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MEETING OF THE SUPREME COURT ADVISORY COMMITTEE

May 14, 2011

(SATURDAY SESSION)

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Taken before *D'Lois L. Jones*, Certified Shorthand Reporter in and for the State of Texas, reported by machine shorthand method, on the 14th day of May, 2011, between the hours of 9:00 a.m. and 12:00 p.m., at the Texas Association of Broadcasters, 502 East 11th Street, Suite 200, Austin, Texas 78701.

INDEX OF VOTES

No votes were taken during this session.

Documents referenced in this session

11-04 Ancillary Proceedings Task Force draft (January 2011)

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CHAIRMAN BABCOCK: Okay. Everybody, let's get on the record and get ready for more Saturday morning fun with the ancillary rules. Thank you all for being here. This is a great -- great turn out, and I know there's some other people that are on their way, so let's keep going, and I think we stopped at Rule 4(d), and Richard Orsinger was just about on the absolute verge of making insightful comments about 4(d) when we had to stop, and, frankly, I, for one, have been anticipating this ever since then, Richard.

MR. STORIE: Couldn't sleep last night.

CHAIRMAN BABCOCK: It's all we could talk about at dinner last night, was what Richard was going to say on 4(d).

MR. ORSINGER: I really have nothing much to say about that.

HONORABLE JAN PATTERSON: He's always much more subdued on Saturday morning.

CHAIRMAN BABCOCK: Yeah.

MR. ORSINGER: I'm sure that "under equitable circumstances" is in the present rule, and that's why it's in here, even though it's so vague that it's meaningless.

MS. WINK: Yes, this is all present rule. It's just been made more readable. This was one of those

run-on sentences from the underworld kind of rules, and we just tried to make it understandable.

MR. ORSINGER: Okay.

CHAIRMAN BABCOCK: So you're okay with 4(d), Richard?

MR. ORSINGER: No, but I don't want to fight over it.

CHAIRMAN BABCOCK: How about 4(e), got any comments about that?

MR. ORSINGER: That's new, right?

MS. WINK: It is.

MR. ORSINGER: So we're not constrained to stick with the language?

MS. WINK: Absolutely not. And you're going to find a provision like this throughout the other sets of rules, attachment, sequestration, garnishment. So, again, a lot of what we're getting in the first set of rules will apply elsewhere.

PROFESSOR CARLSON: If we like it.

MS. WINK: If we like it.

CHAIRMAN BABCOCK: Any comments about 4(e)?

MR. GILSTRAP: Yes.

CHAIRMAN BABCOCK: Yeah, Frank.

MR. GILSTRAP: This looks to me like you get something called "prompt judicial review" any time you want

it. I'm not sure what prompt judicial review is, and I'm not sure why you should be able to get it any time. Does that include appellate review? It's -- I think the phrase "prompt judicial review" needs to be explained.

CHAIRMAN BABCOCK: Okay. Dulcie, any explanation for "prompt judicial review"?

MS. WINK: Actually, I'm going to turn to Pat and David because I think --

CHAIRMAN BABCOCK: Pat and David. They're shaking their head like "We don't know."

MR. FRITSCHE: I was just looking to see if it's in attachments.

MS. WINK: It must be either attachment, sequestration, or garnishment.

MR. DYER: Well, the judicial review we're speaking of is with the trial court, not appellate review.

HONORABLE JAN PATTERSON: "Prompt" makes that clear, doesn't it?

MR. GILSTRAP: But the trial court sets the bond to begin with, so --

CHAIRMAN BABCOCK: Right.

MR. GILSTRAP: And so I guess, you know, Tuesday you set the bond, on Thursday you say, "Judge, I want you to review your decision of Tuesday." Is that what we're saying?

MR. DYER: Yes, but "Based on this information, Judge, this is why you need to change it." This is why it's too high, this is why it's too low.

MS. WINK: In preparing -- again, in temporary injunctions it could be an ex parte bond.

MR. MUNZINGER: I'm sorry, we couldn't hear you.

THE REPORTER: You're going to have to speak up.

CHAIRMAN BABCOCK: Dulcie, you've got to speak up.

MS. WINK: Many times these -- especially in the TRO practice the bond is set ex parte and it isn't sufficient to protect the respondent for damages sufficiently if the injunction was issued improperly. So being able to fix that is one thing, and I will say that in my experience a lot of practitioners get to even a temporary injunction hearing, and the one thing that they haven't thought through sufficiently is what evidence is necessary for the bond, and then at the end of the hearing when the judge is saying, "Well, where should the bond be set," people are rethinking things and going back to their clients and getting more information, so that's the issue.

MR. GILSTRAP: Well, presumably at the temporary injunction hearing the judge has made a decision

on the bond, and you have had a chance. Why do we then allow you the next day to come in and ask for further review? It says "on reasonable notice," which can be less than three days apparently, or maybe six hours notice. You see what I'm saying? It seems like it opens the door to constantly raising questions about the bond, and do you want that, or should we permit it?

CHAIRMAN BABCOCK: Okay. Any other comments? Yeah. Judge Evans.

HONORABLE DAVID EVANS: Well, I think any hearing should be scheduled at the earliest possible time for the relief that may be needed for parties, and this is a bond for damages on temporary injunction, and it is one that should be tried in the temporary injunction hearing, but I do agree with you, many people get to end of the temporary injunction hearing, and they haven't given any real thought of how to set up a bond for damages for wrongful injunction, but this does tie to sort of my problem with the temporary restraining order. You know, thinking back last night, making the argument I wish I had made, but my wife would not listen to it or my friends, but part of this problem is you come in to the trial judge and the court coordinator and say, "We have this bond here, and the Supreme Court says you have to give this prompt review and probably in less than three days we have to set it from

the date of filing." All right. This is Tuesday, and what do we have scheduled for tomorrow? Well, we have that Daubert-Robinson hearing with half the Supreme Court advisory committee that we had to reset because you were supposed to try a hundred thousand-dollar cases faster and you were tied up on 12(b) motions, and, you know, last week you had medical expert day, and, you know, next month is interlocutory appeal month, and you know --

CHAIRMAN BABCOCK: So where's the problem?

HONORABLE DAVID EVANS: "Oh, and, Judge, and I'm a general jurisdiction judge in Montague County and I've got a capital murder case I'm trying to get to trial." I just think you have to at some point trust the judges to look at their docket and administer it and decide what the priorities are, and then, you know, in Fort Worth we're the home of Burlington Northern. We've got every FELA case that can be filed in Texas coming through, and they have congressional priority, which is admittedly lower than priority set by this committee, I admit that, but it's just a terrible management problem for us with words like this, but I understand that on the practitioner's side, you know, you can wait a month sometimes to get a hearing scheduled, but --

CHAIRMAN BABCOCK: What this says --

HONORABLE DAVID EVANS: I'm worried about

this whole -- this whole idea that, you know, that we're -- I guess really going back to temporary restraining order, we're going to add a -- write in the rule that says you have to set it in two days irregardless of what's on your docket or what's been going on with the other party, but in this area I would just say that you're entitled to judicial -- "shall have a right to judicial review upon reasonable" -- I would take out the "prompt." You should have tried it, and it should have been done.

MR. FRITSCHE: Chip?

CHAIRMAN BABCOCK: Okay, yeah.

MR. FRITSCHE: And just so the committee is aware, we brought this into the injunction rules because there is a similar rule in attachments, distress warrants, garnishments, and sequestration for the review of the bond and thought it was appropriate to bring it into --

HONORABLE DAVID EVANS: And I'm aware that that's true. If you're a trial judge you suddenly become aware of all of the times that rules and legislation have been passed that tries to prioritize matters, and so you become a master of just juggling the prioritized matters, whether it's comp or FELA or, you know, the emphasis placed on early dispositive motions that are going to lead to interlocutory appeals, and I think you're entitled to review, and I think you should get it scheduled as quick --

and the judge in his or her capacity should schedule it as quickly as possible.

CHAIRMAN BABCOCK: Richard.

MR. MUNZINGER: I sympathize with what I think Frank Gilstrap was saying, and if he wasn't, this is what I think. The lawyer who comes to get the injunction, if he does his or her work is going to have a checklist of what must be established, which would include the bond, because the rules say you have to have a bond; and if the person does their work then they're going to figure out what the bond is supposed to insure against. Here we're having a rule which says you just had a hearing where the bond, which is part and parcel of the cause of action, necessary to the cause of action, necessary to the relief granted, but we're going to incorporate in the rule some kind of a thing where you can reconsider it two days later or four days later? I don't understand it.

It's an invitation in my opinion for trouble and for delay. It's almost as if you're saying, "Okay, all you people who had a bond set, even though the bond is set you've had the temporary injunction hearing, the judge has entered the injunction, the bond has been posted, you've got a right to come back now and second guess the bond, its amount or sufficiency of surety," which obviously anybody could question the sufficiency of the surety. I think that

would be -- you don't have to have a rule that says that, but here you're inviting a reconsideration of the amount of the bond, which is part and parcel of the basic cause of action.

CHAIRMAN BABCOCK: Don't you have the right to do this anyway?

MR. MUNZINGER: I think you do have the right to do it anyway, and the judge has the right to say, "You're full of prunes, I thought about that," but here for us to incorporate this provision into a rule is an open invitation in my opinion to have second and third guesses as to the amount of a bond when that is part of the cause of action.

CHAIRMAN BABCOCK: Pat.

MR. DYER: I see two aspects being discussed in this rule. One is the question of priority, whether we ought to have that less than three days provision and then the provision as a whole for judicial review. Yes, everybody knows you can always file a motion for anything, but we wanted to make these rules very clear to the practitioner. What if you filed the bond in the amount, but the sureties aren't good enough? The defendant ought to be able to come in and say, "Look, yeah, they've got the right amount of the bond, but they've got the guy's dad here as the surety, and he is not sufficient." I think

they ought to be able to file that motion. I think we could take out the "less than three days." That isn't in the current provision.

MS. WINK: And the word "prompt."

MR. DYER: Right. But the current rules allow motions to reduce or increase the bond and to question the sureties.

HONORABLE DAVID EVANS: And, you know, I always come back to 21 allows the judge to set one in shorter than three days on any of these things; and if somebody comes in and says, "Judge, they put up a fake surety," that's a telephone call almost, recorded, you know; but, I mean, it's a no-brainer.

Now, the other motion is more tricky, and that is "We've gone back, and we muffed it during the temporary injunction hearing, Judge. We didn't realize how damaging this injunction would be to our business, and since our relief for wrongful injunction is really against the bond, we need you to up this bond and make them pay the price that they need to pay in order to prevent us from doing what" -- and we're going to come in with about a day's worth of testimony. Fine, I can do that. Let me find that day, we'll get that scheduled, we'll have that evidence, I'll make that decision, and we'll go on down the road; and that bond as I understand it, when it's modified,

relates back to the original injunction and covers all the damages, so I'm not certain why I'd have to have a full day evidentiary hearing when someone realizes that they muffed it in the injunction within three days. I can schedule that, I can get it done, and I can get it done in an efficient manner. On the surety I'm with you all the way. You know, you can't put up your uncle who doesn't have any assets.

CHAIRMAN BABCOCK: Richard Orsinger.

MR. ORSINGER: I may be projecting too much into the wording, but to me the first sentence clearly talks about judicial review of the clerk's decision to approve the bond, because you wouldn't be thinking in terms of judicial review of the judge's decision to set the amount of the bond. To me the prompt judicial review of the applicant's bond wouldn't be the amount. It would be the sufficiency of the sureties. That's what is allowed within three days notice and then there's a separate sentence that says, "Any party may move to increase or reduce the bond," which to me is just a normal motion.

In other words, the first three-day business -- the less than three-day business to me has to do with judicial review of the sufficiency of the sureties. Now, I may be reading too much into that, but I see the two sentences as different and that the "under three days" is

in the first sentence, not in the second sentence, and it -- it could be that we could say "prompt judicial review of the sufficiency of the bond," and maybe everybody would feel better about that and then the second sentence would just more likely be a motion to modify the amount of the bond.

MR. DYER: Well, there may be instances where plaintiff's lawyer argues, "Judge, look, the only bond consideration here is they're going to lose a little bit of interest, so keep it low at a thousand dollars"; and the defendant says, "No, Judge, you're actually going to shut down my business, and I'm going to lose $50,000." Plaintiff's lawyer, "No, that's never going to happen." Bond is set at a thousand and then, sure enough, the worst case scenario happens, business gets shut down. So the amount of the bond set by the judge should also be subject to later reconsideration, because bond arguments frequently are about the future.

MR. ORSINGER: The arguments I'm hearing that they don't like is they don't want a judge to have to come in and make another decision about the same subject matter within three days. I think this first sentence --

HONORABLE DAVID EVANS: You know, I don't mind a bond hearing later on because it relates back to the very beginning. I can't speak for the other judges, but I

don't mind a bond hearing to increase or even if you want to come in and challenge the sufficiency of the sureties, and that could take some time, depending on who the surety is and how deep you would have to go on it, but it always relates back, and it pulls up the damages, and I think there is -- I think there is -- I think there are -- the practitioner that defends it is a problem.

He doesn't know how much damages or she doesn't know how much damages their client is going to incur as a result of the injunction because they don't know the full breadth of the injunction, you know, so I think we're all prepared to retry them. I mean, my sense is a lot of judges are now raising their bonds in business transactions just to -- just to make sure that the applicant's really serious about going forward that wants to pay the price for it. That's my sense.

CHAIRMAN BABCOCK: Well, do we have consensus that the notice thing is unnecessary, or is that just one person or --

HONORABLE JAN PATTERSON: The day, the number of days?

CHAIRMAN BABCOCK: Yeah.

HONORABLE JAN PATTERSON: But keep "reasonable notice."

CHAIRMAN BABCOCK: Judge Wallace, what do you

think about the "less than three days' notice."

HONORABLE R. H. WALLACE: I don't think we need that.

CHAIRMAN BABCOCK: Yeah. What if -- what if we started it at "Any party shall have the right to" -- well, you could leave that out, too, I guess. What about the "right to prompt judicial review"? You always have that, I assume.

HONORABLE TOM GRAY: Chip, I actually think that Richard is onto something with the different issues, that the first sentence and the rest of that subsection really is designed to review, because, I mean, Judge Evans, I mean, do you consider when you are reviewing the sureties on the bond that that is a judicial review? I mean, isn't that different than what you -- I mean, it's not a modification in the traditional sense. It's -- I think it's exactly what Richard was arguing, that the clerk approves the bond, and that has the sureties in it probably for the first time that the folks have seen and then you come in and review whether or not you agree with the sureties on the bond.

HONORABLE DAVID EVANS: That's right, and most of the time the surety problem is handled in these type situations, because the bond is low -- it's a high bond what is -- will bring the sureties into play. 5,000

and lower is generally a law firm check into the registry. Anything higher will push it into -- and if you really get a big bond like a hundred thousand-dollar bond then you start seeing the surety issue; but most of those are carriers for that type of bond; and you don't find individuals that will go on many large bonds of that nature; and it depends on whether the financial statements are any good; and if it's an individual that's a surety that somehow got approved by the clerk, that's going to be a long hearing anyway because they're going to take the deposition of the individual to see how stout they are to stand up for the bond and where the assets are pledged.

HONORABLE TOM GRAY: It just seems to me that those are two different functions than what we traditionally think of it, and maybe it would be good to have an (e) and an (f) and break those out into separate subsections if you're going to have them. Of course, you could, if we had not eliminated subsection, you know, (g) over here, you could just say, "Modification of the temporary injunction or bond," but since that was eliminated I won't revisit that.

MS. WINK: Is there anything about the two different issues, one being the amount of the bond and the other being the sufficiency of the surety or sureties that you think would be handled different; meaning, you know,

the judge has got to set the hearing and decide when to have it. That's what we're hearing here and has to -- and can decide it based on uncontroverted affidavits, and if not, then he has to hear evidence.

HONORABLE TOM GRAY: Yes, I do think there's something different because the sufficiency of the sureties on the bond is an issue -- the way I look at what is happening, as described by Judge Evans, is that that's never been looked at. I mean, not in the context of the hearing. The amount has, but the -- whether or not the credit worthiness of the sureties are there, that's not something that has been presented to the trial court before.

MS. WINK: Let me -- let me just answer that, and what we found in the task force as a whole, the issue of the sureties is something you don't see as often perhaps in the large counties, but in a lot of the smaller ones, every county and every district clerk seems to have a little bit different way of looking at which sureties will be accepted. In some counties there is a standardized -- there is a list that is posted by the clerk so that you know who the clerk will -- will approve, and I always recommend that people look at that before they go to their hearings and get that in place. The problem is especially heated now because of changes in financial issues; and

financial issues can be extremely sound one day, and as we found out recently, not the next; and sureties would have to be shifted around. So this actually is an issue that the judges have told us, at least those who have worked on these issues, not just in injunctions, but the other unusual writs, that they do address both of those issues, and it's not uncommon, not uncommon.

CHAIRMAN BABCOCK: Frank.

MR. GILSTRAP: Justice Gray is correct. Those are two different issues, and the clerk sets one, the judge sets the other. Even so, I think we can get where we want to get by just striking out the first sentence and then it just reads, "Any party may move to increase the amount of the bond or question the sufficiency of the sureties."

CHAIRMAN BABCOCK: Yeah, that's where I was headed with it.

HONORABLE DAVID EVANS: That's right. That would do it.

CHAIRMAN BABCOCK: Does everybody think that's okay? All right. Let's do that. Any -- so we'll strike out the sentence that says, "On reasonable notice, which may be less than three days, any party shall have the right to prompt judicial review of the applicant's bond." We'll strike that sentence, leave the rest of it. Any

other comments about the rest of (e), 4(e)? Okay.

MR. GILSTRAP: One more thing here, that we don't have the Family Code carve out in this particular section. Do we need it?

CHAIRMAN BABCOCK: Well, you've got it in (c), don't you?

MR. GILSTRAP: Oh, yes. I apologize. Okay. I'm sorry.

CHAIRMAN BABCOCK: All right. Do we need to talk about the comment?

MS. WINK: No, because, again, we moved things out of -- I moved things around, and it will be easier for you to look at it as a whole.

CHAIRMAN BABCOCK: All right. Let's talk about 5, contents of writ of injunction.

MS. WINK: For the most part this comes from Rule 687(d), (a), (b), (c), (d), (e), (f), all the various pieces, and we've broken it out because, again, different courts like to have forms and different clerks do, and we thought this would be helpful.

CHAIRMAN BABCOCK: When you say you've broken it out, what do you mean by that?

MS. WINK: In other words, we actually created a form of the writ because there wasn't one before. We had these rules that had long sentences of what had had

to be in the contents of the writ and they needed to be met, but different clerks have or don't have forms, and when we have changes they like to have the forms, so I don't think there's anything different here than what is in the existing rules as far as the general requirements and the content of the writ or the command of the writ.

CHAIRMAN BABCOCK: Okay.

HONORABLE NATHAN HECHT: How standard is the form?

MS. WINK: This form has never been presented in the rule book before. The information, however, is all standard.

HONORABLE NATHAN HECHT: Yeah, but the form in subparagraph (e) --

MS. WINK: Yes, sir.

HONORABLE NATHAN HECHT: -- how standard is that among clerks offices and judges?

MS. WINK: Well, I actually pulled a few that I had received in years past to compare them in creating this form, so they complied, they seemed to mesh very well, so it appeared standard from my relatively recent experiences.

HONORABLE NATHAN HECHT: Are there any clerks' offices that have prescribed forms like this one where you fill in blanks and stuff?

MS. WINK: Some of them do have them, but in general when you take -- when you take the order granting the writ down to the clerk's office, they don't want you to fill it in. They generally, at least in the large counties, they take it, they fill it in through key stroke and provide it back to you to review, which is always a good idea before it's served. So they start with a form and then they customize it as necessary.

CHAIRMAN BABCOCK: But what you're saying is they do have a form?

MS. WINK: They do. I have never seen one in printed out format. They may exist.

HONORABLE NATHAN HECHT: But is it your sense that lots of counties do, some counties, not very many?

MS. WINK: My sense is lots of counties have a format that they use.

HONORABLE NATHAN HECHT: And do you think they get that from the clerks association, or where does it come from?

MS. WINK: I can't remember that. Although, they -- I know the counties and the clerks do meet and talk about those kinds of things and share information. I would suspect from that, but that's a guess on my part.

CHAIRMAN BABCOCK: Richard Orsinger.

MR. ORSINGER: I think in my experience back

before word processors were so universal that they used a form that actually looked like this, a piece of paper that had the blanks that got filled into the typewriter, and that nowadays they have it on a word processor and they do it, but I also think that the rural counties don't maintain forms at all, because the experience I have had is that I have to ship down whatever process I want. If it's not a straight ordinary citation or something that's routine then I'm expected to submit in word processor form the piece of process that I want associated with whatever it is I'm issuing. So I think it would be helpful to have a form that everyone across the state can -- that will eliminate all of the discretion, but the form better be right, and there's some things in this form that I think -- some words that need to be discussed.

CHAIRMAN BABCOCK: Okay.

MR. ORSINGER: Something else I'll say, it was in Bexar County, I don't know how universal this is, but they recognize that the piece of process that was to be attached to a notice of a hearing was called a notice, not a temporary restraining order, and so they always issued two pieces of process, one was the TRO and one was the notice of the show cause hearing. That's what it was traditionally called, and you had to have both pieces of process. I see that in your form you've included the

notice of hearing in the temporary restraining order, and I'm wondering, I've always thought there was a little bit subjectivity about what these cover sheets or what these pieces of process are that were used, and I don't know, its's been so many years since I dug into this. Do you know if the use of a notice was widespread, and is it still widespread, and is it duplicative of the TRO or not?

MS. WINK: Well, they're not duplicative, although in my experience -- I haven't had one in Bexar County, but in my experience when the clerks have prepared them for me they've had not only the TRO language but the show cause language all in the same document.

MR. ORSINGER: And they only have one piece of process --

MS. WINK: Yes.

MR. ORSINGER: -- and it's called a TRO, and they didn't have a second piece of process called a notice?

MS. WINK: Correct.

MR. ORSINGER: Notice of show cause order?

MS. WINK: Correct.

MR. ORSINGER: Okay. Then that must have been a local practice.

MS. WINK: They really do vary from place to place.

CHAIRMAN BABCOCK: Jan.

HONORABLE JAN PATTERSON: What is the source of the language in paragraph (2), quote, "be dated and signed by the clerk officially"? Would it not be official just to say "signed by the clerk of the court"? Isn't that what we usually say?

MS. WINK: Which --

HONORABLE JAN PATTERSON: On paragraph (2).

CHAIRMAN BABCOCK: (a)(2).

HONORABLE JAN PATTERSON: What is the source of that language, "be dated and signed by the clerk officially."

MS. WINK: Rule 687(f).

HONORABLE JAN PATTERSON: It says it that way?

MS. WINK: Yes. "It shall be dated by the clerk and signed by the clerk officially and attested with the seal of his office, and the date of its issuance must be endorsed thereon," so that's why you're seeing No. (2), No. (3), et cetera. We've moved things to where we think we've got them all in here.

HONORABLE TOM GRAY: That sounded like it called for the seal of the clerk, not the seal of the court.

MS. WINK: It's "dated, with seal of the clerk officially." You're right.

HONORABLE TOM GRAY: (3) says "bear the seal of the court."

MS. WINK: Let's fix that. Got it. Got it. The -- what you see as (a)(4) is from Rule 687(c), and Rule 687(c) says, "It must state the names of the parties to the proceedings," comma, "plaintiff and defendant," comma, "and the nature of the plaintiff's application," comma, "with the action of the judge thereon."

CHAIRMAN BABCOCK: Richard.

MR. ORSINGER: Yeah, the nature of the application means temporary restraining order or temporary injunction?

MS. WINK: Correct.

MR. ORSINGER: Okay.

CHAIRMAN BABCOCK: Okay. Any other comments about (a), 5(a)? Frank.

MR. GILSTRAP: By combining the notice and the order will that cut down on the fees the clerk can charge in some counties where they hit you for both?

MR. ORSINGER: I think so. You have to pay for each piece of process.

MR. GILSTRAP: Let's do it and let them deal with it.

MS. WINK: And if you would like, Chip --

CHAIRMAN BABCOCK: Yeah.

MS. WINK: -- one thing that we can do is send this to Bonnie and some of the other clerks --

CHAIRMAN BABCOCK: Uh-huh.

MS. WINK: -- and have them look over the forms in their -- I don't know if they're meeting this summer, but that might be helpful so that they can prepare.

CHAIRMAN BABCOCK: Yeah, that's probably a pretty good idea.

MS. WINK: Be happy to do that.

MR. ORSINGER: I think I should point out when we're talking about the notice that if you skip the TRO stage and just go directly to the show cause order then this form isn't going to work, and you are not going to be able to serve it with the TRO. You are going to have to have a notice of a show cause hearing --

MR. GILSTRAP: Announcing the TRO.

MR. ORSINGER: -- because you want the TRO to include it.

MS. WINK: Well, actually if you look down a little further on the rule, and it says "Form of writ," we have one for TROs, and you go further and the one for the temporary injunction and the one for permanent injunction. Now --

MR. ORSINGER: But I'm talking about the service. Yeah, I know you're talking about the writ that's

issued after the judge signs the order --

MS. WINK: Uh-huh.

MR. ORSINGER: -- but I'm talking about a show cause order that's directing someone to appear at a temporary injunction hearing without there first being a temporary restraining order issued. Sometimes people will skip the TRO and just go to the temporary hearing on the injunction.

MS. WINK: I hear you. The form does say, you know, "and when and where you shall appear and show cause why a temporary injunction should not be issued as prayed," et cetera, and that -- that's covered in each, but let me also bring this up since Judge Peeples is not here today. He had a suggestion, which we'll come to later when we get into enforcement of the writs and contempt issues. He said why don't we consider getting rid of the language "show cause." In other words, you know, give them more present language, "appear and defend," you know, and "show why you should not be held," you know -- "why you should not be enjoined" as a fore set or however you want to say it. That way if we want to get rid of those old show cause hearings, it's really -- we can get rid of that language, but I wanted to present that here just so that I could get your input on that or whether you're more comfortable using the show cause language in general. There's a rush of

excitement.

CHAIRMAN BABCOCK: Jeff.

MR. BOYD: I'm thinking back to when the Court did away with petitions for writ and went to petitions for review. Do we even want to talk about whether all of this is still necessary? I mean, the reality is the court's order -- well, first, under just regular pleadings in Rule 21a, the fact that I filed the petition asking for it and gave you notice is enough to make you show up and respond. You don't have a burden of proof to show cause anything. I've got the petition asking for relief, and you've got to respond to my request. The writ itself, I mean, I understand that the order once signed can only be effective once the bond is filed, but -- but that may be a whole other conversation, but is there a reason to perpetuate this ancient practice that in reality is more fluff than merit?

MS. WINK: In fact, as an entire task force, as well as in the subcommittees, it was interesting. The subcommittees separate from the task force as a whole each met to focus on their rules. Almost all of the subcommittees separately and apart came up with the same question, which is can we ditch the writ situation, can we live on the orders and have the orders served, et cetera, the notice, whatever; and Judge Randy Wilson offered to

take the lead on that issue; and he and -- and I presume some help in his office -- did some research; and because the references to writs are permeated throughout our statutes, it did not seem feasible. I mean, we would love to get away from that, but we would be asking the Legislature to literally make so many statutory changes or somebody's got to make a separate statute that says, "From this point forward" --

MR. BOYD: Right.

MS. WINK: -- "any reference to a writ refers to the order granting the relief requested."

CHAIRMAN BABCOCK: Richard.

MR. ORSINGER: I would be against that change on policy anyway because of the difficulty we had yesterday in determining what constitutes an order, and with these writs are always enforceable by jail time or immediate possession in the custody of the state --

MS. WINK: Yes, sir.

MR. ORSINGER: -- and I would like before somebody can be thrown in jail or be picked up without notice and without grand jury indictment or anything else, I would like to see a formal writ. I know -- I mean, I'm usually a modernist, but in this case we're setting up people to be seized, property to be seized, people to go to jail, and you can see the ambiguity of what constitutes an

order as a result of our debate yesterday morning. I would like to see a writ any time anybody's property is being seized or any time anybody might go to jail.

CHAIRMAN BABCOCK: Okay. Frank.

MR. GILSTRAP: Well, I certainly -- I mean, I really like what they've done. They've kept the idea of writ and you just attach the order. That strikes me as really helpful. I like the idea of getting rid of the show cause language. I mean, we know that when you get the writ that says, "You shall appear and show cause, if any you may have, why you should not be thrown in jail," you know, you don't have to do anything except resist, but a layman who is served with that doesn't, and I think they could be quite intimidated by it and think that they're under the duty to come in and prove why the writ shouldn't issue.

CHAIRMAN BABCOCK: Okay. All right. Any other comments about 5(a)? 5(b)?

MS. WINK: 5(b), the command of the writ, is taken from existing Rule 687 again, and let me see exactly where it is. Here it is. 687(d) currently says, "It must command the person or persons to whom it is directed to desist and refrain from the commission or continuance of the act enjoined or to obey and execute such order as the judge has seen proper to make."

CHAIRMAN BABCOCK: Okay. Any comments on

(b)?

MS. WINK: You will note that we added the (b)(2) that explains in the rare occasion when a mandatory injunction is granted it gives the mandatory language as well.

CHAIRMAN BABCOCK: What about (c), setting of hearing or trial?

MS. WINK: That comes from existing Rule 687 as well.

CHAIRMAN BABCOCK: Richard raised a point a minute ago that said if I don't want to go for a TRO, but I just want to go directly to the temporary injunction stage, this rule doesn't provide for that.

MS. WINK: It does not. What you do in that situation is after everyone has been served with the case, you --

CHAIRMAN BABCOCK: Just get a setting.

MS. WINK: -- request a hearing and get a setting.

MR. ORSINGER: Well, again, may be local practice, but if you're seeking an injunction, it's been the local practice in the courts where I've gone that you don't just get a Rule 21a fiat on it. You get a notice that directs them to come to court. Now, that could be local practice. I don't think so. I think it's a

statewide practice, but there's a difference between -- or at least historically, in my practice there has been a difference between notice of a hearing and notice of a temporary injunction hearing.

CHAIRMAN BABCOCK: Judge Evans, how do you bring them to court on a --

HONORABLE DAVID EVANS: How do I do what?

CHAIRMAN BABCOCK: Bring people to court on a temporary injunction. Do you --

HONORABLE DAVID EVANS: I do it by show cause order, but I don't -- I don't show cause that they should be in jail. I just show cause why the writ shouldn't issue.

MR. ORSINGER: That's my point. I think that there's -- and that proves my point also that I don't think it's a local practice.

HONORABLE DAVID EVANS: I didn't mean to do that. I'll take another position.

MR. ORSINGER: I think it's been a tradition across the state that the notice that someone gets with their original petition and citation when a temporary injunction order might issue is more forceful and more formal than a notice of a hearing, just an ordinary hearing for discovery or special exceptions or something like that; and so it's always been a tradition, and I think it's part

of the family law practice manual, which, of course, is prevalent, that if what's at stake is the issuance of a temporary injunction then what you get is a notice of -- a notice of hearing or show cause order to appear at a hearing; and, yes, I agree with Frank that it's likely to be more intimidating; but it also means that people are more likely to show up because they really feel like something bad may happen to them if they don't come, even though we all know the burden of proof isn't shifted to the defendant.

CHAIRMAN BABCOCK: Yeah, Roger.

MR. HUGHES: Well, if we're talking about the situation where the party has decided to skip the TRO and go directly to a TI, I think the distinction should be made between whether a party has been served already or whether they're getting notice of a hearing before they've even been served with the -- otherwise by citation. I mean, I -- if a party has already been served and filed an answer, I can understand why just an order from the court might be sufficient to get them; but if they haven't even been served, just to get an order in the mail, "Oh, by the way there's going to be a temporary injunction party at the court, you may attend," I mean, you may -- an ordinary person might get in a quandary about, well, if I don't show up can they issue it or not? So I'm thinking that unless

the person has already been served with process so that they know they're a party to the proceeding, I think a notice for a TI hearing ought to be served formally in some manner so that they know that this is -- their attendance is mandatory.

MR. ORSINGER: I might follow-up that if you're an unrepresented person and you get served, the first thing you're going to see is the citation, which gives you until Monday following the 20th day of service to appear, and they may not dig deeper because almost always the process server will have the citation followed by the petition followed by the other stuff, and I'm a little worried. I think we should protect people, as Roger points out, that are just being introduced to the process without having a lawyer on board that there's something that's really, really important that's going to happen on a certain day.

HONORABLE DAVID EVANS: I think that's the difference between --

CHAIRMAN BABCOCK: Yeah, David.

HONORABLE DAVID EVANS: I'm sorry.

CHAIRMAN BABCOCK: No, go ahead, Judge.

HONORABLE DAVID EVANS: I was just going to say that's sort of the difference between the normal citation that says you have to file an answer and appear,

file an answer on the first Monday before 10:00 o'clock, and a show cause order that orders you to show cause why it shouldn't issue, that that made the difference or emphasize the difference. Maybe I'm missing that point. Now, it's not mandatory where you appear for injunction. Contempt is one where you have to go out and get a writ of attachment. I think most of us -- I think almost everybody is worried about service when they go into an injunction hearing.

CHAIRMAN BABCOCK: David.

MR. FRITSCHE: Chip, may I suggest since Rule 5 is dealing with the actual contents of the writ of injunction, would this issue be better addressed in 2(c), Richard? Is that -- the notice and hearing on the TI?

CHAIRMAN BABCOCK: Well --

MS. WINK: I think -- I think, David, we might actually have to add some specifics either to Rule 5 or Rule 6, which is delivery, service, and return of the writ. So to address -- to address that issue and to get more clarity, Richard, and Judge Evans, we need some input from you. Do you feel like if the party -- if the party has already been served with process, has answered the lawsuit or been served with process, do you feel like a Rule 21a service is sufficient for the TI hearing, or do you feel like the TI hearing should be pursuant to a show cause order?

MR. ORSINGER: If they filed an answer I think Rule 21a notice is perfectly adequate notice for any kind of hearing.

HONORABLE DAVID EVANS: If they've been served, 21a would be -- I would think it would be sufficient unless the rule called for a different service on the writ. You know, entering an injunction or entering an order after service of process and answer and on 21a notice is -- there's another situation, of course, and that is default, and then somebody amends the pleading and then I think every judge who thinks about it requires a reservice of the pleading if the relief has changed from the original default citation.

MR. DYER: Not anymore.

HONORABLE DAVID EVANS: And you have to.

MR. DYER: The Supreme Court has changed that.

HONORABLE DAVID EVANS: What's that?

MR. DYER: No, the Texas Supreme Court has changed that. Even if it's a more onerous cause of action, it can be done under Rule 21, 21a.

HONORABLE DAVID EVANS: Well, that's --

MR. ORSINGER: Has the U.S. Supreme Court changed that? Because I thought they had an opinion on it.

HONORABLE DAVID EVANS: If I could just say

this off the record, not in the 48th, but that's okay.

CHAIRMAN BABCOCK: Be careful about talking over one another. Richard.

MR. ORSINGER: Yeah, back on point, to me it's not whether they're served that counts. It's whether they've filed an answer. If they filed an answer, they're on board, regular notices apply. If they haven't filed an answer, they need to get served with process. That's my opinion. If you take a default, you take a default, but if you haven't taken a default and they haven't appeared then I think you need to get process served on them in order to prove service.

CHAIRMAN BABCOCK: Roger.

MR. HUGHES: Well, I'm going to say I totally agree with that remark. That was what I was about to say, and there's another hidden thing, getting back to support your local courts, is that what I have seen some lawyers do is apply for a TRO, then call the opposing counsel and say, "Tomorrow morning at 9:00 I'm going to go in front of the judge. You're invited to attend if you like. Here's a courtesy copy," and then the moment they show up to talk to the judge they -- the other side says, "Well, now you've made a formal appearance, so I don't need to serve you, so I just saved $150 in court costs and service charges"; and, you know, if you've got special appearance and venue issues

it could sure make for some difficult issues about whether showing up, you know, is forfeiting your right to contest a TRO or are you waiving a formal service. So I think it might be of some value to say if the person hasn't officially filed an answer they need to be formally served. Nothing else to raise a little much needed revenue for our court system.

CHAIRMAN BABCOCK: Okay. So how do we -- how do we fix this?

MS. WINK: I think what I'm going to do is I've made bold yellow highlighted notes for myself in the draft so that I can bring something back to you the next time.

CHAIRMAN BABCOCK: Okay. What about the return of writ, subsection (e)?

MS. WINK: And that comes from Rule 689, which currently says, "The officer receiving a writ of injunction shall endorse thereon the date of its receipt by him and shall forthwith" -- we did trash "forthwith" pretty much everywhere -- "execute the same by delivering to the party and returning a true copy thereof. The original should be returned to the court" -- and we deal with that here. "The original should be returned to the court from which it issued on or before the return day named therein and in the action of the officer endorsed thereon or next

thereto showing how and when he executed same."

CHAIRMAN BABCOCK: Richard.

MR. ORSINGER: Do you preserve that directory language to the serving officer somewhere else in your rules, or have you just dropped it?

MS. WINK: We have the return language in here, I believe.

MR. ORSINGER: In other words, there were instructions -- those are instructions to the process server, and you just dropped half of them, and I want to be sure that they're not lost.

HONORABLE TOM LAWRENCE: Look at Rule 6.

MS. WINK: Look at Rule 6. It's more explicit about delivery, service, and return of the writ, and that's where that language went.

MR. ORSINGER: I don't see that you preserved that idea that they need to notate on there the time that they received the writ and then that they are directed to serve it.

MR. DYER: (b)(2).

MR. ORSINGER: (b)(2), am I missing that? (b)(2)? Okay, fine. I'm okay.

CHAIRMAN BABCOCK: Okay. Well, back to (d), any comments about (d), return of writ? Okay. What about the (e), form of writ? Yeah, Richard.

MR. ORSINGER: It seems to me that we ought to provide -- since this is a form we're expecting people to follow, we ought to provide for the style of the case to be at the top of the form so that everyone is reminded to put in the cause number and the names of the parties. Isn't that normally -- well, maybe it's not on a piece of process. Maybe it's not at the top. It is on a pleading and an order. If you --

MS. WINK: Well, it is placed in the "whereas in this court of such and such county, certain cause wherein so-and-so is plaintiff and defendant." That's generally where it's put.

MR. ORSINGER: Okay, then that's fine. We would change that up in a family law case because we don't have a plaintiff and a defendant, and there's no place to mention children in here, which normally would be in the style but apparently is not in the form of the writ. Did you --

HONORABLE NATHAN HECHT: None of this applies to that.

MR. ORSINGER: It doesn't? These processes have to apply. This is the only --

MR. FRITSCHE: 5(f).

CHAIRMAN BABCOCK: (f) says if there's a conflict.

MR. ORSINGER: Yeah, but the Family Code, Family Code provides for the process for a citation by publication, but I don't think it provides for the process of ordinary writs or -- yeah. I can check that out, but I'm almost certain it doesn't. There would be no reason to.

MS. WINK: Okay.

MR. ORSINGER: Oh, but anyway, I guess if people are flexible about this, I think it might make more sense to just put the style of the case in and just not worry about what they're called.

MS. WINK: Okay.

MR. ORSINGER: And then at the end of the paragraph that says "whereas in the," blank, "court, copy of the attached petition," I guess that's always assuming that it's only the petitioner or the plaintiff who is going to get a TRO, but it could be a counterclaim, and I wonder if you should just say "pleading or" -- what do you really want here? You know, you have this new definition of the -- of pleading, which is going to be called an application, and it might be a pleading or might be a motion in addition to a pleading, and what do you intend to be served with this? If it's a -- if it's not in the pleading, if it's a separate document, would they be attaching the separate document that's the motion without

attaching the petition?

MS. WINK: Here's how -- here's how we clarified that later that you will see. If -- if attached to the style, if we have put in the application a copy of the entire petition then the Court does not have to add another copy yet of the entire petition. If, on the other hand -- petition or application. Am I making sense? If on the other hand, it's not attached, it will be -- it gets attached, so you get the entire picture of the case.

MR. ORSINGER: Well, it's possible under the new terminology that your application may not be your pleading. Would you agree with that?

MS. WINK: I do.

MR. ORSINGER: Okay. So we use the word "petition" here, and I'm wondering if we ought to be using the word "application" instead, and if we should be using the word "application," are you wanting the application that's separate -- do you want both the pleading and the application attached or just the application or just the pleading?

MS. WINK: I think -- I think we need to make -- the reason a copy of the petition is shown here is because most often these are requested at the original citation.

MR. ORSINGER: Right.

MS. WINK: So the copy of the petition -- and I'm going to have to do some working on this for you there. I agree. We talk about the application farther in on the third paragraph, so it looks like we need to do some more massaging for those issues, so that we make sure that the form is going to work for both situations, both for the initial pleading as well as at the application.

MR. ORSINGER: And I think we ought to -- I mean, maybe you just want to decide that, but it seems to me like you should attach a copy of the petition if they're not being served with the citation that has a copy of the petition, but if they're being served with the citation then you would be asking them to get two copies of the petition. It may be too difficult to write around, but it's possible under your new framework that the application is not the same thing as the pleading, and so we ought to make it crystal clear that the application, meaning the thing that actually requests the TRO is what's attached to the TRO, regardless of what you do about the pleading.

MS. WINK: Got it. I'll work on that for you.

MR. ORSINGER: And then in the next paragraph, the application -- and it says, "The honorable court upon presentment of the application entered an order." I don't like the use of the word "entered" there.

That means when the clerk photocopies it or scans it and puts it into the minutes of the court, so to me the driving act is that it was signed. The court signed an order granting the application. Do you see the next paragraph?

MS. WINK: I'm just getting to it. I was still making the notes from the last one. Say that again.

MR. ORSINGER: Sorry. On the second line after the word "application" is the use of the word "entered," and that is not going to work.

MS. WINK: Got it.

MR. ORSINGER: In my opinion, it should say "signed by the court," "signed an order granting the application."

MS. WINK: Okay.

CHAIRMAN BABCOCK: Good point.

MS. WINK: Uh-huh.

MR. ORSINGER: And then --

CHAIRMAN BABCOCK: What else?

MR. ORSINGER: Well, the last line says, "a true copy of which is attached," and we're talking about both the application and the order, so that -- you're referring there as it's a copy of the order, true copy of --

MS. WINK: Yes.

MR. ORSINGER: -- the orders attached.

MS. WINK: Yes.

MR. ORSINGER: Okay. And then my last comment on that page or maybe at the top of the next page is that our Rules of Procedure require that the temporary restraining order expire at the end of 14 days, and this doesn't reflect that information anywhere, and you're making the assumption that there will be a hearing that's set before the 14th day and that, therefore, the terminating period of the TRO is the time of the hearing, but if for any reason the hearing is not held it expires by its own terms at the end of 14 days, and I'm wondering if that shouldn't be built into the form.

CHAIRMAN BABCOCK: Well, wait a second, it was said yesterday that -- that at the -- on day 15 that it converts into a temporary injunction. Is that right or not?

MR. ORSINGER: No, that is not right.

MS. WINK: Day 29.

MR. ORSINGER: The court can extend the TRO for a second 14-day period --

CHAIRMAN BABCOCK: Okay.

MR. ORSINGER: -- but in my opinion -- well, that's an interesting question.

CHAIRMAN BABCOCK: Okay. Well, what about on day 29 then?

MR. ORSINGER: Well, the temporary restraining order expires on the 14th day unless it's extended.

CHAIRMAN BABCOCK: And let's assume it's continued for another 14 days.

MR. ORSINGER: Then it expires at the end of the 28th day.

CHAIRMAN BABCOCK: That's what I always thought, but somebody yesterday said that on day 29 you could appeal it because it converted to a temporary injunction.

MR. ORSINGER: I think that that was a discussion when the parties entered into a permanent extension of the TRO --

MS. WINK: No.

MR. ORSINGER: -- that that might make it a temporary injunction that was appealable. That's the comment that I heard yesterday. There is no way that a TRO that expires at the 28th day becomes an appealable temporary injunction on the 29th day.

CHAIRMAN BABCOCK: Judge Wallace.

HONORABLE R. H. WALLACE: Well, I understood it to mean unless the parties agree and the court extends it more than 28 days. That's what I thought we were talking about.

CHAIRMAN BABCOCK: Yeah.

MR. ORSINGER: I remember the discussion, I think, and what the idea was, is if the parties -- it was an argument against allowing people to waive certain things by consent.

CHAIRMAN BABCOCK: Right.

MR. ORSINGER: And they were saying that if you consent to the extension of the TRO past the expiration period you've really consented to a temporary injunction.

MS. WINK: No, no, no, no, no. No, no, no.

MR. ORSINGER: I don't agree with that either. That was the comment that was made.

MS. WINK: Very clearly -- and there was a lot of it, and I would have had a fit if that were the situation, but it's very clear the parties can agree to extend a TRO as long as they wish, but a judge cannot -- cannot over the disagreement of the parties extend it beyond the 28 days total.

MR. ORSINGER: The question in that debate was a different question, which is that if you agree to extend the TRO until the trial, have you not just agreed to a temporary injunction?

MS. WINK: No, but you may be arguing form over substance. The parties can just change the name and enter an additional temporary injunction, but the rule is

-- and it is existing rule and existing case law -- that your TRO can be extended beyond the 28 days maximum that the court can extend by agreement. The parties can agree.

MR. ORSINGER: Yeah, I don't -- I don't know that it matters what was said yesterday --

MS. WINK: Right.

MR. ORSINGER: -- but the debate was whether it was an appealable order at that point, not whether you could or couldn't do it.

CHAIRMAN BABCOCK: Pam.

MS. BARON: Richard, I think the case law says that you can't appeal a TRO, but if for some reason the court enters a TRO that would provide for it to be in place for like let's say 30 days, which is not proper, it would in effect be a temporary injunction, and it is appealable.

MS. WINK: Correct.

MS. BARON: But it could also be mandamusable because you can't enter a TRO for more than 14 days, but either way, you can go up on appeal.

MR. ORSINGER: Okay. Well, I think that's important for us to remember in the --

HONORABLE DAVID EVANS: I understood the statement to be that if an agreed temporary restraining order longer than 28 days was signed that it somehow became

an injunction and appealable, and I misunderstood that.

CHAIRMAN BABCOCK: Okay.

MR. ORSINGER: Okay. So my suggestion on that is, is that since this is a form to apply to all situations and since it's possible the hearing may get dropped or not reached, we ought to provide in there that it's going to expire on the 14th day unless extended or something.

MS. WINK: I've already made notes, and we're going to work on that for you.

MR. ORSINGER: Then on the top of the next page, nine, third line where it says why the temporary issue -- a temporary injunction should not be issued as prayed for, I think we ought to use the word "requested," because this is addressed to laypeople, and the prayer, you know, praying for and the prayer and all that, I'm not sure that they're going to get that at all.

MS. WINK: Fixed it. Got it.

CHAIRMAN BABCOCK: Okay. Yeah, Judge Wallace.

HONORABLE R. H. WALLACE: This is not a big issue that I want to take on, but I have never liked that language, "You will appear and show cause." That, to me, as lawyers we know that's just legalese, but to laypersons and some newspaper people and whatnot that sounds like the

judge has already made the determination that this person or company has done something wrong and that they're being ordered to appear and show cause why something bad is not going to happen, and I think we -- I don't like that language.

CHAIRMAN BABCOCK: Anybody else feel that way?

MR. GILSTRAP: Yeah.

CHAIRMAN BABCOCK: Frank.

MR. GILSTRAP: Yeah, I agree. That's what I was talking about while ago.

MR. ORSINGER: Well, my response is, is that if we're going to take that out -- and, I agree, I think it's misleading -- I think we should replace it with some very, very significant language that impresses upon the reader how important it is for them to appear at this hearing, because that's what that language does. It makes -- it scares people into showing up, and if we take it out and we act like this is just another lawsuit you can go hire a lawyer and file an answer in three weeks, I would like if you're going to replace it with some language like, "Notice, if you do not appear, an injunction may be issued against you," or something to tell them how important this hearing is.

HONORABLE R. H. WALLACE: Yeah, and I don't

disagree with you, because it's conceivable you could have a hearing before their answer date. I mean, even if they're served you've got to pick the hearing within 14 days. That could be prior to their answer date. I don't disagree with that. I just don't like --

MR. ORSINGER: I get a lot of phone calls from people that get served, and they have read the first page, which says that they've got three weeks to do something, and they don't understand what it is that they have to do, and they haven't read really much past the first page, and so --

CHAIRMAN BABCOCK: That's why they're calling you.

MR. ORSINGER: This is the -- they know that they've got to hire a lawyer because they can tell that it's a divorce, but they don't know whether -- I ask them is there a hearing? That's the first question I ask, is there a hearing set, and they say, "I don't know." So I think that people don't read deeply into these pleadings, and we need to be careful about that.

MR. GILSTRAP: Well, I agree with that, but, I mean, we don't need an erroneous statement of law. We're telling people that the judge has told them to appear and show cause.

MR. ORSINGER: I know. I agree. It's

misleading.

CHAIRMAN BABCOCK: Well, not really, but Kent.

HONORABLE KENT SULLIVAN: Why don't we just say, "You should be scared"?

CHAIRMAN BABCOCK: "Be very afraid."

MR. ORSINGER: "You are ordered to hire a lawyer."

CHAIRMAN BABCOCK: "You shall appear and be very afraid."

HONORABLE DAVID EVANS: What's the substitute language? I mean, it is misleading, and even young, young lawyers that come in freshly trained come in and think that they have the burden to show why an injunction shouldn't issue, but I can't find a better substitute to put somebody on notice that they need to be prepared to defend this matter and show why the other party isn't entitled to their relief. If you had a good -- it impresses the seriousness on the situation.

CHAIRMAN BABCOCK: Yeah, show cause is scary sounding.

HONORABLE DAVID EVANS: Yeah.

CHAIRMAN BABCOCK: So but is there a -- yeah, Pat, is there different language we could --

MR. DYER: Could we change it to "when and

where a temporary injunction may be issued against you on the basis of the attached application"?

CHAIRMAN BABCOCK: Doesn't sound as scary.

MS. WINK: I don't think it's -- yeah, I agree.

MR. FRITSCHE: I think --

CHAIRMAN BABCOCK: Jan.

HONORABLE JAN PATTERSON: Well, surely there is some common language movement that has addressed this issue, and I wonder if we could say "will appear and show" -- leaving out the word "cause" -- "why a temporary injunction should or should not be issued."

CHAIRMAN BABCOCK: Yeah. You could say that.

MR. FULLER: Or "explain," "show and explain."

MR. GILSTRAP: Boldface, "Warning, if you do not appear, the court may issue an injunction against you in accordance with the attached pleading," something like that.

CHAIRMAN BABCOCK: Yeah. Restraining your liberties contrary to the American way.

MR. ORSINGER: Put it in caps.

MR. GILSTRAP: If you violate it, you can be thrown in jail.

CHAIRMAN BABCOCK: Justice Bland.

HONORABLE JANE BLAND: I think we say enough in these notices that a layperson would know you must appear, and the language of show cause means a lot to lawyers, so they know that's important when they see it, and so I would be hesitant to leave it out because it's so rooted in tradition, and it does scare people when they see it to know that this isn't just any old hearing, and since a lot of these things will be reviewed by lawyers eventually I think it's important to have them in there so they know what they're dealing with.

MR. BOYD: But it's incorrect, isn't it? I mean, the responding party has no burden to show anything.

MS. WINK: I think that's -- that's technically true, but awfully misleading, right, to the person who receives it. The old-fashioned language "show cause why I should not do this against you" or those kinds of words, what we really want them to know is it's important -- it's urgent that they appear, that they be prepared to defend themselves, however that -- and defend the allegations and that they show why the court should not take the action that's requested by the applicant and enter an injunction against them.

CHAIRMAN BABCOCK: Kent.

HONORABLE KENT SULLIVAN: There is a movement that's gained a fair amount of traction around the country

that I think is generally referred to as the plain language movement, and I've worked with it somewhat in working with the PJC over the last decade, and we have worked with one person who's been sort of a consultant in the past at the University of Texas who has helped with respect to that, and we've made some progress. It's been limited, but this is the sort of task that I think is perfectly suited to get a consultant to take a look at it and try and suggest how it could be written in a plain language format.

I agree with Justice Bland's point that there are certain aspects of the -- you know, the ancient practice that may be worth keeping around, but having somebody who has that eye towards writing it so that a -- you know, a ninth grader who is not legally trained could read it and fairly understand the import of the language is really useful, and I think it's a direction which we need to generally move. I think it's particularly important for this sort of thing because, you know, as Richard pointed to with respect to family law practice, there are a lot of folks that may not be hiring lawyers. You know, we forget about that as an access to justice question. Not everybody is going to pull their checkbook out and write, you know, a 10,000-dollar retainer to a lawyer to have them dance down to the courthouse and represent them in these proceedings. There are a lot of folks and I think -- I trust people have

seen folks having to show up and fend for themselves, and we ought to facilitate their ability to do so when they have to.

MS. WINK: And I would also say we can drop in the commentary that says that we're using this language to replace the old show cause language so that the lawyers will know that when they look at the rule.

CHAIRMAN BABCOCK: If Judge Peeples were here, he would say that there's no problem with the show cause language, it's been with us for over a hundred years, and to try to mess with something that's as basic as that to our jurisprudence is an unwise thing to say.

MS. WINK: Actually, Chip, he called me specifically to talk about this this week, and he wants to get rid of the show cause language.

CHAIRMAN BABCOCK: Like I said, if Judge Peeples was here --

MS. WINK: I wish I had money on that.

CHAIRMAN BABCOCK: -- he would be all in favor of eliminating this. Jan.

HONORABLE JAN PATTERSON: That was my comment, is that there is so much literature on the plain language that I don't think we need to hire a consultant, but I'm sure that if there is, there are a couple of books out, and University of Texas has one.

HONORABLE KENT SULLIVAN: You don't need to hire somebody. I mean, there are people that would sign onto this.

HONORABLE JAN PATTERSON: But of all the language I would think that this has been addressed in some manner already.

CHAIRMAN BABCOCK: Okay. Well, are we -- do we have a consensus in this room that we should try to get rid of the show cause language and replace it with some other scary word or words?

HONORABLE DAVID EVANS: I guess we could have a show why instead of show cause.

MR. STORIE: Show and tell.

MR. GILSTRAP: That's still a misstatement, though. They don't have to show why.

HONORABLE DAVID EVANS: But they need to be told that when they come they need to be prepared to defend and be in active trial and point out the deficiencies in the plaintiff's case, and if you don't put that language in there for the pro se that this is going to happen, they don't -- they don't -- they don't come in there and say, "Well, I don't have any proof." Show cause does not -- I know we think it's assumed it sets a burden. It says show up and tell us why -- after the evidence, why we shouldn't do it.

Now, maybe it could do -- tell why the plaintiff's evidence is insufficient, show cause why the plaintiff's basis is insufficient for injunction. That's a shorthand. I can't find a better word. I agree, it's ancient. I agree that some are confused by it on burden of proof, but it does put an alert out, and I would just take the issue show why orders.

CHAIRMAN BABCOCK: Kent.

HONORABLE KENT SULLIVAN: It's always difficult I think to make choices in a vacuum, and I mean, we're looking at this saying it's this or nothing.

CHAIRMAN BABCOCK: Right.

HONORABLE KENT SULLIVAN: So I see that Alex Albright isn't here today, so she's perfect to pick on. I wonder if we could get -- and I know from PJC work that she could help facilitate this, I think, and I would be willing to help, but get somebody to write up an alternative that would be a plain language alternative and then vote on that just with respect to the language that would be used in the writ and just have that to look at as an alternative to the arcane language that we've got.

CHAIRMAN BABCOCK: Levi.

HONORABLE LEVI BENTON: Just to supplement the voices of those who say we've got to change this, Wikipedia defines "show cause" as "a court order that

requires a party to a case to justify, explain, or prove something to a court"; and, of course, the party served with it doesn't have any burden, but maybe something like "Please appear and respond to these charges or claims" might be better.

CHAIRMAN BABCOCK: Yeah, Hayes, and then Jeff.

MR. FULLER: I didn't have my Wikipedia up, but I just penciled in here "where you must appear and explain to the court why a temporary injunction should not be issued." I mean, your explanation could be just they're not entitled.

MR. GILSTRAP: You don't have to do that, though, Hayes.

MR. FULLER: Huh?

MR. GILSTRAP: You don't have to come in and explain.

MR. FULLER: If necessary.

MR. GILSTRAP: You might be prepared to, but you're not required to come in and explain to the court why you shouldn't be restrained. The other side has got to show why you should be restrained.

MR. FULLER: But if you don't come in and show or if you don't come in and if you don't come in and say at least, "Judge, they haven't shown you enough," the

judge is going to enter that temporary injunction in all likelihood.

CHAIRMAN BABCOCK: Who was -- Jeff, you had your hand up, and then Justice Gray.

MR. BOYD: I was just going to make -- draw the relationship to other -- to the phrase that shows up in a lot of other rules that says a judge can do something for good cause shown, and that imply -- that requires that the party wanting it done has to show good cause to get it done, but in this injunction context the responding party doesn't have a burden to show anything, so I do think it's inconsistent with what the burdens really are.

CHAIRMAN BABCOCK: Justice Gray.

HONORABLE TOM GRAY: I think "cease and desist" has a certain amount of -- triggers an emotional response, so I tried to work that in here because that's what you're going after, and so I propose something along the order will have -- "when and where you will have the opportunity to respond to a request that you be ordered by the court to cease and desist the conduct described as requested in the application." And that puts the burden of proof, I think, on the applicant, and the person that's getting this knows that they will have the opportunity to respond, otherwise, they're going to have to cease and desist from doing something, the prescribed conduct,

just -- but we're spending a lot of time wordsmithing here, and I think she's got the concept of what we're wanting to change and so --

CHAIRMAN BABCOCK: Yeah. Richard. Yeah, I agree. Richard, and then Roger.

MR. ORSINGER: At the conceptual level, what I think is fair is to tell people that if they do not appear and contest this that an injunction may be granted against them, because that's what's true, and it's not just appearing, as David points out. They've got to also fight for themselves, so maybe you should say "appear and contest this application," but we need to let them know that something is going to happen by default against them that's going to be in the nature of an injunction if they don't appear and fight it.

HONORABLE DAVID EVANS: "Appear and be prepared to contest the right of the plaintiff to an injunction."

CHAIRMAN BABCOCK: Okay.

MR. GARCIA: Or could you say, "A judge may do something," because even if you don't show there are times when the judge says, "I don't think you" --

MR. ORSINGER: Sure.

MR. GARCIA: -- "you've proven it."

MR. ORSINGER: Yeah, I think it should say,

"An injunction may be granted against you."

CHAIRMAN BABCOCK: Well, I thought Justice Gray's language -- read that again, Judge.

HONORABLE TOM GRAY: "When and where you will have the opportunity to respond to a request that you be ordered by the court to cease and desist the conduct described, as requested in the application, and why the other relief requested for therein should not be granted."

CHAIRMAN BABCOCK: It's a mouthful.

MR. ORSINGER: The thing about this is in my book is the warning that by default something may be issued. It's just an invitation to come, and I'm looking more for a warning that if you don't come you may be enjoined.

MR. GILSTRAP: How about this? "Warning, if you do not appear at the hearing the court may issue an injunction restraining your actions, and if you violate the order you may be put in jail."

CHAIRMAN BABCOCK: "Or fined or both."

MR. ORSINGER: I mean, that's great. I like that.

CHAIRMAN BABCOCK: Sufficiently scary.

HONORABLE TOM GRAY: Come on, Richard, we need a flag here.

CHAIRMAN BABCOCK: Skip.

MR. WATSON: I would just point out we're assuming in all of this that we're not dealing with a mandatory injunction, right? This is not coming in and saying "You're two feet over the line. Tear down your garage."

MS. WINK: I'm also going to tweak that as well. I'll make note of it now.

CHAIRMAN BABCOCK: Judge Lawrence.

HONORABLE TOM LAWRENCE: I suggest everybody e-mail Dulcie their thoughts and we move on.

CHAIRMAN BABCOCK: Well, not only that, but the thoughts as expressed here when the record is done. Yeah, Gene.

MR. STORIE: One is if we're going to consider modernizing we might take out "whereas," too. I still remember Russell Weinkauf saying, you know, 35 years ago the great contract is it has 15 whereases in it.

CHAIRMAN BABCOCK: Okay. All right. What about the writ of temporary injunction in subpart (e)(2)? Obviously some of the comments that we've just made on (e)(1) are going to be applicable here, and we don't need to go over that again, but Richard.

MR. ORSINGER: Yeah, skipping what we discussed, down to the big, long paragraph, "Therefore, you

are commanded," you've dropped down about halfway and it says "until trial on the merits," and I think we decided yesterday that that was going to be "further order of the court."

MS. WINK: I've already made note on that for you.

MR. ORSINGER: And then I think that it's kind of archaic phraseology, "trial on the merits with respect to," and that may be gone, but I would just say "trial on the ultimate relief sought is set forth," rather than "with respect to the ultimately sought, which shall be conducted on." It just seems to me to be a lot simpler to say "trial will be held" or "trial will be set for such and such a date."

MR. GILSTRAP: Chip, can't --

CHAIRMAN BABCOCK: Yeah, Frank.

MR. GILSTRAP: I mean, we're attaching the order.

CHAIRMAN BABCOCK: Right.

MR. GILSTRAP: So why do we have to say what the order says?

MR. ORSINGER: This is a notice of setting being served on somebody.

MR. GILSTRAP: Okay, right.

MR. ORSINGER: I don't know. I mean, I don't

know, maybe -- maybe you just let it go, but --

MR. GILSTRAP: Well, if it's a notice of a setting, there may or may not be an attached order, right?

MR. ORSINGER: Well, the temporary injunction is required, except in the family law arena, to have a trial setting, I believe.

CHAIRMAN BABCOCK: Right. That's true.

MR. ORSINGER: And so if we're going to require that the injunction be served on them, it seems just as logical to me that you should also include in that injunction the other requirement, which is the setting, but you know, you could go either way. You could just say they have to rely on Rule 21a to get notice of the setting.

MR. GILSTRAP: But the injunction order is going to be attached, right?

MR. ORSINGER: Yes.

MR. GILSTRAP: The injunction order says when the hearing is going to be.

MR. ORSINGER: Yes.

MR. GILSTRAP: And it says how long the duration is going to be, so why do we need to repeat it in this paragraph?

MS. WINK: I actually don't think it's a bad idea for the very face of the writ to have the big focus language. We proposed to attach the order because it

certainly doesn't hurt to have all the details of that order and if for some reason the clerk's office fails to type one thing or another it's all there, but I like for people who are receiving service of an important writ to see right on the face the big issues.

MR. GILSTRAP: Well, but what we used to do, I mean, back -- I can remember when you went down there and they actually took scissors and cut up your order and stuck it on their form, you know, so that it was part of the writ, and now we're moving away from putting the language in the writ, and the idea was to give them notice. Now we're moving away from putting language in the writ. The problem is, you know, we may get the language in the writ different from the language in the injunction order.

CHAIRMAN BABCOCK: And that would be a problem.

MR. ORSINGER: Probably wouldn't keep you out of jail, but it would probably get you a writ to get you out of jail once you're there.

MS. WINK: The typographical errors do happen, and, you know, practitioners should be looking at the writs before they just have someone pick them up and have them served on someone, but those are good explanatory issues perhaps to put practitioners on warning, and maybe we need the simple comments about that, not -- but, you

know, that's more like a law review article than it is the kinds of comments we should put in binding issues for the rules.

MR. ORSINGER: I think it's salutary to have a trial setting in the writ itself, but I can go either way. I mean, I'm not going to lose one bit of sleep over the vote, but it just seems to me like it can't hurt when someone is reading the writ to see when it's set for trial.

CHAIRMAN BABCOCK: And that makes sense to me. Okay. What else? Anything on (e)(3)? Richard?

MR. ORSINGER: Yeah, skipping the equivalent changes mentioned before, the paragraph that says, "and whereas the honorable judge of said court upon presentment of the application in trial granted a permanent injunction," sounds archaic. It seems to me you just say, "after trial on the application granted the permanent injunction against the respondent" and again use the word "issued" or "signed" rather than "entered a judgment."

CHAIRMAN BABCOCK: Yeah.

MR. ORSINGER: And then in the next paragraph, I think that's awkwardly worded since this is, you know, command language. "You are commanded to obey all the terms of the attached judgment and that." I guess that means you are commanded that you permanently cease. It seems to me like you ought to take the "that" out and just

say, "You shall permanently cease and refrain from performing all of the acts."

MS. WINK: Good point. I've got that.

MR. ORSINGER: "Said judgment," and I don't like the use of the word "restrains" there rather than "prohibits" because to me a restraint is temporary as in temporary restraining order, and I think a prohibition is permanent, which is more like an injunction, permanent injunction, so I would use the word "prohibits" instead of restrains, and then at the end we have --

CHAIRMAN BABCOCK: Where are you reading from?

MR. ORSINGER: The paragraph that's in all caps, starts out --

CHAIRMAN BABCOCK: Right.

MR. ORSINGER: -- "Therefore you are commanded to obey all of the elements" --

CHAIRMAN BABCOCK: Okay, yeah.

MR. ORSINGER: -- "of the attached judgment," and then I would just simply and modernize slightly and "You shall permanently cease and refrain from performing all of the acts said judgment prohibits you from performing." And at the end of that it says "execute the terms of the order." I don't -- I think this is going to be a judgment. I think it's going to say it's a judgment

and not an order, and I think it creates a lot of confusion, and since this is a permanent injunction that's based on a final judgment that's appealable, I think we ought to use the word "judgment" instead of "order." I don't know whether --

CHAIRMAN BABCOCK: Yeah, Kent.

HONORABLE KENT SULLIVAN: If you're going to refer to it as "said judgment" can we put in some more whereases? And I don't see anything in Latin in here. I would really like to see something in Latin.

CHAIRMAN BABCOCK: Where is our Latin, guys? Roger.

MR. HUGHES: Well, you know, I understand, you know, we talk about entering a judgment above, but when we're talking about ordering them in a mandatory injunction, you know, a judgment may include a money judgment or an obligation to pay money, and I'm not sure we want to be able to just willy-nilly enter permanent injunctions to pay money, and when we talk about permanently obey and execute the terms of said order or judgment I suspect perhaps some wordsmithing might be appropriate so that we don't suddenly have the permanent injunction requiring them to do everything in the judgment or be held in contempt. I mean, that could create an ambiguity.

MR. ORSINGER: Then you're going to have to fix it in the previous paragraph because it says, "The court issued a judgment, a true copy of which is attached." And so what you're saying is if it's just a pure injunction that's not a problem, but what if it's a money judgment plus an injunction, in which event this paragraph is overbroad because it tells them they have to obey the entire judgment, and really they only have to obey the injunctive portion of the entire judgment.

MR. HUGHES: Yes.

MR. ORSINGER: And are you expecting them to figure out which is injunctive, or are you going to pull it out and quote it here?

MR. HUGHES: Well, you're probably going to have to, I would say, quote it if you want to hold them in contempt.

MS. WINK: Now, this is one of those times where I can definitely drop in commentary. When I have a judgment, whether it's agreed or not, we often have the judgment call for the entry of a particular order before the final judgment is entered, and we make the order the injunctive order that's referred to separately in the judgment and then I use that order to get the permanent injunction, so we might want to say "order or judgment," but I'm not sure that's going to be clear to everybody

without some commentary on it.

CHAIRMAN BABCOCK: Yeah, Richard.

MR. ORSINGER: Are you saying that you have a separate signed document called an order that's signed by a judge and then another judgment that's signed by the judge?

MS. WINK: Sometimes I do it in an agreed -- a partial judgment, and I separate the injunctive part of the judgment from the rest of the judgment.

MR. ORSINGER: Are there two separate documents with two signatures of a judge?

MS. WINK: Yep. Yep.

MR. ORSINGER: Then you probably have two interlocutory orders.

MS. WINK: But when they're all gone, when everything is done, everything is no longer interlocutory. When the entire case is taken care of it's no longer interlocutory.

MR. ORSINGER: Well, is it ever folded into one judgment, one single judgment?

MS. WINK: It can be, yes.

MR. ORSINGER: See, I don't -- I wish that -- well, where did Pam go? Sarah is not here. I'm not entirely sure that your two separate orders are not both interlocutory forever. I wish -- all the appellate lawyers or many of the appellate lawyers are gone. Skip's over

there doing his e-mails. I'm a little worried that --

MR. WATSON: Actually, I was trying to see if there was a Latin app for my iPhone.

MS. WINK: I tell you what --

MR. ORSINGER: It scares me to death to think that it might be a prevailing practice that you have one injunction judgment order slash and then one like monetary noninjunctive order and they're both signed by the judge and they both together resolve -- we've had many, many discussions over many, many years on this committee as to whether you can do that.

MS. WINK: I'll tell you what I'll do. I'll tell you what I'll do. I'll talk to Nina about that and get all of her input on how to tweak this.

MR. ORSINGER: That would be good. Just for fun you should also call Sarah. She feels very strongly about this issue.

MS. WINK: Will do.

MR. MUNZINGER: There's case law --

CHAIRMAN BABCOCK: Anything more on this?

HONORABLE TOM GRAY: Chip, the section that was right before the "Therefore, you are commanded" that's in all caps -- and I know that Richard mentioned something about the archaic part of the "upon presentment" or that might -- my concern there is the trial, because as you

pointed out, a lot of these are not actual trials. That whole phrase to me seems like is unnecessary and just the honorable -- "the judge of the court granted the permanent injunction," if you see where I'm going with that.

MS. WINK: I do.

CHAIRMAN BABCOCK: Yeah. You might say "at trial granted."

MR. ORSINGER: Well, what if it's a --

HONORABLE TOM GRAY: May not be trial.

MR. ORSINGER: -- a default or what if it's an agreed judgment? I don't know, I mean, there might not be a trial. Is it even necessary to say there was a trial if there wasn't?

HONORABLE TOM GRAY: That was my point. I just think you can go straight from the -- straight from, you know, the "whereas," in deference to Kent.

HONORABLE KENT SULLIVAN: Yeah, I appreciate that.

HONORABLE TOM GRAY: I knew you would. To what's ordered.

CHAIRMAN BABCOCK: Okay. Are we done now with 5? Okay. Why don't we take our morning break?

(Recess from 10:29 a.m. to 10:46 a.m.)

CHAIRMAN BABCOCK: All right. We're now on injunction Rule 6, subparagraph (a), and, Richard, you

undoubtedly will have comments about it, so why don't we just start with you?

MR. ORSINGER: On (a)(1), second line after "Rule 103" I would put in "or to the applicant" so that it's clear that it's parallel construction. In subdivision (2) I've got some problem with the wording or even the concept. If several persons are enjoined, and it says if they reside in different counties then the clerk has to issue additional copies. In my view every single person who is enjoined is entitled to an original, original writ, so it doesn't matter whether they live in different counties or not, and they shouldn't be getting a copy of the writ. I think they should each get their own writ. So if we have four defendants in one county I think that the clerk has to issue four writs and not one writ and three copies of a writ or not just one writ for all four people that happen to live in one county. I mean --

MS. WINK: I'll check that for you. It is in the existing rule.

MR. ORSINGER: I know, but --

MS. WINK: No, no, no, I'll check it.

MR. ORSINGER: It's not making any sense to me. I mean, let's say that I have an injunction against four people, and in one case they all live in different counties, so everybody gets their own injunction, but in

one case they live all in the same county, so only one of them gets an injunction, and what do you get the injunction back from them and give it to the other guy, or how do you even make this work?

MS. WINK: No. I think the language of the rule is not what's actually happening. I think the clerks are issuing multiple writs just as if they were in multiple counties, and they're just using the word "copy."

MR. ORSINGER: I would think that, too, but I think we may take this opportunity to have the rule make some sense.

MS. WINK: Got it.

CHAIRMAN BABCOCK: Okay. Any other comments about 6(a)? Skip is not checking his e-mails.

MR. WATSON: No.

CHAIRMAN BABCOCK: He's fully engaged, but has no comments about 6(a).

MR. ORSINGER: The one appellate point we had all morning, too.

CHAIRMAN BABCOCK: Okay. 6(b). Richard.

MR. ORSINGER: Yes, okay, thank you. It seems to me like we shouldn't list in subdivision (1) just "a temporary restraining order or other writ of injunction." A temporary restraining order under this new phraseology is a writ of injunction because the new

definition of writ of injunction is TRO, temporary injunction, and permanent injunction.

CHAIRMAN BABCOCK: Right.

MR. ORSINGER: So why don't we just say, "a writ of injunction is not effective." And when you say "until served on the person to be enjoined," I know that's in the rule already, but the way we write these things they say that they're effective on actual notice even before service. I don't know if yours are that way.

MS. WINK: No.

MR. ORSINGER: All the ones that I see, which are family law ones admittedly, and they follow the form book, so almost all the family lawyers are doing it, say that it's effective immediately upon notice, even if that's before service.

MS. WINK: As to other parties who have actual -- who have actual knowledge, whether -- that's true. Those who might be in concert with them, but it's my understanding that the writ is not effective on the responding party until they're served with it.

MR. ORSINGER: Well, I don't know. I haven't researched that in so long I may agree with you, but what I will tell you is that's not the prevailing practice in family law.

MR. GILSTRAP: That's what Rule 7 says.

MR. ORSINGER: What does it say? What does it say? No. It does require service on a party. It requires service on a nonparty.

MR. GILSTRAP: Okay.

MR. ORSINGER: And so we're up here, we're talking about writs that might be applied to parties, and a lot of these orders, maybe not the permanent injunctions, but the TROs and the temporary injunctions say that there's --

CHAIRMAN BABCOCK: Yeah. Frank's point is that this -- if you just read a little bit down the page, injunction Rule 7 says actual notice.

MR. ORSINGER: No, it says --

MS. WINK: That's other parties. That's other parties.

MR. ORSINGER: It depends on how you read it. I see that is actual notice are those -- "and on those persons in active concert or participation who receive actual notice." The first part of that sentence says that the injunction is effective on parties and on nonparties who receive service, and there's a public policy reason to say that parties are influenced by the utterance by the judge versus having it typed up, which is always going to take a couple of hours or maybe even a day or two; and particularly in the family law arena, we expect our

injunctive orders to be effective immediately because we need the protection immediately, and we don't have a bond requirement. So what I'm saying is that I'm not sure whether contempt requires service. I don't think it does from my long ago research. If you had actual notice of a court order and you violated it, you went to jail whether you got served with the writ or not. But if someone here has better knowledge than I do about that, all I'm saying is that I think this sentence may be wrong when you say that a writ of injunction is not effective until it's served upon the person to be enjoined.

MS. WINK: Just so that you know, in the injunctive, I know Chris Wrampelmeier was on the subcommittee, but that doesn't address your family law issues, but one reason that sentence was added was because both Bill Dorsaneo and Judge Randy Wilson were on the panel with me, and it was the understanding of all of us that it was not effective against the party who is the subject of the application until they're served with the writ, and that's because you have to have the bond -- you have to post the bond or other security if it's been -- before you can have the writ served, and until the bond is posted it's definitely not effective.

CHAIRMAN BABCOCK: Richard Munzinger.

MR. MUNZINGER: I just point out it's an

affirmative statement of substantive law, which if erroneous is awfully embarrassing. It's an affirmative statement of substantive law. I would use it to defend against a contempt citation, so Richard's point is if you're in a divorce case and the husband is told not to do A or the wife is told not to do A, and she's told that by the judge, but the injunction hadn't been written, the bond hadn't been posted, she hadn't been handed the piece of paper, she can go do A. I'm not sure that that's good law. I think Richard has a very valid point, and I don't know that we should be adopting a rule or accepting language that has an affirmative statement that is potentially erroneous unless we have law to back up the statement.

CHAIRMAN BABCOCK: Frank, what do you say about that?

MR. GILSTRAP: Why don't we -- you know, either in part (b)(1) or in 7, why don't we just have a rule that says when the injunction becomes effective, and sets forth all of the requirements, got to be -- the bond has got to be issued, you've got to either be served or receive actual notice, whether you're a party or nonparty.

CHAIRMAN BABCOCK: Justice Hecht.

HONORABLE NATHAN HECHT: I mean, we want to be careful about this, and I'd be interested in hearing from the other trial judges, but when I was a trial judge,

a couple of times --

CHAIRMAN BABCOCK: That was a long time ago.

HONORABLE NATHAN HECHT: It was a long time ago and the memory dims, but people were standing in the well of the court, and I made it as clear to them as I could that they better not do what I didn't want them to do between the time that I told them and the time that the order got typed up, because there wasn't going to be any difference in my view, and you know, we didn't have -- we barely had typewriters back in that era.

CHAIRMAN BABCOCK: Quill pens, I thought.

HONORABLE NATHAN HECHT: If it took time to go get it typed up, everybody knew that whatever was supposed to stop was going to stop. Now, is that the law? I don't know. But I could imagine in a family situation, never having been there, that you might tell people this better not happen again, and if it happened -- if they went out in the hallway and one of them cold-cocked the other one, they would have serious problems.

CHAIRMAN BABCOCK: Yeah, well, Judge Evans, what's your thinking about it?

HONORABLE DAVID EVANS: You would be a fool with me to disobey an oral order while waiting on a writing. I might not get you then but I might get you the next time on it. You know, I've got a long enough memory

to remember who messes with it. I've always read it that you can't hold them in contempt unless you have -- you comply with all the issues, but, you know, if you have a litigant that starts taking that kind of liberties with you then you know you have a lot of work to do in the future.

CHAIRMAN BABCOCK: Yeah. Yeah, Roger.

MR. HUGHES: Well, I think there is some -- some merit in waiting for service. I mean, as was pointed out earlier, it can't at all be effective until they put up a bond, and I had one case where after we set the bond the applicant could never make bond, they could never -- they could never find a surety who was willing to go on board with them, and so you had an order from the judge, but no -- but no bond, and so -- and knowing how fast things actually got out of that courthouse, I was concerned that a bond might be filed and we might not know about it for a while. So there is some purpose to saying maybe it ought not to be effective until the person gets served.

Then, on the other hand, I've had cases where I knew that afternoon there was going to be a bond on file, and my client would not waive service. On the other hand, I told them "Don't be violating it in the meantime."

CHAIRMAN BABCOCK: Uh-huh. Jan.

HONORABLE JAN PATTERSON: I think it is a correct statement of the law, but it is something that we

may want to think about, because I think it's a common problem, and I once asked a lawyer in this same situation who acted inconsistently with what the judge had said in court but before it had been served, and his response -- I said, "What made you think that you could engage in that type of behavior or that you could go out and do that after the judge had essentially told you no?" And he said, "Well, Judge, I was thinking outside the box," so --

CHAIRMAN BABCOCK: "I was thinking outside the box." Jeff.

MR. BOYD: Speaking of thinking outside the box, I wonder if the court's power to enter orders to protect its jurisdiction authorizes Judge Evans to say, I'm hereby ordering you not to do this until this writ gets issued and served so that the contempt hearing is not over a violation of the writ but of that oral order that you issued before.

HONORABLE DAVID EVANS: You know, we're really talking about the power of the court, the ultimate power of the court to confine somebody, but the 500-dollar fine is not much of a hit on many people for one, and you can only do it one time -- well, each transgression, but you're really talking about the ability to confine, and the fact that somebody violates your order while you're waiting to get the writ in place and served and the bond made, you

know, that's not going to make a judge go crazy at the contempt hearing. It just recognizes that the technical portions haven't been met and he can't confine them, and I don't think any of us lose sleep over that, but what it does is it tells us this is not a credible litigant who is going to participate in the process, and we need to be careful, and we need to have -- the next time we go through this we need to have an order ready in the courtroom or bonds ready in the courtroom, and we need to be more -- and maybe need to be more precise. It's not an overwhelming problem to me.

CHAIRMAN BABCOCK: Okay. Kent.

HONORABLE KENT SULLIVAN: I think Rule 7 is not terribly helpful. It is an attempt to summarize many different issues in a single sentence, and as such I think it is potentially very misleading to people.

MS. WINK: By the way, that is existing rule.

HONORABLE KENT SULLIVAN: And I am not the slightest bit surprised.

CHAIRMAN BABCOCK: Richard.

HONORABLE KENT SULLIVAN: I would eliminate it.

MR. ORSINGER: A little research or maybe a lot of research could do this, but I used to defend some of these things, and my recollection was, is that you could

put somebody in jail for violating an oral order if you could prove that it was clear and specific enough to meet the Slavin requirements. The reason that the writing was required was so that the clarity requirement for jail was clearly met by an objective document that the appellate court could evaluate, but I believe that due process of law does not require a written order. It just requires clarity in understanding what the prohibited behavior is, so if you have a court reporter's record and the judge's order is clear and you violate it, I think you can go to jail.

Now, I think for -- maybe we need to have two different conversations about family law practice versus practice everywhere else, because in family law practice you do not have to post a bond unless there is a nonfamily member involved as a litigant and you're getting an injunction against them, like enjoining a foreclosure or something; and so there's usually not an external step that's required for the order to be effective; and, yes, if they're comprehensive orders you're going to need them all written down; but if it's a simple order like you can't remove funds from that account or you cannot take the child out of the state of Texas, that's specific enough in my view for due process.

The thing I don't like about this sentence is it's calling everyone's attention to the fact that they may

be able to use a legal technicality to violate the court's clear order and never be punished for it. It's saying that, by the way, you are free to disregard the court's order between the time that you walk out of that courtroom and the time you get served by a writ, and, by the way, if you avoid service of the writ for two or three weeks then you can avoid the court's order for two or three weeks.

CHAIRMAN BABCOCK: And even though this might be a correct statement of the law we shouldn't say it.

MR. ORSINGER: I don't think it's correct. It's certainly not correct in all areas of the law, but why would we want to advertise that they can freely disregard the court's order as long as they can avoid the deputy constable walking up to their car and dropping it through a window.

CHAIRMAN BABCOCK: I'm not disagreeing. Judge Evans.

HONORABLE DAVID EVANS: The injunction has to be in writing. I don't disagree with Richard's statement that you can be held in contempt for disobeying an oral order that you were given in court. Don't disagree with that. But for an injunction to be effective it has to be in writing, it has to state the -- currently has to state the reasons why and the acts prohibited, and it has to be served. I think that's the difference, Richard, between

the oral pronouncement and an oral order and to the degree that you could enforce an oral order. Now, most oral orders, though, in my area, like trade secrets and things like that or market penetration, if you try a complicated case where a fellow has a certain segment of a market and you're enjoining just certain customer base, you could make that order, but I doubt it would hold up on specificity, the oral order would hold up. We do see a fair number of people come to court with the injunction ready to be signed at the hearing and served on the defendant in the presence of the court so that the bond is the last item to go be done.

MS. WINK: And, in fact, my practice is to already -- from the moment a client calls about a potential injunction, we put them together -- if we think we're going to need a surety as opposed to posting cash or other property, I immediately put them together with sureties so that when we have the pleadings before the court and the proposed order we can go straight down, post, writ will be issued within a few hours and served.

CHAIRMAN BABCOCK: Judge Lawrence.

HONORABLE TOM LAWRENCE: What percentage of your cases do the defendants not show up on the TI hearings?

HONORABLE DAVID EVANS: Percentage would be

the wrong way to approach it maybe, but the percentage is very large when it's lenders being enjoined by borrowers. The lenders are not bothering to come to the initial temporary restraining hearing. They're going to take that first pass on foreclosure, but if you'll get past our current foreclosure issues and get to the other issues, almost everyone appears on our temporary injunction hearing and almost everyone is represented, but I have a strictly civil court with no family law docket, and so that's the nature of it.

CHAIRMAN BABCOCK: Yeah, Frank.

MR. GILSTRAP: I mean, we're not putting this in anything being served on anyone, are we? I mean, it seems to me we need a -- somewhere we need a clear statement as to when the injunction becomes effective and who it's effective against. I mean, just because we don't want people to know is no reason not to put it in the rule.

CHAIRMAN BABCOCK: Well --

MS. WINK: And, actually, your concerns were part of what the task force addressed. There are a lot of people who think once the judge signs the order they think they have an injunction, and they don't. They think that they can have it enforced by contempt and someone thrown in jail, and they don't, and so by putting the information here we were trying to make sure that the lawyers who don't

do this everyday really know what they've got to do. And do it by --

MR. ORSINGER: Well, do you want to drop a footnote that says "but your client may be held in contempt of an oral order while they're in court" or whatever --

MS. WINK: Yes.

MR. ORSINGER: -- so that we're going to have a full disclosure of the law here?

MS. WINK: I think it's a good -- I'll make the note of putting that in there right now.

MR. GILSTRAP: Although I don't think it belongs necessarily in the part involving service of writ. Maybe it needs to go -- I still like the idea of combining it with 7.

CHAIRMAN BABCOCK: Okay. Yeah, Justice Gaultney.

HONORABLE DAVID GAULTNEY: This is a new sentence that's being added?

MR. ORSINGER: It's a restatement.

MS. WINK: I'm talking about a comment. Oh, you mean the sentence that we've been talking about?

HONORABLE DAVID GAULTNEY: Right.

MS. WINK: Yes. That sentence is not written in the rule, but it is --

HONORABLE DAVID GAULTNEY: So the purpose of

service is to assure notice.

MS. WINK: No. The purpose of service is to do two things. One is notice, but the other is to make the injunction effective. For instance, if I -- if somebody has asked for an injunction against me and we had a TRO hearing, until they post the bond they can't issue the writ; and in that situation, as Judge Evans was saying, it's not an injunction yet, and somebody might never make the bond issues.

MR. GILSTRAP: What if the bond is -- the bond is posted, the people know about the injunction, and they're ducking service? They're still subject to the injunction, aren't they?

MR. ORSINGER: No.

MR. GILSTRAP: That's what 7 says.

MS. WINK: No. They're subject to a court order but not injunction.

HONORABLE DAVID GAULTNEY: I think this really -- I think you're going to be presented with lots of scenarios, one of which may be someone trying to evade service, and generally -- or in other instances if you have -- if you can show that they -- there are ways you can show effective service, even though it wasn't actually handed to the person if there is an attempt to evade service, but if someone shows up in court, okay, I assume

that what we've got is an appearance maybe, so in another context we treat that as there is then no need to serve because you're in court. I mean, you have notice of your need to be there.

Why is this different? I mean, why is it that we're giving such strict requirement on specific method of service, personal service, when really in my mind the purpose for service is due process, to make sure that you have -- that you know what you're being restrained from and that you have an opportunity to show up and be heard; but if you're in court and you have actual knowledge of it and there's some technical defect on the service, this says, to me, that it's totally ineffective; and first of all, I think you might be presented with situations where otherwise a court might not hold that. They might say you have actual knowledge of it, you were in court, you made an appearance, you were told, you were handed it to you by the opposing -- by the judge, but because somehow we didn't have the technical return of service in the exact time, you know, we're going to say that that was ineffective, and I'm not -- you know, if that statement is in there in the rule, that's the way it's going to be applied, and is that good policy given the purpose of service is notice?

MS. WINK: Well, I'm going to pull research for you guys, because I hear hesitation that this is a true

statement of the law. I've been telling people for years --

HONORABLE DAVID GAULTNEY: I --

MS. WINK: No, no, no, it's okay. I see the issue, but this is a little bit of a due process issue. Understanding the difference between a plain old order and an injunctive order that is punishable at the full range of civil and criminal contempt, right, that's where that due process issue is especially elevated; and that injunctive order cannot live, cannot be enforced as a matter of law before that bond is posted or that security, if any has been required; and then the person who's bound by the soon to be injunctive order doesn't have notice of whether or not that bond has been filed and the writ issued until it is served on them.

There are several things that I do and probably Chip does to address that when I'm already dealing with an opposing counsel in the case. We can get written agreements that the attorney will accept service on behalf of someone, just like you do with people who agree to accept service of a citation, and we handle it that way. So there are choices of how to deal with it, but, yes, and I have had the fun of chasing down someone trying to evade service, too.

CHAIRMAN BABCOCK: Richard Munzinger, you had

your hand up.

MR. MUNZINGER: I just was going to make the point she just made in response to Judge Gaultney, Justice Gaultney. The injunction is not effective until the bond is posted, so that's different. Everybody can -- the judge can rule on every term, say everything there is, but if the plaintiff seeking injunction or the party seeking injunction can't post the bond, there is no injunction, so there is no order to have violated. There is nothing to be done until that person meets the obligation of the bond, which is not in some cases something that's done in your sleep. Sureties want protection.

CHAIRMAN BABCOCK: Uh-huh. Frank, Pat, and then Jan.

MR. GILSTRAP: The injunction is not effective until the bond is posted because the rule says that. I mean, we can -- we can -- as long as we conform to due process, we can change all of this by rule. And maybe -- you know, maybe we want to -- maybe we want as long as it conforms to due process, maybe we want to have people who receive actual notice of the injunction after the bond has been posted bound by the injunction. We certainly want to have a provision in here saying a person as who is an act in concert who received actual notice are bound by the injunction. We can say whatever we want to as

long as we conform to the 14th Amendment.

CHAIRMAN BABCOCK: Yeah, Pat.

MR. DYER: I was going to point out related to that, the way that it's written and the way that it's in the current rules, someone who is, quote, "in active participation" or whatever the language is here, "active concert or participation," they're bound by it just on actual notice and not service; whereas, the particular target, the way it reads now, is not bound until personal service, so that's somewhat of an anomaly. The other thing is that the way that Rule 7 -- I think we do need to address those who are in active concert or participation. Perhaps we need clearer language, but I think that does need to be in the rule.

MS. WINK: Now, let me make a technical distinction here, though. If I am the person who is the actor in concert out there and I get actual notice of something that's not an injunction yet, I haven't violated an injunction. So, again, the injunction itself, the way my lifetime understanding is, until that writ is issued and served, there is not a, quote, injunction.

MR. DYER: I would disagree. I would say -- I would say you have an injunction when the bond has been posted. The next question is who does it bind and when does it bind, and the way the current rule reads and our

rule reads, if you're in active concert and participation you're already bound if you have notice without service, but it's not effective on the target until it's been served.

MS. WINK: That's why I'm going to get case law for you.

MR. DYER: Well, I think that's an anomaly. The other thing is the way (b)(1) reads, it says it's not effective until served upon the persons to be enjoined. Aren't we also saying the persons to be enjoined are those in active concert and participation? So it seems to me it could be a little ambiguous with Rule 7.

CHAIRMAN BABCOCK: Jan.

HONORABLE JAN PATTERSON: While I think it is a correct statement of the law, that first sentence, I do think that some clarification and explanation is in order, because we don't want it to suggest that it's in derogation of anything that went on in open court, and I think that an explanation of that and that it does not speak to that issue might be in order, and I wonder also if it could be clarified. I do think that Pat raises a good point about the ambiguity, and I wonder if we could rephrase it to instead of saying "it's not effective until," but "it's effective upon service to the person" to make it a positive statement. There's no reason for it to be negative, but I

do agree that there's an ambiguity there.

CHAIRMAN BABCOCK: Roger.

MR. HUGHES: Well, making another plea for some sort of actual service on the person before it becomes effective, you know, I -- when we say the person learns of it in court, golly, that's not entirely accurate. The person may know the judge is about to sign or has signed some order up there on the bench, and the parties may have discussed some of the terms, but some of these injunctive orders that are signed are fairly complex, and to say that the person simply because they were in the courtroom when the judge signed it knows every term, every act that's prohibited, that might be a little expansive until they get a chance to read it, and I think what we all are upset about is the possibility that a person could get -- gets a kind of a grace period where they can freely violate the order, violate an order which they have, as I say, notice, not actual knowledge of all the terms, but that seems to me that if at least actual knowledge of the terms is the prerequisite to criminal liability, unless -- I mean, we're putting somebody in jail for violating an order, and do we really want the person saying, "Well, I had actual notice of paragraphs (a) and (b) because those were read in the courtroom, but I didn't know about (c) and (d) because I never saw the draft order, and my lawyer didn't show it to

me, and the other side didn't show it to me. I didn't know about it until I got a copy when the sheriff served it on me, and by that time I had already done (c) and (d)." I mean, we would be fighting over things like that, so I think there is -- I realize people don't like the little grace period there or the possibility of willful evasion, but the alternative is then we're going to be fighting these things on just how much you knew about that order's terms when you walked out of the courtroom.

CHAIRMAN BABCOCK: Richard.

MR. ORSINGER: I think that we're using service as a surrogate for notice, and it's not. People can get notice independent of service, and if I created a hypothetical I think you could see that. Let's say that an individual has been enjoined and the bond has been posted and the process is out in the street and the lawyer gets a copy of it and delivers a copy of that writ of injunction to the client, but they haven't been able to get service of the writ on the client and then the order is violated. In my opinion, due process of law is met. Can you put that person in jail because they had actual notice? Under this rule you can't put this person in jail because they haven't been served, unless you're going to say that a copy to their lawyer is the equivalent of service, in which event the whole debate we're having is kind of irrelevant, but if

this means personal service it's being used as some kind of marker for when there's sufficient notice to put somebody in jail, and it's not an accurate marker.

The accurate marker is actual notice, not service. That's what the cases require, is actual notice, not service, and I think that it's wrong. I think it's wrong for several reasons, but I think it's wrong that I do not think the U.S. Supreme Court or the Texas Supreme Court requires that you must be officially served with a document as the only way to prove notice. That's just an easy way to prove notice because you've got a return from an officer or at least a private process server that's now authorized by the court or by the Supreme Court, so you have a presumption that the accuracy of the service from the return that's in the file, but I don't know that there's any court ever has said that someone that has actual notice but just simply hasn't been served can't be held to the standards of actual notice.

This blows past that and says we're going to forget all the stuff about actual notice, we're going to forget about the real policy here, and we're going to substitute the formality of official service of an official document is the acid test by when somebody can go to jail, and I just think it's wrong in all respects.

CHAIRMAN BABCOCK: So you don't like that

sentence.

MR. ORSINGER: I don't like that sentence, that's right.

CHAIRMAN BABCOCK: Hayes.

MR. FULLER: Aren't we talking about two separate things? All the -- I mean, you can violate an order, you can violate a writ of injunction. All this is talking about is the writ of injunction. It's served -- and whether we put it in the positive, you know, is effective upon service or is not effective until served, all that goes to is whether or not you can be sanctioned or held in contempt for violating that writ. If an order is given in open court on the record in front of all the parties and I choose to disobey that, I'm violating that order, and I'm going to get punished for something else, in some other way perhaps, but I'm going to get punished. So, I mean, I think -- it seems to me we're muddying two concepts here. We've got the order and we've got the writ and all we're talking about here is the writ.

CHAIRMAN BABCOCK: Richard Munzinger.

MR. MUNZINGER: You have a trade secret case, and the defendant is in the court with counsel, the plaintiff is in the court with counsel. The judge grants the temporary injunction. The plaintiff's lawyer goes over and hands the judge an order to the defendant that says the

president of the defendant company has to leave or something. Judge says, "That's fine, go on your way." The plaintiff's lawyer's done his homework. He's got the order written, injunction written, in the exact language that the court grants it or it's edited, what have you. The bond is there. They've brought their surety. The bond is posted. The guy has left the courtroom. The judge signs the injunction, and a copy of it is handed to the defendant's lawyer. Is it effective to bind the defendant given the text of this rule?

MR. ORSINGER: I would say no.

MR. MUNZINGER: I don't know about that because -- I mean, the text of the rule would say you're correct, except that the lawyer is an agent for the client under the law so that service on the lawyer is service on the client, but the text of the rule is confusing under the circumstances I just outlined, and those would not be unusual circumstances in commercial cases with good lawyers.

CHAIRMAN BABCOCK: Justice Bland.

HONORABLE JANE BLAND: Well, I agree with Roger that it's important that the parties get notice of the contents of the order, not just that an order was signed or that a judge is going to sign an order, because unlike other kinds of orders, injunctions require you to

refrain from certain conduct on an ongoing basis or to engage in certain conduct every once in a while, and if we -- if we say, well, you knew, there's going to be a fight about what you knew, which is why I think there's always been this importance placed on actually serving the writ of injunction, and I do think that good lawyers in injunction cases have their order ready to be signed there in the courtroom and are prepared to serve it immediately because I think the general practice is that people don't expect that the injunction is enforceable until it's served, until the order is signed and it's served. So I don't think it would be a departure from standard practice to say that the actual order needs to be served, and I don't think that people that are in concert and participation with them can be held accountable for it if -- with just the mere knowledge that an injunction was signed. They actually need to know what the injunction says.

CHAIRMAN BABCOCK: Okay. Judge Evans.

HONORABLE DAVID EVANS: Yeah, this is just one order that requires service. Other orders don't require service. 21a does not address orders, so it is a -- you really have to go back to 103 and when you do it in court if you do it -- if you really dot the I's and cross the T's, you hand it to your bailiff, and you hand

your bailiff a handwritten order, says, "I order you to serve this injunction on the defendant" because you have to have a written order to authorize somebody outside of 103 to do it, and you really have to dot your I's and cross your T's if you're taking it on as a judge, and you do it in some circumstances when you've got really recalcitrant type defendants.

We did one in one of these city disputes over ordinance and things like that, served them. I handed the bailiff a handwritten order that said, "Serve this on the defendant," made it a court exhibit. I don't know how good it was, but under 103, but that's how we did it and then they duplicated it by having citation issued and served again, but service of orders is just -- and notice of orders are two different issues and have been traditionally.

So I would like to make one comment about the balance of it. The balance of that paragraph, it says that only a sheriff or constable can serve a temporary restraining order or writ of injunction that requires certain things. That's a little bit narrower than 103. 103 allows a judge -- actually has a preface on it that says "unless otherwise authorized by" -- "unless otherwise ordered by the court," only a sheriff or constable could do that.

MS. WINK: To address the 106 issue, 109.

HONORABLE DAVID EVANS: So I would just say that you might want to say -- if you're going to stick with 103 as the method of service of order, just say 103 and drop out that second -- that last -- that last sentence. If you go to 103 it starts out about "No other party who is interested in the outcome of the suit" -- "unless otherwise authorized by a written order only a sheriff or constable may serve citation" in those circumstances. So I'm not sure when I would do that, but I would just go to 103.

CHAIRMAN BABCOCK: Uh-huh. Good point. Any other comment? Yeah, Roland.

MR. GARCIA: Well, it just seems like if you -- and this has come up in several cases I've had where you have multiple defendants, some are international out-of-country defendants, and you have to go through The Hague Convention for your initial service, which requires translations to Norwegian and all sorts of things, which can take months, and then the Norwegian consulate has to determine whether they will accept it or not, and so to have to reserve every time you get a new injunction or a modified injunction is just not practical.

The way we were -- the way we handled it is -- and maybe this was not correct, but the way all the parties in our case handled it was once they appear and

answer and they have counsel then you have a right to serve forever more on that -- on the lawyer, instead of tracking down the Norwegian defendant again through more translations and what have you, because that just means you will never get protection. Only if the lawyer says, "Well, I'm authorized to accept service for defendant A but not defendant B" okay, well, now you've got to go serve defendant B, even though it's the same lawyer you know communicates with all the defendants. So it seems like -- it seems like service should be able to be by hand-delivery right there in court if counsel is there, opposing counsel is there.

CHAIRMAN BABCOCK: Justice Bland, did you have your hand up?

HONORABLE JANE BLAND: No, I'm not quarreling with a lawyer accepting service on behalf of his client after he's appeared in the case on behalf of the client. I'm quarreling more with the idea that somebody can be bound to an injunction before the order is signed or in the interim while the bond is being posted and before they had service by any means to any -- of a copy of the order, because orders often look very different than what the judge says in open court.

CHAIRMAN BABCOCK: Let's talk about (b)(2). Does anybody have any comments about that? Yeah, Gene.

MR. STORIE: In -- do we want to say "person enjoined" rather than just "party enjoined" since we recognized earlier there could be other persons enjoined?

MS. WINK: Got it.

CHAIRMAN BABCOCK: Okay. Good catch. Anything else about this? All right. How about (c), return of writ? Any comments about that? Richard.

MR. ORSINGER: In (c)(1), second line, executing the writ, I'm not sure if that's really -- is that the correct language, or do we use -- are we delivering the writ? Do we use the word "execute" under all of our service language?

MS. WINK: It's my understanding we do. The same kind of language is in all the other rules as well, so we tried to follow the form on that.

CHAIRMAN BABCOCK: Okay. Any other comments about (c)? All right. Why don't we talk about 7 a little bit more since we've been talking about it a lot so far? Yeah, Roger.

MR. HUGHES: Well, I know some people have mentioned they would like to see this obliterated, but I think it's necessary, because the issue does come up about, you know, collateral parties who are not agents, servants, or employees of another party and whether the injunction will reach them, and I think this is one area where having

a rule will crystallize for both the bench and the bar just what is -- how far a contempt will reach. Otherwise, we're left with -- to common law, and I think that's a -- since we're talking about exercising the power of criminal contempt, that's a poor way to proceed, and the judge ought to have some language to turn to for guidance.

CHAIRMAN BABCOCK: Okay. Richard.

MR. ORSINGER: Okay. This rule really carries forward all of the previous debate even in spades, because the previous Rule 6, subdivision (1) says it's not effective unless it's served on the persons to be enjoined, and literally applied then that would mean that you would have to serve it on the parties. Whoever you want to be enforced against you would have to serve the writ on their officers, you would have to serve the writ on the agents, you would have to serve the writ on their servants, you would have to serve the writs on their employees, and you have to serve the writs on their attorneys; and if it's one of those people who are not on that list, all you have to do is give them actual notice. You don't even have to give them personal service.

So the parties and their officers, agents, servants, employees, and attorneys all have to be served by a writ, but the people who are only collaterally involved only have to have actual notice, so it's convoluted. It

ought to be the reverse of that, which is what I think the proper interpretation in this is, that if you're a party the order is binding on you whether you get served with the writ or not, if you have actual notice of the order. If the judge signs an order, let's forget the oral part. Now we're in writing. It's signed by the judge. A copy is handed to you, and you're a party. No writ has been issued yet because the clerk issues the writ, so no writ has been served, but you're a party, it's a signed order, you have actual notice. You ought to be held in contempt for that, but if you're not a party then you ought to have actual notice before you can be held in contempt.

That's what I think Rule 7 is supposed to say, that the order is effective on parties and their employees and their lawyers without the service of a writ, but noninvolved people who don't have a lawyer or representative in the courtroom have to get served with an official writ before they can be held in contempt. That's what I've always thought this language meant, and the sentence we were debating earlier convolutes that in my view and now means, I think, that employees and attorneys are going to have to be served by a writ to be held in contempt, but in the meantime Rule 7 says can you hold a nonparty in contempt even if they haven't been served with a writ, although the previous rule says they can't, it's

not effective unless they're served with the writ. So the problem in my opinion is under the previous subdivision (1) we were debating.

CHAIRMAN BABCOCK: Okay. Frank.

MR. GILSTRAP: We can solve the problem by eliminating the first sentence in 6(b)(1) and then that would leave us with paragraph -- with Rule 7, and one ambiguity in paragraph Rule 7 is how the phrase "who received actual notice of the order by personal service or otherwise," what that modifies. Richard says it might only modify the persons who are in active concert or participation with them. What we can do there is either put a comma there to make sure that last clause modifies the whole rule, or rather than say "who received," put "provided that they received actual notice of the order by personal service or otherwise." That solves your problem.

CHAIRMAN BABCOCK: Dulcie.

MS. WINK: I want to -- I just want to point out that there's a little difference between what is drafted here in proposed Rule 7 to what is in existing Rule 683, and I think what you've hit, Richard, as well as Frank, is this whole order versus injunction issue. The Rule 683 says, "Every order granting an injunction and every restraining order shall set forth the reasons," la-dee-da-dee-da, "and is binding only upon the parties,"

and it goes into the same language that you have here, that the parties, officers, agents, and on persons in active concert, right? So instead of saying "every writ of injunction," it really should -- this rule I believe should say "every order granting a writ of injunction."

MR. ORSINGER: Then you better take 6(b)(1) out of it because that is a train wreck. If what you just said is right that actual notice of an order is binding on the parties and their lawyers then you've got to do something with 6(b)(1).

MS. WINK: And again, order versus the writ. There's a difference. Order versus injunction, and I think if I take (b) out I'm going to create confusion.

MR. ORSINGER: If you say -- if you say that 6(b)(1) means that the order is not enforceable unless the writ is served, you're saying the order is not enforceable on the parties and the lawyers even though they have actual notice.

MS. WINK: No, I think I'm going back to the same situation. A court is going to have to decide -- if the writ of injunction is not issued and served yet, the court is going to have to decide how am I going to enforce the order if I can't enforce it under the full scope of civil and criminal contempt as it can in an injunction. Okay. So the order has one level, but the writ of

injunction is the one that has the higher level. The reason the order applies to persons in concert is to prevent the directly enjoined party from trying to do through others what he or she can't do directly.

MR. GARCIA: But the only practical -- I mean, the writ is really just administrative because you've got the order. There's no other action by the judge. You just need the writ because you've got to now go to the clerk's office and get all that bond paperwork posted and you've got to get it paid, and once the bond's paid then you get your writ. There's no magic to it. It's just going down and getting the bond posted, because you don't even know what the bond is until the TRO, the blank is filled in.

MS. WINK: We don't know if it will ever be posted. We don't know if that writ is ever going to exist.

MR. GARCIA: But that's right. That's the point I think we're getting at, is that it's -- you don't even need a writ document. You just go down and post the bond as a practical matter.

MS. WINK: No, I disagree with that, and I've got cases on that.

MR. GARCIA: No, I know it's -- right now that's the case, but I'm saying as a practical matter.

MR. ORSINGER: What do the cases say?

MS. WINK: You've got to get it served. You know, your order isn't it. Your order granting the injunction is not the injunction. It's just not. If we back away from the minutia of the language here and we focus the big picture, a writ of injunction is sort of like a -- before we have the full trial on the merits, I, the court, am going to be enforcing action that I normally can't enforce against parties, especially for otherwise permitted conduct, prior to trial. So we have this elevated level of everything. We've got the sworn allegations and everything else. And the writ itself, you've got to post the -- you've got to be able to post the security for that. I'm excluding the family law issues. There are completely different policy situations there, but the reason the party has to post security is because they've got to be able to make the other side whole in case the judge who is having to work ahead of time on a very expedited basis issues an injunction that they find out later at trial probably never should have been issued, not that they -- they just didn't have everything that they had at trial.

So, again, the posting of that security when it's required and the actual issuance of that writ saying this is -- the writ does more than just say it's a piece of paper. It says what's been required has now been

officially done. Here is your due process notice of it. Beware, you know, that you can get thrown in jail for that, so there's just a different level of constitutional requirement to get somebody subject to that injunctive order. I'm not saying the court can't take action otherwise for a violation of an order, but --

CHAIRMAN BABCOCK: Jan.

HONORABLE JAN PATTERSON: And what's important about that is that it's a bright line both for the parties in case it involves complex issues and multiple aspects of an injunction, but also a bright line for the judges, because -- how shall I say this -- having served on the Commission on Judicial Conduct, I will tell you that there are many times when judges express desires to throw people in jail prematurely, and that may be a larger problem than individuals who violate orders of judges in open court, but it really is a problem, and it's a service to the parties as well as to the judges to know what that bright line is and to not leave it to uncertainty.

CHAIRMAN BABCOCK: Judge Evans.

HONORABLE DAVID EVANS: Well, it is -- I've come to the realization that there is no method prescribed by the rules for a judge to serve an order not made in open court. 21a only covers pleadings, motions, does not cover orders, and really deals with the parties service upon each

other, and I've -- I've assumed that this order is a method -- since this is a court order as opposed to a party's pleading has to be served in some fashion, but if there was a method for service to handle a problem that Roland brought up of court orders after appearance, I'm not sure that you wouldn't meet the constitutional requirement, but there is -- I don't believe that currently there is anything in the Government Code or in the rules that states how I'm you supposed to serve my orders and when they become effective on the parties.

Now, I know what the working definition is, and the practical definition is that when I fax it to an office or mail it to an office and a reasonable time has elapsed for it to be there then I assume that it's effective. Whatever that order is, they've got notice of it. But this is a service of an order, and if there was another method of service available and prescribed by the rules then it could be handled in that fashion. There is a problem with this current procedure. You could have the finest lawyers in town representing someone -- or the worst, and this still requires you to go find a sheriff, pay a fee, and go find the person and deliver it to them, and that seems -- that's not the way it's done.

MR. GARCIA: Are you meaning after they appear and have counsel?

HONORABLE DAVID EVANS: Yeah, after they appear.

MR. GARCIA: That cannot be right. That cannot be right.

HONORABLE DAVID EVANS: That shouldn't be -- there should be a better method.

MS. WINK: I'll admit to you, Roland, there are lots of people who have not been following the law, which is what I run into all the time when people call about injunctive procedure. That's why we need to make it clear, or if we're going to say that there's the ability to do something through 21a after someone has appeared, I am all in favor of that, believe me. I hate paying for service over and over on writs.

MR. GARCIA: Maybe if we had order in 21.

HONORABLE DAVID EVANS: Or you could say "orders of the court may be served" -- I just roughed out in my mind "orders not made in open court," so that you have that out of the way, the oral pronouncement, "may be served upon the parties by facsimile, mail, or hand-delivery or their counsel," and it's done.

CHAIRMAN BABCOCK: Roger.

HONORABLE DAVID EVANS: Now, you might have to work out whether it's effective when it's dropped in the post office or not. I think that's unfair to a party, but

there's some issues there.

CHAIRMAN BABCOCK: Roger.

MR. HUGHES: Well, I think we may be overthinking how this thing works. I mean, Rule 6(b)(1) tells us when the writ of injunction becomes effective. Rule 7 about who it -- about who it affects doesn't even become an issue until it's been properly served. The second thing about serving an attorney, I realize that on the surface appears to be a lot easier, but I do have some experiences with as soon as a hearing is over and an attorney has lost the hearing, they disappear from the courthouse extremely quickly, and then when you say serve on the attorney, what do you mean, hand-delivery, or do you mean I just left it with the receptionist out front?

And, you know, the thing about the return of the writ, we're requiring a rather formal process. We've got a return of service showing an officer has served it on the party, and they fill out when and where. Well, you serve it on the attorney, how do you know the attorney gave it to the client? I mean, in some sense -- in one sense either the attorney is going to fall on the sword and say, "Oh, we forgot it got put in the wrong file" or the attorney is always going to say, "Oh, yeah, I gave it to the client" because the client is not going to want to suffer liability.

I mean, I realize this is cumbersome and it seems to allow a gap, but the alternative is that we're going to be plunged into an area where everything becomes fact intensive. This way it's simple. We have a return of citation, shows when it was served. That's it. And I think Rule 7 is pretty practical. I think the Federal rule is pretty much the same way, and once it's been officially served on a party you can preserve -- you can presume that every one of their employees knows about it. You can't make that presumption about others, but then again, you can't go out and serve everyone they might conspire with. I mean, you can't know in advance who the defendant is going to conspire with to violate it. So I think Rule 7 seems to me fairly reasonable.

CHAIRMAN BABCOCK: Richard.

MR. ORSINGER: In my view if you're being held in contempt you're being held in contempt for violating the order, not violating the writ of injunction. In my view a piece of process is just a way to prove service, and so what is happening at this -- either the committee stage or at the task force stage is that we have decided to substitute a more objective measure of when someone has notice, which would be official service of a writ, for the more subjective, but the only constitutional requirement in that is actual notice. If you go read the

cases, they require actual notice. They don't require the service of a writ, so we're making a policy decision here that we're going to take the constitutional requirement of actual notice and substitute that, the formality of the issuance and service of a writ, and when we do that we are going beyond due process of law requires, and we're creating a lot of issues about the difference between someone that has actual notice of a signed order and someone who has received a writ service of the signed order as well as the oral order versus the written order.

We're affecting a lot of things by making this decision that we're going to forget actual notice is the standard and instead use service of the writ as the standard, and we have problems when we go to third parties, because third parties don't even have constructive notice of what their lawyer knows because they're third parties and are not represented by lawyers. So third parties need to have actual notice, which is what it says. "Actual notice by personal service or otherwise." The first part of that sentence I think is assuming that if you're an employee of a corporation and there's an injunction against the corporation, they're assuming that your employer is going to let you know that certain behavior is prohibited.

So to me the rule in its original language is the parties and the people that work for them and their

attorneys are bound by a sort of constructive notice to their employer or notice to the lawyer or whatever and third parties are not. So to me we're making the decision today to substitute the formality of a writ for the constitutionally required actual notice in contravention to the way our rules have been applied in the past, and the last thing is that I don't think the family law is excepted. They are excepted from the bonding requirement, but I don't recall that the Family Code says that you don't have to issue a writ of injunction. I could be wrong. The form book frequently waives the writ of injunction being served, but I can tell you as a practice that it is uniform across the state that lawyers do not get writs of injunctions served on the opposing party after a temporary hearing.

They all go by the signed order, and they all get the orders noticed -- notice to the opposing party is through their lawyer, and the motions for contempt, people go to jail all the time without the issuance of a writ or the service of a writ, and I don't have the Family Code with me. I will not make that mistake next time, but I don't think the Family Code obviates the necessity of issuing a writ, so if we say that instead of actual notice being the foundation for due process now the issuance and service of a writ is going to be the foundation for due

process or enforceability, then I'm thinking that all of our divorces are now going to have to have writs served, and I'll check that out, but if that's true, that's going to be a real problem.

CHAIRMAN BABCOCK: Well, it's all a big mess. Let's talk about Rule 8. Anybody have any comments on Rule 8?

MR. ORSINGER: I have a question.

CHAIRMAN BABCOCK: Somehow I knew you would.

MR. ORSINGER: This is just a limitation on my experience, but you can get a TRO before you even file a lawsuit. Is that what this is saying?

MS. WINK: Indeed.

MR. ORSINGER: Okay.

MS. WINK: This information, by the way, is all existing. It's in Rules 685 and 686. I always feel really hesitant just to use those words in this moment, but the reality is -- and it does vary from jurisdiction to jurisdiction, county to county. You could have a situation happening in the middle of the night, and I assure you even at night there is some judge who is on call for those kinds of issues, and in some counties the judge will also wake up the district clerk, so you're going to be making not only a judge angry but a district clerk as well, which means, lawyers, beware, you better be right, but literally things

are heard in the middle of the night. They'll have the petition with them. They can fax it to the judge, but it doesn't yet have a cause number in it. The counties who literally wake up the clerk, the clerk issues a cause number in some of them. This is what we gathered from the way it works throughout county to county from those who were on the task force.

So in the situation with the example after hours and there's just somebody on call, as soon as -- you know, it has to be filed and docketed and all of those usual things taken care of, so that's the only reason, and this is rarely going to happen, but it does happen.

MR. ORSINGER: Do you have to issue the citation at the same time you issue the writ of the temporary restraining order?

MS. WINK: Yes. In that particular situation you would, and literally if a judge orders it, whether by conference call or whatever in the middle of the night and something has to be done, that's where you've made the enemy of the clerk, and that person is going to have to issue it all.

MR. ORSINGER: Well, if you haven't filed a petition --

MS. WINK: Uh-huh.

MR. ORSINGER: -- then what do you attach to

the citation?

MR. ORSINGER: No, you -- you have a petition. You can't get any of these things without the sworn allegations. Let me give you an example. Okay. This happened back when Justice Wainwright was at Haynes & Boone, and we were at 3:00 in the morning getting ready for a TRO hearing, and suddenly one of the young associates walks in and, you know, with his suit on, and his situation was he was going to have to seize a vessel. Now, that was a Federal issue, but middle of the night, had a client who had huge judgment and the owner of the vessel, and that vessel was worth millions of dollars, was on its way to territorial waters of the United States. If it had touched those territorial waters, we would have had to wake up a particular Federal judge. All the pleadings were written, the affidavits were ready, the copies of the judgments, all those things were ready for that moment.

So sometimes we're aware ahead of time. If we had not been aware ahead of time those kind of things would have to be handwritten. Sometimes that happens, but if the court determines in those kind of situations that the injunction is required then absolutely somebody is going to have to issue the cause number. It's going to be the clerk. The cause number, going to file it and docket it, and copies of that petition, whether it's handwritten

or otherwise, and sworn allegations and the affidavits are going to be copied and attached to the writ as well as the petition.

MR. ORSINGER: Well, in that situation then the TRO is never issued before the suit is filed. It's contemporaneous with the suit being filed, but the writ, meaning the temporary restraining order, which means the writ, is always after there is a petition, after there's a filing fee, and after there's a bond.

MS. WINK: You're right. We should make this specify an order granting a TRO.

MR. ORSINGER: Okay.

MS. WINK: I think that's a good clarification.

CHAIRMAN BABCOCK: Any other comments on this? Yeah, Gene.

MR. STORIE: Would you have multiple defendants in these as you would multiple respondents in the TRO? So in (b) you might want to say "must also issue a citation to each defendant as a notice."

MS. WINK: We don't -- all of our other rules just talk about one defendant, and they issue them for multiples in that situation, so I wouldn't make this special and different for the others.

MR. STORIE: Okay.

CHAIRMAN BABCOCK: Any other comments on this?

MR. ORSINGER: Under (b) it says "when a true copy of the petition is attached to the temporary restraining order." Is that a situation that we were discussing before? You might have a copy attached to the citation but then you might have a copy attached to the petition for the -- to the TRO itself?

MS. WINK: Right. In other words, you might have a petition that has the application in it, or you might have a petition separately from the application. Sometimes if you've done that application as a separate document you've attached a copy of the petition and incorporated it by reference, then fine. When they issue the actual TRO they have to -- they ordinarily have to attach a copy of the petition. If that copy of the petition is attached to your application as well, this is just saying, okay, clerk, you don't have to attach yet another copy of the petition.

MR. ORSINGER: Okay.

MS. WINK: We're making sure that the respondent gets the petition as well as the application, if they're in separate documents.

CHAIRMAN BABCOCK: Okay. Any more comments on this?

HONORABLE TOM GRAY: Is there some other kind of copy besides a true copy? Did I miss something there?

MR. DYER: A false copy.

MS. WINK: I've thought that for years, yes.

HONORABLE TOM GRAY: Could we maybe drop the word "true"? Is that a constitutional requirement?

MS. WINK: You know, the big worry there is, is some sneaky lawyer out there going to think he can -- he or she can attach a false copy. You know, there's another reason we left it in the rule saying that equity applies, because we didn't want to take it out and have someone think that equity no longer applied.

MR. ORSINGER: That would be a felony, by the way, if they did that, I think.

CHAIRMAN BABCOCK: A false copy?

MR. ORSINGER: Uh-huh. If you attach that to a piece of process and it's not a copy of the original citation, I think it violates the Texas Penal Code.

MR. GARCIA: Well, a false copy is not a copy. It's something else.

CHAIRMAN BABCOCK: Okay. Rule 9, the answer.

MR. GILSTRAP: We can get rid of this quickly.

CHAIRMAN BABCOCK: Any comments on Rule 9? Roger.

MR. HUGHES: Are we on Rule 9?

MS. WINK: Yes.

MR. HUGHES: Okay. You know, I'm not a big fan of sworn denials, but as long as it's clear we've got to have it, that what I would say is I don't think the answer should deny the allegation -- I mean, a sworn one, because after 93 there's a lot of things in Rule 93 that you have to swear to are false that are just pure legal concepts. So I would say it might be stronger to say that they only have to deny the material facts in the petition as opposed to the material allegation.

CHAIRMAN BABCOCK: Okay. Frank.

MR. GILSTRAP: I think we can get rid of this rule. The first sentence says that the defendant can file an answer. Well, we already know that. That doesn't add anything. The second sentence does talk about you can get a dissolution of the injunction based on a sworn denial, but I think we've already overtaken that with 1(g) and 2(d).

CHAIRMAN BABCOCK: Right.

MR. GILSTRAP: There we said that if you're seeking to dissolve it on the basis of law you just ask for -- file a motion. If it's on the basis of fact, you either have to have a sworn motion or a -- put on evidence, so with that, I think the second sentence would just confuse

that, so we ought to take it out, too.

MS. WINK: How about if I work on clarifying that to be in parallel with what was 1(g) and 2(g)?

HONORABLE JANE BLAND: How about we get rid of it?

MR. GILSTRAP: I think we ought to get rid of it. It's been around since 1940, and as far as I can tell nobody has used it.

CHAIRMAN BABCOCK: 10, disobedience. We've spoken quite a bit about disobedience already.

HONORABLE DAVID EVANS: Can you actually proceed on a contempt motion based on just a show cause order without the defendant present and incarcerate them? I thought you had to have them present in order to incarcerate them.

MS. WINK: I think there's trouble in this language here, too. It was my understanding that you've got to have them present, and the other day Judge Peeples -- in fact, I'm not the best person to ask that because I've never had to do this in state court. I've always done it in Federal court, and we had the people present, so it wasn't a question, and we had show cause orders out there. So one of the things that Judge Peeples suggested is that we really focus on perhaps revising this rule to address those kinds of issues. I have started an

alternative draft to be considered and would recommend that y'all take a look at that when we come in next time, but I will double-check that for you before we come in here.

HONORABLE DAVID EVANS: I think the way we proceed now, and I don't know that it's required, but the way we're currently -- I think our practice up in our districts is to issue the show cause order if the defendant doesn't appear personally, and that includes -- counsel is not enough. Then you issue the writ of attachment to bring them present before the court, so -- and I think that's required by the case law, but it's been a while since I've gone back to check it.

CHAIRMAN BABCOCK: Okay. We're going to get a redraft of this next time. I just want to ask briefly about Rule 11. To me this doesn't say very much.

MR. GILSTRAP: I don't think we need it. I mean, it's been -- I think it's been overtaken by the statute. The statute says that -- that principles of equity are one of the basis for getting an injunction. For example, if it's real property you don't have to prove -- you don't have to prove adequate -- adequate remedy at law. I don't think this adds anything. I think we ought to take it out.

MS. WINK: Now, this is existing Rule 693, by the way.

MR. GILSTRAP: Right.

MS. WINK: I don't disagree with you.

MR. GILSTRAP: I know it's the old rule.

MS. WINK: I just want to make sure everybody has got this out. The one reason the task force as a whole as well as the subcommittee suggested not taking it out is we don't want practitioners to think that there's no longer equitable principles in injunctions simply because the rule has been taken out.

MR. GILSTRAP: Well, what equitable principles are there? There's no adequate remedy at law and irreparable harm.

HONORABLE DAVID EVANS: Unclean hands.

MR. GILSTRAP: What's that?

HONORABLE DAVID EVANS: I try all of the unclean hands cases in Tarrant County.

MR. ORSINGER: Don't undertake to list equitable defenses because the list is infinite, and it will eventually end up in Latin.

MR. GILSTRAP: I forgot about clean hands.

CHAIRMAN BABCOCK: Well, taking this out is --

MR. ORSINGER: I would say on taking out on Rule 11, I mean, I think that there is a danger that people begin to think that the only rules that govern the issuance

of injunctions are the Rules of Procedure, and in reality there's a whole host of rules that involve a lot of equitable principles that we don't mention anywhere but here. So this is, if you will, a reminder to people that even though we are controlling the procedure that's associated with it, there are many associated principles, and so I'm not against this rule. I think that people don't think enough of equity.

CHAIRMAN BABCOCK: Jan.

HONORABLE JAN PATTERSON: It's a gap filler by reference, and I would favor leaving it in.

CHAIRMAN BABCOCK: Richard.

MR. MUNZINGER: I think there's a lot of risk in deleting it, because everybody looks at this and says, "My god, the Supreme Court deleted this rule. There must have been a substantive reason for doing so," and that isn't the intent.

CHAIRMAN BABCOCK: Modernization.

HONORABLE JAN PATTERSON: They're against equity.

CHAIRMAN BABCOCK: Okay. Our next meeting is August 26 and 27th, right back here, dealing again with the ancillary rules; and I think that's probably, absent an emergency, going to be the only issue on our docket. So we're going to get as far as we can next time with the

ancillary rules.

MR. GILSTRAP: Although, I think -- we didn't cover 12, because they're deleting the old 691.

CHAIRMAN BABCOCK: Yeah.

PROFESSOR CARLSON: Chip, could you just make an announcement that the entire ancillary report is on the web page?

CHAIRMAN BABCOCK: Okay. Everybody, the entire -- hang on for a second. The entire ancillary report is on the SCAC website if you want to look at it in advance of the meeting.

MR. ORSINGER: And are we going to revisit any of this language, or is it over?

CHAIRMAN BABCOCK: No. Dulcie is going to redraft in accordance with our discussion.

MR. ORSINGER: Okay.

CHAIRMAN BABCOCK: But we're not going to go through this line by line again. We're going to target the specific things.

(Adjourned at 12:00 p.m.)

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REPORTER'S CERTIFICATION
MEETING OF THE
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