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MEETING OF THE SUPREME COURT ADVISORY COMMITTEE

OCTOBER 1, 2022

(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 1st day of October, 2022, between the hours of 9:00 a.m. and 11:29 a.m., at the Texas Association of Broadcasters, 502 E. 11th Street, Suite 200, Austin, Texas 78701.

INDEX OF VOTES

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

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CHAIRMAN BABCOCK: Good morning, everybody. Great to see so many on a Saturday morning. This may be our first Saturday meeting in a while, and we've got a couple of agenda items to get through, and the first one is suits affecting the parent-child relationship, and we've been going through this methodically and well, led by Judge Boyce, and so, Bill, take it away.

HONORABLE BILL BOYCE: Thank you, nad if you'll allow me to pause for a moment, I'm going to dial in Pam on my cell phone so she can listen in and correct me when I misspeak so if I might have that opportunity here.

CHAIRMAN BABCOCK: That would be great.

HONORABLE BILL BOYCE: This is a continuation of our discussion that was held most recently at the May 27th meeting, and I was absent from that meeting, but Pam led it, and you may recall that there were a series of votes that were taken on about seven aspects of what would a rule look like to address the frivolous appeal situation. Those are recounted in your memorandum, so I think where we are is on the wordsmithing part of the rule that tries to implement the seven votes that were taken, and so that's what you have on page two of your memorandum. This is a proposed addition to TRAP

28.4. It is a revision of a task force proposed rule, and this attempts to implement the votes that we went through at the May 27th meeting.

Just a couple of highlights. The consensus and the vote of the committee as a whole was to have a narrower focus of this rule, and so that's why it's framed in terms of suits for termination of the parent-child relationship or affecting the parent-child relationship filed by a governmental entity, seeking managing conservatorship. So the appointed situation is the one being addressed. We talked about some of the terminology. The vote from the last meeting was to not define or try to describe what a frivolous appeal would be. That is abundantly discussed in case law, and there are numerous other circumstances in rules and statutes where frivolous is referenced without being defined, so it's not defined here. We use the terminology -- you'll see this reflected in a couple of different locations -- "appeals deemed frivolous," and I think that was Skip's insight that the subcommittee agreed with, which was in large part we're talking about characterizations here, and so we don't want to have the citation of a rule suddenly carry with it the -- the notion that the appeal is irretrievably and irredeemably frivolous. This is a process, some things are arguable, some things are gray areas. Occasionally

courts will send appeals back because it will look at the appeal and say, no, this really isn't frivolous, there's at least something arguable here, go back and look at it. So that's why we use this "appeal deemed frivolous" phraseology here.

I think that that covers an overview of the revised draft of 28.4. It has a companion rule, 53.2, that applies and relates back to the situation for the petition process if you find yourself under 28.4, this new subdivision. So the votes that we took are reflected in the first page of the memo, and so if you want to compare and contrast and see how they carry through you can, but I think with that introductory remark, I would ask for questions, comments, or proposed revisions and tweaks that people have on the form of the rule itself.

CHAIRMAN BABCOCK: All right. Richard, you usually have some comments and questions.

MR. ORSINGER: You know, Chip, I didn't have a chance to prepare properly for this.

CHAIRMAN BABCOCK: Because you were yapping your mouth yesterday.

MR. ORSINGER: But I was on -- I was on the House Bill 7 task force, and the plight of the courts of appeals was pretty compelling. They were having more and more of these cases, particularly the San Antonio court of

appeals, but I think El Paso as well and perhaps others, and there was a lot of time and effort was put into a way to streamline these appeals and particularly to alleviate the burden of searching through the entire record on the sufficiency of the evidence, and then we have the timing problems and the fact that ineffective assistance of counsel couldn't be developed until after an appellate lawyer was appointed, by which time it was too late to make a record of the ineffective assistance, and so I thought it was all very well thought out, and I think generally that the committee here has fulfilled those expectations, Bill.

CHAIRMAN BABCOCK: Well, that's a good endorsement.

MR. ORSINGER: Yeah.

CHAIRMAN BABCOCK: Given your knowledge of the subject matter area. Any other comments or questions about -- about this rule? Justice Gray.

HONORABLE TOM GRAY: Bill cut me out of the participation in the last subcommittee meeting.

CHAIRMAN BABCOCK: He'll do that.

HONORABLE TOM GRAY: How did he do that?

CHAIRMAN BABCOCK: No, he will do that.

HONORABLE TOM GRAY: Oh, he will do that. He asked what dates were available, and I told him this

was the only date that I could not be available, and that was when he scheduled. So with that caveat, I want to make sure that everyone on this committee, given their limited exposure to criminal proceedings, understands a fundamental and, in my view, incredibly forward-thinking view of this procedure as distinguished from the -- what we call Anders procedures in criminal cases, and I draw your attention to -- well, it's not numbered. It's below the subsection numbered (4) in the caption that is "pro se response to certification of appeal deemed frivolous," and the sentence is --

PROFESSOR HOFFMAN: Hold on, Tom, what page are you on of the PDF?

HONORABLE TOM GRAY: 386.

PROFESSOR HOFFMAN: Thank you.

HONORABLE TOM GRAY: And the sentence that I want to draw everybody's attention to is, "An appellate court may abate the appeal for existing counsel to provide additional briefing or for appointment of a new lawyer." The thing that's different in this than in criminal cases is that the appellate court is given the option of having the previously appointed counsel that did not see an arguable issue brief the issue that the court has seen or that the party has seen. Am I characterizing that correctly?

HONORABLE BILL BOYCE: Yes.

HONORABLE TOM GRAY: That is very different than what we can do as an appellate court in criminal proceedings currently. If the party or the appellate court sees an issue that is arguable, we have to abate it and have the trial court appoint another attorney to brief the case. And they brief it from scratch. They don't start with just that issue. So this, to my way of thinking, is a tremendous advancement for efficiency and cost savings that really needs to be made.

CHAIRMAN BABCOCK: Are you suggesting that the Court of Criminal Appeals should adopt this or there should be some effort to coordinate with the Court of Criminal Appeals on criminal cases?

HONORABLE TOM GRAY: I would not want to speak for the CRAC committee, which I also serve on, but if I could ever get their attention on that, yes, I would love to see the same. The -- you may recall, was it the May meeting that we talked briefly about the Wende procedure?

HONORABLE BILL BOYCE: Yes. Yes.

HONORABLE TOM GRAY: And you sent the committee back, the subcommittee back, to evaluate that and they've basically worked it into this, but, yes, if the CCA could very easily take up this issue. The problem

is they can't write rules, so they have to do some of their modification of the process, the common law process of the adoption of Anders from the federal requirements. To get to something like this, they would either have to get a statute or start a tedious process of common law revision of their Anders procedures.

CHAIRMAN BABCOCK: Could they -- Justice Christopher.

HONORABLE TRACY CHRISTOPHER: Well, I hate to say I disagree with Tom, but I do. It is -- it is absolutely more efficient to have the same lawyer look at the issue, which is what this rule does. Okay. So I spot something, and I say to him or her, "Hey, you missed this issue, please brief it," right? But from a client's perspective, I feel like the new lawyer is the better way to go, because the new lawyer starts fresh, right? So the old lawyer who wrote the Anders brief says, "I've read everything, I don't see anything," and files a brief, you know, swears "I don't see anything here"; and to me, just from a client perspective, the new lawyer is better.

And I will have to admit that we have done that. We have done this rule in some parental termination cases, but that's based on the fact that we are stuck with that 180-day rule even when we have to get new counsel. And because that is a driver for us and -- because it is

more efficient. All right. This lawyer has already -- well, I'll give you an example, so it will make more sense to you. So in parental termination cases, parents are often terminated under different grounds. Okay. There's a statutory list of grounds, and they're often terminated under different grounds. So this lawyer briefed it and said absolutely the evidence 100 percent supports termination under ground (O), which is failure to comply with a service plan, and we didn't -- I don't see anything else in the record that would be arguably different.

Well, the Supreme Court has said that the parties are entitled to an independent review of grounds (D) and (E), which involve abuse or neglect of the child, and the reason for that is that if you're terminated under (D) and (E) in case number one, then with child number two and case number two, it's easier to terminate you the second time. So reviewing (D) and (E) provides closure there, so because, you know, once they're over here at case number two, they can't go back and say (D) and (E) was a bad finding in case number one.

So we sent that case back to the original attorney to look at (D) and (E) and to brief (D) and (E) for us. But, you know, either the lawyer didn't understand that that was his job to brief (D) and (E), which is concerning, or, you know, they were just -- so it

concerned me that we were sending it back to that same lawyer to look at the (D) and (E) grounds. So but, yes, it's absolutely more efficient for that same lawyer who's already read everything to brief those grounds. So I'm not 100 percent sure I disagree with Tom, but that's the countervailing issue.

CHAIRMAN BABCOCK: But for this rule, you're okay with this because it gives you the option either to --

HONORABLE TRACY CHRISTOPHER: It does give you the option.

CHAIRMAN BABCOCK: Yeah, okay. Lisa.

MS. HOBBS: I mean, you could, if you wanted to kind of lean appellate courts towards new counsel, you could word it where it kind of weights towards new appellate counsel.

HONORABLE TRACY CHRISTOPHER: Yeah, and I actually -- I don't know how people are paid, which is another consideration.

MS. HOBBS: I think they are paid by the counties.

HONORABLE TRACY CHRISTOPHER: Yeah, no, but I mean they're paid for the case, right? They're paid to file a brief, and they're paid, you know, a very small sum of money --

MS. HOBBS: Fairly small.

HONORABLE TRACY CHRISTOPHER: -- to file the brief, and so now we're asking them to file two briefs, the same counsel, versus if we appoint for a new counsel, the county has to pay, you know, the second $500 or $750 or, you know, whatever they pay. I mean, it is very small that they pay them.

MS. HOBBS: They are capped, so every county is a little bit different, but they are capped at some point, so you're right, the first -- the original lawyer probably has met their cap.

HONORABLE TRACY CHRISTOPHER: Right.

HONORABLE EMILY MISKEL: Often it's a flat flee.

MS. HOBBS: Yeah.

HONORABLE TRACY CHRISTOPHER: It's usually a flat fee, and they all just -- you know. So that's another concern. You know, sending it to a new lawyer requires more money from the county, but sending it to the old lawyer who has already spent their time writing the brief and now has to write a new brief, basically for free, again, you get a little -- you feel a little uneasy about that.

MS. GREER: Well, and it's not just for free. It's they're basically reversing themselves.

HONORABLE TRACY CHRISTOPHER: Yeah, they are. Although in my particular instance, it's not necessarily reversal. All we want them to do is brief is their sufficient evidence on (D) and (E). They could still file an Anders as to (D) and (E), which, you know --

MS. GREER: Yeah, but it's kind of like when a judge gets a motion for rehearing.

HONORABLE TRACY CHRISTOPHER: Right. It is. It is a little bit like that.

MS. GREER: Every muscle in your body is going, no, I got it right.

HONORABLE TRACY CHRISTOPHER: Correct. Correct. Yes. Yes. I just think that that's something to consider, you know, when you're writing a rule that is different from the criminal procedural rules, so --

CHAIRMAN BABCOCK: Okay.

HONORABLE TRACY CHRISTOPHER: Just so the group understands it a little bit more.

CHAIRMAN BABCOCK: Justice Gray.

HONORABLE TOM GRAY: I wanted to ask Bill -- Bill, I didn't see on a quick read of this where in our independent review the same provision specifically applies. Is it there? Am I missing it?

HONORABLE BILL BOYCE: So I'm not sure I'm understanding your question.

HONORABLE TOM GRAY: Okay. When we do one of these, in addition to the pro se response, whether there's a pro se response or not, we have an independent duty to review and see if we agree with counsel's determination that the appeal is frivolous.

HONORABLE BILL BOYCE: Uh-huh.

HONORABLE TOM GRAY: If we see an issue, where is our authorization to abate it to existing counsel to brief that issue? And understand, in a criminal context, while he's looking for that, we have actually had the situation where we identified an issue, abated it to the trial court, new counsel was appointed; and we identified the issue that we saw, but told them, you know, here's an issue, do this and anything else you see; and we get yet another Anders brief, and we've told them already there's an issue. And in the Anders criminal context, then there is a third attorney appointed to go back through and do what we said, and so I'm hoping that there's a -- did you find it, Bill, for me?

HONORABLE BILL BOYCE: I don't think it's reflected in -- I think it would be helpful.

HONORABLE TOM GRAY: Where is our discussion in the rule about the court's duty to do an independent review since everything else seems to be in some way a codification of the case law within the rule? Is there --

does it explain here our independent duty, and if you're going to write up our independent duties, notwithstanding my vehement opposition to our review of (D) and (E).

THE COURT: Lisa.

MS. HOBBS: As a suggestion, you could take out the paragraph that Chief Justice Gray was referencing on the first day response. You could take out that last sentence and make it a separate section, so regardless of whether you're reviewing by pro se motion or you're reviewing because of your independent duty, that last sentence is actually what you can do about it. So if you pulled that out as a separate section and gave it, you know, an intro that says, you know, whether by pro se motion or on the court's own independent review, blah, blah, blah, blah, blah, blah.

HONORABLE TOM GRAY: I would probably recommend a paragraph that talks about our duty of independent review.

MS. HOBBS: We'll call it the Tom Gray provision.

HONORABLE TOM GRAY: Oh, please don't.

HONORABLE STEPHEN YELENOSKY: Tom, is that a review outside of the typical adversarial process?

HONORABLE TRACY CHRISTOPHER: Yes, it is.

HONORABLE TOM GRAY: It is. And stay tuned

for what the Waco court does, and you will see that -- I mean, notwithstanding yesterday's conversation, there are a lot of times that the court has an existing independent duty to do something because of case authority, and I recognize the precedent that I am required to do that and follow.

I'm also surprised that we don't have an independent duty to see that a litigant gets due process. When we identify at the appellate level a violation of due process, we have no tool to require it. So that's kind of the genesis of yesterday's conversation and my concern about where our independent duties come from, but in this context there is no -- and I knew that you were being a bit facetious with regard to yesterday's conversation, and I understand that and I appreciate it, because this is constantly a balancing act of what we do, because I think Tracy will support me in this and Bill has certainly seen it as well. It's the concept that we see things in appellate records all the time that we just want to say, holy cow, what were they thinking, what were they doing? As Tracy said, why were they still sitting there not objecting? I mean, it's like -- but literally the rules handcuff us, and we cannot delve into it and -- as much as we might like to.

And so in this context I think, Bill, a

break out the documents the court of appeals independent duty to review it. I would not yet want the Supreme Court's holding in -- which one is it?

HONORABLE TRACY CHRISTOPHER: Some initials.

MS. HOBBS: Some initials.

HONORABLE TOM GRAY: I actually have it. If I was sitting in my office and this was a Zoom meeting, I have the two cases up on my -- the edge of one of my monitors. Anyway, the one that requires the review of --

HONORABLE TRACY CHRISTOPHER: Of (D) and (E).

HONORABLE TOM GRAY: -- of (D) and (E). It's M.N. or M.G. or something, and anyway, and then our ability, like Lisa said, break out that sentence so that it applies to issues identified by the party or the --

CHAIRMAN BABCOCK: Bill.

HONORABLE BILL BOYCE: So I think I hear a motion for a friendly amendment to break it out, as suggested by Lisa and by Chief Justice Gray, and I guess what I would ask for is clarification from the committee as a whole in response to Chief Justice Christopher's comments about whether there's a general comfort level with leaving the option to have the same lawyer continue or whether that should be either eliminated or made more weighted, I think was the way Lisa had described it,

towards getting a new lawyer to look at the case once it's been determined that actually there is something arguable there that the first lawyer did not identify as being arguable.

CHAIRMAN BABCOCK: You want to vote? It's not even 9:30. So the vote would be to leave the language as proposed, giving the option but not weighting it, or come up with new language that would weight it in favor of new counsel. Lisa.

MS. HOBBS: And to weight it, I would kind of flip the order. Right now it says, "existing counsel for additional briefing or appointment of new counsel," you could say "for appointment of new counsel, if" -- and "if not available," or some phrase that says this is your preferred thing, but if not available, existing counsel. Or if -- you know, pick your standard, for what it is. Is it availability, is it efficiency, is it --

MS. GREER: Practicality.

MS. HOBBS: Practicality or something.

HONORABLE BILL BOYCE: But none of those really go to the court's discretion.

CHAIRMAN BABCOCK: Yeah, that's right.

HONORABLE BILL BOYCE: It's more like good cause.

MS. HOBBS: Yeah. I don't know if you can

weight it, but I mean, I feel like if you sat around long enough you could think of a way to weight it, and I actually think weighting it is the better policy, even though I know it means drafting becomes more difficult.

CHAIRMAN BABCOCK: Well, you could say something like, "For appointment of new counsel, or in extraordinary circumstances" or "extreme circumstances" or "appropriate circumstances, existing counsel." You could say something like that. Kent.

HONORABLE KENT SULLIVAN: I want to make sure that I understand Tracy's comments. I think I do, and that is, is the interest in new counsel out of a concern that old counsel, for the obvious reasons, has lost credibility with the client?

HONORABLE TRACY CHRISTOPHER: Yes. Credibility with the client is the big thing, and I also think what Marcy said. You know, once you feel like you've reviewed something, and it's hard to be told, "Well, maybe you didn't, and do it again," just from a -- from an appellate lawyer's viewpoint.

HONORABLE KENT SULLIVAN: It would be interesting if there was a mechanism to get some input from the client that is probably not practical in these sorts of unique circumstances. But you could have the reverse situation in which the counsel and the client,

despite these circumstances, had a unique relationship and they actually had great confidence in them.

HONORABLE TRACY CHRISTOPHER: True. True. But it's been my impression that the vast majority of appellate counsel rarely talk to the clients.

MS. HOBBS: Or know where they are.

HONORABLE TRACY CHRISTOPHER: Or know where they are.

CHAIRMAN BABCOCK: Justice Gray, and then --

HONORABLE TOM GRAY: Actually, Lisa said exactly what I was going to suggest, is you've got to remember that this is an area where there is not usually a lot of contact between the appellate lawyer and the client for any number of reasons, and I will say that I've seen the situation where very able counsel in doing one of these Anders briefs in a termination case has simply missed an issue. I mean, it is fairly nuanced, as we all know, and that's why I thought what the subcommittee did in my absence was such a brilliant stroke of leaving it as an option for the appellate court. I think the current phraseology of it is perfect. It strikes the right balance of these are your options.

When it's in the situation that Tracy is concerned about, the appellate court can say, internally, if we send this back to the same counsel, all we're going

to get is a rubber stamp, that issue is frivolous, too, because I already said it was. Whereas, if we think it's good counsel that did the right thing that missed the issue, or we're looking at it from a different way, then we can say, "You go do it again," or make that decision to get a new counsel involved.

CHAIRMAN BABCOCK: Marcy.

MS. GREER: I was just echoing what Chief Justice Gray is saying, is that I think it's important to have very flexible standards because there is an element of expedience, there is an element of, you know, is this counsel doing the right thing? I know it's very difficult to file an Anders brief. I have come close, but I've never done it. I've always managed to find something, because it's just so hard to say, "This is frivolous." You feel like you're selling your client up the river, and I mean, it's very difficult, so when someone has done that certification I do think it's going to be difficult for them, but not everyone. I mean, there are some that would listen and be good, and you can kind of tell that.

So I think that it's expedience. It also could be a timing issue, which goes into expedience. They filed it at the last possible minute, you're running out of your 180 days, but I think good cause is too limited, and it just ought to be appropriate circumstances or

something like that.

CHAIRMAN BABCOCK: Lisa, and then Judge Yelenosky.

MS. HOBBS: I just wanted to make sure the record reflects that -- and the appellate judges in the room can correct me if I'm wrong, but most of these termination records are actually pretty short. I mean, it's actually shocking how quick of a hearing you can have where your rights are terminated -- your parental rights are terminated. So most of the time, the ones I've seen at least, which is a fair number, they are -- I agree with the efficiency, and I am very attuned to the 180 days, we've got to get this done, but most of the time these are not vast records.

CHAIRMAN BABCOCK: Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: Is this correct that, appellate judges, if you have the option there's nothing reviewable, right? If you put in a standard, you have an abuse of discretion standard; is that right? If it says only if available or you really should do this unless, isn't that subject to review?

HONORABLE TRACY CHRISTOPHER: Well, I think whenever we're given a choice, it's an abuse of discretion standard, which choice we made.

HONORABLE STEPHEN YELENOSKY: Okay. I was

just thinking it kind of would initiate satellite litigation on whether you appropriately appointed the old attorney or the new attorney.

HONORABLE TRACY CHRISTOPHER: Right. Well, it might.

CHAIRMAN BABCOCK: Professor Hoffman.

PROFESSOR HOFFMAN: I have two thoughts. One is that I don't think you gain anything by adding a standard. I think that's essentially where Stephen is going, and, Tom, as you say, if it says "or" then the court is exercising its discretion. Okay.

A second point is more of a wordsmithing one, which is if you're going to do that, I would probably suggest putting the two subjects of that sentence, existing counsel or new counsel, right next to each other and not having that intervene -- so as it's written, you know, "abate for existing counsel to provide additional briefing," or for the appointment of new lawyers to do something different, which is to evaluate the nonfrivolous grounds for appeal. And, in fact, I think what you mean is for either existing counsel or for new counsel to do those things, and so I think if you just word it that way. Do you follow what I'm saying there, Bill?

HONORABLE BILL BOYCE: Yes.

PROFESSOR HOFFMAN: So I would say, "abate

either for existing counsel or appointment of new counsel to provide additional briefing and/or evaluate a nonfrivolous ground," and so that way it applies to both and you have a choice.

CHAIRMAN BABCOCK: Justice Christopher.

HONORABLE TRACY CHRISTOPHER: So if we add a -- you know, if we separate out the court's duty as Justice Gray suggested, I -- I mean, we have the same practice that Tom has. We will say in our abatement letter, "Please brief X," or "New counsel, please brief X," but sometimes they don't. And I don't know whether or not we need to enshrine, because I don't know how -- what all of the other courts of appeals do, the requirement that both Tom and I do of identifying the issue we want briefed. So that's just -- and it's funny, sometimes you appoint for new counsel, and they'll brief your issue and find something else, and we've had a case where mother and father had different counsel and mother found an issue and father didn't. Father filed the Anders brief, and mother's issue went to father's point, and you're kind of like -- I mean, we ultimately didn't rule in favor of mother's point, but it was kind of like, oh, well, should we have -- you know, do we abate to make father's counsel raise the same point that mother's counsel raised that we're going to overrule anyway? It's a -- it's kind of a

complicated scenario.

CHAIRMAN BABCOCK: Bill.

HONORABLE BILL BOYCE: So I'm reacting to Lonnie's comment, and I think I would make this pitch, which is if there is an appetite to have a weighted standard that it should be most of the time newly appointed counsel "unless." Then I don't think it's particularly productive to say "appropriate circumstances," because that's kind of like, of course, a court of appeals is going to do what it thinks is appropriate under the appropriate circumstances, and so that's a rule that tells the court what it's going to do anyway.

So if there is some kind of appetite to have a weighted rule that puts the thumb on the scale in favor of appointing new counsel, I hesitate to even use the word, but, you know, perhaps some kind of a presumptive situation as opposed to trying to articulate a standard that is going to be baked into whatever a court does -- the appellate court does, if the court is presented with a rule choice, you can do this or that.

CHAIRMAN BABCOCK: Well, we know that the rule as written already has one vote in its favor, so why don't we see how many more there are? So everybody that likes the rule as it's written, the sentence we've been

talking about, raise your hand, please.

PROFESSOR HOFFMAN: Essentially you're asking without it being weighted?

CHAIRMAN BABCOCK: Yes. All right. And opposed?

MS. GREER: Meaning weighted?

MS. HOBBS: Does opposed mean you would weight it?

CHAIRMAN BABCOCK: Yes.

All right. The rule as written gathered 12 votes, and weighted gathered six, the Chair not voting, so that's what we have. Are you trying to vote for rehearing or something?

HONORABLE BILL BOYCE: No. I think we should get a new lawyer to present this.

CHAIRMAN BABCOCK: Yeah, I don't think the old guy was very good.

HONORABLE ROBERT SCHAFFER: But only with a 750-dollar fee.

CHAIRMAN BABCOCK: Yeah, there you go, yeah.

HONORABLE BILL BOYCE: So I guess I would also like clarity. Okay, we leave -- I take that vote to be leaving the wording as-is, perhaps as clarified by Lonny's suggestion in terms of putting the phrase together, but a choice of this or that without trying to

further weight the language. I would also appreciate an understanding of the committee's view on should we -- should we break it out -- break out that clause separately to incorporate Chief Justice Gray's reference to referring in the rule itself to the court of appeals' independent duty to review it for a frivolousness determination?

CHAIRMAN BABCOCK: Okay. Breaking it out is one thing, but you want to add to the language to incorporate the independent duty of the judge? Yes, Judge.

HONORABLE TOM GRAY: I would frame the question, Chip, if I might suggest --

CHAIRMAN BABCOCK: Yeah.

HONORABLE TOM GRAY: Do we want to add to the draft the articulation that the court of appeals has an independent duty to look -- to determine frivolousness? That would be one question. The second question then is do we break out the sentence that we just voted on so that it applies to both an issue identified by the pro se parent as well, or the pro se response, the parent individually, and the -- or the court if they identify an issue?

CHAIRMAN BABCOCK: Got it. Any discussion on the independent duty issue? Richard.

MR. ORSINGER: Yeah. Justice Gray -- Chief

Justice Gray, I would like to ask, does it only apply when an Anders brief has been filed, or what if there's a brief on the merits that fails to raise an important perhaps reversible point? Would that duty apply there also?

HONORABLE TOM GRAY: The committee's draft and summary of the prior votes, question three, answers that question; and it's the correct answer, if you will, not -- I mean, short answer to your question is no, it applies only to an appointed counsel situation. If we -- if a merits brief is filed and we see something that should have been challenged, can't -- we can't get there.

MR. ORSINGER: Is that -- is that right? Is that the way it should be?

HONORABLE TOM GRAY: You're starting to policy now.

MR. ORSINGER: Well, I mean, if you have a duty in an Anders brief to search the record for reversible error and we're talking about a constitutional relationship, parent-child here, and you're doing -- whether it's appointed counsel or whether it's hired counsel, if they missed a point that could be reversible error, should we authorize the court of appeals to request rebriefing?

HONORABLE TOM GRAY: We go back to that conversation of yesterday of an adversarial system and

what I said earlier today. We see issues all the time, big issues, in my humble opinion, that could affect the result of a case in a particular situation, and we are not authorized to take them up. And I would say that that is where it is -- it's appropriate. It is the system we have, and if -- if it needs to be modified, it's not by this branch.

MR. ORSINGER: Okay.

CHAIRMAN BABCOCK: Richard, would you argue that -- that in the issue as here where there is a clear constitutional right that that duty attaches or -- and would not be so broad that if, you know, if you got a, you know, personal injury case or a contract case or something --

MR. ORSINGER: Right.

CHAIRMAN BABCOCK: -- but in the area where constitutional rights are at stake, would you make that argument?

MR. ORSINGER: I think it's a stronger argument in that context, Chip, and we have altered the rules or the application of the rules in a number of different ways to take into account the significance of the decision of terminating the parent-child relationship, so I think it's certainly justifiable from my perspective, though Chief Justice Gray's comment is that is it the

judiciary's duty to expand its responsibility to search the record for reversible error, or is that the Legislature's job? I think it's within the scope of the power of the judiciary to decide whether they are going to in this particular area address -- and they're not reversing for unassigned error, they're sending it back to the trial court for briefing so that it becomes assigned error.

So I think it's -- I think it's achievable by the judiciary. It's just a policy question, but considering this is the last stop before you terminate a natural relationship that's constitutionally protected, I think arguably, whether it's an Anders brief that misses it or whether it's a brief on the merits that has a couple of things that are no good and misses it, you know, what's the difference?

MS. HOBBS: If I may, Chip?

CHAIRMAN BABCOCK: Yeah, go.

MS. HOBBS: I'm super sympathetic to Richard's position on this, but keep in mind that parental rights are terminated outside of the context of a CPS termination. So you're going to open Pandora's box for -- like the way we've drafted this rule, we're talking about like your right to appellate counsel, you know, and I just would -- as sympathetic as I am to your position, Richard,

I just think that would be a really big burden because I don't know how you would stop at appointed counsel. If the basis of expanded independent review by the appellate courts is based on the sacred parent-child relationship and its constitutional dimensions, it seems like that same concept would apply even in a nonappointed, non-CPS termination context and that just -- that seems like a lot.

HONORABLE TOM GRAY: And remember there was a trial judge involved in this process that resulted in a record that had the opportunity to do something.

CHAIRMAN BABCOCK: Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: I don't know criminal law, but when you have a brief, an Anders brief, I guess, in a capital punishment case, would you have an independent duty, or would you review some constitutional issue that's not been picked up by counsel?

HONORABLE TOM GRAY: In a -- first of all, understand that we don't -- if the death penalty is assessed, we don't get those. But they --

HONORABLE STEPHEN YELENOSKY: If you were on the Court of Criminal Appeals.

HONORABLE TOM GRAY: But we still get capital cases where -- life without the possibility of parole. The answer to the question deals -- and thank you

for using the term "unassigned error." In the criminal appeals, we do have the authority to review preserved unassigned error.

HONORABLE STEPHEN YELENOSKY: Preserved.

HONORABLE TOM GRAY: But if it is unassigned and not preserved and is subject to the normal rules of procedural default, we do not have the authority to reach out and take that issue and review it, but we do have the authority if it is preserved, even if it is unassigned, but I will say that is very, very rare that we do that.

HONORABLE STEPHEN YELENOSKY: Well, my follow-up to that, is understanding that, it seems to me that, yesterday aside, there are circumstances we're discussing here today where there is something beyond whether it's just finding unassigned error -- I mean, yes, unassigned error, where the higher courts or maybe a trial court has some independent duty. It seems to me that's already in the law, and there's a reason it is, and it's not necessarily every constitutional right that might be an issue in a contract case or whatever.

It's the -- it's the issue, the factual issue, I guess, the factual result that really drives that, are parent's rights going to be terminated, are you going to be put in jail for the rest of your life, are you going to be subject to the death penalty, where sort of

our values are, well, you know, if there's something that's been done wrong, in some sense the court has some duty and just can't sit back and say, "Well, yes, this person's constitutional rights were violated, but we couldn't do anything about stopping the death penalty." I think we've already made a value judgment. It's just question of what falls within the purview of what falls within this independent responsibility, and so we're not talking about whether you ever have an independent responsibility, but -- but what it is and what it applies to.

CHAIRMAN BABCOCK: Richard.

MR. ORSINGER: It seems to me that the precise question is narrower than the broad question we have been debating, and that is, I think we all agree that if it's an appointed counsel that does an Anders brief and says essentially there's no basis for reversal here, the court of appeals has a duty to look in the record and see if there is a basis, and if so, send it back down for rebriefing.

What I'm talking about is what happens if the appointed counsel finds grounds one and two, which are not meritorious, and this is ground three? It's not an Anders brief anymore, but the appointed lawyer has missed a potentially reversible error point. To me you don't

have to change our whole structure of our jurisprudence to say that in that situation where it's not an Anders brief but the appointed lawyer blew it, the court of appeals should have the right -- we should tell the court of appeals they have the right to send it back down for briefing on the missed point. That's a little bit narrower than whether courts of appeals should generically spot unassigned error and send it down.

CHAIRMAN BABCOCK: Roger.

MR. HUGHES: Well, I for once am a little troubled by the idea of by rule imposing a duty on the appellate judiciary to play spot the issue when they've received an Anders brief or they've received a brief that doesn't identify an issue that might be there. I think it probably would be better than to create a free-floating duty to skim through the record to find error that may be preserved but unassigned and just simply say the court may direct assigned -- appointed counsel to brief certain issues or to address them in their brief. And that way you won't have imposed an absolute duty on the court to do something, but on the other hand, if something jumps out at the reviewing justices, they can say, "Counsel, there seems to be an issue here."

Another thing that nobody has mentioned but does happen from time to time is that as counsel is

writing the brief, settled law changes, and counsel may not have known that this particular court has suddenly overruled otherwise rock solid precedent for one reason or another, and therefore, counsel may have honestly believed, yeah, this issue doesn't exist. There was nothing to object to, or I can't see any reason to bring it up; and then after the brief is filed, the Anders brief is filed, all of the sudden it could be an issue; and maybe a mechanism for the court to tell counsel, you know, "Maybe you'd like to re-examine your thinking on this issue or that issue." So I -- I'm reluctant to impose a duty, but I think perhaps a rule allowing, you know, a discretionary process to identify particular issues for counsel's consideration for rebriefing.

CHAIRMAN BABCOCK: Isn't that what we have now, though?

MR. HUGHES: I --

CHAIRMAN BABCOCK: I mean, because the court can send it to new counsel and say look at A, B, and C.

HONORABLE TOM GRAY: As I'm understanding Richard's comments, he's essentially advocating expanding that to non-appointed counsel cases, so that's the big difference, and I would suggest that that's an issue for next month's meeting.

MR. ORSINGER: My proposal is narrower.

CHAIRMAN BABCOCK: Deep thoughts. And shallower, too. It's not a deep thought.

MR. ORSINGER: There's a difference between appointed counsel filing an Anders brief and appointed counsel a filing brief on the merits that misses a reversible error. I'm only talking about appointed counsel and the question of whether the rule that we apply to Anders briefs should also apply to a brief that was purportedly on the merits but is arguing invalid points and misses the valid one. So it's a narrower expansion than going to retained counsel. See what I'm saying?

CHAIRMAN BABCOCK: Justice Christopher, then Judge Yelenosky.

HONORABLE TRACY CHRISTOPHER: Well, in Anders situation, we don't send it back for new counsel to brief reversible error. We send it back to brief arguable error, so you have to be real careful with -- with those terms, because we'll get briefing on a point and we'll still -- you know, we'll send it back for new counsel. We'll get briefing on the point we identified. The state will respond or DFPS will respond, and, you know, the result is the same, we uphold the termination. So it's kind of a little weird, which is another sort of factor to consider when you're talking about new counsel, old counsel.

But while we're talking about independent duty, this one, this one got me when I was a new appellate lawyer on the criminal side. Even when the state agrees to the defendant's point of error and believes the case should be reversed for a new trial, we have an independent duty to determine whether it really was reversible error.

HONORABLE STEPHEN YELENOSKY: Both sides.

HONORABLE TRACY CHRISTOPHER: Yeah. Yeah. And we just have do that totally independent. I mean, you know, there's no -- we don't get a third lawyer to brief it for us or anything like that. I mean, the first time I was on one of those cases I was like, you're kidding me, what, and sure enough, you know, I started following the trail. So, I mean, there's all sorts of things in the criminal law that -- like when Tom was talking about preserved unassigned error, I'm like, oh, wow, do we need to add a sentence to our opinions about it?

And, you know, that's another thing. Our Anders opinion always says we've looked at everything and, you know, agree with the Anders brief that there's no reversible error. So if we had some other independent duty, we might have to put that in all of our opinions. You know, we've checked everything else just to make sure, and there's nothing. But the policy reason for expanding the duty in parental termination cases is the fact that

there is no habeas review. Okay.

HONORABLE TOM GRAY: That's right.

HONORABLE TRACY CHRISTOPHER: This is their shot. On the criminal side, you know, they can file something later and have a possibility of relief that way, but not -- not in the parental termination.

CHAIRMAN BABCOCK: Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: It seems to me concern about a change in rock solid law is not much of a concern, because mostly what we're talking about is the lawyer who filed the Anders brief didn't know or didn't do it right, and so that lawyer isn't going to say -- himself or herself isn't going to point out what they did wrong because they may not know, but when there's a change in rock solid law, I would think the lawyer would initiate something with the court of appeals. I know at the trial courts, you know, if rock solid law changes while I still have plenary power, I always get something. I mean, it doesn't happen very often, but that's one of the reasons I'll do a reconsideration, and we don't do them otherwise, but if the law changes -- I just don't think that's the same problem.

CHAIRMAN BABCOCK: Okay. Bill, if you were to frame the vote in light of this conversation, how would you frame it?

MS. WOOTEN: If you were chair, what would you do?

HONORABLE BILL BOYCE: That's a trick question.

CHAIRMAN BABCOCK: Yeah, you're the one asking for a vote, and by the way, you haven't made your 9:30 yet.

HONORABLE BILL BOYCE: So digesting these comments, I'm going to offer this observation before I answer your question, and maybe if I talk long enough I'll never have to answer your question. So, number one, I think there is benefit to breaking out the last sentence that would be a separate section that would say whatever we want it to say, and right now it says, "An appellate court may abate the appeal for existing counsel to provide additional briefing or for appointment of a new lawyer."

I think there's benefit to breaking that out separately, because lumping it together like it is now sort of implies that it's somehow dependent on whether the pro se -- whether there's a pro se response or not, and it's really the court's independent duty. So that's one observation.

CHAIRMAN BABCOCK: Yeah. So that's an easy thing to vote on. We either break it out or we don't.

HONORABLE BILL BOYCE: So let's have a vote

on breaking it out.

CHAIRMAN BABCOCK: All right. Everybody who wants to break it out?

All right, anybody not want to break it out? So that's unanimous. Easy vote. See, Bill, just let me -- just let me work with you on this.

MS. HOBBS: Help me help you.

CHAIRMAN BABCOCK: Yeah, help me help you.

HONORABLE BILL BOYCE: As tempting as it is to quit while we're ahead, I just can't. So I'm also digesting Chief Justice Gray's comments, and I'm going to ask for a clarification, which is, are -- are you articulating a basis to remind courts of appeals to do what they already have a duty to do?

HONORABLE TOM GRAY: Yeah. I mean, that's what this whole rule is. It's documenting basically case law.

HONORABLE TRACY CHRISTOPHER: Right.

HONORABLE TOM GRAY: And I would just say right before your court of appeals disposition paragraph, have "Court of appeals independent review" and have a sentence or two dedicated to that that describes our independent review. And then the next one would be the sentence we just voted to break out, and then you would have your sentence about court of appeals -- or your

section on court of appeals disposition. So all I'm advocating or suggesting that makes the sentence we just broke out more meaningful is to have a subsection here that defines court of appeals independent review.

MS. HOBBS: What if it evolves? Like I think there's a little bit of disagreement here around the room about what your independent duty is.

HONORABLE TOM GRAY: There is no question that our duty evolves, which is why there was one vote against the first question, do we want a rule at all, because that was me, because I didn't think we needed a rule. But the rule as written stymies change. It does. I mean, it kind of circumscribes us in our ability to adjust to evolving circumstances, but I think -- I mean, the independent review is what the independent review is. We don't have to define that.

MS. HOBBS: I think it's going to be hard to define in a way that accepts that it might evolve, and so that's why I wonder if you would be satisfied by a reminder by implication. In the breakout paragraph that we just voted we are going to put in this rule, we had an introductory phrase that says, "If nonfrivolous grounds" -- or use Judge Christopher's -- she has a more precise way to say it, but are -- "The court of appeals finds nonfrivolous grounds either by pro se motion on its own

independent review," comma, "the appellate court shall" -- "may abate the case and appoint counsel."

HONORABLE TOM GRAY: I mean, that would sort of get it done, but --

MS. HOBBS: You would be more direct.

CHAIRMAN BABCOCK: Judge Schaffer.

HONORABLE ROBERT SCHAFFER: Is the idea of an independent review a -- in general, in CPS cases, or is it strictly related to these sections which relate to deemed frivolous appeals? Or deemed -- yeah, deemed frivolous appeals. Because if you put the concept of independent review in this part, that would limit that, wouldn't it, to only this type of review?

HONORABLE TOM GRAY: Which is the point that I would argue is why you need to break it out as a complete section so that you do make sure that the independent review is limited to those cases in which appointed counsel has filed a brief that says there are no issues of arguable merit.

MR. FULLER: So you would take it out of these three paragraphs that we're talking about, or put them in these -- one of these three paragraphs.

HONORABLE TOM GRAY: It's not in this now.

HONORABLE ROBERT SCHAFFER: I know that.

HONORABLE TOM GRAY: I would make it a

separate paragraph, separate heading, "Court of appeals independent review" and say that we have a duty to conduct an independent review if appointed counsel in these kinds of cases files a brief that suggests that there is no arguable issue.

MS. HOBBS: The risk in doing that is if the independent duty expands beyond the Anders situation, which Richard believes it should and -- at least should, if not does, then we have put into a -- we've defined a duty in a way that may not be accurate and/or may not be accurate six months from now if we get a new "in re: initial" case that tells you you need to do it in a non-Anders, non-appointed defense counsel case.

HONORABLE ROBERT SCHAFFER: And more expansive than you had intended in the first place.

CHAIRMAN BABCOCK: Bill.

HONORABLE BILL BOYCE: So I'm not sure that defining or setting out one circumstance when there is an independent duty of appellate court review limits it to that. That's one observation.

Second observation is if we go with the suggestion that you had made, Lisa, about an introductory phrase that something along the lines of, you know, in performing an independent appellate review under these circumstances, the court of appeals can do X, Y, and Z, I

think that kind of phraseology does not lock us into saying when the duty exists. I guess I've got some heartburn about trying to define the scope of a duty in a rule in this circumstance for the exact reason we've already discussed, which is duties evolve as cases evolve. So --

HONORABLE TOM GRAY: The independent duty doesn't evolve. What is involved in that independent review may evolve, but to help it move, Chip, if I'm in the way, just tell me, but the solution that Lisa proposed may be an elegant one where there is a reminder that there exists an independent review, but I think we've -- I feel like Chief Justice Hecht has a pretty good idea of what the scope of our issues and concerns are, and however we propose it, it's going to be adequate for their purposes to make their decision.

CHAIRMAN BABCOCK: Yeah, you've described a situation that is often the case. So back to you, Bill. You've got to answer the question now. Frame a vote and we'll vote.

HONORABLE BILL BOYCE: So the vote would be this: To the new section that we just voted to break out, do we want to add an introductory phrase that references but does not define the appellate court's independent duty to conduct a review of grounds in this circumstance?

CHAIRMAN BABCOCK: So everybody in favor of that, raise your hand.

HONORABLE STEPHEN YELENOSKY: "In this circumstance," can you clarify that?

HONORABLE BILL BOYCE: In the appointed counsel's circumstance for seeking termination.

CHAIRMAN BABCOCK: Okay. Everybody in favor of that, raise your hand. And if you raise it slowly, it's not going to minimize your vote.

MR. ORSINGER: I'm afraid to vote because I'm not exactly sure what the vote is.

CHAIRMAN BABCOCK: Okay. Everybody against?

HONORABLE BILL BOYCE: Yeah. I'm sensing confusion.

HONORABLE KENT SULLIVAN: Everybody that's confused, raise your hand.

CHAIRMAN BABCOCK: The confusion wins, before that by a vote of three to nothing. One of the hands rising slowly, I might add.

MS. HOBBS: You want me to try to take a shot at articulating it and resolving it?

CHAIRMAN BABCOCK: Yeah, because obviously Bill's inadequate.

HONORABLE BILL BOYCE: Yes, please.

MS. HOBBS: Okay. So option A would be to

write a rule --

CHAIRMAN BABCOCK: Whoa, whoa, hold on. We're going to vote on something, we can't vote on option A or option B, right?

MS. HOBBS: Well, I think then you vote for all those in favor of A and all of those in favor of B.

CHAIRMAN BABCOCK: Okay, great.

MS. HOBBS: If I define option A and option B.

CHAIRMAN BABCOCK: All right.

MS. HOBBS: Okay. So option A is a separate section in this rule that says -- reminds courts of appeals of their independent obligation to review the record or briefing a la case name that we cannot remember the initials to. Option two would be to hint -- or B, sorry, I don't mean to switch numbers and letters, but option B would be to more subtly hint at that obligation by means of an introductory phrase in our new breakout section that says "If a nonfrivolous ground is identified by the court, either through its independent review or by a pro se response, the court of appeals may appoint new counsel or old counsel."

CHAIRMAN BABCOCK: The problem with voting in that way is it doesn't allow for people who think the rule is just fine as it is.

MS. HOBBS: No reference to duty, option C. No reference to duty at all.

CHAIRMAN BABCOCK: But you're also going to split your duty references by A and B.

MR. ORSINGER: You could add A and B together to find out who wants a duty somewhere, right?

CHAIRMAN BABCOCK: Yeah, that's the way to do it. Judge Gray.

HONORABLE TOM GRAY: Up or down, do you want to specifically make reference to the court of appeals' duty to conduct an independent review?

HONORABLE STEPHEN YELENOSKY: Without definition?

CHAIRMAN BABCOCK: Yes. Justice Kelly.

HONORABLE PETER KELLY: We do it anyway. I don't need a reminder.

CHAIRMAN BABCOCK: So you'll vote no. Well, I sort of like Justice Gray's idea, but Professor Carlson.

PROFESSOR CARLSON: Why not just put it in a comment?

HONORABLE TOM GRAY: Understand that the whole rule --

MS. HOBBS: It is.

HONORABLE TOM GRAY: -- is discussing something that we already do anyway.

PROFESSOR CARLSON: I understand.

HONORABLE TOM GRAY: And so my whole point of trying to get the duty articulated is to make it where it's all in the rule. I don't see that a comment achieves anything -- it doesn't further the purpose of the rule, of putting it in a rule.

PROFESSOR CARLSON: But it does make it more fluid, in response to Lisa's concern that it could change, so if you reference "in re whatever it is," and "in re" gets expanded.

CHAIRMAN BABCOCK: Rich.

MR. PHILLIPS: If we're going to specifically authorize either sending it back to the existing counsel or appointing new counsel in response to the -- a statement or a filing from the pro se, then I feel like we've got to expressly say if the court finds this on its own, you can also do that, right, which is why I like Lisa's 2B, whichever one we're talking about. Because if you're going to talk about appointing a new counsel in one situation, it ought to be clear you can also appoint new counsel or send it back to the existing in the other situation, without necessarily trying to remind them or subtly do anything. If we're just saying, you know, in either situation, the court finds it independently or the pro se says, "Here's this issue," you

can send it back or you can appoint a new counsel. And I think that's the most elegant solution.

MS. HOBBS: Rich is in favor of option B.

CHAIRMAN BABCOCK: Yeah, you're a B guy. Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: Well, regarding the rule whose name shall not be mentioned or number shall not be mentioned, in that one, we dealt with it in the draft as a comment, talking about essentially the independent duty of the judge regardless of the agreement of the parties; and one could say, well, you don't need that comment because I'm already -- I already know that. Not every trial judge knows that, and that's apparent because trial judges still say, "I don't have an independent duty." Now, maybe the court of appeals is -- this is clear and obvious to everyone, in which case maybe we do need to allude to it -- I mean, not allude to it. I don't know. Is it?

MS. HOBBS: It is. I think of theirs different, because we -- you and I philosophically believe in the rule that shall not be numbered or named that you have an independent duty, but no court of appeals -- no Supreme Court, Texas Supreme Court, opinion says you actually have that duty, right?

HONORABLE STEPHEN YELENOSKY: Well, the

rule -- the way I read the rule, it says shall --

MS. HOBBS: I agree with you.

HONORABLE STEPHEN YELENOSKY: And it says you can only do it upon a showing.

MS. HOBBS: Yeah.

HONORABLE STEPHEN YELENOSKY: So --

MS. HOBBS: But in this case there is a specific case that tells appellate court justices you have this obligation.

CHAIRMAN BABCOCK: So why don't we try this, why don't we vote on the Gray formulation, which is do you want Lisa's A or B or not; and if you don't want it, you'll vote one way, and if you do want it, you'll vote another way. And then if the people who want Lisa's A or B win, then we'll have a vote on A or B. How does that sound?

PROFESSOR CARLSON: Sadly, I understand that.

CHAIRMAN BABCOCK: Okay. Everybody who is in favor of having either Lisa's A or B, raise your hand. All right. Everybody got them up now?

Everybody against? So that fails by a vote of seven in favor, 11 against, the Chair not voting. So there's your direction, Bill. You seem stunned. It's a political upset.

HONORABLE BILL BOYCE: So I think that's a vote not to have a duty reference added in some place in the rule?

CHAIRMAN BABCOCK: I think that's what we voted on, yeah.

MS. GREER: There was nothing in the vote about comments.

CHAIRMAN BABCOCK: That's true. So we can vote on that if you want.

MS. GREER: I like that idea.

CHAIRMAN BABCOCK: Okay.

MS. GREER: Professor Carlson.

CHAIRMAN BABCOCK: All right. The vote having been not to include the judicial duty, however characterized, in the rule, how many people are in favor of that -- putting that in a comment? Raise your hand if you are in favor of that.

And raise your hand if you are not in favor of putting it in a comment. So 13 people say put it in a comment, three say no, Chair not voting.

MS. HOBBS: I thought I saw four votes on the last one, I just want to point out for the record.

HONORABLE STEPHEN YELENOSKY: Either way you still lose.

MS. HOBBS: I lose either way.

CHAIRMAN BABCOCK: So the beatdown was not quite as bad, is that what you're saying?

HONORABLE STEPHEN YELENOSKY: Three to 13, 4 to 13, I don't know.

CHAIRMAN BABCOCK: All right. Let's take our morning break. It's a little after -- it's like 10:17. No, it's 10:15, so we'll be back at 10:30.

(Recess from 10:15 a.m. to 10:31 a.m.)

CHAIRMAN BABCOCK: All right, we're back on the record. Bill, thank you very much for your work, and now we're going to go to Rule 193.7, and Justice Christopher has got that well in hand and will tell us what she thinks, and then we will vote yes.

HONORABLE EMILY MISKEL: I'll just vote yes now.

HONORABLE TRACY CHRISTOPHER: Okay. We received a request from the State Bar Rules Committee to make a change to Rule 193.7. Their memo is in the electronic version at page 390. We do not have a memo from our committee, because no one in our committee had really had a problem with this particular issue. Having said that, no one in our committee was opposed to the change, although they would make one change to the change by a general reference to "all documents produced or all Bates numbers" is insufficient. Because we're afraid by,

you know, the -- apparently, and maybe some of the practitioners here that have had an issue with this, there's squabbles between lawyers about this rule and, you know, is it realistic -- people will say, you know, "I am triggering this rule for every document you've produced." And then the other side says, "Well, I can't possibly, you know, respond in 10 days to whether every document I produce is authentic or not."

So that -- I mean, that is the dispute, and the change, the fix, is to say "the specific document that will be used," although I have heard people who then do a little bit more work and make a huge flowchart that has every single document on it to satisfy the specificity requirement, but at least it would be a little more work on the person trying to get -- take advantage of this rule. To me, authenticity is such a low bar that there is so -- there are so few cases where authenticity is an issue that I didn't see it as being a problem, but apparently some practitioners do.

CHAIRMAN BABCOCK: Yeah. Richard.

MR. ORSINGER: I think this is a progressive step, a good step to take, and I see in my practice that lawyers will typically include in their pleading that anything produced by the other side is -- we're invoking this authentication rule and you've got 10 days. I assume

it's not 10 days from when they put it their pleading but 10 days from when you produce the document, but in my cases, there's a lot of documents. My cases are very, very document intensive, and documents are not always produced at the same time. Sometimes they are produced incrementally as we acquire a record from a third place, like a bank, a savings and loan, or physician or whatever; and so I guess every time you make a production of documents, you have to assume that there's challenging their authenticity of that, and so you have to, you know, establish or respond as the rule requires.

And it would result -- or does result in a lot of wasted time concerning yourself with something that's never going to be an issue; and it makes a difference, Tracy, in my cases because that means we have to go out and get business record affidavits or we have to get depositions of the custodian of the records to authenticate it; and it's going to result, I think, in your having to authenticate everything you produce because you just may use it. And so I would -- I would much like the idea of if someone is going to say, "You produce that document, I'm going to use it, if you haven't authenticated it, go out and authenticate it." To me, that's okay because you're focused on what counts, but to say globally that you've got to authenticate everything

because you might use it is just a waste.

HONORABLE TRACY CHRISTOPHER: No, it doesn't require you to -- you just have to say whether it is or is not authentic. You do not have to say it's a business record. You just have to say, yeah, it's authentic.

MR. ORSINGER: You mean a conclusory? I thought you had to establish the authenticity.

HONORABLE TRACY CHRISTOPHER: Well, like I said, I have not seen this in case law, and it appears to be a fight between practitioners, so I'm going to let the practitioners talk about it.

CHAIRMAN BABCOCK: Judge Miskel. Not a practitioner currently.

HONORABLE EMILY MISKEL: Yeah, I was going to say, we used to do this all the time. Exactly the problematic behavior that she was describing, we would just send these notices, "I give you notice that I intend to use anything," and I think we all kind of knew that's not what the rule was supposed to mean, but we all did it anyway. So I think the change looks fine and would address that, but the other wrinkle I want to bring up is now we have mandatory pretrial disclosures where 30 days before trial you have to file the list of the exhibits that you plan to use, and so I think that some of this is taken away anyway. Or if we revise the rule, we should do

it with the eye to everybody is now listing 30 days before trial what exhibits they're actually going to use out of the thousands of pages of discovery.

CHAIRMAN BABCOCK: Okay. Kennon.

MS. WOOTEN: So I have had this happen to me where I received letters from opposing counsel saying, "We're going to use every single one of your documents" and then the burden under the existing rule shifts to me to identify what is not -- or what is authentic. And so think about a case, for example, where I'm coming in and it's litigation that's been ongoing for many, many years and there are literally hundreds of millions of pages of documents that have come over to me; and so the burden can be very significant in complex commercial litigation if you're going to do this right to then go through the entire set of documents to figure out whether there is a need to make kind of statement on the record about the use of these documents.

I have before gone to the skimpy authority, I think it's cited in the comments in the brief statement by the State Bar Court Rules Committee that's out there to say "This is insufficient, you can't do it this way," and try to force the other side to instead specify what they're actually going to use as opposed to making a blanket statement of use, and that's worked in some cases.

But I make this comment only to convey that, like Judge Miskel said, this is something that happens in practice, and I think it would be helpful to amend the rule to make it clearer that it shouldn't be happening this way, and I would suggest that beyond the change to the rule text that's recommended by the State Bar Court Rules Committee, it might be good to put into the rule text itself something along the lines of this: "A notice generally referencing all documents produced by a party is insufficient" as opposed to just putting that concept in the comment.

CHAIRMAN BABCOCK: Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: Isn't this a terrible waste of time all together? I mean, I'm trying to think of the number of times somebody said something was inauthentic. What is -- what does that mean? Well, a forgery. I've had one forgery claim, and it was forged, right? Other than that, I don't remember any valid claim that something was inauthentic. Why are we wasting our time with this at all? I mean, it should be -- I would have it everything is authentic unless you want to argue that it's a forgery.

CHAIRMAN BABCOCK: John.

MR. WARREN: Isn't all of this -- based on what Kennon is saying, isn't that what you take up at

pretrial?

CHAIRMAN BABCOCK: Well, yeah, you do. Sometimes it does come up at pretrial, I'm sure.

MR. WARREN: I mean, it would be kind of a waste of time. I mean, that's what pretrial hearings are for.

CHAIRMAN BABCOCK: Yeah. Kent, did you have your hand up?

HONORABLE KENT SULLIVAN: I did, and it really is largely to echo John's point, and that is, back in the dark ages when I was on the trial bench, I insisted that lawyers show up and have the exhibits marked with an exhibit list, and we would take it up in advance, and we could often preadmit a substantial number of exhibits and leave the -- you know, the ones in controversy to only those that needed a live witness to deal with whatever predicate issues might exist. I thought it was pretty efficient, and I found the parties seemed to as well. You cut down on juror time because they didn't have to listen to the lawyers go back and forth about a lot of things that really could have been taken up outside their presence. It streamlined the process.

To this point, you know, I think we have to acknowledge that unfortunately most cases don't get tried, and there are many people that call themselves trial

lawyers that don't try cases, and so this is a process that I think reflects some of that, and there ought to be a point in terms of docket management where you narrow this and decide if this case is going to trial. There's a fairly defined universe of documents that are going to be used at the trial, and then you deal with this. There are various ways to do that, but this I think avoids some of these larger issues.

CHAIRMAN BABCOCK: Kennon.

MS. WOOTEN: Regarding authenticity, I think Judge Yelenosky makes a good point that most of the time it's a nonissue.

HONORABLE STEPHEN YELENOSKY: Almost all the time.

MS. WOOTEN: Almost all the time, that's fair, but in my experience, I have many cases where a production from the past will include not just my client's documents but third party's documents in their files that they can't necessarily authenticate, so I've got in that situation a client saying "I don't know what that is. It's in my file. It was produced, but I can't tell you for sure whether it is or is not authentic." And so it becomes an issue in my litigation from time to time, even though I agree that most of time it should be a nonissue.

I think it would be good for this to be

handled pretrial, but this rule is used earlier in cases. For example, when a party wants to file dispositive motions. They don't want to tell me which documents they're going to rely on for their dispositive motion, so I get the blanket notice so that they can use whatever they want to use and not have to worry about authenticity. So, yes, it should be done pretrial most of the time, but this rule is implemented long before that for dispositive motions from time to time.

CHAIRMAN BABCOCK: Lisa, and then Justice Christopher.

MS. HOBBS: Kennon's last point was exactly what I wanted to touch on, is when I have an authenticity dispute, it's usually in the summary judgment context where -- and that's where you see the abuse of this early and often, and it's unrelated to trial. It's actually dispositive motion -- it's pushed up much further.

CHAIRMAN BABCOCK: Justice Christopher.

HONORABLE TRACY CHRISTOPHER: Well, I guess, you know, maybe we sort of have this fundamental disagreement on what authentic means. You know, it's authentic because it was in my file, and we use those documents in my file, and at some point they become my business records and to avoid the hearsay component of third party documents in your business records. I mean, I

think people have different ideas of what authenticity means, but having said that, the change is minimal, although it seems like a lot of people would prefer to eliminate the rule all together.

MS. HOBBS: Yeah.

CHAIRMAN BABCOCK: Yeah.

MR. YORK: Alan York, by the way. I'm on the court rules committee, I'm sitting in for Andy Jones.

CHAIRMAN BABCOCK: Yeah, I should have introduced you earlier, sorry.

MR. YORK: No worries at all. So I think that this absolutely is a practitioner issue, and what we -- what we talked about at the committee level was exactly what we've been talking about today, that we're seeing these squabbles; and ultimately our belief was that the way the rule is currently being used is never the way the rule was intended; and so this change is really intended to get back to how the rule, we think, was intended to operate, which was if I produce documents and you intend to use them against me, you give me notice of what documents those are, and then you're relying on them as authentic so that I can either object or I can take the steps that I need to without having to just assume that everything that has been produced -- because that's exactly how it's being used.

Like we were talking about earlier, these notices go into petitions and into answers. That's where they're being put out there, and so this is really just trying to get the rule back to where we think the rule was intended to be.

CHAIRMAN BABCOCK: Great. Jim.

MR. PERDUE: So I think Rule 901 just says the thing is what it purports to be, and I don't know what the bar's specific example is of the need to change this rule; but the intent of the rule, as I've always understood it, was to simplify the procedure that if you produce something, then I have the opportunity to use that against you without you objecting to its authenticity because you were the producing party. And what you're asking now is instead of the presumption that you as the producing party have produced to me something that is authentic that I have to designate for you, which by the way, is done as Judge Sullivan points out before trial, as the rules now require, as Judge Miskel points out. I've got to designate exactly what I'm going to use at trial, and so you're going to have that list under the rules and under the procedures, and I don't understand the issue with a motion for summary judgment, because if somebody attaches something to a motion for summary judgment that you have an authenticity objection to, then you make an

objection to the summary judgment --

MS. WOOTEN: Well, right, but --

MR. PERDUE: -- evidence. So the proposition here is that, yes, the rule is designed to globally set if you produce something to me, I get to believe that it is authentic, and now what you're doing is instead making me specify exactly what I'm going to use apparently much earlier, is what you guys want to set up, is specify exactly what I intend to use against you at trial earlier in the process for some reason, which doesn't make any sense. The reason why you have these global -- global things is I'm going to use what you produce against me is because that's what the rule was designed to do. If you produce it to me, I'm entitled to assume it is what it purports to be.

That's all authenticity is, so I just don't -- I don't understand how it's ever come up in the real world. I don't understand what the fix is supposed to fix as far as a problem, and I -- you know, I think the rule was intended so that a party could believe that the other person gave you something that is what it purports to be.

CHAIRMAN BABCOCK: Kennon.

MS. WOOTEN: Yes. What you said about summary judgment procedure is the way it works if you

haven't, prior to the filing of the summary judgment motion, had somebody give you a notice saying, "I'm going to use all of these documents unless you object, then they're presumed authentic." Because if that happens before the summary judgment motion is filed, and I don't have time to go through hundreds of thousands of documents, then when summary judgment motion gets filed, it's already authenticated. So I've lost that objection unless I go through these steps if a general notice is enough to trigger my obligation to do so.

I don't want it to be perceived that I'm arguing for anything to happen earlier than it should under the rules. In fact, it's the contrary. I think people prematurely send these notices to individuals in litigation in an effort to create a burden on you to go through the production and identify areas in which you may need to say, "No, that's not authentic," and I think most of the time if you've produced it, it is authentic, almost all the time. But if I've got in the production -- and this has happened to me in several cases, files that include a lot of information from third parties, and maybe it was just turned over because it's easier than having this fight and making it a big production expensive cost to review things, then there are things in that file that my client's like, "I don't know, this just came over from

a third party, and it was in the file, so it's there." So --

HONORABLE STEPHEN YELENOSKY: How often have you been -- somebody been unable to authenticate something?

MS. WOOTEN: It's more about whether there should be a burden to go through that process. Like they could reach out to the third parties whose information is in their files and go through all of those steps, right, but that's a burden for them, and so the question is should they be obligated to do that because there's this blanket notice that every single thing produced is authentic unless you object.

MR. PERDUE: Kennon, what is the case where you get a -- you get an exhibit to a motion for summary judgment --

MS. WOOTEN: Uh-huh.

MR. PERDUE: And you want to make a authentication objection, what is the case or a judge who has ruled, you know what, you've waived that authentication objection because they gave you a 193.7 notice and you didn't make a timely authentication objection to the 193.7 notice, and now it's up against you in summary judgment? I just -- I've never seen anybody do that.

MS. WOOTEN: I've never seen it happen, Jim, but it's the fear of something like that happening because you didn't go through it all and identify areas where documents aren't authentic that drives me to say to the other side "That notice is insufficient," right, like you're just covering yourself.

MR. PERDUE: I would just say that I think then if that is your concern and you've produced to me or -- whether you are in commercial litigation, personal injury, whatever, if you have a party that has produced something to you that they believe is not authentic, I need to get that information from you. I need to know that. So how am I going to find that out?

MS. WOOTEN: You're going to actually file a motion for summary judgment with that document appended and then that raises the issue.

MR. PERDUE: I'm using it in depositions. Are you going to object to it as inauthentic while I use it in a deposition?

MS. WOOTEN: No, because I don't have to.

MR. PERDUE: See, that's gamesmanship. That's gamesmanship on the other side, and I think that all 193.7 was designed to do, which is if you give it to me I'm entitled to believe it is what it purports to be.

MS. WOOTEN: So what's your objection to

specifying the documents?

MR. PERDUE: Because now instead of me saying everything you've given me is what it purports to be, I have to say, "I'm going to use early in the process, your Bates range blah, blah, blah, your Bates range blah, blah, blah," and give you my litigation I -- I mean --

HONORABLE STEPHEN YELENOSKY: Work product.

MR. PERDUE: The thing that's so simple about the rule is I designate everything you give to me in discovery may be used and that way then we just all know that what you've given me is what it purports to be.

MS. WOOTEN: But that's not the rule. The rule isn't I may use it, it's that the document will be used. That's the current rule.

MR. PERDUE: Except that the discovery rules and the changes to the rules have now fixed that because we have mandatory pretrial that I'm going to have to tell you what I'm going to use at trial.

MS. WOOTEN: It fixes it at that stage of the process, absolutely. What I'm addressing is what happens earlier in the process.

HONORABLE STEPHEN YELENOSKY: Well, summary judgment is a trial. Maybe you have to do it before that.

CHAIRMAN BABCOCK: Can I ask a question about this? I've got a -- I've got a client, and in the

client's file is an investigative report done by a third party, let's call it the Mitchell report, baseball, right, and it's 50 pages, and it's in my -- it's in my client's files. We don't know when it got there, we don't know who read it, so the question -- the request for production is produce all investigative reports that you have, so we produce it.

Now, is that authentic? Because I don't know if it's complete, I don't know if the Mitchell report -- if this is it. It says it is, but I don't know that. I don't know if there were exhibits to it. It says in the body there were, but I don't have the exhibits, so what do I say about authenticity there?

MS. WOOTEN: And that's -- that's an example where I don't know --

CHAIRMAN BABCOCK: That's a question --

MS. WOOTEN: -- if it's a draft or the final where I would say to my client, "Is this the actual investigation," because --

CHAIRMAN BABCOCK: He'll say, "I don't know."

MS. WOOTEN: Right.

CHAIRMAN BABCOCK: Judge Christopher.

HONORABLE TRACY CHRISTOPHER: Well, case law says if your company took that report and acted upon it,

it becomes part of your business records. So --

CHAIRMAN BABCOCK: It became -- it's in my files.

HONORABLE TRACY CHRISTOPHER: Uh-huh. And you took it and acted on it, it becomes part of your business records. If you didn't act on it, then, no, it's not.

CHAIRMAN BABCOCK: Well, act on it, what does "act on it" mean?

HONORABLE TRACY CHRISTOPHER: Like you took some action in response to looking at that report or you used that report in making another report.

CHAIRMAN BABCOCK: And that makes the report authentic?

HONORABLE TRACY CHRISTOPHER: It makes it part of your business records, according to case law.

MS. WOOTEN: And in that instance maybe I have a client representative who can tell me, yes, we took some action on it. Maybe I have a client representative who can't tell me because it's been in the file for 25 years and they've only been there for 10, and so these are the kinds of things that play out if you really want to assess authenticity of documents that have been produced that are not your client's own documents, but just documents in the files of your clients.

CHAIRMAN BABCOCK: I started by saying Justice Christopher has got the answer. In fact, Judge Miskel has got the answer.

HONORABLE EMILY MISKEL: I was going to say we're talking about this like it's a choice between proving a document is authentic and proving that it's inauthentic, but what I mostly see, especially in family law, they're not business records. It's a bunch of junk that somebody found from a variety of sources that turned over, and often evidence fails to be authenticated at trial because they don't have a witness that has personal knowledge that the document is what it's claimed to be.

MS. WOOTEN: Right.

HONORABLE EMILY MISKEL: And so it's not that it's proven inauthentic, which does almost never happen, but rather that they don't have the correct witness that can sponsor the authenticity of it, and that happens all the time. But the big picture for the requested change that we're here on, I think that I agree with the bar rules committee that there is a ton of game playing on this and that we're all using it the way we all probably know it's not meant to be used.

I also appreciate what Jim is saying about it. So my suggestion was either make the change that's proposed in attachment T or just delete the whole rest of

the paragraph, and so it says, "A party's production authenticates the document" and just add a period and don't leave the rest of the process in there.

CHAIRMAN BABCOCK: Okay. I think Richard had his hand up next, then Roger.

MR. ORSINGER: To me what we're really debating here when someone does a global designation that everything that you produce I may use against you, so you've got 10 days from the day, I presume not 10 days from the objection, but 10 days from the production, to make -- to make an objection, okay. So should we do that generically with everything, if I -- the other side has designated everything I produce, so whenever I do a production I have 10 days to decide whether I'm going to preserve an authentication objection or not to everything that I produced, and that goes on with all of the productions. I'm having to make that evaluation, I'm having to make that objection, and it may be that 99 percent of that will never be truly objected -- I mean, offered in trial, so why go to the work?

Why don't we say -- somebody says, you know, I've got a legitimate objection -- pardon me, "I intend to use that document you've produced" and then I can say, okay, I've got to decide now whether I'm going to use it or not, but I've been pointed to what is at issue, not

just everything I produce, and to me it's much better -- and I don't care when you do it. You can do it 30 days before trial, but it's just the idea is that the focus on admissibility is on things that really count and not just everything that gets produced. To me that's what's at issue here.

CHAIRMAN BABCOCK: Well, but, Roger, let me jump in for a second. I'm troubled by what Jim says, though, because I'm worried -- you know, he gets a bunch of documents or I do, and -- from the other side, and we just assume that they are authentic, but then we don't -- you know, we don't make this objection, and I'm worried that we can't make the objection later.

MR. ORSINGER: Why not? You can make the objection any time. In fact, I think the rule is designed that you can make it close to trial. Jim doesn't have to designate within 10 days of my production what he's going to use. He just has to designate it 10 days -- at least 10 days before he's going to use it in something, whether it's a motion, summary judgment, trial. That's the way I read the rule.

CHAIRMAN BABCOCK: Is that how everybody reads the rule?

MR. ORSINGER: What does everyone think?

CHAIRMAN BABCOCK: Roger, sorry, I didn't

mean to step on you.

MR. HUGHES: No, no, no. Everybody keeps saying the issue is simple, it's is the document what it purports to be, but the phrase "purports to be" itself is a trade name or a stock phrase, and it's like purports to be what? For example, it was just mentioned in family law cases, what if you are asked to produce e-mails on a particular topic? Well, I got this e-mail, and it purports to be written by Joe Schmoe or Suzy, but I have no idea if it really was. I just got it, and it could be total spam. It could be somebody spoofing their e-mail. It could be whatever, but I can't verify this is actually somebody sent this to me, et cetera, et cetera.

So if -- is it -- if all you have to do is show you -- the issue is like notice, how does this purport to be notice? How can we say this is a valid communication? And also, because I do some representation of governments, you'd be surprised what ends up in these files, and -- and the same thing for business records, and Kennon noted a problem is sometimes these records are so old, there's been a turnover and nobody knows how this got in the file, why it was there, did we collect them, et cetera, et cetera.

But the other thing of it is, and I don't mean to cast aspersions, most of the time -- authenticity

also includes the self-authentication of business records and public records, and the moment -- my experience has been the moment you say, okay, this might qualify, these 10 documents might qualify as a business record, all your objections, substantive objection is to the contents. Double hearsay, an expert who didn't know what in the world they were talking about, unreliable expert reports, et cetera, all go out the window. I'm sorry, it's authentic, it's all coming in.

HONORABLE STEPHEN YELENOSKY: No. No.

MR. HUGHES: I know it shouldn't, but that's the problem, and the other thing I will note is that somebody said even if the rule was enacted they supposed that people could just basically send "I'm going to use" and list every document.

The last sentence of the rule says, "An objection to authenticity must be made in good faith." I might say, we might want to think about saying that the -- that the claim of self-authentication by this also has to be asserted in good faith, so if I produce 200 documents and I get 200 self-authentication notices, there's something -- one might argue that they can't all be what they purport to be. Anyway, that's my comment.

CHAIRMAN BABCOCK: Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: Well --

HONORABLE TRACY CHRISTOPHER: No, no.

CHAIRMAN BABCOCK: Yielding to --

HONORABLE TRACY CHRISTOPHER: I didn't have my hand up. I'm just muttering back here.

HONORABLE STEPHEN YELENOSKY: And I know what she's muttering about.

CHAIRMAN BABCOCK: Whoa, don't reveal secrets.

HONORABLE TRACY CHRISTOPHER: Sorry.

HONORABLE STEPHEN YELENOSKY: Just because we've talked about it. Authenticity is such a low bar, such a low bar, it's not -- it doesn't -- you know, it doesn't -- if something is authentic, that doesn't mean anything about any of the other objections. You still have all your other objections, right? What other objection do you lose?

MR. HUGHES: Well, technically you shouldn't lose the objections. My experience, though, is that the moment you say this -- these might constitute a business record, I'm not going to claim they aren't a business record or they're not a public record, then all of the other substantive objections you could make --

HONORABLE STEPHEN YELENOSKY: So they're not following the law. That's a problem all the time. I mean, if we just took that as a reason to do something,

you know, I mean, we would have a whole different committee I think, but, I mean, I don't understand all of this effort coming in. There are other ways to deal with it, both with timing and pretrial. I mean, you could say, for instance, an assumption of authenticity can be objected to after a summary judgment. You know, maybe that's the first time that somebody realizes, wait, that signature doesn't look right. Why should they be barred from arguing?

And the other side, you know, they can file another summary judgment. It's only when you get to trial, and you can take care of that pretrial. It just seems to me an incredible waste of time that we're spending on something where you're saying, well, this could happen with these 10,000 documents, therefore, I've got to look through 10,000 documents and, therefore, you know, because this might happen, that might happen; but those mights, you know, hardly ever happen; and if there's a concern about them, they can be dealt with at the time or at pretrial. It's just crazy to me.

CHAIRMAN BABCOCK: Judge Miskel.

HONORABLE EMILY MISKEL: I mean, I will get back to even when we are sending these generic notices, we know they are not in good faith because the rule itself says, "After the producing party has actual notice that

the document will be used." So tell me how me sending a one-word letter that says, "I'm giving you notice that I may use any document you've ever produced," it doesn't even satisfy the current wording of the rule because how could that be actual notice that a document was used. So I think the change is fine, because it makes the rule mean what it already says, even though the background is we're all using it in a way that it doesn't mean what it says.

CHAIRMAN BABCOCK: Okay. Any other comments? I want to get back to the timing of the objection. If -- if I have actual notice that the document will be used and I've received one of these notices that say I'm going to use everything, if I don't object within 10 days, am I going to be able to later object at pretrial to authenticity?

MR. ORSINGER: Well, Chip, that's what I say. Does the duty to make an objection arise when you receive the notice, i.e., when the original answer is filed, or does the duty arise when you produce the document? Because you are on a generic notice on an ongoing basis that everything you produce will be used against you, so it would seem to me that the 10-day clock to object starts running when you produce the document, not when you receive the designation global of all future productions, and so that means that I have to evaluate

everything I produce for whether I'm going to object to authenticity at the time I produce it, even if I might be producing many, many, many pages that are under --

CHAIRMAN BABCOCK: So at summary judgment, you can't -- if you haven't done this, at either summary judgment or trial, you can't -- you've waived your authenticity objection as the producing party?

MR. ORSINGER: My view of it is that if you had a global thing that everything you produce is going to be used --

CHAIRMAN BABCOCK: Yeah.

MR. ORSINGER: -- then you've got 10 days from when you produce it to make an objection to it. If you don't make an objection within 10 days of your own production, I think you're precluded from objecting to it at a later time. But to address Jim's problem, I don't think that -- if you took away the global designation at the start of the case, I don't think it forces Jim to prepare or reveal his case in advance because if he's getting ready to file a motion for summary judgment, heck, he can just attach it to a summary judgment motion, and there's your actual notice of an intent to use, and you've got 10 days to make an objection or you're foreclosed from doing it.

CHAIRMAN BABCOCK: Got it. Yeah, Kennon.

MS. WOOTEN: I agree completely, and the way I read this rule, I thought if you're going to give me actual notice that it will be used, it's probably going to be through a filing of a motion appending it or through a list of proposed trial exhibits, but what's happening instead is exactly what Judge Miskel noted. You get something in the petition, you get a letter with a blanket notice that all of these documents will be used, and sometimes this is literally somebody telling you, if you take them at their word, "I will use 500,000 documents in this case," which you know isn't true; but to avoid the risk of waiver, I've always felt like I have to say something in response; and what I typically will say is that doesn't constitute notice under this rule to give myself some protection and, more specifically, to give my client protection against a waiver argument later on down the line.

CHAIRMAN BABCOCK: Yeah. And you've never said in response, "I object because I'm going -- because some of these $500,000 -- 500,000 documents I may object to on authenticity grounds"?

MS. WOOTEN: I have said before that some of these documents are not my client's documents and there may be an objection to authenticity.

CHAIRMAN BABCOCK: Justice Christopher.

HONORABLE TRACY CHRISTOPHER: Well, if we make it, it can only happen when you file your summary judgment or it can only happen when you file your use at pretrial, you know, these are the documents I intend to use pretrial, then there's absolutely no point to the rule, because that's when you would make your objections anyway, right? If somebody filed the document and you didn't think it was authentic in response to a summary judgment, you make your objection. So the -- if you don't allow, you know, a little bit of blanket work, if it has to actually be in connection with a pretrial or in connection with a summary judgment, then we don't need this rule at all, because it just goes back to its usual authenticity.

MS. WOOTEN: And I'll say that the current comment 7 to the rule addresses the fact that you can make a statement about authenticity prior to trial, and so there is a reference to potential timing and the possibility that this will be done before you get to the trial stage of things, but again, I just more than anything else would like to not have a reading of the rule that a blanket notice that every single document ever produced will be used is sufficient. That's really what would help in the actual practice.

HONORABLE TRACY CHRISTOPHER: Well, like I

said, I don't really have an objection, but, you know, if -- if we require this then there's no basis for the rule. I mean --

CHAIRMAN BABCOCK: Jim.

MR. PERDUE: Respectfully, there is a conflation, and maybe it's the language of the rule, but the comment has always been clear to the practitioner. You keep talking about using it, which is now in the revised rules. This rule was designed to allow for simplicity in that if you produced it to me, it would be considered authentic, and that's achieved by saying, "I will use it," but the end goal is -- is that's the way you get there, but it is basically that I'm not going to get a 901 objection out of nowhere to something that you produced to me if you know, if you know.

But so now we've got to tell you what we're going to use at trial, and what you're objecting to is I don't know that you're really going to use everything I produced to you. Well, that's not going to happen under the rules. That's not the way trial can be conducted under the current set of rules. I cannot say, "I'm going to use everything in Exhibit 1." All the rule is designed to achieve, as Justice Christopher is pointing out, is to try to get that which you have produced past an authentication objection, which is the most marginal

objection that I can think of.

So there is -- this seems to be a solution seeking a problem and an overengineered one at that, and I just -- I've always thought that the parties, both parties, ought to be able to rely on essentially a presumption that what you produced to me is authentic and that if we get down to trial and you find an authentication objection, you know, then I'll know about it, and so -- and I've never heard of anybody suggesting that, you know, 193.7 notice creates waiver. I mean, can you give me an example of that? So this is just -- I join Judge Christopher in thinking this is very -- complicating something that's not that hard.

CHAIRMAN BABCOCK: Jim, I agree with what you said, but I did have an example. Somebody claimed a waiver on that once.

MR. PERDUE: Well, it wasn't me.

HONORABLE TRACY CHRISTOPHER: But did you win? Was there an appellate case?

CHAIRMAN BABCOCK: No. It was not an appellate case, although it did go on appeal, but not on that point, but I did win at the trial court. The judge said, "No, come on."

HONORABLE STEPHEN YELENOSKY: Exactly.

HONORABLE TRACY CHRISTOPHER: Exactly.

MS. WOOTEN: In the report, the memo from the State Bar Court Rules Committee, there's a reference to a Texarkana Court of Appeals opinion; and the way it's described is Texarkana court commented on but didn't determine the specificity issue by concluding that the respondent waive the complaint by failing to timely complain about the vague notice. So at least one court has commented on the form of waiver that can occur in the context.

MR. PERDUE: I'm not sure that case is on this issue.

MS. WOOTEN: I don't think it's on that particular issue, but it does stand for the proposition that a court can reach the conclusion that you have waived something by not complaining about it along the way.

CHAIRMAN BABCOCK: Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: You raise an interesting point, or at least I inferred from it one. What was the original reason behind this rule? I mean, was it there because people were filing all of these authenticity objections? Why was there a rule?

CHAIRMAN BABCOCK: It was -- it was part of the massive overhaul of the discovery rules that we did 20 years ago, I think.

HONORABLE TRACY CHRISTOPHER: '99. Yeah, it

was a '99 rule.

CHAIRMAN BABCOCK: Yeah.

HONORABLE STEPHEN YELENOSKY: And what was the problem being addressed?

HONORABLE NATHAN HECHT: In this rule?

CHAIRMAN BABCOCK: Yeah.

HONORABLE NATHAN HECHT: I have no idea.

HONORABLE STEPHEN YELENOSKY: I mean, the problem would have to be -- the problem would have to be there are a lot of objections in authenticity, so let's solve all of that by making them presumptively authentic, and if there was no problem, we don't need the rule, and the rule is creating all of these other problems.

CHAIRMAN BABCOCK: I have a very vague recollection that Steve Susman, who was the chair of the subcommittee that did the overhaul of the discovery rules, felt strongly about this rule, but I can't remember anything else.

HONORABLE STEPHEN YELENOSKY: I don't buy that rationale. I mean, that's not enough to convince me.

CHAIRMAN BABCOCK: No, no, no. I get it. That's not dispositive by any means, but you asked for the history, and that's what I remember.

HONORABLE STEPHEN YELENOSKY: Well, then why -- well, who could support the rule then on the

original rule that there needs to be a presumption of authenticity, and what's the reason for that original rule?

HONORABLE TRACY CHRISTOPHER: Well, Jim likes it.

MR. PERDUE: The comment -- the comment explains to you exactly why. I mean, the comment to the rule is if I get down to the courthouse and I've designated that I'm going to use the document you produced to me, it is what it purports to be.

HONORABLE STEPHEN YELENOSKY: Why is that important if nobody is filing authenticity objections?

MR. PERDUE: Well, I've never seen an authenticity objection until Kennon apparently uses them all the time.

HONORABLE STEPHEN YELENOSKY: I mean, you only create a default, right, that they're presumptively authentic if somebody is -- a lot of people are saying they're not. So why do you need to be reassured that you can go down to the courthouse and count on it? Isn't it reassurance enough, in your experience, it's very, very rare that anybody has an authenticity objection that a judge is going to give any attention to unless it's a forgery or unless the person wants to argue, "Well, this is the first three pages, it's not the other ones." As I

think Justice Christopher said, this rule is not going to get in the way of a judge saying "No, no, we're going to deal with this now."

MR. PERDUE: So I guess I would say that the rule achieves simplification in the presentation of evidence because what you're talking about now is the opportunity for the opposite party to object, saying, "We object to that being authentic." Now, I have to get a sponsoring witness from that party to the courtroom to come in and lay a 901 predicate, which is the simplest predicate it is, because I no longer have the presumption that you gave to me something that is what it purports to be. So what you're saying, if you erase the rule, essentially implodes the trial process so that the other party can now object to their own thing not being what it is, for every single document.

HONORABLE STEPHEN YELENOSKY: And are they going to do that?

MR. PERDUE: Well, why give them the opportunity?

HONORABLE STEPHEN YELENOSKY: Well, the opportunity that they're probably not going to take and a judge is not going to consider, because if it's just there to harass you and cause time is not a good reason for all of this.

MR. PERDUE: Well, I would say just like Chip enjoyed having somebody making a waiver objection, I will see authenticity objections for not having a sponsoring witness if you do that.

HONORABLE STEPHEN YELENOSKY: Well, then let's change the rule on sponsoring witnesses or create sanctions for it or whatever.

MR. PERDUE: I thought we were trying to make things easier, not harder.

HONORABLE STEPHEN YELENOSKY: Why was it harder before? Nobody could justify.

MR. PERDUE: There's a whole bunch of stuff that's self-authenticating, and this rule reads and reads in the comment very clearly to add into the classification of self-authenticating something that the other party has produced to you. It doesn't waive all of the other objections.

HONORABLE TRACY CHRISTOPHER: No.

HONORABLE STEPHEN YELENOSKY: No, it doesn't, but apparently there's a lot of heartburn about I've got to do something by a certain time or this is going to come in, even though I now think it's inauthentic, and I just -- nobody has explained, other than Steve Susman, and we're not going to get that explanation unless it's in the record --

CHAIRMAN BABCOCK: Now, now.

HONORABLE STEPHEN YELENOSKY: -- as to why it originally was put in place.

CHAIRMAN BABCOCK: Yeah, Richard, and then Roger, and then Judge Miskel.

MR. ORSINGER: My takeaway was that the purpose of the rule was to move the authenticated -- authentication objections from the middle of trial to before trial in areas where they probably weren't legitimate. Without a rule like this, a party can wait until trial until a document they produced is offered and object to authenticity, and then it's really practically too late for the opposing party to get it authenticated.

You could actually justify a rule that all documents produced in discovery will be presumed to be authenticated unless 30 days before trial or 60 days before trial somebody files an authenticity objection.

HONORABLE STEPHEN YELENOSKY: Yeah.

MR. ORSINGER: And then whoever wants that document can go out and get the affidavits or depositions or whatever they want. The idea is that it's too late to fix an authenticity problem, and it's not just forgery, Steve. It's also just a document from a third party that doesn't clearly fit the business record exception to the hearsay and authentication rules.

So that's where I run into it. I hardly ever get a forged document, but e-mails are a problem, like Roger said. It's really hard to figure out how to authenticate an e-mail, but at any rate, to me the value of this rule is that it moves at least part of the authentication argument to a pretrial time when it can be fixed.

HONORABLE STEPHEN YELENOSKY: That's fine.

MR. ORSINGER: Right now they're doing it just for the producing party, but, gosh, you know, we could just say any party that wants to make an authenticity objection should do it so much before trial or else -- or else they can't.

HONORABLE STEPHEN YELENOSKY: Because right now you're looking at e-mails that probably are totally inadmissible, irrelevant, or whatever, just because, well, they might be used at trial, and that's a waste of time. I mean, it's got to be narrowed down to before summary judgment or even after summary judgment if it's long enough before trial, or 30 days before trial. I agree with that, but because there's a bunch of e-mails in your 5,000 pages and you can't attest to them being authentic is a bad reason for doing what this rule does.

CHAIRMAN BABCOCK: Roger, and then Judge Miskel.

MR. HUGHES: Well, again, we keep talking about these records that a party produces as their records, these come from you. There are a number of types of cases where your opponent papers your file for you, and first in insurance cases, now arguably the insurance company is conducting an investigation will usually ask the policyholder to submit something, but then the policyholder submits all kinds of statements from witnesses or whatever, all kinds of expert reports, all kinds of damage estimates, medical records, et cetera, et cetera. And I can tell you that if you say, well, these become authentic business records, authenticated business records of the party, the party offering them will look for any way not to actually have to call their experts. They've already submitted their evidence in your business records the way they want them, and they don't want that expert cross-examined, and so now these records come in as business records.

The same thing goes, for example, in the government. Usually personal injury claims, they're required to submit notice of claim, et cetera, et cetera, but some people go quite far beyond that and submit all manner of stuff. Again, if all of those become public records that are self-authenticated, they may well come into evidence, and the plaintiff will go, "I don't need to

call my doctor. I don't need to call my damage expert. Their reports are a matter of public record."

I -- I see the value of having a rule about if you produced it, I should be able to determine that if you're going to claim it's authentic, you need to tell -- inauthentic, you need to tell me that, but this rule is being used to drag all sorts of manner into the courthouse, and it's up to the defendant to say, no, it's not authentic in order to raise the issue at all. And it's -- and again, you have a short fuse deadline, and any time you have a deadline and you blow it, you've just given the judge an easy way to say, "I'm sorry, that objection is waived." And, you know, if we're getting these at the beginning of the litigation or you get one of these as soon as you respond to request for production, that may just be too soon in the case to be able to determine these things, especially if the rule says only if you know this will be used against you. Anyway, I've spoken my piece, thank you.

CHAIRMAN BABCOCK: Judge Miskel.

HONORABLE EMILY MISKEL: Okay. So at 11:24 a.m. on Saturday, right now the question before us is whether to add one word, "specific," to the rule. And so here's what I would say. These generic notices, I already don't think they comply with the plain language of the

existing rule. Nevertheless, there's a ton of game playing. I've received those notices, I've sent those notices. We all knew we were game playing when we were doing it, and so I think adding the word "specific" makes the rule mean what it already says and does away with a bunch of unproductive spending on game playing things that already don't fall under the rule.

CHAIRMAN BABCOCK: So there you go.

MR. ORSINGER: Here, here.

CHAIRMAN BABCOCK: Jim.

MR. PERDUE: So --

CHAIRMAN BABCOCK: So this is point, counterpoint. You're Jane Curtain, and he's Dan Aykroyd.

MR. PERDUE: Well, I would like this whole record to go to the State Bar Rule Committee as a cautionary tale of why you don't bring this stuff to this committee, because at some point in this conversation I think I heard Yelenosky propose we'll just repeal the rule, and I think that's a really bad idea.

HONORABLE STEPHEN YELENOSKY: You did hear that.

MR. PERDUE: Yeah. And I will just tell you it's a really bad idea. I am -- I do not have an objection to the addition of the word "specific."

MS. WOOTEN: Oh, okay. Let's vote.

MR. ORSINGER: Let's vote. No more debate.

MR. PHILLIPS: Call the question, let's go.

MR. PERDUE: So I've enjoyed the conversation, and frankly, I'd like another cup of coffee.

CHAIRMAN BABCOCK: Or something stronger.

MR. PERDUE: Or something stronger. I did think that the solution in the comment is a little over -- overengineered, and I think that the sentence, "A general reference to all documents produced by a party is insufficient" is a fair addition to the comment, but I don't think you need all of the other stuff, and so that would be my concession to an hour-and-a-half-long debate over a very valid contribution to the rules by the late Steve Susman that should be honored.

CHAIRMAN BABCOCK: In honor of him. I found the case where the other side made the argument that I had waived the authenticity, and it wound up not being decided by the appellate court, although Judge Bernal found in my favor, and I was so hoping that Justice Christopher would be on the panel.

HONORABLE TRACY CHRISTOPHER: That is quite possible. I do not doubt that.

CHAIRMAN BABCOCK: But you were not unfortunately, but Justice Sullivan was.

HONORABLE TRACY CHRISTOPHER: Oh, funny.

CHAIRMAN BABCOCK: So, anyway, they didn't reach that question, so --

HONORABLE TRACY CHRISTOPHER: Well, again, the report of the committee was we had really no objection to the change.

CHAIRMAN BABCOCK: Yeah, so that's the way it looks to me. And the Court will --

HONORABLE TRACY CHRISTOPHER: The Court has heard it.

CHAIRMAN BABCOCK: -- will undoubtedly wordsmith the comment, taking into account all of our hour-and-a-half discussion, and once again the discussion has been great. The humor has been off the charts good, and --

MS. WOOTEN: Not great, but off the chart good.

HONORABLE PETER KELLY: Which direction?

CHAIRMAN BABCOCK: And I don't think we need to do anything more, having achieved consensus --

MR. ORSINGER: We shouldn't forget to mention the quality of the leadership.

CHAIRMAN BABCOCK: Yes, let's mention that.

MR. ORSINGER: For the record, yeah.

CHAIRMAN BABCOCK: I'll entertain that motion, but anyway, a good two days of meetings, and it's

nice to be back together. And December 2nd we will be back for deep thoughts, and we will make one exception to that. Richard can have some shallow thoughts if he wants.

MR. ORSINGER: I'm almost deep thoughted out.

CHAIRMAN BABCOCK: But unless there's anything else, we'll be in recess.

PROFESSOR HOFFMAN: We're expecting that will be a one-day meeting, the December?

PROFESSOR CARLSON: We don't have that many deep thoughts.

CHAIRMAN BABCOCK: The pool is not that deep, Lonny.

(Adjourned)

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MEETING OF THE
SUPREME COURT ADVISORY COMMITTEE

* *

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