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MEETING OF THE SUPREME COURT ADVISORY COMMITTEE

September 20, 2002

(AFTERNOON SESSION)

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COPY

Taken before *D'Lois L. Jones*, Certified
Shorthand Reporter in Travis County for the State of
Texas, reported by machine shorthand method, on the 20th
day of September, 2002, between the hours of 1:05 p.m. and
4:57 p.m., at the Texas Law Center, 1414 Colorado, Room
101, Austin, Texas 78701.

INDEX OF VOTES

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

<u>Vote on</u>	<u>Page</u>
Rule 18c	7424
Rule 18c	7467
Rule 18c	7481
Rule 18c	7523
Rule 740	7549
Rule 740	7562

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1 witness consent; and the guideline rule, whatever that we
2 have under consideration that is the bigger thing, gives
3 the judge a lot more discretion over both whether and how.
4 I mean, there are other factors in the big rule that we're
5 talking about, so Carl says perhaps it would be a good
6 idea before we get into that to give the Court a sense of
7 our committee as to whether or not we think the parties
8 ought to be able to block televised proceedings just in
9 and of themselves or whether or not we do away with that.
10 Is that fair to say?

11 MR. HAMILTON: Right.

12 HONORABLE SARAH DUNCAN: So we're voting on
13 whether the parties can have that power?

14 CHAIRMAN BABCOCK: Yeah. Whether the
15 parties can have -- in effect have veto power.

16 HONORABLE SARAH DUNCAN: But we're only
17 talking about parties right now, not witnesses?

18 CHAIRMAN BABCOCK: Yeah. That's what Carl
19 is saying, and I think that's right, because I think that
20 a fair reading of subpart (b), I don't know if a witness
21 could block anything other than their testimony, although
22 I think you could read it the other way.

23 MR. EDWARDS: Are you talking about parties
24 as applied to the entire rule or parties as applied to
25 subparagraph (b)?

1 CHAIRMAN BABCOCK: Carl, you want to respond
2 to that?

3 MR. HAMILTON: I'm not sure I understand the
4 question.

5 MR. EDWARDS: Well, (b) is an alternative to
6 other things, and are you talking -- I'm not arguing one
7 way or the other. The question is, is your proposition
8 that a party should have the right to veto any cameras in
9 the courtroom under any circumstances, or are you talking
10 about it if you're going to use the alternative of
11 permission that either party may block it?

12 MR. HAMILTON: No, I think that the way I'd
13 like to see it worded is that the parties have the right
14 to veto cameras in the courtroom, period.

15 MR. EDWARDS: So that would be part of 14
16 and not of subparagraph (b). You wouldn't need a
17 subparagraph (b). It would just be a part of the general
18 rule.

19 MR. HAMILTON: Well, it doesn't matter how
20 you put it together. It's just that I don't want the -- I
21 don't want the guidelines to trump the right of the party
22 to veto cameras in the courtroom.

23 MR. EDWARDS: Right. You want it up there
24 before (a), (b), (c), or whatever the subparagraphs are.
25 You just want it to say it can be in there, provided

1 neither party vetos it.

2 MR. HAMILTON: Right.

3 CHAIRMAN BABCOCK: Judge Brown.

4 HONORABLE HARVEY BROWN: I think what he's
5 saying is he doesn't want an "or." He wants an "and."

6 MR. EDWARDS: He just wants it up there in
7 the beginning.

8 MR. YELENOSKY: Well, either one of those.

9 CHAIRMAN BABCOCK: Either way. Yeah.

10 MR. EDWARDS: Either one.

11 CHAIRMAN BABCOCK: Either an "and" or up at
12 the beginning. Right.

13 MR. EDWARDS: He wants it to apply to the
14 whole rule or is suggesting that it does.

15 MR. YELENOSKY: Right.

16 CHAIRMAN BABCOCK: And that is a -- and that
17 would be a very threshold kind of thing if the committee
18 thought that that was a good idea. So that's Carl's
19 proposal.

20 Yeah, Elaine.

21 PROFESSOR CARLSON: Can I ask a question?
22 Under the local rules are there counties where the parties
23 have no say?

24 MR. DUGGINS: Have what?

25 PROFESSOR CARLSON: Have no say.

1 CHAIRMAN BABCOCK: The parties always have a
2 say, but there's no county where they have a veto power.

3 PROFESSOR CARLSON: Well, what do they say?

4 CHAIRMAN BABCOCK: They say whatever they
5 want.

6 MR. ORSINGER: Anybody who wants to object
7 to the coverage can make some kind of principled argument,
8 probably not just "I don't like it," but some articulable
9 reason why, but the court's not bound by that. That's the
10 core difference.

11 CHAIRMAN BABCOCK: Yeah. In the Turner
12 case, Turner vs. Dolcefino, Turner opposed the
13 gavel-to-gavel coverage by Court TV, and I forget the
14 reasons he had, but he had two or three reasons why it
15 wasn't a good idea.

16 And I have been involved as a lawyer for the
17 media in these where one or the other party -- in one case
18 both parties objected to it, and so they just say, you
19 know, "You shouldn't have it for A, B, C, and D reasons."
20 But what Carl's saying is when a party objects then that's
21 the end of the game.

22 MR. YELENOSKY: And that's not the way it is
23 under 18c right now? I guess I don't understand.

24 CHAIRMAN BABCOCK: Well, yeah, 18c, subpart
25 (b) --

1 MR. ORSINGER: Let me respond to that.
2 That's the way it is when you don't have local rules to
3 the contrary.

4 CHAIRMAN BABCOCK: Right.

5 MR. ORSINGER: But in Houston, Dallas,
6 Travis County, the local rules are operating under (a), so
7 you don't look to (b) and consent to --

8 MR. YELENOSKY: I guess I didn't understand
9 how a local rule was under (a).

10 MR. ORSINGER: Well, that's the debate that
11 Sarah and I were having you're coming around to now.

12 CHAIRMAN BABCOCK: You and Sarah are on the
13 same page about that.

14 HONORABLE SARAH DUNCAN: So what's new?

15 CHAIRMAN BABCOCK: That's a different issue.
16 See, the way (b) is read, if a media entity wanted to,
17 they could go around -- they never do this that I know of.
18 But they could go around, they could say, "Okay,
19 plaintiff, is it okay if we televise it?" Plaintiff says,
20 "Yeah." They go to the defendant "Is it okay?" Defendant
21 says, "Yeah." Then they say, "Give me your witness list,"
22 and they go around to all the witnesses and they get their
23 consent.

24 Then they go to the judge and they say,
25 "Judge, the parties consent, all the witnesses consent.

1 You know, having a TV there, camera there, is not going to
2 unduly distract participants or impair the dignity of the
3 proceedings, so, you know, you must let us in because
4 we've got all this consent."

5 So (b) is really casting more of an
6 affirmative consent rather than a negative veto, but
7 Carl's point is well-taken. It's the same thing. I mean,
8 somebody withholds consent, and that is an element of
9 having televised proceedings, then it's the same thing as
10 a veto.

11 MR. HAMILTON: But under your example even
12 though the media got everybody's consent, the judge can
13 still say "no."

14 CHAIRMAN BABCOCK: Right. That's right.
15 That's right.

16 Yeah, Judge Brown.

17 HONORABLE HARVEY BROWN: It can also come up
18 where the judge says, "Well, you know, I'm willing to
19 think about this. Does everybody consent?" And then the
20 judge flips it to the lawyers and says, "Go get it."

21 CHAIRMAN BABCOCK: Right.

22 HONORABLE HARVEY BROWN: Including the
23 witnesses.

24 CHAIRMAN BABCOCK: That's another way they
25 can do it.

1 Frank.

2 MR. GILSTRAP: I think the way we ought to
3 proceed is, first of all, do we have a statewide rule,
4 whether you call it a statewide rule or guideline,
5 however. That's the first question. Second, should we
6 allow the local courts to opt out of it? Once you make
7 those decisions then you've got to decide, do we allow the
8 witnesses -- the parties to veto it, do we allow the
9 witness to veto it. Then once you get past that then
10 we've got the question of judge's discretion. Is the
11 judge's discretion absolute or qualified; and if it's
12 qualified, do we tilt for or against?

13 MR. ORSINGER: The problem I have with that
14 is, is that whether I want a statewide rule depends on
15 what it is, because if the statewide rule is worse than
16 the local rule, I do not want to revoke the local rules;
17 and so the way I would vote on a statewide rule depends on
18 what we're going to do to Houston and Dallas and Fort
19 Worth and Austin. So to me that would be the last vote,
20 is whether to go statewide rule or not because it depends
21 on what the rule says as to whether I'm for it or against
22 it.

23 MR. GILSTRAP: So you would -- well, you
24 would put the opt out last in that?

25 MR. ORSINGER: No. I would say that my

1 personal vote -- I'm not talking about as a committee
2 draftsman. My personal vote is going to depend on whether
3 we're -- whether the committee product would revoke the
4 Houston, Austin, Travis County, and Fort Worth rules by,
5 for example, as Carl is saying, requiring the consent of
6 the parties. If this committee wants to require the
7 consent of the parties, I'm against a statewide rule
8 because I think that does a disservice to the counties
9 that have successfully implemented these policies. So
10 until I know what the rule looks like, I don't know
11 whether to vote to go statewide or not, so I would argue
12 we shouldn't vote that without knowing the content.

13 MR. GILSTRAP: Okay. So you just want to
14 promulgate a rule and then decide whether to apply it
15 statewide?

16 MR. ORSINGER: Well, I would rather --

17 MR. YELENOSKY: He wants a veto on
18 whatever --

19 MR. GILSTRAP: You want to have your cake
20 and eat it, too, Richard.

21 MR. ORSINGER: Well, it's a pig and a poke.
22 If you vote for a rule that you don't have any idea which
23 direction it's heading, I don't know that anybody really
24 should be bound to that vote.

25 MR. LOW: But, Richard, you're not voting

1 for that. You're voting that no matter what, if the rule
2 is the way you want it, you could support a statewide
3 rule, and then you determine whether or not you vote for
4 or against the rule; but I mean, if you're just totally
5 against a statewide rule no matter what it is, I mean,
6 that's the vote, because nobody -- I don't know what the
7 rule is going to be.

8 MR. ORSINGER: Okay.

9 MR. LOW: And I'm like you, I want to know
10 what it's going to be before I vote it in, but I do know
11 whether I would vote for a statewide rule, no matter what
12 it was, if I could draw it, yeah, I'd vote for it.

13 CHAIRMAN BABCOCK: Nina.

14 MS. CORTELL: I think we can have a
15 straight-up vote on whether to have a statewide rule
16 because I think 18c as currently worded is an empty set.
17 I think that the comments made earlier are absolutely
18 correct that it contemplates something that is not in
19 place. Now that we have adopted an end around and
20 everybody with a wink and a nod is allowing it to occur
21 does not make it right.

22 This rule only provides an out from the
23 consent requirement if we have Supreme Court promulgated
24 guidelines. We do not have that, so as far as I'm
25 concerned there's a very important -- big question as to

1 whether the current practice is valid and if challenged
2 whether it would be upheld or not, so I think it is
3 incumbent on us to create guidelines if we're going to
4 have a rule that contemplates guidelines. So I think we
5 can have a straight-up vote.

6 In terms of ultimately the rule to be
7 promulgated, there's going to be discretion in the trial
8 court, and that is the opt out right there. I mean, if a
9 court exercising its discretion, albeit I understand the
10 great political consequences and difficulties, but that's
11 no different than a lot of decisions we ask our judiciary
12 to engage in, so I'm for a straight-up vote and then also
13 for a statewide guideline.

14 CHAIRMAN BABCOCK: Frank, you said two or
15 three things. You said whether we have a statewide rule
16 and then what were the other things you said?

17 MR. GILSTRAP: I think the statewide rule --
18 what we ought to say is do we have a statewide rule?

19 CHAIRMAN BABCOCK: Right.

20 MR. GILSTRAP: And then does the statewide
21 rule include any of the veto provisions currently in
22 18c(b), and then once you get past that -- I suspect it
23 won't, but I could be wrong, then, you know, are we
24 talking -- does the judge have absolute or qualified
25 discretion on whether to permit cameras in the courtroom,

1 and then if he does have qualified discretion, are we
2 tilting for coverage or against coverage? Once we figure
3 that out, we can draw a rule.

4 MR. EDWARDS: What is absolute discretion?

5 MR. GILSTRAP: What's that?

6 MR. EDWARDS: What is absolute discretion?

7 MR. GILSTRAP: That means he can say "no"
8 and that's the end of it.

9 MR. EDWARDS: That's a discretion that
10 cannot be abused?

11 MR. WATSON: Right. Absolutely.

12 MR. EDWARDS: I'm just asking for terms, so
13 I know what I'm talking about.

14 CHAIRMAN BABCOCK: Bill Dorsaneo.

15 PROFESSOR DORSANEO: I think Carl was right.
16 I think that the way this rule was written (b) provides
17 for everybody has to consent, and I'm assuming that we
18 don't have guidelines under (a) not because the Court
19 didn't get around to it, but because they had this issue
20 about consent. And consent seems to be the key issue to
21 me, not whether you ought to do a motion or a 14 days
22 before or whatever.

23 CHAIRMAN BABCOCK: Richard.

24 MR. ORSINGER: If we're going to vote on the
25 concept of the statewide rule then I feel like we should

1 also vote whether we would allow a locale to opt out in
2 favor of their own local rules.

3 PROFESSOR DORSANEO: The Court can always do
4 that by approving local rules.

5 MR. EDWARDS: I don't know about that. They
6 can't adopt one that's contrary to state rules.

7 PROFESSOR DORSANEO: Well, Justice Hecht
8 said sometimes they do that just to see how it will work.

9 MR. EDWARDS: Suppose they adopt a rule that
10 says you don't have to answer for 40 days instead of 20.

11 MR. ORSINGER: It seems to me that if we do
12 vote on the statewide as a concept we ought to decide
13 whether we would allow locales like Houston or Dallas to
14 opt out of it.

15 MR. GILSTRAP: That's fine. I was just
16 trying to accommodate you.

17 MR. ORSINGER: Yeah. But if we do vote on
18 the statewide we ought to --

19 PROFESSOR CARLSON: Then we should vote on
20 whether we want a statewide rule or guidelines.
21 Guidelines necessarily indicates to me discretion on a
22 local basis.

23 CHAIRMAN BABCOCK: Good point. So the one
24 issue is -- well, one vote is statewide rule, statewide
25 guideline, or status quo, is what we have right now.

1 Whatever it is, whether it's legal, illegal, or whatever.

2 MR. LOW: Chip, I don't see a statewide rule
3 with an opt out provision as being a statewide rule. I
4 see a statewide rule with some discretion in the statewide
5 rule, but opt out, that's not even a statewide rule.

6 CHAIRMAN BABCOCK: Well, that's what
7 Elaine's point was, that if you have a rule, that's
8 somewhat inconsistent with opt out. If you have a
9 guideline then that is consistent with opt out.

10 MR. LOW: Yeah. Yeah. Okay.

11 CHAIRMAN BABCOCK: So that's -- and then
12 Carl's point was -- you know, Carl's point, I think
13 disagreeing with Frank, is that Carl says that the
14 parties' veto is a threshold issue. Frank says statewide
15 rule is a threshold issue. Maybe they both are. The
16 question is what do we want to take up first, or something
17 else first?

18 Yeah, Stephen.

19 MR. YELENOSKY: Well, it does seem to me
20 that, as Bill said, we're going to have to deal with the
21 consent issue, because if the Supreme Court did promulgate
22 guidelines and the guidelines were only about which kind
23 of cameras you could use then under this rule by following
24 the Supreme Court's guidelines as to what kind of cameras
25 you can use, you can totally avoid the consent issue; and

1 that doesn't seem to make sense, because guidelines don't
2 have to address consent in order to get you around part
3 (b) in this rule; and that doesn't seem to make sense to
4 me.

5 CHAIRMAN BABCOCK: Okay. Judge Brister.

6 HONORABLE SCOTT BRISTER: I think you've got
7 to vote on the statewide rule first. People are going to
8 vote against the statewide rule because they don't like
9 the rule. Then you're getting a vote on the rule, not on
10 whether there ought to be a statewide. The only way to
11 get a vote on the statewide rule is to vote on it before
12 you find -- I mean, you know, it's like saying, "Well,
13 yeah, I'm against -- I'm for filing suit if I know whether
14 I'm going to win or not." Well, you know, I mean --

15 HONORABLE SARAH DUNCAN: Which is precisely
16 what Mr. Orsinger is saying.

17 MR. ORSINGER: Yeah.

18 HONORABLE SCOTT BRISTER: One could say
19 we're all against Rules of Civil Procedure if we're
20 talking about the rules we don't like, but that's not a
21 good reason not to have the Rules of Civil Procedure.

22 CHAIRMAN BABCOCK: Yeah. By the way, just
23 parenthetically, I think we all should get Chuck Taylor
24 Converse All-Star hightop designer shoes in red and wear
25 them to our next meeting.

1 MR. ORSINGER: And then Sarah is going to
2 have to wear something else.

3 PROFESSOR DORSANEO: I am not wearing a
4 dress.

5 CHAIRMAN BABCOCK: That's an idea. Well, to
6 flip it around, should we consider voting on whether we
7 like the status quo, because the status quo is that all
8 the metropolitan counties have rules that have been
9 specifically sanctioned by the Texas Supreme Court,
10 whether the Court's acting illegally or not, there it is,
11 and there haven't been a lot of complaints that I'm aware
12 of, nobody that anybody has heard of. So, you know, maybe
13 we should have the status quo and that should be the first
14 vote and then we vote -- if we say we don't want the
15 status quo, we want a change, then we vote between whether
16 we should have a statewide rule or a statewide guideline.
17 Does that make any sense?

18 MR. ORSINGER: It does, but if we're going
19 to go with the status quo we could just rewrite (a), "In
20 accordance with local rules approved by the Supreme Court,
21 and that will eliminate the intellectual debate some of us
22 are concerned about."

23 HONORABLE SARAH DUNCAN: It will also
24 eliminate any challenge to the rules that you are so fond
25 of.

1 CHAIRMAN BABCOCK: You're not calling me an
2 intellectual, are you?

3 MR. YELENOSKY: Them's fighting words.

4 CHAIRMAN BABCOCK: Because that would be
5 fighting words if you were. Well, is everybody
6 comfortable in going that way? Carl, I mean, is that the
7 first issue or do you think --

8 MR. HAMILTON: I don't really care as long
9 as we get to my issue.

10 MR. ORSINGER: We will get to your issue.
11 Don't worry.

12 CHAIRMAN BABCOCK: Well, why don't we vote
13 then on whether or not we want to accept the status quo
14 and give the Court a sense -- and give the Court a sense
15 of our committee's feeling on that issue and then move
16 to -- and if that doesn't pass then move to the issue
17 between statewide rule or statewide guideline. Bill, is
18 that --

19 PROFESSOR DORSANEO: I don't care if we
20 vote, but are we going to discuss that? I mean, what
21 would be the reason for doing this as a matter of local
22 practice? Some things I could see we do as a matter of
23 local practice like setting cases for trial, things like
24 that, but why would this particular subject be something
25 that would be one way in San Antonio, one way in Houston?

1 CHAIRMAN BABCOCK: Judge Brown.

2 HONORABLE HARVEY BROWN: Well, I haven't
3 thought about this a lot before today, because I've only
4 thought about the Harris County rules, but it seems to me
5 that if you're in a small county where everybody is going
6 to be watching that particular trial, that may have some
7 impact on the judge that's different than in Dallas or
8 Houston where the number of people who are going to watch
9 that trial is so small that the political realities are
10 much different.

11 So, for example, whether you put a thumb on
12 favoring open court, doesn't bother me in Houston. It
13 might bother me in a one-judge county with the, you know,
14 mayor of a major city suing the city councilmen. I just
15 think there could be differences in parts of the state
16 because of that.

17 CHAIRMAN BABCOCK: And I think that's
18 exactly what the thinking was; but as it turned out, other
19 than Williamson County, Chris, is there any lesser
20 populated county that has got local rules? Other than
21 that they're all the metropolitan counties.

22 Well, we certainly could have a discussion
23 about the status quo issue. Anybody have any feelings
24 about it? Carl.

25 MR. HAMILTON: I think what you're saying,

1 though, or what you said earlier is that those counties
2 that have adopted local rules, they don't ever get to the
3 (b) part; is that right?

4 CHAIRMAN BABCOCK: I think that's right.

5 MR. ORSINGER: If they comply with the local
6 rules they don't get to (b).

7 CHAIRMAN BABCOCK: Yeah. I'm not aware of
8 any instance where they've gone and rounded up all the
9 witnesses and -- I mean, you always try to get consent of
10 the parties going in if you're going to make an
11 application.

12 MR. HAMILTON: Even in the local rules
13 situation.

14 CHAIRMAN BABCOCK: Yeah. Yeah. I mean, not
15 that that's binding, but you go in with your application,
16 and say, "Judge, I've talked to counsel for the plaintiff
17 and the defendant. They have no objection, and we want to
18 propose having a pool camera and we want to do it this way
19 and that way, and so grant our application."

20 MR. HAMILTON: But if one of the parties
21 says, "I don't want it," the judge can still order it.

22 CHAIRMAN BABCOCK: Yeah. You say, "Judge,
23 I've talked to the parties. The plaintiff's all in favor
24 of it. The defendant doesn't want to do it, and here's
25 how we want to do it, and please grant our request." But

1 you still always ask if anybody objects.

2 MR. ORSINGER: I mean, as a practical
3 matter, in almost all of the instances where anyone cares
4 (b) is not applied. I mean, (b) is not being applied
5 really, is it? Because all the big counties where all the
6 news media is wanting to send all the cameras are always
7 under a local rule. So in reality, (b) is like a
8 philosophical statement, but it's not a practical reality.
9 The practical reality in terms of percentages is the local
10 rules out there.

11 PROFESSOR DORSANEO: That sounds completely
12 wrong to me. It sounds to me if you name four counties
13 that have opted out of this then (b), everybody consents,
14 is the rule for the other 250 counties.

15 MR. ORSINGER: Sure, but there's no demand
16 for it there, Bill, is my point. The reason that the
17 counties that have the local rules have them is because
18 they had all this phonate when the media went down there
19 and wanted to do it, and there was so much confusion, and
20 everybody wanted their own camera and their own
21 microphone, and somebody had to put some kind of
22 consistency to it. I bet you if we look we'll find out
23 that 99 percent of what has gone media has gone media
24 under a local rule and not under 18c(b).

25 MR. YELENOSKY: Yeah, but after this

1 discussion and people find out that Judge Duncan, for
2 instance, doesn't think a local rule falls under (a),
3 maybe people are going to start making that argument if we
4 don't change the rule.

5 CHAIRMAN BABCOCK: That's right, and they
6 will appeal it.

7 PROFESSOR DORSANEO: The sense is, though,
8 that there will be smaller counties that if (b) leaves
9 will pass a local rule that will say "consent."

10 CHAIRMAN BABCOCK: It's possible. Sure.

11 MR. ORSINGER: Sure could. Sure could.

12 CHAIRMAN BABCOCK: And I can't say -- I
13 probably should know this, but I think that there have
14 been some counties where district judges have allowed
15 cameras in there even though they don't have a local rule.
16 Is that right, Chris?

17 MR. GRIESEL: Yeah. And it's usually in
18 high profile civil or transferred criminal cases.

19 CHAIRMAN BABCOCK: Well, criminal is
20 different because the Court of Criminal Appeals says they
21 don't need a rule.

22 MR. GRIESEL: But it will be in cases where
23 they show up at their doorstep.

24 MR. EDWARDS: Are there any anecdotal
25 stories of problems in the last 12 or 24 months about

1 cameras or anything in the courtroom? Any problems at all
2 under what we've got?

3 CHAIRMAN BABCOCK: Problems, I mean, there
4 are disputes. Like yesterday, for example, there was a
5 dispute in a criminal case in Harris County where a four
6 year-old was going to testify, and the judge had allowed
7 cameras in for the whole trial, but she was going to
8 exclude the cameras for the four year-old's testimony.
9 Fine, nobody is particularly objecting about that, but the
10 mother asked that CBS be allowed to stay in because she
11 had a special deal with "48 Hours," so "48 Hours" gets to
12 do the four year-old and nobody else does, and you can't
13 do that.

14 I mean, so all the other media says, "Whoa,
15 we understand we don't get to do the four year-old, but
16 CBS can't be there."

17 MR. EDWARDS: That's going to come up no
18 matter what you do. Are there any other problems?

19 CHAIRMAN BABCOCK: Not really, no, not that
20 I know of. Bonnie.

21 MS. WOLBRUECK: The only thing that I know
22 of is that occasionally the judge will ask the clerk to
23 call around to see, you know, how other counties are
24 handling the issue of cameras in the courtroom, and I know
25 I have received some of those phone calls because we

1 happen to have a local rule, but I would hope then -- you
2 know, I'm sitting here thinking that guidelines would
3 certainly be helpful for those district judges or those
4 judges in any of those courts that haven't been affected
5 in those smaller counties like the larger counties have.

6 CHAIRMAN BABCOCK: Yeah. Good point.
7 Buddy.

8 MR. LOW: Could I ask one question so I know
9 what I'm voting on?

10 CHAIRMAN BABCOCK: If you know it, let me
11 know because --

12 MR. LOW: Yeah. Because the way it reads,
13 the status quo to me would mean that a court may permit,
14 which would mean that for any reason he decides he doesn't
15 want to, he doesn't have to, but if he does permit, he
16 permits it under these guidelines.

17 MR. ORSINGER: True.

18 MR. LOW: I mean, is that what -- I mean,
19 that's the way I read it. It says, "He may." It doesn't
20 say -- so that means that he doesn't even get to the
21 guidelines if he doesn't want to. Is that the status quo?
22 Am I right?

23 MR. EDWARDS: Yeah.

24 CHAIRMAN BABCOCK: I think it's generally
25 accepted that the district judges have discretion to let

1 them in or keep them out.

2 MR. LOW: Well, but what I'm saying is
3 instead of saying "at his discretion following these
4 guidelines," but the status quo would mean that when you
5 say "may," you say, "I may do this" or "If I do it, I do
6 it under these guidelines." Well, the first thing, "Do I
7 want to do it?" I say, "No, I don't want to do it," and
8 then I don't reach the guidelines. That, to me, is the
9 status quo. Am I wrong? I mean, if so, why is that not
10 the right interpretation?

11 CHAIRMAN BABCOCK: I don't think you're
12 wrong, but I think that plays into Frank's concept of
13 absolute discretion, and I think it's a practical matter.
14 District judges have broad discretion that may approach
15 absolutism in 99 percent of the cases, but I can conceive
16 of a case where there is such extraordinary public
17 interest and there is such extraordinarily public issues
18 at stake that a judge might not have absolute discretion
19 to keep the cameras out.

20 MR. YELENOSKY: It wouldn't be by virtue of
21 the rule. It would be by virtue of some constitutional
22 principle.

23 CHAIRMAN BABCOCK: Perhaps.

24 MR. YELENOSKY: So as far as the rule is
25 concerned, it's absolute.

1 MR. LOW: My point was that if we vote the
2 status quo, if I vote for that, that's what I'm saying.
3 I'm saying the judge doesn't even have to reach the
4 guidelines if he decides he doesn't want to do it for any
5 reason. Well, our guidelines, it doesn't say "may refuse
6 if you don't meet guidelines." It gives him the absolute
7 power to refuse, but if he grants it, he can only do it
8 under these guidelines.

9 CHAIRMAN BABCOCK: Well, by "status quo"
10 what I mean is the system we have now where we have the
11 rule as it's written and we have local rules in the major
12 metropolitan counties and one or two other smaller
13 counties, and those rules exist, and they have been
14 approved by the Supreme Court, and they have whatever
15 force and effect they have. You know, maybe if it ever
16 gets up to the San Antonio court of appeals it won't have
17 much effect at all, but --

18 MR. LOW: I just --

19 CHAIRMAN BABCOCK: That's the status quo as
20 it exists today. Yeah, Richard.

21 MR. ORSINGER: The argument I would like to
22 raise against the status quo is the experience I had
23 before Fort Worth adopted its local rules, and I had a
24 week-long hearing that was of interest internationally,
25 and the trial judge allowed the press -- allowed the

1 foreign press to sit in the jury box and made the American
2 press sit behind the counsel table, and everybody was
3 entitled to have their own cameras and their own
4 microphones. There was no jury, but the closest
5 microphone to my back was about three feet behind me, and
6 it was a shotgun microphone that could have picked up
7 somebody talking a half mile away, and I objected to the
8 trial court that the people in the media would be able to
9 hear our confidential discussions whispered at the counsel
10 table and was overruled, and so we had to conduct the
11 whole hearing by passing notes back and forth whenever it
12 was a matter that we didn't want the listeners in
13 Australia to hear.

14 So one of the advantages of a statewide rule
15 is the pooling requirement, which I think protects the
16 confidentiality, because the court will not have a pooled
17 mike via shotgun mike that's picking up the confidential
18 communications in the courtroom between the lawyer and his
19 client. So if -- and the Houston and Dallas and these
20 generalized rules have solved this problem, but the rest
21 of these counties haven't. And so if you ever are out
22 somewhere and you've got a dozen microphones and you don't
23 have the ability to talk to your client in the middle of a
24 hearing, you'll appreciate the fact that these pooled
25 media requirements might have been better for the trial

1 process, and the status quo only has those pooled media
2 requirements in the big counties and not in the small, and
3 that's I think one of the deficiencies of the status quo.

4 MR. GILSTRAP: But in the small county if
5 you didn't like it you could have opted out. Your client
6 could have said, "I don't want any cameras."

7 MR. HAMILTON: No.

8 MR. ORSINGER: Well, the trial judge didn't
9 read the rule that way. And so --

10 MR. GILSTRAP: We can't fix that.

11 MR. ORSINGER: And is there mandamus review
12 for violation of 18c(b); and if so, you know, when you're
13 calling your next witness who is going to be filing the
14 petition for written mandamus? I mean, you know, as a
15 practical matter I would prefer to see pooled media
16 requirements statewide regardless of whether they're
17 tilted in no direction or both directions.

18 CHAIRMAN BABCOCK: Okay.

19 MR. MEADOWS: So, Richard, you are in favor
20 of a statewide rule?

21 MR. YELENOSKY: He is. Right.

22 CHAIRMAN BABCOCK: He's talked himself into
23 it, Bobby. He's talked himself into it, even though he
24 doesn't know what it's going to say. Any other discussion
25 on the issue of status quo? I guess we could vote on

1 that.

2 MR. GILSTRAP: Chip, let me ask one thing.
3 Are you telling me that in Dallas where you have the tilt
4 for --

5 CHAIRMAN BABCOCK: Right.

6 MR. GILSTRAP: -- still the way it's applied
7 is everybody understands the judge can still -- has the
8 power to keep the cameras out under the "may" in the first
9 line of 18c?

10 CHAIRMAN BABCOCK: Well, I don't think
11 that's the way it's usually analyzed in Dallas County.

12 MR. GILSTRAP: Okay. Okay.

13 CHAIRMAN BABCOCK: But I agree with the
14 second part of your sentence that the judge has discretion
15 to keep it out, but that's --

16 MR. GILSTRAP: Whether it's absolute or not.
17 In other words, is it generally understood that the judge
18 in Dallas where they have the tilt for --

19 CHAIRMAN BABCOCK: Right.

20 MR. GILSTRAP: -- still has the power to
21 keep the camera out?

22 CHAIRMAN BABCOCK: Oh, certainly.

23 MR. GILSTRAP: If he has the backbone and
24 wants to.

25 CHAIRMAN BABCOCK: Certainly.

1 MR. GILSTRAP: Okay. Thank you.

2 MR. LOW: But if it read "may permit" or
3 "may refuse broadcasting" then I would see the guidelines
4 having some effect. It wouldn't be that -- he would have
5 discretion, but there wouldn't be just an absolute power
6 that you didn't reach the guidelines. That was really
7 what I was -- I don't know how you reach that.

8 CHAIRMAN BABCOCK: Okay. Well, why don't we
9 vote on whether or not we should keep 18c as it is,
10 recognizing that there are local rules in many counties
11 that have been approved by the Supreme Court and have been
12 in operation for between 10 and 15 years. That's the
13 status quo. Now, everybody in favor of keeping the status
14 quo raise your hand.

15 Everybody opposed to keeping the status quo?
16 The vote is 1 in favor of keeping the status quo, 19
17 against, the Chair not voting.

18 Okay. Now, let's decide whether or not we
19 ought to have a statewide rule or a statewide guideline.
20 Elaine, what's the argument in favor of a statewide
21 guideline instead of a statewide rule?

22 PROFESSOR CARLSON: I guess the argument
23 would be made that that preserves a local choice, but
24 within certain parameters that the Court's discretion
25 could be tested, anybody that may want to mandamus the

1 decision.

2 CHAIRMAN BABCOCK: Okay. Buddy.

3 MR. LOW: But a statewide rule could have
4 guidelines, but they're discretionary. I mean, that's
5 what a statewide rule would be for. I mean, that's what
6 the rule, as I contemplate what we're talking about, is
7 having this with certain guidelines, but that is a
8 statewide rule that includes guidelines.

9 PROFESSOR CARLSON: Factors.

10 MR. LOW: Factors. Yeah. Factors or
11 elements or whatever you want to call them.

12 CHAIRMAN BABCOCK: Sarah.

13 HONORABLE SARAH DUNCAN: If all you have is
14 a guideline, have you done anything to resolve Richard's
15 problem of a boom mike overhearing his conversations with
16 his client?

17 CHAIRMAN BABCOCK: It depends on what the
18 guideline says, but if this proposal here becomes the
19 guideline, I think there is a provision in here about
20 that.

21 HONORABLE SARAH DUNCAN: There is, but
22 aren't I as a district court judge free to disregard a
23 guideline, and would there not be any reviewability
24 through mandamus of that decision?

25 CHAIRMAN BABCOCK: What do you say to that,

1 Richard?

2 MR. ORSINGER: I don't know. Since we don't
3 know the shape of the guideline, would it be a mandatory
4 rule that the guidelines must be followed, but in certain
5 respects they can be altered but others they can't? I
6 mean --

7 HONORABLE TOM LAWRENCE: Give me an example
8 of a guideline.

9 CHAIRMAN BABCOCK: As opposed to a rule.

10 HONORABLE TOM LAWRENCE: Yeah. Are there
11 any guidelines in the rules now?

12 MR. ORSINGER: Well, I think that -- to me
13 it depends on whether guideline means something that the
14 court can have as an example to follow, but is not
15 required to follow; whereas, a rule is something the court
16 is required to follow.

17 MR. YELENOSKY: But --

18 CHAIRMAN BABCOCK: Stephen.

19 MR. YELENOSKY: Well, aren't we just getting
20 into semantics, because once we get into what the rule is
21 there are going to be some things that are mandatory and
22 other things that aren't, and the things that aren't I
23 guess you could call guidelines, but we've already said we
24 don't want the status quo. I can see where this
25 discussion under the status quo would be significant

1 because the rule uses the term "guidelines," but outside
2 of this rule, I don't really see where calling it a rule
3 or a guideline really matters. It's the substance of it.
4 If it says you must have consent, I guess you call that a
5 rule and then it says, "but as far as whether you pool or
6 not, you have a choice," well, then that's a guideline
7 under this discussion. But I don't know that that gets us
8 anywhere.

9 MR. ORSINGER: If I may -- I'm sorry, if I
10 may, in my view what the Supreme Court meant by
11 "guidelines" is along the lines of what I said earlier
12 about Rule 226a. The admonitory instructions you give to
13 a jury are not discretionary, but they are not part of the
14 rule. They are issued as an order of the Court pursuant
15 to the rule, but they are not actually part of the rule,
16 and that's what I think the Supreme Court was talking
17 about. We don't want to have a 10-page pooling rule in
18 the Rules of Civil Procedure. We don't need it, and we
19 may need to tinker with it. So I think what they were
20 contemplating is that there would be a rule where we would
21 adopt some guidelines. You've got to follow them and here
22 they are and we can revise them as needed. That's my
23 perspective on it.

24 CHAIRMAN BABCOCK: Buddy.

25 MR. LOW: We did 702. We put certain basic

1 things and we chose not to have every element as a, quote,
2 "guideline" because you get into problems there.

3 CHAIRMAN BABCOCK: Right.

4 MR. LOW: But we could have the same thing
5 here that we have in 702, just general with the
6 discretionary power of the judge.

7 CHAIRMAN BABCOCK: You could change 18c to
8 just have subpart (a) saying, "In accordance with the
9 statewide guidelines promulgated by the Court."

10 MR. LOW: Right.

11 CHAIRMAN BABCOCK: You could do it that way
12 if you wanted to. Any other discussion?

13 HONORABLE DAVID PEEPLES: Chip, I think no
14 matter what they're called, West is going to put them in
15 this book, and they may be way back in the back, but no
16 matter whether they're called, "rule" or "guideline," they
17 will be followed.

18 CHAIRMAN BABCOCK: They will be around
19 somewhere to look at.

20 HONORABLE TOM LAWRENCE: Let me raise
21 another point. The Code of Judicial Conduct says I have
22 to follow the rules, the Rules of Civil Procedure. So is
23 this a Rule of Civil Procedure, this guideline?

24 CHAIRMAN BABCOCK: Well, it's something you
25 ought to follow, I suppose.

1 HONORABLE SARAH DUNCAN: I don't think so.

2 HONORABLE TOM LAWRENCE: Well, not according
3 to the Code of Judicial Conduct. It says you have to
4 follow the Rules of Civil Procedure.

5 CHAIRMAN BABCOCK: But you can ignore the
6 guidelines?

7 HONORABLE TOM LAWRENCE: Well, I don't know
8 what a guideline is. It's not in the Code.

9 MR. GRIESEL: But you can't disregard a
10 court order under the Code either.

11 HONORABLE SARAH DUNCAN: Right, but we're
12 not talking about a court order.

13 MR. GRIESEL: It would probably be
14 promulgated -- if we're going to promulgate the guidelines
15 the same way that we're promulgating under 226 then it
16 will probably be a miscellaneous docket order of the
17 Court.

18 CHAIRMAN BABCOCK: So I wouldn't think you
19 could ignore that.

20 MR. ORSINGER: Well, but you don't ignore it
21 for the jury instructions, because they're promulgated the
22 same way.

23 HONORABLE TOM LAWRENCE: But that's in the
24 rules.

25 MR. ORSINGER: No, it isn't. If you look at

1 226a, it says, you know, "The court shall instruct the
2 jury," whatever the generic language is and then all of
3 that stuff that's in there many people think is part of
4 the rule. It's not. It's a miscellaneous docket order
5 signed by nine justices on the Supreme Court.

6 MR. HAMILTON: And that rule says that it
7 will be promulgated as orders, 226a.

8 MR. ORSINGER: Right. And I think the
9 Supreme Court intends to do that, and I think that's
10 sensible.

11 HONORABLE TOM LAWRENCE: Okay. But under
12 "prudent instructions" in 226a the first sentence is
13 "pursuant to the provisions of Rule 226a."

14 MR. ORSINGER: That's right, but the
15 approved instructions are actually not the rule, all I'm
16 saying. The rule is like three and a half lines long, and
17 it says, "We're going to promulgate admonitory
18 instructions"; and then after the Rules of Procedure were
19 adopted, and independently from that process, they signed
20 a separate order that all nine justices signed that had
21 all this stuff in it; and so, yes, West and everybody else
22 puts it right here because that's where we all expect to
23 find it; and I'll bet you if they do the same thing,
24 they'll put it after 18c. But actually it's not a rule
25 and it's more flexible than a rule because the Supreme

1 Court can change one of those orders --

2 MR. YELENOSKY: Right.

3 MR. ORSINGER: -- just by signing a new one.

4 MR. YELENOSKY: So it saves space and it's
5 flexible, but otherwise, it all depends on what you write.

6 MR. ORSINGER: I think it's just as
7 enforceable because it's mandatory if the introductory
8 rule says that it is.

9 CHAIRMAN BABCOCK: It definitely is talking
10 prospectively. 226a says, "The court shall give these
11 instructions as may be prescribed by the Supreme Court in
12 an order or orders entered for that purpose." So....

13 PROFESSOR DORSANEO: It still doesn't say
14 what a guideline is. I don't know what "guideline" means.

15 PROFESSOR CARLSON: Let's just do 226a then.

16 MR. ORSINGER: Yeah. No, I think the
17 question really of whether it's a rule or a guideline is a
18 question of whether it's mandatory or whether it's not
19 mandatory and that we have just been talking about it. I
20 think it's a misnomer to call it a guideline even though
21 the rule calls it a guideline.

22 HONORABLE SARAH DUNCAN: I think it has the
23 potential for having tremendous practical effect if 18c(a)
24 is basically ignored, which is my view of what's
25 happening.

1 MR. ORSINGER: I agree.

2 HONORABLE SARAH DUNCAN: If all we're going
3 to do is say there's a guideline out there where there
4 wasn't one before, why couldn't the local rules exist
5 side-by-side with the guideline, even absolutely
6 conflicting with the guidelines?

7 CHAIRMAN BABCOCK: Well, I mean, I suppose
8 you could amend subparagraph (a) of Rule 18c just to track
9 the same language as is in 226a if you wanted to bring
10 clarity to it.

11 MR. ORSINGER: Yeah, but the problem, Chip,
12 is that what we have right now is de facto local rules
13 approved by the Court under Rule 9, or whatever that is,
14 even though we're all pretending like it's under 18c(a).
15 They are really local rules approved by the Supreme Court
16 rather than guidelines promulgated by the Supreme Court,
17 so we do need to clean that up.

18 CHAIRMAN BABCOCK: But didn't somebody say
19 that you can have local rules so long as they don't
20 conflict with the rules?

21 MR. ORSINGER: If the Supreme Court approves
22 them, yeah, that's right. But if they are going to,
23 quote, opt out of the consent requirement or whatever they
24 want, if they want to tilt for instead of against, that's
25 going to conflict, isn't it?

1 CHAIRMAN BABCOCK: Bill.

2 PROFESSOR DORSANEO: This is belaboring the
3 obvious, but status quo would actually be to say in (a)
4 "In accordance with local rules approved by the Supreme
5 Court." That would be status quo, and I might could go
6 with that if there is a difference in big counties, small
7 counties without requiring everybody to promulgate 18(b)
8 counter-media rules.

9 CHAIRMAN BABCOCK: You want us to change our
10 19 to 1 vote to 18 to 2?

11 HONORABLE SARAH DUNCAN: If that's going to
12 be significant, I would like to respond to what Chip said.
13 Just because we're talking about one of the not very
14 populated counties and that the coverage might have a
15 different impact if it's a less populated county because
16 everybody will be watching than if it's a very populated
17 county because only a fraction of the population will be
18 watching, is that really a principled basis for having
19 different rules? I mean, why, why, Chip, would that be a
20 legitimate reason for having a different set of rules in
21 Sutton County than we have in Harris County?

22 CHAIRMAN BABCOCK: I don't know that it
23 would be, but I do know that at the inception of this
24 whole thing that there was a sentiment expressed that the
25 makeup and character of the counties might influence how

1 they went about allowing electronic coverage, if they
2 allowed it at all, and that wasn't the only factor. I
3 mean, there was also a sentiment -- it was just like this
4 laboratory concept where, you know, a bunch of lawyers get
5 together in Travis County and think about doing it a
6 particular way. They may not agree with the lawyers in
7 Harris County, and we'll just see how everybody deals with
8 it.

9 But the distinction between small and big
10 certainly wasn't, I don't think, meant to be
11 determinative, just that there could be some issues in
12 small counties that they didn't face in big counties.

13 HONORABLE SARAH DUNCAN: Well, it wouldn't
14 surprise me at all if the judges in the more rural
15 counties are less receptive to broadcast media coverage of
16 their courts, but I also think we need to consider in the
17 more populous metropolitan counties, those judges are
18 having to deal with the media from their counties, and
19 that's the same media that's going to affect their
20 elections. So it doesn't surprise me that there's not a
21 consent feature in the local rules that there might be in
22 a statewide rule, and I think we need to keep that in
23 mind, that the leverage the media has with any given judge
24 is in part a reflection of the leverage that media
25 participant has in that judge's election, his or her

1 election.

2 CHAIRMAN BABCOCK: Yeah. I can speak from
3 personal knowledge on the Dallas County rule, and at the
4 time it was promulgated, elections weren't a big deal,
5 because you just didn't have contested elections in Dallas
6 County at that time, and there wasn't -- you know, any
7 idea about the pressure of the electorate that influenced
8 during forming of those rules; and, Sarah, don't you have
9 a TRAP rule that allows electronic coverage, and there's
10 no consent feature in that?

11 HONORABLE SARAH DUNCAN: We also don't have
12 witnesses or parties appearing before cameras.

13 CHAIRMAN BABCOCK: Yeah, but you still have
14 judges making rules.

15 HONORABLE SARAH DUNCAN: Yeah.

16 CHAIRMAN BABCOCK: Behaving a certain way.

17 HONORABLE SARAH DUNCAN: Yeah. But we also
18 have, I believe, almost complete discretion to keep them
19 out.

20 MR. LOW: You remember when we were drafting
21 702 and we were trying to reach every element to be
22 considered and then there was one that said "such other
23 elements as may be relevant to the particular case"? What
24 would be wrong with having the court either permit or deny
25 that in accordance with guidelines promulgated by the

1 Supreme Court for a particular court or "under the
2 following guidelines" and set forth guidelines. And you
3 can't include everything, so you would have to have other
4 elements and do it like we did 702 and use that, abuse of
5 discretion.

6 Why couldn't you do that? We did 702.
7 There was a disagreement. Some said it should be included
8 in the footnote and then we ended up not doing it, but
9 certainly we could have, and that wouldn't be inconsistent
10 with the Court being able to grant San Antonio and Richard
11 what he wants in his courts and somebody else, and if they
12 don't have it then they follow the usual under either/or.

13 HONORABLE SARAH DUNCAN: But part of my
14 reason for voting in favor of a statewide something,
15 whatever we're going to call it --

16 MR. LOW: Okay. Well, that would be
17 statewide, but it would be recognizing some --

18 HONORABLE SARAH DUNCAN: But, Buddy, there
19 are people --

20 MR. LOW: You're right.

21 HONORABLE SARAH DUNCAN: There are people
22 involved in the judicial process --

23 MR. LOW: That's true.

24 HONORABLE SARAH DUNCAN: -- that are not
25 going to have any say in this at all, and why should --

1 MR. LOW: You've convinced me wrong. I
2 admit you're right.

3 CHAIRMAN BABCOCK: But, Sarah, I don't think
4 it's fair to say that if you don't have this parties veto
5 thing that people have no say. I mean, the parties --

6 HONORABLE SARAH DUNCAN: I am not saying
7 that they have no say in whether there will be coverage.
8 What I'm saying is they have no say in the crafting of the
9 rule or the guideline or whatever you want to call it,
10 regardless of whether it's a statewide rule or guideline
11 or a local rule or guideline, and this is particularly
12 true if you've got parties or witnesses who are from
13 outside the local rule coverage area.

14 My only point is I think parties and
15 witnesses in the state of Texas should have the same rule,
16 no matter where the lawsuit is tried. I don't think that
17 just because my cause -- the venue for my cause of action
18 is in Harris County I am going to be subjected to a
19 different rule than if the venue for my cause of action
20 were in Sutton County.

21 CHAIRMAN BABCOCK: What else? Elaine?

22 PROFESSOR CARLSON: I want to follow up on
23 Bill's comment. The more I think about it the more I'm
24 kind of thinking about not small versus large, but maybe
25 there are some very valid reasons why this should be done

1 on a local basis. You know, ultimately the judge is
2 responsible for the courtroom and providing an arena that
3 allows the litigants a fair and impartial trial, and that
4 could be very different. It could be something as mundane
5 as the size of the courtroom. It could be a lot of
6 factors that require on a local basis the judges to decide
7 whether philosophically they are behind this notion or
8 not. I can see some real virtue in allowing local rules
9 and that there will be local variations allowing coverage.

10 CHAIRMAN BABCOCK: Stephen.

11 MR. YELENOSKY: Well, those kind of
12 variations seem to me to support writing a rule so that
13 when we get down to the latter questions that Frank
14 identified, like the judge's discretion, that we might
15 allow some discretion and maybe even state what the
16 factors are, but that doesn't really support different
17 local rules. For example, I was trying to think of a
18 counter-example in a big county where nonetheless there
19 would be a lot of concern about the coverage, and I guess
20 you could have a subpopulation of that very big county in
21 a JP area or something where everybody is going to watch
22 it. I don't know.

23 I'm just trying to think of a
24 counter-example, but the point is just that those
25 variations wouldn't seem to naturally follow the local

1 jurisdiction lines but instead might follow, as you said,
2 the size of the courtroom, which would differ from
3 courtroom to courtroom, not from one locality to another.
4 So, I mean, I'm not against discretion. I just do see
5 some question as to why the discretion should be by local
6 rule.

7 CHAIRMAN BABCOCK: Why don't we try to think
8 about it in terms of what would the differences be? For
9 example, on the policy, the very first paragraph of this
10 rule, that there are some counties like Dallas and Harris
11 that have a policy in favor of allowing the cameras in. I
12 think Travis County, unless they've amended it, still has
13 a -- the tilt, if you will, is against having the cameras
14 in. This policy as it's written, although I think there's
15 maybe one phrase that was omitted, maybe intentionally,
16 maybe not, but anyway, this phrase I think is neutral on
17 that, on whether you let them in or keep them out. Just
18 says, "Here, Judge, the policy of these rules, you've got
19 to think about these things." Richard.

20 MR. ORSINGER: I personally think that this
21 statement is tilted against.

22 MR. LOW: I do, too.

23 MR. ORSINGER: Because it doesn't mention
24 the First Amendment, the right of the press, and the right
25 of the public.

1 CHAIRMAN BABCOCK: That's what I wondered if
2 that had been --

3 MR. GILSTRAP: What statement? What
4 statement are we talking about?

5 MR. ORSINGER: The statement of policy under
6 this, the Judicial Council's Committee on media in the
7 courts proposal, which is Appendix B to the report. The
8 first paragraph, policy statement, and Chip was saying
9 that first paragraph is neutral. I don't think it is,
10 because it doesn't mention the core issue that we're
11 balancing against the privacy rights of the parties, and
12 that is the right of the public to know about their
13 government proceedings.

14 CHAIRMAN BABCOCK: You notice I said that I
15 thought there was a phrase left out?

16 MR. ORSINGER: Oh, okay.

17 CHAIRMAN BABCOCK: And I thought the phrase
18 that was left out, perhaps deliberately, but "protect the
19 rights of the litigants and the public." If you add in
20 "the public" then I think it's neutral.

21 MR. ORSINGER: Okay. I agree.

22 CHAIRMAN BABCOCK: For the sake of
23 discussion, let's just say we add that, and so we all
24 agree this is a neutral policy. What happens in Dallas
25 County now or in Travis County? You've got a statewide

1 guideline that's neutral, but people in our county,
2 whichever way it goes, want to have a different policy.
3 Is that okay? Is that something we want to allow? Do we
4 want to allow people in Bexar County, if their judges get
5 together and say, "We think the cameras ought to be in
6 here by and large," is that okay?

7 Or do we want to say, "No, you don't tilt
8 one way or you don't tilt the other way. You just, you
9 know, look at that all these things, and if you're going
10 to let them in, you're going to let them in, but don't
11 start out with one side or the other being ahead."

12 So how does everybody feel? And take it
13 another way, take it an even further step. Let's say
14 there are some counties, which there are, that just are
15 silent about whether you can show jurors; but there are
16 other counties that say, "Absolutely no way can you show a
17 juror in the courtroom." Now, how does -- how does that
18 work? You've got a prohibition in the statewide
19 guideline, but you have silence in the local guideline, or
20 let's say they change the local guideline to say you can
21 show the jurors. How does that work?

22 Judge Brown.

23 HONORABLE HARVEY BROWN: Don't forget one
24 thing. Any local guideline has to be approved by the
25 Supreme Court.

1 CHAIRMAN BABCOCK: Right. Now we've got a
2 bunch that have been.

3 HONORABLE HARVEY BROWN: Yeah, but I
4 couldn't see the Court allowing one rule that says, "You
5 can't show jurors" and another rule that says you can. I
6 mean, I can tell you the Court does make suggestions on
7 local rules back to the local courts.

8 CHAIRMAN BABCOCK: Right. That's true.

9 HONORABLE SARAH DUNCAN: With all due
10 respect to the Court, our local rule expert is here, but
11 my memory is of it they have approved local rules that
12 conflict with the --

13 HONORABLE HARVEY BROWN: They have done that
14 intentionally in some cases I know where they have adopted
15 this kind of laboratory type of mentality to want to see
16 what happens.

17 HONORABLE SARAH DUNCAN: They have also done
18 it unintentionally.

19 HONORABLE HARVEY BROWN: Maybe so.

20 HONORABLE SARAH DUNCAN: And it's caused
21 some unpleasant situations for --

22 CHAIRMAN BABCOCK: You've got the deposition
23 testimony to show it.

24 HONORABLE SARAH DUNCAN: -- people.

25 CHAIRMAN BABCOCK: Okay. Let's -- but what

1 I'm trying to do is frame the issue about whether or not
2 we have a -- you know, we have a guideline that allows
3 local flexibility or whether we just say, "Hey, this is a
4 statewide something and the local guys don't have a say."
5 I'm not saying how I vote. I'm just saying, you know, as
6 you think about the issue, I mean, isn't that the
7 practical -- Nina.

8 MS. CORTELL: Why wouldn't we do this the
9 way we always treat local rules, which is that they cannot
10 be at variance with the state promulgated rule or
11 guideline? If that's how it works, I don't have a
12 problem.

13 CHAIRMAN BABCOCK: Okay. Fair enough.
14 Richard.

15 MR. ORSINGER: When we eventually get around
16 to the mechanics of the rule we may decide that there are
17 some things that we consider to be core and should
18 universally apply. For example, you can't impair the
19 right to a fair trial. We may decide you can't show the
20 face of an individual juror. You can't show the face of a
21 minor child without the consent of the parents, whatever.
22 Those could be rock solid requirements, but then there
23 could be a lot of other areas where local discretion is
24 permitted because we don't take it away, and that would be
25 consistent with Nina's idea that there may be some things

1 that you can't conflict with, other things that you could
2 by locale, and it may not be as stark a choice as we think
3 we have right now.

4 CHAIRMAN BABCOCK: Okay. Judge -- whichever
5 judge wants to talk. Judge Peeples.

6 HONORABLE DAVID PEEPLES: I'm starting to
7 lean toward having substantial statewide rules with maybe
8 minor opt out. I think it's helpful to think about the
9 interests that we're trying to protect. First of all
10 would be the interest of the litigants. The litigants
11 have an interest in a fair hearing and an impartial,
12 independent decisionmaker, and also they have an interest
13 in privacy; and witnesses, it seems to me, have a greater
14 interest in privacy because they are subpoenaed in,
15 sometimes against their will. They don't have a dog in
16 this fight.

17 And I'm inclined to think that those
18 interests are statewide interests. I can't think of a
19 reason why we ought to let some county care less about the
20 privacy interests of people or the fair hearing interests
21 of a people. I mean, I think that's a decision that Texas
22 ought to make for its courts, not for local people to opt
23 out.

24 Okay. There are other interests. I think
25 of the interest of the public. The public has a right to

1 know about its legal system, about an institution of
2 government and what's happening there, and the public has
3 a right to know about public issues, public officials that
4 are in court or just issues that are important, and I
5 think the public's interests I think are greater in a
6 Court TV situation because they're going to see the
7 institution as opposed to the evening news.

8 You know, and let's be honest about it,
9 they're not going to get an accurate view of an
10 institution of government or, frankly, about the issues
11 involved on the evening news the way they would in an
12 O. J. Simpson situation; and, I don't know, I think Texas
13 has a lot to say about what ought to happen and the
14 public's rights to know about its institution, its courts.
15 We've got an interest in dignity and decorum. That's
16 taken care of.

17 It was mentioned that in some small counties
18 people can know what's happening in their courts and they
19 don't need TV. I agree with that, but I think about the
20 James Byrd dragging case trials. Those trials were of
21 national interest, and they were tried in small counties,
22 and so I don't think we would want to allow a county just
23 because it's small to close its -- you know, say there's
24 no TV in a case that's just very, very important not only
25 to the state or the country. So I find it helpful in

1 deciding statewide versus local opt out to think about the
2 interests that we're trying to consider here, and I think
3 an awful lot of those interests are statewide interests
4 that we shouldn't allow 254 counties to go it alone.

5 MR. CHAPMAN: Chip, let me ask Judge Peeples
6 to clarify for me the distinction he makes between this
7 privacy interest and the concept of open courts and it
8 being a public forum.

9 HONORABLE DAVID PEEPLES: I'm a person
10 minding my own business, and I happened to have witnessed
11 something, and I'm dragged into court, and I'm going to be
12 put on the evening news.

13 MR. CHAPMAN: Well, no, no. About the
14 parties. You said the parties have a privacy interest.

15 HONORABLE DAVID PEEPLES: Well, they're in a
16 lawsuit, and it just seems to me that their interest in
17 not having their face shown and their testimony taken out
18 of context and being embarrassed, their interest is not
19 quite as weighty as the person who is brought in there
20 against his or her will who has no interest in that
21 contest. I just think that the witness has a slightly
22 higher privacy interest. I'm more sympathetic to it than
23 I am of the party who is involved in a fight.

24 MR. CHAPMAN: I'm having trouble --

25 HONORABLE DAVID PEEPLES: I'm not saying

1 that there's --

2 MR. CHAPMAN: I'm having trouble squaring
3 that with the concept of public trial and the idea that
4 it's open to the public for the public to come and view it
5 and to not only see the parties and all of their blemishes
6 but --

7 HONORABLE DAVID PEEPLES: Nobody is
8 advocating a closed, private trial.

9 MR. CHAPMAN: I'm just trying to understand
10 your concept.

11 HONORABLE DAVID PEEPLES: And I think
12 there's a greater interest in having the media in if
13 they're going to show the trial as opposed to show 5 or 10
14 seconds of a two or three-hour or two or three-day trial.
15 The interest, we're trying to balance things here, and
16 some of them conflict.

17 CHAIRMAN BABCOCK: But Carlyle's point is
18 that in terms of a privacy interest, I mean, for better or
19 worse, our system is that we have public trials so that if
20 somebody does get dragged in there to testify that they
21 are losing some measure of their privacy just by virtue of
22 the fact that they're in a public proceeding, and they've
23 got to come.

24 MR. GILSTRAP: When they're on TV they lose
25 a whole, whole lot more, and that's the problem.

1 CHAIRMAN BABCOCK: That's why I said some --
2 that's why I said "some measure."

3 HONORABLE DAVID PEEPLES: Subdivision (b)
4 right now in the rules gives conclusive weight to the
5 privacy interest of the litigants and every witness. I am
6 not sure we want to give that much weight to it. There
7 are some conflicting interests that we have to balance
8 here. I'm just saying that I think that I'm going towards
9 the view that probably the state ought to make more of
10 these decisions than fewer of them and not let people opt
11 out because they are so important, and I think the
12 collective weight of Texas ought to speak on these issues
13 by and large rather than 254.

14 MR. CHAPMAN: I guess I was a little
15 concerned because for me the sentiments or the balancing
16 that is reflected from 18c(b) seems to be out of step. I
17 mean, the idea that a witness, for example, by denying
18 consent can prohibit broadcast or -- well, broadcast is
19 what's addressed, seems to be out of step, and I was -- I
20 just think that there may even be a consensus that a
21 witness should not be able to veto the broadcast.

22 CHAIRMAN BABCOCK: Judge Lawrence has been
23 patient and then Skip Watson.

24 HONORABLE TOM LAWRENCE: If we have a
25 statewide rule that has some flexibility for counties to

1 have some local rules within some reason or some
2 guidelines, are we going to have a situation where we have
3 one rule in the district court and one in the county
4 courts and something else in the JP courts? In other
5 words, is the automobile accident that could be tried in
6 the district, county, or JP court going to have different
7 media rules depending on which court you end up, or do we
8 want to have some consistency within the county?

9 CHAIRMAN BABCOCK: Well, the way this thing
10 is written right now, Judge, it says "the courts of
11 Texas," so I think it's not --

12 HONORABLE TOM LAWRENCE: Well, but Rule
13 (3)(a) says that any district court can have local rules
14 and a county court and probate court. JP can't have local
15 rules.

16 CHAIRMAN BABCOCK: Oh, I see what you're
17 saying.

18 HONORABLE TOM LAWRENCE: What I'm saying is
19 that Channel 11 in Harris County goes into the district
20 court, and there's a local rule that interprets it in one
21 way and a county court a different way and in JP court
22 there's no local rule, so I guess they do what they want.
23 So, I mean, do we want to have consistency within a
24 county?

25 CHAIRMAN BABCOCK: I see what you're saying.

1 Skip and then Frank.

2 MR. WATSON: On the narrow issue of whether
3 there should be a difference between the way -- between
4 the rights of veto between witnesses and parties, I
5 understand the point being made that sometimes witnesses
6 are subpoenaed and brought in against their will, but it
7 seems to me that one other interest that we might overlook
8 is that because we are a country of laws and want our
9 disputes, including civil disputes, settled in the
10 courthouse rather than in the streets, we want to be
11 encouraging people to have access to the courts and to use
12 them; and it occurs to me that private people who may be,
13 for example, getting a divorce, but there may be a
14 particularly salacious elements of that divorce, they may
15 or may not be high profile, but they ought to have the
16 right, in my opinion, if they want, to have that divorce
17 heard in chambers, that that could be done or if they
18 wanted to say, no, the media shouldn't come in and hear
19 this.

20 Or if there is a horribly disfigured
21 plaintiff from a gas tank explosion and that person is
22 trying to seek redress from an auto manufacturer, and yet,
23 that's a terribly shy person or someone who really doesn't
24 want the world to see them as they are, but in order to
25 get compensation a jury has to see them as they are before

1 the plastic surgery is done. It just seems to me that we
2 need in part of our priorities to balance the fact that we
3 don't want to do anything that would keep parties from
4 having full and complete access to the courts and using
5 that, and I would tend to say as a result of that fault
6 that we should not treat witnesses and parties
7 differencely in terms of the right to say "no."

8 CHAIRMAN BABCOCK: Well, there have been
9 times in our history where -- and certainly in the history
10 of other countries where the fact that the public has been
11 able to view the proceedings has been a protection to one
12 side of the litigation and giving veto power to one side
13 to keep the proceedings to the -- the publicity about them
14 to the minimum is a public issue it seems. Sarah.

15 HONORABLE SARAH DUNCAN: We are not talking
16 about barring any member of the press from the courtroom.

17 CHAIRMAN BABCOCK: Right.

18 HONORABLE SARAH DUNCAN: That's not even on
19 the table and couldn't be even if we wanted it to be.
20 What we're talking about is how much more additional
21 exposure is there going to be, and, you know, Carl, it's
22 not just your newspaper that's not being read. The
23 statistics on newspapers being read throughout the country
24 are hardly anybody reads the newspaper anymore. So the
25 fact that --

1 CHAIRMAN BABCOCK: Which the publishers will
2 be happy to hear.

3 HONORABLE SARAH DUNCAN: Well, I mean,
4 that's one of the reasons that publishers are now buying
5 up television broadcasting and radio stations, is because
6 they're losing their readership. So we're not talking
7 about not having public trials, we're not talking about
8 barring the press from the courtroom. What we're talking
9 about is letting somebody into the courtroom without their
10 expending either their time or their money to get there,
11 and that's completely different, it seems to me.

12 CHAIRMAN BABCOCK: It certainly is. Yeah,
13 Frank.

14 MR. GILSTRAP: These are really gripping
15 issues, they really are. I'm saying that straight up.
16 Just on the procedural question, with regard to whether or
17 not we have the local opt out, I think, you know,
18 Richard's -- I think Richard hit it on the ahead. Some
19 things we might want to have a local opt out. Some things
20 we might not. It seems to me we ought to put the local
21 opt out at the end. Let's craft a rule. If everybody
22 says we want a statewide rule, let's craft a rule and then
23 at the end of the day we can sit down and say, well, some
24 of these things we might want to have some local
25 variances, some not, but until we solve that problem we're

1 not going to be able to craft the rule or unless we defer
2 the problem we're not going to be able to craft a rule.

3 CHAIRMAN BABCOCK: Yeah. Richard, I think
4 that makes some sense because there are probably some
5 things that, as Frank and Judge Peeples say, is a matter
6 of statewide interest and that we ought not to allow the
7 counties to --

8 MR. GILSTRAP: For example, Richard's
9 problem on the pooled microphone. At first I say, well,
10 that's really -- we should require pooled coverage
11 everywhere, but I could see out in Hudspeth County where
12 there's only two reporters they might want to let both of
13 them bring their microphones.

14 CHAIRMAN BABCOCK: Yeah. Yeah. Carlyle.

15 MR. CHAPMAN: I would just say that I think
16 that rather than talking about veto we ought to let those
17 interests that Judge Peeples and Skip are talking about be
18 part of the balancing and consideration that in the
19 exercise of sound discretion the trial court undertakes.

20 CHAIRMAN BABCOCK: Yeah. Stephen.

21 MR. YELENOSKY: I agree with that, and I
22 think -- and just like I don't think that the variations
23 or the discretion neatly falls in the lines between the
24 Harris County courts and the Dallas County courts, I don't
25 think the discretion neatly falls within the lines between

1 party and witness either. I think one witness may be a
2 custodian of records who doesn't want to appear on camera
3 that day because of what he or she is wearing, and that
4 may be a good enough reason not to show that person on
5 camera.

6 On the other hand, a witness could be in a
7 political trial, somebody who has been granted immunity
8 and therefore is not a defendant, and despite all the
9 objections that witness may have to appearing, I think the
10 First Amendment concerns there and the public's need to
11 know and right to know far outweighs it. So those, if you
12 talk about the interests we're talking about and weigh
13 those, aren't going to lead to bright line distinctions
14 either along local rule lines in my mind or along
15 party/witness lines either.

16 CHAIRMAN BABCOCK: Ralph.

17 MR. DUGGINS: I was just going to say that I
18 don't think it's consistent with rejecting this veto
19 concept to continue with 18(b), the center section, which
20 essentially gives the witnesses and parties a veto. I
21 mean, I think that's what we're talking about, what I seem
22 to be hearing the general consensus is. Somebody out
23 there ought to have the ability to exercise some control
24 where appropriate, and to me that somebody is the trial
25 judge and not a witness or a litigant. That's -- I don't

1 favor keeping this concept that's embodied in that center
2 section, but I do favor giving the trial judge the
3 discretion where appropriate to cover the situation,
4 Stephen, that you're just talking about and that others
5 have talked about.

6 CHAIRMAN BABCOCK: Yeah. An example I guess
7 would be yesterday's proceeding where the mother of a four
8 year-old says, "By the way, I'm all in favor of this
9 proceeding being televised, but not for my four year-old,
10 except for CBS," but that's another issue; and the judge,
11 you know, doesn't have to just automatically fall in line,
12 but you would expect that he would or she in this case
13 when the mother of a four year-old says, "By the way, can
14 we get the cameras out of here when my four year-old is
15 testifying?" You would expect that in virtually every
16 case the judge would say, "Yeah, okay, fine," and that's
17 what happened yesterday.

18 MR. LOW: You know, Chip, we faced a similar
19 thing when we did 76a because they were divorce cases and
20 things that weren't -- and we reached a policy that we
21 favor everything going to the public and you have to walk
22 a narrow line not to. For instance, like with Firestone,
23 I could understand why they wouldn't want one of their
24 trials publicized.

25 CHAIRMAN BABCOCK: Right.

1 MR. LOW: Or their documents and so forth.
2 We don't allow that. So we're going more toward the right
3 of the public and somewhat less to the privacy, and I am
4 not saying that's good or that's bad. I'm just saying
5 that seems to be the way we're heading, and we need to
6 recognize it.

7 CHAIRMAN BABCOCK: Yeah, Carl.

8 MR. HAMILTON: We're not excluding the
9 public, Buddy.

10 MR. LOW: I know. I am not saying --

11 MR. HAMILTON: All we're doing is saying do
12 we want to have the witnesses and the parties exploited by
13 TV coverage.

14 MR. LOW: I understand, Carl, but you tell
15 me I can write you a letter, but you don't give me a pen
16 to write with. I mean, you don't give a means of
17 communicating then you don't have it.

18 MR. HAMILTON: The means of communicating --

19 MR. GILSTRAP: They've got a pen. That's
20 the point. They've got a pen. They just don't have a
21 camera.

22 MR. LOW: Nobody reads what's written.
23 That's what everybody tells me. So the way of getting it
24 to the public, this is the way. Years ago computers
25 weren't in. As far as I'm concerned, still not, but --

1 MR. GILSTRAP: Frankly, if the public
2 doesn't read the paper, I don't think they need to hear
3 it.

4 HONORABLE SARAH DUNCAN: I don't either.

5 MR. GILSTRAP: That's where I am.

6 HONORABLE SARAH DUNCAN: Me, too.

7 MR. LOW: Well, I'm not saying I disagree.
8 I'm just trying to be modern.

9 HONORABLE SARAH DUNCAN: Then go learn to
10 work a computer.

11 MR. LOW: Except on that.

12 CHAIRMAN BABCOCK: Do we have a consensus
13 that we ought to go forward basically with a statewide
14 whatever we call it, rule, and at the end of the day we
15 just say if there's any room for the counties to
16 supplement the statewide rule? That's where I sense we're
17 going or where we've gotten to.

18 MR. GILSTRAP: What makes you think we're
19 going to get done in a day?

20 MR. ORSINGER: At the end of the day, not
21 the end of today.

22 CHAIRMAN BABCOCK: At the end of the day.
23 No, I did not mean to -- all right. Richard, was it your
24 intention for us to go forward with the proposed uniform
25 court rules or --

1 MR. ORSINGER: You know, we have nothing
2 presently to offer as an alternative. This is a sober
3 analysis by a group of people pulled together at the
4 instance of the Texas Senate, appointed by the Texas
5 Judicial Council, representative of the court of appeals
6 judges, Court of Criminal Appeals, you know, from around
7 the state; and rather than us do something, I would rather
8 that my subcommittee react to the criticisms or the
9 suggestions of this work product; and rather than look at
10 every sentence, which I don't frankly think we can, I can
11 carry us to what I consider to be important concepts, with
12 other people chiming in when we pass over a sentence of
13 something that's important. That's a possible way to do
14 it.

15 HONORABLE SARAH DUNCAN: Before we do that,
16 I believe Carl had something that's not in the proposal.

17 MR. HAMILTON: Yeah. This proposal that the
18 (b) part is excluded from the rules.

19 HONORABLE SARAH DUNCAN: Right.

20 MR. HAMILTON: I think we still need to vote
21 on whether or not people want to have the (b) part, the
22 consent.

23 CHAIRMAN BABCOCK: Yeah. That's where we
24 started this whole discussion, and I don't mind doing
25 that. I think that's fine. If we want to tell the Court

1 that it is the -- well, want to advise the Court that it
2 is the sense of our committee that -- and I think your
3 proposal was parties either have veto party or they
4 don't --

5 MR. HAMILTON: Just talking parties and then
6 add witnesses to it later.

7 CHAIRMAN BABCOCK: Yeah. But I think that
8 might be helpful for the Court to hear what the sense of
9 this committee is about that.

10 MR. ORSINGER: In that regard can I say that
11 the current rule as written, that any one party can veto
12 the coverage, but that's not the only party consent
13 choice. There's also the possibility that all parties
14 might consent that they don't want broadcast. In other
15 words, rather than one party can stop it, all parties
16 agreed can stop it, even if the trial judge wants it.
17 That is an alternative we can consider.

18 CHAIRMAN BABCOCK: Well, let's stick with
19 Carl's proposal to start with. That's hard enough. If --
20 so the issue would be whether or not we want to tell the
21 Court that we think it's a good idea that a party, a
22 single party, can prohibit electronic coverage of the
23 proceeding.

24 MR. HAMILTON: Right.

25 CHAIRMAN BABCOCK: Do we want to have any

1 discussion on that?

2 MR. YELENOSKY: Well --

3 CHAIRMAN BABCOCK: Stephen.

4 MR. YELENOSKY: That would concede that the
5 public interest could never override the private
6 interests, and, you know, I mean, it's inconceivable to me
7 that that never could be the case.

8 CHAIRMAN BABCOCK: So you would vote against
9 it.

10 MR. YELENOSKY: Yeah.

11 MR. LOW: Well, it doesn't say that a party
12 couldn't give reasons and come in under the guidelines and
13 say shouldn't do it. It just means I don't have the power
14 to just say, "I don't have to tell you why. No." That's
15 all we're saying.

16 MR. YELENOSKY: To be clear what I was
17 saying, is that I don't think that the parties, even
18 collectively, should have an absolute veto, because only
19 the judge can protect the public interest.

20 MR. LOW: And I agree.

21 CHAIRMAN BABCOCK: But, I mean, this rule is
22 what it is.

23 MR. HAMILTON: That's what it is now.

24 MR. YELENOSKY: Well, I don't agree with it.

25 CHAIRMAN BABCOCK: Okay. Who had their hand

1 up first?

2 MS. CORTELL: I just have a question.

3 CHAIRMAN BABCOCK: Nina.

4 MS. CORTELL: If (b) is currently an
5 alternative to (a), it would only be an alternative. I'm
6 confused on the question being posed.

7 CHAIRMAN BABCOCK: Carl's point is -- Carl's
8 point is forget about (a). Carl says we ought to vote on
9 whether or not a party ought to have a veto. No matter
10 what else --

11 MR. GILSTRAP: In the context of a
12 statewide --

13 CHAIRMAN BABCOCK: In the context of a
14 statewide rule.

15 MR. GILSTRAP: I think where we're going is
16 in the context of a statewide rule, should we retain the
17 features that are presently in (b).

18 PROFESSOR ALBRIGHT: Well, (b) is not a
19 veto. (b) is really -- if you have guidelines, (b) is a
20 -- even regardless of the guidelines, we can all agree and
21 then you have to do it.

22 MR. YELENOSKY: No, it is a veto. Because
23 if any party says "no" --

24 MS. CORTELL: But it's an alternative to
25 (a).

1 PROFESSOR ALBRIGHT: No. If any party says
2 "no," you go to (a) under the guidelines.

3 MR. YELENOSKY: Yeah, but we're not --

4 PROFESSOR DORSANEO: There is no (a). (b) is
5 the rule. There is no (a).

6 PROFESSOR ALBRIGHT: Oh, see, I thought this
7 was under the assumption we were going to have guidelines.

8 CHAIRMAN BABCOCK: No.

9 PROFESSOR ALBRIGHT: Oh.

10 CHAIRMAN BABCOCK: Carl's point. I'm sorry.
11 I didn't explain it very well. Carl's point is forget
12 about (a), whether there is an (a) or whether there is not
13 currently, forget about it in the future. There is no (a)
14 under Carl's proposal. The proposal is do we advise the
15 Court that a party should have a veto, and if that veto is
16 exercised then there's not going to be any electronic
17 coverage. And, Carl, that's what you're saying, right?

18 MR. HAMILTON: That's right. And if there
19 is no veto by anybody then the discretion falls to the
20 judge, and if he decides to have it then he has to have it
21 under the guidelines.

22 MR. GILSTRAP: Or the statewide rule.

23 MR. HAMILTON: Under the statewide rule,
24 yeah.

25 CHAIRMAN BABCOCK: Under the statewide rule.

1 But it's a hurdle that's got to be jumped over, and that's
2 where somebody said, Judge Brown or Bill said, you put it
3 at the beginning of the rule, you know, as long as all
4 parties consent then electronic coverage will be within
5 the discretion of the judge. If you exercise this
6 discretion to have it then he's got to do it under these
7 guidelines or rule.

8 PROFESSOR ALBRIGHT: So it's a parties
9 consent is a necessary prerequisite to having cameras in
10 the courtroom.

11 CHAIRMAN BABCOCK: Unanimous consent is
12 another way to put it.

13 PROFESSOR ALBRIGHT: And under this, under
14 (b), it's not only parties, it's also witnesses, any
15 witness can.

16 MR. ORSINGER: Well, what we need to do is
17 let's get away from rewriting (b) and let's vote on the
18 concept. Should a single party to the lawsuit be able to
19 preclude publication, no matter what the matter what the judge
20 wants, no matter what the other parties want, no matter
21 what the press wants.

22 CHAIRMAN BABCOCK: Not publication, but
23 electronic coverage.

24 MR. ORSINGER: Electronic recording.

25 MR. GILSTRAP: Which side are you for?

1 MR. YELENOSKY: Take a vote on that.

2 CHAIRMAN BABCOCK: Okay. And Carl says
3 we'll get to the witnesses later, but -- Bill.

4 MR. EDWARDS: The alternative to that I
5 think is set forth on the fourth page of this Appendix B
6 where it says "one of the considerations, (e), the
7 objections of any parties, prospective witnesses, victims,
8 or other participants in the proceeding of which coverage
9 is sought."

10 CHAIRMAN BABCOCK: Right. That would be an
11 alternative to what Carl's saying.

12 MR. EDWARDS: That's what I'm saying. Yeah.
13 I mean, that's a potential alternative.

14 CHAIRMAN BABCOCK: Right. Yeah, Nina.

15 MS. CORTELL: What about the converse? If
16 everybody agrees to coverage then there could be no issue,
17 which is the way (b) would currently work, right? I guess
18 I'm just confused why we're --

19 MR. ORSINGER: We shouldn't be talking about
20 (b). That's what's causing so much confusion.

21 MS. CORTELL: Okay.

22 MR. ORSINGER: The real issue that Carl
23 wants to raise is Carl wants the statewide rule to say
24 that unless all parties agree you cannot electronically
25 record and broadcast the trial.

1 MS. CORTELL: Okay.

2 MR. ORSINGER: Forget current (b), because
3 that's got three or four other concepts mixed into it. Is
4 that not right, Chip?

5 CHAIRMAN BABCOCK: That's exactly right.

6 MR. CHAPMAN: And he never reaches the
7 converse, Nina.

8 MR. YELENOSKY: Why don't we take a vote on
9 the various parts of this concept?

10 MR. ORSINGER: We ought to take a vote on
11 Carl's proposition.

12 HONORABLE TOM LAWRENCE: But if I vote
13 against Carl's then I'm saying that the trial judge would
14 control, no matter what any party --

15 MR. EDWARDS: No, you haven't said that.

16 MR. GILSTRAP: Haven't said that yet.

17 HONORABLE TOM LAWRENCE: What would be the
18 alternative?

19 MR. EDWARDS: As I understand it, if you
20 vote against Carl all you've said is that there will not
21 be an absolute veto and then we go on to the rest of the
22 rule.

23 MR. HAMILTON: And that a trial judge may
24 decide to have electronic media even if one of the parties
25 doesn't want it.

1 CHAIRMAN BABCOCK: Right. Even under the
2 opposition of a party.

3 MR. ORSINGER: Well, I'm planning to make a
4 motion, if I can, after this vote to find out what we do
5 when all parties agree that it shouldn't be recorded and
6 broadcast, which may happen a lot in family law cases.

7 MR. YELENOSKY: Why don't we actually vote
8 instead of predicting how these votes will go?

9 CHAIRMAN BABCOCK: Yeah. Let's stay focused
10 on this if we can. I didn't hear a second, but I
11 assume --

12 MR. LOW: I second it.

13 CHAIRMAN BABCOCK: Okay. Buddy seconds it.
14 Okay. So the proposal is that the trigger for any
15 electronic coverage has got to be unanimous consent of the
16 parties.

17 Put another way, one party can veto
18 electronic coverage of a proceeding.

19 MR. CHAPMAN: Any party.

20 MR. EDWARDS: Does parties include witnesses
21 or not witnesses?

22 CHAIRMAN BABCOCK: No. Parties.

23 MR. LOW: If you vote, you say "yes," you
24 mean one party can veto.

25 CHAIRMAN BABCOCK: Right.

1 MR. LOW: All right.

2 CHAIRMAN BABCOCK: Okay. So everybody who
3 thinks that one party can veto electronic coverage of a
4 proceeding raise your hand.

5 All people that say that one party should
6 not be able to veto electronic coverage raise your hand.
7 So on a vote of 20 to 1, one person saying that all
8 parties should be able to -- one party should be able to
9 veto, 20 say that one party should not be able to veto
10 electronic coverage. The motion fails, the Chair not
11 voting. Richard.

12 MR. ORSINGER: I would like to move that if
13 all parties agree to no electronic coverage, that the
14 court may not order it against the consent of all parties.

15 CHAIRMAN BABCOCK: Stephen.

16 MR. YELENOSKY: Are we going to have any
17 more discussion on that?

18 MR. ORSINGER: Sure. I haven't even stated
19 the support for my motion.

20 MR. YELENOSKY: I'm sorry?

21 MR. ORSINGER: I haven't even stated the
22 support for my motion.

23 MR. YELENOSKY: Okay.

24 MR. CHAPMAN: Have at it.

25 MR. ORSINGER: Well, I happen to handle the

1 kind of litigation where parties have to go to court in
2 order to resolve their disputes because the law has bound
3 them together and only the law can unbind them, and
4 typically those disputes might be of prurient interest to
5 others but almost never involve public issues or public
6 policies, and I think that if this rule is going to apply
7 to family law cases, and maybe it won't because Rule 76a
8 doesn't apply to family law cases for exactly this reason,
9 then we are forcing or we're allowing a trial judge to say
10 that parties that have to come to court to arrange their
11 personal affairs can have those details put on the
12 television.

13 MR. YELENOSKY: Well, then propose a rule
14 for family law and I'll support it. The problem is that
15 your rule will also allow the Democratic party to sue the
16 Republican party and both of them to agree not to have it
17 televised.

18 MR. ORSINGER: Well-taken, so what I'm going
19 to do is I'm going to amend my motion to say that it would
20 be like it is in 76a, that in a case arising under the
21 Family Code if the parties consent then the court could
22 not require electronic recording.

23 MR. GILSTRAP: Well, if we're going to do
24 that, why does a camera ever need to be in the family law
25 court? What public interest is served by that?

1 CHAIRMAN BABCOCK: Oh, I don't know, Hillary
2 versus Bill.

3 MR. CHAPMAN: That may be a prurient
4 interest.

5 MR. ORSINGER: What I'm trying to do is to
6 find a way to balance the privacy interest against the
7 public. If one party says, "No, I want this to be an open
8 trial because I think the judge is against me going into
9 this, and I want people to be able to find out the way the
10 rulings are going and how I'm treated in the courtroom,
11 and I want that protection of the public knowing what's
12 going on," I think we ought to let them have that
13 protection.

14 But if everyone says, "I'm totally
15 comfortable having a private proceeding. People can walk
16 in and out the back door, but I'm just not going to be up
17 on TV."

18 MR. GILSTRAP: But under Chip's example
19 even, you know, Hillary and Bill shouldn't be able to
20 agree to keep the cameras out. There's always going to be
21 that exception.

22 MR. ORSINGER: Well, you sure can, and
23 that's why you should vote against this proposal.

24 MR. LOW: Can you keep the press out when
25 you try a case down there? Just tell them it's family law

1 and the press can't come?

2 MR. ORSINGER: No. No.

3 HONORABLE DAVID PEEPLES: He's talking about
4 TV cameras, not the press.

5 MR. LOW: I understand. I'm just leading to
6 a point.

7 MR. DUGGINS: I have a question for Richard.
8 Are you talking about your motion also applying to
9 guardianship proceedings and proceedings where the CPS
10 might be involved?

11 MR. ORSINGER: Guardianship proceedings
12 would be under the Probate Code, if I understand your term
13 correctly, but the Child Protective Services terminations
14 and stuff like that, that would be under the Family Code.

15 MR. DUGGINS: Well, I'm not sure about
16 those. I agree with you on the divorce situation, but
17 where there's an abuse of a child situation, something
18 like that, I can see different interests other than a
19 husband and wife.

20 CHAIRMAN BABCOCK: I think you're raising a
21 very important point, but I would think that maybe that
22 whether a family case is brought under the Family Code is
23 for the moment off center from where we are.

24 MR. ORSINGER: All right. Well, then I'll
25 withdraw my motion.

1 MR. EDWARDS: Is that left or right of
2 center?

3 MR. YELENOSKY: That's the kind of
4 discussion I like.

5 MR. ORSINGER: Can we revisit it later after
6 the rule is formulated?

7 CHAIRMAN BABCOCK: Well, I'm not -- we're
8 trying to decide whether -- what our statewide guidelines
9 ought to be. If we ought to except them from a whole body
10 of cases, there may -- there certainly would be good
11 policy arguments. In fact, I think I probably favor it,
12 as there were under 76a, but we can -- we've got limited
13 time, and we're not going to even touch this rule if we
14 get bogged down in whether family court ought to have this
15 coverage or not.

16 HONORABLE SARAH DUNCAN: I would just like
17 to say I think it's absolutely central to this debate
18 whether this committee recognizes that anybody has a
19 privacy interest in any matter that's in litigation in the
20 courts; and I think Ralph's point about guardianship
21 proceedings, I would add probate cases, our Chair's
22 interest in the President and his wife's divorce, if that
23 were to ever occur, I think that is exactly what this
24 discussion is about, is when does the public's interest in
25 what happens in the courts outweigh the litigants'

1 interest in any privacy in the intimate details of their
2 lives.

3 CHAIRMAN BABCOCK: Well, and I don't
4 disagree with that, and if you look over at the second
5 page of this proposed rule, you'll see the decision of the
6 court is informed by a whole bunch of things, (a) through
7 (h) which subsumes everything that you're saying and
8 everything everybody is saying. And Richard's issue, as I
9 perceived it, was whether or not we would view this rule
10 on a -- what type of statute the case arose under basis,
11 which I think is a way to get away from discussing the
12 rule that the Court has asked us to look at and frame it
13 in a way that the 76a debate ended up with.

14 There's certainly -- you can discuss all the
15 issues you want to discuss, Sarah, under subpart (b). It
16 says "whether the coverage will harm any of the
17 participants." That raises all the issues you're talking
18 about, and whether the proceeding is dealing with a child.
19 I mean, that's subpart (h). That deals with what you're
20 talking about.

21 PROFESSOR DORSANEO: Meaning a minor child.
22 Meaning a minor child, since we're all children.

23 CHAIRMAN BABCOCK: I assume in your friendly
24 amendment that it would be minor child.

25 HONORABLE SARAH DUNCAN: Chip, that is only

1 in the context of factors the trial court should consider.
2 What Richard has put on the table is whether there are
3 certain classes of cases that should be exempted from
4 operation of a rule or a guideline, and I think that is
5 central to --

6 MR. ORSINGER: My original proposal was even
7 more broad than that, Chip, which was -- and I am not
8 supporting this, but if all the parties consent that there
9 should be no electronic recording should that tie the
10 judge's hands or should the judge be able -- we voted on
11 whether one party could nix it, and I just think it's
12 natural to see whether we would agree that if all parties
13 agree would that nix it or can the trial judge force it
14 anyway and then I segued over into the family law
15 justification for that, but maybe nobody --

16 CHAIRMAN BABCOCK: Bill.

17 PROFESSOR DORSANEO: Chip, when you
18 mentioned the minor child thing, that's kind of given some
19 special status. That's given great weight, and maybe
20 something could be done along those lines. If it's a
21 divorce case not involving anybody of any particular
22 public figure status then -- and they don't want to have
23 it then great weight.

24 CHAIRMAN BABCOCK: Yeah.

25 PROFESSOR DORSANEO: You could adjust the

1 factors to make the playing field a little bit different
2 in the context of things I think we could all agree on.

3 CHAIRMAN BABCOCK: Yeah. I agree. Yeah,
4 Alex.

5 PROFESSOR ALBRIGHT: I just want to say I
6 think it's very difficult to define big groups of cases
7 that it's appropriate to exempt from something like this
8 because you say, well, of course, nobody has any business
9 knowing about family law cases. Well, in Austin recently
10 we just found out Gary Bradley has a whole lot of money
11 because of his divorce case; and so, you know, it was all
12 over the newspaper for weeks; and so there is a public
13 interest in that. Whether it would be on television or
14 not I don't know.

15 CHAIRMAN BABCOCK: And nobody knew about it
16 because --

17 MR. ORSINGER: Well, I don't know who Gary
18 Bradley is.

19 PROFESSOR DORSANEO: Who is Gary Bradley?

20 MR. ORSINGER: For the record, who is Gary
21 Bradley?

22 PROFESSOR ALBRIGHT: Oh, Gary Bradley is the
23 guy who developed Circle C and isn't paying a bunch of
24 loans.

25 MR. ORSINGER: Sounds like a local story to

1 me.

2 PROFESSOR ALBRIGHT: He's living in Barton
3 Springs and things like that.

4 MR. EDWARDS: It comes under the local
5 rules.

6 CHAIRMAN BABCOCK: Buddy.

7 MR. LOW: I move that we --

8 PROFESSOR ALBRIGHT: That's all alleged in
9 the --

10 MR. LOW: -- vote on whether all parties --
11 all parties can vote to exclude the media -- not the media
12 but TV.

13 CHAIRMAN BABCOCK: Electronic coverage.

14 MR. LOW: Right.

15 CHAIRMAN BABCOCK: When we say electronic
16 coverage we're talking about cameras.

17 MR. LOW: Cameras. I understand, right.

18 CHAIRMAN BABCOCK: Digital camera or video
19 camera.

20 MR. LOW: Right.

21 MR. ORSINGER: And also tape recordings.

22 PROFESSOR DORSANEO: Whether it has a
23 battery or not.

24 CHAIRMAN BABCOCK: Whether it has a battery
25 or not.

1 MR. HAMILTON: I'll second the motion.

2 CHAIRMAN BABCOCK: Carlyle.

3 MR. CHAPMAN: I would like to say before we
4 vote that I agree with the policy concerns that have been
5 voiced by Richard and by Judge Duncan. I think, however,
6 that these policy concerns are ones that are particularly
7 within the kin and the expertise and the field of interest
8 of the courts that have been delegated the authority for
9 these kinds of matters. I would think that a probate
10 judge and a divorce court judge could bring those issues
11 from a list such as we have in this model rule to the fore
12 and give them the weight that would be appropriate in view
13 of the forum and the parties before the court, and I would
14 think that that would take care of it, because I agree
15 that any time you try to opt out for any class of cases
16 when you're talking about fundamental rights such as First
17 Amendment rights and the concept of a right to know and
18 open courts, public access to courts, you're going to
19 always come up with a good and sufficient cases in a
20 particular circumstance which would be contrary to that
21 opt out concept, and so I would just make that plea to the
22 body to consider that concern.

23 CHAIRMAN BABCOCK: Okay. As I understand
24 Buddy's motion, which is a derivative of Richard's and
25 second by Carl, it says in the circumstance where all

1 parties agree that there will be no electronic coverage of
2 a judicial proceeding, a court may not allow such
3 electronic coverage.

4 MR. LOW: No. No. My motion is just the
5 opposite because I don't want to vote against my own
6 motion. In other words, I don't want all parties to be
7 able to kill or veto it. It's still up to the judge. In
8 other words, we said one party cannot veto. I'm saying
9 all parties can't. By that --

10 CHAIRMAN BABCOCK: You're the flip of that.
11 Carl, you still want to second that?

12 MR. HAMILTON: No. I don't want to second
13 that.

14 MR. LOW: Bill will second it.

15 MR. EDWARDS: I'll second it. I'm glad to
16 hear I'm back on top.

17 MR. CHAPMAN: So even in the event all
18 parties agree they cannot veto. That's the motion.

19 HONORABLE TOM LAWRENCE: Is there a mandamus
20 on that?

21 CHAIRMAN BABCOCK: I don't know. I don't
22 know. All right. Let me see if I've got it straight.

23 MR. LOW: It doesn't matter. Just vote
24 whether all can veto. Put me down as not being able to
25 veto it.

1 CHAIRMAN BABCOCK: Okay. Even where all
2 parties agree no electronic coverage of a judicial
3 proceeding --

4 MR. LOW: Right.

5 CHAIRMAN BABCOCK: -- that agreement is not
6 binding on the court or something like that?

7 MR. LOW: That's right.

8 CHAIRMAN BABCOCK: Okay. That agreement is
9 not binding on the court. And that got a second from
10 Bill?

11 MR. LOW: Yes.

12 MR. EDWARDS: Yes.

13 CHAIRMAN BABCOCK: Okay. Anyone want to
14 have discussion on that?

15 PROFESSOR DORSANEO: Do you mean it's not
16 binding but it is entitled to weight, or do you mean it's
17 entitled to no weight?

18 MR. LOW: No. What I --

19 HONORABLE DAVID PEEPLES: He didn't say
20 that.

21 MR. LOW: What I intend is that everybody
22 come in and they can tell the judge, "We don't want it
23 recorded," and the judge can do what he wants to, that
24 that factor, that factor alone, does not decide whether
25 there is electronic recording.

1 MR. CHAPMAN: Will not be a veto.

2 MR. LOW: That's right, will not be a veto
3 or however you want to put it.

4 MR. YELENOSKY: It could still be a factor.

5 MR. LOW: And the judge can consider a
6 number of things. We've not gotten to what all the judge
7 can consider. I mean, that might exclude one thing.

8 MR. CHAPMAN: It may be weighty that both
9 parties or all parties --

10 MR. LOW: It may be. That would get into
11 the factor.

12 MR. CHAPMAN: But it wouldn't be an
13 automatic veto factor. That wouldn't take discretion out
14 of the hands of the trial court.

15 MR. LOW: Right. Right.

16 CHAIRMAN BABCOCK: All right. Anybody want
17 to discuss that further?

18 MR. GILSTRAP: Can we think of a -- I mean,
19 here, unlike the last one, there is -- the adversary
20 system is at work. You know, I mean, presumably one
21 party -- in the first thing we voted on, one party might
22 think it's to his best interest to have it on TV, the
23 other one doesn't. Is that enough of a safeguard? I
24 mean, are there situations in which both parties want to
25 agree that it won't be on TV and the public still should

1 have a right to see it?

2 MR. ORSINGER: Sure. You could have a
3 high/low agreement with the manufacturer of a defective
4 product that says, "I'll guarantee you a minimum of
5 \$500,000 in damages as long as we don't have cameras in
6 the courtroom," and all of the sudden your adversary
7 process has been sold out. And all that plaintiff did --

8 MR. GILSTRAP: Sounds to me like it's
9 working.

10 MR. ORSINGER: Okay. Anyway, you cannot
11 rely necessarily that in a personal injury or a damage
12 suit that both sides -- one side at least will be
13 protecting the public interest. That's the whole debate
14 on sealing settlements. People are buying privacy that
15 they shouldn't be. We will get to that, probably not
16 tomorrow but maybe next year.

17 MR. GILSTRAP: I think it's a good answer.

18 MR. LOW: Richard's right for once.

19 MR. ORSINGER: Did you get that in the
20 record?

21 MR. YELENOSKY: Took him 20 minutes to get
22 there.

23 CHAIRMAN BABCOCK: All right. So any
24 further discussion? You want to say anything else? Okay.
25 We're voting on Buddy's motion, seconded by Bill, that

1 even where all parties agree there should be no electronic
2 coverage of a judicial proceeding, that agreement is not
3 binding on the court. All in favor of that raise your
4 hand.

5 All opposed? By a vote of 22 to 1 that
6 motion carries, the Chair not voting.

7 PROFESSOR DORSANEO: It proves we're not
8 voting on the issue yet.

9 CHAIRMAN BABCOCK: Huh?

10 PROFESSOR DORSANEO: I said it proves we're
11 not voting on the issue yet, whatever that issue is.

12 MR. ORSINGER: This is helpful. This is way
13 more helpful than the previous debates. We're moving
14 forward.

15 CHAIRMAN BABCOCK: Okay. Well, since we're
16 doing so good where do we go first?

17 HONORABLE SARAH DUNCAN: Why did we vote on
18 that and not vote on exempting classes of cases?

19 CHAIRMAN BABCOCK: Because we didn't want
20 to.

21 HONORABLE SARAH DUNCAN: I see.

22 MR. ORSINGER: My next comment, and I think
23 we ought to go through this, my proposal is, is that I
24 would take -- I mean, I would move paragraph-by-paragraph
25 as to what I think is important and let other people speak

1 up if they want.

2 MR. GILSTRAP: Get to witnesses.

3 MR. ORSINGER: You want to raise the issue
4 of witnesses?

5 MR. GILSTRAP: Well, I mean, I think --
6 isn't that still part of (b)?

7 MR. ORSINGER: That's okay.

8 CHAIRMAN BABCOCK: Carl had earlier wanted
9 to vote on witnesses, so --

10 MR. HAMILTON: We don't need to vote on that
11 now.

12 CHAIRMAN BABCOCK: If the parties can't do
13 it then why would the witnesses be able to do it.

14 MR. HAMILTON: Right.

15 MR. ORSINGER: Well, I think, I mean, I
16 might feel differently about witnesses. The vote may be
17 the same, and also let me point out, it's not just -- you
18 don't have to just totally not record a witness. You
19 could also require, as these rules provide, the court can
20 require an electronic patch over the face so that you
21 can't see them. You know, there are other alternatives
22 for witnesses. Do we want to give the witness the power
23 of "I've been subpoenaed here. They want me to testify
24 about some psychotherapy I had. It's nobody's business.
25 I don't want it on TV"?

1 CHAIRMAN BABCOCK: Anybody wants to make a
2 motion, make a motion. About anything you want. Stephen.

3 MR. YELENOSKY: Well, I move that we not
4 eliminate the discretion of the court even with respect to
5 witnesses. I think generally, as I said before, if a
6 witness doesn't want to be shown, that the court would
7 defer to that unless there's a really good reason to show
8 that witness; and there may be in a political trial, for
9 example, where that person is really central to the case
10 and they happened to be a witness rather than a party.

11 MR. ORSINGER: Could be an undercover agent
12 in a drug case that wouldn't want his picture on
13 television.

14 MR. YELENOSKY: Well, then I assume the
15 judge would defer.

16 MR. ORSINGER: Yeah.

17 CHAIRMAN BABCOCK: Could be a four year-old.

18 MR. CHAPMAN: Except CBS gets it.

19 CHAIRMAN BABCOCK: Except for CBS.

20 MR. GILSTRAP: What would be the
21 circumstance where you would ever --

22 MR. LOW: Could have been at the wrong place
23 at the wrong time.

24 MR. GILSTRAP: This is another -- somebody
25 has a good answer, I'm sure, but what circumstance would

1 you ever have where you would want a four year-old on?

2 MR. ORSINGER: When the four year-old is a
3 complainant in a sexual abuse case.

4 MR. GILSTRAP: Why on earth would you want
5 the four year-old on TV if he's the complainant in a
6 sexual abuse case?

7 MR. ORSINGER: You wouldn't want them on TV,
8 but the state wants them on the witness stand.

9 MR. EDWARDS: Because CNN was willing to pay
10 you \$500,000 for the rights.

11 MR. GILSTRAP: My point is why would you
12 ever have the situation in which you would want to show
13 the testimony of a child on television?

14 CHAIRMAN BABCOCK: Well, Frank, just to give
15 you a real-life example, you've got a four year-old who
16 was a witness to his brother's murder and testified
17 yesterday.

18 MR. GILSTRAP: Yes.

19 CHAIRMAN BABCOCK: And the guardian of that
20 child, the parent of that child, had an arrangement with
21 CBS where they could do it.

22 MR. GILSTRAP: I understand that's why the
23 parent wants them on. Why would the state ever want to
24 allow the testimony of a four year-old child to be
25 televised?

1 CHAIRMAN BABCOCK: It would be hard to
2 imagine.

3 MR. GILSTRAP: It would be what?

4 CHAIRMAN BABCOCK: I say it would be hard to
5 imagine; and the judge yesterday, despite the parents'
6 wishes, precluded all media from televising that
7 testimony.

8 MR. GILSTRAP: Okay. But we're -- looks
9 like we're going to say that if the judge decides the four
10 year-old ought to be on TV, he's going to have discretion
11 to do it.

12 MR. LOW: Where are you going to draw the
13 age?

14 MR. GILSTRAP: What's that?

15 MR. LOW: Where are you going to draw the
16 age if we start saying, "But no four year-old will be able
17 to be on TV, no discretion of the judge." What about
18 five? What about 10? I mean, you know, you get to a
19 certain point.

20 MR. GILSTRAP: How about 15? You know, I
21 mean --

22 MR. LOW: 15, they don't do as good as 10.

23 MR. YELENOSKY: Well, I mean, yeah. I mean,
24 I think that's the problem, and I can imagine some older
25 children where the credibility of the witness might be of

1 great public importance, particularly if you have a case,
2 for instance, that has really incited the population where
3 there are racial allegations or whatever, and there could
4 be a public interest in seeing whether or not they believe
5 this 13 year-old. I just can't -- I just don't --

6 MR. GILSTRAP: Like the Bradley case they
7 had in New York?

8 MR. YELENOSKY: Yeah. I mean, I just don't
9 see that the veto -- given that the judge is going to
10 hopefully, you know, as we always assume, exercise
11 discretion well, that I think the greater harm is to say
12 "absolutely never."

13 MR. GILSTRAP: I am not real comfortable
14 with that.

15 MR. ORSINGER: I mean, the thing we have to
16 be careful about here is that you cannot assume that all
17 judges are going to exercise good judgment in all
18 circumstances, and so I think the question that Frank has
19 posed is are there not some circumstances that are so
20 outrageous that we're willing to commit in advance that no
21 judge could rule that way; and if so, then write it in.

22 We don't have effective appellate review of
23 these decisions. I'm going to be skeptical there's going
24 to be a lot of mandamus review when some trial judge
25 decides some six year-old girl is going to have to testify

1 on TV; and, you know, without that I think it is a
2 legitimate question. I don't know where to draw the line
3 or whatever, but I think it's a legitimate question, are
4 there some issues about which we are not going to let the
5 trial judge have the discretion, especially when you
6 consider that there's effectively no appellate review.

7 CHAIRMAN BABCOCK: Yeah, Ralph.

8 MR. DUGGINS: Could you deal with that in
9 the factors by wording the factors such that the
10 overwhelming presumption was you should not permit
11 electronic --

12 CHAIRMAN BABCOCK: Yeah. In this model rule
13 there is a -- there is a -- the factor may not be worded
14 strongly enough, but it says if it's a child the court
15 should give it great weight. Maybe do it some other way.

16 MR. DUGGINS: What I'm suggesting is perhaps
17 strengthen that so that we don't get Stephen's point, and
18 I agree with it, is that it's absolute and can never
19 occur.

20 CHAIRMAN BABCOCK: You've got to be a little
21 bit careful about per se rules because there is a U.S.
22 Supreme Court case involving a juvenile rape victim where
23 there was a per se rule you couldn't view her testimony
24 and they said that was unconstitutional.

25 MR. EDWARDS: Any prohibition that we put on

1 it in concrete terms presumes that we sitting here who
2 don't know the facts are in a better position than the
3 district judge to whom we delegate all kinds of
4 discretion, such as in Daubert challenges where with a
5 single stroke of the pen he can wipe out all the rights of
6 one side or another; and further, that there are things
7 that are so bad that we can decide that if a judge happens
8 to abuse his discretion that a court of appeals won't see
9 that and won't grant a mandamus on it.

10 MR. LOW: Frank's point is --

11 MR. EDWARDS: I'm not willing to make that
12 assumption. I believe that the district judges do their
13 jobs and that the court of appeals judges do their jobs.

14 CHAIRMAN BABCOCK: Carl.

15 MR. HAMILTON: What do I do when the judge
16 has ordered this media coverage and then my principal
17 witness says, "I'm not going to testify because I don't
18 want to be on the news"? Or he tells that to the judge.
19 Is he going to be held in contempt or he just leaves the
20 courtroom? What do we do in that situation?

21 MR. EDWARDS: We do what they did with that
22 reporter that spent how many days in jail?

23 CHAIRMAN BABCOCK: Several months.

24 MR. HAMILTON: The judge is not going to
25 hold a witness in contempt just because he says, "I'm not

1 going to testify" and gets up and walks out.

2 MR. EDWARDS: Again, I think you're saying
3 that we can decide what we pay the judges to use their
4 discretion on and appellate judges to use their discretion
5 on, and we can sit here and make decisions for them. I
6 don't buy that.

7 CHAIRMAN BABCOCK: Justice Duncan.

8 HONORABLE SARAH DUNCAN: I think I'd like to
9 respond to what Richard was saying about there not being
10 effectively any appellate review of these decisions. I
11 think Carl may have expected me to vote with him on the
12 party being able to veto the coverage and was surprised
13 when I didn't. The reason I didn't --

14 CHAIRMAN BABCOCK: Kind of lonely over
15 there, isn't it, Carl?

16 MR. HAMILTON: Yeah.

17 HONORABLE SARAH DUNCAN: The reason I didn't
18 is because I can foresee situations in which coverage
19 would be a good thing for the public and there is a real
20 public issue involved, but I want to find a way for that
21 trial to be electronically broadcast or covered in some
22 way while still retaining some degree of privacy for
23 people, whether they're hauled into court as a witness or
24 whether they are voluntarily in court by filing a lawsuit,
25 and to me the way you do it is that you require some

1 rather core findings that would make the order subject to
2 mandamus.

3 And, you know, as we all know, there are
4 some courts of appeals and some versions of the Supreme
5 Court that will never find a mandamus they like, and there
6 are some courts that like every mandamus that walks in the
7 door, which will give some inconsistency certainly, but at
8 least if we provide the framework for mandamus there could
9 be appellate -- effective appellate review by a court that
10 was willing to exercise that responsibility.

11 CHAIRMAN BABCOCK: Frank.

12 MR. GILSTRAP: There's a two-edged sword
13 there, though. The danger is once you start setting out
14 guidelines then you're going to set up a situation in
15 which you can mandamus a judge to compel coverage --

16 MR. LOW: Yeah.

17 MR. GILSTRAP: -- and I'm not sure -- I don't
18 know. I'm not sure I want to go there.

19 MR. LOW: But also, Frank, what if you have
20 a situation that you need a little more time, you know,
21 and you say, "Okay, this witness said that you don't want
22 to testify. Well, we'll just have to mandamus. We'll get
23 two or three days." I mean, you know, there's a lot of
24 evils that can be created, too.

25 HONORABLE SARAH DUNCAN: I can foresee

1 situations in which mandamus to compel coverage should be
2 filed and should be granted. As long as we're going to go
3 this far I think we need to do what we can to ensure
4 coverage in those situations.

5 MR. GILSTRAP: But when you go down that
6 road you start eroding the discretion of the judge that
7 everybody says is the key to making this whole thing work.

8 MR. LOW: And then there's a young witness
9 that, you know, once he's been on, whatever reason, he's
10 on then; and you can't go back and say, "Well, the judge
11 was wrong"; and you stop the trial to mandamus and say,
12 "Look, this is wrong to put this kid on." If you have
13 some procedure for that, somebody is going to find the
14 young kid that his parents don't want him to testify and
15 they're going to get three or four more days delay, and
16 it's going to be used like Daubert. You're right, but the
17 evils are worse.

18 CHAIRMAN BABCOCK: Anybody aware of a
19 mandamus on TV coverage since we've had the local rules?

20 Stephen.

21 MR. YELENOSKY: I'm not, but I want to speak
22 to that point. One thing we haven't even talked about,
23 which goes beyond the judge protecting the public
24 interest, is in times when the public interest may be to
25 see how the court operates in particular cases; and so I

1 could imagine situations where the news media might want
2 to show how things are handled by a particular judge and
3 through a particular process and the judge, of course,
4 doesn't want that.

5 I mean, we have -- where I work, Advocacy,
6 Inc., we have lot of concern about how some probate
7 hearings are held. In some places very well. In other
8 places there's sort of an agreement between the judge and
9 the people they appoint that they essentially run people
10 through the mental health commitment process without the
11 statutory requirements. Now, you know, there's a record
12 of that, but it might be quite revealing to see that with
13 the consent of the individuals involved or in some way
14 where you mask their identity to show visually how quickly
15 that happens and what goes on.

16 So I can clearly imagine review; and when we
17 talk about eroding the discretion of the judge, which I
18 support, I think it's different when you say it's subject
19 to review by appellate court than when you say, "We're not
20 going to allow any discretion at all" up front.

21 CHAIRMAN BABCOCK: Nina.

22 MS. CORTELL: We had a case in Dallas that
23 was not coverage by television, but the trial court did
24 shut down the courtroom, basically because it was a trade
25 secret case; and he took the position that the public

1 should not be allowed entry unless you signed a
2 certificate agreeing to maintain confidentiality. A
3 mandamus was taken to the Dallas court, no relief. I
4 believe further taken to the Texas Supreme Court, no
5 relief granted, so the courtroom was closed.

6 CHAIRMAN BABCOCK: Richard.

7 MR. ORSINGER: I agree with Sarah that I
8 think that there should be some effort made to see that if
9 discretion is abused that it can be corrected by a higher
10 court; but in disagreeing with Frank, I think that the
11 abuse of discretion standard, which is the standard for
12 mandamus, protects the discretion of the trial court. It
13 is the standard that's used in all of the areas where
14 mandamus is sought, and it gives the court broad latitude
15 in resolving factual issues and deciding how to make
16 judgment calls. Most of these things I'm seeing in here
17 are judgment calls.

18 I myself don't know how you could show an
19 abuse of discretion, but I do not like the idea that just
20 a single member of the judiciary can make a decision that
21 no matter how extreme it is, it's not subject to effective
22 review by a panel of higher judges. So I like the idea --
23 it's not in force right now, but I like the idea that we
24 ought to build in some review, and I think that the abuse
25 of discretion standard properly balances the power of the

1 appellate court against the trial court.

2 CHAIRMAN BABCOCK: Stephen, do you have a
3 motion on the floor?

4 MR. YELENOSKY: Can I?

5 CHAIRMAN BABCOCK: No, no. Did you make a
6 motion? I'm asking.

7 MR. YELENOSKY: No, I didn't. No.

8 MR. LOW: What motion are you looking for,
9 and I'll make it?

10 CHAIRMAN BABCOCK: All right, Buddy.

11 MR. LOW: What motion are you looking for
12 and I'll make it?

13 CHAIRMAN BABCOCK: Didn't somebody say
14 something about the witnesses?

15 MR. ORSINGER: Well, there was a question
16 about whether we would have witness veto, but I don't know
17 that anybody really --

18 MR. YELENOSKY: Oh, way back then.

19 MR. GILSTRAP: The question was should we
20 have witness veto and then should we maybe have veto for
21 witnesses who are children. That was what the discussion
22 was about.

23 CHAIRMAN BABCOCK: Okay. Did anybody want
24 to make a motion on either of those two topics?

25 MR. YELENOSKY: Well, that we not -- I guess

1 I did -- I don't know if I formed it as a motion. I guess
2 the motion was that nor shall a witness or any collection
3 of witnesses be able to veto the electronic coverage,
4 which would be (a). It could be a factor but not be a
5 veto.

6 CHAIRMAN BABCOCK: Anybody want to second
7 that?

8 MR. ORSINGER: Okay. Before we vote on that
9 I want to understand that our single choice is not between
10 electronic coverage and no electronic coverage and this
11 proposed rule or guidelines, I guess you want to call
12 them, those uniform rules, say that you can blot out the
13 face of a witness, for example, rather than not record
14 their testimony.

15 MR. YELENOSKY: That's still open, I think.

16 MR. ORSINGER: Yeah. I think that I want to
17 make it clear that we might later on want to revisit the
18 question of whether we would give the witness the power to
19 have their face blotted out but not the power to keep
20 their voice from being recorded, and so I just wanted to
21 draw that distinction. You're saying that we don't want
22 the witness to have the authority to say, "You have to
23 turn the cameras on just because I came in the courtroom."

24 HONORABLE SARAH DUNCAN: Off.

25 MR. GILSTRAP: Off.

1 MR. ORSINGER: "Turn the cameras off, just
2 because I came in the courtroom."

3 CHAIRMAN BABCOCK: Anybody want to second
4 that? Apparently not. Dies for lack of a second.

5 MR. ORSINGER: Okay. Then if you move into
6 the definitions part of this you'll see that the rules --

7 MR. GILSTRAP: Wait a second.

8 CHAIRMAN BABCOCK: Let's not leave the
9 policy yet.

10 MR. ORSINGER: Oh, we're not going to leave
11 the policy. Okay. More fun.

12 CHAIRMAN BABCOCK: Would we not want to add
13 "protect the rights of the litigants and the public"?

14 MR. ORSINGER: I would at least add "and the
15 public," if not more than "and the public."

16 CHAIRMAN BABCOCK: How does everybody feel
17 about that?

18 HONORABLE SARAH DUNCAN: What rights does --

19 CHAIRMAN BABCOCK: Is there a public
20 interest component to this?

21 HONORABLE SARAH DUNCAN: I think there is
22 certainly a public interest component, but that doesn't
23 translate into rights of the public.

24 PROFESSOR CARLSON: How about "public
25 interest"?

1 MR. ORSINGER: I think it does.

2 HONORABLE SARAH DUNCAN: I think "public
3 interest" is more descriptive.

4 MR. ORSINGER: Well, when you talk about the
5 press you're talking about a right that's -- under the
6 U.S. Constitution is binding on us. So it is actually --

7 HONORABLE SARAH DUNCAN: I understand, but
8 as Chip has said, there is not a constitutional right for
9 a member of the electronic media to electronically record
10 and then broadcast a trial.

11 CHAIRMAN BABCOCK: I think more accurately I
12 said "no court has held."

13 HONORABLE SARAH DUNCAN: Oh, I'm sorry. I
14 would never, never -- of course.

15 MR. ORSINGER: That's just a function of the
16 fact that it's not as frequent as the other, but as soon
17 as it is, it will be ruled that way.

18 HONORABLE SARAH DUNCAN: Well, I don't want
19 to encourage the creation of a new right by putting in the
20 rule that there is a right that doesn't exist yet. So I
21 think "public interest" is more appropriate.

22 CHAIRMAN BABCOCK: Well, the language in the
23 policy --

24 HONORABLE SARAH DUNCAN: I would even go
25 further and say "legitimate public interest."

1 CHAIRMAN BABCOCK: It says, "The guidelines
2 are intended to standardize the use of electronic media
3 coverage in the courts of Texas." That's one interest,
4 standardization. Two, "to preserve the independence of
5 the judiciary, to maintain the dignity, decorum, and
6 impartiality of court proceedings, and to protect the
7 rights of litigants."

8 MR. LOW: Put "witnesses and the public."

9 CHAIRMAN BABCOCK: "Protect the rights of
10 litigants" -- what did you say, Buddy?

11 MR. LOW: "Witnesses and the public."

12 MR. ORSINGER: "Witnesses and the public."

13 CHAIRMAN BABCOCK: "Witnesses and the
14 public."

15 MR. CHAPMAN: Well, I tend to have some
16 questions with regard to "rights of the public." What
17 about "promote public interest" as a clause to be inserted
18 after "proceedings"? Comma, "promote public interest and
19 protect the interest -- protect the rights of litigants
20 and the witnesses."

21 MR. LOW: We're not trying to promote public
22 interest.

23 HONORABLE HARVEY BROWN: How about
24 "recognize"?

25 MR. CHAPMAN: "Recognize." That's good.

1 CHAIRMAN BABCOCK: Carl.

2 MR. HAMILTON: I wanted to suggest that
3 after the word "Texas" in the second line, the first word
4 in the second line, we insert the phrase "if allowed."

5 CHAIRMAN BABCOCK: And your thinking behind
6 that, Carl, is what?

7 MR. HAMILTON: Well, the guidelines are
8 intended to standardize the use of electronic media if
9 it's allowed.

10 HONORABLE SARAH DUNCAN: When it's allowed.

11 MR. HAMILTON: Or when it's allowed.

12 MR. LOW: Well, it's not when it's allowed.
13 It's both to allow it and not allow it that we're
14 protecting these. Not just when it's done but it's to
15 protect these when you allow it and when you don't allow
16 it. When you don't allow it, it's to protect these. When
17 you allow it, it's to protect these. So you wouldn't want
18 to put "when authorized" or "when used."

19 MR. HAMILTON: Well, the reason for that is
20 that the way it's worded is it sort of implies that the
21 use of electronic media is okay and accepted.

22 MR. EDWARDS: He's trying to win that vote
23 that he lost before.

24 HONORABLE SARAH DUNCAN: I think we also
25 need to include the rights of jurors.

1 CHAIRMAN BABCOCK: How about "the rights of
2 the participants"?

3 MR. ORSINGER: "Participants," how about
4 that? Instead of "litigants" would you just say "the
5 rights of participants"?

6 CHAIRMAN BABCOCK: "The rights of the
7 participants." Where did -- Richard, where did you want
8 to put the -- what was the public interest, whatever the
9 public thing was?

10 MR. CHAPMAN: "Recognize public interest."
11 Right after the word "proceedings," comma, "recognize
12 public interest."

13 CHAIRMAN BABCOCK: "Recognize public
14 interest."

15 MR. CHAPMAN: "And to protect the rights of
16 the participants," I guess you said.

17 MR. YELENOSKY: Could you read that back?

18 CHAIRMAN BABCOCK: Yeah. Here are the
19 proposals. There are three proposals made to this
20 sentence. "These guidelines are intended to standardize
21 the use of electronic media coverage in the courts of
22 Texas," and Carl would insert in here "when allowed,"
23 comma, "to preserve the independence of the judiciary,
24 maintain the dignity, decorum, and impartiality of the
25 court proceedings," comma, and Carlyle would add

1 "recognize public interest." Is that right?

2 MR. ORSINGER: You better put a "to" in
3 front of that, because they're all "to," "to," "to."

4 CHAIRMAN BABCOCK: Yeah. Okay. "To
5 preserve," "to maintain," "to recognize."

6 HONORABLE SARAH DUNCAN: You don't need the
7 "to."

8 MR. ORSINGER: Well, take them all out.

9 HONORABLE SARAH DUNCAN: Take them all out.
10 And change "courts of Texas" to "Texas courts."

11 HONORABLE DAVID PEEPLES: Chip, can I make a
12 suggestion here?

13 CHAIRMAN BABCOCK: Yes, sir.

14 HONORABLE DAVID PEEPLES: There are two
15 basic ways to handle this. One, you know, a lot of times
16 when we reach the end of something we have really talked
17 about we get down to fine-tuning the language in this
18 great big committee, and we're doing that now on the front
19 end of something we've barely looked at.

20 CHAIRMAN BABCOCK: Good point.

21 HONORABLE DAVID PEEPLES: Another way to do
22 it, which is what I prefer in this situation, is to be
23 sure that we find out what we feel as a committee about
24 the broad policies here and then have somebody do some
25 drafting. I think it's a bad mistake to draft the way

1 we're doing here.

2 CHAIRMAN BABCOCK: Yeah. I always agree
3 with that. Anybody disagree?

4 MR. CHAPMAN: I agree.

5 CHAIRMAN BABCOCK: Richard, you know, you
6 and your group are the draftsmen, so you know what we're
7 saying here.

8 MR. ORSINGER: Okay. Then we'll move on to
9 the definitions unless somebody wants to add more.

10 CHAIRMAN BABCOCK: Not before we take a
11 break.

12 MR. GILSTRAP: Wait a second.

13 HONORABLE SARAH DUNCAN: Well, let's just go
14 to the flash points.

15 MR. GILSTRAP: Let's cut to the chase. The
16 guts of it is the discretion. You know, when we know
17 where we are on discretion we know where we are on the
18 rest of the rule. Until we get to that we're just kind of
19 dancing around for that big question.

20 MR. ORSINGER: So that means as soon as we
21 take that vote everyone leaves, right?

22 MR. GILSTRAP: Well, it's better than taking
23 it after everyone leaves.

24 CHAIRMAN BABCOCK: Let me ask another
25 question. If we take -- if we take a bathroom break, will

1 people come back at least till we talk about discretion?

2 HONORABLE DAVID PEEPLES: Yes.

3 CHAIRMAN BABCOCK: Okay. We'll take a
4 15-minute break.

5 (Recess from 3:09 p.m. to 3:32 p.m.)

6 CHAIRMAN BABCOCK: Okay. When last we spoke
7 somebody said that we ought to get this discretion angle
8 decided. Who was that? That was Frank. Where is Frank?

9 There he is. So, Richard, where in the rule
10 is this -- I mean, it seems to me that discretion is just
11 written all over this thing.

12 MR. ORSINGER: Yeah. I mean, the problem we
13 have in cutting to the chase is that there's more than one
14 chase scene in the movie, but, you know, let's see the --
15 probably I don't -- these are unnumbered pages, but if you
16 look on the paragraph on the third page called "Decision
17 of the court," "The granting of a coverage request shall
18 be made at the court's discretion." To me that's a core
19 concept here. I don't know if it's debatable. It seems
20 like we all agree with that, but to say that it's at the
21 court's discretion isn't enough because then you have to
22 look into the factors that the court is supposed to
23 consider in exercising its discretion. So I'm not sure
24 exactly what we vote on, so that's probably not it.

25 HONORABLE SARAH DUNCAN: Can we not move

1 over that so quickly?

2 MR. ORSINGER: What? We can stop any time
3 anybody wants. I don't know where we're going. I mean,
4 what is the core issue, Frank?

5 MR. GILSTRAP: Well, I mean, I think what we
6 have to get out front is, is everybody on board with the
7 idea that this is a question of the court's discretion;
8 and if it is a question of the court's discretion, which
9 way does it tilt? Do we pitch it in a way such that the
10 court should deny, but it has the discretion if certain
11 factors are met; or should we say the court, which looks
12 like where this thing is going, should allow it if certain
13 factors are met? You see what I'm saying?

14 It has to do with the backbone issue that
15 Judge Peeples was talking about earlier. We can put down
16 a rule and say, oh, there's discretion here and sounds
17 like a great rule on paper, but the realities of being on
18 TV and being elected are going to be such that the courts
19 are going to feel that they've got to allow coverage in a
20 doubtful case, and we need to decide that. We need to
21 decide if it's important enough that we're going to give a
22 judge a rule that he can say, you know, "In this case I'm
23 not going to do it, fellows."

24 CHAIRMAN BABCOCK: Buddy.

25 MR. LOW: But in 702 we don't face the

1 burden either way. We say whether he -- very important
2 thing, whether he allows the witness to testify or
3 doesn't. To review it by discretion.

4 MR. GILSTRAP: The witness doesn't buy ink
5 by the barrel or doesn't have a TV station.

6 MR. LOW: He doesn't buy ink by the barrel,
7 but he's just as important as the ink people.

8 HONORABLE SCOTT BRISTER: That's a loud
9 phone.

10 MR. ORSINGER: It's a fancy phone. It's a
11 really new, fancy phone. He can even play video games on
12 it.

13 CHAIRMAN BABCOCK: Most people don't carry
14 an amplifier around with them.

15 MR. MARTIN: I bet it has a vibrate feature,
16 and he doesn't know how to work it.

17 CHAIRMAN BABCOCK: Justice Duncan.

18 HONORABLE SARAH DUNCAN: In line with what I
19 was saying are my interests earlier, I would like to
20 propose that not only does the court have to consider
21 these factors but that the court has to make findings on
22 certain core factors; and for me, the minimum is that the
23 court would have to find that coverage, allowing coverage,
24 will not harm either a party or the party's ability to put
25 on its case or a witness, if the witness is the

1 obstruction, or the judicial system as a whole.

2 MR. ORSINGER: Now, what you just said, and
3 you may not have intended, was you created a presumption
4 against coverage by saying --

5 HONORABLE SARAH DUNCAN: I didn't intend
6 that. I would state it exactly the opposite, but I think
7 that the judge should have to find that allowing coverage
8 isn't going to harm anybody or anything of value.

9 MR. ORSINGER: So there is a quote, burden
10 of proof, and the burden of proof is on whoever wants
11 coverage to prove and get a finding that a certain laundry
12 list of things are not impaired?

13 CHAIRMAN BABCOCK: Is that rhetorical or --

14 MR. ORSINGER: That's what Sarah's saying.
15 She's setting it up as if there's a proof requirement and
16 that it must be met as a condition to allowing coverage.

17 HONORABLE SARAH DUNCAN: I'm not trying to
18 set that up as a burden of proof or as a presumption
19 against coverage. I'm simply saying that in my view
20 before there is coverage there should be such a finding,
21 and it would be the subject -- it would be subject to
22 mandamus.

23 CHAIRMAN BABCOCK: Bill.

24 MR. EDWARDS: If there has to be a finding
25 then it's going to hurt somebody or not going to hurt

1 somebody, and I'm a witness and I say it's going to hurt
2 me, who and how is the finding one way or the other that
3 there is or is not harm reviewed?

4 HONORABLE SARAH DUNCAN: The same way we
5 review any other finding.

6 MR. EDWARDS: What's the difference then of
7 why do you need the finding?

8 MR. ORSINGER: Because if you don't have a
9 finding you can't review it.

10 MR. EDWARDS: Well, the finding is I'm going
11 to allow coverage. Is that an abuse of discretion or not?
12 You've got a list of things that should be considered that
13 are the backbone and the outline for what the court of
14 appeals looks at to see whether there's been abuse of
15 discretion. I don't think you need specific findings.

16 MR. ORSINGER: Well, part of the problem
17 with this -- I mean, and this is more important for us
18 appellate lawyers and maybe I'm not speaking for all the
19 appellate lawyers -- but unless you break down the finding
20 into subcomponents you don't give appellate court much
21 handle to overturn the trial court's decision.

22 MR. EDWARDS: It's like an order that -- for
23 you appellate lawyers it's like an order that overrules a
24 motion for summary judgment without stating why.

25 MR. LOW: What if the judge just puts in

1 there and said "I considered" and he just copies all of
2 these factors, and "I've considered that and that, and I
3 find justice prevails." Now, how is that going to help?
4 And he's made his findings. Now, where have you gotten?
5 You've got nowhere more than him just granting it.

6 MR. GILSTRAP: That kind of raises the
7 question of whether or not there's got to be a record. I
8 mean, I think that's where we're going with that.

9 CHAIRMAN BABCOCK: Wendell.

10 MR. HALL: Well, if you have fact findings
11 you're not going to be able to challenge those by
12 mandamus.

13 MR. ORSINGER: Well, if there's no evidence
14 to support it, you can.

15 MR. HALL: Well, if there's no evidence, but
16 I mean --

17 HONORABLE SARAH DUNCAN: And that's the
18 basis for the mandamus, right?

19 MR. EDWARDS: No evidence is not a basis for
20 mandamus because otherwise you could mandamus a finding on
21 a motion for no evidence motion for summary judgment.

22 MR. HALL: Sure.

23 MR. ORSINGER: You can get a mandamus where
24 there is no evidence to support the trial court's ruling.
25 What you can't do is you can't weigh contradictory

1 evidence, although some high courts might have done that.

2 MR. LOW: You are going to be heading for a
3 five-day hearing before you start a trial. You're getting
4 ready to go to trial and you're going to have about a
5 five-day hearing and evidence and findings and so forth,
6 and you're going to end up with as long as the trial.

7 CHAIRMAN BABCOCK: Judge Peeples, tell me if
8 your experience differs from what I -- there are sort of
9 two or maybe three different factual scenarios that arise
10 with electronic coverage. One is that the press just
11 wants to come in to cover a hearing or an injunction or
12 something when the Texas Rangers were sued by their season
13 ticketholders in a class action during the baseball
14 strike. They had a temporary injunction hearing, and the
15 media wanted to come in and film that, and the judge let
16 them in, and that was that, and I think they orally asked
17 for it about five minutes before the hearing.

18 So that happened, and then the other type of
19 situation is when there is a heavily publicized trial of
20 great public interest like Andrea Yates, and the judge is
21 up to her ears in really tough stuff that she's being
22 asked to decide, I mean, aside from the electronic
23 coverage, and has to do with all kinds of logistics and
24 accommodating the press that has an absolute right to be
25 there and then fit into her time the issue of the

1 electronic media and find time to hear that, and she
2 doesn't have very much time. Those are the practicalities
3 of it.

4 Judge Peeples, I don't know. Are there
5 other variations of it that you know of?

6 HONORABLE DAVID PEEPLES: My experience, I
7 don't think San Antonio has ever had an Andrea Yates Court
8 TV case where they wanted to do gavel-to-gavel, so my
9 experience is totally in the first category. All of the
10 sudden you've got a case, and there are one or two TV
11 cameras and reporters, and it's going to be a short
12 hearing, and there wouldn't be time for mandamus because
13 -- like Richard said a few hours ago, the lawyer that
14 would want to mandamus you has got to try the case. I
15 mean, it's going to be over before you can do anything, so
16 I think there would not be mandamus except in the Andrea
17 Yates type case where they know way in advance that it's a
18 TV case and they probably present it to the judge in
19 advance and maybe -- no?

20 CHAIRMAN BABCOCK: It was only -- I mean,
21 the media tried to get before her like a month before the
22 case started, but she didn't hold a hearing until like a
23 day before they started evidence, and that's when she held
24 the hearing.

25 HONORABLE DAVID PEEPLES: Well, I think

1 every case I've ever known of in my area was one where
2 they just show up on the day of the hearing and the
3 decision is right there. It wasn't a long matter. It
4 takes me three minutes to talk to them about it and then
5 you get going. I think that's the vast majority of the
6 cases.

7 CHAIRMAN BABCOCK: Yeah. Judge Hill gave
8 us, I don't know, maybe an hour to argue it, and the
9 defendant -- a little funny twist in the Yates case is the
10 defendant wanted it and claimed that she had a
11 constitutional right to coverage, which was a different
12 twist than you normally see.

13 Carlyle.

14 MR. CHAPMAN: I just wanted to ask Judge
15 Peeples if it's correct that if you're approached five
16 minutes before the hearing, for example, a TRO
17 application, and counsel for the media says, "I'd like to
18 have this covered." You decide on some list of factors
19 similar to those we're considering, that, no, you can't
20 have that. That lawyer would then ask you, I presume, to
21 allow him to make a brief record. I assume that you would
22 then call in your court reporter. The lawyer would put on
23 whatever he or she thought was sufficient to make a record
24 as to the basis why it should have been granted and why
25 your decision not to grant it would be an abuse of

1 discretion, and that would be the hearing, and then
2 wouldn't that be sufficient or all that there was to take
3 up on mandamus and be the basis for your mandamus
4 application?

5 HONORABLE DAVID PEEPLES: If a lawyer showed
6 up it would happen that way.

7 MR. CHAPMAN: Yeah.

8 HONORABLE DAVID PEEPLES: I've never had a
9 lawyer show up. The TV cameras and the anchorperson show
10 up and want in, and I let them in for a little while
11 before we start the hearing. They get their footage and
12 go.

13 MR. CHAPMAN: Suppose you decide --

14 HONORABLE DAVID PEEPLES: They wait out in
15 the hall and then when the people come out they show them
16 and talk to them and they're happy.

17 MR. CHAPMAN: Suppose you decide in response
18 to the request of the reporter armed with his or her
19 cameraperson that you're not going to allow the coverage.
20 Would you give them an opportunity, if they asked, to have
21 their lawyer come and make a showing, or would you go
22 forward with the hearing that is scheduled five minutes
23 later?

24 HONORABLE DAVID PEEPLES: I would probably
25 go forward with the hearing and it would be over before

1 the lawyer could get there.

2 MR. CHAPMAN: That's the practicality, I
3 think, that we have do deal with.

4 CHAIRMAN BABCOCK: I agree. I don't know
5 that this discussion informs what we're doing, but that's
6 what happens.

7 MR. GILSTRAP: Maybe we need to separate out
8 what the standard should be from the question of how it
9 gets reviewed. In other words, the standard itself is
10 important whether or not it's reviewed. It's important
11 for, you know, the judge, first of all, making the
12 decision and, second, the judge having some basis to
13 justify his decision when he gets pressured that he ought
14 to allow the TV coverage. I mean, that's a different
15 issue from whether or not we mandamus him, what the
16 standards are, whether we have a record, that type thing.

17 MR. CHAPMAN: Well, and the point, of
18 course, is that in the absence of a record there's not
19 much to mandamus, and so we talk about whether or not
20 there is a remedy of mandamus. We have to, I think, talk
21 in some practical sense as to whether or not there's going
22 to be anything there as a basis for mandamus, and that's
23 all I'm -- that's my point.

24 HONORABLE DAVID PEEPLES: On these
25 30-minute, one-hour hearings, mandamus just seems crazy.

1 CHAIRMAN BABCOCK: It's not going to happen.

2 HONORABLE DAVID PEEPLES: What are you going
3 to do, wait a day or two for the appellate court to decide
4 whether a one-hour hearing gets TV cameras?

5 CHAIRMAN BABCOCK: And they're not going to
6 ask for it, either side. TV station is not going to do
7 it.

8 HONORABLE DAVID PEEPLES: Correct.

9 CHAIRMAN BABCOCK: Bill had his hand up, but
10 now he's talking. So Carl.

11 MR. HAMILTON: Under this proposal, though,
12 they've got to file a written application, so there would
13 be time then to consider that response, I guess, and hear
14 it.

15 CHAIRMAN BABCOCK: Bill then Richard.

16 PROFESSOR DORSANEO: It does strike me that
17 "Decision of the court" section there's something that
18 vaguely looks like a general standard before getting into
19 the factors, but it doesn't seem to mention what might be
20 the most important thing, and that is the -- whether this
21 is a matter of any particular public concern.

22 We're talking about the court granting a
23 coverage request. So the request is made, you know, by
24 the person -- by the media, but then it goes to talk about
25 discretion in terms of when the interests of justice

1 demand protecting the rights of the parties, witnesses, or
2 the dignity of the court or assuring the orderly conduct
3 of the proceedings; and then it vaguely says "or for any
4 other reason considered necessary or appropriate by the
5 court" without really talking about what you're talking
6 about, you know, balancing public against private
7 interests; and that seems to me what it ought to be about.

8 CHAIRMAN BABCOCK: Stephen.

9 MR. YELENOSKY: Yeah, I mean, (a) -- I had
10 jotted in here, (a) says the type of case involved, but it
11 doesn't go to say something like "in the interest of" --
12 "the legitimate interest of the public in an electronic
13 means of viewing that case," and nowhere in here does it
14 say -- the policy, it doesn't say anything like that. And
15 I know Sarah didn't want to elevate this to a right that
16 hasn't been recognized, so you don't have to state it as a
17 right, but I think somewhere we have to state some reason
18 for doing it, and we haven't done that anywhere in here.
19 It's like this is something a judge could do, and here are
20 the reasons why you wouldn't do it, and maybe implicit in
21 there somewhere, I mean, it's like you know the judge may
22 have breaks in the trial. You know why you would have
23 breaks in the trial, but it isn't all that obvious why you
24 would let the media in.

25 CHAIRMAN BABCOCK: Yeah. And the public

1 interest is sometimes tied to the type of case it is, but
2 sometimes it's not. Sometimes the public interest deals
3 with just the way the court is being administered.

4 MR. YELENOSKY: Exactly.

5 CHAIRMAN BABCOCK: Sometimes it's --

6 MR. GILSTRAP: The people involved.

7 CHAIRMAN BABCOCK: Huh?

8 MR. GILSTRAP: The people involved.

9 CHAIRMAN BABCOCK: The people involved.

10 There's lots of other things other than type of case.

11 Yeah, Richard.

12 MR. ORSINGER: This list of factors has kind
13 of an implicit bias that these are reasons why you
14 shouldn't permit coverage, and it doesn't really list
15 reasons why you should permit coverage, and I think that
16 the most likely mandamus is not the press trying to force
17 the judge to permit coverage, but one or both of the
18 parties trying to stop coverage or one or both of the
19 parties trying to require coverage. I think it's more
20 likely a party will seek mandamus relief than the press;
21 and if a party felt that they needed the press as a friend
22 to get a fair trial or whatever, they ought to have
23 factors they can rely on on why a trial judge's decision
24 to not publish, over their request, should be mandamused.

25 And so the list -- the rules don't presume

1 it should be published, but it kind of -- the list is
2 reasons why it wouldn't be, and we either ought to have a
3 presumption that it should be published unless these
4 reasons are shown, or if we're going to be neutral then we
5 ought to start putting in here some reasons why you might
6 mandate publicity.

7 MR. LOW: Richard, why wouldn't you put
8 there where it says "in granting a request," but put in
9 "ruling on the request," you know, not "granting," but you
10 grant or deny. Don't put "granting."

11 MR. GILSTRAP: The opening sentence is
12 biased for coverage. "The granting shall be made at the
13 court's discretion." How about the denial?

14 CHAIRMAN BABCOCK: Yeah. The problem with
15 this is I see the roots of a number of the different local
16 rules. For example, this laundry list I think is taken
17 from the Travis County rules. Right?

18 MR. GRIESEL: Yes.

19 CHAIRMAN BABCOCK: And the Travis County
20 rules have a bias against electronic coverage, but some of
21 the other language is taken from the Dallas and Harris
22 County rules, which have a bias in favor. So maybe the
23 thinking was if we put all this language in together we'll
24 come out neutral.

25 MR. ORSINGER: I mean, let me give you an

1 example. The second factor of where the coverage would
2 harm any participants, that shouldn't be absolute. You
3 should weigh whether the failure to cover might harm a
4 participant and whether the failure to cover might damage
5 a public interest and balance that against the harms or
6 harm to one participant, because one participant might
7 gain by publication, one might harm by publication. So
8 the list has a tacit vice we need to cure.

9 CHAIRMAN BABCOCK: Bill Dorsaneo.

10 MR. LOW: You can cure all that with just
11 marking certain things out. Type of case involved,
12 possible harm to any participant. I mean, you don't have
13 to put "granted." Up here, "The granting of coverage on a
14 request shall be made at the court's" -- I mean, you don't
15 have to -- put you can strike out "granting." There are
16 other words that could be put into it that would make it
17 neutral.

18 MR. YELENOSKY: Well, also, if you strike
19 out the beginning phrase on most of those alphabetized
20 lists and just say "You consider the harm to any
21 participant, the fair administration of justice," rather
22 than whether the coverage would --

23 MR. LOW: Right. Would harm.

24 CHAIRMAN BABCOCK: Bill Dorsaneo.

25 PROFESSOR DORSANEO: There is that language

1 in here, too, that I didn't focus on carefully enough
2 before. When you take into account these private
3 interests and the interests of the court in an orderly
4 proceeding "when the interest of justice" -- I guess I
5 can't see. "When the interests of justice demand," which
6 is -- I guess it is a pretty strong presumption in favor
7 of granting coverage, too strong -- stronger than I would
8 like for it to be.

9 CHAIRMAN BABCOCK: Okay. You've got three
10 choices. You can be biased in favor, biased against, or
11 you can be neutral, and we've got -- and, frankly, having
12 litigated in all the jurisdictions in practice, it doesn't
13 much matter. I mean, I've had them denied, I've had them
14 granted, and I don't know that the presumption has
15 influenced the judge very much. Maybe in the Turner case
16 because Judge Ray did make findings on findings that she
17 was persuaded by the presumption. She was persuaded by
18 the presumption.

19 MR. ORSINGER: Presumption in favor of
20 coverage?

21 CHAIRMAN BABCOCK: Yeah. She said to Turner
22 that, you know, "You've got to give me some reason why
23 I've got to keep the cameras out, because otherwise I've
24 got the let them in." And there wasn't anything that she
25 felt was persuasive. So I guess in that instance that

1 would -- and we, of course, as a television station, we
2 couldn't very well oppose it, so we were neutral on that
3 as defendants.

4 MR. LOW: Chip, would it be well to vote for
5 "granted" or -- you know, which way, or neutral. I mean,
6 we've got three ways to go.

7 CHAIRMAN BABCOCK: That's where Frank was
8 leading us, I think, wasn't it?

9 MR. GILSTRAP: I think so. I think so.
10 And, you know, it has something more to do with than just
11 the ruling. I mean, you know, when the judge is summoned
12 down to the newspaper every four years, and they say,
13 "Judge, we think you don't believe in the First
14 Amendment," he can say, "Well, look. It says I shouldn't
15 grant coverage unless." I mean, that's the reality of it.

16 You've got to give -- as Judge Peeples
17 points out, it takes some courage to say "no," especially
18 in a high profile case, if you think that there shouldn't
19 be coverage; and it seems to me, you know, do we give the
20 judge that backbone or do we tell the judge, "No, we want
21 you to let them in unless"? I mean, that's a real
22 important problem.

23 CHAIRMAN BABCOCK: Or do we want to say --

24 MR. GILSTRAP: Do we say neutral, yeah.

25 CHAIRMAN BABCOCK: -- we're not going to

1 comment on it?

2 Yeah, Carl.

3 MR. HAMILTON: The litigants have a right to
4 the courtroom, I mean, constitutionally and elsewhere.
5 Where are we balancing what right that the media has for
6 cameras in the courtroom? Where do they get a right
7 either under the Constitution or by statute or anything?
8 I mean, we're fashioning a rule here to allow them to come
9 in, but where do they get a right so to speak as opposed
10 to the litigants where you have to balance these two
11 rights? I don't know. Is there a right somewhere?

12 CHAIRMAN BABCOCK: You want to know what the
13 argument is or --

14 MR. HAMILTON: What's the argument?

15 CHAIRMAN BABCOCK: The argument? The
16 argument is under the U.S. Supreme Court case in Richmond
17 Newspapers and then two or three cases that followed it
18 and most notably the Globe News vs. Sutton County case,
19 the Court held that there was a First Amendment right for
20 the press to attend a proceeding, be it civil or criminal,
21 and there have been a lot of lower court decisions
22 following that.

23 The argument as yet, as yet unaccepted by
24 the U.S. Supreme Court is that a camera is merely a tool
25 that a reporter carries with him into the courtroom just

1 as a print reporter carries a pencil or a sketch artist
2 carries an easel, or not an easel but a sketch pad, and
3 ink, and it is making my right meaningless if I can't take
4 my tool into the courtroom. That's the argument.

5 MR. HAMILTON: But has there been a court
6 uphold that argument?

7 CHAIRMAN BABCOCK: Not that I know of.
8 Certainly not the U.S. Supreme Court. I mean, there's
9 probably some lower court decisions that accept that, but
10 nothing in Texas, but that's the argument. That's the
11 argument.

12 So, Frank, how do you think we ought to do
13 it? Should we vote on neutral first or should we vote
14 on --

15 MR. GILSTRAP: Why don't we just vote for,
16 against, or neutral?

17 CHAIRMAN BABCOCK: I know, but --

18 MR. ORSINGER: We could have a three-way
19 vote and see how -- I mean, I think we're going to be
20 pretty close to split, but we could say everyone in favor
21 of tilting or having a presumption in favor of it,
22 everyone who wants to be neutral, and everyone who wants
23 to presume against it.

24 CHAIRMAN BABCOCK: Okay. Presumption in
25 favor of electronic coverage, presumption against

1 electronic coverage, or neutral.

2 MR. TIPPS: He's just preparing the ballot.

3 CHAIRMAN BABCOCK: I was preparing the
4 ballot, and those are the three issues in which you can --
5 and what order do we want to vote it, Frank?

6 MR. GILSTRAP: Let's just ask -- let's have
7 a straw vote on those three and see how they come down.

8 HONORABLE HARVEY BROWN: You only get one
9 vote.

10 MR. ORSINGER: Yeah, one vote.

11 CHAIRMAN BABCOCK: What?

12 MR. ORSINGER: Let's just right now decide
13 who's in which camp if you only get to vote once.

14 CHAIRMAN BABCOCK: Who's in which camp?
15 Okay. All right. Who is in the camp of presumption in
16 favor of electronic media coverage?

17 Who is a presumption against electronic
18 media coverage?

19 Who wants to be neutral? The vote is one
20 person in favor of the presumption in favor of electronic
21 media coverage, one vote. Presumption against electronic
22 media coverage, four votes; and for neutral, 18, the Chair
23 not voting.

24 MR. MEADOWS: Now, Chip, my vote on the
25 presumption against actually is a view that in order to

1 have cameras in the courtroom certain conditions ought to
2 be met, but I mean, I'm assuming that's a presumption
3 against, but that's the way I see it. In order to have it
4 happen certain conditions need to be met and satisfied.

5 CHAIRMAN BABCOCK: You've got to jump over
6 some hurdle.

7 MR. ORSINGER: That's not right.

8 HONORABLE SARAH DUNCAN: If that's the
9 presumption against, that's what I'm in favor of.

10 MR. ORSINGER: No, I don't agree that that's
11 the vote, because in either for or against or neutral
12 there are going to be criteria that probably have to be
13 met. The question is if the requisite showing is not
14 made, what happens? If the requisite showing is not made,
15 do you have cameras; or if the requisite showing is not
16 made, do you not have cameras?

17 MR. GILSTRAP: Here's how you word it. If
18 you have a presumption against coverage, you say, "The
19 court shall deny electronic media coverage unless..."; and
20 then if you have the one for, "The court shall allow
21 electronic media coverage unless..."

22 HONORABLE HARVEY BROWN: And neutral is
23 deciding whether --

24 CHAIRMAN BABCOCK: Well, in fact, the way
25 the -- whether right or wrong, the way the Dallas County

1 rules are written, I think it says in the policy, it says,
2 "The policy of the district courts of Dallas County are in
3 favor of providing the most access to electronic media
4 coverage consistent with," you know, "integrity, decorum,"
5 you know, "truth, justice and the American way," something
6 like that. That's the way it's written.

7 Yeah, Stephen.

8 MR. YELENOSKY: Well, I don't think I agree
9 with Richard, because I think it's at the extreme, and in
10 the middle, you know, I could flip a coin. I mean, I do
11 think that there are times when you will have to show why
12 not coverage and, in fact, the presumption will become
13 that you should have coverage because the public interest
14 in seeing it would be so great; and the other extreme,
15 let's say a child in a family law case, you would have to
16 meet a really high burden to show why. So I think it
17 depends, and in the middle, you know, everybody is fine
18 with it but nobody particularly wants to watch it on TV, I
19 could flip a coin.

20 CHAIRMAN BABCOCK: Well, in terms of writing
21 a rule, and that's what we're trying to give the
22 subcommittee direction to, it seems to me that what we
23 voted on fairly decisively was that the rule is going to
24 be neutral. That doesn't mean that we're not going to say
25 that, you know, here's some things you've got to look at;

1 but we're going to put things, as Richard said, on both
2 sides of the equation. We're not going to bias the rule
3 into, you know, into harming participants in a bad way
4 without looking at the other side of it.

5 MR. YELENOSKY: But he was saying that there
6 has to be a default; and if somebody doesn't meet some
7 burden that the judge is obligated to go with that
8 default. Isn't that right?

9 CHAIRMAN BABCOCK: Well, that's what he's
10 saying, but I think we just voted --

11 MR. ORSINGER: Well, now, wait a minute. I
12 mean, the first off is that someone has to request it
13 because you can't bring a camera into the courtroom
14 without telling the judge and getting the judge's
15 permission.

16 MR. GILSTRAP: Not yet.

17 MR. ORSINGER: So right off the bat there's
18 got to be a request. Under all of these things everybody
19 is given the right to object, but if there is no
20 objection, you don't win coverage by default. You know,
21 it's still up to the judge to decide whether to permit it.
22 So in a sense the burden of bringing the issue to the
23 judge is with the media, but then the question is, well,
24 if I make an objection, if I'm a litigant and I don't want
25 litigation, is it my duty to put on evidence of why I'm

1 harmed or do I just claim I'm harmed or say "I disagree"
2 and now the media has to come in and prove that they don't
3 harm me?

4 It's different. Who's going to call the
5 first witness and what are the witnesses going to say in
6 order for the trial judge to make the decision? I don't
7 see how you can have an adversarial system without
8 somebody having the burden of going forward and someone
9 having the burden of persuasion.

10 MR. MEADOWS: But in terms of your request,
11 in the example that Judge Peeples gave us where a news man
12 and his cameraman show up at the courtroom and there's no
13 lawyer present for them or either party, is that a
14 request?

15 HONORABLE DAVID PEEPLES: Yes.

16 MR. ORSINGER: It's not a request in
17 compliance with the local rules because that has to be in
18 writing, but that happens to be working in Bexar County in
19 David Peeples' court.

20 HONORABLE DAVID PEEPLES: That's the way it
21 happens everywhere in Bexar County. They just show up and
22 say, "Can we come in and show it?"

23 MR. MEADOWS: And so my thought is the
24 answer is "no" unless there are certain conditions that
25 are satisfied. I guess they get articulated some -- they

1 have to be articulated.

2 CHAIRMAN BABCOCK: Sometimes it's as
3 informal as, "Hey, this is interesting. Can we come in?"
4 Judge says "sure."

5 HONORABLE DAVID PEEPLES: Is there any other
6 instance in our law where there is not a burden of proof
7 or a default rule or a presumption, no tie breaker?

8 MR. LOW: Well, in 702 there's not. You
9 don't have to, you know, prove -- I mean, it says he can
10 testify and it doesn't say you will deny his testimony or
11 admit it, I don't believe, the way we've redrawn 702.

12 MR. ORSINGER: I disagree with Buddy. If
13 you make a 702 objection to the reliability of the expert,
14 the burden is on the proponent of the expert to convince
15 the judge that the standards for admissibility have been
16 met.

17 CHAIRMAN BABCOCK: The judge is still the
18 gatekeeper.

19 MR. ORSINGER: But what my point is, is that
20 there is a default position. The default position is once
21 an objection is made, at least under Rule 702, the witness
22 is out unless the proponent proves that they're in. Now,
23 on something like hearsay or something else like that, I'm
24 not as clear on who has the burden on that ruling.

25 But in this situation somebody has got to be

1 responsible for calling the witness. I mean, what if
2 there are no witness? Then who wins? I mean, do we not
3 say who wins, in which event the rule is truly neutral? I
4 don't even know how you would write that rule.

5 PROFESSOR ALBRIGHT: Why do you have to have
6 witnesses? Because, I mean, I don't think we want to get
7 in a situation that you have to bring a passel of
8 witnesses to this thing. The judge knows what the case is
9 about. The judge should have an idea about whether it's
10 appropriate or not to have the -- have the -- I can't even
11 think with that thing going.

12 MR. MEADOWS: It's got a snare drum on it.

13 MR. CHAPMAN: I was looking for the drum
14 major.

15 MR. ORSINGER: Maybe Bill can get one of his
16 sons to tell him how to set that.

17 PROFESSOR ALBRIGHT: So I don't think we
18 want to set up some burden of proof that makes you have a
19 hearing and swearing in witnesses. Then you're really
20 creating a mess.

21 CHAIRMAN BABCOCK: Yeah, Judge Brown.
22 Harvey.

23 HONORABLE HARVEY BROWN: I agree with that.
24 You know, frankly, when these come in I've never seen
25 anybody bring a witness. They only argue it, and a judge

1 has some sense -- especially if it's right before trial or
2 right before an injunction hearing, he has some sense of
3 the dynamics of the case, and that's what you're ruling
4 on, frankly, is kind of the arguments and your common
5 sense. Not having a burden of proof is another way of
6 giving the judge more discretion it seems to me, and it
7 creates a kind of an informality of a procedure, which I
8 think is probably a good thing here.

9 CHAIRMAN BABCOCK: I don't think I've ever
10 brought a witness to one of these things, and I think if I
11 did the judge would say, "What are you doing?"

12 MR. ORSINGER: Well, then don't anticipate
13 any appellate review if you don't have a record and no
14 witnesses.

15 MR. GILSTRAP: Well, Chip, hasn't that been
16 done, though, in some of the big, high profile cases? I
17 mean, it seems like I've read where they've actually had
18 -- the judge has heard evidence and everything.

19 CHAIRMAN BABCOCK: Yeah, I think there have
20 been some. I think O. J. there was a lengthy proceeding
21 about how they were going to do -- and then we see how
22 well that worked, but I don't -- I certainly never have
23 had personally, and if there has been one in Texas, I
24 mean, I just don't know about it. I'm not saying there
25 hasn't been.

1 Justice Duncan.

2 HONORABLE SARAH DUNCAN: Well, I was just
3 thinking about -- and, I'm sorry, I can't remember which
4 of you guys over there said it, but --

5 MR. EDWARDS: All of us.

6 CHAIRMAN BABCOCK: You're treating them like
7 they're criminals.

8 HONORABLE SARAH DUNCAN: It may have been
9 Carl, but I don't want to pin it on Carl without
10 remembering more clearly, and at my age I don't remember
11 anything very clearly, but someone said something about,
12 you know, what am I going to do if my witness, my only
13 witness, my star witness, says, "If it's going to be
14 televised, count me out. I'm going to be on vacation in
15 the Bahamas." And that guts that party's case, only it's
16 sort of like a discovery proceeding mandamus where the
17 party is no longer able to put on their defense. It just
18 seems to me there ought to be some recourse and that you
19 shouldn't have to be subject to the decision of one judge
20 in one court in this state. There ought to be review for
21 that.

22 CHAIRMAN BABCOCK: Well, but there is
23 recourse. If a witness doesn't want to testify, the judge
24 says, "Yeah, you are going to testify."

25 MR. ORSINGER: If they are subject to the

1 subpoena power.

2 CHAIRMAN BABCOCK: Yeah. That's right.

3 HONORABLE SARAH DUNCAN: Oh, that's a big
4 "if."

5 MR. EDWARDS: Well, you have the same
6 problem -- you have the same problem if you've got a
7 witness, your star witness, and all of the sudden a
8 business deal goes sour between you and him or her and he
9 says, "Okay, unless you do this in the deal I'm out." I
10 mean, you've got the same problem any time a witness says,
11 "I'm out."

12 HONORABLE SARAH DUNCAN: But that's not a
13 state-promulgated rule.

14 MR. EDWARDS: Well, I know, but the problem
15 is the same.

16 HONORABLE SARAH DUNCAN: I know, but the
17 cause of the problem makes a big difference. We're
18 sitting here talking about a statewide rule that's going
19 to affect people's cases.

20 MR. EDWARDS: Well, how many times has that
21 ever happened? We're talking about the last hair on the
22 elephant's tail and trying to wag the elephant.

23 MR. LOW: You know, Chip, we're talking
24 about 702. I draw a distinction between burden of proof
25 and burden of persuasion, and I consider this a burden of

1 persuasion, not proving by a preponderance of the
2 evidence, and that's why I said that if you put in the
3 rule "the burden of proof is on" I think that means
4 preponderance of the evidence, and there is many articles
5 written about the distinction, and there might not be --
6 that might be like the hair on the elephant. Might not be
7 much.

8 CHAIRMAN BABCOCK: This elephant is picking
9 up a lot of hair on his tail.

10 HONORABLE DAVID PEEPLES: But didn't we vote
11 not to -- didn't we vote not to even have a burden of
12 persuasion, Buddy?

13 MR. LOW: No. No. I'm not saying -- I'm
14 saying 702 says that if I'm going to bring a witness I
15 have to prove he's qualified by these, these, and others,
16 but it doesn't say I have the burden of proof. It says,
17 "It must be proved," and I consider that my burden to
18 persuade rather than prove by a preponderance of the
19 evidence is what -- all I'm saying, but some rules do put
20 -- and we've got a new evidence rule that's been
21 recommended by the State Bar that changes and says the
22 burden of proof, but we'll argue about that another day.

23 CHAIRMAN BABCOCK: Let's have a few more
24 comments and then if it's all right with everybody, we'll
25 let Richard go back to the drawing board and tinker with

1 this a little bit based on the votes and on the
2 discussion, and we need to finish up FED today. We don't
3 want to leave that for Saturday morning because there will
4 be nobody here, but a couple more comments.

5 Frank.

6 MR. GILSTRAP: I think where we are is we
7 voted that the rule should be neutral.

8 CHAIRMAN BABCOCK: Right.

9 MR. GILSTRAP: Then someone said, "Well,
10 wait a minute, what does that mean in terms of a mandamus
11 proceeding? Somebody has got to have the burden of
12 proof." We've now concluded that probably there isn't
13 going to be a mandamus proceeding. So what this rule
14 really is, as Richard likes to say, it's hoity-toity. I
15 mean, it's the way that things should be, but nobody is
16 going to get reviewed. So I think Richard's instructions
17 are to go back and draw a rule that doesn't tilt either
18 way.

19 CHAIRMAN BABCOCK: That's my sense of what
20 the vote was. Stephen.

21 MR. YELENOSKY: It also occurs to me that
22 maybe at the extremes the burden will come from the basis
23 of the claim. I mean, obviously even this rule says that
24 you need to consider the constitutional rights of the
25 litigants, for instance, and whether they could be

1 affected, right? I mean, it seems unless coverage would
2 clearly deprive a participant of a right protected by the
3 Constitution or other laws, and I guess a litigant could
4 say that the coverage was violating their constitutional
5 rights and then obviously if they can meet that threshold
6 of establishing an impairment of constitutional rights, we
7 all know how to litigate that.

8 And on the other end, if the media is being
9 held out of the courtroom and is arguing -- and wants to
10 make the law that apparently has never yet been held by
11 the U.S. Supreme Court that there's some First Amendment
12 right to electronic coverage, that could be litigated, and
13 obviously there are burdens of proof inherent in that. Is
14 that right?

15 CHAIRMAN BABCOCK: Frank, do you have a
16 thought about that?

17 MR. GILSTRAP: I don't know.

18 MR. ORSINGER: Well, that could be litigated
19 as a declaratory judgment perhaps. You're talking about
20 the media trying to insert a constitutional right if we
21 adopted a rule that they felt like systematically unfairly
22 and unconstitutionally excluded them from the legal
23 process. I would presume they could challenge that.

24 MR. YELENOSKY: Well, no, I don't mean the
25 rule itself. I mean in a particular instance the judge

1 says, "No, I'm not going to let you in the courtroom and
2 I've considered these factors"; and people are saying,
3 "Well, how does that get reviewed based on the rule?"
4 Well, even if the rule doesn't say what the standard of
5 review is under the rule, does the fact that there are
6 probably going to be constitutional applications if it's
7 going up on mandamus take care of that? I don't know.
8 I'm thinking outloud.

9 CHAIRMAN BABCOCK: Carl, then Elaine.

10 MR. HAMILTON: Unless I missed something, I
11 don't think, Frank, that the committee decided there
12 wouldn't be a mandamus review.

13 MR. GILSTRAP: No, no. I think that
14 question was raised. I think that's where we wind up. I
15 don't -- I can't -- you know, in most cases we're not
16 going to have mandamus and probably in almost all of them.
17 Certainly in Judge Peeples' kinds of cases. There's not
18 enough time. So it's only going to happen in --

19 MR. HAMILTON: In this rule there will be
20 enough time.

21 MR. GILSTRAP: Because you've got to make a
22 written application?

23 MR. HAMILTON: You've got to make an
24 application. There's time for objection.

25 MR. GILSTRAP: So the media is not going to

1 get into Judge Peeples' court.

2 MR. HAMILTON: Not under this rule.

3 MR. GILSTRAP: Okay. That's fine.

4 CHAIRMAN BABCOCK: But this rule is -- can't
5 you do it under this rule a day before, a day before the
6 hearing, and that's the same time period you have in I
7 think every county that's got local rules; and the
8 practice is that, you know, they will come up to the judge
9 and say, "Hey, we want to come in" and the judge will say
10 "Yeah." And, yeah, is that a violation of the rule?
11 Yeah, but you can waive time limits, you know.

12 HONORABLE HARVEY BROWN: I guess that raises
13 the question should we leave some out for somebody to make
14 an oral request if they do come down to the courtroom and
15 ask? This right now says it has to be in writing.

16 CHAIRMAN BABCOCK: So does the local rules,
17 but yeah, there probably ought to be something to
18 accommodate that, unless we think it's a bad idea.

19 Okay. Elaine, you had something.

20 PROFESSOR CARLSON: I don't know if this has
21 been covered, but, Richard, could you, or Chip can
22 enlighten, what do other states do? Do other state have
23 statutes, guidelines, and are they much different from
24 this?

25 CHAIRMAN BABCOCK: There's a wide variety of

1 practice in the states, but a lot of them have rules.

2 PROFESSOR CARLSON: Rules of Procedure?

3 CHAIRMAN BABCOCK: Yeah. Yeah.

4 MR. DUGGINS: Don't Florida and California
5 presume that every trial can be televised gavel-to-gavel?

6 CHAIRMAN BABCOCK: Yeah. Florida was
7 probably the pioneer in that, and their rules are the ones
8 that got challenged in the Chandler case.

9 Okay. Why don't we throw this back into
10 Richard's ample lap and see if you can come back in
11 November and we'll finish this off?

12 MR. ORSINGER: Okay. Finish it off? That's
13 certainly optimistic.

14 CHAIRMAN BABCOCK: We'll finish this puppy
15 off, and now for the remainder of the day, don't anybody
16 leave. Lock the doors, Bailiff. We are going to talk --
17 we are going to finish off FED.

18 For the record, I had an e-mail from George
19 Bramblett, who is a lawyer at Haynes & Boone, who is
20 passing along comments from Lincoln Property, which is a
21 major property owner in the state, concerned about
22 permitting discovery in eviction cases, something that we
23 have, of course -- we, of course, talked about more than a
24 little bit, and Mr. Bramblett's admonition, quoting Sam
25 Houston, is that we "do the right thing and risk the

1 consequences." So that's our standard -- our standard
2 here.

3 So, Judge Lawrence and Elaine. Judge
4 Lawrence.

5 HONORABLE TOM LAWRENCE: In June we voted
6 final votes on most of the rules in -- they're over there.
7 I've got two versions, a clean version and a marked up
8 draft version. I'm going to be talking from the marked up
9 draft version. We talked about a number of rules. We've
10 taken final votes on most of these rules. There were some
11 things remaining in June that we took final votes -- we've
12 taken final votes on everything.

13 There were a number of rules discussed in
14 June. There were actually nine rules that were changed,
15 and I'll propose to go through those in order, and then in
16 addition, at the end of that there are a couple of other
17 issues that I discovered in finishing these up that we
18 need to talk about briefly.

19 Also, the committee directed us to draft a
20 complaint form that will be attached to the rules in some
21 manner, and that sample is in here, and then also I
22 discovered -- well, it occurred to me that we would have
23 to have a separate complaint form for an emergency
24 eviction, so I've also drafted that. One thing -- oh, and
25 the purpose of having this on the docket is even though we

1 voted on this, it was kind of we voted and the
2 subcommittee was directed to do this. Well, we've done
3 it, and I've gone through the transcript, which, by the
4 way, was four inches high, from the last meeting. I've
5 gone through the transcript and made all the changes that
6 I believe were in the transcript, and I think we need to
7 go over it one more time just to make sure that we've got
8 everything, and I do have the transcript here today if
9 anybody wants to look through it.

10 The first one would be starting on page two,
11 which is Rule 190. Discovery control plan required, what
12 we did, we had talked about no discovery control plans in
13 evictions, but we decided that in eviction appeals in
14 county court that there would be discovery and a discovery
15 control plan, so what we did was add "in justice court" so
16 after "accepted eviction cases" we added "in justice
17 court," and that was what we did on Rule 190.

18 And I'm just going to go through these
19 unless somebody wants to stop me for some reason. Rule
20 739 has to do with the discovery issue, and we ended up
21 deleting the last sentence of Rule 739, which was that any
22 documents filed -- any documents that were required to be
23 filed by the plaintiff will be on file at the JP court,
24 and we deleted that and added a sentence to the -- or
25 added to the last sentence in the first paragraph the

1 sentence, "The justice shall attach to each citation
2 copies of all documents and records which the plaintiff is
3 required to file with the complaint by Rule 741," and that
4 was our vote, is that we decided that certain things --
5 we'll talk about these in 741 certain things are going to
6 be attached and filed with the complaint and which would
7 then be served with the citation. We also at the end of
8 739, there is a direction to put a warning in Spanish, and
9 Stephen Yelenosky sent me the translation, which I presume
10 is right because I wouldn't have a clue.

11 MR. YELENOSKY: I do think there were
12 some errors, and I don't know if they were on my end or in
13 the transmission or whatever, but I assume people want an
14 accurate translation and will allow us to correct those.

15 HONORABLE TOM LAWRENCE: Well, if you can
16 let me know what's wrong. I thought I tried to take it
17 from the -- I did have one question. There was a
18 statement in English which I've got in there and the
19 Spanish translation seems to be a lot longer. Is that
20 verbatim? Just wondering.

21 MR. YELENOSKY: Well, I'm not -- I haven't
22 looked at this in a while, but Spanish usually is longer
23 than English, but --

24 HONORABLE TOM LAWRENCE: Okay.

25 MR. YELENOSKY: -- what it usually isn't is

1 three sentences where you have two.

2 HONORABLE TOM LAWRENCE: Okay. That's what
3 we've got here.

4 MR. YELENOSKY: But what that is, is
5 basically the last two sentences literally say, "There are
6 some deadlines that have urgency. You should have those
7 translated immediately." That's divided into two
8 sentences, but there are some misspellings, and I don't
9 know if we're going to be capable of doing accents, but
10 there are some accents missing.

11 HONORABLE TOM LAWRENCE: I don't know how to
12 do that. Maybe the Supreme Court can do that. I can't do
13 it on mine.

14 MR. GRIESEL: We can find you some accent
15 marks.

16 HONORABLE TOM LAWRENCE: Well, if you'll let
17 me know, you know --

18 MR. YELENOSKY: Sure.

19 HONORABLE TOM LAWRENCE: -- in the next few
20 days or next week sometime exactly what needs to be
21 corrected.

22 Rule 740, now, this is a possession bond
23 rule, and what we did on this is that we basically
24 shortened the time schedule on possession bonds so that
25 instead of the normal 6 to 10 days it's going to be 4 to 7

1 for the trial setting, after request of jury trial within
2 two days of the setting, and you only have three days to
3 appeal. So we didn't allow an immediate possession. We
4 simply shortened the time schedule. That's what the
5 committee voted to do, and the changes in here are to do
6 that.

7 Now, there are two other things that we need
8 to talk about on 740. One is the issue of a possession
9 bond; and to understand that, the rule, the genesis of the
10 rule, was that you could in some circumstances actually
11 put somebody out on the street without them ever having
12 had their day in court on a possession bond. It was sort
13 of a summary proceeding in some respects for a default and
14 there wouldn't be any effective appeal, and so in order to
15 guard against that having been done in bad faith or
16 improperly there would have to be a bond filed by the
17 plaintiff that would protect the defendant if it was done
18 improperly.

19 Well, we had a discussion at one of our
20 meetings, and I think it was January, but it could have
21 been May, that if all we're going to do is shorten the
22 deadlines we don't necessarily need a possession bond, but
23 we never voted on that, and we voted on Rule 740 last
24 time, but we never really took up this issue of possession
25 bond, and I guess I just want to throw out something just

1 for consideration. Do we want to change it or leave it
2 like it is?

3 If all we're doing is accelerating the
4 timetable a little bit and the defendant has the right to
5 a trial, even a jury trial, and the defendant has the
6 right to appeal, is there really any need any longer for a
7 possession bond in that situation? So I have drafted an
8 alternative to that to not have a possession bond. The
9 rule would otherwise be as we voted on last time and twice
10 before in different parts, but I would delete the
11 possession bond. I just, frankly, don't know why we need
12 a possession bond given the way we've amended the rule.

13 MR. YELENOSKY: Judge Lawrence, can I just
14 ask on -- there's one of these versions "sworn petition"
15 is stricken.

16 HONORABLE TOM LAWRENCE: Hold that. That's
17 my next one.

18 MR. YELENOSKY: Okay.

19 HONORABLE TOM LAWRENCE: I don't know if
20 there's discussion, but if a motion would be in order, I
21 would move that we take out this possession bond
22 requirement in view of the way that we have amended the
23 rule.

24 CHAIRMAN BABCOCK: Anybody second that?

25 MR. GILSTRAP: Second.

1 MR. HAMILTON: Let me ask a question.

2 CHAIRMAN BABCOCK: All right. Discussion?

3 MR. HAMILTON: How does the amendment,
4 though, ensure that the court is going to give you a quick
5 trial which you might otherwise get, at least you might
6 otherwise get possession on the possession bond.

7 HONORABLE TOM LAWRENCE: Well, we've changed
8 the time limits to four to seven days.

9 MR. HAMILTON: But then if the defendant
10 comes in and asks for a jury trial on the fifth day then I
11 assume that setting goes out the window.

12 HONORABLE TOM LAWRENCE: Well, the setting
13 would go out the window. Actually, the defendant would
14 have to request in a shorter period of time, but the
15 language if they ask for a jury trial is that we hold it
16 as soon as practicable, because a jury trial obviously is
17 going to take longer to set.

18 MR. HAMILTON: But if that all happens, so
19 you get the trial set 10 or 15 or 20 days, does the
20 possession bond get the plaintiff possession any quicker?

21 HONORABLE TOM LAWRENCE: No. So there's
22 no -- the possession bond really doesn't do anything for
23 the defendant, and I just -- I don't think it -- you know,
24 the way the rule has been changed it just doesn't do
25 anything. The defendant would remain in possession.

1 CHAIRMAN BABCOCK: Stephen.

2 MR. YELENOSKY: The reason I asked about the
3 sworn part is because one of the things that, as you know,
4 Judge Lawrence, Fred Fuchs pointed out and was concerned
5 about removing the possession bond was if the complaint
6 were not sworn because then there really wasn't a downside
7 to a landlord in every instance going for the emergency
8 proceeding, and it does place an additional burden on the
9 defendant because they have to act more quickly. So there
10 has to be something, and Fred said, you know, possession
11 bond at least makes the landlord do something, doesn't
12 really cost him anything, but if you're not going to have
13 the possession bond, at least it needs to be sworn for
14 them to be able to take this expedited track.

15 HONORABLE TOM LAWRENCE: Okay. Well, let me
16 tell you what happened on the sworn petition. When I
17 looked at 740 it occurred to me yesterday, as a matter of
18 fact, that although we had a complaint form for a regular
19 eviction that we're going to have to have another
20 complaint form for an emergency eviction because it was
21 different, so I started drafting that. Now, on the
22 complaint itself we voted last time to delete the word
23 "sworn" from the complaint.

24 So on a normal eviction complaint it only
25 has to be signed by the plaintiff, the plaintiff's agent,

1 or the plaintiff's attorney. It does not have to be sworn
2 to. I transferred that vote to this possession bond
3 complaint inadvertently, and I went back and I looked at
4 the transcript, and clearly in the transcript it said
5 "sworn complaint." So that was a mistake when I lined
6 through that.

7 Frankly, I guess my personal feeling is that
8 it shouldn't be sworn to in that. I think it's going to
9 be confusing, but that's my opinion. I mean, the vote was
10 that it be sworn, and I just -- I messed up.

11 MR. YELENOSKY: Okay. So that would go back
12 in here and then on the sample complaint you have you
13 would have to add in --

14 HONORABLE TOM LAWRENCE: That's right.

15 MR. YELENOSKY: -- a jurat.

16 HONORABLE TOM LAWRENCE: That's right.

17 Unless we want to keep the emergency eviction and the
18 possession bond requirement just to have that signed and
19 not sworn to so it is the same as the regular eviction
20 complaint.

21 MR. YELENOSKY: Okay. So is the motion on
22 the table right now to eliminate the possession bond, but
23 there's a concession that at least right now without
24 another motion "sworn petition" is back in there?

25 HONORABLE TOM LAWRENCE: Yeah.

1 MR. YELENOSKY: Okay.

2 HONORABLE TOM LAWRENCE: Exactly.

3 CHAIRMAN BABCOCK: Okay. Larry.

4 MR. NIEMANN: On the issue of sworn, we
5 don't mind it being sworn as landlords, but there's a
6 distinction between swearing on personal knowledge and
7 swearing on information and belief, I guess, because many
8 times when the eviction lawsuit is filed because of a
9 knifing or a threat of murder, or what have you, the
10 person who is signing the petition cannot swear on
11 personal knowledge. So if we're going to have a swearing
12 then it seems to me it needs to be on information and
13 belief, personal knowledge or information and belief.
14 That would be okay.

15 CHAIRMAN BABCOCK: Sarah.

16 HONORABLE SARAH DUNCAN: Well, as I remember
17 the discussion about this whole expedited proceeding, I
18 remember I had some serious concerns, and other people did
19 as well, about people being put to trial very quickly on a
20 matter that is -- I mean, it's their home. It's where
21 they live. I don't have any problem with requiring the
22 landlord to put up a possession bond if they want an
23 expedited proceeding.

24 CHAIRMAN BABCOCK: Okay. Who else? You
25 want to restate your motion?

1 HONORABLE TOM LAWRENCE: The motion is that
2 we delete the requirement for a possession bond in Rule
3 740. There would be an accelerated time schedule for
4 trial, but the possession bond, the requirement of a
5 landlord to post a possession bond, would be out, the
6 justification being that the defendant is not going to be
7 summarily put out on the street without any recourse.
8 He's going to have the opportunity for a trial and for an
9 appeal, so I just -- I don't know. I don't think we need
10 a possession bond.

11 CHAIRMAN BABCOCK: Any further discussion?
12 Okay. All in favor of the motion raise your hand.

13 All those opposed? Passes by a vote of 9 to
14 7, Chair not voting.

15 HONORABLE TOM LAWRENCE: The next thing we
16 need to take up is the "sworn." What we have voted on,
17 which is reflected incorrectly because I should not have
18 lined through "sworn petition," we voted to take out
19 "petition put in complaint," so I made -- "petition"
20 should be out, but the issue is whether or not we want to
21 have -- in a possession bond want to have it sworn.

22 MR. EDWARDS: Not in a possession bond
23 because --

24 HONORABLE TOM LAWRENCE: 740. Yeah. 740,
25 subpart (a).

1 MR. EDWARDS: We're not talking about a
2 possession bond. We just ruled that out, I thought.

3 HONORABLE TOM LAWRENCE: Well, we are taking
4 out possession bond. You still have to have a complaint.

5 MR. EDWARDS: Well, you said "possession
6 bond."

7 CHAIRMAN BABCOCK: Yeah. You said
8 "possession bond."

9 HONORABLE TOM LAWRENCE: I'm sorry. Excuse
10 me. I mean on the complaint itself, for the complaint is
11 it going to be sworn to or is it just going to be like the
12 regular eviction complaint, signed?

13 CHAIRMAN BABCOCK: What's your
14 recommendation?

15 HONORABLE TOM LAWRENCE: Well, I mean, if
16 the landlords don't have a problem with -- what are you
17 saying, Larry, that you could live with --

18 MR. NIEMANN: "Personal knowledge or
19 information and belief." You could put both of them, and
20 I think whatever you decide on ought to be put in the form
21 itself.

22 MR. CHAPMAN: Can you explain again why
23 personal knowledge is a burden?

24 MR. NIEMANN: Yes, because if you are the
25 on-site manager and you have the responsibility of filing

1 the petition, you are not always a witness to the knifing
2 or threaten to murder or stabbing or illegal criminal
3 conduct that is causing the safety and the security risk.
4 You have to rely on your maintenance person who witnessed
5 it or a tenant who witnessed it, something like that.

6 MR. CHAPMAN: Well, can't their affidavit be
7 attached?

8 MR. NIEMANN: Just like when you file --
9 when you file a civil lawsuit you --

10 MR. CHAPMAN: Can't their affidavit be
11 attached?

12 MR. NIEMANN: I suppose it's possible.

13 MR. CHAPMAN: Well, we're putting people on
14 the street. I mean, this is an emergency.

15 MR. NIEMANN: But realize, when you get to
16 court you're going to have to have your witnesses there
17 swearing under oath as to the facts.

18 HONORABLE TOM LAWRENCE: You're still going
19 to have a trial, Carlyle.

20 MR. NIEMANN: It's not going to be
21 unilateral ex parte. You're going to have to have a
22 trial. And if you were filing the exact same factual
23 lawsuit without the emergency, you have already voted that
24 you didn't have to have affidavits, you didn't have to
25 have swearing or bond for possession. So to be consistent

1 it seems to me that you wouldn't have to go further than
2 swearing on personal knowledge and belief in this
3 accelerated eviction procedure.

4 MR. CHAPMAN: Well, the reason why it's
5 accelerated is because there's something there that is
6 going on that puts the landlord at risk.

7 MR. NIEMANN: No. There is something there
8 that's going on to put people or property in present
9 danger.

10 HONORABLE TOM LAWRENCE: Could be landlord,
11 tenants.

12 MR. NIEMANN: Could be tenants, occupants,
13 employees.

14 MR. CHAPMAN: I think there ought to be some
15 showing of that.

16 MR. NIEMANN: There will be at the trial.

17 MR. CHAPMAN: No, to get an expedited
18 hearing.

19 MR. NIEMANN: About swearing it on personal
20 knowledge or information and belief.

21 MR. CHAPMAN: I think I made my position.

22 CHAIRMAN BABCOCK: Well, certainly it's okay
23 if they swear on personal knowledge. You can't do any
24 better than that, right?

25 HONORABLE TOM LAWRENCE: Right.

1 CHAIRMAN BABCOCK: So all we're talking
2 about is information and belief, whether the manager -- I
3 mean, we answer interrogatories all the time where
4 corporations talk to people and then answer
5 interrogatories.

6 HONORABLE TOM LAWRENCE: What we're saying
7 is that the manager that comes in to file this is not
8 going to have seen what happened, but the police officer
9 that investigated is going to -- would have told her or
10 other tenants would have told her, and what he's
11 suggesting is that they be able to file the petition based
12 on that information and belief from people that did
13 personally see it.

14 CHAIRMAN BABCOCK: What are we doing now?
15 What is this a change from/to?

16 HONORABLE TOM LAWRENCE: I think now it's
17 sworn.

18 CHAIRMAN BABCOCK: It is sworn now, Larry?

19 MR. NIEMANN: Yes.

20 CHAIRMAN BABCOCK: So what are people doing?
21 I mean, are they --

22 HONORABLE TOM LAWRENCE: Well, I think
23 everything is -- well, they're swearing to it, you know.

24 MR. NIEMANN: But objections are being
25 raised by tenant attorneys that this is illegal because

1 you don't have personal knowledge; therefore, defective
2 petition; therefore, it gets kicked out. And one other
3 point I would like to quickly make is --

4 MR. CHAPMAN: Well, why shouldn't that
5 standard be met, that they have personal knowledge if
6 they're going to swear to it?

7 HONORABLE TOM LAWRENCE: Well, it's just to
8 file it. It's not to prove anything at trial. You've
9 still got to have your witnesses at trial with personal
10 knowledge. This is just to get it filed.

11 MR. CHAPMAN: But you've --

12 HONORABLE SARAH DUNCAN: But it's an
13 expedited proceeding.

14 MR. CHAPMAN: But you're expediting the
15 proceedings.

16 HONORABLE TOM LAWRENCE: Slightly expedited,
17 yes.

18 CHAIRMAN BABCOCK: Frank.

19 MR. GILSTRAP: Okay. I think, you know, in
20 theory it sounds great that we could get somebody to swear
21 to it on personal knowledge, but, you know, the cop is not
22 going to sign the eviction complaint. I mean, he's just
23 not going to do it. He'll come and testify, but he's not
24 going to sign an eviction complaint. You know, and I
25 guess you could have a thing where he could get a separate

1 affidavit and attach it or something like that, but just
2 in the real world you're not going to get people who can
3 swear on personal knowledge in this situation to sign the
4 complaint.

5 MR. CHAPMAN: I just don't think it's so
6 onerous to have a separate affidavit if it's someone who
7 has personal knowledge and that's what it ought to be
8 based on.

9 HONORABLE SARAH DUNCAN: There may be a
10 hearsay objection to an affidavit that says, "I was told
11 by a policeperson, named X, Y and Z, that Joe tenant
12 threatened Betty tenant with her life."

13 PROFESSOR CARLSON: At trial.

14 HONORABLE SARAH DUNCAN: That may be a
15 hearsay objection --

16 PROFESSOR CARLSON: At trial.

17 HONORABLE SARAH DUNCAN: -- but I can
18 certainly put in an affidavit that I have personal
19 knowledge that the policeperson told me this, and
20 shouldn't we require that?

21 HONORABLE HARVEY BROWN: Well, that's a --
22 pardon me.

23 CHAIRMAN BABCOCK: No, go ahead.

24 HONORABLE HARVEY BROWN: I don't think
25 that's going to be the way that some of the affidavits are

1 written. I assume they're more summary than that. "I
2 have personal knowledge of the facts stated herein."

3 HONORABLE SARAH DUNCAN: Well, maybe they
4 need to figure out how to write an affidavit so that it is
5 personal knowledge, but it does convey the urgency of the
6 situation.

7 HONORABLE HARVEY BROWN: Or you could say
8 information and belief is sufficient if you provide the
9 basis for the belief, which is basically the same thing.

10 CHAIRMAN BABCOCK: Larry.

11 MR. NIEMANN: This is certainly a factor of
12 weighing entities, but in these situations people's lives
13 are at risk, people's safety and security is at risk. You
14 have murderers and molesters and knifings and gun
15 threatenings and for us to say, "Well, you've got to have
16 an affidavit of these facts attached because you can't
17 personally swear you saw it," that is going to force
18 people into the hands of an attorney to prepare an
19 affidavit that's going to slow down the process, and it
20 just may cost somebody some real grief and some personal
21 injury and harm if we slow down the process in these kinds
22 of very serious cases.

23 I know Judge Prindle, who was here last
24 time, was extremely perturbed about all the cases of
25 serious personal harm that was threatened in the cases

1 before him, that he would be stymied by a delay in getting
2 the case filed and tried and the eviction accomplished.

3 CHAIRMAN BABCOCK: Larry, Justice Duncan,
4 however, says that would it not be sufficient for the
5 petition to say "sworn to and attested by somebody who
6 says, 'This is based on my personal knowledge,'" and the
7 petition says, "And, furthermore, police officer Joe Smith
8 told me that he responded to a call and arrested so-and-so
9 because they were suspected of knifing, you know, the guy
10 who was lying on the ground in a pool of blood," and that
11 that -- and that's okay and --

12 HONORABLE TOM LAWRENCE: In essence that's
13 information and belief, and you're just stating where
14 you're getting that from, right?

15 HONORABLE SARAH DUNCAN: As I understand the
16 distinction between personal knowledge and information and
17 belief, information and belief could be "I was walking
18 down the street and I overheard somebody say to somebody
19 else that Joe tenant is going to try to murder Betty
20 tenant tonight," and it could be an absolutely, totally
21 uncredible source, and that would be good enough on
22 information and belief to get the expedited proceeding.

23 CHAIRMAN BABCOCK: It could be more vague
24 than that, actually.

25 HONORABLE SARAH DUNCAN: Yeah.

1 CHAIRMAN BABCOCK: It could be -- I would
2 think somebody on information and belief could say, you
3 know, "I know this guy and, you know, I've observed him,
4 and he looks a little sketchy to me, and so, you know, I'm
5 informed and believe that there could be violence in this
6 apartment, and" -- but the problem -- the only problem I
7 see is if judges don't agree with what you say, which I
8 think is a correct statement of the law, that it may be
9 hearsay, but it's sufficient to satisfy the requirements
10 of a petition.

11 I mean, if there's an affidavit that was
12 submitted as part of a summary judgment record or for some
13 other purpose, it could be objected to on the basis of
14 hearsay, but it's enough to get you through the hurdle of
15 having an adequate petition. Now, if all the judges agree
16 with that, then there's no reason for information and
17 belief; and as Carlyle says, there's some danger in
18 information and belief. But if -- Larry, if you guys are
19 running into trouble where you frame it that way, you
20 frame it the way that the property manager says, you know,
21 "Officer Smith told me that, you know, this guy stabbed
22 his roommate 16 times, and that's why we're moving for
23 this expedited treatment," that that's being struck as
24 insufficient then maybe we have a problem we need to fix.

25 MR. NIEMANN: That's exactly what's

1 happening in San Antonio right now. This problem -- I'm
2 sorry. In Austin.

3 MR. CHAPMAN: Well, that's another issue,
4 though, because, you see, from my perspective you are
5 expediting the proceeding because it's based on something
6 that has occurred. If, in fact, it's wrong then we owe
7 the safeguard at least to the person who is having this
8 expedited proceeding initiated against them to have
9 someone say on a sworn basis that those are the facts. I
10 mean, there's another side to this, and it seems to me
11 that that's the least amount of protection that we can
12 provide them.

13 CHAIRMAN BABCOCK: Let me suggest this. Is
14 it the sense of the committee that our understanding of
15 what a sworn petition would be, it would be sufficient if
16 a property manager or the person that's swearing to the
17 petition says that, you know, "I have a basis to present
18 these facts, and it is because Joe Blow told me that, and
19 that is sufficient for the purposes of the petition, even
20 though it might not be for some other reasons"? Is it the
21 sense of our committee -- Larry, maybe you could use this
22 record to persuade some judges of that -- and based on
23 that assumption we are going to suggest that this rule
24 retain, as it is now, just a sworn petition.

25 HONORABLE TOM LAWRENCE: Sworn complaint?

1 CHAIRMAN BABCOCK: Sworn complaint.

2 MR. NIEMANN: And I assume from that if the
3 manager swears, "I swear that the police officer told me
4 that this man was arrested for heroine possession and
5 selling heroine to the kids in the complex" --

6 CHAIRMAN BABCOCK: Yeah.

7 MR. NIEMANN: -- that would be sufficient
8 for a sworn -- I guess a jurat by the manager.

9 CHAIRMAN BABCOCK: For satisfying the
10 requirements of the rule.

11 MR. NIEMANN: Okay.

12 CHAIRMAN BABCOCK: I would think so. Is it
13 the sense of the committee that that would be sufficient?

14 MR. HAMILTON: We're saying that the sworn
15 statement of hearsay satisfies the rule?

16 CHAIRMAN BABCOCK: In this context.

17 MR. HAMILTON: Yeah.

18 CHAIRMAN BABCOCK: In this context.

19 MR. HAMILTON: And it's just for the purpose
20 of getting the expedited trial.

21 CHAIRMAN BABCOCK: Right. That's all it is,
22 for no other purpose.

23 HONORABLE HARVEY BROWN: Would it satisfy
24 the requirements for TRO?

25 MR. CHAPMAN: It should not.

1 HONORABLE HARVEY BROWN: What's the
2 difference in the rule?

3 MR. EDWARDS: Well, all this is really
4 doing, what we're talking about doing is simply
5 identifying the basis for information and belief.

6 HONORABLE HARVEY BROWN: Right. That's
7 really all we're doing, so we ought to call it that. It's
8 really not personal knowledge.

9 MR. EDWARDS: That's okay. That's okay
10 because if somebody did something wrong that's identified
11 in there, it's either the manager, because whoever it was
12 didn't tell them or whoever told the manager was lying.
13 As long as it's identified.

14 CHAIRMAN BABCOCK: And all we're doing is
15 getting an expedited hearing, a slightly expedited hearing
16 by this; and a judge, I guess, if there's a challenge, if
17 there's a challenge to the petition and it doesn't say,
18 for example, "It was the police officer who told me this,"
19 but it was some, you know, 13 year-old wino that I just
20 happened to bump into and I can't remember what his name
21 was" then maybe you don't get the expedited treatment.

22 MR. NIEMANN: Could we put something to this
23 effect in the comments? It would be hard for me to take
24 this transcript and convince a JP what the law is.

25 HONORABLE TOM LAWRENCE: Well, if the rule

1 is going to say "sworn complaint," I don't know how we
2 can -- what would you propose we put in the comment then?

3 CHAIRMAN BABCOCK: Just what we're saying
4 here. Let me phrase it a different way. How many people
5 are in favor -- because if you are, raise your hand. How
6 many people are in favor of adding the phrase "upon
7 information and belief"? Anybody who is in favor of that
8 raise your hand.

9 How many are opposed to adding "information
10 and belief"? Well, that passes by 13 to 3. I misread the
11 sense of the committee. So I think probably that's what
12 we ought to do.

13 MR. MEADOWS: Chip, if I may, if I followed
14 the discussion, it seems that what we were talking about
15 as an add-on is that if the information on which the
16 belief is held is stated.

17 HONORABLE HARVEY BROWN: Right.

18 MR. CHAPMAN: And the possessor of firsthand
19 information identified. That's the difference between
20 saying "information and belief," because if you never
21 identify who gives the statement there's this expedited
22 proceeding on the basis of rank hearsay without any
23 information about who it is. At least with an affidavit
24 that identifies someone who has firsthand information the
25 tenant understands who is saying it and is hopefully

1 prepared to deal with that. I mean, we're talking about
2 folks who don't have much of a way to defend themselves at
3 any rate. This stacks the deck pretty heavily. I think
4 it's -- I think it's a bad decision.

5 CHAIRMAN BABCOCK: Judge Lawrence -- hang on
6 foreign a second, Elaine. Judge Lawrence, how much more
7 do we have to do on this?

8 HONORABLE TOM LAWRENCE: Not much. 10
9 minutes.

10 CHAIRMAN BABCOCK: 10 minutes? Okay. Let's
11 spend 10 minutes doing something.

12 HONORABLE TOM LAWRENCE: Okay. So what are
13 we doing on 740 then and "sworn complaint"?

14 CHAIRMAN BABCOCK: "Information and belief"
15 is what the committee voted.

16 HONORABLE TOM LAWRENCE: All right. So
17 we're going to say, "If the plaintiff alleges in the
18 complaint facts based on information and belief, that the
19 defendant" --

20 PROFESSOR CARLSON: "Sworn complaint."

21 MR. TIPPS: No, it has to be sworn.

22 HONORABLE TOM LAWRENCE: Oh, so we're going
23 to leave "sworn."

24 CHAIRMAN BABCOCK: Yeah. Absolutely.

25 MR. HAMILTON: "Personal knowledge or

1 information and belief."

2 CHAIRMAN BABCOCK: Right. "Personal
3 knowledge or information and belief."

4 HONORABLE TOM LAWRENCE: Just "information
5 and belief"?

6 CHAIRMAN BABCOCK: "Personal knowledge or
7 information and belief."

8 HONORABLE TOM LAWRENCE: Okay. "Based on
9 personal knowledge or information and belief that the
10 defendant," correct?

11 PROFESSOR CARLSON: Right.

12 CHAIRMAN BABCOCK: Yes.

13 HONORABLE TOM LAWRENCE: All right. Good.

14 741, this is the requisites for the
15 complaint. In the first paragraph we have struck the
16 requirement that it be on 8 1/2 by 11 paper. In (d) we
17 have deleted (1), (2), (3), (4), and (5) and basically
18 taken everything in (1), (2), (3), (4), and (5) and added
19 a sentence -- two sentences to (d) that says that "In any
20 suit involving a written lease agreement, the plaintiff
21 must attach a copy of the lease agreement to the
22 complaint. If the suit is for nonpayment of rent and/or
23 contractual late charges, the plaintiff must attach to the
24 complaint a copy of written payment records for the period
25 in dispute."

1 So those are the only things that would have
2 to be attached to the complaint and, thus, to the
3 citation, would be the lease agreement and the written
4 payment, written rental payment records, for the period in
5 dispute.

6 PROFESSOR CARLSON: Was that the vote?

7 HONORABLE TOM LAWRENCE: Yes. That was the
8 vote, and that's been amended accordingly. And then in
9 (f) --

10 MR. HAMILTON: What if it's just an oral
11 agreement? Then you still don't have to --

12 HONORABLE TOM LAWRENCE: Well, there
13 wouldn't be anything to attach. That's just oral.

14 MR. HAMILTON: But you don't have to allege
15 any of those other things?

16 HONORABLE TOM LAWRENCE: Don't have to
17 allege them?

18 MR. HAMILTON: That are in (1) through (5).

19 HONORABLE TOM LAWRENCE: Well, we've deleted
20 (1) through (5). That's correct. All that's out.

21 Now, there is a requirement in (c) that the
22 notice to vacate be attached, but that was not -- you
23 know, we didn't do anything to that. So that's the other
24 thing that could have to be attached.

25 Now, in (f) we talked about amending the

1 complaint. We added a sentence that said that last -- or
2 the next to the last sentence and the last sentence that
3 says, "No default judgment shall be entered on an amended
4 complaint unless proof of service of the amended complaint
5 on defendant is established. If the complaint is amended,
6 the defendant may request a continuance for a period not
7 to exceed seven days."

8 743 was re discovery. All that we did is we
9 took in the last paragraph where it says, "Generally
10 discovery is not appropriate in eviction actions;
11 however," we have moved that sentence to a comment so that
12 the rule itself will read, "The justice has discretion to
13 allow reasonable discovery of a limited scope which does
14 not unduly delay the trial."

15 Rule 748, we took out one word. (b)(4) we
16 took out the word "Federal." The way it was written it
17 would be "Rent subsidized by the Federal government," and
18 now it just says "government."

19 Rule 749. Now, this is not Rule 749a. This
20 is Rule 749 subparagraph (a), and that deals with a motion
21 for new trial, and the rule will read, "In eviction cases
22 in which there has been an evidentiary trial on the merits
23 no motion for new trial may be filed. A justice may set
24 aside a default judgment or a dismissal for want of
25 prosecution as justice requires any time before the

1 expiration of five days from the date the judgment was
2 signed. Any dismissal or default set aside under this
3 rule must be tried within seven days from the date the
4 prior judgment was set aside."

5 754, we took out the provision -- in fact,
6 it's actually out of here. It was a provision that said
7 that generally discovery is not appropriate in an appeal
8 of an eviction case, and we took that out so that
9 discovery in forcible evictions will be handled just as
10 any other county court case would with full and
11 appropriate discovery of any county court case.

12 And then in 755 we changed -- we took out
13 the last sentence and basically modified the first
14 sentence, and the first sentence reads, "If after the
15 expiration of 10 days from the date of the judgment the
16 defendant has not filed a supersedeas bond then the writ
17 of possession or execution or both shall be issued by the
18 clerk of the county court according to the judgment
19 rendered, and the same shall be executed by the sheriff or
20 constable."

21 And those were the changes, and then there
22 is one other thing I need to mention, and Larry Niemann
23 brought this to my attention, and it deals with Rule 5;
24 and, frankly, I've got to tell you in almost 20 years of
25 doing this I've never had this occur; but Larry tells me

1 he got a fax from a lawyer in San Antonio that says there
2 is a JP that is not issuing writs of possession after the
3 five days on the anticipation that there could have been
4 an appeal mailed in, which under Rule 5, the second
5 paragraph, says that if it's mailed then you have to
6 extend the timetables.

7 And so what I would propose -- and I've
8 never heard of anybody applying this to an eviction, but I
9 can't tell you that there's anything that says it could
10 not apply, so -- and we went into Rule 4 and exempted out
11 a number of the rules, so I would say that if this is a
12 potential problem that we just simply add a sentence to
13 Rule 5 that says that this rule does not apply in eviction
14 cases because there are 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11,
15 12 rules that Rule 5 could affect in the eviction. So I
16 would suggest just adding that sentence, and that's it,
17 and that's under 10 minutes, let the record reflect.
18 Except for the petition.

19 CHAIRMAN BABCOCK: Nicely done. What about
20 adding that sentence? Everybody okay with that?

21 MR. EDWARDS: Is there any difference
22 whether that applies to both the original JP case and the
23 appeal?

24 HONORABLE TOM LAWRENCE: Well, I don't think
25 it's going to -- yeah, it could have some effect. Yeah.

1 Rule 754 it could affect in the appeal.

2 MR. EDWARDS: Do you intend it to go to
3 both?

4 HONORABLE TOM LAWRENCE: Yes. That's why I
5 would just say "does not apply in eviction cases."

6 CHAIRMAN BABCOCK: Okay. Everybody okay
7 with that? Nicely done, the two of you.

8 HONORABLE TOM LAWRENCE: One more -- two
9 more things. I'm sorry.

10 CHAIRMAN BABCOCK: Wait a minute.

11 MR. GRIESEL: Start his clock.

12 HONORABLE TOM LAWRENCE: There is a
13 complaint form for the eviction, and there is also an
14 emergency eviction complaint. Basically Larry Niemann had
15 made the original draft of this a couple months ago, and I
16 took Larry Niemann's draft and modified it. We have to
17 make sure that it complies with 741 and also that all of
18 the information that we need for the judgment in Rule 748
19 is in there. Elaine has looked at it. Larry Niemann has
20 looked at it. He and I have discussed it. There are a
21 couple of minor changes that he suggested on the original
22 complaint.

23 The complaint for emergency eviction
24 obviously is going to have to be changed now for the sworn
25 complaint, so we'll make that amendment, and there are a

1 couple of minor changes moving some things around on that.
2 I guess I'd like to just have a vote that this looks
3 substantially okay. The plan is that this will be one of
4 those 226a approvals that the Supreme Court would simply
5 adopt as an order and promulgate, and what I'd like to do
6 is maybe Chris Griesel and I and whoever else would try to
7 refine this form a little bit, but I think it's
8 substantially -- is that all right?

9 PROFESSOR CARLSON: Yeah.

10 CHAIRMAN BABCOCK: When you said "anybody
11 else" Elaine was moving her chair out of the line of fire.
12 Okay. Yeah, Carl.

13 MR. HAMILTON: I have a problem with that
14 Rule 5 thing. The first part of Rule 5 may contain stuff
15 that the JP wants to use, so to exempt all of Rule 5 might
16 be a mistake.

17 HONORABLE TOM LAWRENCE: Well, I was going
18 to put it in a separate paragraph.

19 MR. HAMILTON: Well, but you said you're
20 just going to say the second paragraph of Rule 5.

21 HONORABLE TOM LAWRENCE: Okay. Well, let
22 me --

23 MR. GRIESEL: Why don't we make it an (a)
24 and (b), break the paragraphs down into (a) and (b)?

25 MR. HAMILTON: Or you could put it under the

1 provision in the JP rules that says "The provisions of the
2 second paragraph of Rule 5 don't apply to this rule."

3 HONORABLE TOM LAWRENCE: Well, if you'll
4 give me the permission to work that language out, I think
5 we can make that fit. We'll get with Chris on that.

6 MR. HAMILTON: Yeah.

7 HONORABLE TOM LAWRENCE: That's a good
8 point, though. But does anybody see anything on either
9 one of the complaint forms that looks troublesome or any
10 problems or questions?

11 MR. YELENOSKY: I just don't have -- and I
12 obviously could have downloaded it, but I didn't see over
13 there the regular complaint, just the emergency one.

14 HONORABLE TOM LAWRENCE: I think it's over
15 there. Debra brought copies. It should be over there.

16 MR. YELENOSKY: Okay. Maybe they ran out by
17 the time I got over there or maybe I didn't see it.

18 And, Judge Lawrence, has Fred given you any
19 input on the form itself?

20 HONORABLE TOM LAWRENCE: No.

21 Yeah. I mean, I guess I'm not asking for a
22 final approval of this. This is something that is not
23 going to be -- I mean, it's something that the Court is
24 going to adopt as an order, and I don't want to hold the
25 rules up, and if you-all would just let -- maybe we could

1 send it to Chris and he can get some -- talk to Fred and
2 to Larry and whoever else and try to refine the form.

3 MR. YELENOSKY: That's fine with me.

4 HONORABLE TOM LAWRENCE: I mean, there are a
5 lot of different ways to draft a complaint form like this,
6 so I think it's important we get everything in there.

7 CHAIRMAN BABCOCK: We will remand this to
8 you and Chris.

9 MR. GILSTRAP: What about the rules? Have
10 we closed on the rules themselves?

11 CHAIRMAN BABCOCK: Unless anybody has got
12 something to say, we have closed on the rules. Is that
13 all right? Anybody got anything to say?

14 We've closed on these rules.

15 HONORABLE HARVEY BROWN: Good job. Thank
16 you.

17 MR. LOW: I'm not going be here tomorrow.
18 I've got to go to my niece's wedding, and Paul had asked
19 that this ex parte physician/patient thing be deferred,
20 and since we're not going to reach it today I would ask
21 that it be deferred, too, because I have got a good bit of
22 information on the new Federal rules. I think a lot of
23 people that are opposing this rule aren't aware of the
24 Federal rules and the fact that they can be fined up to --
25 how much, Bill?

1 MR. EDWARDS: I don't know for sure. A lot
2 of money.

3 MR. LOW: \$10,000 or something like that. I
4 think we need to take a look at that.

5 CHAIRMAN BABCOCK: As the vice-chair of this
6 committee and as the person who is going to lead us in
7 that discussion, consider it deferred.

8 MR. LOW: Thank you.

9 CHAIRMAN BABCOCK: We are in recess till
10 9:00 o'clock tomorrow. 8:30 is a beastly hour.

11 MR. TIPPS: Chip, what is your expectation
12 concerning which of these we'll reach tomorrow?

13 CHAIRMAN BABCOCK: I was planning on taking
14 it in order, which would be motion for new trial,
15 deferring rule -- and then going Rule 21, amendment to
16 include discovery. That's Orsinger. Deferring Item 2.6
17 and then going to judge peer review, rules of judicial
18 administration and Rule 202, executions, 76a, and cy pres.

19 The only thing that I might move up in the
20 agenda if we're running out of time is cy pres because
21 Justice Hankinson wants us very much to move forward on
22 that and conclude --

23 HONORABLE TOM LAWRENCE: I move we table the
24 executions until November.

25 CHAIRMAN BABCOCK: All right. Executions

1 can be tabled, but Justice Hankinson wants cy pres
2 expedited, so we're going to try to do that, so we will
3 definitely talk about that tomorrow.

4 PROFESSOR CARLSON: Did you say 9:00
5 o'clock?

6 CHAIRMAN BABCOCK: I said 9:00 o'clock.

7 (Meeting recessed for the day at 4:57 p.m.,
8 and the meeting continued the following day,
9 September 21, 2002, as reflected in the next
10 volume.)

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CERTIFICATION OF THE MEETING OF
THE SUPREME COURT ADVISORY COMMITTEE

* * * * *

I, D'LOIS L. JONES, Certified Shorthand
Reporter, State of Texas, hereby certify that I reported
the above meeting of the Supreme Court Advisory Committee
on the 20th day of September, 2002, Afternoon Session, and
the same was thereafter reduced to computer transcription
by me.

I further certify that the costs for my
services in the matter are \$ 1303.00.

Charged to: Jackson Walker, L.L.P.

Given under my hand and seal of office on
this the 4th day of October, 2002.

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