, and Bill Storie --

MR. STORIE: Gene.

CHAIRMAN BABCOCK: -- is also a new member of our Supreme Court Advisory Committee. Subcommittee on Rules 171 through 205. Bobby Meadows is the chair. Judge Christopher from Houston is the vice-chair. I don't know if Tracy is here. The subcommittee members consist of Professor Albright, Justice Bland, Harvey Brown, who is not here, David Jackson, who is a court reporter and long-time member of this committee. Rodney Satterwhite, who is I don't think here, is a new member and wanted to be on this particular subcommittee, and Steve Susman, who is not here.

Subcommittee on Texas Rules of Civil Procedure 215, Ralph Duggins is the chair. Pete Schenkkan is the vice-chair. Pam Baron is on this committee. Judge Benton from Houston, I don't think is here. Judge Christopher, Carlos Lopez -- is Carlos here -- a former judge from Dallas County. Bobby Meadows and Jim Perdue, and Jim is somewhere.

MR. PERDUE: Morning.

CHAIRMAN BABCOCK: New member of the SCAC. The subcommittee 216 through 299a, the chair is Elaine Carlson. Judge Peeples is the vice-chair. George Chandler, who is a new member of the SCAC, right here. Thank you, George.

MR. CHANDLER: Thank you.

CHAIRMAN BABCOCK: Tommy Jacks, who is here. Alistair Dawson down at the end of the table. Bobby Meadows, Carl Hamilton, Tom Riney, who left Amarillo this morning and got here, and Judge Kent Sullivan from Harris County, over on the left.

Subcommittee on Rules 300 through 330, the subcommittee chair is Sarah Duncan, Justice Duncan, from the San Antonio court of appeals. Ralph Duggins is vice-chair. Frank Gilstrap, a member of that committee, Mike Hatchell down here. Lamont Jefferson is over there, Steve Tipps, who is not here today, Kathryn Green, a new member of the Supreme Court Advisory Committee, is not here.

And then subcommittees on Rules 523 through 734, a choice appointment, as Elaine Carlson will tell you. These are the JP rules. Judge --

HONORABLE STEPHEN YELENOSKY: That's what you told them.

CHAIRMAN BABCOCK: -- Lawrence, who is not here, but he's the chair. No one was willing to serve as vice-chair of this subcommittee, so we don't have one, but Jeff Boyd. Hayes Fuller is here. Hayes, thanks, is on this, and Carl Hamilton. Elaine, having completely redone the JP rules with Judge Lawrence several years ago, you guys mercifully probably will not have a lot to do on that subcommittee.

PROFESSOR CARLSON: You never know.

CHAIRMAN BABCOCK: Rules 725 through 822, Judge Yelenosky from Austin. Lamont Jefferson is the vice-chair. Steve Yelenosky is the chair. Frank Gilstrap, Andy Harwell. Is Andy here? County clerk from McClennan County. Tom Lawrence and Pete Schenkkan.

We have a subcommittee on the Texas Rules of Evidence. Buddy Low is the chair over here. Harvey Brown, former judge from Harris County is the vice-chair. Judge Benton from Houston is on that committee, Professor Carlson, Lonny Hoffman, who is right here on our left. Are you visiting here in Austin?

PROFESSOR HOFFMAN: I am. About to leave.

CHAIRMAN BABCOCK: About to leave, okay. A visiting professor at UT, but generally you're a University of Houston guy, right?

PROFESSOR HOFFMAN: Right.

CHAIRMAN BABCOCK: Bill Wade is on this committee, down here, new member. Justice Terry Jennings, First Court of Appeals, down there, and the ever present Tommy Jacks.

(Laughter)

MR. JACKS: That a boy.

CHAIRMAN BABCOCK: We have a subcommittee on appellate procedure, which is chaired by Professor Dorsaneo from SMU, Justice Duncan from the Fourth Court of Appeals as a vice-chair, and Pam Baron, Frank Gilstrap, and Mike Hatchell, Justice Jennings, Richard Orsinger, Justice Patterson, right here. Skip Watson from, now, Austin I see in his address, is not here today. Justice Gaultney down at the end. Professor Carlson.

PROFESSOR DORSANEO: Justice Jennings.

CHAIRMAN BABCOCK: And Justice Jennings. Did I say that? I thought I did. The subcommittee on Rules of Judicial Administration, Mike Hatchell is the chair. Ralph Duggins the vice-chair. Professor Albright, Justice Duncan, Justice Tom Gray, who is right here, is on this subcommittee. Andy Harwell, Hugh Rice Kelly, a new member over here on my left, Justice Peeples, Steve Tipps, and Bonnie Wolbrueck.

And, finally, we have a new subcommittee, which I just titled legislative mandates. In the last two

sessions of the Legislature, maybe the last three sessions, the Legislature has -- in passing statutes has inserted sentences that the "Texas Supreme Court shall promulgate rules in such and such an area"; and you usually have 15 days or so to do it, being facetious, but not too facetious; and some of the statutes that are passed don't naturally fit into our existing subcommittees, so we established this where Jeff Boyd is the chair. Justice Patterson is the vice-chair, and consisting of Justice Bland, Carlos Lopez, Pete Schenkkan, and Judge Yelenosky.

So those are our subcommittees, and that really is where the guts of the work of this Supreme Court Advisory Committee is done. We are open to the public and are -- we have a website that I think you get to, Angie, by going to jw.com and going down to the bottom and there is a little thing to click on called "SCAC," and that will have many of the documents that will -- or the core documents, base documents that we're going to be talking about at our meetings. It will also have an agenda posted as to what's going to happen, who is going to be responsible for it.

I think we looked at this a number of years ago, and I think technically we're not subject to the Texas Open Meetings Act, although it's our view that we

are going to post notice of our meetings and everybody is welcome. We sometimes hear from people who want to speak on various topics and within reason, and we've never really had any problem with people wanting to speak more than was appropriate, and we don't swear them in as witnesses, but we assume they're going to be telling the truth as best they know it.

We are on the record. There is a transcript of these proceedings that is available for any -- for our use and for members of the public, and that transcript is posted on our website. When we did some research we thought although we weren't technically covered by the Open Meetings Act we are most assuredly covered by the Texas Open Records Act, and I don't -- in my memory, we have never had a request under the Open Records Act for any information, but if someone were to do so, I think we would be obliged to comply with that statute.

Our discussions, I think you will find, are always respectful of everybody's opinions. They -- to me anyway, they are at a very high level. You're in a room with some of the smartest legal minds in this state and, frankly, any state. I tell people all the time, this is the most enjoyable, exciting thing that I do as a lawyer, and I hope at the end of this -- at the end of the three-year term you all feel the same way.

We have literally led the nation in some of the things that we have done. Our discovery rules have been talked about and discussed as a model of how to conduct discovery in a state court system. Two days ago the United States Supreme Court issued a ruling on unpublished opinions, adopting the approach that we took four years ago amidst much gnashing of teeth and controversy in the Federal court system, but the Federal courts are now going to do what we have been doing for the last four years in the unpublished opinion rule area, Rule 47.

As for expenses, Angie -- this is Angie Senneff, by the way, who many of you know, but she works with me at Jackson Walker's office in Houston, and she spends maybe 30 or 40 percent of her time on Supreme Court Advisory Committee work, and on expenses, how do they get compensated for that?

MS. SENNEFF: There is -- I made a sheet over here that Jan Evans, who is the chief accountant for the Supreme Court, has approved. What you're going to need to do is just attach copies of your receipts to that sheet and mail it to her. Her address is on the sheet. Then she will fill out the official form, which she will then have to send back to you for your signature, and then you send it back to her and she'll get you paid. She said

there are parts of the form that only she can fill out, but it has to have your original signature, so that's the steps that we have to take.

CHAIRMAN BABCOCK: That's a little change because our funding has changed. We are now jointly funded between the Bar and the Legislature, whereas it used to be the Bar picked up a hundred percent of the tab of this committee. There has been a tradition on this committee that people who can afford to pay for their travel and meals and lodging while they're here should do so, but no one is obligated to do that. You're contributing an enormous amount of time and energy to this committee, and no questions asked if you submit your expense report, but there are many members of this committee who it's not too much of an economic burden to also pick up their expenses, and many have done so over the years.

One of the things that -- this is my third -- beginning of my third term as chair. I think I'm only the fourth chair of this committee in 68 years, and one of the things that I hope I will never do is waste your time. I don't think we need to meet just to be meeting. If we've got something to do, we'll do it and try to do it in as expeditious a manner as we can, but we're not going to take any more time than we need to.

There has been frustration over the years when we have worked as a committee very, very hard on rules and have come up with what we thought was a good solution to the problem that the Court has addressed to us, and we have sent it on to the Court, and month after month after month nothing happens. Well, get used to that. But the Court has got a lot of things on its plate, and this is only one small piece of it, and some of the rules that we send up there, they will promulgate it in a quick and expeditious manner and others take a lot more time for a variety of reasons that have nothing to do with us.

But in an effort to deal with what has been frustration from time to time, we have by custom over the past six years started our meeting with Justice Hecht giving us a report on sort of where the Court is in terms of our rules, and he's going to do that in a minute, and he's also going to tell us just historically how it came to be that the Legislature decided to pick up some of our expenses this year, and before I turn it over to him, Justice Brister is here down at the end of the table, and before he was elevated to the Texas Supreme Court he was a long-time active member of this committee and is still a member of the committee, and the more you can participate the better. Great. But having -- and I don't usually

talk this long at the beginning, but I thought it might be interesting to give some historical perspective on what we do and how we do it, mostly for our new members, but with that, Justice Hecht.

HONORABLE NATHAN HECHT: Well, thank you, Chip, and thanks for being here this morning. As Chip has said, this is our only standing committee that has been in existence since the Legislature passed the Rules Enabling Act back in 1937, I guess it was, or '39, and our charter has grown over the years to include the separate appellate rules, the separate evidence rules, and the Rules of Judicial Administration and then some other ancillary matters that have arisen as our practice has changed and as we have gotten different directives from the Legislature, including the parental notification rules, which we'll talk some about today.

We -- the Court is very grateful for your service. It has great respect for the counsel of this group. The reason that you were chosen is because the Court believes that you represent well an expertise part of the state, a part of our practice that will contribute to the overall product that this group produces, and so we -- we talk internally of picking the best and brightest of our state practice to do this work because it is so important, so I thank you for being here.

The -- our relationship with the Legislature has been a dance of different steps over the years, and some toes have been bruised in the process, but we're in a very -- in a good relationship right at this moment, and Chip alluded to two things I want to mention to you. One is that in the last two sessions and beginning the session before that thanks to Governor Ratliff, the speaker -- the speakers, Speaker Laney and Speaker Craddock, the Governors themselves, Governor Bush and Governor Perry, there has been an idea that has developed in the Legislature that it is very workable for them to try to set policy -- make policy decisions that can then be implemented by this group that is concerned with details and practicalities and how to really make the system function, and so for the first time in the last three sessions they have -- the Legislature has asked us to implement legislation in a way that really has been unprecedented in the, as Chip says, 68 years that the committee has been in existence, and we -- the Court regards that as a very good development because more and more the Legislature is interested in substantive law, and that takes them into procedure to some extent, and so it's good for the Court and this committee to have as much input into that as we can, and so that has worked very well, and we hope that that cooperation will continue.

As a result of that partially the Legislature decided in the last session to provide funding for this committee, which is the first time that it has been funded as far as I know, in its existence. It may have been funded at the very beginning, but I'm not sure. So we are grateful for that, and previously, as Chip said, the Bar picked up the tab for the committee, which includes a transcript of all of its proceedings, which are available to you and are kept on the website, and there are copies at the Supreme Court and also in the State Law Library and as well as travel expenses and other expenses of members attending meetings, but because the source of funding has changed, we must -- the Court must administer the funds, and so we're bound by the Comptroller's guidelines on how to do that, and that is -- that occasions the change in your reporting.

Please be patient with us. We're working through this and trying to figure out the best way to do this, but when you submit expense statements you may get a call from Jan Evans, our chief accountant, asking you about this or that, and please don't think you're being ragged around on. We are just trying to work through the accounting requirements that the state imposes on its funding, and there will be some incidental funding also still coming from the Bar, and so we hope that -- we hope

that continues for -- for the future.

We welcome the new members and thank you for agreeing, and for those who re-upped, thank you for your continued service. We have a new liaison, Justice Brister, who was a member of this committee, as Chip said, our former assistant liaison having become Chief Justice. This committee incidentally is just a stair step to greatness. I'm sure you will experience that as time passes.

We also have a new rules attorney, our former rules attorney having become general counsel of the Court, Lisa Hobbs. Jody Hughes is the ~~fourth~~ fifth rules attorney that we have had, and he is a honors graduate of the UT Law School and Rice University. He worked a while at Mayor Day Caldwell and Keeton here in Austin and then in the solicitor general's office here in Texas, and we stole him from there. He is a motorcycle afficionado, but has good sense anyway, and so we are glad to have his help, and you should feel free to contact him at any time regards to substance, procedure, expenses, anything that has to do with the committee.

We -- in November the Court amended Rule 13 of the Rules of Judicial Administration to accommodate the recent legislation that creates an inactive docket for -- in essence for asbestos and silica-related injury cases.

The asbestos cases are before Judge Davidson of Harris County, and the silica cases are before Judge Christopher of Harris County, and as far as I know those changes, which this committee discussed in September and October, have been working okay. So there may be some additional changes that need to be made there, but as far as I know those are doing pretty well.

We will take up -- the Court will take up pretty quickly e-filing rules, which we have previously discussed but which have been in a sort of transition as e-filing has evolved in this state, but the state, including its IT department and the direct -- Department of Information, or whatever it's called, and the OCA, Office of Court Administration, and the Court are anxious to make changes to the Rules of Civil Procedures, the statewide rules, that will basically expand what has up until now been pilot projects in various different counties around the state. So this is all a move toward universal e-filing in all of the courts of Texas, and, frankly, that's a ways off because we have about 650 trial courts of general jurisdiction and then, of course, lots of constitutional county courts, justice courts, all sorts of other courts as well, but we're -- but we're trying to move in that direction, and probably we will ask the advisory committee to take another look at those before we

finalize them.

Then we have some very important rules regarding electronic access to court information that the committee discussed a couple or three times last year that involved a number of policy issues as well as practical issues, and we'll be working on those this spring, and of course, we have some other things, some appellate rules changes, and some various other changes that you have sent over to us.

We are also going to appoint, I hope fairly soon, a jury assembly task force that I guess I should start by saying has nothing to do with voir dire, so we can calm down about that. This has to do with assembly of jurors, and it has been pointed out in various newspapers around the state, including Dallas and Houston as well as other places, that the methods of selecting the jury pool, sending out the notices, and getting jurors to the pool may be -- may not meet constitutional standards, may be ineffective in some places, and that the practices and how that's done varied across the state very widely, and so we want to put together a task force that will look at that problem across the state and see what can be done by rule and what should -- what recommendations should be made to the Legislature regarding the uniform selection of the jury pool around the state, so that is a -- that's been a

suggestion of Judge Benton of Harris County and Judge Davidson of Harris County, and so we will be looking at that, and I hope they have a report by the end of this year, although this is a very difficult subject to research. It may take a while to get there.

Then you see on the agenda that we have some questions about the parental notification rules in response to recent changes in the statutes to change to parental consent, and we have asked your advice on that. We have some issues regarding Process Server Review Board that we have talked about in the past, and then Judge Sullivan has raised an issue about the three-day notice requirement in Rule 21, which we should look at, and Jody was digging through our files and found a memo from me to Luke Soules, the former chair of this group, January 15, 1990, that begins "Some members of the Court have questioned whether the three-day notice provision really affords enough time generally for a matter to be prepared for hearing," so every 16 years or so we should look at these issues and make sure we've got them right, and I look forward to the discussion.

Oh, and we also are deeply grateful to Chip and his leadership and service on this committee. He keeps us together with a light but firm touch and keeps our discussions moving, and the Court has a great deal of

confidence in his work on this committee. Thank you.

CHAIRMAN BABCOCK: Thank you. I'm glad you didn't forget that.

HONORABLE NATHAN HECHT: Yeah.

MR. HATCHELL: Since you rode him out.

CHAIRMAN BABCOCK: I was kind of kicking him under the table, if nobody noticed. Well, it is an honor to do this. We will go right into Jeff Boyd, who has met with his subcommittee and will report on the potential changes in parental notification rules.

MR. BOYD: Thank you. Let me start, I want to apologize for wearing a Saturday uniform. Looks like I'm the only one who did so. I have to leave early for a family road trip, and those are hard enough in a golf shirt, much less in a suit, so I want to say thanks to Chip for letting this be first on the agenda so I can leave early and begin that trip.

I brought with me today and you should all -- you all had access to many documents, but I actually brought another one today, and so if you didn't stop at the table and pick up a two-page outline that summarizes, I think it will be a lot easier to get through that outline than it will all the many documents that were already made available. Sorry. I should have told you.

I apologize for not getting that earlier,

but the subcommittee just met Wednesday evening by telephone conference, and this is at least a draft of our preliminary report to the committee and I think will help carry us through the discussion more efficiently. So let me begin with kind of the background and what lays the foundation for what the issue is.

In 1999 the Texas Legislature passed a parental notification law, which became effective on January 1st of 2000, and it's in Chapter 33 of the Texas Family Code. Section 33.002 provides that a physician may not perform an abortion on a pregnant unemancipated minor unless one of four conditions exists, the first one being that the physician has to give at least 48 hours notice, in person or by telephone, to a parent or managing conservator of the minor, or -- and this is the judicial bypass provision, "a court issues an order authorizing the minor to consent to the abortion without notification to the parent or conservator," and that order is provided for at the trial court level in 33.003 and in the appellate courts at 33.004, and then there are two other alternative grounds for the physician to perform that abortion, the third being if the court under 003 fails to issue its ruling timely, and there is a specific time period required in order to expedite that.

Under 33.003 if the court fails to do so

then the court is deemed to have constructively granted that order, and then finally, the physician can independently conclude and certify that an immediate abortion is necessary to avert the minor's death or irreversible physical impairment.

33.003 and 04 provide the process and standards for the minor to seek the judicial bypass order, and the standards there provide for -- consistent with 33.002 provide for that order to be issued to allow for the abortion to be performed in the absence of notification to the parent or guardian conservator. So, for example, 33.003(i) says that "The Court shall enter such an order" -- and these are the standards that are set -- "if the Court finds that the minor is mature and sufficiently well-informed to make the decision without notification to the parent or conservator or notification would not be in the minor's best interest or notification may lead to physical or sexual abuse of the minor."

So that law was passed effective January 1, 2000, and that was one of the ones in which the Legislature directed the Court to adopt rules for that procedure, which the Court did. Those rules are the Texas Parental Notification Rules and Forms, which also became effective January 1, 2000, and they are -- they cover a wide variety of things, such as requirement to expedite

the decision, requirement of anonymity for the petitioner, confidentiality of the process, judicial disqualification and recusal, appointment of attorneys ad litem, filing of amicus briefs, so on and so forth, all intended to provide for an expedited anonymous procedure as required by Chapter 33.003.

Last year the Legislature passed a new law amending not the Family Code but the Occupations Code, adding a new subsection to section 164.052(a) of the Occupations Code. 164.052(a) is the laundry list of prohibited practices for physicians, and subsection (19) is the new section that makes one of the prohibited practices is if a physician performs an abortion on an unemancipated minor without the written consent of the child's parent, managing conservator, or legal guardian, so now we have a consent requirement, not just a notification requirement, "or without a court order as provided by section 33.003 and 004 of the Family Code." So the bypass provision of the new law incorporates -- expressly incorporates by reference the bypass provisions of the old law.

The Legislature did not revise, amend, or remove the notification requirements under 33.002. They merely added the consent requirement under the Occupations Code, but provided for the continued existence of the

bypass procedure under the old law in the Family Code, and then it still includes this other alternative where the physician independently can conclude that the immediate abortion is necessary to avert the minor's death or irreversible impairment.

In March of this year -- and on the outline the date is incorrect. March 7th, 2006, should be the date. In March of this year, Justice Hecht sent a letter on behalf of the Court to this committee raising the issue does the enactment of subsection (19) with a new written consent requirement require that this Court revise the Texas Parental Notification Rules and Forms which govern the procedure for the bypass under the notification statute and in that letter informed us that the Supreme Court has tentatively concluded that it does not, but they request our committee's -- our committee to provide any counsel that it may offer on the matter.

The subcommittee reviewed the statutes, the rules. Bob Pemberton, who is on that subcommittee, was the Court's rules committee when the rules were adopted in 2000 and had some background information to provide us. The subcommittee -- other than Carlos and Pete and I the subcommittee are all judges or justices, and so we had a lot of input from the courts' view on the issue, and we discussed it on Wednesday, and here in front of you is a

brief summary of our analysis.

First, the enactment of this new provision probably raises some interesting issues for physicians to deal with. For example, if a minor comes to a physician and says, "I want an abortion and here is the written consent that my parent has already signed," must the physician still call or in person give 48 hours notice as required under 33.002? The notification requirement that the physician must give notice in person or by telephone at least 48 hours in advance of the abortion has not been removed. Interesting legal issue. That's only one of several legal issues that physicians may have to face and courts may ultimately have to resolve.

There are also -- the other example specifically for the courts to decide at the trial court level is what happens if a minor comes in and says, "I have -- my physician has given notification to my parents more than 48 hours ago" -- and perhaps even has the written form from the doctor saying, "Yes, I gave this required notification" -- "but my parents won't consent" and so now is there any process by which a bypass could even be permitted because notification has already been given and notification is the standard for the bypass decision to be made on. That, too, is an interesting issue that we discussed, but in the end we concluded that

for purposes of this committee the new law does not in any way change the standard or the procedure for a bypass to be granted. Instead it expressly incorporates the 33.003 standard and procedure for which the rules that currently exist were adopted.

So our recommendations, preliminary to this committee, are it's not -- number one, it's not necessary or appropriate to revise the parental notification rules and forms just to make sure they refer to this new provision. Throughout the rules there are a number of places where it refers to Chapter 33, and our first question was, well, do we need to go back and make sure it refers to both 33 and subsection (19), and the conclusion was no because all of those references are to the notification bypass procedure in 33, which is the procedure that still governs under subsection (19).

Number two, it's not necessary or appropriate to revise the rules and forms to refer to the requirement of written consent instead of or in addition to the requirement of notification because, as I said, it's still the requirement of notification and the question of whether notification might lead to abuse or notification would not be in the minor's best interest. That's still the standard that governs.

Third, we concluded it's not necessary to

revise the comments to the parental notification rules, but it might be advisable to add an explanatory note, not to explain any of what I have just explained but just to make reference to the fact that subsection (19) now exists, merely so that if there is a judge or practitioner who is dealing with this for the first time, pulls up the rules, we felt like they probably ought to know that section (19) is out there as well as section -- Chapter 33, and so our only proposal would be to consider adding something like the paragraph that is presented here that basically advises them that subsection (19) is there and this is what it says.

Four, it's not within our current charge to consider issues that subsection (19) might raise for physicians or also whether there are any other revisions to the rules that might be necessary totally unrelated to the adoption of subsection (19). That wasn't what we were asked to consider. We didn't feel like it was within our current charge to address those issues. Although they will be interesting issues to be resolved someday, and many of you on the court -- on the courts may be involved in that process, we didn't feel like it was this committee's charge at this time.

And finally, because it's not necessary or appropriate to revise the rules, it's also at this time

not necessary to solicit input from the public or practitioners outside of this committee. Five years, six years ago when the rules were adopted the subcommittee brought in a whole lot of outside input to help prepare those rules, and we talked about should we solicit that same kind of input now and concluded that if we were going to be recommending amendments or revisions to the existing rules that might be advisable, but because our recommendation is they don't need to be amended because the standard hasn't changed then there is no need to solicit that input.

CHAIRMAN BABCOCK: Great. Thanks, Jeff. Comments about what Jeff has to say or contrary feelings that people think we do need that? Professor Dorsaneo.

PROFESSOR DORSANEO: Well, I read Justice Hecht's letter, and it starts out by saying we probably don't need to do anything and then it starts pointing out a lot of problems --

CHAIRMAN BABCOCK: That's his style.

PROFESSOR DORSANEO: -- as it gets rolling, and the memo identifies a lot of questions. I don't know what the answers to those questions are in the subcommittee analysis, but it seems to me the fit does need to be perfect, at least from the standpoint of physicians. They need to know what's required before they

engage in behavior that could get them into a lot of difficulty.

Now, I don't know why it's not the committee's charge to consider issues that -- under four that the adoption of subsection (19) may raise for physicians. I'm not sure I understand why that's not in the charge. If it would be in the charge, would something -- or should something be done to the rules? I'm no longer familiar with the interstices of the parental notification rules, so I don't know what needs to be done or where there would need something to be done, but this seems too much like it doesn't want to work on a problem that's really there.

CHAIRMAN BABCOCK: Buddy, then Carl.

MR. LOW: Chip, it looks like what Jeff is saying is that the Legislature in 2005 recognized Section 33, so they are aware of it. They didn't intend -- there is nothing in the history apparently that shows it's inconsistent, so if it is consistent and our rules were proper for Section 33, they would be proper now except he said we may put something in the note so as to give physicians notice. There is nothing in the legislative history to show that they intend to be inconsistent or something, was there, Jeff?

MR. BOYD: No.

MR. LOW: So that's the way I look at it.

CHAIRMAN BABCOCK: Carl.

MR. HAMILTON: There is an additional section, 33.002(b), which says that even though the -- if you can't give the actual notice to the parents you send a certified letter to them, but even if they don't get it, it's okay to go ahead with this bypass provision, and I see the new legislation as an attempt to correct the notification situation and require actual consent, and if that's true, then to the extent that our rules under 33 imply that notification alone is enough, they need to be changed.

Secondly, if the new statute requires an actual order, which is what it says, it may be impliedly saying that we're not going to go along with this provision that's -- what do they call that -- implied authorization or something, if the court doesn't act timely then there is going to be a deemed granting of it, but there is no order issued. It's just a certificate that comes out of the clerk's office, and so if that's not an order under the new statute then our rules need to be revised because they incorporate those deemed granted situations, and there may have to be an order for that, so I think there is a conflict between the new statute and the old statute that we need to resolve.

CHAIRMAN BABCOCK: Justice Gray and then Frank.

HONORABLE TOM GRAY: I noticed that on one of the documents that was distributed regarding Chapter 164 subsection (c) it said that the -- this is in the legislation, "The board shall adopt the forms necessary for physicians to obtain the consent required for an abortion to be performed on an unemancipated minor under subsection (a)." Do we know if the board has adopted such forms and do we have them and were anybody involved in the court side of it working with the board on those forms?

MR. BOYD: Alex can address that.

CHAIRMAN BABCOCK: Alex, do you know the answer to that?

PROFESSOR ALBRIGHT: Yeah. I was a resource witness at the Legislature on some of these bills, and so I was involved in that, and there was a bill to amend section 33 that didn't get through, so you-all need to know that. The Legislature knew what it was doing. The medical examiners are working on forms right now.

We also have Rita Lucido and Susan Hays here from Jane's Due Process who work with these rules all the time, and I think they may be able to answer some of your questions as well, but I know that they are working on those, and in my view, these are issues that I don't think

can be resolved in the notification rules, and we sure need to wait to see what the medical examiner form looks like, and it seems to me like most of these issues are judicial issues and not rules issues.

CHAIRMAN BABCOCK: Frank and then Judge Yelenosky.

MR. GILSTRAP: Well, this -- I mean, I think there is a temptation to think this is just kind of a minor change and we can fit it into the old system. This is a huge change. There is an enormous difference between notification and consent. As I understand under the prior law, the minor can come in and say, "Look, I want an abortion, my parents don't approve, get on the phone and tell them, but if they say 'no' I'm going ahead." Now, under the new law, they have to get on the phone and say, "Do you consent" and if they say "no," the physician cannot give the abortion, and that's -- and that is such a big change probably it's not going to pass constitutional muster. I don't know. It's my impression that the notification provisions are -- have passed constitutional muster, although I don't know, but this is a much bigger step; and since one of our jobs is to alert the Court to problems, even though we may not be able to solve the problem, we might need to note that there is another problem with this new provision that -- and I don't want

to jump off into the abortion briar patch, but it's there.

It says that the physician commits a prohibited practice if he or she performs an abortion on an unemancipated minor without the written consent of the child's parents, and what does child mean? Well, you think that means unemancipated minor, but they don't say it. Moreover, in the prior section, (18), they talk about prohibiting third trimester abortions on an unborn child, and finally, in 33 they define fetus as a -- from birth -- from conception to birth.

Somebody is going to look at that and argue that that gives the father a right to consent. I believe that probably will not pass constitutional muster. I think there may have been some cases on that, although I am not conversant, but -- and I think we need to note those severe problems in passing. We may not be able to solve them, but just to start with the one that I began with, there is a difference between consent and notification.

The business about certified letter doesn't mean anything here. I mean, so you sent them a certified letter. That's not consent, and there are -- and while the judicial bypass is fairly broad, including the language "minor's best interest," you are not automatically entitled to a judicial bypass; and under

this statute if you're not entitled to judicial bypass and the parents don't consent, you can't give the abortion; and it's -- the physician can't do it.

CHAIRMAN BABCOCK: Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: I just want to respond to Professor Dorsaneo, but these are not rules for the doctors. These are rules for the court, and the way I look at this is there are various things that a doctor may have which authorize the doctor to go forward. One of those is this particular order that existed before the change in law and that exists now. That order is exactly the same, the standard for getting that order is exactly the same, so the rules to get that order should not change. What the effect of that order is, how it relates to the two statutes, are questions of statutory and constitutional interpretation, but the order is the same.

CHAIRMAN BABCOCK: Buddy.

MR. LOW: That's all we -- our procedure was to draw a procedure for getting a court order, not about abortions, and the court order is the thing we're concerned about now.

CHAIRMAN BABCOCK: Yeah. Bill.

PROFESSOR DORSANEO: What exactly is the court order?

MR. LOW: Well, the court order is to allow

the abortion, isn't it?

PROFESSOR DORSANEO: Isn't anybody troubled, isn't the judge troubled, for example, by the fact that you're going to make that kind of an order without written consent, the statute might mean you need to get written consent? Doesn't that trouble anybody?

HONORABLE STEPHEN YELENOSKY: Well, I can tell you what the order says. The order says -- and this is something that came up, of course, when the law changed. The order -- and I'm looking at a form order, which I believe these actual orders were approved. Were they approved by the Court?

HONORABLE BOB PEMBERTON: There was a form sent over to the Court.

HONORABLE STEPHEN YELENOSKY: Right. Right.

CHAIRMAN BABCOCK: People down at that end like Judge Pemberton, speak up.

HONORABLE BOB PEMBERTON: I was just saying, yes, there were form orders and all kinds of forms crafted at the time the Court responded to the legislative mandate to create these notification rules.

HONORABLE JAN PATTERSON: And approved by the committee I think, right, Bob?

HONORABLE BOB PEMBERTON: I believe it did come through the committee and the Court signed off.

HONORABLE STEPHEN YELENOSKY: And we did discuss it in the subcommittee, and specifically the order language is therefore, "if it's granted, therefore, it is ordered the application is granted and the applicant is authorized to consent to the performance of an abortion without notifying either of her parents or managing conservator or guardian," and the statute refers to consent. The notification, the old statute refers to consent without notification, so the current form order gives the minor authority through the court order to consent without notification.

CHAIRMAN BABCOCK: But what if there is notification but no consent? Is that order still okay?

HONORABLE STEPHEN YELENOSKY: Well, that isn't -- I mean, if there is notification but by the doctor?

CHAIRMAN BABCOCK: If there is notification of the parents of the pregnant under 18-year-old young woman, but the parents don't consent, they say specifically, "We withhold consent."

HONORABLE STEPHEN YELENOSKY: Well, you're asking what a doctor -- you're saying the order was issued and what a doctor does. Is that your question?

CHAIRMAN BABCOCK: Well, does that order cover that situation?

HONORABLE STEPHEN YELENOSKY: Well, whether it does or not, how does that have anything to do with the process for getting the order, which is the question for us?

MR. LOW: Right.

MR. ORSINGER: Chip, if I might say, it's my understanding that parental consent is not constitutionally permitted but parental notice is constitutionally permitted, so the Legislature, which might have wanted to require parental consent knew it couldn't, so they require parental notice which then allows the parents to have conversations with their daughter about whether she ought to make this decision. That's my understanding of why we have a parental notice statute, but someone else here may know better than I.

CHAIRMAN BABCOCK: Yeah, Alex.

PROFESSOR ALBRIGHT: I believe the consent is constitutional.

CHAIRMAN BABCOCK: The requirement of consent is constitutionally permitted?

PROFESSOR ALBRIGHT: Yeah.

MR. BOYD: If you have a --

MS. LUCIDO: As long as there is a bypass.

PROFESSOR ALBRIGHT: As long as there is a bypass and an exception for the --

CHAIRMAN BABCOCK: Okay. Bill.

PROFESSOR DORSANEO: What about the -- Carl raised two things. What about the part of the statute that's -- that talks about constructive authorization? I mean, this isn't -- this doesn't fit right to me.

MR. BOYD: Well --

PROFESSOR DORSANEO: At least we need to ask somebody else to -- maybe not the world at large, but some people who are in this domain academically or otherwise, my colleague Tom Mayo at SMU, for example, what their views are on this subject. It doesn't seem to me that it's so simple that we could just say, "not a problem."

CHAIRMAN BABCOCK: Pete and then Justice Jennings.

MR. SCHENKKAN: The form that Judge Yelenosky called our attention to is form 2D, and it is expressly referred to in our existing rules, 2.5(a), which reads "The court's ruling on the application must include a signed order and written findings of fact and conclusions of law. The findings and conclusions may be included in the order. The court may use form 2D, but is not required to do so," and then when you look at the form it has the ordering paragraphs, which would only be applicable if the court has made appropriate findings and conclusions to support the order under those

circumstances, but the findings and conclusions section of the form are blank.

In other words, it is the court's job on the facts of that case to determine if the evidence and the law support findings and conclusions that justify that order. That seems to me to be appropriate even given this change in the law and maybe especially given this change in the law about parental consent and physicians. These things are going to have to be sorted out by trial courts on those facts, and findings and conclusions are going to have to be entered. I don't see how this committee could advise the Supreme Court or why the Supreme Court should try to say in advance what the comprehensive set of findings and conclusions that would apply in all cases are.

That really does seem to me to be quite different from the process notion of notice that is the Supreme Court's only duty in its capacity as a rulemaker. The Court is going to have to wrestle with some of these issues in specific cases when some trial court has made some findings and conclusions and issued some order and somebody disagrees.

CHAIRMAN BABCOCK: Justice Jennings.

HONORABLE TERRY JENNINGS: I was just going to ask in relation to what Pete just said, also pointing

out rule -- Parental Notification Rule 2.1(c), the application form, consists of two pages and consists of a cover page. The cover page must state a number of things including that the minor wishes to have an abortion without notifying either of her parents and so forth and so on. I was wondering what the subcommittee's -- did they address these particular rules that Pete just mentioned and this rule in regard to see if the legislative changes require any tinkering with some of this language?

MR. BOYD: We did, and we concluded that no tinkering is required, and the reason is because this application is intended to show the basis for getting the bypass order under 33.003, and under the Occupations Code it's still 33.003 that provides the standard and procedure for getting that bypass order. So there is not anything in this rule or any of them that we could -- had identified that was changed at all by this new standard.

I mean one -- you have to look at this, I think, from the physician's perspective first because that's what both statutes govern. The physician is there and a minor comes and says, "I want an abortion," and in order for that physician to be able to do that legally, the physician -- the minor has to provide the right token, and there are four tokens that will make it legal. One is

notification and consent, both, when you combine the two statutes. One is arguably -- and this is an issue out there -- is this constructive authorization from a court that has failed to timely issue the order, and there is an issue there about whether that still applies or not.

One is the physician's independent determination that the abortion is immediately necessary to prevent death or physical impairment, and then the last one is a court order. Nothing in this new statute changes anything about the basis for that court order, what the court has to find; and when you think about it, it kind of makes sense, because even though the law now requires parental consent -- I don't want to argue on behalf of the Legislature here, but there is a commonsense approach.

Even though the law now requires parental consent, the risk of abuse or the acting in -- not in the best interest of the minor, the level of maturity necessary to not require, that risk -- all of that occurs not by whether or not you get consent, but merely whether you give notice or not. The mere -- the parent merely finding out that the minor is pregnant and wants an abortion creates all of those risks, so obviously you can't get consent unless you give notice first, and so the standard for the judge to determine is still is there a risk that this minor will be abused if the parent is

notified or is it not in the best interest of this minor for the parent to be notified, and so --

HONORABLE STEPHEN YELENOSKY: Or is the minor sufficiently mature and well-informed.

MR. BOYD: Yeah, there's three of them. Yeah. All of which, at least to me there are -- there are a whole lot of things that don't fit still, and I agree the courts are going to have to flesh through some of those, and my -- our memos pointed that out, but in terms of why the standard for the court to consider is still notification that makes sense in a lot of ways to me.

CHAIRMAN BABCOCK: Justice Hecht.

HONORABLE NATHAN HECHT: Bill Dorsaneo noted some ambivalence in my letter, and it's there purposefully because we did reach a tentative conclusion, but we were interested in the committee's advice; but just to take the rule we were last looking at, which is 2.1(c)(1), it says, "The cover page must state" -- this is the page that the minor must file. "The cover page must state," subsection (c), "that the minor wishes to have an abortion without notifying either of her parents," but the -- one of the lacunae noticed in the letter is that she may have noticed -- notified her parents and they know about it but they won't consent; and if that's true, she can't make the statement in (c). She can't do what the rule says she has

to do to proceed, so does something like that -- I mean, does something like that have to be fixed, or is it just too clear beyond words that it really means now consent or it's never going to happen, or I mean, it does kind of raise a problem.

CHAIRMAN BABCOCK: Jeff.

MR. BOYD: And we discussed that, and that's -- you know, the two real world issues that we identified -- of the two that we identified and focused on the most, that's the one that's hardest, I think, to resolve; and I think our ultimate conclusion was probably if the minor -- if the minor comes and has the proof that the physician gave 48 hours notice, the parent has already been notified, but I'm standing here before the court to say my parents won't consent. We think there is no statutory basis on which a bypass order can now be issued because the court cannot find that giving notice would create a risk of abuse or that it's in the best interest of the minor not to give notice or that the minor is sufficiently mature and knowledge -- I forget the words, so that notice is not required.

In other words, the fact that notice has already been given moots the basis under which the bypass order could be granted. Now, whether that represents a policy decision by the Legislature that, look, parents

ought to be making this decision and if they've got notice and have said "no," then the courts can't do it. I don't know whether that's what led to that or not, but we think that's probably the result.

Having said all that, for purposes of the charge to this committee and the question being whether the rules need to be amended, the statute that the Legislature expressly incorporated into this new law for purposes of the bypass is still 33.003, which is based on notice, and so the rule still has to require the minor to say, "I want to do it without giving notice," because that's what the statute requires.

CHAIRMAN BABCOCK: Why is -- Jeff, if what you're saying is that the doctor, the physician, cannot perform a notice if consent is withheld --

MR. BOYD: Cannot perform an abortion.

CHAIRMAN BABCOCK: Cannot perform an abortion if consent is withheld, why is there the reference then to section 33 in the -- in section (19) of the Occupation Code?

MR. BOYD: Because -- well, no, I'm not saying that the doctor cannot ever perform an abortion if consent is withheld. If there is no notification or consent then that ground is gone. The doctor can't perform it based on notification and consent because

there's not any. So then you have these three other grounds, one of which is the bypass order; and the issue that Justice Hecht has raised is can you get the bypass order if there's been notification but no consent; and I think the answer is probably "no," but I think the courts will have to resolve that in the end.

CHAIRMAN BABCOCK: Okay. Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: Well, I was just going to say I think that is a question not for us and not for the rules and the process for getting a bypass under the Family Code. It's a question as to whether or not statutory interpretation or constitutional interpretation requires some bypass of the denial of consent, but that's not what's at issue here. That's a judicial question.

CHAIRMAN BABCOCK: Gene.

MR. STORIE: I had some confusion when I looked at some of this stuff because of section 33.003(j), which says, "If the court finds that the minor does not meet the requirements of subsection (i)," that's the maturity and so forth, "the court may not authorize the minor to consent to an abortion without the notification authorized under section 33.002(a)(1)," so to me that looked like a situation where you would have notification and implicitly some possibility of an order.

CHAIRMAN BABCOCK: Yeah, Carl.

MR. HAMILTON: If I were representing a doctor under section (19) that was charged with violating that provision because he did an abortion with no actual court order and no consent but maybe one of these certificates from the clerk, why couldn't I argue to the body, the court, whoever, that, well, you know, I've got the Supreme Court rules here that tell me all that application had to say was that the minor wanted an abortion without notification, didn't say anything about consent, and the rules even provide over here in section 2.2(g) and 2.5(d) that we don't even need an order. We can have this certificate from the court, so you can't fault me for performing this abortion. I followed the court rules. Court rules under 33, but they're still the court rules.

HONORABLE STEPHEN YELENOSKY: You may argue that, but you wouldn't be arguing that to me when the minor is in there requesting the order. You would be arguing that I guess in the criminal court --

MR. HAMILTON: Correct.

HONORABLE STEPHEN YELENOSKY: -- and that's the point.

MR. HAMILTON: Correct.

HONORABLE STEPHEN YELENOSKY: That's the

point. What we're doing is devising rules for the trial judge who is presented with the minor who wants a bypass. What you're talking about is what happens later and what arguments might be made by the doctor or what advice you give to the doctor, and that has nothing to do with what I'd do when I'm presented with the minor who wants the order.

MR. HAMILTON: Well, but it's confusing to the doctor.

HONORABLE STEPHEN YELENOSKY: Well, it may be, but is it our role to resolve that confusion?

CHAIRMAN BABCOCK: Pete.

MR. SCHENKKAN: That was -- the possibility of that confusion to the doctor is why we did want to at least flag the existence of this change in the Occupations Code and its potential very grave implication for the physicians to, you know, do what tiny bit can be done through these rules that, as Judge Yelenosky says, are really about something else. To improve the odds that the physician or the physicians' lawyers will bear this in mind and make sure the physician does what the physician needs to do; but reading the two statutes together, the new statute, the Occupations Code is aimed at the physicians, not at the courts giving the bypass orders; and it says there are three circumstances in which you can

escape the definition that the abortion is a prohibited practice, and one is the written consent.

If you've got the written consent, we don't have a problem for the physician. Two is without the court order as provided under these two sections, and the court order is an order in circumstances in which you don't even have to give notice to the parents, but if you've already given notice to the parents, as you said, you've taken that case out of the you don't have to give notice category; and the third is the immediate abortion is necessary to prevent the minor's death or irreversible impairment and there is insufficient time to obtain the parent's consent.

Again, in this hypothetical in which the minor has notified the parents already and the parents do not consent, as I read the Occupations Code, the physician, even if the physician concludes that an immediate abortion is necessary to prevent the death or irreversible impairment, the physician commits a prohibited practice under the Occupations Code by performing that abortion. Now, is that constitutional? I don't know. I doubt it, but whether it is or not is a matter that is not for the parental notification statute. That would be a matter for that physician and that physician's lawyer.

CHAIRMAN BABCOCK: All right. And, Pete, under your analysis, if the parents are notified and withhold consent then section 33 is out of the picture?

MR. SCHENKKAN: It sure looks like it to me.

CHAIRMAN BABCOCK: Okay. And that's the way our rules are drafted right now, so our rules are taking -- implicitly taking a position on the reconciliation of these two statutes that it's consistent with what you just said.

MR. SCHENKKAN: Well, they're taking a position only in the sense that they were drafted to be a notification statute and it's the only thing the Court's been told to draft rules on and they are a notification statute and they cover situations in which the minor doesn't want to give notice to the parents. They're well-designed for that purpose, and we do have this other reconciliation, but it is not for the notice rules. It is a substantive reconciliation of enormous potential impact to both minors and physicians.

CHAIRMAN BABCOCK: Is there a way to reconcile the two statutes in a different way so that they -- the result comes out differently or not? Is this pretty plain?

MR. BOYD: Well, I think it's pretty -- I mean, if you're the judge and the minor appears before you

and says, "I need a bypass order under 33.003" and you, the judge, say, "Okay, on what ground am I supposed to find, that you're sufficiently mature and knowledgeable, that notice -- that I should authorize you to consent to this abortion without notifying your parent or conservator, or am I supposed to find that giving notice is not in your best interest, or am I supposed to find that giving notice may lead to your abuse" and your response is, "Oh, well, Judge, I've already given notice".

CHAIRMAN BABCOCK: Yeah, "I've told them. They don't want me to do that."

MR. BOYD: I think as a judge there is no way I can find any of those three grounds at that point, and so I can't give you the order.

CHAIRMAN BABCOCK: And we've given the judges a pretty good hint that that's the way these two statutes get reconciled because we haven't changed our -- we haven't changed our rules after discussing it, or the Court hasn't, and that's because we interpret these statutes the way that you and Pete have just articulated.

HONORABLE SARAH DUNCAN: I would like to speak out against what you just said.

CHAIRMAN BABCOCK: Okay.

HONORABLE SARAH DUNCAN: I don't think this committee is charged with, capable of, or has interpreted

the legal -- has construed the fit between the two statutes, and that's for a court to do. That's not for this committee to do in my view. There are -- I have learned in 20 years of practicing law there are always constructions of statutes that I can't think of and I can't see that somebody else can, and they end up prevailing sometimes.

So I think it's a little bit premature for this committee or members of this committee to say what these statutes mean and how they fit together. We can say what our own opinion is, but that's not authoritative, and I don't think the minutes of today's meeting should be taken by anyone as being authoritative.

CHAIRMAN BABCOCK: Sarah, the point that I was making was that by inaction you're speaking, and Justice Hecht's point I thought was if we leave it the way it is then there cannot be a good faith pleading in the situation where consent -- notice has been given and consent has been withheld to have a judicial bypass.

HONORABLE SARAH DUNCAN: And that's what I'm saying is your interpretation. I think by not changing the current rules we're saying the new statute deals with what the physician must have before performing an abortion. The rules deal with implementing the bypass statute, and those are two different things.

CHAIRMAN BABCOCK: Steve.

HONORABLE STEPHEN YELENOSKY: Well, I agree with Justice Duncan, and I hope everything I said is consistent with --

HONORABLE SARAH DUNCAN: Everything you have said is.

HONORABLE STEPHEN YELENOSKY: Okay. And the point I would make is if the question as to whether when the minor comes and says, "I've already told my parents," whether or not the judge says it's moot, the answer can be "yes" or "no," and it doesn't change the procedure. That's a judicial question, and if the Supreme Court wants to answer that by rule obviously that's the Court's prerogative, but it doesn't -- whatever the answer is, it does not change the procedure. It's an answer to a judicial question that doesn't require a change in procedure.

MR. SCHENKKAN: I just want to say I don't think we, in fact, do disagree with that. I mean, we mean exactly that, the issue of how you try to reconcile these substantive statutes and if you can't how you deal with any constitutional issues that may be presented is going to be fought out case-by-case and even our existing rule doesn't provide any guidance. There are blanks for findings and conclusions. That's the way it --

HONORABLE SARAH DUNCAN: Yeah, I think we completely agree. My only point is I don't think by not amending the parental notification rules, I don't think that is a statement of interpretation of the new statute, which is what you had said on the record. I believe that the subcommittee chair very eloquently explained why that's not true.

MR. BOYD: And, in fact, I think, Chip, if you'll look, like the provision that you're referring to, Rule 2.1(c)(1), which requires the cover page and the verification page that has to include statements that the minor is pregnant, unmarried, under 18, and wishes to have an abortion without notifying, the statute itself, 33.003, expressly requires that those statements be made in the application before the court. "The application must be made under oath and include a statement that the minor is pregnant, is unmarried, is under 18, and wishes to have an abortion without notification."

So all the rules do is require what the statute requires, and the new statute expressly incorporates that statute by reference.

HONORABLE STEPHEN YELENOSKY: And in response to -- even if the statute -- I agree. It tracks the statute, and in response to Justice Hecht's question of are we requiring this, if somebody wants to address the

question of whether or not once notice has been given a court bypass is moot, they're going to figure out how to get that before the court either by challenging the statute directly or pleading artfully or whatever, but otherwise we have the answer to that question now without it having been judicially addressed.

CHAIRMAN BABCOCK: Yeah. Justice Jennings.

HONORABLE TERRY JENNINGS: Just my final comment. I think the subcommittee's report is well-taken, and just look at the title of what our rules are. They're the Texas Parental Notification Rules. Rule 1.1 says, "Applicability of these rules. These rules govern proceedings for obtaining a court order authorizing a minor to consent to an abortion without notice to either of her parents or her managing conservator." So that's the whole point of the rules, is when there is no notice, and what we're talking about is the situation where there is notice and the parents have not consented. The Legislature has removed that possibility, and I don't see a need for a change either.

CHAIRMAN BABCOCK: Yeah, Nina.

MS. CORTELL: I just had a question. It may have come up already. I just want to make clear that when we get an order under the current protocol is it clear that it will authorize the minor to consent to the --

HONORABLE STEPHEN YELENOSKY: Yes.

HONORABLE SARAH DUNCAN: Yes.

MS. CORTELL: Okay.

HONORABLE BOB PEMBERTON: That, in fact, is what the notification statute says already, that it is a order authorizing consent without notification.

CHAIRMAN BABCOCK: Okay. Any further -- Carl.

MR. HAMILTON: Maybe at the very least under the current rule under the explanatory statement there could be some reference to the new statute.

CHAIRMAN BABCOCK: Yeah. Well, I think that was one of their recommendations.

MR. HAMILTON: Okay.

CHAIRMAN BABCOCK: Any other discussions? All right. Just for the sake of the record let's vote in two parts, first on whether we should accept the subcommittee's recommendation that no change be made to the parental notification rules. Everybody in favor of that raise your hand. You've got your hand up, Kent?

Okay. Everybody opposed? By a vote of 31 to 2 that passes. Now let's go on to the issue of whether there should be a commentary or a note to the parental notification rules along the lines suggested by the subcommittee. All in favor of recommending to the Court

that we include a commentary or a note to the parental notification rules referencing section 164.052, subparagraph (19), of the Occupation Code, raise your hand.

All those opposed? By a vote of 27 to 6 that passes, and that brings us up to our morning break, so we'll take ten minutes. Thank you.

(Recess from 9:28 a.m. to 9:43 a.m.)

CHAIRMAN BABCOCK: All right. We're back on the record, and we're on to our second agenda item, which has to do with Process Server Review Board matters; and Richard Orsinger, our subcommittee chair, is going to report on that; and there are two handouts, which Angie is going to pass around so everybody doesn't have to get up and go to the table. Richard.

MR. ORSINGER: Okay. Thank you, Mr. Chair. I'm going to start out by giving the entire committee background on the situation to remind those of us who went through this discussion before and for those of you who were not on the committee when we considered this initially. There has been a desire in the process serving field to have private process servers for a long time. You know, 25 years ago we were confined to constables and sheriffs, and in some communities it was very difficult to get quick service, and so at some point in the past, I

think in the late 1980s, the Rules of Procedure were amended to allow a court to authorize private process serving, and that authorization is under Rule 103 of the Rules of Civil Procedure.

Rule 103 is titled "Who May Serve," and it describes who can make lawful service of process in civil litigation in Texas courts. Now, I want to distinguish that from Rule 106, which has to do with methods of service and substitute service. We are not talking about the decision of a court to allow substitute service, something to the alternative of personal service. That's not part of this discussion. We're under Rule 103, which is the identity of people who can make service of process in Texas court proceedings; and if you look at 103 or if you just listen I'll tell you there are three categories of people that can make service of process. One is a sheriff or constable or other person authorized by law, and that will, of course, include deputy sheriffs and constables as well as some other people maybe. Maybe probation officers. I don't know who all under all the authorizations are permitted, but for our purposes it's going to the sheriff or constable's office.

The second category of people authorized to serve process in Texas lawsuits is any person authorized by law or by written order of the court who is not less

than 18 years of age, and that is the rule we've had for some years where you can go and get a court order authorizing a particular private process server to serve and then that is the authority of that private process server to act in the official capacity to give someone notice, serve whatever paperwork it is.

Now, in 2005 this issue came to a head, and the Supreme Court of Texas acted and added a subdivision (3) to Rule 103 and included in the list of people who are entitled to serve process any person certified under order of the Supreme Court. So our discussions today will concern ourselves with that subpart (3) about a person certified under an order of the Supreme Court, who is certified, who can be certified, what are the grounds for certification, who is the certifying authority, what are the grounds for revoking a certification, what is the necessity of a certification, etc.

Now, the Rule 103 makes it clear that subdivision (3) of certification does not apply to certain what we might call sensitive instances where service is being made in a tense situation. One would be service of a citation of an FE&D, which is an eviction proceeding where somebody is going to be thrown out of their residence or business. Subdivision (2) is a writ of possession of a person, property, or thing, so the

certification aspect of substitute -- of private process serving is not available if you're serving a writ of possession to take -- certainly a writ of attachment for a person to take possession of a premises or take a physical item of personal property.

And also, if there is process requiring an enforcement action that be physically enforced on the person, that is excluded from this third category of a person certified for private process, so the instances that are likely to result in a physical confrontation, the way I view it, are your -- you're excluded. The certification does not permit you by virtue of being certified to make that kind of personal service.

A little background on how the rule got to where it is today, for some years segments of the private process serving community have wanted to create a licensing environment or professional environment or some kind of controls where there are standards and the persons who are engaged in this business have to meet certain criteria, minimum criteria, either for education, honesty, or whatever. They have been unable to get the Legislature to adopt any kind of licensing arrangement or establish any agency or assign this particular field to any overall existing agency of the State of Texas, and I didn't -- I was not personally involved in any of those politics. It

is my general understanding that there was a disagreement between the constables and the private process servers, but the details of that, perhaps someone else can inform you, but at any rate the Legislature never acted.

Eventually, the activists in the area came to the Supreme Court, as an alternative could the Supreme Court use its rule-making authority to bring some regulation or some organization or standardization to the area since the Legislature was not willing to impose a licensing scheme or adopt a statute that set uniform standards across the state, and that is in fact eventually what happened.

The Supreme Court actually did use its rule-making authority to create kind of a quasi-agency that really has no home, really has no funding, and yet it's operating through volunteer services, some by individuals of the private sector, some with the assistance of the clerk of the Supreme Court, and some with the assistance of the Office of Court Administration, all of which I think have to come out of their budget because it's not an item that's financed by the Legislature.

So in our discussions in the last committee term one proposal we considered but was never adopted was to piggyback onto the notary public environment. Notary

public's have a statutory framework. They have a licensing agency. There are requirements in terms of prior convictions, you have to make application, you have to have a 5,000-dollar bond, I believe. One proposal was, well, maybe we say you have to be a notary public in order to serve private process, but that was not what was adopted. Instead the Supreme Court adopted a process that would require the creation of the Texas Process Service Review Board, which never existed before; and even today, although it does exist, it doesn't exist by any legislative authority. It exists solely by virtue of a Court order signed by all nine justices of the Supreme Court, although perhaps it may have just been seven at the time that order was signed, but it was signed by all the justices of the Supreme Court.

You need to understand that apart from the certification process the framework for private process serving is not geographical. In other words, the judges in Harris County don't control the service of process in Harris County. The judges in Dallas County don't control the services of process in Dallas County. A Harris County judge can control service of process of cases in his or her court, and the Dallas judge can control service of process in the cases of his or her court, so we tend to think of these areas like Houston or Dallas or El Paso as

having rules or protocols for service of process in that county, and in reading the minutes of this review board I even see people talking -- people who are on the commission or on the review board, talking in terms of geographical foundation for rules, but it's not really a geographical foundation.

It's a court by court foundation, and one of the consequences of that is if all the judges in Harris County decide to adopt a rule, which it's my understanding they have, that rule is not really just a rule that applies in Harris County. It is a rule that applies -- if it relates to private process serving, it applies to the service of process in a Houston case anywhere in Texas, so if the Houston judges all have some agreed requirement for private process serving of process issued out of their court, that requirement applies to service of a defendant in Dallas County or Travis County or El Paso County or Potter County, or wherever you are in Texas.

So if the judges in Houston agree that they're going to do X, it doesn't just affect Houston, it affects the whole state, and there are various counties that had different requirements about private process serving. Bexar County, San Antonio, had a requirement of a substantial bond, much more than a 5,000-dollar notary bond, and it had to be an approval process through the

district clerk and whatnot. Harris County had its own standards, including an education requirement that was fairly unique in the state, and there were some other communities, some other districts or counties, that had rules, local rules that they adopted that you had to comply with in order to serve process in their court.

Well, the result of that was that there was not uniformity in private process serving across the state. In fact, there wasn't even uniformity in private process serving in Harris County because if you had a Dallas County lawsuit that was being served in Harris County it obeyed the rules of the Dallas County or the Dallas County district court that issued the process, so the complaint was that the people who are in the business of serving process statewide had to comply with each local rule. There was not a standard approach, and so in order to -- in a big county like Dallas or Harris County, you really had to qualify in these various individual counties in order to be able to serve process on a routine basis. That was why they want standardization, and that was what the Supreme Court gave them in the form of this certificate, this subdivision (3) on Rule 103.

The reason that it created standardization was that you could either be a government official like a sheriff or constable or deputy and you're authorized to

serve or you could have a court order that authorized you to serve or you could be certified by the Supreme Court to serve. If you were certified by the Supreme Court to serve, you had the authority to serve process out of any Texas court, even though you might not have complied with whatever local rules previously existed that would require that you had to meet, if it was a Bexar County court, Harris County court, or whatever.

There is a notable exception, though, which we will talk about not now but in a minute, and that is the educational requirement. The standard across the state under the certification program is seven hours of continuing education as a prerequisite to being certified, and the courses that will qualify you to be certified have to be approved by the Texas Supreme Court, and the Texas Supreme Court has approved, to my knowledge, three courses, but the Harris County district judges, I believe as a whole -- someone from Houston that knows differently correct me -- they require that service of process of Harris County district court process can only be done on substitute service by someone who has attended the educational course offered by the Houston Young Lawyers Association.

It does not matter for Harris County district courts if you have attended a course elsewhere

that's been approved by the Texas Supreme Court. If you have not attended the HYLA process server course, I believe that you cannot serve process out of the Harris County district courts. Now, anybody here, will you confirm me, Kent or somebody, can confirm that that's countywide rule for --

CHAIRMAN BABCOCK: Kent Sullivan has left the room.

MR. ORSINGER: Judge Sullivan left the room. All right.

CHAIRMAN BABCOCK: Not wanting to confirm you.

MR. ORSINGER: Is Judge Bland still here?

CHAIRMAN BABCOCK: She's here.

MR. ORSINGER: Do you remember?

HONORABLE JANE BLAND: Well, to get on the list of approved private process servers you have to take the course, and it is a course that's put on by the Young Lawyers, in connection, though, with the civil district judges.

MR. ORSINGER: Okay. So is it actually countywide for all of the district judges in Harris County?

HONORABLE JANE BLAND: Well, I don't know about the county, though, county courts, though.

MR. ORSINGER: Among all the district courts, though? All the district courts abide by this standard?

HONORABLE JANE BLAND: The district courts, yes, I think adopted a local rule that you go to the --

MR. ORSINGER: Okay.

HONORABLE JANE BLAND: -- course, but as far as whether or not you can serve, you probably can get an order from a judge allowing you to serve process not being on the list, but I think if you're on the list then you're approved to serve process in any case without going, you know, through any other steps.

MR. ORSINGER: Okay. So there may be a kind of a case-by-case opportunity to serve even if you haven't taken the HYLA course, but to be on the approved routine list where you can routinely serve process issued out of Harris County district courts you must take the HYLA course even if you've taken one of the other courses that's been approved by the Supreme Court. Whether that exception --

HONORABLE JANE BLAND: That part I don't know. I don't know that you cannot have taken another course. That would be new since I left.

MR. ORSINGER: Yeah, I believe that -- yes, sir. This is Carl Weeks, by the way, who is the chair --

is that the name, chair?

MR. WEEKS: Correct.

MR. ORSINGER: Of the Texas Process Service Review Board.

MR. WEEKS: I can elaborate just a little bit. Substantially that's all correct with the exception of if you attend a TCLEOSE. There was a provision in the miscellaneous order that was issued by the Court that if you attend a TCLEOSE civil process course -- that's the Texas Commission on Law Enforcement Standards and Education that approves the civil process training for constables and sheriffs. If you took one of those courses as well you would be authorized to deliver process out of Harris County.

MR. ORSINGER: Okay. So I'm going to amend my statement then. Carl is the chair of this board that the Supreme Court has created, and he just pointed out that there is a course that is required for sheriffs and constables and deputy sheriffs and deputy constables who are going to serve process, and it's sponsored by the state, and it's called the Texas Commission on Law Enforcement, which I think provides this course, and if you attend that course then you are qualified in Harris County. So if you -- to be qualified for Harris County process, district court process, you have to either attend

the TYLA course or the course sponsored by the Texas Commission on Law Enforcement or you can't get on the routinely approved list; is that right, Carl?

MR. WEEKS: That's correct. To be clear, the course was not offered by TCLEOSE. They just approve courses for various education providers around the state.

MR. ORSINGER: Okay.

MR. WEEKS: Any approved academy, and at this time Harris County is not accepting applications for their list. They're out of the approval of private process server business, and they're referring everyone to Supreme Court for application process to be approved to serve process out of Harris County.

So at this time -- that was in times past. At this time they're not accepting new applications to apply to the Harris County district courts for approval locally there. They're deferring to the Supreme Court process.

MR. ORSINGER: Well, Carl, let me get a point of clarification then. If you're a private process server applying for certification and you have taken a private course that's neither offered by the HYLA nor is it approved by the Texas Commission on Law Enforcement, can you serve process for Harris County district courts based on a certification through this board, but also

based on a private course approved by the Supreme Court, but not those two we enumerated?

MR. WEEKS: No, you cannot. Those are the only two that are enumerated, that you mentioned, that are provided to get the H endorsement, what we call the H endorsement, on your certification number that's issued by the board.

CHAIRMAN BABCOCK: Okay. Thank you. So what that means then basically is there are two courses -- pardon me, there are two sources of authority for your education to be certified, one is the Supreme Court and one is the Texas Process Servers Association, and Harris County will recognize only the HYLA or one approved by the Texas Commission on Law Enforcement, but not a private course that's been approved by the Supreme Court by all other counties.

HONORABLE JANE BLAND: Judge Sullivan is here, and he needs to update you because I think -- and Judge Benton, because, Judge Sullivan, the confusion is what Harris County is approving for private process servers.

CHAIRMAN BABCOCK: Calling on Justice Bland was unfair since she's been elevated to the court of appeals.

HONORABLE JANE BLAND: I'm always willing to

give my opinion, but it may not be based on good information.

CHAIRMAN BABCOCK: Judge Sullivan and Judge Benton are here, however, and they can enlighten us perhaps.

HONORABLE KENT SULLIVAN: We can attempt to do that. We can misinform everyone as well as anyone else can.

HONORABLE LEVI BENTON: I would defer to you, Kent.

HONORABLE KENT SULLIVAN: My recollection is that we -- now that there is a statewide process that we simply are standardized consistent with the statewide process. That is my recollection.

MR. ORSINGER: Well, there is -- Kent, let me say that they have certificates the Supreme Court is now issuing -- I guess it's the Supreme Court technically that issues them, maybe it's not, and you can either have an H designation or not. If you have an H designation you can serve private process issued by all of these district courts. If you don't have an H designation you can't serve the Houston originations, and it was my understanding that whether you got an H designation or not depended on whether you took a course that was approved by the Harris County district judges.

If you took a course approved by the Harris County district judges then you got an H designation, but if it was a private course other than the HYLA course, you didn't get your H designation and, therefore, couldn't make service of process on Houston district court paper work.

MR. WEEKS: That's correct.

MR. ORSINGER: That's right. So Carl Weeks, who is the chair of the board, is saying that, so it may appear to you as a judge that we have -- that the Harris County has kind of bought into the overall certification process, but there is an exception on the education side, which is one of the points for discussion today.

Okay. Now, to move on, on June 29th of 2005, which was less than a year ago, the Supreme Court amended Rule 103 and then issued two miscellaneous court orders that sort of put this framework in place, and as I said, it's kind of a quasi-agency. It sort of has a headquarters, which is the clerk of the Supreme Court, but if you go to the website they ask you to please don't call and ask us any questions. You can see an e-mail to the following e-mail address and if you have to call you can leave a voice mail and somebody will get back with you, and so they're like a mailbox drop, basically, for all of this stuff and then to the extent that some administrative

support is required, I think that's offered gratis by the Office of Court Administration; is that not true, Carl?

MR. WEEKS: That's correct.

MR. ORSINGER: And then I noticed in the minutes of your second meeting, I think, that if, in fact, a database was going to be maintained for this -- for the board to do its evaluative work that a constable in Harris County had offered up the use of his computer system, or did I get that right?

MR. WEEKS: For the complaint system?

MR. ORSINGER: I think so.

MR. WEEKS: He's using his personal laptop. He's the chair of our complaint committee for -- he's the chairman of our complaint committee, and as he investigates the complaints for our board he maintains and opens those files and then forwards them to Meredith Musick, who is the clerk for the board for OCA.

MR. ORSINGER: And so if he use loses his laptop I guess we're in trouble.

MR. WEEKS: We have a copy here in Austin as well. THe originals are maintained here.

MR. ORSINGER: Okay. We're trying to run a quasi-agency here with no money and no staff. But at any rate, there is -- it is important to remember that this is not a licensing system. Although there is a dispute

whether some of the proposals today wouldn't move us into a quasi-licensing environment, this is a voluntary application process, and you don't have to apply for it if you want to, and you don't have to be certified in order to be a private process server, but if you're not certified, then you're going to have to have the authority of a court order in order to do private process serving.

Now, some of the proposals we'll talk about today from reading the correspondence, I think members of the field feel like it moves us away from a voluntary certification process and more into kind of a licensing board environment where the board of review has the authority to take away your license, quote-unquote, and therefore put you out of business, quote-unquote, even though there really isn't a license. It's just a certificate, but at any rate, those appear to be the perceptions on the issue.

If you are certified then you are assigned a number, and the Supreme Court website, someone at the Supreme Court, I believe, or the OCA will put your name and your certificate number up at the website which has alphabetical listings of everyone that's certified, and that, if you will, is the way to confirm whether a private process server has properly been certified. That's the source of authority. There is no agency really that you

can call on the telephone, so you just look at the website and figure it out.

Now, under the current two orders that are in place that were issued on June 29th of last year, in order to be certified you have to -- there are really four criteria that must be met. You have to make a sworn application, you have to make a statement in that application that you have not been convicted of a felony or a mismisdemeanor involving moral turpitude. You must submit a Department of Public Safety criminal history record issued within the last 90 days to show that you have -- to show what your conviction history is and you must submit a certificate of attendance at an approved civil process course, and when I say "approved" I mean approved by the Supreme Court.

I told you that HYLA has been approved, the course offered by the Texas Process Server Association is approved for all purposes except Harris County courts, or a course, it says here, "offered or approved by the Texas Commission on Law Enforcement." If you have those four things, then so far as I can tell by reading the order you're entitled to be certified.

Now, the same order of June 29th, 2005, talks about when you can lose a certification, and paragraph (4) says "Certification may be revoked for good

cause, including a conviction of a felony or a misdemeanor involving moral turpitude." It is not limited to conviction of a felony or misdemeanor of moral turpitude. It says "good cause including" and then it enumerates felony or misdemeanor of moral turpitude. Good cause is not defined in this order, so we don't have any authority at this point on what constitutes good cause to revoke a certification. Do you agree with that, Carl?

MR. WEEKS: That's correct.

MR. ORSINGER: Okay. Now, it's my understanding that about half of the people in the field have chosen to become certified and about half not. Is that right or wrong, Carl?

MR. WEEKS: Well, that's one number we don't have a good handle on to be real accurate because we don't know how many people are in the field serving civil process. We right now have about 1,900 people, private process servers on the statewide order under the Supreme Court to serve process. We don't know the total number of private process servers in the state, so that percentage is hard to speculate on.

MR. ORSINGER: Okay. Well, my perception reading the correspondence, which admittedly is limited information, is that there is a segment of the private process field that has not chosen to apply for

certification because they're still mistrustful of the regulation, who is regulating, what the standards for regulation are, and what the effect would be if they got certified and lost their certification; and this board has been in place for less than a year and we don't have very concrete standards for what they're -- what -- how they will exercise their judgment; and so it doesn't surprise me that in a field that's previously been unregulated that there may be some practitioners who are a little wary of this new authority that came from the Supreme Court and is by appointment of the Supreme Court, and that is -- has some control perhaps over their ability to make a living as a private process server, and perhaps we'll have some comments reflecting that point of view a little bit later; but what I'd like to do is leave this background and step into the first specific issue before us for discussion and that is the board's proposal to either adopt or have the Supreme Court adopt a code of professional conduct for private process servers, certified private process servers; and this is in the materials that were e-mailed to you, and it's Appendix A to the agenda and also I think to the board minutes, or actually this is a refinement of the board minutes; and so what I would like to do is talk about it a little bit generally and then talk about it specifically.

HONORABLE JAN PATTERSON: Richard, may I ask a question?

MR. ORSINGER: Yes.

HONORABLE JAN PATTERSON: Do we assume that the unregulated are perhaps operating out of one court alone and that they may be in some of the rural areas, or do we just not know?

MR. WEEKS: I think the presumption is that they are the folks that really aren't in the business full time that are serving papers everyday. They're what we call in the business the mom and pops that may be in rural West Texas or wherever that serve, you know, three or four papers a month, and it's not worth it to them to go through the process to do this application and that type of thing. They can be approved still on a local order by a local judge for that limited amount of process that they serve.

MR. ORSINGER: Okay. The context of this code of professional conduct, because we operate one as lawyers, we all know, there is a backdrop, of course, of criminal law that governs all of our activities. Whether we're lawyers, doctors, or private process servers, if we violate the law in conjunction with our work we can be prosecuted by the government, so the backdrop of the Penal Code is out there whether or not there is a code of

conduct that's applied to the profession.

There's also tort law. Any of us who commit a tort in the conduct of our work can be made to answer in a suit for damages if we injure a person, damage personal property or real estate, and so the backdrop of tort law exists in this field of private process serving, whether or not there is a code of conduct.

I would also point out something to you that you may not know, and I found this to be an eye-opener, the Court of Criminal Appeals on March 22 of 2006 in a case called State vs. Basilas, B-a-s-i-l-a-s, ruled, I believe without dissent that filing a pleading or a document in a civil case that you know is false is a crime.

Now, before that a lot of people thought that the crime of tampering with the government record meant that you went to the county clerk's office and tried to alter a document or you altered a pleading or a judgment that was in the court's jacket. That's certainly what I thought tampering with a government record was, but the Court of Criminal Appeals has said that if you file a pleading, a lawyer who files a pleading and knows that it has misstatements of fact is violating that statute of tampering with a government record, and they go into all their statutory analysis, but the bottom line is that they

reversed a quashal of an indictment against a lawyer who filed a petition for expunction on behalf of a client that contained misstatements of fact.

And so it will probably take a little while for us to figure out exactly what is the difference between a Rule 13 sanctionable behavior and behavior that can result in you being prosecuted. If the -- let's see, it's a Class A misdemeanor, unless there is intent to defraud or harm another, in which event the offense is a state jail felony. Now, this applies to lawyers who file pleadings, but it would obviously also apply to a private process server who filed a return that misrepresented personal service when personal service had not actually been effected. So probably the act of filing a false return is going to be at least a misdemeanor and maybe a felony.

MR. GILSTRAP: Do you have a cite on that, Richard?

MR. ORSINGER: Yes. The cite on that is 2006 Westlaw 709324; again, 2006 Westlaw 709324, State vs. Basilas. So I knew that we would all be interested in reading that case, but I mention that because --

HONORABLE NATHAN HECHT: There will be a lot more associates filing papers.

(Laughter)

MR. ORSINGER: I wanted to have that background in this discussion about professional standards because even if there are no professional standards we have the Penal Code, which apparently could apply with a vengeance to a false return, and we have tort law. Both of those are covered in this proposed code, but then also some other aspects, too.

Okay. Moving on then to the specifics, this code contains some very concrete concepts and then some very, very general concepts, and if the code is just going to be a voluntary statement of things we all agree we should aspire to do then generality in concepts is not harmful and, in fact, may even be beneficial because you're maybe getting to the thrust of a point rather than trying to define it so that it can be enforced.

However, if this code is going to be a foundation for finding good cause to revoke certifications, an argument can be made that general concepts or general statements or vague statements are not fair to the certified individuals, or even to the board, which has to pass judgment on somebody if the terms are so general or the standards are so vague that it's very subjective when someone has violated the code and when they have not. And as lawyers, of course, we know that our code has -- our code of ethics has a lot of

generalities in it, but it also has some clearly prohibited black and white behavior and so I tend to evaluate this in terms of what I have been living with for 30 years as a code of professional responsibility.

Now, the very first category here is to treat people with respect, and of course, that's everyone here at the table, if we were asked to describe what that meant would probably describe it differently, but we could probably all agree that that would be a good idea; but could we all agree that if someone did not treat someone with respect that they should lose their certification; and if so, how do you distinguish a frivolous complaint of lack of respect from a meritorious one that should invoke an investigation and maybe even a hearing or the revocation of a certification. You can see the problem.

Trespassing, number two, is more concrete, because we have a Penal Code definition of criminal trespass and we have a tort code, tort standard, of trespass as well, but it says, "Do not trespass in a way that could subject you to a criminal conviction," so I'm thinking that that's the criminal trespass statute that you can't violate. While we're on the subject, I will say that if you do violate the criminal statute on trespass, you could be prosecuted, so there is a remedy for a private process server that commits a criminal trespass,

and that is to go file a complaint against him with the government rather than filing a complaint with the board to revoke his certification.

Number three is truthfulness, completely candid and truthful concerning all process service matters, and that's very broad because "all process service matters" could include all manner of things, including telling a white lie to somebody at the front door of the building in order to get inside to serve process. I had one case some years ago where I couldn't get process served on a doctor, so my private process server made an appointment to go in as a patient and when the doctor came in to examine him he handed the process to him. That worked. That was the only way I could get service on that guy, but it was not candid --

CHAIRMAN BABCOCK: "What's your complaint?" "Here it is." Totally candid.

MR. ORSINGER: He was not completely candid and truthful concerning all process service matters, so I think that perhaps we need to consider how extensive the requirement of candidness and truthfulness is going to be.

Returns is that the returns have to comply with the Rules of Civil Procedure and have to be accurate, and if it -- if the return -- if the service doesn't actually fit the actual form then you need to add or

delete information so that it is accurate, and we all agree that there should be accurate returns, but perhaps a better way to do it is to have a standardized return, which, in fact, is one of the proposals for us to consider, that the board wants a better standardized return that everybody has to use.

Next one, disclosure of dual capacity. Apparently there are some people in the field who have a government job but who also do private process serving, and there is a concern which maybe someone can explain to us how it will be harmful, but where someone may be using their apparent authority as a government employee somehow in connection with private process serving, and this would prohibit that.

The next one, wearing official uniforms or displaying a badge or emblem of office, seems to me to be the same thing, that if you're acting in your private process server capacity, you shouldn't be pretending to be under the authority of some other part of the state other than the private process serving part of it. It does permit identification issued by the Supreme Court. So far none is, but there is a proposal for us to discuss today about the Supreme Court adopting an identification card process that would be, if you will, an official card identifying this person as certified by the Texas Supreme

Court to serve process.

HONORABLE TOM GRAY: Richard, hold that thought while the court reporter turns over her tape.

MR. ORSINGER: Okay.

CHAIRMAN BABCOCK: Because we don't want to miss a thing.

PROFESSOR DORSANEO: We're not.

MR. ORSINGER: This is early in the committee process, Chip.

CHAIRMAN BABCOCK: That's what I was afraid of.

MR. ORSINGER: The next one is service by law firm employees, and this standard would require or prohibit you from serving anything other than a subpoena where you work for the law firm which has issued the service. The next one prohibits exaggerating your authority. The next one is comply with the CLE, or pardon me, continuing education requirements of the Supreme Court. The next one prohibits misrepresenting your qualifications. The next one is maintaining a current address with the board. The next one is cooperation with the complaint investigation, and exactly right now there is kind of a de facto complaint process in effect, although there are no, I think, published standards for it; and that's one of the things to discuss today; but the

board is proposing or maybe inferring from the existing Supreme Court order that it has the responsibility of conducting investigations to see whether standards have been violated by process servers; and, Carl, it's my understanding that you-all have actually done four investigations already.

MR. WEEKS: That's correct.

MR. ORSINGER: Okay. And of the four investigations they've done they were all compliants by members of the public left at the website, or how did they get to you?

MR. WEEKS: The total number of complaints we've have been where the person fills out a -- there is a complaint form, to answer your question first, that the Court approved that's on the process server review board website. It does require the complainant to sign before a notary and state the facts of the complaint, and they submit that to our office here, or actually OCA handles the mail, and the Process Servers Review Board, they come into our office and then there -- I asked Constable Hickman, who we talked about earlier who chairs our complaint committee, has been working those. We are a little overloaded right now. We have got five we are actively working. I'm working two of those because he had the other three, so about 15 total sworn complaints we've

had submitted to the Process Server Review Board in the last eight months.

MR. ORSINGER: Okay. And I have seen four acted on in your minutes.

MR. WEEKS: Correct.

MR. ORSINGER: Is that right? And of the four acted on two were complaints against certified servers and two were complaints against noncertified servers; is that right?

MR. WEEKS: I believe that's correct, yes, sir.

MR. ORSINGER: Okay. Thank you. There has been some reaction in the letters that I have seen as to what the authority of the board is to review the behavior of people who are not certified since the board exists as part of the certification process and decertification process and has nothing to do with the noncertified process servers, and there -- for lack of a technical word I'm going to call it -- or maybe I saw it written somewhere it's mission creep that the board has been created to monitor the certification process, but it was natural, if you will, for it to monitor also the activities of people in the field who are not certified but where complaints come before the board. What did I say that you disagree with?

MR. WEEKS: Could I clarify on that?

MR. ORSINGER: Yes.

MR. WEEKS: Those two that were not certified that we did investigate were folks that had applications pending before our board.

MR. ORSINGER: Okay.

MR. WEEKS: We have routinely denied to this point because we have -- the Attorney General has graciously given us general counsel, a fellow by the name of Jim Krausen, who advises the board, and based on advice of counsel we have not pursued investigations on folks that were either not certified or applied to our board for certification.

MR. ORSINGER: Okay.

MR. WEEKS: To be clear on those other two.

MR. ORSINGER: Thanks for that clarification because there is at least the tie of an application pending that would bring them within the purview of your board.

MR. WEEKS: Correct.

MR. ORSINGER: But if there is no tie whatsoever you-all have not undertaken to do an investigation even?

MR. WEEKS: That's correct. We've turned those down.

MR. ORSINGER: Okay. Now then, this cooperation with the complaint investigation requires notice to the -- let's see, I might be mixing two of these together. "Provide any requesting person the necessary information to file complaints" and that's done, of course, because the state -- the Supreme Court website has the actual form on it, and then there is a description of what would be reportable events under these standards, and that would be a conviction or imposition of community supervision or deferred adjudication, so it doesn't matter how you get out of it unless you're acquitted you're snared here; felony or crime involving fraud, dishonesty; crime involving moral turpitude; or a crime related to the qualifications, functions, or duties of a process server; and the crimes that would fall into category two are probably well known under the case law, but under category three those are probably not well known unless we define them.

Any disciplinary action, you have to -- shall report in writing any disciplinary action, refusal by another authority to grant or renew a license or a finding of contempt by a state or Federal court. Paragraph (14) says you have a requirement to expose corruption or dishonest conduct of another licensee.

Paragraph (15) attempts to list the

misconduct that no doubt would be seen as good cause to deny certification or revoke it, and one is a violation of the code or knowingly assisting someone else to; next, fraud or deceit; next, representing a certificate, degree, or title you don't have; committing a criminal act that reflects adversely on honesty, trustworthiness, or fitness; engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation; obstruction of justice; subjecting behavior -- or being held in contempt by a state or Federal court; engaging in a practice, or should I say process serving when the process -- the status is on inactive status or the authorization to serve process has been suspended or terminated.

I guess, Carl, I need to get some clarification of that. If we have a noncertified person who has never applied, never been rejected, they are not on inactive status?

MR. WEEKS: No, sir. That's correct. It would be one --

MR. ORSINGER: But if someone did apply and got certified and then did something wrong and then their status was suspended, have they just lost their certification or have they lost their ability to serve private process under a court order?

MR. WEEKS: No. They have just lost their

certification. We have one of those in effect now where they're still serving on a local order.

MR. ORSINGER: Okay. Category (i), don't hire somebody on an inactive status; category (j), don't violate the laws of the State of Texas or the U.S., or these professional standards; (k), don't violate rules of the Supreme Court; (l), in connection with a felony or crime involving fraud, dishonesty, or moral turpitude, the process server will be considered to have engaged in misconduct when finally convicted or imposed community supervision or deferred adjudication. It is also misconduct if a court makes a finding of a false return, and it says you "shall not comply with the final order of a state or Federal court unless it's been stayed."

(O) is repeated failure to respond to a board inquiry without good cause will be considered misconduct. "The certified process server cannot threaten or commit assault or retaliation, make libelous or slanderous statements, or make public allegations of lack of mental capacity regarding parties that cannot be supported in fact." So I guess if it's true, you can say it no matter how bad it is, but don't say it if it's not true, and then the last one here is breach the security of the process server examination.

So the proposal is to adopt this code of

professional conduct, which evidently will be some standard by which your certification will be accepted or rejected or your certification will be revoked if it's been granted, and then also it contains provisions that may not be contemplated as being specifically enforceable but are just good moral, ethical judgments that people should aspire to. Can we ask Carl to explain why they feel this is necessary?

CHAIRMAN BABCOCK: Absolutely.

MR. ORSINGER: Carl, would you, if you will, defend the board's proposition that this be approved by the Supreme Court?

MR. WEEKS: I'd be glad to. My committee, this work product was brought forth out of an exhaustive number of hours, and there are obviously issues that are addressed in here that aren't articulated in the Penal Code or the Code of Criminal Procedure or the Texas rules, and we felt like that these items, as some of them have already come up before our board with regard to conduct of process servers, needed to be articulated so the board would in essence have some basis or guidelines to work from when considersing these complaints that have come up, and they have come up already in numerous nature and of different kinds.

They are not all straightforward, and

combined with that we wanted to have some further supporting guidelines to go by where we were going to be considering -- we're not obviously operating from the principle that everybody would be summarily revoked. It could be a suspension, it could be a letter of reprimand, it could be a temporary probation, whatever the case may be with regard to their certification.

I'm glad to go through and answer any specific questions rather than me going through each one. Is that what you'd like?

MR. ORSINGER: No, I just wanted you to -- why do you feel that a code is necessary? Let's say, for example, could you get by with a more concrete list of criteria for being certified and decertified beyond just a felony or misdemeanor of moral turpitude?

MR. WEEKS: We'll get by with what we have to get by with obviously. We could, I assume. The feeling of the board was that we needed as much covered as we could; and to be quite frankly, we had some basic items that we started out with in our committee; and the three folks that were on that committee that started this process brought forward a work product that was fairly substantial; and then at that time we as a full committee started looking at the other options of what's in place with a similar circumstance that may be applicable; and

one of the things where we drew a great deal of this, to be quite candid with you, is from the Court Reporters Certification Board.

Some of this may -- I think there is a court reporter down here shaking his head, which is a board that obviously operates under the authority of the Supreme Court, Court Reporters Certification Board; and we felt like that many of these things that were articulated in the Court Reporters Certification Board, because there were issues that had come up and I met with those folks that run that board and the executive director of that agency, and these complaints that come in are many times not clear-cut and very ambiguous, and you need these. I guess to explain, we felt like because they worked well for that agency and had been in place, and according to the executive director of the Court Reporters Certification Board, they had been through hundreds of hearings, and they have recently revised even last year, I believe, their code of professional conduct, if you will. I think they may call it a different name, and it was a product that worked well, and I think the Court Reporters Certification Board and the court reporting industry functions very well, and personally I thought it was a good standard to subscribe to for our board.

MR. ORSINGER: Okay. Thank you.

CHAIRMAN BABCOCK: How much overlap -- how much does this code track the court reporters, David? Do you know?

MR. JACKSON: Well, I don't. I haven't really studied everything that you're asking for, but we're still tuning ours. I think the Supreme Court has some adjustments that the Court Reporters Certification Board passed two years ago on (a) through (h) on contracting issues and that type of thing, so we're still in limbo on some of those issues.

CHAIRMAN BABCOCK: Okay.

MR. WEEKS: I think maybe 50 percent, if I could answer your question, 50 to 60 percent range, somewhere in there. We came up with half and then we went and looked at some of the things the Court Reporters Certification Board had done, and I met with Michele Henricks, the executive director of that agency. She informed me that they had through a series of revisions over the number of years -- this last two years they made the most recent revisions and indeed it was an ongoing work in progress, but they were pretty happy and it was working pretty well with their code of conduct that they were operating under at this time.

MR. ORSINGER: Okay. Is Tod Pendergrass with us?

MR. WEEKS: He is. There, just walked in the door.

MR. ORSINGER: Tod?

MR. PENDERGRASS: Yes.

MR. ORSINGER: I'm Richard Orsinger. I'm the chair of the subcommittee that's been evaluating these proposals. It's my understanding that you're a private process server, and you may have views that would recommend against the adoption of the proposed code; is that correct?

MR. PENDERGRASS: Yes, sir.

MR. ORSINGER: Would you mind stating those briefly to us what your concerns are and whether you think they represent -- or even if they're not personal, can you share concerns of other people you know in the industry why they would oppose such a thing?

MR. PENDERGRASS: There is many, many reasons. A lot of the items in the code are redundant, perjury, assault, falsifying a return, all of that stuff is already against the law. Basically, I have just been asking for proof that any of these changes need to be made. For instance, if you were to say that last year 50 process servers were convicted of filing a false return or committing perjury or assaulting someone or trespassing, or even five process servers. So the numbers don't

support the need for all of this regulation.

I'd also like to clarify that at the last legislative session the fiscal note for the Senate bill that would have licensed us, Senate Bill 165, used an estimate -- an estimate that was provided by the Texas Process Servers Association, of which Chairman Weeks is the vice-president, of approximately 3,000 process servers in Texas, and by last count on the website there's only about 16 or 1,700, so maybe they're just catching up, but there's estimated 3,000 servers, so that's quite a few that have chosen not to be certified.

And as far as mom and pop servers go, I don't know what the estimate is, but the majority of private process servers in Texas, including myself, are mom and pop servers. There is a very small number of large companies of process servers.

Also, concerning complaints, it's my personal opinion that this Process Servers Review Board is acting in a rogue manner, and the only instance that I can tell you right now is there is a process server in Texas by the name of Alex Londolf, L-o-n-d-o-l-f. He is not a certified process server, and he has not applied to be a certified process server; however, he just recently received a letter from Ron Hickman, the complaint chair on the committee of the Process Server Review Board,

concerning a complaint that was filed against him.

So I don't know if that falls under investigation or not, but a letter has been sent to him about conduct involving some incident, so I don't know if that -- if they are investigating stuff, but the board is actively doing things to address incidents about noncertified process servers and not just process servers who have applied and are yet to be certified, and that's the only one I know about.

CHAIRMAN BABCOCK: What is the complaint made against this individual?

MR. PENDERGRASS: I don't know what the complaint is. I haven't seen the letter. I just got off of the phone with Mr. Longdolf to verify that before I spoke about it.

MR. WEEKS: I can answer the question. He was -- charges were brought at the local level by the district attorney's office that he, I believe, filled out a fraudulent return, and subsequent investigation revealed that he was a convicted sex offender and obviously a crime of moral turpitude. There were some other issues that were brought. Criminal charges, there is a case pending at the district attorney's office in Collin County with regard to his ability to even serve civil process under the provisions of Rule 103.

HONORABLE SARAH DUNCAN: And why is your board investigating it if he hasn't applied or isn't certified?

MR. WEEKS: We were contacted by the district attorney's office, and which we routinely get calls from folks that want to understand the business. When the criminal side -- we're not actively investigating. We're just offering assistance to the criminal district attorney's office in that county. They have an open, active case investigation, and for the most part criminal investigators don't understand civil process obviously, and now that there is a resource for them we have gotten other calls from folks that are trying to find out what, you know, the issues of maybe perjury or aggravated perjury are with regard to the return or tampering with a government record or those other applications of criminal law as they affect civil process servers.

MR. ORSINGER: Well, Carl, do you know whether someone on behalf of the board sent a letter indicating that the board was somehow making an investigation or an inquiry?

MR. WEEKS: I am not aware.

MR. ORSINGER: Would it surprise you if a letter went out from the committee that's charged with

investigations?

MR. WEEKS: That we were contacted about his private process server activities? It would not surprise me at all.

MR. ORSINGER: But you would be surprised if they were undertaking an investigation, but not if they just said, "We have been contacted about your activities"?

The impression I got from Mr. Pendergrass's statement was that there was a letter of inquiry, kind of like there was an investigation. Do you know anything about the specifics of the letter?

MR. PENDERGRASS: I do not.

MR. ORSINGER: Okay. So it may have been nothing more than "We have been contacted"?

MR. WEEKS: I apologize, I don't know either, so I don't want to give you incorrect information.

MR. ORSINGER: Okay. Got anything else?

MR. PENDERGRASS: Yes. According to what I have learned about Mr. Longdolf, he pled no contest to a charge and is currently on probation, so if he completes his probation he will be dismissed of all that. So it depends on what your definition of conviction is. It's my understanding he has not been convicted.

I'd also like to point out that just many of you know that there are many, many different types of

process. There is subpoenas, Federal summonses, Federal subpoenas as well, and this Process Service Review Board and this whole certification only covers citations and other notices that are not enforceable writs. So you cannot be certified and serve all subpoenas in the State of Texas, all Federal summonses, all Federal subpoenas, all citations that come out of the child support cases, which are some of the most sensitive ones, and all process from any other state that you receive, so the certification actually covers a very specific type of process.

MR. ORSINGER: Should I ask, does it require a court order for private process serving on all of those other state things?

MR. PENDERGRASS: No. No court order is required except on citations and other nonenforceable notices. So all subpoenas can be served by anyone over 18 who is not a party to the case, which is a mirror of the Federal rule, which anybody can serve a Federal system summons or subpoena if they are over 18 and not a party to the case. So there is no kind of criminal requirement. You can be a convicted criminal and serve all Federal summonses, not that there is a lot of convicted criminals out there doing this, but you can have those convictions and serve many, many types of process, because evidently

the courts don't really care about the person's background, just that the person is of age and not a party to the case.

MR. ORSINGER: Do you know what the Federal procedure is for substitute service, if any, of the Federal citation, the citation of the initiation of a Federal lawsuit?

MR. PENDERGRASS: Yes, it's referred to as a summons, same as state court. Substituted service in Federal court, if you go to a person's residence and you have a summons for the initiation of the case and the person is not home, you can leave that summons with a person of suitable age that resides therein at the house on the very first try. It works beautifully for Federal process and for the majority of all the other states, and I have a letter in my packet addressing that, although that's, I don't think, on the agenda.

MR. ORSINGER: So let me clarify, the initiation of a Federal lawsuit is served with a summons, and under the Federal Rules of Civil Procedure any adult can serve the summons.

MR. PENDERGRASS: As long as they're over 18 and not a party to the case.

MR. ORSINGER: Again, okay, it doesn't require any court approval, and it doesn't matter if they

have 15 felony convictions?

MR. PENDERGRASS: That's correct.

MR. ORSINGER: And that's in all of the district courts of the United States across the country?

MR. PENDERGRASS: Yes, sir, and that's why I make reference to there are just no numbers to support as in convictions of process servers fouling up the system, and I put some percentages in one of the letters that I wrote that even if this board has ten substantiated complaints, that's less than one half of one percent of the 1,600, is what I estimate process servers that are certified. It's even less of the 3,000 that are certified, and if you assume that each of us have served about a hundred papers, which is a low estimate, since this certification program has been enacted almost a year ago, that's about 300,000 papers. Each paper we serve is a possibility of a complaint being filed against us. That's less than one -- three one-thousandths of a percent. I mean, we're squeaky clean.

MR. ORSINGER: Okay. Anything else?

MR. PENDERGRASS: Not at this time.

MR. ORSINGER: Okay. Thank you.

MR. PENDERGRASS: You're welcome.

MR. ORSINGER: But wait a minute, before you sit down, is there anything -- I know generally you don't

feel like this is required regulation, but is there anything specific about this code that bothers you other than that it's redundant, or is it just the idea that we will have a code imposed that you object to?

MR. PENDERGRASS: Quite honestly, specifically what bothers me about this code is I see an attempt by many of the board members -- I don't know if it's a majority, but they are powerful influences on this Process Servers Review Board that were for licensing at the last session, and they seem to be trying to license us through this certification program that is set up to be nothing more than a statewide blanket order.

MR. ORSINGER: Okay. Now, that's an objection to adopting a code at all.

MR. PENDERGRASS: Correct.

MR. ORSINGER: But assume for a second that we want to consider this code. Are there specific parts of this code, not the code as a concept or the code in its totality, but specific parts of this code that bother you more so than other parts?

MR. PENDERGRASS: Nearly every single item in the code. I mean, I have no problem with being respectful when I serve papers.

MR. ORSINGER: Okay. Well, I understand. In other words, your objection is to the entirety and not

to specific sections of it?

MR. PENDERGRASS: Right. I'm afraid that the board is going to --

CHAIRMAN BABCOCK: I think he said both.

MR. ORSINGER: Okay. That's fine. Thank you.

MR. PENDERGRASS: -- enforce these --

MR. ORSINGER: Okay. So, now, probably we ought to remember that we have another issue here about how we're going to enforce this if it's adopted, and some people might decide that maybe they don't like some of these generalities once they see what the enforcement mechanism is, but it seems to make sense to me to have some discussion or a vote or a show of hands or whatever on this whole idea of whether to adopt the code, and if so, do we want to do it verbatim or whether we want to consolidate paragraphs or cut some things out.

CHAIRMAN BABCOCK: Yeah. Let's talk about that a little bit. Justice Jennings.

HONORABLE TERRY JENNINGS: Can I ask the gentleman a question? How will this negatively affect your business?

MR. PENDERGRASS: I could be -- I have had complaints filed against me from the general public by people who are just mad that I got them served. I have

not broken any laws. I have had the cops called on me when I am sitting out in front of somebody's house. The cop shows up and they say, "What are you doing?"

I say, "I'm trying to serve a paper, waiting for this guy to come home." The cop knocks on the door and says, "Mr. Johnson, this guy is out here with some papers." I served the guy, and the cop had made a determination that I'm not doing anything wrong. The board is going to be able to take those complaints and re-review what the police officer has already shown up and done and possibly might revoke my certification on unfounded complaints, which I believe there are some instances of certification being revoked already on unfounded --

CHAIRMAN BABCOCK: Judge Lawrence.

HONORABLE TERRY JENNINGS: Why would they do something like that?

MR. PENDERGRASS: There are some negative influences on the board, is my only opinion.

HONORABLE SARAH DUNCAN: So you are certified?

MR. PENDERGRASS: I am certified with an H designation.

CHAIRMAN BABCOCK: Judge.

HONORABLE TOM LAWRENCE: For the record, I

would like to point out that when you're saying Rule 103 you also mean Rule 536, correct?

MR. ORSINGER: Yes, and would you append that, because there is an interface between this first part of the rules and the latter part of the rules that I didn't explain?

HONORABLE TOM LAWRENCE: Well, 536 is kind of a recodification of 103 for the justice courts, so although you really don't have to change 536 to make it consistent with 103, it makes sense to do that; and I think we would want to keep those consistent; but my question is, if this code is aspirational, if it merely is a statement saying that we want to operate professionally and politely and do a good job and there is no penalty, well, that's one thing; but what I'm not understanding is what is the purpose of doing this? Is there another purpose? Is there going to be a link to this code and enforcement, or is someone going to ask the Court after this code has been adopted, okay, the code has been adopted, we want an order saying that from now on we can use a violation of the code to go against or investigate or withdraw the certification? Is that the next step, or is this merely aspirational and that's going to be the end of it?

MR. WEEKS: If I may.

CHAIRMAN BABCOCK: Yeah.

MR. WEEKS: It's already addressed in the Court's miscellaneous docket that the board has the authority to revoke certifications for good cause or -- and sort of where we have been with that and we're asking for further clarification on that in these rules, that the propositions that we would have would be to not maybe summarily revoke but simply suspend or certify or issue a letter of reprimand or whatever the case may be. I would certainly not anticipate that every certain situation would be a revocation flat out of certification.

We haven't revoked anybody's certification yet. We have temporarily revoked one person's certification because it's a pending criminal investigation going on that we felt was very material. He's still serving process under a local standing order, so we haven't impaired his ability to make a living.

HONORABLE TOM LAWRENCE: So this is going to be good cause. If you violate any provision of this code, that's going to constitute good cause and that can be revoked.

MR. WEEKS: Or suspended or a letter of not -- or no action. It would be ability for the board to consider the complaint, and a perfect example is -- to follow up, is one that we've already had this come before

our board recently wherein the police were called on the process server and the folks filed a complaint. They came to our board, filed numerous sworn complaints, had an attorney and, you know, exhaustive issues about knocking on the door too late, and they were, you know, being impolite and rude and whatever. We investigated, we put a lot of hours into investigating that specific complaint. We interviewed the police officers, the witnesses, everybody, and we found the complaint unsubstantiated and we found it unfounded and we dismissed it. It was a reasonableness standard.

HONORABLE TOM LAWRENCE: Can I ask a question on (15)(i), page six, "A CPPS shall not engage the services of a CPPS who is on inactive status or whose process server certification to deliver process has been suspended or terminated"? Why would that be in there if it would be legal for him to serve process under court order?

MR. WEEKS: Well, if he had been suspended under our board and we had -- it rose to the level that we suspended his certification, we would not want that person -- that person, really, there would be good cause and would be findings of our board that that person should not -- and we have been asked already to notify the local courts when our board takes an action of a revocation or

suspension of a person that the local court is notified about our complaint here in Austin of what's going on.

HONORABLE TOM LAWRENCE: But the Supreme Court says that it is okay to serve process if a court approves it. Well, you're saying in essence that that's not correct anymore, that if that person has been suspended by your board that they no longer -- that you're going to also suspend the person that hires them. You're taking punishment against somebody that may legally be able to serve process under a court order.

MR. WEEKS: Well, we would not necessarily suspend them or decertify them, but it would say you shouldn't use those services of a person that has been suspended or decertified by our board.

HONORABLE TOM LAWRENCE: Well, but if it's in your rules that a violation constitutes good cause that you can then -- you know, it seems to me you're penalizing somebody for doing something which is otherwise legal.

MR. WEEKS: Otherwise allowed by a judge, you certainly have that local jurisdiction to do that. Absolutely correct.

CHAIRMAN BABCOCK: Judge Sullivan, did you have a question? And then Professor Hoffman.

HONORABLE KENT SULLIVAN: No.

CHAIRMAN BABCOCK: Professor Hoffman.

PROFESSOR HOFFMAN: I have got two questions. One is to get a little more history about what was proposed to the Legislature and they chose not to do. In other words, what regulation was that? The second question I had is --

MR. ORSINGER: I'll get Carl to do this.

PROFESSOR HOFFMAN: The second question I had is this is kind of a bizarre situation that I feel like I'm coming into and the horse is a bit out of the barn on, but we have got a Supreme Court order that says, you know, this is what we need for certification. There will be this statewide process on that, and then you go to the Harris County website and it says, "We're not going to listen to you," and so I'm wondering what's going on in Harris County and either what does Harris County know that we don't know and then, secondly, what does Harris County -- why do they think they can do this?

MR. ORSINGER: Well, no, the Supreme Court --

PROFESSOR HOFFMAN: And I'm from Houston. I don't get it.

MR. ORSINGER: The Supreme Court has allowed them to do that, but one of the proposals in here is to eliminate the special treatment of Harris County as far as the educational requirements.

PROFESSOR HOFFMAN: So they have been given an exemption right now?

MR. ORSINGER: Well, that's right because when you first put things in place you're building a consensus.

HONORABLE NATHAN HECHT: The second question is out of order.

(Laughter)

PROFESSOR HOFFMAN: That is for sure.

MR. WEEKS: If I may answer the first one --

CHAIRMAN BABCOCK: Yeah.

MR. WEEKS: -- exactly on the legislation, and for those of you that don't know, when the order was initially activated in July of last year there was 1,300 and -- I can't remember the exact number or so, private process servers that were on the Harris, Dallas, and Denton County orders that pretty much met the standards of what the Supreme Court was going to adopt. Those folks were grandfathered on the order. Okay. So all of those people you're talking about in Harris County that were on the Harris County order were automatically grandfathered under the Supreme Court order because the Harris County standards, if you will, criminal history background check, training, and those things, were the same standard as what the Court basically adopted in their miscellaneous docket

order.

Now, with regard to the legislative history in your first question, I was very involved the last two sessions, and specifically this last one, and I really needed to clarify one thing that Mr. Orsinger made in his opening statement that was a little bit incorrect. For 10 sessions now the private process server industry, literally 20 years, has tried to bring forward a statewide licensing bill to get the statewide authority for private process servers. We never until this last session had the cooperation or the support of the constables association, and this last time the constables did get on board and supported the board, SB 165, that Mr. Pendergrass earlier referenced. It was brought forward by Senator Wentworth in the Senate, SB 165, and it was co-sponsored by Chairman Hartnett in the House side.

It was a good bill. We put a lot of work into it, and we would have gone -- the bill provided for pretty much similar basic requirements of the order, and we would have been under Texas Department of Licensing and Regulation. TDLR is where process servers would have been. There was some what folks thought were erroneous provisions for requirements of insurance and those type of things that folks objected to because of the cost. They thought it was going to be a thousand dollars a year or

whatever to be a licensed process server because there was a requirement that a process server under the TDLR issue of the bill, if you will, 165, would have been required to have insurance.

Through negotiations at the very end that bill was dropped. The constables for the first time, JPCA, 2,700-member, very powerful organization in the state of Texas, supported this bill for the first time in 20 years, SB 165. It would have passed, but there were a group of folks, private process servers that thought that the provisions of that bill were too erroneous, and it was too much government regulation, and that's what killed SB 165, private process servers.

I wanted to be clear on Mr. Orsinger's statement. It was not the constables. This last time around SB 165 would have passed if it were not for a group of private process servers that didn't want any form of regulation or oversight or control over the private process serving business. They had been basically free to run and do whatever they wanted to do for the last 20 years or whenever private process servers were authorized.

MR. ORSINGER: With court approval, I might add.

MR. WEEKS: With court approval, you might add, yes.

CHAIRMAN BABCOCK: Mr. Pendergrass had his hand up and then Bill. Yeah, go ahead.

MR. PENDERGRASS: That is true. The constables have always opposed the licensing bills in the past. They have always pretty much been the ones that killed it. I have also been there, too, and fought against these bills but for different reasons than the constables.

Initially when the Supreme Court wrote its order it left the word "writs" into what we would be able to serve. The constables saw that as a threat. The argument was made that process servers were going to start taking possession of children and property and doing all this stuff that we don't want to do. It would be silly for us to get into that. That forced the constables to the table to support a licensing bill. When the licensing bill failed the Supreme Court changed that and took the word "writs" out before it enacted the certification program.

CHAIRMAN BABCOCK: Bill Dorsaneo and then you.

PROFESSOR DORSANEO: I'm probably behind the curve here, but is the Supreme Court order we're talking about the one of June 29th, 2005?

MR. ORSINGER: There are two of them on that

date, and if you're looking in this book, that's them.

PROFESSOR DORSANEO: Okay. Well, what part of this order gives this board rule-making power? My first question. Then my second question would be it does say in paragraph (4) that certification may be revoked for good cause, but it doesn't say who does that, and I need answers to those questions before I can get started.

MR. WEEKS: If I may, we were just making -- we're not -- as our board have never felt we had any rule-making authority. We make recommendations to the Court. Our recommendations for this code of conduct and the other proposals you have before you today were submitted to the Court for the Court to adopt or issue, if you will, or promulgate, and the Court has submitted them to this body for further consideration and study, not our board would not be the authority.

CHAIRMAN BABCOCK: Yes, sir. Would you identify yourself?

MR. MCMICHAEL: Dana McMichael, Assured Civil Process Agency, 19 years in the industry, and I am the ringleader of the people, this group of process servers that's been killing the licensing bill every session for the last eight sessions. I'm very proud of that fact.

CHAIRMAN BABCOCK: So you should be in the

record as ringleader?

MR. MCMICHAEL: Ringleader works for me.

MR. ORSINGER: Okay.

MR. MCMICHAEL: There is a fundamental conflict on the perception of certification program, and this is where the real problem lies. The PSRB is behaving as though the orders that established them created them as a regulatory commission. The very fact that you're considering this proposal for a code of conduct is strongly indicative of the fact that they feel like they have the authority to impose standards that were not in the Court order upon the process serving community.

They don't have that authority. The section that was referred to earlier about revoking certifications for good cause, that section says, "including convictions of felonies and misdemeanors involving moral turpitude." Now, I don't have to explain to this distinct body that when the word "includes" is used in a statute it means specifically the items that follow. This provision, the second half of that, stipulates that if a process server who has been certified is subsequently convicted of a felony or misdemeanor involving moral turpitude that immediately report it to the board, they immediately stop serving process. That is the good cause.

From this not ambiguous term "good cause"

has sprung all this issue about how to file complaints, how to investigate complaints, what standards do we use to say, "yes, you can serve," "yes, you can suspend."

Mr. Weeks is telling you that they don't believe that they have rule-making authority and yet where is the authority to suspend that one person, where is the authority to investigate those people, where is the authority that they have? They're asking you to give them the authority, but they've already done it. They've got the cart before the horse.

The fundamental conflict is the vast majority of the process serving community views the certification as exactly what the Supreme Court set forth, and that is a statewide blanket order. Now, I have over a hundred blanket orders in counties around the state of Texas. I'm not certified. I will never submit an application for certification under this board. I don't trust it, and I would expect probably to be disapproved if for no other reason than the fact that I am the ringleader that killed their licensing.

The complaints have no basis in these orders. They don't have the authority to investigate complaints. They don't have the authority to even create a committee on investigating complaints. They are a statewide blanket order.

Now, with my 105 plus blanket orders around the state of Texas most of them -- and this is a fact, like 99 of those blanket orders it says "Assured Civil Process Service Agency, its agents or officers thereof, not less than 18 years of age, not a party to the suit that they will serve process in." The judge signs it and sends it back, done deal. On the four or five that aren't worded that carte blanche "Go ahead and do it, we don't care. If you're of age, if you're not a party to the suit, you satisfy our understanding of Rule 103."

The others started throwing in -- like Bexar County, insurance, Harris County, Dallas County, Denton County, training programs, and it began to muddy up the industry which used to be basically a Federal Rule 4 qualification, age, not a party to the suit, but they added the fact -- they gave the judges the authority to look at it and say "yes" or "no" on the guy, sort of a thumb up, thumb down, on somebody who is otherwise qualified by a Federal Rule 4 qualification.

These handful of courts muddied the whole system, created the disparity in authorization of process servers, which is a very highly identified quote in the paper work that we're dealing with today, and so in order to make it possible to simply fill out one application and get a blanket order that will satisfy all 254 counties in

Texas the certification program was created. With its inception a person who is certified by following the basic regulations, the application format, the PSRB is supposed to rubber stamp that application and you go off and serve papers and you don't have to worry about satisfying blanket orders in 254 different counties. That's what this program is. The PSRB is behaving as though they now have the authority to regulate the industry, and over half the industry has chosen not to get a certification. I, for one. Yes, sir.

HONORABLE TERRY JENNINGS: Are members of the board still in the business?

MR. MCMICHAEL: I think there is only, what, two process servers on the board?

MR. WEEKS: Three of us are in the business.

HONORABLE TERRY JENNINGS: I mean, do you-all have some fear that some people are going to use this in such a way to put you-all out of business and so they can get other business or --

MR. MCMICHAEL: I have a fundamental position on the whole thing, irrespective of my personal opinion of what might happen if I were to apply. Yes, I believe that there is a possibility, given the current staff on the PSRB, that there will be repercussions against me personally because they are the primary

proponents of the licensing bills, I am the primary person who has killed those bills every session.

The industry doesn't need to be licensed, as Mr. Pendergrass has already explained. Without a license, without a 103 order, I can serve every form of subpoena in Texas whether it's from a justice court, county court, district court, Federal court. I can serve all Federal process. I can serve all citations and process issued by the Attorney General's office child support enforcement division, all process that's issued in other states for service. I can do that because I'm 18 and not a party to the suit. I could have any number of convictions, I could have no education by taking a training course. It doesn't matter if I'm 18 or 78. It's a Federal Rule 4 qualification.

All of that process, and so this PSRB is trying to create a regulatory commission and govern us because they couldn't get it in Senate Bill 165 or all the other equal bills in prior sessions. It's irrelevant. All of this is irrelevant because the vast majority of the process that's issued out there, anybody off the street who is 18 years of age and not a party to the suit can already serve it.

CHAIRMAN BABCOCK: Richard, do you have a question for --

MR. ORSINGER: No, but I wanted to say two things.

CHAIRMAN BABCOCK: Okay.

MR. ORSINGER: One, I wanted to say, David, that I think that the legal basis for your argument that "including" limits the grounds for denial of certification or removal of the certification is not a good legal argument. I just happened to bring a case here today that involves statutory interpretation, State vs. Basilas, which I'll show to you, but it refers to the Code Construction Act here in Texas about how you interpret statutes and says that "'includes' and 'including' are terms of enlargement and not of limitation or exclusive enumeration, and use of the terms does not create a presumption that components not expressed are excluded," so I think there has been a traditional rule of law --

CHAIRMAN BABCOCK: Everybody follow that?

MR. ORSINGER: There is a traditional rule of law that to start a list makes the list exclusive, but interpreting Texas statutes it doesn't. Now, admittedly we're interpreting a court rule here and not a statute, so does that apply, I don't know.

Secondly, I think there is a complete difference in perspective here. I think the people that would like to see this industry as a profession, like,

say, real estate appraisers were struggling for so many years to -- you know, they're kind of quasi under the authority of Federal law now, but they're still not licensed as such necessarily. They would like to see a profession develop, a sense of profession. They would like to have professional standards, they would like to have a grievance mechanism, they would like to have the ability to punish and remove from their field the people that are violating these standards, just like lawyers and doctors and psychologists and everyone else.

There is another perspective, though, which is that the Federal district courts around the country don't require this professionalism. All they require is that you not be a child, that you not be a minor, and that you not be a party to the lawsuit, and that's working in I don't know how many courts because a great number of the state courts have that approach. So from that perspective this amendment and this order that the Supreme Court granted is nothing but just like a court approval to serve process on steroids. Instead of having to get the order out of each judge, you get the order out of the Supreme Court and that substitutes for an order from each judge, and from that perspective that's really all this did.

All this did is to give you one Supreme Court order that lets you serve in all courts instead of

going around to each court and getting an order from each court or in some courts, like Harris County, you can get on the list if you meet all their requirements to be on their list.

Those are both valid perspectives, and we're -- and I have always felt that we're being asked to legislate in an area where the Legislature wouldn't legislate, and if this experiment is less than a year old -- and I don't personally think that the members of the board are going to refuse to certify someone because of their political position. If I find that out I will be very disappointed, not that my opinion makes any difference, but I think these people have been appointed by the Supreme Court, and we can assume that they will discharge their responsibilities in a fair manner.

I think that it's kind of come to us because we're the only venue that's responsive as to whether this idea of making this a profession with professional standards and professional enforcement is something we're going to do or the Supreme Court is going to do under its rule-making authority or whether the Supreme Court is going to just simply allow blanket approvals to serve private process and get on with business as usual, and I guess something I learned this morning is a whole lot of the process that's served in this state is not served

under the authority of this order already. So if that's broken, then a whole lot of what's going on is broken, and to me it's just a a very simple position, or for us a choice, whether we want to move forward with this idea of professionalizing the field and regulating it under the de facto rule-making authority of the Supreme Court or whether we just want to say this is just a super-powered 103 order and let's move on down the road.

CHAIRMAN BABCOCK: Bill, then Skip, and then Justice Duncan and then Buddy.

PROFESSOR DORSANEO: Richard, all these appendices that are attached, they came from the --

MR. ORSINGER: Board?

PROFESSOR DORSANEO: Yeah.

MR. ORSINGER: Appendix B would be the procedures by which you would decide to investigate a complaint; and Appendix C is the educational curriculum, which is semi already articulated by the Supreme Court; and Appendix D is a policy statement, which I'm not sure exactly how it fits into the whole picture; but what's happened here, Bill, is that the board has tried to put some concrete or semiconcrete standards out there to deal with what I consider to be the good cause issue on certification and decertification.

PROFESSOR DORSANEO: But now they're

bringing it to the committee to ask us to ratify --

MR. ORSINGER: No. No.

PROFESSOR DORSANEO: -- since they didn't have authority to promulgate it to begin with.

MR. ORSINGER: They took it to the Supreme Court. They did not come to the committee.

PROFESSOR DORSANEO: All right.

MR. ORSINGER: These gentlemen are not here because they want to be here. They are here because they submitted it to the Supreme Court, and the Supreme Court bounced it down to us.

PROFESSOR DORSANEO: Okay.

MR. ORSINGER: And so the Supreme Court is now asking us to build a record and make a recommendation about whether to go with what the board says or reject what the board says or edit what the board says.

PROFESSOR DORSANEO: Well, we're here before the full committee here. I mean, did your subcommittee go through this and does it have --

MR. ORSINGER: You know, Bill, my subcommittee, my subcommittee's view is that they don't -- they are not sufficiently conversant with the issues to be able to reach a recommendation to make to the full committee.

PROFESSOR DORSANEO: So the full committee

ought to go through this inch by inch?

MR. ORSINGER: Well, no, that was not Chip Babcock's intent when he referred it to us, but you can only work with your subcommittee to the extent that they'll work with you, right, and you're on that subcommittee, Bill.

(Laughter)

PROFESSOR DORSANEO: I would never --

MR. ORSINGER: Right. Okay.

CHAIRMAN BABCOCK: All right. You guys quit bantering with each other. Skip.

MR. WATSON: Richard, I think you're close to doing it, but for those of us with -- that aren't as close to this as you are and that don't have your attention span, can you please take the policy considerations that you were just talking about and for me bring them down in two or three sentences to the decision before us today? I got the policy, but I don't get what we're being asked to decide, to implement either way on that policy.

MR. ORSINGER: I think what we're being asked to do is to put more concrete standards for the definition of good cause and some procedures in place by which investigations are done that result in a good cause determination that result in either approval or rejection

of an application or removal of a -- or suspension of a certification.

MR. WATSON: Now, are we voting on to vote yes or no on that, what you just said?

MR. ORSINGER: Well, literally we're here to decide whether we want to approve a work product that's been forwarded to the Supreme Court by a board that had input, but, you know, before my subcommittee spends 50 hours editing this --

MR. WATSON: I understand.

MR. ORSINGER: -- I would like to know whether the committee even wants to spend the time on that, because it's a lot of time, and it's not anything that practicing lawyers or law professors are necessarily expert at.

MR. WATSON: Okay. You're getting where I need to go. Now, are we being asked to then give you sort of a proceed or don't proceed because we like the idea or we don't like the idea kind of vote?

MR. ORSINGER: That's Chip's call.

MR. WATSON: Where are we, Chip?

CHAIRMAN BABCOCK: Well, it's never my call, but the letter that I received --

MR. WATSON: I understand.

CHAIRMAN BABCOCK: -- from the Supreme Court

asked us to consider without limitation, for example, the proposed code of professional conduct, which is Appendix A, and then, you know, the other appendices and the request of the board to expand its jurisdiction.

MR. WATSON: Did it really say without limitation?

CHAIRMAN BABCOCK: There is no limitation on the letter.

MR. WATSON: Oh, god.

CHAIRMAN BABCOCK: So what I think Richard -- and I agree with him -- is winding up to do shortly, is to suggest after full discussion whether we have a vote on is this really a good idea to --

MR. WATSON: Good.

CHAIRMAN BABCOCK: -- go full bore and then if it is a good idea, we say it is a good idea, and the Court still wants us to, then to slug through Appendix A and say, man, this is great or it's not great or it needs to be modified.

MR. WATSON: Thanks. I'm sorry, Richard. I just -- I wasn't sure where we were or where we were trying to go.

CHAIRMAN BABCOCK: In our typical snail-like fashion. Justice Duncan.

HONORABLE SARAH DUNCAN: It seems to me

there are some discrete questions that we need to vote on. The first question I have is should the certification experiment be continued or should we go the way of the Federal system. The second question is if we're going to continue --

CHAIRMAN BABCOCK: Judge Benton cannot hear you, Justice Duncan.

HONORABLE SARAH DUNCAN: Sorry.

MR. JACKSON: We heard the first question and the second question, but we didn't hear the other part.

HONORABLE LEVI BENTON: If you would stand to make your argument, perhaps.

HONORABLE SARAH DUNCAN: Okay, yes, Judge, I'll be happy to do that. Question one, should the certification experiment be continued or should we go the way of the Federal system. If we're going to continue the certification experiment, should there be a code of conduct.

Professor Carlson let me see one of the letters of complaint about the board, and if -- and I have to say after reading that letter, if I were on the board I would want a code of conduct because a lot of -- apparently a lot of the criticism of the board is that it is acting beyond the powers enumerated in the

miscellaneous docket orders.

So if we're going to have a code of conduct it seems to me the first question that has to be asked is who is going to have the power to revoke a certification. One of my concerns about the board doing so is that as far as I know there is no review process, which makes me very uncomfortable. Or should the Court be the entity that has the power to revoke.

MR. ORSINGER: Or a district judge?

HONORABLE SARAH DUNCAN: Or a district judge. See, I don't think of all of them. And then --

HONORABLE TOM GRAY: In Harris County, that wouldn't have approved them in the first place.

HONORABLE SARAH DUNCAN: Yeah, the Harris County issue has to be addressed.

MR. ORSINGER: You know, a natural choice is the judge whose court issued the process that's in dispute. That's a natural choice in my book.

HONORABLE TOM GRAY: Right.

HONORABLE SARAH DUNCAN: Well, that's kind of loaded with baggage, too, but if there is going to be a code I feel very strongly that it should be modeled after the old code of professional conduct, and it should be divided into those things that are aspirational and cannot be the subject of a disciplinary action, those that are

rules that are subject to discipline, and then the whole disciplinary procedure, because there are things in here that -- treat with respect all persons? My idea of respect and Angie's idea of respect might be very different, and I don't think that's enforceable.

CHAIRMAN BABCOCK: Angie says you guys are like that.

HONORABLE SARAH DUNCAN: I don't think that should be -- that should be aspirational. That's my pitch.

CHAIRMAN BABCOCK: Buddy and then Frank and then Carl.

MR. LOW: I think of this just like our own code of professional conduct, and when we go through one it takes a lot of review, committee work, and when you start drawing it you better be very careful. For instance, here "engage in conduct that's not a misrepresentation." Well, we just got his service processer right there, and there's sometimes that's a misrepresenttation, that you want to see the doctor and you serve him. Sometimes you have to do things when people -- so I'm not just picking on that. I'm saying we have to be very, very careful that these things are studied out, each one of them, and requires a lot of study if we're going to have one, and that's basically it.

CHAIRMAN BABCOCK: Okay. Frank, will you yield to Justice Brister for a moment?

MR. GILSTRAP: Certainly.

HONORABLE SCOTT BRISTER: I will wait my turn.

CHAIRMAN BABCOCK: No, no, no. You always get to go to the end of the line.

MR. GILSTRAP: I'll pass, Chip.

HONORABLE SCOTT BRISTER: Just briefly, the reason -- the rule has always been 103. You come in, want to serve, sign the order and you can serve. If I didn't want you to serve it, no. That was it. That's what 103 is. I and other judges in Harris County got tired of doing six of those every week, so we did them countywide and somebody with the county said, "Everybody does it and if we didn't like what you did, you don't do it."

And then all these process servers got tired of having to get that in Harris County and Fort Bend County and Dallas County and said, "Why doesn't the Supreme Court do this"? That's why we have the rule. It's just so you can grant it, and if you want to take it back, take it back.

Now, the licensing and administrative remedies, and this is what you've got to do for the procedures if you want to -- that's never been the deal on

private process servers. If you want to do that, that's fine, but generally those kind of investigations are where there is some expertise. My position as a trial judge was always anybody wants to serve process, as long as they're not a party to the case they ought to do it; and this thing about, well, they can't be a felon, I said, look, some of these people that need to be served are felons. It may take one to serve them.

It's not that much expertise in this, and the problem was in Harris County 15 years ago it took you six weeks to get service by a constable; and you could call the constable and they had no idea where it was, no idea when it was back. I said, look, we just need some -- anybody can do it, and if you do it bad, I'm going to take it back. Remember, the people receiving process have a strong incentive to complain. If they didn't get it and get a default for $2 million they're going to say something, so it's going to show up and, you know, if you -- I would think twice about a whole big process about people who think somebody is being rude. Then we have got to have this whole hearing procedure and then they're going to come up to us and then we're all going to get sued because it's not a good process. Remember what this was is just if a judge signed it, you could do it; and if a judge took it back, it was gone, and that was it. Keep

that in mind on where you want to go.

CHAIRMAN BABCOCK: Thank you. Frank, back to you.

MR. GILSTRAP: Well, somebody just help refresh my recollection, and we're not writing on a clean slate. We do have the comment after Rule 103 which is something more than just a statewide Federal regime and does have -- you know, does seem to suggest this whole where we're going with this thing. What was the genesis of that? I was here, but I don't remember.

HONORABLE NATHAN HECHT: Well, just, I mean, Scott basically set it out, and that is that there was -- there were essentially no requirements or they were court by court by court and then courts in Harris County and Bexar County and Dallas County and Denton County wanted to not have to look at those every week and have a general clearinghouse, a general certification system so they didn't have to fool with anything.

And some judges, including I think Judge Lindsay in Harris County, but also others, felt like there should be standards and that there should be a fairly high standard of reliability and credibility involved in process serving; and so everybody, all the judges went off and did their own thing; and the process servers were complaining that they had not -- they had to go around and

comply with all these different requirements county by county by county and why should they have to do that when the issue was really statewide. As Richard pointed out earlier, you know, a Bexar County case may have defendants all over the state or maybe even all over the country, and so you're serving elsewhere, and so why should the Bexar County judges be deciding who can serve process in Texarkana.

And so to solve all those problems this setup was made to have a statewide clearinghouse and get on the list, and no judge can turn you down. Then if the judge out in Kenedy County wants to put somebody -- have somebody else serve process, then he can do that.

MR. GILSTRAP: But in the process there was a certification revocation and good cause mechanism that was adopted?

HONORABLE NATHAN HECHT: Well, there's got to be some way to get on the list.

MR. GILSTRAP: I understand, and so that's kind of -- we're playing that out now.

HONORABLE NATHAN HECHT: Yeah.

MR. GILSTRAP: What is certification, revocation, and good cause, what are the standards for that. That seems to be where we're going with that.

HONORABLE NATHAN HECHT: And, you know, the

trial judges felt differently about that. Judge Lindsay took a very strong position that there had to be training and a particular kind of training and background checks and the fee paid and so on. Other of the judges in Bexar County thought there should be an insurance component or bonding. The judges in Dallas County didn't agree with that. So, I mean, it was different views around the state about how you got on the list, how you got off the list.

CHAIRMAN BABCOCK: Carl.

MR. HAMILTON: I just have a question. Are process servers considered to be officers of the court?

MR. ORSINGER: I don't know.

HONORABLE SCOTT BRISTER: To some degree, yeah. When you make -- I mean, when you make the return, that's given special recognition.

MR. WEEKS: And if I may, we have had -- that's one of the issues we're trying to get clarification on, because prior to this we had one court in one county saying process servers were officers of the court and in another county if you represent yourself as being an officer of the court you were in big trouble. It's not a clear issue, never has been.

CHAIRMAN BABCOCK: Judge Lawrence.

HONORABLE TOM LAWRENCE: This is at least I think twice we have brought up this private process

certification, and the most extensive discussion was last year; and as I recall it, and I could be wrong, it seems like the biggest problem or the biggest issue was the education, the training, to make sure that there was sufficient training; and a secondary consideration was the criminal history, and there were several others, the bonding and other things that were lesser consideration; but that was the focus and the main justification for having a certification process, and the fact that the Legislature wasn't going to do it; but what we have today is, for whatever reason, a quantum leap beyond all of that.

We're going way beyond what was the initial scope of why we needed the certification process and going to a lot of other issues. I would be more comfortable if we -- if we initially concentrated on the things that concerned us initially, which is the education to make sure that these people have some degree of training and then maybe to a lesser degree the criminal history, to the extent that that's significant; and maybe that's not as significant, but certainly the education, I think you can make a strong case for that; but there is an awful lot here that to me is too much too soon.

We're fairly new in this process, and I would like to see them concentrate on the things that

concerned us the most last year when we first talked about this, and these may be necessary at some point, but it seems like we're getting ahead of the game.

CHAIRMAN BABCOCK: Well, with that comment we'll stew over this over lunch and be back in an hour.

(Recess from 12:35 p.m. to 1:36 p.m.)

CHAIRMAN BABCOCK: All right. We're back on the record after lunch, and, Richard, where do you think we are?

MR. ORSINGER: Well, what I would like to do is kind of get a sense of the committee, but before we do that, we have the unusual opportunity to get a fiscal note on this whole code because I did not realize this, but Carl Reynolds is sitting over there. He's the director of the Office of Court Administration, and they have more or less been providing the infrastructure for this board and no doubt would provide the infrastructure for any kind of grievance system or comprehensive oversight, and I thought if Carl is willing to stand up and tell us what kind of support have you been providing, what kind of time is it demanding from your department, and if we were to put a more robust system with procedures and hearings maybe or investigations or whatever, what kind of demands would that put on your agency.

MR. REYNOLDS: Okay. Nice to see you all.

I'm Carl Reynolds. I'm the director of OCA. I have been there for about a year, and last June I found out about the Process Service Review Board and the order that said the OCA will provide clerical support for this new entity. I didn't have anybody to give that to except for my executive assistant, and she's the one that's been staffing the Process Service Review Board for the most part, and I'd say she spends anywhere from 30 to 50 percent of her time on this. In fact, she has hired a temporary to help her do some data entry to get a database together for the PRSB.

So that gives you some sense of what we're dealing with right now. I also have in my office the Court Reporters Certification Board, which is attached -- it's called administratively attached to OCA. That happened in 2003 by the Legislature, and that board has a staff of three, a sort of higher level program person and a couple of clerical people, and they are in the business of regulating court reporters and certifying them and investigating complaints about them and so forth.

I would say they are buried with a staff of three, so I think you would -- I would want to have something that looks at least something like that to do the full-blown process service procedure. I also have the Guardianship Certification Board, which was given to me

last session by the Legislature, a new entity that was created to be housed in my office. It has its first meeting on May 6th, and I think eventually this group will see some policy emulations from that body that will be headed towards the Supreme Court. The Legislature gave me one person, but they didn't let me hire the person yet. They passed a law that says I have to ask the board if they want to tell me who to hire. So all told, I have four people that are dedicated to certification type stuff, plus my assistant, who is spending half her time on the Process Service Review Board.

What I'm going to ask the Legislature for next session is a director to govern a certification division. I do have a new attorney on board, that's coming on board, that's going to be dedicated in large part to these three certification functions, so that will help quite a bit, but that's not going to be someone going out and investigating things or anything like that. It will not be clerical, obviously, so we're trying to get more of an infrastructure for these new certification and licensure type functions, but we don't have it yet.

MR. ORSINGER: Okay, Carl. Does anybody have any questions they want to ask Carl Reynolds?

Thank you very much.

MR. AGOSTO: I have.

MR. ORSINGER: Yes.

MR. AGOSTO: The certifications that you handle, are they assigned by the Legislature?

MR. REYNOLDS: The other two, yes.

MR. AGOSTO: So the Legislature looked at a bill, passed the bill, and empowered you to handle it?

MR. REYNOLDS: The court reporters were a stand-alone entity and a couple of sessions ago they attached them to us, as part of their Sunset Bill, I believe; but the Guardianship Certification Board was part of Senate Bill 6, a big giant Adult Protective Services, Child Protective Services Reform Bill with a guardianship piece to it, but again, legislative.

MR. SCHENKKAN: Carl, on the court reporter model as a go-by, who came up with the standards for what counts as a good court reporter and for what you can be kicked out of being a court reporter for, and what is the process other than the three staff people you have and the board? What else is there?

MR. REYNOLDS: Well, I haven't really lived through that process too much, but I think that the Court Reporter Certification Board is similar to what you have been discussing in that they are expected to give the Supreme Court things to adopt, so the Supreme Court is really the rule-making authority, with the CRCB just like

it would be for the PSRB. Does that answer --

MR. SCHENKKAN: And then are they themselves making standards and without any -- you said this earlier was a free-standing agency. Did it have its own statute then?

MR. REYNOLDS: Yeah. It's Chapter 52 of the Government Code. It's still there. It just now says it's administratively attached to OCA. I think that they have some things that they adopt as their own standards and some things that they propose as rules, but I'm not entirely clear. Do you know, Jody?

MR. HUGHES: I don't.

CHAIRMAN BABCOCK: David Jackson.

MR. JACKSON: We originally started out in 1978 under the Office of Court Administration and then a few years later we were kind of separated out on our own and operated on our own for several years and then through Sunset they thought it would be more cost feasible to incorporate us back into the Office of Court Administration, and our original model was developed from our national association guidelines and then tweaked from there.

MR. ORSINGER: Do you have a code of ethics?

MR. JACKSON: Yes.

MR. ORSINGER: Similar to this?

MR. JACKSON: Yes, our code of ethics is 14 points.

MR. ORSINGER: And is it enforceable by suspension?

MR. JACKSON: Yes.

MR. ORSINGER: And is it concrete, or does it have a lot of aspirational generalities?

MR. JACKSON: It's pretty concrete. I mean, there are some vague ones like this, but for the most part they address, you know, mischarging attorneys, like if I was to take a deposition for you and I cut a deal with you to take a deposition for three dollars a page, I can't then incorporate charges to other parties that weren't part of our negotiation and make up the difference by charging them more than a third. We have a one-third rule, so that keeps me from cost-shifting to get your business.

MR. ORSINGER: And what's the grievance mechanism like? Who files a complaint with who and what kind of investigation do they have and what recourse is there to higher review?

MR. JACKSON: Whoever is aggrieved can file. A lawyer can file, another court reporter that finds out that something is not being done according to the Uniform Format Manual or something like that, somebody is

contracting and not disclosing it. You know, for a number of reasons they find out that there is something going on that are against our rules, they can file a grievance with the Court Reporters Certification Board. The Court Reporters Certification Board can then investigate that grievance and set it for a formal hearing and then they can take whatever action from there they want to take from a reprimand all the way up to pulling their license.

MR. ORSINGER: Does the hearing permit --

MR. SCHENKKAN: Pulling their license, you do a sanction like --

MR. JACKSON: They can't be a reporter in Texas.

MR. SCHENKKAN: Is there any judicial review?

MR. REYNOLDS: Yes.

MR. JACKSON: Yeah. They have to file a -- they can take the test again if -- under certain circumstances they can take it again after a while, but --

MR. REYNOLDS: But there is also judicial review possible --

CHAIRMAN BABCOCK: Judge Sullivan.

MR. REYNOLDS: -- just like any other administrative.

HONORABLE KENT SULLIVAN: I was appointed to

serve on the Court Reporters Certification Board and did serve a couple of years. There is judicial review. In fact, at that time, I don't know whether it's been amended, but there is de novo review by --

THE REPORTER: Speak up, please.

CHAIRMAN BABCOCK: Can you speak up, Judge Sullivan?

HONORABLE KENT SULLIVAN: I am almost never asked to do that. There is a de novo judicial review by simply filing a petition in a district court in Texas. That's at least the process that was in existence at the time that I served, that is several years ago.

MR. REYNOLDS: That's still like that. That board has -- it's going to meet on April 28th, and they have a -- I have looked at their agenda. There is probably five or ten disciplinary actions in a preliminary mode and five or ten disciplinary actions in a full-blown hearing on each agenda that they have. They are getting more and more into the business of trying to regulate the profession through disciplinary; and by the way, the staff that we have isn't getting out there and investigating. We don't have any investigative staff.

Frankly, I'm not sure how they're doing it. I guess some of those board members are volunteering like some of the PSRB members to go out and find out and

interview people, but they're doing a lot of it in their meetings. They're having these full-blown meetings of the whole board where they air these issues and make decisions.

MR. ORSINGER: Is there an opportunity for the person being targeted to appear with a lawyer --

MR. REYNOLDS: Yes.

MR. ORSINGER: -- and present evidence, or are they -- do witnesses come, are they subject to cross-examination?

MR. REYNOLDS: Yes.

CHAIRMAN BABCOCK: Judge Sullivan.

HONORABLE KENT SULLIVAN: One quick comment and then perhaps a suggestion. There was a discussion of the Federal system as an analog here.

CHAIRMAN BABCOCK: Right.

HONORABLE KENT SULLIVAN: And I will say that I have some discomfort with that. My recollection is that service of process, service of the summons is allowed by way of certified mail as well as the more routine personal service, and I think a great deal of service of summons occurs that way. I think they're dealing with substantially lower volumes than the state system would deal with, and also, of course, you're dealing with a jurisdictional threshold of $75,000 plus.

I think it is at least in part potentially a different animal and an imprecise analogy. The suggestion that I might make, because I confess I am uncomfortable in this area, I do not know what the right answer is, but perhaps some best practice analysis is in order; and by that I mean to look to states of similar size, similar litigation volume, and see what their practices are and to the extent that we find good ideas then steal them.

At least it would provide us perhaps with a more precise analog of what other states -- if they have indeed grappled with this recently, what would be a good yardstick.

HONORABLE NATHAN HECHT: Just for information, we've got the handy-dandy Thompson West rules pamphlet. Standards and rules for certification of certified shorthand reporters is in the back, but not their ethic. I don't think the -- Page 647 of the 2005 version, which is all the Court can afford, but there is an ethical code that's not in here.

MR. JACKSON: There is also a Uniform Format Manual that was adopted by the Supreme Court that's not in there, and it's a little harder for a lawyer to find, but the web page -- your web page has it on it.

MR. REYNOLDS: Correct.

CHAIRMAN BABCOCK: Just a question. This

I'm sure was answered, but as I understand the order that we're operating under now, there can be certification and there can be revocation of certification for good cause. Did I hear earlier that there are investigations going on of people that never applied for certification? Richard, is that right?

MR. ORSINGER: I think that what Mr. Pendergrass said was that he was on the telephone with somebody who had received a letter saying they received a complaint relating to him, which means that they're at least forwarding the information, but we didn't know enough to say that they were investigating, and I think that Carl Weeks says he's not aware of an investigation being brought against someone who is not licensed and not applied.

CHAIRMAN BABCOCK: Not certified.

MR. ORSINGER: Pardon me. Not certified and not applied. A Freudian slip.

CHAIRMAN BABCOCK: All right. Any other comments? It seems to me that the first order of business is whether -- as the referral letter to me says, what do we think about this attachment A, Appendix A, which is the code of professional conduct that certified process servers exists conceptually without regard to the subparts, but is this a matter that we recommend the Court

consider in some fashion sanctioning, and if the answer to that is yes, then we can go through the subparts. Carl.

MR. HAMILTON: Can't Appendix A stand on its own, or do we have to consider Appendix B along with it? Do they go together? Because if they have to go together then we ought to look at B also.

MR. ORSINGER: Well, I made a reference to that, Chip, when I said Appendix A, your reaction to that may be completely different if it's merely aspirational than if it's part of the implemented grievance system; and Appendix B is, if you will, the procedure associated with evaluating whether good cause exists; and so I agree that how you vote may be influenced by B, but I hate to go through B with such a fine-toothed comb if we don't have very much support for the idea of endorsing this code. Maybe we could just assume that if we adopt a code that there is going to be a possibility or probability that it will be enforced through some mechanism.

CHAIRMAN BABCOCK: For whatever reason, and this may have not have been intentional by Justice Hecht or by Jody, but the letter -- referral letter to me separated A and B, but I agree that they sort of -- it's all part of the bigger picture. Buddy.

MR. LOW: I would feel more comfortable rather than a code of conduct, grounds for revocation,

make it shorter and simpler rather than just aspire, because you remember one time in our contracts we had certain basic rules and we had what you really aspired to --

CHAIRMAN BABCOCK: Right.

MR. LOW: -- and so forth. That's just an idea.

CHAIRMAN BABCOCK: Yeah. Yeah, Elaine.

PROFESSOR CARLSON: I agree with Buddy, and I understand there is a Texas Process Servers Association, which I assume serves to educate and promote the professionalism of process servers, and it would seem to me that would be the appropriate body to deal with aspirational behavior of process servers.

CHAIRMAN BABCOCK: Is the -- my read of this is that this is not -- I tend to say it's not intended to be aspirational but rather intended to be regulatory.

PROFESSOR CARLSON: Well, it kind of has --

CHAIRMAN BABCOCK: Regulatory tool.

MR. ORSINGER: It all depends on how you enforce it. This code itself doesn't say you'll be decertified if you do something, or maybe it does. I don't think it does. I don't think it's that explicit. I think we can infer that if Appendix A or something like it is adopted that it will be the standard for good cause.

And that could be good and bad. If what Buddy is saying what we need is a concrete list of five things that if you do this you lose your certification --

MR. LOW: Yeah.

MR. ORSINGER: -- that's really all you need to have a standard of good cause. Right now we know felony or misdemeanor with moral turpitude, plus whatever the board thinks is good cause, and they have no standard to go by.

MR. LOW: Yeah. I mean --

CHAIRMAN BABCOCK: Yeah. Yeah. Hayes Fuller.

MR. FULLER: What do you need to be certified? What do you need to do to be certified now?

MR. ORSINGER: Well, you do four things. You have to fill out an application under oath, and in it you have to swear that you haven't been convicted of a felony or a misdemeanor involving moral turpitude. You have to submit your Department of Public Safety criminal history record, which is based on having sent your prints in, and they will verify that you do or don't have convictions, and then you have to have certification that you have attended seven hours from an approved course. With those four things you get certified; is that not right, Carl?

MR. FULLER: And if that's all that's required to be certified, why are we going through this long list of things to determine whether or not you get to stay certified, be certified, or whatever? I mean, it seems to me that we can't require anything more by way of certification than what it took to get you there.

CHAIRMAN BABCOCK: Well, I think the argument, Hayes, is that paragraph (1) of the order talks about what you need to do to be certified, but paragraph (4) says how you get decertified, and that's for good cause, and the language of the order says "including" and it talks about this, but Orsinger's complicated statutory order construction argument is that "including" means including but not everything, and the question is whether there is some more everything to it. Did I read you right on that, Richard?

MR. ORSINGER: Yes.

CHAIRMAN BABCOCK: Yeah, Buddy.

MR. LOW: And in addition to what I was saying, grounds for being decertified, I'd think you would have to have then a next section which is hearing, in other words some short process for hearing and then appeals process should go through it rather than -- and if they want to have rules of conduct and so forth like that, then that would be up to them, but I would think ours

should be cut to just those bare bones.

MR. ORSINGER: But how does the Supreme Court issue a rule saying there is judicial review for this quasi-administrative determination that really doesn't exist except by virtue of Rule 103?

MR. LOW: Well, I question sometimes how the Supreme Court does several things, but -- no, really, I don't know. Judge, you didn't hear that. No, but if we can draw and say how they can be -- how can you decertify somebody, draw a rule without providing some appellate procedure, would it be constitutional? Some procedure for it.

CHAIRMAN BABCOCK: Pete.

MR. SCHENKKAN: This looks to me like a fine statute, the proposed statute, but barring some showing that there is something so badly broken that we can't wait for the Legislature, to buy the possibility that the Legislature would remain so deadlocked and won't pass a statute on this subject, I mean, it's obviously for the Court to decide, but as a committee recommending to the Court, I don't see what is in it that encourages us to recommend to the Court that they adopt this entire structure by rule when the Legislature won't do it by statute and with no staff to enforce it.

MR. LAMONT JEFFERSON: Second.

MR. SCHENKKAN: This just doesn't seem to me like a good situation. We ought to stop right here unless there is some aspects of the thing that is broken now that it can't wait and then we ought to target that one specific thing and see how we can solve it, and if we're comfortable on a consensus for it that it is within rule-making power, fine, but this big picture thing, let's leave it as a statute and say "Legislature, sure hope you take this up in the next session," maybe even encourage the governor to add it to the call after they fix the taxes.

CHAIRMAN BABCOCK: Justice Duncan.

HONORABLE SARAH DUNCAN: I think the problem is that the Court has created certification. It's created a board, and the board has decided that it has the authority to investigate and discipline certified process servers with no standards; and I think the Court needs to decide, one, if it wants the board rather than itself or some other entity to be in the disciplinary business; and if it's going to be in the disciplinary business, it needs to have rules governing its disciplinary process.

I mean, that's the problem. If you read these letters, the complaints of what the board is doing, I think that's a problem for the Court, because the Court is the one that created the certification process and the

board.

MR. SCHENKKAN: Sounds like a friendly amendment. You're saying in addition that the Court shouldn't adopt this by rule. Court should tell the board, "This isn't what we wanted you to do. Don't do that unless you get a statute."

HONORABLE SARAH DUNCAN: I think the first decision the Court has to make is whether it wants the board to be in the disciplinary process, and I think that's a big decision, and we could certainly offer an opinion on it, but I don't know that Chip thinks that's within our referral letter.

CHAIRMAN BABCOCK: The order right now gives the board or asks the board to review and approve or reject for good cause applications. That's one thing they're supposed to do, and then paragraph (4) says "Certification may be revoked for good cause."

HONORABLE SARAH DUNCAN: A great passive construction. It proves the point of the value of the passive voice.

CHAIRMAN BABCOCK: I'm sure that's right.

MR. ORSINGER: Why do you think it was written in the passive in the first place?

CHAIRMAN BABCOCK: But it doesn't say explicitly, I don't think, who is supposed to do the

revoking.

HONORABLE SARAH DUNCAN: That's what I'm saying by referencing the passive voice.

CHAIRMAN BABCOCK: Okay.

HONORABLE SARAH DUNCAN: There is no actor in that sentence.

MR. ORSINGER: I'm suggesting that wasn't an accident.

HONORABLE SARAH DUNCAN: And I'm not disagreeing.

CHAIRMAN BABCOCK: Okay.

HONORABLE NATHAN HECHT: And I'm not saying.

(Laughter)

CHAIRMAN BABCOCK: Well, is --

HONORABLE SARAH DUNCAN: So there.

CHAIRMAN BABCOCK: Yeah, so there. Justice Gray.

HONORABLE TOM GRAY: I don't know how or if this fits, but I recall that at one of the judicial conferences I went to there was a great hue and cry raised because of a Federal case that was going on involving something about a juvenile justice board or something like that being conducted out of Tarrant County and they wound up in a Federal lawsuit without judicial immunity, and before the Supreme Court goes forward on this, I would

want to at least inquire of the Attorney General whether or not this is an area that we can send the Supreme Court off into without judicial immunity.

MR. ORSINGER: You're talking about the Supreme Court members or are you talking about the board members?

HONORABLE TOM GRAY: It was judges who were serving on some kind of board.

MR. REYNOLDS: It was the Adult Probation Board of Tarrant County.

HONORABLE TOM GRAY: There you go.

MR. GILSTRAP: They all got sued.

MR. REYNOLDS: It was the judges in Tarrant County that governed the adult probation -- the CSCD is what it's referred to, and the plaintiff's name was Alexander, and basically the court issued an opinion, Judge Means -- Federal Judge Means issued an opinion that denied the Attorney General's argument for judicial immunity because the judges in Tarrant County were so involved in the running of the probation department that they were not -- that the court deemed it an administrative function and something that was not entitled to judicial immunity.

Eventually I think that story ended happily for those judges, but as a result the Legislature passed a

a bill last session that really tried to narrow what judges are supposed to do with respect to running probation departments, but to the extent that judges are in the business of doing administrative things and litigation ensues, I think there is a looming issue out there.

MR. ORSINGER: What about the members of the of the board? Are they subject to being sued and have no judicial immunity?

MR. WEEKS: That was my first question to the Attorney General, as we had representation from the Attorney General, does the board have immunity? Our Attorney General representative did a little research, came back to me and clearly said that we do. Whatever type of immunity that may be, the Attorney General has made that representation.

MR. ORSINGER: Okay.

HONORABLE TOM GRAY: Which is probably the same attorney that was representing the judges in front of Judge Means. He had a consistent argument.

HONORABLE SARAH DUNCAN: The Attorney General's view of immunity is quite broad.

CHAIRMAN BABCOCK: Well, it seems to me maybe there are at least two issues. One is who should do the revoking, if there is going to be revocation; and two,

whether -- if good cause means more than being convicted of a felony or misdemeanor involving moral turpitude, what is that additional thing or is it just supposed to come up on a case-by-case basis and you sort of know it when you see it, and I don't know how we come to a vote on those things. Richard, do you have any suggestions?

MR. ORSINGER: Well, we could have an up or down vote on our recommendation as to who should do the revoking. I mean, the problem with the board doing the revoking is that the board really doesn't have any authority, although maybe they have derivative authority from the Court.

CHAIRMAN BABCOCK: That was Sarah's point, I think.

MR. ORSINGER: Yeah. But you don't want the Supreme Court to do the revoking because if somebody does have a right of judicial review, which probably they have under the United States Constitution if not under Rule 103 and Texas statutes, it eventually is going to go back to the Supreme Court, so I guess the Supreme Court would be reviewing its own revocation, which I am sure that they would be capable of doing that in a fair way, but it might look to the average person like --

CHAIRMAN BABCOCK: Well, you earlier, Richard, suggested --

MR. ORSINGER: A district judge.

CHAIRMAN BABCOCK: -- the trial court from where the process was issued.

MR. ORSINGER: Well, my thought is as follows. If somebody does something wrong in serving process, that process issued out of some court; and if there is a complaint about what that process server did with that process, a logical place to take it is to the court the process issued out of by filing some kind of motion; and I don't know that it has to be a motion that we have to include in a rule. You know, first of all, we all know now that you can file a criminal complaint. If what happened here was somebody alleged in a return that they had personal service and they didn't, they'll go to jail for it now. You know, filing a false return according to the Court of Criminal Appeals probably is a crime.

HONORABLE SARAH DUNCAN: That's this week.

CHAIRMAN BABCOCK: Exactly.

MR. ORSINGER: Okay, that's this week.

HONORABLE NATHAN HECHT: But let me point out, let me remind us, which maybe we're thinking about it anyway, and I know substantive due process property rights is not a perfectly clear area of the law, but if we just go back to square one, Rule 103 does not have to include

private citizens in it, period. Just you can take them out and there is no appeal of that, and nobody has a right to be in Rule 103, so we put individuals in 103 and we say, "but it's got to be up to the trial judge," and so if I were -- before all of this happened if I were the trial judge and somebody came in and said, "I want Richard Orsinger to serve this process," I would just say "no" for the heck of it. I don't have to have a reason. You know, maybe he -- maybe I don't like Richard, and so I don't do it for that reason, but the law doesn't require me to give him a hearing or he has no right to do this. I can just tell him "no."

And so the genesis of this, as Judge Brister pointed out earlier, is that judges -- and I remember this when I was on the trial bench. Judges are getting five or six of these orders a week or maybe more, and they're always the same, "Lawyer X wants private citizen Y to serve this process rather than the constable" and so you, you know, just routinely signed all of those.

One of your colleagues raises concerns that maybe that's not a good idea, maybe somebody should take a look at who's doing this because the consequences can be rather severe for someone who is not reputable returning service of process. So, well, that's a good idea as long as I don't have to do it, somebody else can do it. So we

all agreed that in a big county that judge X can screen all of this and set up a list and so on.

I'm having trouble figuring out why you have a right to be on that list, why the judge couldn't just tell you "no" to start with, why the judge couldn't just say, "Well, we're only going to use these five people and that's it." And if everybody agrees to that, I'm having trouble seeing what the problem is, so given -- and maybe there aren't -- maybe it's more complicated than that, but if what is only being done here is trying to set up that list for trial judges all over the state and if they want to buy into it, fine, if they don't want to buy into it, they don't have to. They can put anybody on their own list that they want to, and as one representative here says, you can go around and get a hundred orders from a hundred judges and you're on all those lists, but if -- how much do we think is involved in just saying you can be on the list or you cannot be on the list?

I mean, maybe there is some sort of -- maybe we are creating some sort of property interest here, but surely it's not very much of one; and even if we don't have a full-blown grievance process, because the worst thing that can happen to you is you're not on this list and you have to go see judge X yourself, and he can still let you off or he can say, no, I'm going to do what the

Supreme Court thinks I should do, and he could do that anyway, then how much process is really going to be involved here? I'm just wondering if this problem is that big. I don't know. I'm just asking.

CHAIRMAN BABCOCK: Judge Patterson had her hand up.

HONORABLE JAN PATTERSON: Well, I think that's a very useful exercise, because I hate to see a good idea taken to some extreme and thrown out here, and I think it would be useful for the committee to examine what part of it might be useful. There are other lists such as mediators, maybe even defense lawyer, whether for appellate or appointed that are similar that -- where people get on a list and can get bounced off by judges.

It seems to me that we ought to look beyond the interests of certain groups and to the court system where there is some -- something to say for uniformity and the availability of uniformity throughout the state so that it doesn't become a fiefdom of people in certain areas or so that the standards are not so different across the state, although you could still have that under this system, it would seem to me. You could have the uniformity plus those who want to do it in a different way, but it does -- there are problems with service, and it seems to me that we do have lots of cases that are

started by this system, and as I recall one of the values of looking at this originally was that we wanted to be able to put the process servers on sort of an equal footing with the constables, that we didn't want to have the constables monopolize that area to such an extent that other people couldn't do it, and so that led us to examine how to do that.

But I think there are interests to be served here, and I think Judge Hecht's -- I mean, I think there is something short of a property interest and certification and disqualification and all this, but I'm not quite sure where that point is.

CHAIRMAN BABCOCK: Okay. Justice Duncan.

HONORABLE SARAH DUNCAN: My concern is not constitutional. My concern is just fairness, fairness to the board who wants to feel good about what it's doing and feel comfortable that it's operating within the parameters that the Court wants it to operate in and fair to the process servers who are subject to the board's disciplinary review.

HONORABLE JAN PATTERSON: Well, and to provide some certainty.

HONORABLE SARAH DUNCAN: Yeah.

HONORABLE JAN PATTERSON: That would be helpful for people to know what the rules are.

CHAIRMAN BABCOCK: Buddy.

MR. LOW: As I understand what Justice Hecht is saying, is we have two other than the constables and the sheriff. One is preapprove. If you are able to get on that preapproved you don't have go through the hoops. It doesn't keep anybody else from being there. You can still be approved by the court, so if you want to go the easy route where you won't have to do that, then you have this, but you have two choices you can make, and it would be -- is that what -- well, that sounds all right.

CHAIRMAN BABCOCK: Yeah, Professor Hoffman.

PROFESSOR HOFFMAN: I think that point goes to the getting on, and I think what seems to be the place we're having this is the getting off, which is where the process review board, on the one hand in the order, it makes it seem like they may be the people who are supposed to be deciding good cause, and so, again, I would go back to what Justice Duncan said.

We have got an order that says that you can be kicked off for good cause and includes these things, so one way to get out of this thicket would be to have the rules committee recommend or the Court to consider taking that language out entirely, and that would leave us with a process by which you get on the list. You can also get off the list by a judge. To be precise, you wouldn't be

off the list, but you would be off the list for that case if a judge either quashed the process or had some other sanctions for you in that proceeding.

So it seems to me one solution is the language could just simply be taken out entirely. There is no good cause for getting off the list. There is how you get on the list, and there may be an annual renewal list. I take it the continuing education is an annual?

MR. ORSINGER: No. At the present time it's one time to get certified and your certificate is good for three years, but a proposal that we'll discuss later, if we get to it, is to make it a one-year requirement. The board is recommending an annual education course.

PROFESSOR HOFFMAN: So that could be another way of sort of dealing with good cause in much more certainty. It turns the process review board's responsibilities into a much more defined, in some senses, ministerial responsibility of kind of going through the records, making sure they did what they did and they did it, and anything after that is outside the purview of the board, and the Court's order doesn't speak to that at all. So that's one solution to the problem, it seems to me.

CHAIRMAN BABCOCK: Justice Hecht.

HONORABLE NATHAN HECHT: Could I -- I don't know that this question has ever been asked. We talked

about private process serving several times, but the problem arose from judges, trial judges, being concerned that they were not getting reliable returns on service. That's what the Court reacted to. Do the lawyers think that's a problem or not?

MR. HAMILTON: That is a problem.

MR. ORSINGER: I haven't personally had the problem, but you can see the problem if you have a 10 million-dollar default judgment against you based on personal service that's fraudulent. Whether you get a new trial or not depends on whether the judge believes you or the process server.

HONORABLE NATHAN HECHT: I mean, do lawyers think it's not a problem?

CHAIRMAN BABCOCK: Carl, you and Hayes were quick pretty quick to say it was a problem.

MR. HAMILTON: Well, it's like one of these letters, somebody in some course or something was telling process servers that if the defendant wasn't there all you had to do was leave it, and you know, we get that all the time down south. They just leave it, but then they make the return saying that we personally served, and they really didn't.

MR. FULLER: I'm aware of a situation involving a firm in Houston in toxic tort litigation where

for a year and a half they had a process server serving petitions on the Secretary of State. They had returns in their office indicating that service had been accomplished. In fact, it had not been, and it came up when trial settings started popping up and they started calling various defendants and saying, you know, "Why have you not filed an answer?" "Well, it wasn't served," and they checked with the Secretary of State and that's exactly correct. So it's a huge problem, and they were most upset about it.

CHAIRMAN BABCOCK: Judge Lawrence and then Mr. Weeks.

HONORABLE TOM LAWRENCE: Well, under the current system if you're on the list of approved servers, you have a certificate, then the judge is not going to know that you served that citation until it comes into his court. So if the judge becomes concerned about a private process server that has not been decertified, so to speak, therefore, the judge doesn't personally approve it, then there is really no mechanism now for the judge to review that or to not allow service by a process server who maybe there is some publicity about fraudulent service or something, and you have to have some means to get them off the list fairly quickly, I would think, or have the judge be able to act to remove them, from his court; otherwise,

depending on how long it takes to decertify after this process you could have a problem that continues on for a period of time and no way to address it or control it.

HONORABLE NATHAN HECHT: Well, I assume what would happen, if you were trying to serve -- if you were the lawyer and you wanted somebody served, if you didn't pick somebody off that list or go get a court order under 103, then you're risking that your service is no good, and the judge is not going to be -- is not going to know one way or the other. If the service comes back and something happens as a consequence, a missed deadline or perhaps a default, then the lawyer on the other side is going to look on that list the first thing and see if that name is on the list; and if the name is not on the list and there is not an order appointing the person in the file, he's going to say, "No authorized service, King's X," and so I think that's how it would come up. I don't think the judges would ever know, at least I wouldn't have known as a trial judge whether somebody had been served or not or whether anybody cared.

CHAIRMAN BABCOCK: Mr. Weeks had his hand up, Richard.

MR. WEEKS: I just wanted to -- I had one on my desk -- the two that I'm working this week just came in out of Waco where the person hadn't delivered -- they

called, we got the complaint in. Four cases they hadn't filed an answer on. They started examining it. We didn't, the people on the other end in Waco, the law firm out there, and they figured out that these papers weren't properly served, and this is exactly the case. It's a person that's on our order that we're investigating a complaint on right now where four situations where he left it with, you know, a three-year-old kid or put it in the screen door or whatever it was. It wasn't good service obviously, and as you all probably know, under Craddock there is no valid -- there is no presumption of valid service in any case. You know, there is no valid presumption of any proof of return on a case.

CHAIRMAN BABCOCK: Who else had their hand up? Richard.

MR. ORSINGER: I did earlier.

CHAIRMAN BABCOCK: And then Pete.

MR. ORSINGER: The return problem can be ameliorated, if not fixed, by fixing the return requirement; and, for example, when we get to it, because the board has proposed a new and improved form of return, but I was going to suggest the following where this would be a requirement in Rule 107 for what the return has to say: "Where the person being served does not take physical possession of the citation or other process the

return shall contain detailed information on how process was served."

That's my effort to bring legal sanctions against a process server who is trying to make it look like they had personal service when they didn't, and if we make them detail it and all they did was leave it in the mailbox and they claim personal service, then either you file a criminal complaint under this new Court of Criminal Appeals case or you file a motion for contempt or you file -- you know, whatever, you want to get injunction against them or whatever.

There are remedies, but our returns right now are not standardized, and they're so vague that someone can get away with it. So we don't necessarily have to have a code of conduct in order to protect ourselves better against a fraudulent return. What we need to do is make people who sign fraudulent returns go to prison for 10 years. If we do that for a while then there won't be anymore filed.

CHAIRMAN BABCOCK: That's kind of harsh, isn't it?

MR. ORSINGER: Okay, then seven years.

HONORABLE TOM GRAY: 20 years.

CHAIRMAN BABCOCK: Pete, then Justice Bland.

MR. SCHENKKAN: I think that we're

overlapping two different issues that are related, and there are important relations in both of them.

CHAIRMAN BABCOCK: I counted three, but go ahead.

MR. SCHENKKAN: Defects in particular service and the list, and what they could have in common or overlap is the defects in particular service are because the particular server doesn't do it right, he just refuses to, you know, he's a bad guy, he's not actually trying to serve it the way it's supposed to be done. He's just taking advantage of money, but we need remedies tailored to in particular cases things haven't been properly served so that the people who depend on the service being proper can have their rights properly protected.

I assume we already -- I haven't encountered these issues in my own practice. I'm pretty ignorant of them except the sense of overcoming hearing, about overcoming default when you haven't gotten notice, but that's a separate question at the big picture level from -- moving from getting on the list by one judge has put you on the -- on his list or to being on the list for the whole county because the judges for that county have gotten tired of doing this one by one or where we are now, we're a statewide list. You can still be on the list and

have the problem of a bad service in a particular case or a bad server.

The question for the bad server is do you want the remedy to be that this board itself or the Supreme Court on a recommendation from the board is in the business of taking people off the list as the sanction for the bad service, and this seems to me to be a bad idea for both reasons. It's a very ineffective way of dealing with the bad service, and it gets you in the problem that any removal from the list is a removal of a somewhat valuable right.

And, Justice Hecht, I understand the notion that nobody has a right to -- there is no right to even have such a list, there is no right for private servers to be out there at all unless the Supreme Court continues to say so in the rule, but once you say so, we have already talked about just how valuable a right it is because it saves that process server from having to go around and get a hundred of these individual orders, and that's why this fight over Harris County versus the rest of the state is so important to the process servers. So it is a valuable privilege to be on this list, and the notion that you're going to have that privilege revoked arbitrarily, is not acceptable, isn't going to fly.

I'm sorry Judge Yelenosky is not still here.

He just entered a temporary injunction last week against the division of workers compensation for taking the position that just because the Legislature struck the provision for a contested case and sold out of a statute didn't mean that you could actually deny these people their position without a contested case hearing. Constitutionally you've got to give them a hearing, and I think the temptation for someone, some district judge confronted by a lawsuit about this to say, yeah, that's the right answer constitutionally is pretty strong or -- and I'm assuming the board wants to give people due process and intends to try to do that and they are not trying to run their own court. They are going to set up some rules that say, "We get a complaint. You get this opportunity to respond. You get to come to the board and make your case, and we'll hear you out." That looks like an opportunity for adjudicative hearing.

The Administrative Procedure Act says if you have a matter of rights or privileges as a party or you are determined to have an opportunity for adjudicative hearing, you have to hold a contested case under the APA, and you have substantial evidence on the agency for judicial review. Do you really want to impose that by a rule here?

And so I'm thinking that for the list level

of the problem as opposed to the in a particular case service was bad or in a particular case a particular server is really a bad guy and shouldn't be in this business, for just the list part of the problem I'm not -- absent a statute that sets it up right and with funding, just have it be you apply and we'll let you on and then you have to apply again in three years when it expires, and that's all that the board does.

CHAIRMAN BABCOCK: Okay.

MR. SCHENKKAN: And then as a remedy for the particular server or service go to a specific judge and say, "This service wasn't right." It's a crime if you can make out a criminal case, or it's -- I don't know what it would be, malicious prosecution or abuse of process or something, some kind of civil action, or just, "Judge, take this guy off the list for all cases in this county. Here's my proof of what he's done. He shouldn't be on this list."

CHAIRMAN BABCOCK: Okay. Justice Bland and then Judge Lawrence and then let's subtly shift to another topic in the same genre that the Court is interested in. Justice Bland.

HONORABLE JANE BLAND: I agree with Pete. I think when Harris County started this whole thing -- and I think it began because Harris County got this idea of

handling it -- it was because we perceived not that there are a bunch of people trying to commit fraud but the number of people who were wanting to be private process servers was growing exponentially, and many of these people had no training or any legal background and thus were making lots of mistakes because they didn't know what a proper return of service should look like. They didn't know what needed to be in an affidavit, and so it was a purely educational purpose. It was not designed to root out people who were intentionally defrauding a court, and it never was used to police people for that.

It was mainly to educate, and I think, you know, there became interest; and partly because I think these education programs raise revenues for various organizations that hold the programs, it became of interest statewide; and I don't think that -- you know, I think now it's snowballing into way more than what it was intended to be at the outset.

CHAIRMAN BABCOCK: Okay. Judge Lawrence.

HONORABLE TOM LAWRENCE: I still think one of the problems is getting someone off the list. If you don't have a mechanism to remove somebody from the list then they can continue on even where there is a demonstrated list of problems that they've had. Now, if a judge under 103 and 536 can separately approve somebody in

his court to serve process, why couldn't you have the judge unapprove somebody that's been certified to serve process? Could you do that? Would that solve the problems? Because now there is no mechanism to prevent somebody from serving process if they're on the list, and if you have no effective means to get them off the list, I don't think we want that situation, and we can avoid it.

CHAIRMAN BABCOCK: Let me, Richard, if it's all right with you, and even if it isn't, let me shift the discussions slightly to the second bullet point that the Court was interested in, and that is the board has requested an amendment to the order of June 29th to expand the Court's approval to all of Texas' 254 counties, and as you all -- as you know, right now the order applies to 253 counties but not to Harris County in certain circumstances, and there has been a response on behalf of the Harris County judges by Judge Lindsay that should be in your materials, an October 29th, 2005, letter asking that the order not be changed, but that Harris County be permitted to have its own -- its own system of meeting requirements for certification. So if we could talk about that --

MR. ORSINGER: I think I have laid the groundwork for that, and let me point out that the Texas Process Servers Review Board has recommended that the same

educational standards that apply to other counties apply to Harris County, and the only dissenting vote was Judge Lindsay; is that not right, Carl?

MR. WEEKS: That's correct.

MR. ORSINGER: And so Judge Lindsay, who is on the board and who is also in charge of the HYLA education program for process serving in Houston is the only member of the board that doesn't want Houston to have the same educational requirements as any other county.

I don't know how widespread that support is among all the district judges in Houston, but as you -- if you will think back to my comment about how it's not just a Houston problem, because process in Houston cases is getting served in Dallas and Amarillo and El Paso and everywhere, so could maintaining Houston as an exception and allowing them to require attendance at their HYLA course or now attendance at a government-approved course for constables and sheriffs is not warranted; and I frankly don't know what the -- I know that the people in Houston, the defendants say that their course is better than the other courses, but then I read that they haven't run the course since the certification program was adopted and that if it hadn't have been for the fact that the state sponsored courses were available, we wouldn't have had anyone even had the opportunity to become certified

with an H; is that right, Carl?

MR. WEEKS: That's correct.

MR. ORSINGER: Okay. So if, in fact, Houston is going to require you to attend a Houston course at least they ought to run the Houston course.

CHAIRMAN BABCOCK: It's catch 22.

MR. ORSINGER: I'm sure the HYLA makes some money. I know that they do a lot of good things because I belong to the -- I read their stuff in the *Bar Journal* and everything.

CHAIRMAN BABCOCK: Well, let's hold on for a second. Judge Benton, is he still here? There he is.

MR. ORSINGER: You caught him in the middle of dessert.

CHAIRMAN BABCOCK: Sorry. Judge Benton or Judge Sullivan, was Judge Lindsay speaking on behalf of all of the Harris County judges, or is she a lone voice in the wilderness?

HONORABLE LEVI BENTON: Candidly, Chip, I was just telling Alistair off of the record I don't have any recollection that we formally discussed this or said that "you're speaking for us" or "you're not speaking for us on this issue," but it might be because I just was occupied with something else and missed the meeting. I just don't have a recollection, but the record should note

she has done good service to the state over the years on this issue, and she should be commended for it.

CHAIRMAN BABCOCK: Judge Sullivan. What part of that don't you agree with?

HONORABLE KENT SULLIVAN: Absolutely nothing. I think that Judge Benton is extremely articulate and able to respond for the judges of Harris County.

CHAIRMAN BABCOCK: Okay.

MR. DAWSON: Objection, nonresponsive.

HONORABLE LEVI BENTON: You know, in my own personal experience, when I have written the Court I have said either "I'm speaking for all of us" or "I'm not," and I don't know what Judge Lindsay's letter says, and so I don't have any recollection of any -- we meet monthly, but I don't have a recollection that we took this up at a meeting. We may well have and I just can't remember it.

CHAIRMAN BABCOCK: Well, the letter is somewhat ambiguous about whether she's speaking for everybody or just herself, but one of her points is that, look, we just got started with this, why are you going to go mess with it, you know, five or six months or less than a year after you started with this system, and we don't -- we don't like that.

HONORABLE LEVI BENTON: And --

MR. ORSINGER: Are we allowed to use that same argument against Exhibit A?

HONORABLE LEVI BENTON: I am surprised to hear -- and I can't say Richard is incorrect. I am surprised to hear that -- the statement the Harris County course has not been offered. That's news to me, but I can't say it's incorrect because I have never been involved in teaching the course.

MR. ORSINGER: Carl knows.

MR. WEEKS: And I have spoke just recently this last -- about two weeks ago to Lisa Rodriguez, who is in the Harris County Court Administration Office about the course, and they have not had a course indeed since the order went into effect. That is correct.

HONORABLE LEVI BENTON: Okay.

MR. WEEKS: They usually hold one once a year in the spring, has been their standard, and I did call Judge Lindsay about this a few weeks ago because I was going to have it put up on the Supreme Court website if indeed they were going to have a course, and she indicated to me that they had not picked a date for a course, they were going to have one this summer, this spring sometime, they had not settled on a date, but that they didn't feel quite so under pressure because so many folks had been going through the TCLEOSE course to get the

H endorsement. We have been putting probably 20 people on the list each month with the H endorsement by their name because they are attending TCLEOSE civil process courses.

CHAIRMAN BABCOCK: Okay, Lonny.

PROFESSOR HOFFMAN: I'm a little bit hesitant because I was out of order the last time I brought up Harris County.

CHAIRMAN BABCOCK: That won't be the last time.

PROFESSOR HOFFMAN: But that said, I mean, it seems to me whether there is agreement among the judges or not on this issue, it seems to me that the argument that Judge Lindsay makes is not a compelling reason -- is not even close to a compelling reason to exempt Harris County out.

If Judge Lindsay or someone else thinks that they're teaching something at a course that's wrong or incomplete, well, that's another thing that the Process Review Board ought to be alerted to, and they are presumably in touch with the people who run these education programs, and they can pass that along, and that can be included in the materials. It seems to me that that's a quick, easy fix, or at least a way to deal with that, and we ought not to exempt Harris County if this is the only reason.

HONORABLE SARAH DUNCAN: Why don't you make that in the form of a motion?

PROFESSOR HOFFMAN: And so I do.

HONORABLE SARAH DUNCAN: And I second it.

MR. WEEKS: If I could add, Mr. Chairman, we did have Judge Lindsay on our educational committee as we drafted some minimum guidelines for educational providers that are in your packets today and Judge Lindsay was a very active participant in that effort.

CHAIRMAN BABCOCK: Trying to get her under the tent, right?

MR. WEEKS: Yes, sir. I think all of her concerns were addressed in that.

MR. ORSINGER: You can tell why he's chair.

CHAIRMAN BABCOCK: Yeah, right. Okay. Well, there has been a motion and a second, and the motion as I understand it is that everyone who is in favor of including Harris County in the statewide rules, thus bringing it into --

MR. RATLIFF: Point of order, Mr. Chairman.

CHAIRMAN BABCOCK: Yeah, Shannon.

MR. RATLIFF: If you vote on this do you have to go on and vote on this whole question? It seems to me we're taking something that was done for the administrative convenience of district judges and we are

now erecting this giant edifice on top of it. If I vote on this motion am I committed on the motion about whether we --

CHAIRMAN BABCOCK: No, you are not committed on the other stuff. There was a secret motion to remand to the Court that was granted by the gentleman to my left, so this is just giving the Court direction on certain discrete issues.

HONORABLE JAN PATTERSON: We never commit to consistency, Shannon.

MR. RATLIFF: Okay. All right.

CHAIRMAN BABCOCK: So those in favor of including Harris County and not excluding them as they currently are, raise your hand.

HONORABLE NATHAN HECHT: Several abstentions.

CHAIRMAN BABCOCK: All right. Those opposed? Oh, yeah, there are some abstentions. Now raise your hand up high now, everybody.

HONORABLE LEVI BENTON: I want the record to reflect Benton present, not voting.

CHAIRMAN BABCOCK: All right. 27 to 1, the chair not voting as customary, Judge Sullivan not in the room, Judge Benton not voting, and so there you have an expression from this committee.

HONORABLE JANE BLAND: Judge Bland not voting either.

CHAIRMAN BABCOCK: I was -- Richard, I was serious about the fact that I think the Court feels that there is need for it to study this question further before we dabble in it anymore, so we might pick it up at our next meeting.

MR. ORSINGER: Let me ask you this, Chip.

CHAIRMAN BABCOCK: Yeah.

MR. ORSINGER: We also have the opportunity to point out to everyone that the board would like to fix the prescribed information for a return, and maybe we don't want to take the time to do that this afternoon, but it seems to me like many of the uncertainties or even irregularities could be helped if we had a more robust return requirement, so maybe we could revisit that at a future meeting, and then there is the issue of identity cards which you may not want to take up now. Those are really independent from the previous discussions we have been having.

CHAIRMAN BABCOCK: We'll take that up at a future meeting.

MR. ORSINGER: Okay.

CHAIRMAN BABCOCK: Thank you for that. We have another potential rule amendment to Rule 21 that,

Richard, is also under your purview, although I think Judge Sullivan is the mover in this -- in this regard, and that basically is suggesting that the three-day notice requirement for motions be expanded to some degree. Are you going to talk about this?

MR. ORSINGER: I'll introduce it and then let Judge Sullivan explain his proponent. This really involves Rule 21 of the Rules of Civil Procedure, relating to the amount of notice that's required for a hearing on a motion, but it also interfaces with Rule 4, which adds on notice for service of facts, and it seems to me like we're talking about notice and we need to remember that notice can be served in different ways and, therefore, the length of notice is different.

My subcommittee did not have a very unified view on this proposal. One person favored reasonable notice instead of the minimum three days. Several people preferred to leave it at three days. One person pointed out that the Federal rules require five days, and that person preferred five days. Then several people thought it was a good idea to lengthen it. We wanted to lengthen it to seven days notice. Judge Sullivan's proposal was to move to it 10 days notice.

Now, in the appellate rules there is a Rule 10.3 that has to do with notice, but it's not -- it's not

a required notice to the other side. It just says that the appellate court should not act on a motion until at least 10 days has passed from filing, and I think that's because they are allowing the other parties to have the opportunity to file a response, so the way I see TRAP 10.3 is that it's a 10-day notice rule.

If you're going to move to 10 days then maybe you want to think differently about adding three-days for service by fax, because so many lawyers serve by fax, and that converts a 10-day rule into a 13-day rule. On the other hand, there is a groundswell of support to say that fax is no different than hand-delivery because you know that either the fax went through at that time or it didn't. There is no uncertainty like with mail that it may or may not show up or might show up two or three days later, so it seems to me that in the context of length of notice for a motion we should also decide whether we want to require an additional three days to be added for service by fax.

And as long as we're talking about the fax rule, another part of it is that if fax is served after 5:00 o'clock in the afternoon, it's treated as if the fax is served the next morning, and then I had one person that said as long as we're going to be talking about modes of giving notice, would you please discuss e-mail notice and

whether we have reached the point that we're comfortable with the idea of either allowing or mandating service by e-mail and if there is service by e-mail how will it fit into the timetable. So without saying any more than that, Judge Sullivan, do you want to explain?

HONORABLE KENT SULLIVAN: Well, after hearing from Justice Hecht that apparently the issue was raised 16 years ago, perhaps this comes under the heading of an idea whose time has come, if that's enough time for it to have --

MR. DAWSON: Percolated.

HONORABLE KENT SULLIVAN: Percolated. Ripened, perhaps. I tried to set out my thoughts in the brief memo that came with the proposal, and in large part, as Richard points out, this ended up on the agenda this time and really I guess did not go through the process of having everyone take a look at the drafting involved; and as I'll get to in a minute, I think there are one or two issues that have already been identified that would need to be addressed in terms of drafting; but conceptually I think this is something that is important, relative to the statewide administration of justice and I wanted to start with that point because I really do think this type of an amendment for a statewide rule is important; and as I'll mention in a moment, I readily acknowledge, of course,

that there are many areas in which the current practice may be adequate; but we are trying to establish a minimum standard and a baseline for statewide application.

My thought process was that we need a process that provides a timetable for a court and the parties to be able to receive and digest any written motion and response to be taken up at a hearing in advance of the hearing. In short, I think you need a timetable that contemplates everyone actually being prepared and prepared to address the issues that are before the court. I think a three-day notice period on its face does not allow for that. I think three days is inadequate to provide any meaningful opportunity to write a response of any sophistication to a motion that has been filed against you. I think it disproportionately burdens litigants and lawyers who may be out of town. I think that is particularly troublesome.

Commerce is -- I don't think it's much of a stretch to say that it's increasingly interstate and international. I think that means that our disputes are as well. It means that litigants and lawyers are as well, and, again, I think a three-day minimum notice period is simply inconsistent with some fair acknowledgement of those facts.

I also think that if you are in a situation

where there is routine use of three days notice, and particularly if you are dealing with persons who are out of town, while it may meet the technical requirement of the rule, it creates an unfortunate appearance of parochialism and can perhaps even arise to some appearance of impropriety; and speaking as I do, from the perspective of a trial judge, it's very important to create a process where everyone will have a fair opportunity to have the written terms that they want the court to consider all up in the end, so to speak, in advance of the hearing so the judge can review them and be prepared so that the hearing can be a more meaningful event and it can be as efficient as possible as opposed to having the judge being handed, as happens to me more than a few times, something as the hearing begins, literally having it -- well, metaphorically having it thrown over the transom, so to speak, at the last second, often a very significant document with, of course, no expectation, no hope the judge can do anything about digesting what may be included in it.

My proposal is not intended to affect the practice of areas that on a collegial basis may work on shorter time periods routinely because it explicitly acknowledges exceptions that you can see there, allowing the orders to operate on shorter time periods, of course,

by agreement and allowing -- let me put it this way. There is no attempt to divest control from -- or to divest the discretion of individual courts to shorten time periods when appropriate. It just attempts to formalize some clear process for that when it is indeed appropriate.

I had a little bit of research done about what some other jurisdictions -- what practices they employ. You see a smattering of the results in the chart that accompanied this, and I do believe we are on a fairly extreme end of this notice spectrum, if you will.

With respect to the specific drafting that was done, I want to acknowledge a couple of changes that I think will need to be made, assuming that we go forward after today. One is there was in the language of the specific proposal that I included some implication that was not intended, quite frankly, of a requirement of simultaneously filing a motion and notice of hearing. In fact, I think it implies really that the notice is an inherent part of the motion. That was not intentional on my part. The intent was and remains to require that both a notice and the motion be in the hands of opposing counsel 10 days in advance of the intended date of disposition of the motion. That was whether they were filed together or whether they were filed independently.

The reason that I bring that up is someone

has already pointed out to me that apparently some courts require that the motion be filed before the court or the clerk will give a hearing on that motion, and so custom and practice may require that those two documents be filed at separate times and served separately. As long as each would meet the 10-day requirement, that, of course, would be I think perfectly fine.

Also, there is one oversight that's included in the drafting, and that is it does not say explicitly, although this is easily remedied, that it would not apply to any motion made during a trial. That, I think, was hopefully self-evident, but the rule should be amended to reflect that, and I think I may even already have an amended version that would achieve those objectives. That's largely my intent, Mr. Chairman, and my motion.

CHAIRMAN BABCOCK: Justice Hecht.

HONORABLE NATHAN HECHT: And let me just add one other thing. As his draft indicates in subparagraph (1), as otherwise provided for by these rules there are about a dozen other rules that have three-day notice requirements. Most of them are for garnishments, sequestration, receivers, and injunctions and stuff like that. One is for recusal, but they are scattered all through the rules.

TRCP 18 (recusal), 77 (bystander)

CHAIRMAN BABCOCK: Judge Sullivan, did -- I

may have missed it. In the old rule the trial court has discretion to shorten the time. Is there a parallel provision in this?

HONORABLE KENT SULLIVAN: "Upon written motion and leave of court for good cause shown."

MR. LOW: Good cause.

CHAIRMAN BABCOCK: Sorry. Okay. Yeah, Frank.

MR. GILSTRAP: Okay. I think Judge Sullivan has raised two issues, and I think they are separate issues. First of all, there is an inherent capacity for abuse in this rule, and it's been there for a long time, and everybody understands it. It's three days notice, and they can shorten it, and, you know, on one day's notice you can be on an airplane for a shootout on the border. I mean, it can be abused that way, and everybody has understood that.

My question is, is it being abused that way, and I don't know the answer to that. Is there someplace in the state where you do surprise people regularly and give them three days notice of hearings on important motions? I don't know the answer to that, but -- and I guess my question is, with regard to that issue are the concerns theoretical, which are definitely in the rule, or are they practical?

The second issue is that there is not enough -- that the longer notice period would produce a better decision because the parties would be able to brief it and get the briefs to the judge ahead of time. And again, it seems to me the individual judge can just cure this by telling the clerk not to set things on three days notice. I mean, it seems to me that might be one answer there. There is, however -- and I think I didn't understand that.

The more you extend the time limit the more cumbersome and expensive you make the motion. The classic example is the Northern District of Texas. Every motion there has -- you have the response due in 20 days and reply brief is due in 15 days. For ordinary motions the briefing limits are 25 pages for principal briefs and 10 pages for reply briefs, except for summary judgment motions where it's 50 pages and 25 pages.

Once it's fully briefed you have no entitlement to the hearing, and it's just ripe and it just sits there on the judge's desk while -- and while some motions do get heard quickly, a lot of motions just sit there, and they are very expensive, and the Northern District of Texas is the classic place where if you write briefs and you have a defendant who's prepared to pay a whole lot of money you do real well, but nobody else does

well. And I know we won't get to that point, but I just want to point out that to the extent that we extend it you make every motion more expensive, and my question is, are we doing this -- do we want to do this for practical concerns or theoretical concerns.

CHAIRMAN BABCOCK: Yeah, Buddy.

MR. LOW: All right. One of the things we want to -- you look at it just as a three-day rule alone and it looks okay, but for instance, the Eastern District has 12, but you know what else the Eastern District has? It has a hotline. You have a magistrate there available.

TRAP Rule 10.3 Richard pointed out provides for an emergency. This doesn't provide for an emergency. Federal rule that provides for five days provides for ex parte when necessary. This rule doesn't provide for that. This rule provides that with leave of court. How can you get leave of court to have a hearing without a hearing? I mean --

HONORABLE KENT SULLIVAN: People do it all the time. They do it constantly --

MR. LOW: Does this rule allow where they do it ex parte?

HONORABLE KENT SULLIVAN: They file something. I insist that something be filed, and I sign orders all the time for -- to allow for some emergency

hearing of something.

HONORABLE LEVI BENTON: Buddy, we routinely get requests for emergency hearings in writing served on the other side, and so the -- your concerns are addressed in part (3), and it's not theoretical. It is very practical. It's not just about the judge being prepared. It's about one side or the other having a fair opportunity to know what arguments are being advanced by the other side, to know -- to know that Buddy Low -- or, no, not Buddy Low wouldn't do this, but let's say somebody else might show up and urge to Judge Sullivan that some case that Judge Hecht -- Justice Hecht wrote some years ago stands for X, and because he knows he's not telling Buddy Low he is going to talk about that case when it really stands for Y. So you're standing there before the court because the papers aren't served timely and so -- and what we don't -- what we're really ignoring, and every one of you trial lawyers in this room has done this, is the motion to reconsider, which is a real cost, too, and so I really don't understand practically any trial lawyer's opposition to this.

MR. LOW: But see, the problem is you're going to have a judge like you and you're not going to just haul off and rule right then. It doesn't say when you've got to rule, you've got to rule in three days, and

a judge like you is going to say, "Wait a minute, I need more knowledge on this before I can rule," and you can so order it.

HONORABLE LEVI BENTON: Okay. Well, then --

MR. LOW: What I'm saying is I don't think this rule has precautions that others do because when you're talking about leave of court, good cause shown, what is good cause? I think you're overlooking a lot.

CHAIRMAN BABCOCK: Alistair and then Judge Sullivan.

MR. DAWSON: I think I agree with Judge Sullivan that we need to extend the time frame. Three days is not sufficient for a number of reasons. I agree with him that it creates an inefficient process by which one party files a motion and then, you know, eight, nine times out of ten the response is given to the court at the hearing so that the party who filed the motion doesn't get to see it. You know, as Judge Benton points out, I can't analyze the cases that, you know, are included in the response and distinguish them. The judge is not going to be as well prepared.

So for that reason I think we do need to extend it, and I would point out if you are going to do that and you want to achieve that then you need to include in the rule a mechanism whereby responses, if they're

going to be filed, have to be filed in advance of the hearing, because under the current rule even if you say it's 10 days, the other party, responding party, could wait and hand you the response at the hearing.

HONORABLE LEVI BENTON: No, it says three days.

HONORABLE KENT SULLIVAN: It says three days.

MR. DAWSON: Oh, is it? I'm sorry, I missed that. The other thing is the current three-day rule does permit parties, if they're so inclined, to game the system. They can and I have experienced times where people have obviously put a lot of time and thought into a motion, it's a big motion with exhibits and attachments, and it gets filed on Monday and set for hearing on Friday, and, you know, they may have spent two or three weeks preparing it and I have got to respond to it in two or three days, and in my experience, if you're not -- if you're an out of town lawyer, there -- and you're dealing with someone who is not particularly a professional lawyer, they don't agree to move the hearing.

You know, if I have got a case in some other part of the state and, you know, I'm dealing with someone that is not as professional, say, as the people in this room they'll set it for three days hearing because they

know they've got a strategic advantage, and the rules ought not to be gamed that way. So I think we do need to extend it. I think 10 days is probably a good system.

You know, in terms of Buddy's comments, I agree you do need to have provisions in there where, you know, you can have exceptions. If there's a discovery dispute that needs an immediate ruling for whatever reason, you know, the court can address that, so I think we ought to adopt this.

CHAIRMAN BABCOCK: Judge Sullivan and then Pete Schenkkan.

HONORABLE KENT SULLIVAN: I wanted to speak to the point that Frank raised about burden and cost and his analogy I guess to the Northern District because what I see on a routine basis is much more like what Judge Benton pointed to, and it goes something like this. A respondent -- can be the movant as well because of just the shortened time period, but one or more of the parties say, "I had no idea that this issue was going to be raised or this authority was going to be argued" and inevitablely that quickly leads to, "Judge, I want more time to respond. Will you give me time to file -- to do the research and file some response?"

And inevitably, of course, if there is any legitimacy at all to the notion that they had been

blindsided then, of course, you do give them more time, which then leads to the response from the other side, "We want to come back, because we've never we've now seen what their response is and we want to have an opportunity to hash through this again," all of which relates to just one fundamental problem, there was no organized process by which everyone would have adequate notice of what was truly going to be at issue at the time of the hearing and had in their hands some document that summarized what positions would be taken by the parties at the time of the hearing; and of course, the judge, please remember the judge, didn't have any opportunity to digest this in advance of the hearing so as to have any intelligent questions ready and assist with respect to the decision-making. So I really do question the extent to which this rule, the current rule, somehow is less expensive. My experience is really quite the contrary.

As to Buddy's point, I am very sensitive to the question of having some failsafe mechanisms, and again, on a point of comparison this one explicitly incorporates some failsafe mechanisms and gives a lawyer some idea of how to invoke them. Our current rule I think is much more ambiguous as to exactly how you might deal with unusual circumstances. I think the specificity and clarity is good. Again, that was one of the driving

thoughts I had behind this.

CHAIRMAN BABCOCK: Pete and then Lamont.

MR. SCHENKKAN: I want to address the question of does this actually happen? Yes, it does. I live in Austin, and that's where my practice is based, but I am regularly called down to go to the Rio Grande Valley for hearings, and three times in the last 18 months on token nominally three days notice when, in fact, designed cleverly to ensure that it was practically less than three days notice, including one that was set, if I have the date and the day of the week exactly right, Thursday, December 23rd, a motion to compel, great urgency about that motion that was subsequently abandoned. So, yes, this continues to be a problem.

I think we can also make the seven day extension -- expanding the time to seven days more acceptable by requiring faxes and by requiring the three-day adder for fax service. If I have the fax today of the motion, I have a real seven days to look at them, at the matter, and then I would hope -- I know this is outside the immediate scope of this proposal -- that we would turn at some point to Rule 680, the temporary restraining order rule, and make sure that even when someone believes he has the case that entitles him to a TRO ex parte that he has to fax it when he knows who

opposing counsel is, the same time he sets out to walk over to the courthouse to get it granted ex parte, so that if I'm quick enough and can reach my local counsel, in fact someone will be there to oppose it. Two and three were tiers.

CHAIRMAN BABCOCK: Lamont.

MR. LAMONT JEFFERSON: I think this is a very refreshing discussion because in Bexar County it is absolutely the exception that the judge has read whatever gets filed whenever gets filed before you're actually standing in front of the judge. I don't know what the practice is in Austin, which also has the central docket.

MR. DAWSON: That's because you've got the rotating system there.

MR. LAMONT JEFFERSON: I know.

MR. DAWSON: They can't have read it.

MR. LAMONT JEFFERSON: Well, they can if they can make provisions to read it, at least Judge Massey does. If a motion for summary judgment gets filed in her court, she'll have the parties come before her, give a little talk and then reset it, but generally speaking you go in front of the judge and the judge will not have read it, so the three days doesn't make a huge bit of difference at least as far as educating the judge goes.

The other point I want to make about the

three days -- and I don't have a problem with it if it's three or seven or ten. In my practice, at least in my experience, I haven't been abused by the three-day system even in Bexar County where you can get a setting, you know, literally in three days with no problem. It's not been a significant problem or trap in our practice, and in the jurisdictions where it is a problem you're going to have scheduling problems regardless of what the rule is because there are -- you know, you could always get gamed in a bad jurisdiction, but the one point I want to make about whatever the time period is, is that the three-day rule has been around for, I don't know, since the beginning of the rules. I mean, it's been around a long time, at least since I have been practicing in 1984, and now technology has made it possible -- it has enabled parties to respond much quicker and much more thoroughly to whatever gets filed on you.

I mean, you have not only access to technology that gives you the research that you need, but you have the ability to turn out a response in fair -- in quick order, and you have the opportunity to -- I mean, to have instant access when things get filed and served as opposed to waiting in the mail or even waiting for it to be distributed in the office. It often just pops up on your desktop, whatever it is that got filed.

So we have the skills and the technology to respond very quickly to whatever motions have been filed at whatever time, which, you know, given that we have lived with the three-day rule for as long as we have -- and I don't know the extent of the problems others have experienced, I've not had those problems, but given the time period that we've had -- we have lived with the three-day rule and given now our enhanced ability to react quicker, it seems a little inconsistent to move the other direction and lengthen the three-day notice.

CHAIRMAN BABCOCK: Nina. And then -- I'm sorry, Judge Patterson. Did you have your hand up a minute ago?

HONORABLE JAN PATTERSON: I'll go after.

CHAIRMAN BABCOCK: You'll yield to Nina?

HONORABLE JAN PATTERSON: That's fine.

MS. CORTELL: I guess on balance I'm okay with extending the time out and creating the order and gaining the benefits that have been talked about, but I think the overall picture I think we want to be sensitive to -- and this was sort of all alluded to in what Frank said and Buddy -- we don't want to lose the responsiveness of our state court system that I think at least compared often to the Northern District Federal in Dallas is really -- it works much better generally speaking, our state

court, our ability to be responsive to clients' needs, and as we are in an environment where it seems to me that trial filings are down because people are choosing alternative forms of dispute resolution, be it arbitration or whatever, I mean, I do think the public is telling us that they are not satisfied in many ways with how our court system works.

So my only regret of letting go of the three-day is that it is a responsiveness that often does work, although it can be abused and it can cause the kind of waste that Judge Sullivan spoke to, so while I would probably on balance be in favor of extending it out and creating this protocol I don't want to lose sight of our desire to have a responsive trial system.

CHAIRMAN BABCOCK: Justice Patterson.

HONORABLE JAN PATTERSON: My only point is I think the practices among the judges vary to such an extent in the state and there are some rules that are for the benefit of lawyers, some for the whole system, some for judges. To me this is a rule that speaks to the lawyers, what's efficient and helpful for them, and really, that's the main concern here. What makes for an efficient service and responsiveness and quality of life, perhaps, and all of those things, so to me I would want us to defer to what the lawyer sense is on this.

CHAIRMAN BABCOCK: Buddy and then Carl, two lawyers right down the hallway from you.

MR. LOW: I would point out this came to the Court's attention in 1990, and it was of such a problem it didn't come up until 16 years later, but a lot of times people give notice of a deposition, give you about four days notice, and I'm in this or that, so I've got to have a three-day hearing, and I don't know if I can prove that the way we've got it here, good cause, or what is good cause or so forth, so and I think that the three-day thing can be taken care of by the different judges if they do their jobs.

CHAIRMAN BABCOCK: If you have been convicted of a felony involving moral turpitude, that's good cause.

MR. LOW: Wait a minute. I don't even want to think about that.

MR. ORSINGER: You mean you file the pleading to --

CHAIRMAN BABCOCK: Carl.

MR. HAMILTON: I favor the extension to five days, but what I am troubled with is this -- another motion for leave to shorten it for good cause. I think that in the main motion or whatever you present to the court for hearing it ought to be accompanied by an

affidavit or something saying why you need a shorter hearing, and based on that the judge ought to decide. I don't think we need a separate motion and another hearing on that.

The other thing is that this written notice, I assume that's notice of the hearing, and some judges don't work on the notice principle. They say you've got to send an order. Without the order, there's no notice, so we might need to consider notice or order or whatever the court requires.

CHAIRMAN BABCOCK: I don't want to get off the train here, but in my experience, number one, even if I want or my opponent wants a hearing in three days, it's very hard to get one set --

MR. LOW: Right.

CHAIRMAN BABCOCK: -- in three days. The docket is crowded and, you know, sometimes it will take you a month to get a hearing.

The second thing is that those motions that are set, at least in my practice, on three days notice, are not the kind of case -- not the kind of motions that are going to materially affect the rights of the parties. I mean, they're typically discovery motions or they're the guy is horsing you around because you're trying to do a deposition the day after Christmas or things like that;

and as Nina says, there is something to be said for a system where you can theoretically get to the court quickly without having to file a second motion.

MR. LOW: Right.

CHAIRMAN BABCOCK: You know, I'm sensitive to all these things that are being said, but one of the big pushes the last ten years that we have seen in this committee and in the Legislature is to try to make -- try to make our litigation practice quicker and more efficient, and extending the time out seems to me to potentially run counter of both of those things. Alistair.

MR. DAWSON: My experience, Chip, in Harris County, since we're picking on Harris County today, it is hard to get a hearing within three days. Most of the judges you can call up -- and all of this is administered by the clerk, as we all know. You may be two weeks out or what have you. That's also true in Dallas, but for the rest of the state it's been my experience that you can get hearings in three days, five days notice, pretty routinely, and not being able to get a hearing is more the exception to the rule, so I think it does happen, and I don't think -- I agree with Judge Sullivan that putting a system in place where everyone shows up, you know what the arguments are, judge has the chance to read it, at least

an opportunity to read it beforehand, is a lot more efficient; and I would want to argue you would get your cases to trial or get that issue resolved a lot more efficiently under this proposed system than we do under the current system.

CHAIRMAN BABCOCK: Justice Gaultney.

HONORABLE DAVID GAULTNEY: There is one key advantage to my looking at it, is that it does provide a deadline for a response in advance of the hearing. You know, at least at that point the movant knows what is going to be argued in response before the hearing and you do have notice of what -- both sides have notice of what is going to be presented.

CHAIRMAN BABCOCK: Buddy.

MR. LOW: But generally it doesn't involve a lot of case law. It involves like you're talking about, just kind of an emergency situation and the more -- the longer you give people to brief, the more you're going to cost the client, the more expensive litigation gets, and that's what's our problem right now. You know, Lucius Bunton had what he called the rocket docket. He didn't get things. It's less expensive and people appreciated that.

CHAIRMAN BABCOCK: Judge Sullivan.

HONORABLE KENT SULLIVAN: Again, to the

Northern District analogy and the suggestion that extending time somehow adds cost, I'm not sure that I follow that. There is no requirement here, as apparently there is at least implicitly in requirements like the Northern District requirement, that there be a lot of paper work. There is no paper work requirement contemplated here whatsoever. If someone doesn't want to file a response there is no requirement that they file a response. The intent is simply to create some certainty as to a timetable. That's all.

CHAIRMAN BABCOCK: Yeah. You know, I was smiling when you talked about people handing stuff on the day of the hearing. I was in a hearing in Fort Worth Wednesday. It's a special appearance which has been on file a little over a year. It got set for hearing Wednesday. On the day of the hearing -- and I wasn't involved. I was codefendant, but on the day of the hearing the movant filed a motion to strike portions of the -- his opponent's affidavit; and the plaintiff, who is the nonmovant, filed a -- gave the judge across the transom three cases, and his opponent; and the cases were, you know, pretty on point, too, but I mean, it just happens. Yeah, Pete.

MR. SCHENKKAN: And if you're in a --

CHAIRMAN BABCOCK: I'm sorry. There was

MR. PERDUE: Unfortunately my personal experience, there was a call for whether there is a problem, is that it is -- it is used and abused, and it is serious issues. In medical malpractice we see motions to dismiss the case on an expert report with three days notice. That is a very substantial motion. I see very extensive Daubert motions on motions to strike experts with three days notice, and so just anecdotally I've seen it gamed. I've seen it used, and it is a problem, and just from my personal perspective, I agree with the judge that the opportunity to have a response that will be read prior to the hearing as opposed to handing the response and having the judge essentially try to multitask and then usually take it under advisement is -- it may not be quicker, but it is more efficient. It does expedite from a lawyer's perspective the moving of the issue, and so I agree with the proposal.

CHAIRMAN BABCOCK: Pete.

MR. SCHENKKAN: If you're -- you're saying in Dallas and Houston it can be very hard to get a hearing on these motions in less than a month. If that's true then what's the harm in requiring seven days notice of the

somebody over here.

MR. PERDUE: I was going to weigh in.

CHAIRMAN BABCOCK: Yeah, Jim.

motion and giving the other side definitely a chance to respond and requiring them if you file a response it be three days ahead of time. It seems to me in those counties we're better off with this rule. And then in the counties where you can get one in three days and it can be used in this way, that's where we need it, and this particular one, yes, it was a discovery motion.

The discovery motion would have required every one of 17 insurance companies to search all their files of a certain type. Some insurance companies had 10,000 such files. If granted on December 23rd with essentially no notice, you know, lawyers flying in from Chicago to the Rio Grande Valley for this hearing that would have required relief by mandamus over Christmas, which was exactly, of course, what it was designed to do; and I don't see that that is something that commends itself to the legal system and the judiciary's efforts to make litigation a more attractive alternative than arbitration. To the contrary it's exactly the kind of thing that makes people put arbitration clauses in everything they can so that they at least know their mandamus is good. It's a mandamus to require arbitration.

CHAIRMAN BABCOCK: Bill.

MR. WADE: Well, I was just going to share a little bit of humor. This happened just within the last

couple of weeks on a products case pending in a county out near the New Mexico line, and it involved two Houston lawyers and one of them trying to do just the same thing we are talking about. The movant got it heard, or got it set, but he forgot to take into consideration it was the end of spring break and he couldn't get an airplane into Lubbock, so he had to drive from Houston all the way out there for a hearing at 9:00 o'clock on Monday morning and then the other lawyer attended by telephone.

CHAIRMAN BABCOCK: That will teach him.

MR. WADE: So it happens.

CHAIRMAN BABCOCK: Tommy.

MR. JACKS: Well, I mean, as I listen to this, I am reminded of Gib Lewis' saying that it all depends upon whose ox is being doored in the ditch, which is to say that, yeah, I think there can be some abuses. I do think that the flexibility and ability to get rulings in little time and little cost is a feature of our state court system that I loathe to see sacrificed, and I do believe that the more time you give lawyers to do stuff, the longer the motions become, the longer responses become, and there is a lot to be said for handing the judge a couple of highlighted cases during the hearing and getting the job done and moving on down the road.

Having said all that, I'm not offended by

the idea of changing the brief to seven or perhaps even ten. I do think that Buddy's point is critical, and that is that you've got to have a safety valve. I like the simplicity of our current language "unless shortened by the court." I don't like the good cause requirement. I think you shouldn't have to litigate and, frankly, have much argument about the issue of whether the time is going to be shortened or not. I think that just ought to be something the court can do without thinking about it very much. I think that the -- and so I guess I can take almost any of these provisions as long as there is the ability always to get a hearing on the spot and get your case moved along.

CHAIRMAN BABCOCK: Richard.

MR. ORSINGER: I think that this is not going to work real well in family law cases. The litigation part of --

CHAIRMAN BABCOCK: We just exempt family law.

MR. ORSINGER: Well, I mean, the problem is that if it's too terrible we'll just run to the Legislature and fix it. My goal here is to try to avoid that as much as possible, but on the litigation related stuff, a few extra days isn't going to matter, but on personal issues that arise inside a family where there is

a divorce where they are constantly dealing with each other on visitation, and child support is late or what have you. Somebody finds out somebody is about to, you know, enter a business deal or sell a car or buy a house or whatever. I'm afraid what's going to happen if we have a 10-day period is that we're going to end up having two hearings. We're going to have a motion filed and the setting secured ten days out and then another motion filed and a hearing on shortening that hearing to less than 10 days.

I don't think that's going to happen on discovery objections or, you know, any of the routine litigation stuff, but on the personal stuff where the client just doesn't have the same kind of dispassionate perspective about their problem that you do, you're going to have to do something sooner than 10 days a lot of times. So I think we're condemning many family law cases to having dual hearings instead of single hearings when single could.

Now, five days might not make as much difference. I was just calculating it that it depends on when you file your motion. If you file your motion on Wednesday and we use 10 days, then you really have to give 12 days notice because 10 days hits on a Saturday or Sunday. If you file on a Thursday, you're going to give

11 days notice, but if you file on a Friday or a Tuesday or Wednesday, it's actually 10 days notice on a 5 days rule. On a five-day rule if you file on a Monday, it's really a minimum seven days; on a Tuesday it's a minimum of six days. So either one of these rules for two days out of the week is really an 11-day rule or a 12-day rule. Now, I practice both in South Texas --

CHAIRMAN BABCOCK: Only you would think of that, you know.

MR. ORSINGER: Well --

HONORABLE SARAH DUNCAN: And we're grateful that you did.

CHAIRMAN BABCOCK: And we're grateful. Thank you.

MR. ORSINGER: More problems tend to happen on Friday afternoon, or is it just that I remember those? I practice in both South Texas and North Texas, and the only place in Texas -- so I go to the big cities like Houston and Austin. The only place I get hearings on three days notice is San Antonio. In the Hill Country the judge is in your county about once every three to five weeks, and so you can either get a hearing once every three to five weeks or you can go follow him to wherever he is, but his docket is already full because he hadn't been there for five weeks. So it's hard to get a hearing

quickly in the Hill Country.

In most of the family law courts that I'm in, whether it's in Dallas, Fort Worth, or Houston, you're looking out weeks to get a hearing on anything, it doesn't matter, and if you do get a hearing it will be with the associate judge, which is going to get appealed to the district judge anyway by whoever the loser is, so we have, you know, problems -- and I have also a problem with the requirement of 10 days notice on a countermotion.

If someone files a motion and gets a setting 10 days later and you get it at 5:00 in the afternoon or one minute to 5:00 and you want to file a motion for sanctions on that motion, you can't set your motion for sanctions on the same day as the motion on the merits if they didn't give you 11 or more days notice. In three days it's more likely if I have a countermotion that the hearing is 5, 7, 8, 10, 12 days out, and I have a couple of days to file a countermotion or two motions to set at the same time.

I think that if you -- if you're not careful here, you may require that a responsive motion is going to end up having to be heard on the same day that the motion is; and the longer your period of time is, the more trouble you have with that; and I'm also troubled by the three-day requirement of a written response. First of

all, it's not my experience that any of my judges ever look at anything in advance, and that's all over Texas. Occasionally if I file a really long summary judgment with a stack of cases and exhibits that's so big that they'll get -- they'll know about it in advance and they'll look at it, not in San Antonio, but in other places because in San Antonio they get no advance notice; but there is a lot of times where for one reason or another, I'm not necessarily going to have my written response ready three days in advance; and so that's going to force me to -- especially if they accelerate it, if I still have to have my written response three days in advance for something that's going to be off four days then I've got one day to do it.

I don't like that three-day rule. I can understand why a judge would like it because if he's going to have to make a complicated ruling and he wants to see both sides on paper and study it and get a leg up on it and everything, that's great. As a practicing lawyer the three-day requirement to have a written response before the hearing is problematic for me and I think it's going to be problematic for a lot of family law practitioners, and then I also --

HONORABLE KENT SULLIVAN: Now you won't have the motion for more than three days, but --

MR. ORSINGER: Well, see, I --

HONORABLE KENT SULLIVAN: I don't see how filing a response three days in advance is too short.

MR. ORSINGER: I can file a written response on the day I walk into court on three days notice. And if you're going to give me five days or ten days --

HONORABLE KENT SULLIVAN: I understand, but you get seven under the rule. Anyway, I'm just not following.

MR. ORSINGER: Yeah, that's right. If you give me 10 days notice, that leaves me 7 days to come up with the response. If it's five days then it leaves me only two days to come up with the response. A lot of lawyers in family law are not going to file the response in advance. They're used to bringing it to the hearing and filing it if they file a written response at all.

And then I hope no one infers from this that you have to file a written response in order to make a contrary argument, because we certainly don't want people to be precluded from walking into a hearing with nothing on file and raising whatever legal arguments, fact arguments, or case law that they want to. So at any rate, I myself am attracted to five days, but anything longer than five days I think is going to result in two hearings for most motions in family law.

CHAIRMAN BABCOCK: Okay. Buddy.

MR. LOW: Could I ask Judge Sullivan, did you look at the Federal rule, the language? I like the --

HONORABLE KENT SULLIVAN: Are you talking about the current?

MR. LOW: The current Federal rule, five-day rule? You didn't list it in your -- in the appendix or something. Did you look at the language of it?

HONORABLE KENT SULLIVAN: I believe the reality of hearing practice in Federal court is that each district, practically speaking, sets their own time limits and rules --

MR. LOW: No. No.

HONORABLE KENT SULLIVAN: -- for disposition of motions. I understand what you're saying about with the Federal Rules of Civil Procedure, but that's why what we showed in the chart was the other districts in the state of Texas.

MR. LOW: I'm not talking about -- excuse me. I'm not talking about the time. I'm talking about the language they use where -- I think that the committee ought to consider that language. It's superior language to what we have. It says, "a written motion other than one which may be heard ex parte," and when you call the clerk to get a hearing or something, that's ex parte, or

"notice of a hearing shall be served not later than five days before the time specified, unless a different period is fixed by these rules or by order of the court." It doesn't show good cause. It goes to what Tommy is talking about.

HONORABLE KENT SULLIVAN: That is the issue contemplated by what's in here. "As otherwise provided for by the rules," that deals with ex parte hearings.

MR. LOW: Right.

HONORABLE KENT SULLIVAN: "Upon agreement of the parties or upon written motion," et cetera.

MR. LOW: Yeah, but --

HONORABLE KENT SULLIVAN: So it's intended to take care of the same points that you covered, although the language I understand is different.

MR. LOW: It doesn't say by -- it just says "by order of the court." It doesn't put good cause and all that. "Such an order may be made ex parte." "When a motion is supported by the affidavit," and then they go through a different thing, if there's affidavit then you have to counteraffidavit one day. I think that language itself -- I'm not talking about the time -- is superior to the language in the rule, and I think that ought to be considered before we do anything.

MR. GILSTRAP: Buddy, what rule are you

citing from there?

MR. LOW: It's Rule 5, let's see, (d). I only have one page, I guess it's 5(d).

HONORABLE NATHAN HECHT: It's 6(d).

MR. LOW: 6(d), is it? Okay. I just -- yeah.

MR. GILSTRAP: Thank you.

MR. LOW: And I think it eliminates this -- the word "good cause" just means so many different things, and it says "by order of the court." It doesn't say, you know, you have discretion. I think it's just superior. I'm not arguing with you the number of days, and I'm not arguing about the fact that, you know, it's not in there, because, as you say, every district has its own.

CHAIRMAN BABCOCK: Okay. Before we take our break let's vote because it will make us feel good. The vote would be on whether or not we change the three-day notice requirement to some other requirement, and this is not a vote on what you've just been talking about, Buddy.

MR. LOW: I understand.

CHAIRMAN BABCOCK: Response dates and all that type of thing, just whether we're going to change three days to some other time. So everybody who is in favor of changing our three-day hearing notice requirement to some other time period, raise your hand.

All opposed? By a vote of 26 to 6 that passes, so let's take a 10-minute break. Then we'll come back and finish this rule off.

(Recess from 3:29 p.m. to 3:51 p.m.)

CHAIRMAN BABCOCK: All right. We're rolling. All right. Everybody, let's go. Levi. We've got two issues left on this rule. The first issue is how many days is it going to be. Is it going to be 5, 7, 10, 20?

HONORABLE JAN PATTERSON: I move five.

CHAIRMAN BABCOCK: So Justice Patterson says five.

HONORABLE TOM GRAY: Second.

MR. ORSINGER: I'll second, third. Third.

MR. GILSTRAP: Oh, come one. Let's do a straw vote by numbers.

CHAIRMAN BABCOCK: Is there any more discussion we want to talk about the number of days? We've talked a lot about it already, or are we ready to vote? And I would propose -- yeah.

MR. STORIE: The only thing I would ask is that we consider business days rather than calendar days, which I think the Western District uses business days.

CHAIRMAN BABCOCK: Do our rules say that for any period less than ten it's --

MR. ORSINGER: No. If it's less than five days you don't count the weekend. If it's more than five days you do count; isn't that right?

HONORABLE TOM GRAY: It can't be less than five you do one and more than five you do the other, so if it's five what do we do?

MR. ORSINGER: It's Rule 4.

CHAIRMAN BABCOCK: Don't count the weekend.

Justice Hecht says it's complicated.

MR. KELLY: Doesn't that mean five days is always seven?

CHAIRMAN BABCOCK: Something like that.

MR. ORSINGER: It's "Saturdays, Sundays, and legal holidays shall not be counted for any purpose in any time period of five days or less."

HONORABLE SARAH DUNCAN: "Except Saturdays, Sundays, and legal holidays shall be counted for purposes of three-day periods in Rule 21 and 21a, extending other periods by three days when service is made by registered or certified mail or by telephonic" --

MR. ORSINGER: So if we adopt a five-day rule and not change Rule 4 then --

MR. HAMILTON: You don't count Saturday.

MR. GILSTRAP: No, you do.

HONORABLE SARAH DUNCAN: You do.

MR. HAMILTON: I mean, you do.

HONORABLE JAN PATTERSON: The court reporter is having trouble. It's late in the afternoon.

MR. ORSINGER: She's not having as much trouble as the lawyers. This is the math part that's so difficult.

CHAIRMAN BABCOCK: Well, you had it smoked a minute ago.

MR. GILSTRAP: Well, Chip, why don't we amend the motion to say five days, but you don't count the weekends and we can change Rule 4 in the process?

MR. ORSINGER: Well, that makes it a seven-day rule. So, I mean, is that going do fool anybody here?

MR. GILSTRAP: Uh-huh.

CHAIRMAN BABCOCK: Well, I propose since Judge Sullivan advanced 10 days, I think that's what we ought to vote on first. Now, the question is whether 10 days is going to include or exclude the weekends, and I think under the current rules it would include the weekends.

MR. ORSINGER: Yes, sir, it would.

HONORABLE NATHAN HECHT: Unless the last day falls on a weekend or a holiday.

MR. GILSTRAP: If you give notice on a

Friday then you're going to have two weekends to add to this, Thursday also.

CHAIRMAN BABCOCK: Yeah, Alistair.

MR. DAWSON: I think as people are contemplating the appropriate number of days, remember, part of the reason to do this is to have responses if they are going to be filed, filed in Judge Sullivan's proposal three days before the hearing, which I think is a sensible amount of time. If you have a five-day rule, that means you've got to file your response two days after you get the motion, and I don't think that's a reasonable amount of time, but as people think about these time frames I think we should keep that in mind.

CHAIRMAN BABCOCK: Yeah. Yeah. Good point. Anybody else? All right. Let's -- yeah, Justice Patterson.

HONORABLE JAN PATTERSON: I'd love to have the lawyers thoughts on this, but we have trouble getting appellate briefs filed in advance of argument day and by a date certain, and I would find it very hard to believe that that's a practical thing to do in district court to file three days before. As Richard suggested, I think it's not practicable in most types of cases to always have it filed three days in advance.

CHAIRMAN BABCOCK: Alex.

PROFESSOR ALBRIGHT: If you're requiring three days in advance then that doesn't count weekends; is that right? So really it could be six days in advance? I mean, once you throw the three days in there then you change your rule.

MR. ORSINGER: Chip, my ultimate proposal would be five days with no advanced filing requirement on a response.

CHAIRMAN BABCOCK: Well, okay. If Judge Sullivan wants you to yield on that then he can --

MR. ORSINGER: If we're going to have a three-day filing requirement for a response then you just about make five days unworkable.

CHAIRMAN BABCOCK: Okay. Everybody who is in favor of 10 days as proposed by Judge Sullivan, the head of your subcommittee's attention to this proposal, everybody who is in favor of 10 days, raise your hand.

All opposed? Whoa, a close one today. The 10-dayers win 14 to 13, with the chair not voting.

MR. GILSTRAP: The chair should vote.

MR. ORSINGER: You vote to make the tie, not to break a tie.

CHAIRMAN BABCOCK: I don't vote to make a tie. I vote to break a tie, so 14 to 13. Judge Sullivan.

HONORABLE KENT SULLIVAN: Just a quick

comment. My thought about the 10 days, any time period picked is, of course, by its very nature somewhat arbitrary; but my thought is, as Alistair pointed out, is it was about the minimum amount of time by which you could set up a timetable for the filing of a response.

CHAIRMAN BABCOCK: Kent, you know you won, right?

MR. ORSINGER: But the response deadline is under attack, so he's protecting that.

HONORABLE KENT SULLIVAN: And my thought was, is that we should structure the rule or the essence of the proposal in terms of calendar days, in terms of responding to the point made previously; and on clarity, if we need clarity on that point then we should do so.

CHAIRMAN BABCOCK: All right. So we're at 10 days now, and now what about the response? The proposal is to do it three days before the hearing. What's everybody else think about that? Yeah, Shannon.

MR. RATLIFF: Can I ask a question? Is the idea that you are -- it is mandatory that you file the response?

MR. DAWSON: No.

HONORABLE KENT SULLIVAN: No, in fact --

MR. RATLIFF: Or if you are going to file a response --

HONORABLE KENT SULLIVAN: I think if desired, any desired response.

MR. DAWSON: That's right.

HONORABLE KENT SULLIVAN: There is no intent to require paper work.

MR. RATLIFF: That's all I would --

CHAIRMAN BABCOCK: All right. Carl.

MR. HAMILTON: Well, I don't know of any judge that's going to not consider your response if you file it on the day of the hearing, and if there is no penalty for not doing it here then the judge is probably going to consider it just like he would an oral presentation, so I don't know that it really accomplishes a lot to have that requirement in the rule.

CHAIRMAN BABCOCK: Okay. Yeah, Lamont.

MR. LAMONT JEFFERSON: One other thing that strikes me about having a deadline for a response is if you have the deadline, you're going to have a response.

MR. AGOSTO: To a reply.

MR. LAMONT JEFFERSON: If a lawyer sees that there is a deadline, if you see there is a deadline for a response, you're going to put one together and make sure you beat the deadline. So you're encouraging -- when otherwise you might not file a response, but knowing that if you don't you waive it, you're going to file a

response.

CHAIRMAN BABCOCK: Richard. Back in the count again, are you?

MR. ORSINGER: I want to be clear. If I want to file a brief discussing cases, I have to file that three days in advance, but if I just bring the cases to the hearing I can give them to the judge and argue them and the other side won't know about them until -- and the Court won't know about them until the hearing. I can do that, right?

CHAIRMAN BABCOCK: You can do that today.

HONORABLE LEVI BENTON: Yes.

MR. ORSINGER: There is no -- there is no provision here that I can't make a written response at the time of the hearing. We're about to adopt that for the first time, and I want to be sure what's included in a written response. You know, I mean, if I have -- I want to file some written objections, I guess they have to be filed three days in advance, but I can make them orally or I can make an oral motion to strike a setting or oral motion to quash or I can bring the cases to the hearing and that's okay, but if I want to say anything in writing about them I have to do that three days in advance.

I want to be clear because everybody is assuming that there's no response required, but I don't

want somebody saying that you can't bring your cases here because they're in writing and show them to the judge, they had to be filed three days in advance, which somebody is going to make that argument.

CHAIRMAN BABCOCK: Okay. Justice Gaultney.

HONORABLE DAVID GAULTNEY: Well, the reply is filed for its persuasive effect, and the concept is that the judge is going to take it and read it at some point. The disadvantage to the movant is if it's filed the day of, is that they don't get to read it; and so I think the advantage of having the deadline, if you're going to file something in writing for persuasive effect on a judge, is that the movant at least have notice of that.

CHAIRMAN BABCOCK: Yeah.

MR. ORSINGER: Does that include copies of cases?

HONORABLE DAVID GAULTNEY: I would not interpret it to include copies of cases. I would interpret it to include a document like a brief or reply that's intended to have persuasive written effect to gather your written arguments together so that at least the other side has notice that that's the presentation they made.

CHAIRMAN BABCOCK: Okay. Yeah, Justice

Gray.

HONORABLE TOM GRAY: Are you going to be able to argue at the motion -- the hearing, things that aren't raised in a reply? I mean, are we going to summary judgment practice here on motions?

CHAIRMAN BABCOCK: So if you didn't file a written response, you would be limited in what you could argue?

HONORABLE TOM GRAY: I mean, can you only argue that the other side's grounds for the motion are ill-founded, or can you argue other reasons not to grant their motion? In other words, right now in response to a summary judgment, if you don't file any response you're limited to defeating the grounds that the motion is argued on. Is that where we're going here? I mean, I hope not, but that sort of sounds like the drift.

CHAIRMAN BABCOCK: Judge Sullivan.

HONORABLE KENT SULLIVAN: That's -- you know, that's not the intent, and in both situations you would have precisely the same record before the court. In that regard I see it as no change whatsoever. In other words, if someone has decided not to file a response, it doesn't matter what the timetable is. They have no response on file at the time of the hearing, and so the record in terms of the written record is identical.

HONORABLE TOM GRAY: So why change the rule at all?

HONORABLE KENT SULLIVAN: Because I think that as a practical matter there are many people who know from the very beginning that they intend to file a written response; and it is helpful, I think, and more efficient if there is a timetable for the response; and I think that a judge can probably at least raise the level of expectation that if this is a serious matter, if it's going to involve some request for a significant amount of time, for example, from the court, that someone file their written response in advance so that the court can be ready and the other side can be on notice of what's going to be before the court.

CHAIRMAN BABCOCK: Okay. So --

HONORABLE KENT SULLIVAN: I don't think it's going to change routine motion practice at all, routine in the sense that it is essentially unopposed or some matter for which the parties are largely in agreement as to the timetable for the hearing or otherwise.

CHAIRMAN BABCOCK: Justice Gaultney.

HONORABLE DAVID GAULTNEY: You know, I think an argument was made earlier about, well, we've had this three-day rule forever. Well, that's true. Our practice has changed over the years, though. You know, there is

more discovery, there is more motion practice, more so than, I'm told, in the days where you would just go down there and try your lawsuit.

Well, as a result a lot of the litigation is resolved in motion practice, and so I think that if there is going to be -- I think there is in most cases going to be a reply filed. The only question is, is the movant going to be able to read it before the hearing, and I think the proposal that Judge Sullivan has has the added advantage of not only moving back the time, but providing a process by which that reply will be served timely on the opponent so they don't -- so they know what's being argued.

CHAIRMAN BABCOCK: Okay. Yeah, Jim.

MR. PERDUE: The one -- I don't know if it's a friendly amendment, but the one -- I do get concerned about the concept of waiver, that a failure to file a response or a timely response somehow waives an argument or something that could be presented to the court at hearing, and I would rather than just trusting the intent like to see something explicit in any final version, just something that -- a concern that I raise.

HONORABLE KENT SULLIVAN: That's careful.

CHAIRMAN BABCOCK: Yeah. Richard, then Lonny.

MR. ORSINGER: I'm curious whether this rule will apply to motions for continuance. Is this going to require that a motion for continuance be filed 10 days in advance of the hearing that you're trying to continue?

CHAIRMAN BABCOCK: Well, it says, "except as otherwise provided in the rules."

MR. ORSINGER: Well, the motion for continuance rule, I don't think, has any kind of exemption from timetables, does it?

CHAIRMAN BABCOCK: It's seven days, isn't it? Justice Bland.

HONORABLE JANE BLAND: I think it would apply unless you filed an emergency motion for continuance, we're going to have to say, because the most common emergency motions I think any trial judge sees.

CHAIRMAN BABCOCK: Lonny, sorry. I went out of turn, but Justice Bland looked urgent.

PROFESSOR HOFFMAN: I wonder whether imposing a three-day in advance response requirement will have a disincentive on the filing of responses because the lawyer filing the response will be afraid that that will then give an opportunity to the movant that doesn't exist now to file a reply because they'll have three more days to do it, which will have the effect of, one, increasing loads of paper and fees in a case.

It is true it may also lead to better briefing, though I've always wondered why you wouldn't have put all your best arguments in your motion to begin with, but I think we probably shouldn't doubt that this could have that strange perverse effect. So although I voted for the additional time on the filing at the front end, I would be concerned -- I am concerned about adding time on the response.

CHAIRMAN BABCOCK: Richard.

MR. ORSINGER: I've looked at Rules 251(2) and (3), and I don't see that there is any special timetable for motions for continuance. I can tell you in my practical experience that many people request a continuance for the first time on the day of the hearing, and often they do it orally, but, of course, an oral motion for continuance is not reviewable on appeal, so it seems to me like the motions for continuance are going to have to be filed 10 days in advance of hearing now, and I can see a potential trap here.

If somebody serves you with a note with the hearing at 5:00 o'clock p.m. for a 9:00 a.m. hearing 10 days later you can't file your motion for continuance 10 days in advance of the hearing on their motion. So we've got to make it clear that you are not precluded from filing a motion for continuance simply because you don't

have 10 days notice to do it.

I, furthermore, think as a matter of policy we shouldn't require a motion for continuance to be filed in advance at all, because frequently the real problem -- okay, well, over in Buddy's neck of the woods in Beaumont you can file continuance during trial, but that's not in a rule. That's just their decision, but anyway, I think we should not require a motion for continuance to be filed so many days before a hearing or a trial. So if we go with this I think we ought to except motions for continuance.

CHAIRMAN BABCOCK: Carl.

MR. HAMILTON: I agree with Richard. There is another problem, though, on the three days. The way this is worded it says "shall be served on other parties three days before the hearing" and under the service rules that could be by mail, so they're still not going to get it in time for the haering.

MR. ORSINGER: But you add three days. If your only service is by mail, under Rule 4 you have to add three days to the advance notice, so that's six days. Am I not right?

HONORABLE TOM GRAY: You add three days to when the -- under the mailbox rule it's served when it's dropped in the mailbox.

MR. DAWSON: Right.

HONORABLE TOM GRAY: If there is a response due then you add three days in which to give them to respond.

MR. ORSINGER: If you are giving somebody three days notice of a hearing and that notice is served by U.S. mail, you must give them six days notice of the hearing.

CHAIRMAN BABCOCK: Justice Duncan.

HONORABLE SARAH DUNCAN: Well, my understanding of what we're doing here is deciding discrete issues.

CHAIRMAN BABCOCK: Right.

HONORABLE SARAH DUNCAN: We're not deciding to adopt this language of the rule; is that correct?

CHAIRMAN BABCOCK: We're -- I was --

HONORABLE SARAH DUNCAN: The proposed language?

CHAIRMAN BABCOCK: -- hoping we were talking about three days --

HONORABLE SARAH DUNCAN: Because I still think the exception that's in that little box labeled "deleted" still needs to be in the rule, so I'm not agreeing to this language.

HONORABLE KENT SULLIVAN: I mentioned that up front.

HONORABLE SARAH DUNCAN: I know.

HONORABLE KENT SULLIVAN: I stated that.

HONORABLE SARAH DUNCAN: I know, but I just wanted to clarify with the chair what we're doing here. We're voting on discrete issues --

CHAIRMAN BABCOCK: Right.

HONORABLE SARAH DUNCAN: -- as the chair raises them.

CHAIRMAN BABCOCK: That's what I was hoping we were doing.

HONORABLE SARAH DUNCAN: Okay.

CHAIRMAN BABCOCK: And this issue is whether or not we require any desired response, that is you don't have to file one, but if you're going to file one it's got to be three days before the hearing. That's what we're talking about, right? You don't have to do it, but if you're going to do it, it has to be three days before the hearing.

MR. ORSINGER: Yeah. If you define a motion for continuance as a response instead of a motion then you can file your motion for continuance up to three days before the hearing rather than 10 days before the hearing. Even though it's called a motion, if you consider a motion for continuance the response.

CHAIRMAN BABCOCK: Why do I have this strong

thought that you have got to file a motion for continuance seven days before --

MR. ORSINGER: It's not in the rules.

CHAIRMAN BABCOCK: Yeah, I can't find it.

MR. ORSINGER: Yeah, it's not there.

CHAIRMAN BABCOCK: Maybe it's a local rule. Yeah, Frank.

MR. GILSTRAP: All right. Richard, will you clarify? You're saying that if I have to file a response three days before the hearing and I want to file it by mail I have to put it in six days ahead?

MR. ORSINGER: That's what Rule 4 says. Guys, come on, I have been practicing law 30 years. No one has ever questioned that. Tommy, what do you think? If you give notice of a hearing by mail only --

MR. GILSTRAP: No, I'm not giving notice of the hearing. I'm filing a response.

MR. ORSINGER: Oh.

MR. GILSTRAP: See, and that's not notice.

MR. ORSINGER: All right.

MR. GILSTRAP: And I don't think it adds.

MR. ORSINGER: Since we don't have a response requirement for motions, and I don't think there's case law on that --

MR. GILSTRAP: That's what I'm saying.

That's what we're talking about, is do we have a three-day response, period. And if -- since we're not giving anybody notice, we're just filing a response, if you do drop it in three days ahead of time by mail I think you have met the three-day response requirement. Now, and that's a problem, because the other side is not going to get it, and that's the whole point of filing responses, I understand, is so they will get it. I mean, what they do is they will take it to the judge and then mail it to the other side.

MR. ORSINGER: It says under Rule 4 "in computing in any period of time prescribed or allowed by these rules." It doesn't say that it's just for motions. So if we for the first time create a response deadline then we have to apply Rule 4 to the response deadline, so it seems to me that if the deadline is three days before hearing and you do mail then you're going to have to add the three days, meaning you mail it six days before the hearing.

PROFESSOR HOFFMAN: When you file your response to the summary judgment motion, which has to be seven days before the hearing, I think I agree with Richard, if the way you read that is if you do it by mail that response actually has to get to them 10 days.

MR. ORSINGER: And by fax also, I might add,

which hopefully we're going to knock that in the head today.

CHAIRMAN BABCOCK: We're doing that today?

MR. ORSINGER: We've got to.

CHAIRMAN BABCOCK: We've got to?

MR. ORSINGER: Yeah, because if we don't -- if you don't, to address the problem of the interstate practitioners. If everybody has got a fax or a mail they can't hand-deliver something across the state in 30 minutes, so at some point we've got to deal with this fax rule and realize that faxes are contemporaneously delivered.

HONORABLE TOM GRAY: Hold that thought while we change the tape. This is my designated job today.

MR. HAMILTON: Is the failure to file a written response subject to any kind of objection on the part of the movant that the court shouldn't consider it because it wasn't timely filed?

CHAIRMAN BABCOCK: Say that again, Carl. I'm sorry.

MR. HAMILTON: Can the movant object to the failure to file a written response within three days?

MR. ORSINGER: If you try to file one on the day of hearing --

MR. HAMILTON: Yeah.

MR. ORSINGER: Obviously you're in violation of the Rules of Procedure, but then if you just make your argument orally you're not in violation of the Rules of Procedure.

CHAIRMAN BABCOCK: If the nonmovant tries to file something in writing on the day of the hearing the movant can say, "Judge, I object, because the rule quite plainly says you shall do it three days before the hearing and he hasn't done that," at which point the judge is going to say one of two things. "Well, I'll grant him leave to do it," or "We'll just continue this thing for another three or seven days and then we'll get it all straight."

MR. ORSINGER: No, some of them will deny you that right.

CHAIRMAN BABCOCK: And that's another possibility. "No, you can't file your response, but I'll listen to you, so read it to me."

MR. ORSINGER: This is all going to lead to an argument that it should have been made in writing and it wasn't made in writing so you shouldn't be able to make it orally at the hearing. That's what this is setting up. You just wait for the briefs to come, Judge.

CHAIRMAN BABCOCK: Okay. Bobby.

MR. MEADOWS: I think I'm against having a

due date for the response. I think there are just too many problems with it. I think extending the time, too, is probably a good idea. It facilitates a better practice of getting things on file with the court and in the hands of the other lawyer and a suitable time to go a good job. So I like the idea of extending the time, but I'm opposed to a due date for the response.

CHAIRMAN BABCOCK: Judge Benton or Judge Sullivan, isn't there a local rule in Harris County that requires responses three days before a hearing?

HONORABLE LEVI BENTON: I believe so, and I think the local rules there say that the failure to file a response might be -- may be regarded as no opposition.

HONORABLE KENT SULLIVAN: But this is the written submission rule.

HONORABLE LEVI BENTON: Yeah.

HONORABLE KENT SULLIVAN: In other words, for disposition of --

MR. ORSINGER: I think you just said that if you don't file a written response you default on the motion?

HONORABLE LEVI BENTON: No. That's not what I said.

MR. ORSINGER: Oh, what did you say?

MR. LOW: As no opposition.

MR. ORSINGER: No opposition, what does that mean?

HONORABLE LEVI BENTON: The local rule says something like "the failure to file a response" -- "The trial court may consider the respondent's failure to file a response as an indication of no opposition."

But I want to say something else. In response to what you have been bantering about today and what Bobby just said, you know, you don't file a response, you show up, you argue. The other side is going to say, "Well, no, they can't do that because they filed a response," and my response from the bench to that is, what, seriously do you think the court of appeals is not going to consider the law that's out there even though there is no response filed? I'm sensitive to your concerns about a requirement for the response, but the rule should address it somehow, either by way of footnote because it's just such a disservice to the bar and bench not to urge people to be professional and to put the other side on notice of what their arguments are.

That's all this is about, and, you know, you talked about the efficiency. There is another party -- there are some other folks affected by this inefficiency of not filing the response and -- the motion, the response, and the notice timely. The parties that are

affected are those parties who could not get a hearing that date because your motion was set.

MR. MEADOWS: Well, I agree that it's best practice, and I think allowing additional time to file a response accommodates that best practice, but I think just this discussion here at 4:00 o'clock on Good Friday seems to me that it's pretty common that it's sorting out this whole business about a precise due date for response and everything that goes into filing it, how it gets filed, and consequences of it.

So, you know, again, I think it's a good idea. If you've got a response that you want to have considered by the judge at the hearing you ought to file it three days in advance of the hearing, but I don't think you ought to be prohibited from making an argument or handing up cases or --

HONORABLE LEVI BENTON: Right. I agree with that, because if I grant relief the court of appeals is not going to ignore the law that wasn't urged in some brief that was timely filed, but you know, if we fail to address it, we -- the current practice of handing it to the court the day of the hearing will just continue to persist.

MR. MEADOWS: Well, maybe we ought to impose upon ourselves the same thing that we are requiring of the

process servers, and that is aspirational goals.

HONORABLE LEVI BENTON: I'm fine with that. I think I'm fine with that.

CHAIRMAN BABCOCK: Nina.

MS. CORTELL: If we extend the period of time before the hearing and do not provide a due date for the reply then we have prevented ambush by the movant but we have allowed ambush by the respondent, and that doesn't seem to me to be very fair, so, I mean, I would almost undo my vote if we don't have some kind of protocol here, and I agree there shouldn't be waiver, and I agree it doesn't waive the right to bring cases to the attention.

The other point, I think, I'm pretty sure the new local rules in Dallas require this now.

CHAIRMAN BABCOCK: I think so, too.

MS. CORTELL: We have a requirement that the response must be on file I think two or three days before the hearing. It might be two days.

CHAIRMAN BABCOCK: Yeah. Judge Benton points out that in Harris County there has been -- although it's changing a submission docket so that it's done on the papers, but Dallas has always had an oral document.

HONORABLE JAN PATTERSON: So you would vote against 10 days, Nina?

MS. CORTELL: Well, I would if we don't do this. I had thought the whole idea was to set up a protocol for notice before hearing and then notice of the response. I mean, I sort of voted for it all together.

MR. MEADOWS: Well, Nina, if you don't actually change your vote and just pull it down you'll require Chip to vote.

MS. CORTELL: I will say the other reason it's hard to use the Federal court as the paradigm is because often you don't have hearings, and you know that if you don't get something written in that you have waived your response basically.

CHAIRMAN BABCOCK: Judge Peeples.

HONORABLE DAVID PEEPLES: I think we're under the misimpression that the motion is always going to have a lot of law in it. There is no requirement I know of that the movant has to lay out the law. The movant is going to put out grounds and relief requested and might show up with his cases, too.

MR. GILSTRAP: Or with a written brief.

HONORABLE DAVID PEEPLES: People will show up with their law at the hearing, but if you've got to have grounds in writing that's going to have to be in the motion.

CHAIRMAN BABCOCK: Yeah, Frank.

MR. GILSTRAP: I think the judge is onto something there. I mean, you know, in a summary judgment motion you file your motion and then you show up. You can show up two days -- file a brief two days ahead of time. There is nothing that prevents that. I mean, you know, are we talking about a motion or a motion and a brief, because if it's just the motion, they can still show up at the hearing with a brief.

CHAIRMAN BABCOCK: Dallas County requires a brief on summary judgments now.

MR. ORSINGER: Well, you're not going to be filing your brief -- if this rule is adopted you're not going to be filing your brief on the day of the hearing.

MR. GILSTRAP: It says "motion."

MR. ORSINGER: No, the response. If your brief is --

MR. GILSTRAP: No, I'm the movant.

MR. ORSINGER: Oh, okay. All right.

CHAIRMAN BABCOCK: Pam.

MS. BARON: Well, I have some language to suggest that probably doesn't take care of the problem but it might. "If a respondent to a motion desires to submit a written response in addition to oral argument, such response must be on file three days before the hearing."

CHAIRMAN BABCOCK: What do you think about

that, Judge Sullivan?

HONORABLE KENT SULLIVAN: I think that's fine.

CHAIRMAN BABCOCK: Justice Bland.

HONORABLE JANE BLAND: Well, I'm a little concerned about this whole idea of waiver, because I think that if the trial judge rules for you and you're the respondent, then you're probably okay, but if the trial judge rules against you and you're the respondent, the first thing -- the first thing that many courts of appeals, including ours, you know, sort of fall back on, well, it wasn't waived? And, you know, I think that's a risk.

CHAIRMAN BABCOCK: The first thing I look at in my opponent's briefs in the appellate courts is is the word "waiver" in there.

MR. MEADOWS: Yeah, me, too.

HONORABLE JANE BLAND: That's too bad, but that certainly shouldn't be the intent of this, and so we probably need to say that.

MS. BARON: Well, I was hoping to finesse that with the language I suggested because it suggests that the written response is optional. It contemplates that you will have oral argument at the hearing and that if you have something in writing it should be there three

days before. That was kind of what I was trying to work around without having to get into the "W" word.

MR. PERDUE: I don't know that finesse does it when it comes to waiver, which is my concern, and second sentence to what's proposed saying "the failure to file a written response shall not be construed as a waiver of any argument that may be made" might solve what is really my explicit problem as far as a due date; but you know, we started this conversation about this rule being helpful for the judges or helpful for the lawyers and whether there is a lawyer perspective on it or a judge perspective on it; and there has been a lot of different perspectives on it; but, you know, from my -- the reason why extending the time line seems important from my perspective is it gives you the opportunity to do a response and it gives you an opportunity to get a response timely filed that the judge can see and an opportunity to get to the court, you know, with everything marshalled that you want to be able to have.

So that's why it makes sense from my perspective, and so to suggest that you're -- that by extending the time you are now essentially gaming it for the respondent, I think is exactly contrary to at least my perception of it, which is it is assisting the respondent in putting everything out to the court; and so the idea

that Richard has repeatedly kind of touched on from this idea of wanting to be able to show up and bring it, as long as you don't have a waiver issue I think that's provided for; but from best practices standpoint at least in my -- I want a written response, and I want it timely on file so that the judge can read it. That just seems to me to be from a lawyer's perspective the way you would want to practice.

CHAIRMAN BABCOCK: Judge Sullivan, then Alistair, and then Buddy.

HONORABLE KENT SULLIVAN: Just a quick comment. It was not my intent to change the law with respect to issues of waiver. In other words, there was no intent to inject anything new by way of this proposal. If indeed the unique circumstances of a particular motion imposed a requirement to file a written response for a face waiver, under this proposal the respondent is still in a much better situation than under a three-day rule.

That's -- again, that was in part my purpose. To the extent that the law would impose no requirement of any written response, that doesn't change, and the written record would be whatever it was before the court on the day of the hearing.

CHAIRMAN BABCOCK: Alistair.

MR. DAWSON: My suggestion is we decide

whether we're going to have a deadline for the filing of the responses and are we going to have it three days or some other day, and then once we've decided that then let the committee go back and draft what they think is appropriate to address all the issues between waiver and service and all this stuff and come back at the next meeting and present us with something and then we can start shooting at that.

CHAIRMAN BABCOCK: Buddy.

MR. LOW: All right. If we do go with a three-day response, what if that response is an affidavit? Then what about the one that filed the motion? The Federal rule does address affidavits. Does that mean they have -- how many days they have then to file a counteraffidavit? It doesn't address it at all. I mean, if you leave it like it is, then it means that's it. They couldn't file a counteraffidavit.

CHAIRMAN BABCOCK: Judge Sullivan.

HONORABLE KENT SULLIVAN: Under the current rule you're worse off. You've got three days, no time, no guidance.

MR. LOW: I didn't say worse off, but we're trying to get this thing right, and I'm saying we ain't there.

HONORABLE KENT SULLIVAN: Oh, okay.

CHAIRMAN BABCOCK: Okay. Yeah.

MR. RINEY: The idea that it is best practice to have the response filed three days in advance is based on assumption that the judge is going to have it, going to read it, and going to study it. I'm sorry, that's just not my experience in the majority of the cases in which I'm in front of the judge.

Most of the time, 80 percent of the time when you stand up and say, "Okay, what are we here about today," and my job as a lawyer, as a respondent, is to do what I think is most persuasive in response to the motion; and I'm telling you in front of some judges the most persuasive thing that I can do is stand up with the case with language highlighted in yellow, and I'm either going to win on that or I'm not; but if I have a response, particularly if it's filed in advance, I'm not going to win with some judges or I'm not as likely to win as I am with a case with something highlighted. In Lubbock County, and I'm not exaggerating one bit, I have filed responses -- I do file responses, depending on the judge, depending upon the motion. In Lubbock County if you file something and it's been about three days in advance, the judge says -- you say something about your response, and they're looking through the file and they go, you know, "If it's been filed in the last three or four days it's

not going to be in here yet."

And so it really -- I know we're trying to be persuasive, we're trying to be efficient, but it doesn't work that way in every court just to say it has to be filed three days in advance and we can't solve all those problems with a rule.

CHAIRMAN BABCOCK: Shannon.

MR. RATLIFF: Well, but it occurs to me that if you've got that situation then the judge is going to say, "Fine, haul off and give me the best thing you've got. I haven't read it before, I'll read it now." If you're in front of a judge who does read in advance of the hearing, I think most people would think you're not being a very good advocate if you've got a busy trial judge sitting there who says, "Why didn't you file this stuff three days before the hearing so I would have had a decent chance to look at it," you're going to break even.

If you put it in a way to guard against waiver, and I agree a hundred percent, let's don't turn this thing into a game about that, but if we can guard against the waiver, it seems to me that in the courts that don't read it, like Travis County, they not only ask you what the case is about, they ask what you're doing there, you know, because they get the files the day it's spun out on the docket.

So it's not going to help in terms of what a judge or -- it will help the advocate who has received the response who can be prepared to address it with the judge, but it seems to me the worst that happens is a judge says, "Well, I don't have it, so everybody take the best hold they've got and come on and I'll listen to it." If they do read it in advance you ought to be hopefully down the road looking at it, but I don't know, that's just me.

CHAIRMAN BABCOCK: Judge Benton.

HONORABLE LEVI BENTON: I was going to re-urge Alistair's suggestion that we take an up or down vote on whether we want a deadline on the response, and if that passes by a majority then we take an up or down vote on whether the sense of the body is three days or five days and then punt back to Judge Sullivan and Richard's subcommittee on language.

CHAIRMAN BABCOCK: Yeah. I think what I heard Kent and Pam agree on was some language that we could vote on. Are there too many moving parts in that language? You want to read it again, Pam?

MS. BARON: I think it could just go to the subcommittee and they could come up with something probably better.

CHAIRMAN BABCOCK: Okay.

MS. BARON: Would be my thought, but

something along these lines.

CHAIRMAN BABCOCK: So, Judge Sullivan, what do you want to vote on?

HONORABLE KENT SULLIVAN: I thought that was a good --

HONORABLE LEVI BENTON: I don't know that we have a sense of the body whether there is support for a deadline on the response, and so I thought maybe an up or down vote on that issue, because if the majority says no, game is over. There is no reason for the subcommittee to work on Pam's language, which I support and would urge everyone to vote for.

CHAIRMAN BABCOCK: I gotcha. Okay. So everybody who is in favor of having a deadline for a written response raise your hand.

MR. PERDUE: With the understanding there is no waiver?

CHAIRMAN BABCOCK: Right.

MR. DAWSON: Yes, no waiver.

CHAIRMAN BABCOCK: All right. All opposed?

All right. The no's have it by a vote of 14 to 11. So you saved Pam some time and trouble. All right. The final issue we've got to talk about on this rule --

HONORABLE NATHAN HECHT: Could I ask one

other question?

CHAIRMAN BABCOCK: Sure.

HONORABLE NATHAN HECHT: We've had some discussion about whether there are local rule requirements for responses, I think you said it was in Dallas.

CHAIRMAN BABCOCK: I think the Dallas rules require a brief on summary judgment. Maybe on other motions, too.

HONORABLE NATHAN HECHT: Is there a sense -- I don't want to -- I don't want to keep us from the other issue -- whether it's a good idea or a bad idea to let that be done by local rule? Because Tom says, well, you know, Lubbock County is this and Potter County is that and now we have Harris County saying, "Well, this is the way we do it," and is there an advantage or disadvantage to letting Harris County require a response by some deadline that, assuming it was fair, assuming it could be heard, is that a bad idea or a good idea?

CHAIRMAN BABCOCK: Justice Duncan.

HONORABLE SARAH DUNCAN: It's a bad idea.

HONORABLE LEVI BENTON: Great idea.

HONORABLE SARAH DUNCAN: I think it's a bad idea. We already have a rule that says you can't have a local rule that's in conflict with a Rule of Civil Procedure. We just voted to recommend to the Court that

there not be a deadline for filing a response. If the Court goes with that recommendation, there will be a conflict between something this rule doesn't say and the local rule, and that's -- that's going to set a lot of people up for getting their responses deemed untimely and not considered, and I always think that's a bad idea, which is why I voted against having a deadline for response. I think whatever anybody wants to say ought to be heard, to the extent practicable.

CHAIRMAN BABCOCK: Judge Benton.

HONORABLE LEVI BENTON: Well, we've already heard there is a great difference in the practice of judiciary across the state. I think most people who practice in Harris County find that more often than not the judge has read pending matters, although there are cases where we have not, and it's -- to prohibit us in Harris County from having such a rule only -- is just punitive to those folks in Harris County.

CHAIRMAN BABCOCK: Alex.

PROFESSOR ALBRIGHT: I voted against the response rule, and I don't agree with Justice Duncan that we voted that there should never be any response rule. I don't think we have given that dictum. I think we voted it shouldn't be in this rule. I think it's probably a good idea to have local rules with response rules because

the practice is so different in different counties.

We've already heard that in some counties you can't get a hearing for two or three weeks and then it's reasonable then to require a response three days before, but you know, I think every place is different and there are different kinds of practice. I think practice in little bitty counties is very different from Dallas and Houston, and I think sometimes we tend to think about practice as in Dallas, Houston, Austin, San Antonio, big cities, and there are some places that practice very efficiently in a very different way.

CHAIRMAN BABCOCK: Justice Duncan.

HONORABLE SARAH DUNCAN: And if all the local rules were collected, you know, the project that never came to be, if all the local rules were collected and published somewhere, I think that would be fine. The problem is they're not, and they are sometimes very difficult to get; and as we've all agreed today in expanding 3 days to 10 days, the practice around the state is more and more a statewide practice, more and more involves lawyers from out of state; and those lawyers are going to be caught by local rules that are different from the Rules of Civil Procedure.

So if somebody wants to take on the project that Luke and Elaine took on 20 years ago to collect all

the local rules and publish them, that would be great.

HONORABLE LEVI BENTON: West actually now has a separate publication on local rules.

HONORABLE KENT SULLIVAN: Right. They are published.

MR. ORSINGER: How comprehensive is it?

HONORABLE KENT SULLIVAN: And the other issue is that the local rules are submitted to the Supreme Court for approval, so if a Rule of Civil Procedure is silent and you have a local rule that speaks to some issue on which the other applicable rule is silent, it's a rule that -- absolutely it's the case.

CHAIRMAN BABCOCK: Richard.

HONORABLE KENT SULLIVAN: You have deadlines now with respect to local rules that apply. I mean, I don't think there is any doubt about them. They have been approved by the Supreme Court, and they are not inconsistent with the Rules of Civil Procedure.

CHAIRMAN BABCOCK: Justice Duncan.

HONORABLE SARAH DUNCAN: I think that's not an accurate interpretation of what the Supreme Court does in the approval process, but I'm not involved in that process, so I will just say that there have been --

HONORABLE KENT SULLIVAN: I defer to Justice Hecht on that.

HONORABLE SARAH DUNCAN: -- local rules that conflicted with Rules of Civil Procedure ever since the second year I started practicing law 18 years ago.

The publication of the local rules by West, does that cover all the counties of Texas? That's been the problem.

MR. KELLY: I just got it. I'm pretty sure it covers every county that's got local rules. I'm going to have to put a footnote on that because I haven't looked at it in a long time.

HONORABLE SARAH DUNCAN: But it's never been -- it hasn't been a terrible problem to get the local rules of Dallas County, Harris County, Bexar County. Bexar County has been tough at times, but to get all of the local rules in all of the counties in which a lawyer might be practicing has been difficult; and if there is such a publication, great, I don't have a problem with it.

CHAIRMAN BABCOCK: Pam.

HONORABLE SARAH DUNCAN: A local rule.

CHAIRMAN BABCOCK: Pam.

MS. BARON: Well, you know, I guess when I -- on the 10-day rule, moving it to 10 days is a long time given that there is no requirement that a reply be on file. I mean, I think we're voting on things separately that are connected and that 10 days may be too long if

there is no obligation on the respondent in the motion to do anything in those 10 days, so we're slowing things down but not making an improvement on the back end.

CHAIRMAN BABCOCK: Both votes were close.

MS. BARON: Right. I'm just saying that they are connected, and we voted separately.

HONORABLE TOM GRAY: Does that mean you'll change your vote, too, if we go back and revote on the first one?

MS. BARON: Yeah.

HONORABLE TOM GRAY: So we would be back to the three-day rule, and I have got Nina and you, and we're looking good now.

CHAIRMAN BABCOCK: No, we --

MS. BARON: I would want to vote on a seven-day rule.

MR. SCHENKKAN: Seven days without a reply or 10 days with a reply. Those are really the two choices.

MR. JACKS: Five as well. Don't forget five.

MR. SCHENKKAN: No. Five is -- because of the rule on counting doesn't really mean five.

MR. JACKS: It was five because of the three-day reply rule.

MR. DAWSON: There was no traction for five.

HONORABLE DAVID PEEPLES: However these votes come out we will come back another time and see something drafted, see some language before we vote finally, will we? I'm going to insist on that.

Let me say this. What we're talking about pervades all of civil litigation. This is one of the most important things we've done recently in terms of the day-to-day practice, and to just vote on a bunch of disconnected votes and not see the final product and how it looks I think would be utterly irresponsible. We need to send this back to the committee with some direction, let them draft something, think it through, and bring it back to us.

CHAIRMAN BABCOCK: Okay.

HONORABLE DAVID PEEPLES: I strongly feel that way.

CHAIRMAN BABCOCK: Kent.

HONORABLE KENT SULLIVAN: Mr. Chairman, what about coming up with two alternatives and let all of the -- the expert draftsmen take a crack at those two, one with some contemplation of a response deadline and one without, and try, you know, to get two alternatives that are of the highest quality that we can obtain.

CHAIRMAN BABCOCK: Okay. I think that's a

good idea, Judge. Let's take a vote on what Justice Hecht was asking about, which is should this -- should this be a matter of a statewide rule or should it be -- or can it be left to the individual counties by local rule? We know how Justice Duncan and Judge Benton feel, but how does everybody else feel?

MR. GILSTRAP: Local rules to do what?

MR. SCHENKKAN: You're talking about local rules on the response only?

CHAIRMAN BABCOCK: On the response, right. Local rules on the response.

MS. CORTELL: Well, but wait a minute.

MR. DAWSON: As currently drafted you mean?

MS. CORTELL: Yeah.

MR. DAWSON: Or without taking into consideration what's being proposed? Under our current system is it okay to do it locally versus --

CHAIRMAN BABCOCK: Yeah. Current system.

MR. MEADOWS: I guess the question assumes that there's not a statewide rule calling for a response day. That's the foundation for it.

CHAIRMAN BABCOCK: That's true.

HONORABLE DAVID PEEPLES: I'm interested in knowing if these local rules can create waiver. I mean, it's one thing for the local people to say, "We strongly

urge you to get your responses in. If you want the judge to read them, get them here in three days," but for that to be a waiver situation is a little different.

HONORABLE DAVID GAULTNEY: I think it's extremely problematic to have a general rule applicable throughout the state, have a local rule that requires a response, and then on top of that have a waiver possibility. I think you've got a problem.

CHAIRMAN BABCOCK: Nina.

MS. CORTELL: At least the way it's worked in Dallas so far is no one has urged this has a waiver ground, and it has allowed the judiciary to exercise some control over hearings and get the responses in; and I think the Dallas judiciary is to be commended for this because we have a lot of judges who, unlike some of the stories we've heard today, are committed to reading everything before you get down there; and this allows them to do that.

So if we did not have a statewide rule, which I am in favor of, but if we did not and you had local judiciary that wanted to try at least to move that direction to allow them to be better prepared for the hearing without waiver consequence, I think it should be lotted and enforced and allowed.

CHAIRMAN BABCOCK: Judge Sullivan, then

Frank, and then Tommy.

HONORABLE KENT SULLIVAN: Very quick clarification as to the Harris County rule that we discussed earlier. The Harris County rule that's been referenced is a rule for the written submission docket. That is, when the movant does not contemplate an oral hearing for the motion, the motion must be on file 10 days in advance of the submission date. If the submission date is on a Monday and the response is due the Wednesday prior to the submission date, and the failure to file a response -- and this is in the rule -- can be taken as a statement of no opposition.

CHAIRMAN BABCOCK: Okay. Frank and then --

MR. GILSTRAP: Aside from that particular provision and aside from the summary judgment rule, when is the failure to file a response under the Rules of Civil Procedure a waiver? I don't know the answer. I can't think of any instances.

MS. CORTELL: Summary judgment.

MR. GILSTRAP: Summary judgment, yes, we know that.

MR. ORSINGER: What about venue transfers? What about venue transfers? Don't have you a deadline to respond?

MR. GILSTRAP: Okay. And if you don't file

a response what happens?

MR. ORSINGER: I think you make your venue --

HONORABLE SARAH DUNCAN: You have to deny --

MR. GILSTRAP: Okay.

HONORABLE SARAH DUNCAN: Specifically deny venue facts.

MR. GILSTRAP: So there are some instances we should have to say, "I don't want this to be done. Are you waiving," right? But in other -- aside from that if you don't file a response you don't waive, right? I'm just trying to get a feel for it.

MR. JACKS: Well, in answer to Justice Hecht's question, it does seem to me there is good reason to have this done by local rule. As Shannon has pointed out, here in Austin a three-day response wouldn't mean much in almost all cases that are on the central docket. The same is true in Bexar County, and I gather the same is true in Lubbock, but -- and so I think it makes a lot of sense to have it done by local rule.

CHAIRMAN BABCOCK: Justice Patterson.

HONORABLE JAN PATTERSON: I think the only reason to have a reply is for notice to the opponent. That way you have your met issue, and there is no ambush at that point because the practices among the judges vary

so much as to who prepares and who doesn't, and it would seem to me if you have judges who prepare and who read things in advance there would be an incentive to get the response there so that they would not be reading only the motion and initial brief, but I think for notice to lawyers that that's the main role of that response, whichever way we go.

CHAIRMAN BABCOCK: Okay.

HONORABLE SARAH DUNCAN: Take a vote on Judge Peeples' proposal.

CHAIRMAN BABCOCK: I don't remember what Judge Peeples' proposal --

HONORABLE SARAH DUNCAN: Local rules are fine as long as they don't involve any waiver. I think probably everybody in here would agree with that. Maybe not, but probably.

CHAIRMAN BABCOCK: Okay.

HONORABLE SARAH DUNCAN: Isn't that pretty much your proposal, David?

HONORABLE DAVID PEEPLES: Yes. I think it's fine for local judges to encourage and to strong-arm people to file things beforehand, but I have got a problem if you waive rights by not getting it done.

CHAIRMAN BABCOCK: Yeah, Pete.

MR. SCHENKKAN: And it seems to me what we

want on that is "except as otherwise provided by law there is no waiver by not filing this response." Now, there are sometimes when it is specifically provided by law. We just had some help here calling my attention to the venue deal. You don't have to file any response to the venue challenge unless you plan to challenge the venue facts, in which case there is a deadline. There is a response required for that.

You can see how that would interact with this rule, and then the Harris County written submissions is another example, so unless otherwise provided by law the rule would be this response deadline if we ultimately wind up with some people changing their minds and it is not waived.

CHAIRMAN BABCOCK: Is there consensus on that, that putting aside the waiver issue or otherwise required by law that local rules are okay, given --

HONORABLE SARAH DUNCAN: If there is no waiver.

CHAIRMAN BABCOCK: If there is no waiver, right. Consensus on that? Anybody disagree with that? Okay. Well, there's your answer on that.

MR. ORSINGER: You're talking about local rules in the absence of a statewide rule.

CHAIRMAN BABCOCK: Yeah. I'm talking about

the situation as it exists today.

MR. LOW: But when it says it shall be deemed as no opposition, is that waiver? I don't know what a waiver is.

MR. ORSINGER: That is a waiver for the written submission docket.

MR. LOW: That's -- but then Judge Benton says it's not, that they go ahead.

HONORABLE JAN PATTERSON: Seems like waiver to me.

CHAIRMAN BABCOCK: Anybody that practices in Harris County and wants to contest a motion and doesn't file a written response on a submission docket case is nuts. And I hope I never forget.

MR. DAWSON: Be sure that's in the record.

MR. ORSINGER: They're going to read that to the jury in open court.

CHAIRMAN BABCOCK: All right. The only other issue -- and let's just talk about it really briefly, if anybody has got anything to say about it since we're sending our people back to draft, and that is this part that Judge Sullivan is talking about before, "upon written motion and leave of court for good cause shown it can be less than 10 days." How do people feel about that?

MR. LOW: That language I'd rather just be

"order of the court" rather than putting the good cause --

CHAIRMAN BABCOCK: You're an "order of the court" guy.

MR. LOW: -- like the Federal rule.

CHAIRMAN BABCOCK: Anybody else have any comments on that?

HONORABLE SARAH DUNCAN: I'm an "order of the court" guy.

CHAIRMAN BABCOCK: Excuse me?

HONORABLE SARAH DUNCAN: I'm an "order of the court" guy.

CHAIRMAN BABCOCK: Justice Duncan is an "order of the court" type person. How many people would prefer that rather than say "a motion for good cause shown," pick up the language from the current rule and the Federal rules that just says "shorten by the court" or "order of the court"? How many people in favor of that?

MR. JACKS: I think Judge Sullivan may accept that as a friendly amendment.

HONORABLE KENT SULLIVAN: Yeah, that's fine. I don't care.

CHAIRMAN BABCOCK: Opposed?

Okay. So when you guys are drafting you now know that by a 22 to 0 vote, the chair not voting, "the order of the court" is preferred by this committee.

So that concludes our fun day, and when Hugh Rice Kelly said we can't possibly spend a whole day talking about all of these things, you've been proven wrong on that.

MR. KELLY: I have been proved wrong.

CHAIRMAN BABCOCK: Thank you very much.

(Meeting adjourned at 4:45 p.m.)

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CERTIFICATION OF THE MEETING OF
THE SUPREME COURT ADVISORY COMMITTEE

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I, D'LOIS L. JONES, Certified Shorthand Reporter, State of Texas, hereby certify that I reported the above meeting of the Supreme Court Advisory Committee on the 14th day of April, 2006, Friday Session, and the same was thereafter reduced to computer transcription by me.

I further certify that the costs for my services in the matter are $1,884.00.

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

Given under my hand and seal of office on this the 3rd day of May, 2006.

D'Lois L. Jones

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