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MEETING OF THE SUPREME COURT ADVISORY COMMITTEE

November 8, 2002

(MORNING 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 8th
day of November, 2002, between the hours of 9:04 a.m. and
12:43 p.m., at the Texas Association of Broadcasters, 502
East 11th Street, Suite 200, Austin, Texas 78701.

INDEX OF VOTES

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

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1 and some of his colleagues will be there, and so it will
2 be a good way to kind of finish this whole process off,
3 although we will probably have to do some stuff tomorrow
4 morning.

5 So, having said all of that, Justice Hecht,
6 I guess we're ready for your report.

7 JUSTICE HECHT: We continue to get a few
8 comments on the published TRAP rules, and the comment
9 period closes the end of this month, and we'll look at
10 those in December, and I don't anticipate any problems
11 with at least the civil rules taking effect on January the
12 1st as we planned. There is a -- some greater problem
13 with the criminal rules, and the Court of Criminal Appeals
14 is looking at that, and so we'll see if they can meet that
15 deadline, but I think the civil rules will be ready no
16 matter what.

17 Joe Jamail's committee has -- is continuing
18 to work on a number of issues, and I think they will have
19 a report ready by the first meeting of the next year.
20 There has been some turnover at our Court. Let me see if
21 I can remember who's there now. We still have Phillips as
22 Chief; and Justice Schneider joined us I think right
23 before the last -- this committee's last meeting in
24 September; and now he is there by benefit of election and
25 is hard at work and already gaining seniority as the

1 people have sent us Justice Smith, Stephen Smith, from
2 Austin; and he will take office when the votes are
3 officially canvassed, which we think will be on November
4 20th. So he has already been up to the Court; and I think
5 he's ready to hit the ground running.

6 And then Justice Wainwright, Dale
7 Wainwright, who is a district judge presently in Houston,
8 will be our new -- newest judge who will come January 1 to
9 replace Justice Hankinson, whose term will have expired.
10 So we have three new people on our Court, and I think if
11 the committee wants to sneak something through this would
12 be the time to do it. And we have all sorts of things
13 changing over at the Legislature, so we'll see whether
14 that impacts our work in any way.

15 I can say and will say again this evening
16 that this Court is always very grateful to all of you for
17 your hard work and participation in this process that
18 literally could not keep up with the needed changes in the
19 procedural rules without your input and participation.
20 The Court is convinced that you're the best and the
21 brightest Texas could offer as far as this process is
22 concerned, and I extend to you their regards and their
23 respect. I am particularly grateful to Chip for the job
24 he has done as Chair of this group, and the good work will
25 be reflected in better practices in our civil justice

1 system in Texas, so we are, as always, grateful to all of
2 you.

3 CHAIRMAN BABCOCK: Thank you. Great. The
4 first agenda item was to be the offer of judgment rule.
5 However, that is kind of a ball that's stuck between what
6 progress we had made and what the Jamail committee is
7 doing; and the Jamail committee was not able to meet and
8 comment, so we're going to pass that this morning and go
9 right into the second agenda item, which is Rule 18c
10 coverage, electronic media; and I think it was yesterday
11 maybe or maybe day before that Richard came up with a new
12 annotated draft for our consideration; and I know his
13 subcommittee has been working hard at this and has looked
14 at all of the presently existing local rules.

15 We've had two lengthy discussions about this
16 before, the first one in March of 2002, the last one in
17 September of 2002. We made certain decisions, and Richard
18 is going to tell us about what we did and what he and his
19 subcommittee proposes that we do.

20 MR. ORSINGER: Okay. Chip, basically at our
21 prior meeting, our last meeting, we had a few votes that
22 established that the parties would not by consent be able
23 to force any particular arrangement on the trial court and
24 that these guidelines would be neutral in terms of not
25 either tilting for or against media coverage in the

1 courtroom. We were working against the background of a
2 set of proposed rules that issued from a process initiated
3 by the Legislature, and it's what we have looked at and
4 discussed in the past together with some examination of
5 the rules that exist in the large metropolitan areas.

6 Some of the large metropolitan areas tilt in
7 favor of coverage, some tilt against. Some have very,
8 very little guidance, some much more guidance. But this
9 draft is based on the product of the committee that worked
10 as a result of appointments through the Office of Court
11 Administration, and it represents edits to the fundamental
12 draft that are consistent with our prior discussion, but
13 footnotes explaining where there are deviations or where
14 there were choices that were made to be made.

15 In the last meeting we actually got into
16 some of the wording, but after about 10 minutes the
17 suggestion was made that we just come back with a renewed
18 draft and then be open to comments about the specific
19 wording. So my suggestion is we start at the beginning
20 and just go through it. Would that be all right, Chip?

21 CHAIRMAN BABCOCK: Yeah, that would be
22 great, Richard. You take us through. I should have
23 introduced Tom Leatherbury, who is sitting over there next
24 to Tommy and Joan, and Tom is a former member of the
25 Supreme Court Advisory Committee a number of years ago and

1 was on the subcommittee that came up with the original 18c
2 that created the right of the counties themselves to
3 create these rules subject to Supreme Court review. Tom
4 represents a number of media interests. He's a partner of
5 Vinson & Elkins in Dallas, and he asked if he could be
6 here today and, of course, we welcome everybody,
7 particularly smart guys like Tom. So thanks for being
8 here.

9 MR. LEATHERBURY: Chip, the -- Chip?

10 CHAIRMAN BABCOCK: Yeah?

11 MR. LEATHERBURY: The real smart person,
12 Lisa Bolen is here with me. I wanted to introduce her.

13 CHAIRMAN BABCOCK: Hi, Lisa. Okay, Richard.

14 MR. ORSINGER: All right. To begin with,
15 the preamble is something that didn't exist in the draft
16 that you-all are familiar with because the -- I guess, if
17 you will, the OCA committee draft started out with the
18 policy, but the policy statement or the approach to
19 statement of policy was entirely different from the policy
20 statements that were contained in many of the local rules.
21 So the policy statement of that OCA committee draft has
22 been moved into a preamble, and that may not be
23 satisfactory, but, you know, there's a preamble to the
24 United States Constitution, and there's some precedent for
25 the idea.

1 If anyone likes the preamble as an aside, we
2 can leave it there and edit it, or we can fuse it into the
3 policy. But, at any rate, the idea of the preamble is to
4 tell everybody what the purpose or intent of having
5 guidelines are; and the policy, as distinguished from the
6 preamble, is more like how you should interpret the
7 guidelines. In other words, what is the philosophical
8 perspective behind the guidelines that the reason we're
9 issuing them, and so I wish you would compare these two
10 paragraphs together and decide whether we want to fuse
11 them or whether we want to keep this first thing first.

12 The sentence starts out that "The guidelines
13 are intended to recognize the public interest in court
14 proceedings." That was not in the OCA committee draft.
15 "Public interest" was not mentioned. Of all of the things
16 that were discussed in their policy, which is now this
17 preamble, the interest of the public was not even
18 mentioned, and so we decided in the last meeting that we
19 should mention it because that's one of the factors to
20 consider. So it's to recognize the public interest in
21 court proceedings and standardize the use of electronic
22 media coverage in civil proceedings in Texas courts.

23 Now, standardization is probably one of the
24 things that drives these rules, but we also -- there's the
25 media pooling, which is really what's so important that we

1 have so we don't have the disorganization in the
2 courtroom, but we have made a decision as a committee that
3 we would like to consider standardized rules across the
4 state, but in standardizing the rules we have to get
5 involved in the policy decisions about how much latitude
6 do we want the courts and the parties and the participants
7 to have in controlling media in the courtroom.

8 So the word "civil" is in here to clarify
9 that although the OCA draft does not take a real clear
10 position on that, the local rules de facto apply to civil
11 proceedings, and the criminal proceedings appear to be
12 operating under standards issued by the U.S. Supreme
13 Court, maybe to some extent by the Court of Criminal
14 Appeals, that the only limit on the Court's discretion to
15 allow media into a criminal trial is the constitutional
16 rights of the defendant. It does not appear that any of
17 the locales have wanted to take on greater degree of
18 control or regulation of that decision in criminal cases,
19 and so they have basically put their policies and their
20 procedures together to apply in civil proceedings, and I
21 am making this plain in this preamble that this is for
22 civil proceedings only and does not attempt to get into
23 the balancing that goes on in the criminal arena.

24 And I think probably if there's anyone who
25 thinks that's an important thing, we ought to stop and

1 discuss it, because if this is right then we're going to
2 confine the rest of our discussions to civil proceedings
3 and not criminal proceedings.

4 CHAIRMAN BABCOCK: Yeah. I don't think we
5 have any jurisdiction to --

6 MR. ORSINGER: All right. That's fine.
7 Now, other factors that we have in mind in issuing
8 guidelines is to preserve the independence of the
9 judiciary; and, frankly, I don't understand what that
10 means, but that seems to be in a lot of these, so I
11 carried it forward. I'm not sure why cameras affect the
12 independence of the judiciary, but certainly maintaining
13 dignity, decorum, and impartiality of court proceedings is
14 a factor that we have greatly focused on, and protecting
15 the rights of participants.

16 The previous -- the other underlying rules
17 that we have looked at talks about litigants, but
18 litigants are only some of the participants. You also
19 have the witnesses and you also have the jurors and the
20 potential jurors, and so the word "participants" is used
21 instead of "litigants" so that we all know that we are
22 considering the impact on individuals who are forced to
23 come in under subpoena or otherwise or people who come in
24 and are going through the voir dire process and being
25 asked embarrassing questions and may not even be selected

1 on the jury.

2 And then this last sentence here, which
3 comes out of the Bexar County rules only, I put in here so
4 we could decide whether to exclude it. "Nothing in these
5 rules is intended to restrict any pre-existing right of
6 the news media to appear at and to record on judicial
7 proceedings in accordance with law." Now, you don't
8 necessarily need to say that, but perhaps it's wise to say
9 that because there is a growing area of constitutionality
10 of the media's right and the public's right to have media
11 involved in the court process, and perhaps it is smart for
12 us to say at some point that we are not attempting here to
13 restrict rights that may exist under law. We are just
14 attempting to mesh this together in a way that allows us
15 to go about doing our business in an efficient and a fair
16 way.

17 Now, that sentence that's headed -- that's
18 ended by Footnote 4 is only in one set of local rules, so
19 there may be a feeling that it shouldn't be included. I
20 included it out of an abundance of caution to be sure that
21 we were aware of it, and if we want to take it out, that's
22 fine. If we want to leave it in, it makes sense to me to
23 leave it in. I don't know whether we want to stop on any
24 of these or just keep going until someone --

25 CHAIRMAN BABCOCK: No, I think -- Richard, I

1 think what we ought to do is let you go through the
2 preamble and the policy and then let's discuss all of
3 that.

4 MR. ORSINGER: All right. Now then, the
5 policy is somewhat overlapping of the preamble, and if we
6 decide to mesh them together we need to decide what
7 concepts we want to carry forward in the combined. But
8 the policy is more an embodiment of what the local rules
9 say the policy is. The preamble is more an embodiment of
10 what this OCA committee felt like the underpinnings of it
11 was.

12 But the policy is to allow electronic media
13 coverage to facilitate the free flow of information to the
14 public concerning the judicial system, to foster better
15 public understanding about the administration of justice,
16 and to encourage continuing legal education and
17 professionalism by lawyers consistent with the just, fair,
18 equitable, and impartial adjudication of the rights of
19 litigants. Now, you can tell from looking at the
20 footnotes that some of these principles are taken from
21 different local rules, but to me they represent different
22 factors, and so even though they were not in three or four
23 rules, some of them were only in one set of rules, to the
24 extent they didn't duplicate I went ahead and listed them
25 here and we can decide whether we think it's appropriate

1 to include them or not.

2 The last sentence, "These rules are to be
3 construed to provide the greatest access possible while at
4 the same time maintaining the dignity, decorum, and
5 impartiality of the court proceeding"; and that came out
6 of the Dallas, Harris, and Travis County rules. Now, that
7 policy statement sounds like an encouragement to having
8 media in the courtroom, and I think it is an
9 encouragement, and I think that even the Travis County
10 rules which tilt away from it have that encouragement of
11 considering the media in the courtroom, but when you get
12 down to the working part of the guidelines it just says
13 that the court may if all of these considerations are
14 present. So, in my view, while some people might look at
15 this and say this is an encouragement to media, I don't --
16 when you actually get down to the workings of the
17 guidelines I feel like these are neutral. They don't tilt
18 toward or against, but just give factors for the court to
19 consider. So that's --

20 CHAIRMAN BABCOCK: Okay. Well, let's go
21 through these, the preamble and the policy. Is the first
22 question whether we need both or whether we should merge
23 both or --

24 PROFESSOR DORSANEO: Merge.

25 MR. HAMILTON: Merge.

1 CHAIRMAN BABCOCK: Okay. Merge them?

2 MR. TIPPS: Merge.

3 CHAIRMAN BABCOCK: Anybody an antimerger
4 person?

5 Frank.

6 MR. GILSTRAP: Well, Chip, I think, you
7 know, merger is -- I mean, I don't think there's much
8 difference between a preamble and a policy. What jumps
9 out at me is exactly what Richard said. This is a tilt
10 for media coverage. This is -- I mean, you may say,
11 "Well, the rules really don't say that," but they do.
12 They say it in the first two paragraphs. They say there's
13 a public interest in court proceedings, we're going to
14 standardize using media coverage and allow electronic
15 media coverage in court proceedings. I mean, that's a
16 heavy -- and we're going to give the greatest access
17 possible. Now, that's a heavy tilt for coverage.

18 This business, "Nothing in the rules is
19 intended to recognize any pre-existing right of the news
20 media to appear," well, there's a growing body of -- some
21 judges in California may be saying there's a right to
22 bring cameras in the courtroom, but I haven't seen a Texas
23 court say it, and these rules will be interpreted
24 consistent with the Constitution. I mean, if the
25 committee wants to have a heavy bias, a heavy tilt in

1 favor, let's adopt this, but let's make no mistake about
2 what we're doing.

3 CHAIRMAN BABCOCK: Okay.

4 MR. ORSINGER: I would say in response to
5 that that in the Travis County rules, which I consider to
6 be a tilt away from coverage, has policy -- I mean, this
7 is very -- not identical but very, very closely similar to
8 that, and yet I think the Travis County judges feel like
9 their guidelines tilt away from coverage. I agree that
10 the policy statement is an encouragement to coverage, but
11 if you go down into the guidelines you see that the
12 factors the court considers and the decisions they make
13 are stated on a neutral basis, so apparently at least in
14 Travis County where they, I say, tilt away from coverage,
15 they don't consider this public policy to be in favor of
16 coverage. If they did, I don't see how they could have a
17 set of guidelines that worked against coverage and have
18 this principle.

19 So I agree that kind of facially it looks
20 like we want people to have this freedom of information
21 and all that other stuff. When you get down to the
22 operations of the rule you have factors and then you have
23 kind of a neutral position on whether the court should or
24 shouldn't allow it.

25 MR. GILSTRAP: Why should the rule -- rule's

1 operation be at variance with the policy stated in the
2 rules?

3 CHAIRMAN BABCOCK: Sarah has got the answer
4 to that question.

5 HONORABLE SARAH DUNCAN: Well, I think it's
6 the answer of all committee work. Somebody got that
7 sentence in, and it's a hook, and -- but I agree with what
8 Frank has said, and if the rules are going to be facially
9 neutral then so should the preamble or the policy or
10 whatever we want to call it. If the rules are going to
11 tilt towards media coverage then that needs to be
12 reflected in the preamble or the policy. If they are
13 going to tilt away from coverage, that should be reflected
14 in the -- but, I mean, that's the problem with most
15 committee work. I mean, it's like writing an opinion, and
16 you've got nine judges writing an opinion, and somebody
17 starts out with a draft, and then you start getting input
18 from the other judges who are participating in that
19 decision, and it ends up going a little bit for everybody,
20 and I would hope that this committee in writing this type
21 of rule would have a consistent philosophy throughout the
22 preamble, policy, and the rules.

23 CHAIRMAN BABCOCK: Not to rain on your
24 parade, Richard, but this sentence, "These rules are to be
25 construed to provide the greatest access possible," that

1 sentence was actually written in the library of my house
2 by Judge Bill Rhea and myself, and -- when we were doing
3 the Dallas rules, and our thought at the time was to tilt
4 the rules in favor of access.

5 MR. ORSINGER: But my point to that, Chip,
6 is it's just like in the Legislature. Nobody really is
7 responsible. No one individual can claim that their
8 statute is theirs. This has been adopted --

9 CHAIRMAN BABCOCK: I wasn't claiming that.

10 MR. ORSINGER: -- in Dallas, Harris, and
11 Travis Counties, all of which have different attitudes
12 about when the media ought to be in and how they ought to
13 get in and what the procedure or framework ought to be,
14 and so all I will tell you is that this has made it into
15 even counties that believe their rules tilt away. So, you
16 know, fine. It started out with you. You're a First
17 Amendment lawyer. You represent a bunch of the media.
18 Maybe you intended a slant, but then tell me how did it
19 end up in the Travis County rules where the judges appear
20 to want to have a presumption against coverage?

21 CHAIRMAN BABCOCK: Skip.

22 PROFESSOR DORSANEO: Macros.

23 CHAIRMAN BABCOCK: Which is probably the
24 answer. Skip.

25 MR. WATSON: I take it the answer to the

1 question, though, of why do we want neutral rules but a
2 clearly tilted preamble is because everybody else has done
3 it, and that ain't good enough.

4 HONORABLE SARAH DUNCAN: Didn't your mother
5 ever tell you, Richard, that if Johnny sticks his head in
6 the fire? Don't you remember that from childhood?

7 MR. ORSINGER: No, I don't, but I'll talk to
8 you about that later. Okay. So I guess nobody is
9 defending the inclusion of that sentence that ends with
10 Footnote 7, even though it seems to be working well in
11 three of the four most populous areas in Texas, right?

12 MR. WATSON: Yeah. I think we got the
13 point, but have you gotten the point?

14 MR. ORSINGER: Well, I've only heard from
15 three of you, and there's about 30 of us in here.

16 CHAIRMAN BABCOCK: Sarah.

17 HONORABLE SARAH DUNCAN: It's not just that
18 sentence. The -- under the policy, the way it was written
19 initially, "These guidelines are intended to standardize
20 the use of electronic media coverage in the courts of
21 Texas to preserve the independence of the judiciary,
22 maintain the dignity, decorum, and impartiality of court
23 proceedings, and to protect the rights of litigants,"
24 that's now become the policy of these rules is to allow
25 electronic media coverage; and then only, you know, three

1 lines later do you get the "consistent with just, fair,
2 equitable, and impartial adjudication of the rights of
3 litigants." So I don't think it's -- my objection is not
4 just that sentence. It's pervasive throughout the way the
5 preamble and the policy have been rewritten.

6 HONORABLE SAM MEDINA: Sarah, do you like
7 the way it was before?

8 MR. ORSINGER: Well, now, when we say "the
9 way it was before" I want you to understand that the,
10 quote, "way it was before" is a committee of people who
11 have never gotten their vision implemented anywhere. So
12 if you look at this, this way it was written before,
13 that's a way that a group of people that have -- no judges
14 have ever adopted this, no media has ever followed this,
15 so if you want to say the way it was written before, let's
16 just be aware we're talking about the work of one
17 committee against the work of, say, five or six or seven
18 different actual groups of judges.

19 CHAIRMAN BABCOCK: Yeah. Bill.

20 PROFESSOR DORSANEO: I think another -- I
21 would be in favor of merging these things, but I think
22 recognizing the public interest there in the first line of
23 the preamble has the same kind of characteristic of the
24 other two things that have just been pointed out. You
25 could recognize the public interest a little later in that

1 sentence and still recognize the public interest without
2 suggesting that it's the public interest to have media
3 coverage.

4 CHAIRMAN BABCOCK: Sarah.

5 HONORABLE SARAH DUNCAN: I think that goes
6 to the fundamental decision that this committee needs to
7 make for itself before it can make a proposal or decide on
8 any language at all. Do we want rules that standardize
9 the use of electronic media coverage or do we want rules
10 to achieve some other purpose? And if all we want is
11 rules that standardize electronic media coverage then
12 let's say that's all we want.

13 CHAIRMAN BABCOCK: Yeah. Judge Patterson.

14 HONORABLE JAN PATTERSON: There are two
15 vivid moments from the meeting where we last discussed
16 this for me. One was where we charged this committee with
17 a determination to come up with neutral factors, and the
18 second was that the concern was not so much with
19 standardizing practice across the state, because we all
20 recognize that every district has different needs and
21 communications and we wanted to allow the district judges
22 to be able to employ their own standards. So we didn't
23 speak so much to standardization of practice as we did to
24 providing factors for them to consider, and that was what
25 I thought this committee was charged to do, was to come up

1 with those factors so that -- and I can't recall who the
2 district judge was who spoke to that, but just the
3 difficulty of when you're confronted with these issues,
4 what are the factors and what do other courts take into
5 account and what should be considered, and that was the
6 charge, and I thought that that was somewhat of a more
7 narrow charge than this appears.

8 HONORABLE SARAH DUNCAN: And that's all I
9 meant by "standardization," not that there were going to
10 be mandatory rules that everybody had to follow, but there
11 would be a list of considerations that everyone needed to
12 consider.

13 CHAIRMAN BABCOCK: Frank.

14 MR. GILSTRAP: Why do we need a policy
15 statement or preamble at all? I mean, these type things
16 typically take up a lot of time, they're hard to agree on
17 because everybody has to get their kind of philosophical
18 bias out on the table, and I don't know -- if they're
19 truly going to be neutral, they're not going to advance --
20 like we've said we want them, they're not going to advance
21 the ball at all. Why don't we draft some rules to
22 regulate use of electronic media in the courtroom and kind
23 of leave the philosophical latitudes aside?

24 CHAIRMAN BABCOCK: Judge Peeples.

25 HONORABLE DAVID PEEPLES: As I look at both

1 the preamble and the policy statements, there are three
2 important sentences in there that start out by saying, "We
3 want to recognize public access while preserving judicial
4 independence" and so forth; and that's a tilt; and if you
5 don't agree with that, try flipping it, saying, "These
6 guidelines are intended to recognize judicial
7 independence" and so forth "while preserving public
8 access." That would change the tilt here.

9 I suggest what we want to do is say
10 something like, "These guidelines are intended to strike a
11 balance" or "help courts strike a balance between these
12 conflicting -- sometimes conflicting goals," public access
13 and so forth and judicial independence, integrity, and the
14 rights of the litigants. We're really talking about
15 balancing those, aren't we, instead of recognizing one
16 while maintaining the other?

17 CHAIRMAN BABCOCK: Yeah. I think that's
18 right. I think that's exactly what this rule ought to be
19 doing. That's what judges do everyday. The tilt, though,
20 is -- can be important. For example, in the *Sylvester*
21 *Turner vs. Dolcefino* case there was a petition for access.
22 The defendants being television stations obviously
23 couldn't oppose it. The plaintiff, however, was opposed,
24 and the judge -- the judge's analysis of it was the Harris
25 County rules, you know, tilt in favor of access, so unless

1 you give me a good reason why I shouldn't allow the
2 cameras in here, they're going to be in here. I mean,
3 that was the -- that was -- I mean, it took 15 minutes,
4 and that was it. So the tilt or the -- what did you call
5 it, the encouraging or whatever it is, Richard, that can
6 be important.

7 HONORABLE JAN PATTERSON: The bias.

8 CHAIRMAN BABCOCK: The bias. That can be
9 important to some judges. It won't be important to every
10 judge because a lot of judges will say, "Okay, I see the
11 bias, but I'm going to look at all these factors, and I'm
12 going to deny it for whatever reason." So that it's not a
13 meaningless thing.

14 HONORABLE SARAH DUNCAN: It's not at all.

15 CHAIRMAN BABCOCK: We maybe ought to take it
16 out, but it does have impact sometimes. Yeah, Nina.

17 MS. CORTELL: I would agree with deletion,
18 and the reason is when you get further down into the rule
19 into the factors governing the decision of the court we
20 are giving the court guidance on when and when not to
21 allow coverage, and I'm just thinking of one who is trying
22 to litigate whether the decision was right or wrong, I'm
23 going to have all these conflicting standards. I'm going
24 to have to look at possibly a policy, a preamble, and
25 factors that are guiding the court. It looks like a

1 something for everyone sort of deal, and I think to the
2 extent we can limit that confusion and potential conflict
3 we should.

4 CHAIRMAN BABCOCK: Yeah, Bill.

5 PROFESSOR DORSANEO: It's at least unusual
6 for us to put policy statements in the beginning of rules,
7 I think for exactly the reason you state, that the rules
8 should be applied in accordance with what they say and
9 unless you can discern some policy from what the rule says
10 then you create difficulties in application.

11 CHAIRMAN BABCOCK: Yeah, and I think you
12 have to look at this preamble/policy thing in its
13 historical context because at the time these local rules
14 were drafted it was, Tom, 12 years ago?

15 MR. LEATHERBURY: Yes. Starting after 1990,
16 in April of 1990 when 18c went into effect.

17 CHAIRMAN BABCOCK: Yeah, and cameras in the
18 courtroom were an absolute rarity. It just, you know,
19 hardly had ever happened, so there was a thought on the
20 part of some people -- and I know in Dallas County this
21 was very hotly debated -- that there ought to be kind of a
22 push, you know, a nudge to get cameras in there; and I
23 don't know if that's still present today. I think cameras
24 are much more accepted and much more, you know, part of
25 the fabric of the judicial system than they were, you

1 know, 12 years ago. So the reason for having it may not
2 exist or it may. I don't know. But things have changed.
3 Richard.

4 MR. ORSINGER: Well, I've kind of changed in
5 my years of law practice. I used to think this
6 preparatory language was useless because you had to get
7 down and interpret the way a statute or a contract, what
8 the actual operative terms were, but over my years of
9 litigation and drafting contracts in anticipation of
10 litigation and even in drafting legislation I have found
11 that general policies are helpful for the courts to know
12 how to interpret a set of rules where the facts don't
13 exactly fit into it; and in drafting contracts now a lot
14 of people will have "whereas" clauses in the front that
15 state the intent of the parties. They don't actually
16 control anything, but if you're dealing with ambiguities
17 or different parts of a contract that might not mesh
18 together well, sometimes having a general statement of
19 what the purpose or intent of the parties was will help
20 you decide which of those interpretations to use.

21 Even the Legislature in the Family Code has
22 done the same thing in the knotty area of parent/child
23 relationship. We have chapter upon chapter upon chapter
24 of specific procedures and standards to use in deciding
25 custody of children, but the Legislature has adopted a

1 statement at the front of all that saying it's the policy
2 of this state that both parents should have access to
3 their children and blah-blah-blah-blah. And, you know,
4 that's an overly general statement of the public policy of
5 Texas so that it doesn't really necessarily help you
6 interpret any particular part of the Family Code; but if
7 you go run Westlaw and you look at how many appellate
8 court decisions have cited that section of the Family Code
9 in explaining why they interpreted the code the way they
10 did, you realize that sometimes these statements of
11 overriding intent help when you're trying to figure out
12 how the rules exactly work. So I don't think that these
13 kind of preliminary statements are useless. I think that
14 sometimes they help.

15 CHAIRMAN BABCOCK: And I don't think Frank
16 and Sarah are arguing that it doesn't matter.

17 HONORABLE SARAH DUNCAN: That's precisely
18 the point, Richard, is --

19 CHAIRMAN BABCOCK: Their argument is it does
20 matter.

21 HONORABLE SARAH DUNCAN: If we intend to be
22 neutral then we can't have a preamble or a policy that's
23 not neutral because people like you and Nina and everybody
24 else in here are going to -- it's just like in the Workers
25 Comp Act when they said -- or the DTPA, you know,

1 "construe these provisions in favor of the worker" or "in
2 favor of the plaintiff in a DTPA case." That makes a
3 tremendous difference, and how do we do that and be
4 neutral?

5 CHAIRMAN BABCOCK: Judge Peeples.

6 HONORABLE DAVID PEEPLES: I think the policy
7 statement is especially important when the body of the
8 rule basically says the trial court has discretion to do
9 anything. I mean, that's really what the rule says.

10 CHAIRMAN BABCOCK: Yeah. And I think that's
11 where we were headed last time, but how do you -- why do
12 you think the policy statement is important then?

13 HONORABLE DAVID PEEPLES: If it tilts, it's
14 important. If the judge has total discretion and the
15 policy statement is saying "Tilt this way or the other"
16 helps affect that discretion.

17 CHAIRMAN BABCOCK: Yeah. I agree with that.
18 Okay. Anybody else got any comments about this? Yeah,
19 Bill.

20 MR. EDWARDS: One of the problems with the
21 preamble may be the use of "independence of the judiciary"
22 as opposed to "discretion of the judiciary." You don't
23 say -- you know, it's not that they're going to be
24 independent. It's that you're not going to impair their
25 discretion, and I don't know whether that means the same

1 thing.

2 CHAIRMAN BABCOCK: Well, I think this clause
3 came in here -- and Justice Hecht, correct me if I'm wrong
4 -- but my recollection is that this phrase came in as a
5 reaction to the concern that some judges would use the
6 camera to -- for theatrical purposes or for campaign
7 purposes or for --

8 MR. EDWARDS: I don't see how this clause --
9 "preserving the independence," that says you can do
10 anything you want with it anyway.

11 MR. LEATHERBURY: Or that they would feel
12 pressure -- as the point was made by Justice Duncan in one
13 of the last transcripts, they would feel pressure because
14 the camera is there. I think that's another key reason
15 for that phrase.

16 MR. EDWARDS: Well, maybe you want to say
17 "independence and discretion" or something. Because --

18 HONORABLE JAN PATTERSON: Well, the pressure
19 that we spoke to the last time was not so much when the
20 camera is in the courtroom, but whether a district judge
21 could resist having the cameras in the courtroom at all,
22 either the temptation of playing to the cameras or in a
23 case where it's -- there's a lot of press and it would not
24 promote these goals, perhaps that it would be hard for a
25 district judge to be able to do that, given our elected

1 judiciary in Texas.

2 MR. GILSTRAP: Chip?

3 CHAIRMAN BABCOCK: Yeah, Frank.

4 MR. GILSTRAP: I think Justice Patterson is
5 correct, but I also want to recall that there was another
6 aspect of independence of the judiciary, and that has to
7 do when a judge is afraid to make a certain decision
8 because he or she fears how it's going to be played in the
9 press. That's another aspect of independence of the
10 judiciary that these rules are -- should be eminently
11 concerned with.

12 You know, again we're expending all our time
13 and all our capital on these philosophical statements.
14 You know, what we ought to be doing is talking about what
15 the rule says. I think that's a more productive use.

16 CHAIRMAN BABCOCK: We're going to get to
17 that soon. Bill.

18 PROFESSOR DORSANEO: We could take one of
19 two actions. We could either attempt to neutralize this
20 language or just not bother with it, and we have to go
21 down one of those two paths to make progress, I think.

22 CHAIRMAN BABCOCK: Yeah.

23 HONORABLE JAN PATTERSON: I move to strike.

24 CHAIRMAN BABCOCK: Huh?

25 HONORABLE JAN PATTERSON: I move to strike

1 the preamble and policy.

2 MR. HAMILTON: Second that.

3 CHAIRMAN BABCOCK: Okay, Carl. Any
4 discussion on that motion, which is to strike the preamble
5 and the policy? Yeah, Bill.

6 PROFESSOR DORSANEO: I have one question for
7 Richard. Will we lose anything that's necessary for a
8 court to apply the remainder of the rules provisions if we
9 completely strike it?

10 MR. ORSINGER: You'd have to compare that to
11 the factors that are on page six and seven, and if -- when
12 we get there we could look back and see if there's
13 anything in the preamble or the policy that we want to add
14 as a factor now that there isn't going to be a preamble or
15 a policy.

16 CHAIRMAN BABCOCK: You're assuming the
17 vote's going to go one way.

18 MR. ORSINGER: What?

19 CHAIRMAN BABCOCK: I said you're assuming
20 the vote's going to go one way.

21 MR. ORSINGER: Well, Bill said if we strike
22 both of them are we losing anything, and I'm saying, well,
23 possibly, because the list of factors had the assumption
24 that you had some principles in front, but when we get to
25 the list of factors we may decide to lift one or two

1 clauses out of here and stick them in as a factor.

2 CHAIRMAN BABCOCK: By the way, just so
3 everybody knows, we are not violating our policy on voting
4 on stuff we've already voted on. Ms. Lee tells me that we
5 did not vote at the last meeting on whether there would be
6 a bias in favor or against. We didn't vote on that.

7 MR. ORSINGER: Well, and another thing that
8 I want to make clear, this committee on the media in the
9 courts, nobody here has ever said we ought to take that as
10 the correct approach. It just happened to be a handy
11 approach. It was the product of an independent committee
12 that had some thoughtful things they accomplished and is
13 put before us, so I don't feel like we should necessarily
14 just be biased that the language in the earlier draft is
15 somehow better or more important than the language in the
16 Houston rules or the Dallas rules or the Travis County
17 rules. To me I would tilt the other way because at least
18 the county rules have been adopted by working judges who
19 make these decisions.

20 CHAIRMAN BABCOCK: Yeah.

21 MR. ORSINGER: So --

22 CHAIRMAN BABCOCK: Yeah. I think, Richard,
23 in all deference to your thinking that the preamble and
24 the policy are neutral, my read of them and having seen at
25 least some of this language applied in court, I think the

1 preamble and the policy does tilt in favor of access.
2 Now, that doesn't mean that the trial judge doesn't have
3 discretion and, frankly, as you go down in these rules,
4 perhaps absolute discretion, but still in my view the
5 preamble and the policy as written here does tilt in favor
6 of access. I personally think that that's the way it
7 should be, but there are other people who disagree. Tom.

8 MR. LEATHERBURY: Just a couple of points.
9 I think if you look at other states' guidelines, they
10 generally are tilted towards access, not that that's what
11 we should do, but usually it's cameras are in unless the
12 judge finds A, B, and C, like the Florida guidelines. I
13 guess part of it is just attachment of prior work product
14 in that I think the preamble and policy statement in some
15 form does add something and recognizes that this is being
16 done pursuant to Rule 18c(a) and that there has been a
17 great experiment going on in the state, at least in the
18 metropolitan counties, in terms of allowing coverage in
19 civil cases.

20 On the specific wording of the policy and
21 preamble, I think the gut point is Judge Peoples' point,
22 which is this is a balance, and how you accomplish that by
23 monkeying with the specific words or rearranging words to
24 have one clause in front of another and one behind another
25 is -- you know, may be important, but the gist of it is

1 the balance.

2 CHAIRMAN BABCOCK: Yeah, Bill.

3 PROFESSOR DORSANEO: I was thinking about
4 what you said. You said the committee did not vote on
5 whether we should favor media coverage or not last time.

6 CHAIRMAN BABCOCK: Correct.

7 PROFESSOR DORSANEO: So this motion would be
8 that vote?

9 CHAIRMAN BABCOCK: Yeah. Well, I mean,
10 sure. Sounds like it.

11 PROFESSOR DORSANEO: Rather than just a
12 craftsmanship vote?

13 MR. GILSTRAP: No, I don't think that's
14 correct at all. I think it's just a vote to say, you
15 know, do we want a preamble or not. You know, the balance
16 can still be worked out in shaping the specific rule
17 provisions, but, you know, the question is, is this a wise
18 way to approach the problem, is this a wise way to
19 approach making a decision. I don't think it's a vote on
20 bias at all or tilt at all.

21 PROFESSOR DORSANEO: Hmmmm.

22 MR. ORSINGER: If I could say, I think that
23 the policies that are pulled from the county or the
24 district rules -- I guess they're county rules -- is
25 probably more weighted in favor. The committee on media

1 in the courts is more neutral, but we don't have to accept
2 either one of these or else reject anything. We could do
3 something like David Peeples suggested and say, "We're
4 balancing these various factors." If we never tell them
5 what we're doing and we just give them a bunch of rules,
6 you know, I'm worried that they're not going to
7 understand, well, you know, how am I supposed to weigh
8 these factors.

9 I mean, what is -- anyway, it's not like we
10 have to vote up or down on this language. It's two
11 different approaches. I think the preamble is more
12 neutral than the other, especially if you took the last
13 sentence off of there. If you put the word "balancing" in
14 there, it would be totally neutral. So to me the question
15 shouldn't be should we eliminate a policy because these
16 ones that have been drafted are tilted. We ought to
17 decide if we want --

18 HONORABLE SAM MEDINA: Read that.

19 MR. ORSINGER: -- a policy, and if so, we can
20 draft it --

21 HONORABLE SAM MEDINA: Read that part,
22 putting the word "balancing" in there.

23 MR. ORSINGER: Well, you could -- "These
24 guidelines are intended to balance" -- Bill doesn't like
25 listing this first, but "balance the public interest in

1 court proceedings with the independence of the judiciary
2 and the need to maintain dignity, decorum, and
3 impartiality of court proceedings and protect the rights
4 of litigants."

5 CHAIRMAN BABCOCK: Bill.

6 PROFESSOR DORSANEO: I have no problem
7 tilting if that's what we want to do, and this is an
8 effective way to do it. It seems to me that that's the
9 central issue.

10 CHAIRMAN BABCOCK: Yeah. It strikes me,
11 Frank, that you don't want to give everybody two bites at
12 the apple here. I mean, that the issue of tilt is fairly,
13 to me, starkly raised by the preamble; and if we vote
14 against the preamble and the policy then we are -- to me,
15 we are -- I mean, if we vote to strike that, unless we
16 vote to replace that language with something, we're voting
17 to go neutral on these rules and not express; and you've
18 got to remember this is the Court's rule. It's not our
19 rule. So the Court, the Supreme Court, would be signaling
20 to the trial courts that "Hey, you know, we don't have a
21 policy here. We're not in favor of it. We're not against
22 it. If you're going to do it, here's the way you do it."

23 MR. GILSTRAP: I like that statement.

24 CHAIRMAN BABCOCK: Well, yeah, I know you're
25 in that camp, but to me Judge Patterson's motion raises

1 that issue because I don't think we ought to vote it down
2 here and then try to sneak it back in, you know; and you
3 wouldn't be in favor of that either, you know, sneaking it
4 back in under subsection (6) or something.

5 MR. GILSTRAP: Everybody will know when it
6 comes. It won't be sneaked.

7 CHAIRMAN BABCOCK: Okay. Any other
8 discussion?

9 Okay. Judge Patterson's motion -- and
10 correct me if I misstate it, Judge -- is everybody in
11 favor of striking --

12 HONORABLE SAM MEDINA: Hold on, Chip. But,
13 okay, if we strike and we say, okay, we're staying
14 neutral, is that the same as saying what Richard was
15 saying and saying we're trying to say that there ought to
16 be a balance? It's neutral, but there ought to be some
17 guideline that says we are balancing.

18 MR. GILSTRAP: It's just striking the
19 preamble or policy.

20 HONORABLE DAVID PEEPLES: Striking this one
21 or striking anything, no matter how it would be rewritten?

22 MR. GILSTRAP: Striking these.

23 HONORABLE SAM MEDINA: And that's my
24 question, I guess, is that what we're saying? We're
25 striking this one and we rewrite something if we had to?

1 MR. ORSINGER: Well, I mean, it's Justice
2 Patterson's motion, but I interpret it that we're just
3 going to do without any preparatory language and get right
4 into the definitions.

5 CHAIRMAN BABCOCK: Yeah. That's how I look
6 at it.

7 MR. ORSINGER: So to me we shouldn't allow
8 our vote on whether we ought to have introductory language
9 be influenced by what this introductory language is. I'm
10 in favor of some kind of introductory language, if we can
11 agree on what it is, because I think it's very helpful.
12 If you just launch right into the definition of
13 "audio-visual coverage" I'm worried about how it's going
14 to get handled.

15 CHAIRMAN BABCOCK: Judge Patterson, any
16 comments about the various interpretations of your motion?

17 HONORABLE JAN PATTERSON: Well, my concern
18 is that when you look at the paragraph dealing with the
19 decision of the court, that really is the guts of the
20 rule; and it says, "The court shall consider all relevant
21 factors"; and if there is any balancing, it seems to me
22 you could include some language in that; but the fact is,
23 is that this list of factors -- and it says that "you
24 shall consider all these relevant factors," and if you
25 have it weighted someplace else, that's going to be

1 interpreted.

2 So unlike the Freedom of Information Act or
3 some other more complicated statutes dealing with various
4 provisions, it seems to me that we ought to make this a --
5 I mean, we are providing guidelines to judges for them to
6 apply those factors, and so I -- I think it's -- I don't
7 think -- I think there are two issues, whether you do have
8 a preamble and whether there should be a weight. Mine is
9 simply to -- I don't think it's necessary for this
10 statute, for this rule, because I think that the
11 simplicity of it is undermined.

12 CHAIRMAN BABCOCK: Okay.

13 HONORABLE JAN PATTERSON: And I think it
14 would create more litigation; and, frankly, the fact that
15 you don't have more litigation involving those other rules
16 shows that everybody is applying them in a commonsense
17 factor, in a commonsense manner. There shouldn't be a lot
18 of litigation over conflicting portions of the rule, and I
19 think that's what we're trying to do, is introduce other
20 considerations here when, in fact, you've got very fine
21 considerations and factors set forth for the balance, and
22 that balancing shouldn't be done in another portion of the
23 rule.

24 CHAIRMAN BABCOCK: Well, in fairness to
25 Richard's point, most of the big counties have this policy

1 statement in it as well as the factors.

2 HONORABLE JAN PATTERSON: I understand that,
3 but the key is whether there has been litigation
4 interpreting those, and I gather there hasn't, and so if
5 there hasn't been a battle and --

6 CHAIRMAN BABCOCK: Pretty much everybody
7 just abides by whatever the trial court does. I mean,
8 again, back in the *Turner vs. Dolcefino*, that would have
9 been a case where one side or the other might have, you
10 know, taken that up, but nobody did.

11 MR. ORSINGER: What I'd like to know is how
12 do we know that the policies are not part of the reason
13 why the county rules are working so well? I mean, we're
14 saying the county rules are working well. It's not
15 controversial, yeah, but the county rules, all of them
16 except for Nueces County has a policy, and I'm not sure
17 that trial judges when they're hearing all these contrary
18 arguments and balancing public interest versus the
19 complaint of one witness, I'm not sure that sometimes they
20 don't fall back on what is the fundamental policy here.

21 CHAIRMAN BABCOCK: Well, it makes it easier
22 for them. I know that.

23 HONORABLE JAN PATTERSON: The reason they
24 don't have litigation is because it's highly
25 discretionary.

1 HONORABLE DAVID PEEPLES: I want to support
2 what Richard said a minute ago. Our vote -- and when we
3 vote we ought to know whether we're voting for no
4 preamble, period, or not this one, this particular one.

5 CHAIRMAN BABCOCK: Right. And what I
6 gleaned from what Judge Patterson was saying was her
7 motion is to be construed as no preamble, period. Right?

8 HONORABLE JAN PATTERSON: Yeah.

9 CHAIRMAN BABCOCK: She's nodding her head,
10 so that's the vote. No preamble, period.

11 HONORABLE DAVID PEEPLES: Well, I want to
12 say I think it would be helpful to have a truly neutral
13 preamble that just tells everybody there are sometimes
14 going to be cases in which the public interest in
15 electronic coverage conflicts to some extent with the
16 public interest in the administration of justice for the
17 litigants and the court has to balance those. I think
18 that would be helpful to say that, so I would be against
19 that motion for wiping out preambles.

20 CHAIRMAN BABCOCK: Frank and then Judge
21 Brown.

22 MR. GILSTRAP: That sounds good in theory,
23 Judge Peeples. The problem is any time you have a public
24 body going on record about this, about policy, they're
25 going to tilt for. They're just going to -- it's

1 irresistible to talk about the public's right to know and
2 how important that is, and we're not going to get a
3 neutral policy out of this if we have a policy.

4 CHAIRMAN BABCOCK: Judge Brown.

5 HONORABLE HARVEY BROWN: Well, I think it is
6 nice to have language about balancing rather than just,
7 quote, "consider," but I think you can do that on page
8 six. I think if you just said instead of "the court shall
9 consider all relevant factors," you would say "the court
10 shall balance all relevant factors," and you might start
11 out with A, public interest; B, the independence of the
12 judiciary. I mean, you could put all of that right into
13 the rule itself; and if you do it as a preamble, it
14 strikes me that one of the issues is what are you
15 balancing? Is it the first one, i.e., the public interest
16 versus the second and third, or is it one versus two
17 versus three?

18 I mean, you know, how you add up that
19 equation does make a difference, too; whereas, if you just
20 list all the different factors in a row, that's even more
21 neutral. So I would put it in the rule, put the balancing
22 language in the rule itself.

23 CHAIRMAN BABCOCK: Okay. All right.
24 Everybody in favor of no preamble; that is, we're just not
25 going to have a preamble and a policy statement at all, no

1 matter what it says. Raise your hand.

2 All those opposed? The motion carries by a
3 vote of 18 to 6, the Chair not voting.

4 All right. Let's go onto the next one,
5 Richard. Definitions.

6 MR. ORSINGER: Okay. Again, this is
7 following the Committee on Media in the Courts' draft
8 primarily, but when there are substitutions or insertions
9 made based on local rules, they are footnoted. They
10 define the kind of coverage that's going to be controlled
11 by this, and it includes electronic broadcasting or other
12 transmission. The CMC draft says "to the public." I'm
13 suggesting that we strike that, because I could envision
14 perhaps that someone may want to assert a right to
15 participate for private use only, whatever that might be,
16 and somehow argue that they're not included in the pooling
17 requirements, so that thought is to strike out "public"
18 and just say "transmission of."

19 And then the phrase in the CMC draft was
20 "audio" -- was "radio or television images." Let's see,
21 "radio or television images" and this substitutes "sound
22 or visual images" because our technologies are breaking
23 down and, you know, in a few years they may be
24 broadcasting directly to the internet; and that's not
25 really television or radio, so it seems like we ought to

1 just focus on the information rather than the type of
2 device through which the information is disseminated, and
3 it's from the courtrooms, so that's part 1.

4 Part 2 is the same kinds of information that
5 is recorded for later transmission or reproduction rather
6 than simultaneous live transmission, and the third
7 category is still photography. And then the CMC draft
8 says, "This coverage can only be for news and educational
9 purposes." So that's basically the CMC draft with just a
10 few edits. There's no changes to the definition of "media
11 or media agency," although the CMC rules broke down and
12 started talking about news stations and TV stations,
13 which -- which "media agency" has now been used to
14 substitute throughout. This certainly seems to me to be a
15 workable definition unless somebody has a real problem
16 with it.

17 Then the definition of "judicial proceeding"
18 has been tinkered with from the CMC draft to add the word
19 "public" to "proceedings" to make it clear that if the
20 court goes in chambers or if there are proceedings that
21 for some reason are not open to public then they're not
22 open to media, and I hear stories. I know someone told me
23 the other day -- or, no, I'm sorry, I think it was Nina's
24 discussion in this last meeting that's in our notes about
25 a trade secret where the trial judge just closed the

1 courtroom to the public, which I didn't know they could
2 do, but apparently they did, and I know that some family
3 law proceedings involving juveniles have been closed.

4 So, anyway, if you say that it applies to
5 public proceedings then you're not giving the media any
6 argument that they have any access rights to something
7 that would be private, however that's determined; and it
8 seems like the existing rules, including the Rules of
9 Appellate Procedure, treat investiture and ceremonial
10 events separately from actual judicial proceedings; and
11 they're exempted from the appellate rules that govern
12 media; and in the local rules they're exempted from these
13 whole set of local rules and total discretion is vested in
14 the court to decide what kind of media coverage there's
15 going to be in an investiture or ceremonial event.

16 So because that seems to be a philosophy
17 throughout, it's made clear here that judicial proceedings
18 to which all these rules apply don't apply to investitures
19 and ceremonial events, not because they don't have to pool
20 but because whatever happens with the ceremonial and
21 investiture is totally within control of the court.

22 Bill has a question.

23 PROFESSOR DORSANEO: At the end of the first
24 definition you have "news or educational media" and then
25 I'm reading the next definition, which seems like that's

1 what you're talking about, but you use the words "media or
2 media agency." You follow what I'm saying?

3 MR. ORSINGER: I do. You could take that
4 sentence off the first definition.

5 CHAIRMAN BABCOCK: Yeah, I don't see what
6 that adds.

7 MR. ORSINGER: I don't either, frankly.

8 PROFESSOR DORSANEO: And I would say "means"
9 in both places instead of "shall mean" and "mean."

10 MR. HAMILTON: Strike the last sentence of
11 the first paragraph?

12 MR. ORSINGER: Strike the last sentence of
13 the first paragraph and then in the first sentence under
14 "Definitions" take "shall" out and convert to "means."

15 MR. GILSTRAP: Chip?

16 CHAIRMAN BABCOCK: Yeah, Frank.

17 MR. GILSTRAP: On a point of clarification
18 here, one of the real controversial areas is where judges
19 have attempted to control activities of the news media
20 outside the courtroom; and, you know, we can all imagine
21 situations which that may or may not be appropriate; and
22 as I'm looking at this, the purpose of this rule is simply
23 not to address that. We're just talking about activities
24 in the courtroom or inside the courtroom; is that correct?

25 MR. ORSINGER: Well, that's a very

1 interesting point. You know, some of the local rules like
2 the Nueces County rules controls it by floor of the
3 courthouse. Cameras are permitted on a certain floor of
4 the courthouse and not on another floor of the courthouse,
5 so they clearly feel like they have an investment in what
6 happens in the hallways. So I think that's something we
7 need to decide. I don't think the CMC draft really gets
8 that geographical about just how far does a court's
9 discretion -- can you stop them from videotaping the jury
10 going in and out of the courtroom? Can you stop them from
11 videotaping jurors from going in and out of the
12 courthouse?

13 MR. GILSTRAP: Can you keep them from
14 sending a camera to the juror's home?

15 MR. ORSINGER: Well, I think the further you
16 get away from the courtroom, the more constitutional
17 trouble you have.

18 CHAIRMAN BABCOCK: You certainly can't do
19 that, but Frank's question is these rules are attempting
20 to address the issue of what happens with a camera inside
21 the courtroom, and it's not attempting to define the
22 boundary of how far outside the courtroom the judge's
23 discretion goes, which is a separate question.

24 HONORABLE SAM MEDINA: And that's a good
25 one. For example, in Lubbock we don't tell them "You

1 can't go to that floor." We just say, "Beyond this point
2 you're not coming."

3 CHAIRMAN BABCOCK: Yeah. And I think that's
4 -- I personally think that's wise because there's a huge
5 issue about how far the judge's discretion goes outside
6 the four corners of his courtroom, and there clearly is
7 some, but the question is how much. Sarah.

8 HONORABLE SARAH DUNCAN: It seems to me that
9 this is sort of backwards, and I guess backwards in
10 procedural and substantive questions. We usually leave
11 the definitions till the end of whatever it is we're
12 doing, and we usually start whatever it is we're doing by
13 saying, "Here's what this rule is going to cover," and --

14 CHAIRMAN BABCOCK: We put that in the policy
15 statement.

16 HONORABLE SARAH DUNCAN: It seems to me that
17 we need more of a -- of what we have used in the past as
18 the format of a rule, and what I would suggest in line
19 with the comments that were just made is something like
20 "These guidelines are intended to cover judicial
21 proceedings, which means a public judicial proceeding,
22 wherever conducted." I mean, jury deliberations are not a
23 public judicial proceeding. Administrative meetings are
24 not a public judicial proceeding, and however you fall on
25 that particular question, don't we need to decide before

1 we go any further what the scope of this guideline or rule
2 is going to be?

3 CHAIRMAN BABCOCK: I think that was
4 underlying Frank's question.

5 HONORABLE SARAH DUNCAN: Right.

6 CHAIRMAN BABCOCK: And Richard wasn't
7 totally responsive to the question, but I've always
8 thought that these rules apply to cameras in the
9 courtroom.

10 HONORABLE SARAH DUNCAN: And what I'm saying
11 is we need to say that. It needs to be the first thing we
12 say.

13 HONORABLE SAM MEDINA: But, Chip, what do
14 you do -- I'm sorry.

15 CHAIRMAN BABCOCK: Go ahead, Judge.

16 HONORABLE SAM MEDINA: What do you do? If
17 it's in the courtroom, authority is in the courtroom, can
18 they stand outside when you've got a big old window and
19 just do it from there?

20 CHAIRMAN BABCOCK: Well, I would say that
21 these rules are not intended to cover that situation, and
22 it would not be standard -- because, as you well know, in
23 Dallas County at the George Crowley building, I mean,
24 they've got big old windows, and it's common practice to
25 film through the windows.

1 HONORABLE SAM MEDINA: We do in Lubbock, and
2 that's why we had to say "beyond this point."

3 CHAIRMAN BABCOCK: And there are other
4 courtrooms where they don't have windows in the doors and
5 the judges don't want them outside the doors, and they
6 shoo them out to a central area. I don't know that
7 standardized practice makes a lot of sense outside the
8 four corners of the courtroom, but if it's not clear --
9 and I guess your point is these rules do not make it clear
10 that they are only to be governing things that happen
11 inside the courtroom, and we should make it clear.

12 HONORABLE SARAH DUNCAN: Right. "The use of
13 audio-visual or electronic media coverage in a public
14 judicial proceeding."

15 CHAIRMAN BABCOCK: How's that, Richard?

16 MR. ORSINGER: Where do we put that since we
17 don't have a general area anymore? It doesn't fit under
18 definition or rule.

19 CHAIRMAN BABCOCK: We already voted on that,
20 Richard. We're not going to have a policy.

21 MR. ORSINGER: I know, so where do we put --
22 that's got to fit into some definition or we don't have a
23 place to put it, right?

24 HONORABLE SARAH DUNCAN: No. It seems to me
25 that start -- what I was trying to say is starting with

1 definitions is where we get off on the wrong foot. We
2 need to say -- you know, No. 1, sections and subsections
3 would be helpful, but "These guidelines are intended" --
4 to do whatever, "the use of audio-visual or electronic
5 media coverage in a public judicial proceeding," and then
6 we have to define what we've just said. "Audio-visual
7 means this," "electronic media means that," "public
8 judicial proceeding means that."

9 MR. DUGGINS: Chip?

10 CHAIRMAN BABCOCK: Yes, Ralph.

11 MR. DUGGINS: If you go to the "Decision of
12 the Court" section that says "the granting of a coverage
13 request" and then you go back to the first definition, it
14 ties into the word "coverage," and I think in each of
15 those three situations where the coverage is defined it
16 says "from the courtroom," "from the courtroom," or "in
17 the courtroom."

18 CHAIRMAN BABCOCK: Uh-huh.

19 MR. DUGGINS: Which is your point about
20 limiting it to four corners of the courtroom.

21 CHAIRMAN BABCOCK: Right.

22 MR. DUGGINS: Doesn't that solve the problem
23 or does it not?

24 CHAIRMAN BABCOCK: Yeah. It seems to me
25 that it does, and that's why I didn't think this was an

1 issue, because in each of these instances in the
2 definition, the first definition it says, subpart (1),
3 "from the courtroom"; subpart (2), "in the courtroom";
4 subpart 3, "in the courtroom." So, I mean, what's
5 ambiguous about that?

6 HONORABLE SARAH DUNCAN: What's --

7 CHAIRMAN BABCOCK: Frank.

8 MR. GILSTRAP: I don't think it's unclear at
9 all. I just wanted to point out that the purpose of these
10 rules is not -- we're simply not taking a stand on the
11 judge's authority outside the courtroom.

12 CHAIRMAN BABCOCK: Right.

13 MR. GILSTRAP: Now, I would say that you
14 could probably read this rule broadly enough to deal with
15 the situation where they come stick a camera in the window
16 of the courtroom and broadcast images from inside. I'm
17 not troubled by that at all, but, I mean, I think that
18 does the same thing as bringing the camera in. I just
19 want to make it clear we're not talking about those
20 situations. It doesn't say the judge can't do it. It
21 doesn't say the judge can.

22 HONORABLE SAM MEDINA: And I think you could
23 say that we're talking about a court proceeding. Well, as
24 long as you can -- if you're saying, no, you're not going
25 to cover this and they stand at 10 feet away and still

1 cover it, I think possibly it could make this rule work.
2 Say, no, you can't cover it, so you're not going to go
3 beyond this point if you're going to cover it.

4 MR. ORSINGER: I think we ought to notice
5 that on page 10, the very top of page 10, this is again
6 from the CMC draft, but they purport in this draft to
7 prohibit the coverage of a juror during recess, and so
8 recess means to me in the hallway. So there's actually, I
9 think, an effort here to reach beyond the courtroom door,
10 maybe even all the way down to somebody smoking a
11 cigarette in front of the courthouse.

12 CHAIRMAN BABCOCK: Yeah. I've got -- I have
13 a problem with that, but we'll get to that specific.

14 MR. ORSINGER: Okay.

15 CHAIRMAN BABCOCK: Yeah, Carl.

16 MR. HAMILTON: You-all may have talked about
17 this when I was reading, but as you point out, the
18 definitions do say "in the courtroom" but then "judicial
19 proceedings" says "proceedings of a court wherever
20 conducted," which would be broader than just in the
21 courtroom. That's a problem, I think.

22 Now, on the second paragraph of the
23 definitions, "media, media agency," the last sentence of
24 "educational media coverage," if we're going to go back to
25 coverage, that's supposed to belong up in the first

1 paragraph.

2 CHAIRMAN BABCOCK: Carl, you may raise a
3 good point. Richard, my interpretation of "the public
4 proceeding of the court wherever conducted" meant -- and
5 we do have instances where courts will be held not in the
6 traditional courtroom. Judicial proceedings probably
7 happened a long time ago more than it happens now, but
8 what was the intent of that provision, "proceeding of the
9 court wherever conducted"?

10 MR. ORSINGER: Well, you know, I wasn't on
11 that committee, and I can't tell you, but I think that
12 you're right. I think that, you know, if you have a jury
13 showing out at the -- what do they call that, inspection,
14 you know, where you take the jury out and show them the
15 site. I've tried cases in banks before when the
16 courthouse couldn't accommodate us.

17 CHAIRMAN BABCOCK: The South Texas Nuclear
18 case actually was held at the convention center in Dallas.

19 JUSTICE HECHT: Yeah.

20 CHAIRMAN BABCOCK: Something like that.

21 MR. SOULES: Wasn't there an order making
22 that a courtroom? There is a statute that says that you
23 can make an order this room can be a courtroom and then
24 it's a courtroom. You don't conduct judicial proceedings
25 other than in courtrooms, do you?

1 HONORABLE SARAH DUNCAN: And the point, it
2 seems to me, is that what we're talking about is a public
3 judicial proceeding.

4 CHAIRMAN BABCOCK: Right.

5 HONORABLE SARAH DUNCAN: And I'm not -- I
6 wasn't trying to say, Chip, that I think there's anything
7 ambiguous in these definitions. I'm back, where I so
8 often am, and misunderstood. All I'm talking about is
9 structure. I'm talking about the structure of this and
10 how do we make it clear what this is intended to cover and
11 not intended to cover, and I think it's because of the
12 structure that we're having this whole discussion, because
13 it's not particularly clear.

14 MR. ORSINGER: Let me ask this. Is where
15 the presiding judge goes down and qualifies the large
16 panel of potential jurors, is that a judicial proceeding
17 that would be subject to these rules or not? I mean,
18 that's -- arguably that's an official -- it's not a trial,
19 but it's a judicial proceeding. It's not a courtroom.
20 Would -- is the media under these rules if they wanted to
21 go down there and video that or not?

22 MR. EDWARDS: I would assume that's a public
23 proceeding as part of the trial. In many smaller counties
24 that's conducted in the courtroom.

25 MR. ORSINGER: Okay.

1 MR. EDWARDS: It just happens that in the
2 big counties there isn't room in the courtroom for them.
3 They go to a different room, but I would suppose that
4 that's covered.

5 MR. ORSINGER: Well, then we have to somehow
6 use the term "courtroom" -- I mean, one way is to not
7 focus so much on courtroom and focus on the place where
8 the judge is doing the judicial thing of judging, and
9 another thing is to let's get physical about this and
10 describe the places we're talking about, but I'm worried
11 that we're going to forget something or we're going to get
12 balled up in a list of what all we consider a place that
13 this applies.

14 It makes some sense to say, "Look, you don't
15 have a judicial proceeding without a judge," so if you've
16 got a judge there and there's something going on that has
17 to do with litigation then that's covered.

18 HONORABLE SARAH DUNCAN: Well, that
19 wouldn't --

20 HONORABLE SAM MEDINA: Why do you need a
21 place if you're talking about prohibiting coverage of a
22 judicial proceeding? I mean, wherever it's held you're
23 still saying it's a judicial proceeding, and it's not
24 going to be covered, period. Or it is going to be
25 covered.

1 HONORABLE SARAH DUNCAN: Your definition,
2 Richard, would it include conferences in the appellate
3 court?

4 MR. ORSINGER: Well, of course, since it
5 says "public proceeding" --

6 CHAIRMAN BABCOCK: Richard would be in favor
7 of that.

8 HONORABLE SARAH DUNCAN: I might be, too,
9 actually.

10 MR. ORSINGER: If you say that it's only
11 public proceedings that it applies to then it isn't going
12 to apply to jury deliberations, conferences. They say in
13 here in the rules that you can't audio conferences at the
14 bench. You can video them, can't audio them. You have to
15 cut the sound. You go into chambers, you can't follow
16 them in the chambers because it's not public.

17 CHAIRMAN BABCOCK: Yeah, Stephen.

18 MR. TIPPS: I don't think that we can do
19 much better than this draft does with its definition of
20 "judicial proceeding."

21 HONORABLE SAM MEDINA: Right.

22 MR. TIPPS: I mean, as far as application
23 goes, I'm using the term "application" in a different
24 sense; but under "procedure for application and approval,"
25 it's clear that we're talking about coverage of judicial

1 proceedings.

2 HONORABLE SAM MEDINA: Uh-huh.

3 MR. TIPPS: And that's all we're talking
4 about. We're not talking about what happens in the hall.
5 We're not talking about what happens outside the courtroom
6 where the judge is not present, but you then go back to
7 judicial proceeding, and I'm not sure that we can be much
8 more specific than to say "public proceeding of a court,
9 wherever conducted," and that would include what happens
10 in the jury assembly room where the court swears the
11 jurors. It would include what happens in the parking lot
12 if the judge needs to take the jury out to the parking lot
13 to see some exhibit that's too big to get inside the
14 courtroom. I think that's --

15 CHAIRMAN BABCOCK: It would include the
16 convention center if the statute authorizes the proceeding
17 there.

18 HONORABLE SAM MEDINA: Sure.

19 MR. TIPPS: Sure.

20 CHAIRMAN BABCOCK: I agree. I think you're
21 right. Judge Brown, did you have something?

22 HONORABLE HARVEY BROWN: I guess you could
23 say it would include the judge's home if a TRO is done at
24 the home that night.

25 CHAIRMAN BABCOCK: Good point.

1 MR. ORSINGER: Then we need to go back to
2 the definition of "audio-visual coverage" and make it
3 clear that it's not just the acquiring and the storing or
4 transmitting in the courtroom, but rather say "in
5 connection with the judicial proceeding" or something. We
6 need to make it more judge-centered than place-centered.

7 MR. GILSTRAP: May I make a suggestion? I
8 think one of the problems is, is we're trying to use the
9 definition -- it appears now we're trying to use the
10 definition to make an important call, and really maybe you
11 don't -- maybe you need to strike the words "in the
12 courtroom" and just define "audio-visual" as what it is,
13 using cameras and sound equipment and then some other
14 place spell out where you can and cannot use it.

15 I mean, I think the problem is it's
16 unintentional, I'm sure, but there is a built-in
17 limitation in that definition that maybe wasn't intended
18 really to be there.

19 MR. ORSINGER: Well, you'll find that on
20 page four, "Procedure for application and approval,"
21 bottom, second to last sentence, "coverage of judicial
22 proceedings." I mean, to me that's really where this --
23 where you put it into first gear and start in the motion
24 is we're talking about when can a judge draft coverage of
25 judicial proceedings.

1 MR. SOULES: Would it work if you went back
2 to that first definition and said "audio-visual coverage
3 or electronic media coverage or coverage of a judicial
4 proceeding shall mean" and then take out all the geography
5 from the courtroom, "in the courtroom," "in the
6 courtroom," just means those activities.

7 HONORABLE SAM MEDINA: Yeah.

8 CHAIRMAN BABCOCK: What do you think about
9 that, Richard?

10 MR. ORSINGER: Yeah. I would like that.

11 MR. LEATHERBURY: But then aren't you
12 broadening it to include shooting through the window?

13 MR. SOULES: Yes. Absolutely. And
14 listening from a block away, recording that way like the
15 FBI does. Yes, absolutely. That is my intention, a piece
16 of my intention.

17 MR. ORSINGER: Well, let's discuss it
18 because that's a pretty big policy issue here. I mean,
19 some of the courtrooms have little slits in it. Cameras
20 shoot through it. Judges don't care, others do, so that
21 means if you're walking through the courthouse and you
22 want to shoot through a slit, you're going to have to fill
23 out a written application and you're going to have to get
24 service on all the lawyers and you're going to have to
25 have --

1 MR. SOULES: No, you don't. You just do it
2 until the judge says, "Get out of here unless you file an
3 application."

4 MR. LEATHERBURY: I'm going to advise
5 clients to do that, Luke.

6 MR. ORSINGER: It says on here that the
7 violation of the rules could be treated as a contempt,
8 which I have a question of the constitutionality of that
9 anyway, but, Luke, I mean, in theory this is like a
10 standing rule or an order that people are under and if you
11 are disregarding it you could be in trouble with the
12 court.

13 MR. LEATHERBURY: And, really, I thought
14 shooting through the windows was one of the reasons why I
15 think it's the Bexar County rules had that "Nothing in
16 this rule is intended to affect the right to report on and
17 attend proceedings under existing law or in accordance
18 with law." The last sentence of the preamble in Richard's
19 draft.

20 HONORABLE SCOTT BRISTER: In Harris County
21 general practice was if they started shooting through the
22 windows, you chased them away.

23 MR. ORSINGER: Are you talking about the
24 windows like standing in the flowerbed or are you talking
25 about --

1 HONORABLE SCOTT BRISTER: You can't do that
2 in Harris County. You can do it in the hallway.

3 MR. ORSINGER: Okay.

4 HONORABLE SCOTT BRISTER: And, of course,
5 then the jurors and everybody turns around and looks at
6 the camera shooting through the window, which is exactly
7 the same as being in the courtroom anyway. So you send
8 the bailiff out and say "Get lost. Get lost or come in
9 and file a request."

10 MR. SOULES: Right.

11 CHAIRMAN BABCOCK: Judge Brister, the
12 practice in Harris County and Dallas County --

13 HONORABLE SCOTT BRISTER: Now, that depends
14 on whether you're up for election or not.

15 CHAIRMAN BABCOCK: The practice is, though,
16 that in both Harris and Dallas County you don't have to
17 file an application if you're just shooting through the
18 window, but if you want to get inside the door you do.

19 HONORABLE SCOTT BRISTER: It wasn't the rule
20 in my court. I chased them away a number of times. I
21 know Sharolyn Wood does.

22 CHAIRMAN BABCOCK: Yeah, you can chase them
23 away. In fact, some judges block that window. Some
24 judges put paper or cardboard or something on the window,
25 and that's effective, but the point is I don't think the

1 media ever files an application under the local rules of
2 Harris or Dallas County if they're only shooting through
3 the window. So the issue is whether or not we have a
4 statewide rule where you do have to file an application if
5 you shoot through the window, and if you don't file that
6 application and shoot through the window then you're
7 violating the rules, and that is a serious issue because
8 there are some judges -- this happened in Harris County
9 two weeks ago. There are some judges that if they think
10 that a rule is being violated will do some self-help,
11 because I had a couple of cameramen detained and their
12 tape taken away from them for a few hours, so, you know,
13 we got it all worked out, but --

14 MR. ORSINGER: This is a case you were
15 trying --

16 HONORABLE SCOTT BRISTER: It was somebody
17 not up for election, I bet.

18 CHAIRMAN BABCOCK: That would be true, too.

19 MR. ORSINGER: This is a case you were
20 trying in North Korea, isn't it?

21 CHAIRMAN BABCOCK: Well, we got it worked
22 out, as I said, but Bill.

23 PROFESSOR DORSANEO: What you're saying is
24 that the news media decides whether to take their chances
25 and shoot through the window and see if they get chased

1 away?

2 CHAIRMAN BABCOCK: You know, I think that
3 Tom would advise his clients that under the current
4 practice you don't need to file an application under the
5 local rules that exist, so the question is whether or not
6 we want to make a policy decision that, you know, we're
7 going to capture that practice in this rule so that you do
8 have to make an application; and, frankly, I don't think
9 the judges really want that. I don't think the judges
10 want six media organizations filing applications to say,
11 "Hey, we want to shoot through the window for two
12 minutes."

13 MR. LEATHERBURY: Because then you don't
14 have to pool. It implicates other provisions of the rule
15 that are designed specifically for coverage from within
16 the courtroom.

17 CHAIRMAN BABCOCK: Okay. Harvey.

18 HONORABLE HARVEY BROWN: It's not very
19 practical to file an application every time they want to
20 go through the window. Sometimes they just want 10
21 seconds of a hearing just to show a little something, and
22 they're out there no more than two minutes, and you don't
23 even see them almost. So --

24 CHAIRMAN BABCOCK: It is fundamentally
25 different from being inside the courtroom where you've got

1 sound and you're there for awhile and you can't leave
2 until there's a break. Yeah, Carl, and then Paula.

3 MR. HAMILTON: Current rule, of course, is
4 limited to in the courtroom, and I think that's what we
5 ought to do, is limit this rule to in the courtroom and
6 not try to fix everything outside the courtroom.

7 CHAIRMAN BABCOCK: That would be my
8 preference, but Paula.

9 MS. SWEENEY: Some of the trial judges or
10 maybe some of you-all that are more media savvy, how often
11 does this come up?

12 HONORABLE SCOTT BRISTER: Shooting through
13 the windows? Everyday.

14 MS. SWEENEY: There's somebody outside your
15 door everyday?

16 HONORABLE SCOTT BRISTER: Not my door, but
17 you've got 80 courts.

18 MS. SWEENEY: Even in the civil courts?

19 HONORABLE SCOTT BRISTER: Well, the family
20 law courts is where they like to do it because the family
21 law courts have completely glass doors, so you can't put
22 paper over those, and there's always somebody famous
23 getting a divorce.

24 MR. ORSINGER: But, you know, the point is
25 this is not intrusive, really. I mean, for the most part.

1 PROFESSOR DORSANEO: Well --

2 MR. ORSINGER: Unless you've got a lot of --
3 well, like we've got a courtroom in the Bexar County
4 courthouse, it's frosted, and many of the doors are
5 completely frosted, but this has a slit in there so you
6 can look and see whether there's a trial going on, and the
7 media shoots through there, and no one would ever know
8 unless they just opened the door right into the camera
9 that anyone was out there.

10 HONORABLE SCOTT BRISTER: But I agree with
11 Chip, too.

12 HONORABLE SARAH DUNCAN: Until they go home
13 and turn on their TV.

14 HONORABLE SCOTT BRISTER: This is a
15 different thing. That is in the category of can you take
16 a picture of the litigant when they're walking on the
17 sidewalk outside the courthouse. Obviously, yes, you can.
18 This is pretty close to that. Yes, it can be disruptive,
19 but, boy, it sure is a different thing from broadcasting
20 proceedings and I think ought to probably be in a
21 different rule.

22 CHAIRMAN BABCOCK: Frank.

23 MR. GILSTRAP: Well, I don't take this
24 sanguine view about cameras through the courtroom. I
25 could imagine a situation like probably O. J. Simpson

1 where they put a camera up there and then had actors do
2 voiceovers. I mean, if it was a big enough trial, they
3 could do it. At the same time I think the thing we've got
4 to decide is do we want to take on that area, and in other
5 words, it is a troublesome area. It's going to be hard to
6 follow limits on it, and I think what I wanted to start --
7 the reason I started down this road, I wanted to make it
8 clear that these rules could not be used to limit a
9 judge's authority outside the courtroom. In other words,
10 they just don't take any stand on what happens outside the
11 courtroom, and that area of the law can develop without
12 the aid of these rules.

13 CHAIRMAN BABCOCK: Well, and, yeah, Judge
14 Patterson.

15 HONORABLE JAN PATTERSON: I agree with that,
16 and I also think that we ought to consider proceeding as
17 though it applies just in the courtroom and maybe at the
18 conclusion see if we -- if it's appropriate because it
19 seems to me that these factors are going to pertain to in
20 the courtroom, and every other aspect of the rule
21 pertains, I think, to in the courtroom, and I hate for us
22 to get caught up in this larger or this different issue if
23 we don't need to for the sake of this rule, and maybe it
24 might -- we might conclude at the end that it's properly
25 the subject of something else or could be included. I

1 wonder, though, whether we can't proceed with the rule and
2 the factors, which are the most important.

3 CHAIRMAN BABCOCK: Well, and that gets back
4 to the point that the often misunderstood Justice Duncan
5 made, which is that there ought to be something right up
6 front that says, "These rules apply to judicial
7 proceedings in the courtroom or, you know, wherever court
8 is conducted" or something like that.

9 MR. ORSINGER: We could have an introductory
10 paragraph called "Scope of rules" and then say it only
11 applies in the courtroom.

12 CHAIRMAN BABCOCK: Tommy. Tommy, get us out
13 of this.

14 MR. JACKS: Actually, I move that we have an
15 introductory paragraph called "Scope," and it's a better
16 way to get into the rule. We could use the words then
17 that are then defined in the next section.

18 CHAIRMAN BABCOCK: Yeah. Sarah, listen.
19 You're winning.

20 MR. JACKS: And it's not a homily about the
21 freedom of the press or the independence of the judiciary.
22 It's just saying what the rules do and don't cover. I
23 think it's a good idea, and I would like to move on to
24 discuss the rest of the rule.

25 CHAIRMAN BABCOCK: Sarah, would that be --

1 would that satisfy your --

2 HONORABLE SARAH DUNCAN: I think Mr. Jacks
3 is eminently reasonable.

4 CHAIRMAN BABCOCK: Well, that remains to be
5 seen.

6 HONORABLE SARAH DUNCAN: On this point and
7 others.

8 MR. JACKS: Then say "second."

9 HONORABLE SARAH DUNCAN: Second. I thought
10 that was implicit in what I said.

11 CHAIRMAN BABCOCK: "Scope of the rules."
12 And then there will be some language that says what that
13 scope is, and Richard and Justice Duncan and Tommy can
14 figure out what that's going to be.

15 MR. GILSTRAP: And as part of this then are
16 we going to take "in the courtroom" out of the
17 definitions, because it really doesn't belong there? It
18 really belongs in the scope.

19 CHAIRMAN BABCOCK: I think that's probably
20 right, Frank. Isn't that right, Richard?

21 MR. ORSINGER: Yeah. So we're not -- we
22 just have to privately figure out what the scope of the
23 rules is?

24 CHAIRMAN BABCOCK: Yeah. We will come back
25 to that. You guys can do that on a break. Okay. What

1 about "audio" -- the way I have "audio-visual coverage or
2 electronic media coverage or coverage means, one,
3 electronic broadcasting or other transmission of sound or
4 visual images; two, electronic recording of sound or
5 visual images for later transmission or reproduction; and,
6 three, still photography." Period. Is that the way it
7 reads now?

8 MR. ORSINGER: Yeah.

9 CHAIRMAN BABCOCK: Anybody have any problem
10 with that?

11 Okay. The next one, "media or media agency
12 means." Any other issues on that?

13 MR. GILSTRAP: Chip, and I don't have the
14 definition in front of me, but I think in the summary
15 judgment rules there's some definition of electronic media
16 and --

17 CHAIRMAN BABCOCK: In summary judgment
18 rules?

19 MR. GILSTRAP: Somewhere where you guys --
20 you get a free appeal. You remember?

21 CHAIRMAN BABCOCK: Oh, oh. Oh, yeah.

22 PROFESSOR CARLSON: 76a.

23 MR. LEATHERBURY: That would be Chapter 54.

24 MR. GILSTRAP: Okay. All right. Should
25 that definition conform to this definition?

1 CHAIRMAN BABCOCK: Well, it doesn't exactly
2 fit, Frank --

3 MR. GILSTRAP: Okay.

4 CHAIRMAN BABCOCK: -- because that
5 definition includes people that talk to the media, and
6 there are a whole bunch -- there is a whole class of
7 people that would not traditionally be thought to -- it's
8 not in the rule book. It's a statute.

9 MR. GILSTRAP: Okay. Well, I'm just
10 thinking maybe --

11 CHAIRMAN BABCOCK: We ought to look at it,
12 though. Yeah.

13 MR. GILSTRAP: Yeah. You ought to at least
14 compare the language that is common and make sure it says
15 the same thing.

16 CHAIRMAN BABCOCK: Yeah.

17 HONORABLE SARAH DUNCAN: Are you talking
18 about an interlocutory appeal?

19 PROFESSOR CARLSON: 51.004. Yeah.

20 HONORABLE SARAH DUNCAN: We have a
21 certification procedure. Why can't they just get into
22 that now?

23 PROFESSOR CARLSON: He's just saying look to
24 the definition.

25 HONORABLE SARAH DUNCAN: Oh.

1 MR. GILSTRAP: Just the definition needs to
2 match.

3 CHAIRMAN BABCOCK: Yeah. We'll take --
4 Richard, you can take a look at that maybe.

5 MR. ORSINGER: All right. Will do.

6 CHAIRMAN BABCOCK: On a break. Second
7 break.

8 MR. EDWARDS: Did somebody pick up on the
9 "means" instead of "mean" there?

10 CHAIRMAN BABCOCK: Yeah.

11 MR. ORSINGER: Yes. We dropped "shall mean"
12 and it says "means."

13 MR. EDWARDS: I'm talking about this media
14 area.

15 MR. ORSINGER: Well, it should be "means,"
16 singular, because you have two terms in the subject.

17 MR. EDWARDS: With an "or" to be
18 grammatically correct.

19 CHAIRMAN BABCOCK: "Media or media agency."

20 MR. EDWARDS: Either the phrase means or
21 either one or the other.

22 MR. ORSINGER: They taught grammar better in
23 your day than in my day.

24 MR. EDWARDS: My figures are wrong. I'm
25 kind of hungry.

1 CHAIRMAN BABCOCK: I think, Bill, he said
2 that you're older than he is.

3 Okay. Judicial proceeding, we okay on that?

4 MR. ORSINGER: No, we're not, because that's
5 a kind of a moving target the way that's defined.

6 CHAIRMAN BABCOCK: No, I don't think so.
7 Why is it?

8 MR. ORSINGER: Well, if you're having a jury
9 viewing of a car in the parking lot, that would be a
10 judicial proceeding here, but that's not the courtroom
11 that fits the scope of the rules.

12 CHAIRMAN BABCOCK: Well, no, I disagree. I
13 think that that is the courtroom. I mean, just like at
14 the convention center, which was designated by statute to
15 be the courtroom or when the jury and all the parties go
16 out to look at the bus with the blown tire, and that's the
17 courtroom.

18 HONORABLE SAM MEDINA: And why would that
19 not give discretion to a judge to address the little slit
20 issue? I mean, they can stand out there with a camera all
21 day long --

22 CHAIRMAN BABCOCK: Because -- because in the
23 scope of the rules, Richard is coming up with the
24 language, he's going to say slits are out. He's going to
25 say we're not trying to regulate slits.

1 HONORABLE SAM MEDINA: Okay, but is that a
2 conflict if I am saying, "Okay, but I am regulating a
3 judicial proceeding, and you can stand outside there.
4 It's a public access. You can do that. You're just not
5 going to record"?

6 CHAIRMAN BABCOCK: It's just a matter of a
7 sentence that's going to say, "These rules are not
8 intended to affect one way or the other the coverage,
9 electronic media coverage, through a window or anything
10 outside."

11 HONORABLE SAM MEDINA: So basically it will
12 take the judge's discretion away if he -- in terms of
13 taking care of a judicial proceeding.

14 CHAIRMAN BABCOCK: No, not at all. You hire
15 Gilstrap here, and he'll -- you know, he'll make sure they
16 stay a couple of football fields away.

17 MR. TIPPS: I mean, I think that saying that
18 these rules don't apply to the situation of going through
19 the slit doesn't mean that the judge is totally without
20 power to regulate somebody who is interfering with the
21 proceeding.

22 HONORABLE SAM MEDINA: That's my point, but,
23 see, I think we're asking for a lot of trouble there. If
24 I think, okay, this is going to interfere and they're
25 standing out there and they're filming the jury, the jury

1 is uneasy, you say, "Well, you can't do that." Okay,
2 take the jury out now. What about the witnesses or --
3 well, it's affecting this case. I mean, it may not. But
4 they're not in the courtroom, but they're right outside
5 the courtroom. How much authority do I have?

6 CHAIRMAN BABCOCK: Well, I think -- I think
7 if we proceed in the manner we've been thinking about, you
8 don't have any authority under these rules because the
9 rules just aren't going to address it one way or the
10 other. These rules are not going to take away your
11 authority, but they're not going to give you any
12 additional authority either. So then the question becomes
13 do you have authority under the Constitution to regulate
14 the media in the environs of your courtroom? I think the
15 cases support the proposition that shooting through the
16 window and at the door you have authority.

17 HONORABLE SAM MEDINA: It's an architectural
18 problem.

19 CHAIRMAN BABCOCK: Right. It's an
20 architectural problem, and then as you get further away
21 from the door, get further away from the courtroom, your
22 authority diminishes, I think, under the cases, but it's
23 still a separate issue.

24 HONORABLE JAN PATTERSON: Sam has discretion
25 to order venetian blinds.

1 CHAIRMAN BABCOCK: If he can get the county
2 commissioners to pay for it, I bet he does.

3 HONORABLE SAM MEDINA: I like the idea of
4 the frosted windows.

5 CHAIRMAN BABCOCK: Harvey.

6 HONORABLE HARVEY BROWN: I wonder if it
7 would be helpful to have a definition of a courtroom, say
8 something like, "A courtroom is any place in which a
9 judicial proceeding is conducted," and that would take
10 care of the issue about the convention center or --

11 CHAIRMAN BABCOCK: Viewing the bus.

12 HONORABLE HARVEY BROWN: Right.

13 HONORABLE SAM MEDINA: That's the way it was
14 originally, wasn't it?

15 CHAIRMAN BABCOCK: Richard, you got that?

16 MR. ORSINGER: Yeah, but what is the
17 courtroom when you're standing around outside with no
18 walls? I mean --

19 HONORABLE HARVEY BROWN: That's why I said
20 "place" rather than "room." It's a little undefined,
21 but --

22 MR. ORSINGER: Little undefined, okay.

23 MS. SWEENEY: But if you're standing outside
24 they could shoot from a quarter mile away. The courtroom
25 just got real big.

1 MR. EDWARDS: Yeah. Where is outside the
2 courtroom?

3 HONORABLE SAM MEDINA: Outside.

4 CHAIRMAN BABCOCK: Okay. What else? What
5 else on the definitions? Anything?

6 MR. SOULES: Why do we need a courtroom --
7 "a judicial proceeding can occur anywhere, wherever
8 conducted," as this rule is written?

9 CHAIRMAN BABCOCK: Yeah. I don't think
10 there's a problem with that definition, Luke.

11 MR. SOULES: I don't either, but I don't
12 think we need to define a courtroom if we've got that
13 definition.

14 HONORABLE HARVEY BROWN: I saw something on
15 page five talking about "in the court."

16 MR. SOULES: Well, we need to line up those
17 words to say "judicial proceeding."

18 HONORABLE HARVEY BROWN: Maybe. Maybe that
19 will work. It's something to keep our eye on.

20 MR. SOULES: Use that term as defined.

21 CHAIRMAN BABCOCK: What about the next
22 definition, "court"? Yeah. I'm sorry, Stephen.

23 MR. TIPPS: I just had a question in the
24 definition of "media or media agency." Did we move the
25 last sentence to require paragraph --

1 CHAIRMAN BABCOCK: Yes. Oh, wait a minute.
2 Hold it.

3 MR. HAMILTON: Or just delete the word
4 "coverage" in that next to the last sentence. Maybe
5 that's what's really meant, just delete "coverage."

6 CHAIRMAN BABCOCK: You know, I am not even
7 sure what that last sentence adds. "Educational media
8 coverage includes but is not limited to reproduction of
9 court proceedings for public or private school classroom
10 use or for legal training." What does that say?

11 MR. SOULES: It means that's something else
12 the judge can limit.

13 MR. ORSINGER: Well, the term "educational
14 media" in the previous sentence has no definition if you
15 don't have it, and that's -- yeah, that's fine.

16 CHAIRMAN BABCOCK: I'm not sure what the
17 educational media is as opposed to the media media.

18 MR. ORSINGER: Well, I was not on this
19 committee, but it's obvious to me that they think there
20 may be interest from the standpoint of news reporting on a
21 contemporary immediate basis and then there may be
22 historical purposes or training purposes, and the Travis
23 County rules go so far as to say one of the policies to
24 consider is continuing legal education. So there is a
25 difference between the immediate delivery of information

1 on a contemporaneous basis with a court proceeding and
2 then recording something for historical or educational
3 purposes, and they recognize that distinction. It's
4 important, I think to recognize there's more than just
5 transient media interest. If you don't want to define
6 what constitutes educational use, you don't have to.

7 CHAIRMAN BABCOCK: Well, the point is, are
8 you making that distinction because later on in the rule
9 it might influence the judge's discretion about whether
10 they would allow it or not?

11 MR. ORSINGER: No.

12 CHAIRMAN BABCOCK: Because you can't do
13 that. You can't discriminate among people who are trying
14 to cover it.

15 MR. ORSINGER: No. I think the -- the
16 problem I have is I'm working with a draft of people that
17 I was not on this committee and I don't know why they
18 wrote this, but we for some reason have agreed that this
19 is our baseline.

20 CHAIRMAN BABCOCK: It may seem like we're
21 attacking you, Richard, but we're not.

22 MR. ORSINGER: But it's obvious to me --

23 CHAIRMAN BABCOCK: Don't take it personally.

24 MR. ORSINGER: It's obvious to me that they
25 think that you shouldn't just have a set of rules that

1 says only television stations can cover trials, and they
2 didn't completely succeed in doing that.

3 CHAIRMAN BABCOCK: Yeah.

4 MR. ORSINGER: But there are -- you know,
5 there may be people like -- that want to record something
6 for truly archival purposes. There may be people that
7 want to record something for political science courses or
8 for continuing legal education, and they're saying, "We
9 want them to be included and people who can participate in
10 the media pooling and can have a camera in the courtroom."
11 If no one else cares, at least they care.

12 MR. SOULES: The first sentence in the
13 definition of "media" says, "The function of which is to
14 inform the public." I believe that that phrase modifies
15 everything that precedes it, not just "educational media."
16 So if there is another purpose that is a purpose besides
17 the function of which is to inform the public, such as use
18 for public or private school or classrooms and so forth,
19 you're going to have to add that last sentence in order to
20 get it in, in order to get the scope of coverage, if you
21 want that scope covered.

22 JUSTICE HECHT: We've had the attorney
23 general's office tape arguments in the Supreme Court that
24 they were participating in for training purposes. So they
25 say, "Here's how Lawyer Smith did it."

1 CHAIRMAN BABCOCK: Tommy.

2 MR. JACKS: When I was -- I mean, even back
3 in the dark ages when I was in law school there was a
4 direct feed to the law school from the 126th District
5 courtroom over here at the courthouse so the law students
6 could go back behind the kids casino and sit there and
7 watch trials while you're eating lunch.

8 I would argue that educational media
9 coverage should not be within the scope of this rule, that
10 that ought to be handled as an administrative matter and
11 not require that for every proceeding in which an
12 educational use is going to be made of some recording that
13 -- you know, that the law school has to go file a motion
14 in every case that's heard in that courtroom, in that
15 example. I don't think there's the same need for rules to
16 regulate that sort of thing as there is for true media
17 coverage of court proceedings.

18 CHAIRMAN BABCOCK: Leatherbury, do you have
19 something?

20 MR. LEATHERBURY: I was going a different
21 way, and I was going to say a potential fix to that is to
22 just stop that definition after the first use of
23 educational media and omit "function of which is to inform
24 the public" and then the next sentence.

25 CHAIRMAN BABCOCK: Okay. Bill.

1 PROFESSOR DORSANEO: Keeping reading here,
2 and I'm not sure the definitions actually are the words
3 that need to be defined in the balance of this rule. I
4 think we ought to go to the "Procedure for application and
5 approval" and then see what words we need to define
6 instead of working backwards.

7 HONORABLE SARAH DUNCAN: Another vote for
8 structure. Yes.

9 CHAIRMAN BABCOCK: That was Sarah's point
10 about an hour ago.

11 PROFESSOR DORSANEO: Well, I misunderstood
12 you before.

13 CHAIRMAN BABCOCK: That happens pretty
14 often.

15 MR. ORSINGER: I would like to respond to
16 Tommy's point, which I'm sympathetic with, but if we
17 exclude them from the rule that means that they don't
18 necessarily have the right to participate in a media pool,
19 and that would concern me that these rules say that if
20 there is more than one agency that's interested then you
21 must have a pool and you have a right to have a pool if
22 you send a representative that requests participation in
23 the rule, but if the educational media is completely
24 excluded then they don't have a right to sit at the table
25 if it's pooled.

1 HONORABLE SAM MEDINA: And I agree with
2 Richard in that we could take care of your situation
3 administratively anyway. In other words, if they come in
4 with an application, say, "Okay, any time that there's a
5 case, you know, the school will be allowed if they want to
6 to participate" or something and then get all of them.

7 MR. ORSINGER: But the problem is, is that
8 the media has the duty of filing a written request,
9 serving notice on the lawyers, and securing a written
10 order, and so you can't just have a standing camera
11 because you've got to get -- unless we -- like one of
12 these local rules, I think it's Bexar County, requires the
13 trial judge to inform the lawyers, not the media; and,
14 frankly, that makes a lot of sense to me that the trial
15 judge should inform them. But, at any rate, we do have a
16 notice requirement that would make your standing order
17 problematic, so we need to tinker with it if we want to
18 accomplish what Tommy says. But I sure would hate to say
19 that they don't have a right to participate in a pooled
20 trial.

21 CHAIRMAN BABCOCK: Richard, what do you
22 think about Bill's point?

23 MR. ORSINGER: That's okay with me. We can
24 work backwards if you want to.

25 CHAIRMAN BABCOCK: I think that makes some

1 sense. Why don't we -- you want to go on to procedure?

2 MR. GILSTRAP: Wait a second. This is just
3 a structural point. On the definition of "pool" on page
4 four --

5 CHAIRMAN BABCOCK: Right.

6 MR. GILSTRAP: After the word "joint" you
7 have the phrase "production of video, audio, and still
8 photographic coverage." Why don't we replace that with
9 "electronic media coverage"? That way it will fit with
10 the earlier definition. I think you're saying the same
11 thing, so say "joint electronic media coverage of a
12 judicial proceeding."

13 PROFESSOR DORSANEO: Yeah. That's right.

14 MR. ORSINGER: I don't know if we need "of
15 the judicial proceeding" anymore since we're -- are we not
16 elsewhere confining it? Let's leave it in there
17 temporarily. Okay.

18 CHAIRMAN BABCOCK: Okay.

19 MR. ORSINGER: Then we should move to page
20 four, "Procedure of application and approval."

21 PROFESSOR DORSANEO: Which is in page three
22 on some of these.

23 MR. ORSINGER: It is? Okay. I'm working
24 with the copy that was put on the table there. I
25 apologize. It's entitled, "Procedure for application and

1 approval." The first section is "Application and
2 notification of parties."

3 "Coverage of judicial proceedings," however
4 we decide that's defined, "may be granted only to members
5 of news or educational media and only with the court's
6 written approval."

7 PROFESSOR DORSANEO: Obviously there are
8 words that leap out there that need definition.

9 "Coverage," I wonder why the word "coverage" is used there
10 rather than "electronic media coverage."

11 CHAIRMAN BABCOCK: Yeah. It's got to be
12 "electronic media coverage."

13 PROFESSOR DORSANEO: "Judicial proceedings."

14 MR. ORSINGER: "Coverage" is defined the
15 same way as "electronic media coverage," so we've got a
16 problem with --

17 PROFESSOR DORSANEO: That just creates
18 confusion.

19 MR. ORSINGER: Then we've got to take it out
20 of the definition of "audio-visual." You've got three
21 different phrases that mean the same thing under
22 "definitions."

23 PROFESSOR DORSANEO: But why? Why do we?

24 MR. ORSINGER: Why should we is --

25 CHAIRMAN BABCOCK: Why should we?

1 MR. ORSINGER: I don't know that we should.

2 CHAIRMAN BABCOCK: It's not your rule, is
3 it?

4 MR. ORSINGER: Yeah. But I will be happy to
5 go back and consolidate those.

6 PROFESSOR DORSANEO: I would say "electronic
7 media coverage" probably works better than --

8 MR. ORSINGER: "Audio-visual" or "coverage."

9 PROFESSOR DORSANEO: Yeah.

10 CHAIRMAN BABCOCK: I agree.

11 MR. ORSINGER: Okay. So we're going to
12 strike the other two, and everything now is "electronic
13 media coverage."

14 MR. HAMILTON: But it isn't all electronic.

15 PROFESSOR DORSANEO: But it's defined as --

16 CHAIRMAN BABCOCK: It's defined, though.

17 MR. ORSINGER: And everybody is using
18 digital cameras, which technically they are electronic.

19 MR. SOULES: Not me.

20 MR. ORSINGER: You're not?

21 MR. SOULES: No.

22 PROFESSOR DORSANEO: Your camera will wear
23 out eventually.

24 MR. SOULES: If it ever wears out.

25 CHAIRMAN BABCOCK: The old Polaroid. Soules

1 gets to take whatever pictures he wants.

2 MR. SOULES: That's okay. You can limit it
3 to electronic.

4 MR. ORSINGER: Maybe we should just call it
5 "media coverage" and forget the "electronic."

6 CHAIRMAN BABCOCK: No, no, no. You can't
7 say "media coverage."

8 MR. HAMILTON: Or just "coverage."

9 CHAIRMAN BABCOCK: "Electronic media
10 coverage" is the right way to do it. It's too confusing
11 otherwise.

12 MR. ORSINGER: Okay. So it starts now
13 "electronic media coverage of judicial proceedings."

14 PROFESSOR DORSANEO: Which is going to need
15 to be defined, but you keep going and then you have
16 "news." I think I have some rough idea what news is, but
17 I'm not altogether sure I do.

18 CHAIRMAN BABCOCK: Well, we define that.

19 PROFESSOR DORSANEO: No, we don't.

20 MR. ORSINGER: We don't define "news," but
21 we define "media" to include news.

22 PROFESSOR DORSANEO: "News or educational
23 media."

24 MR. SOULES: That's an oxymoron.

25 MR. LEATHERBURY: I think you could take out

1 "news or educational" and just make it "media
2 representative" to correspond with the definition.

3 MR. ORSINGER: Could we just use the term
4 "media," which we have a special definition for and not
5 try to qualify it? "May be granted to the media"?

6 PROFESSOR DORSANEO: Where does "media
7 agency" appear anywhere in this rule?

8 MR. ORSINGER: In the pooling stuff, and I
9 think the reason for the term "media agency" is to
10 distinguish between TV stations, radio stations. They're
11 all media, but each one of them is a separate media
12 agency. Not my words.

13 PROFESSOR DORSANEO: Man, I don't need to
14 know that much to write this rule, I don't think.

15 CHAIRMAN BABCOCK: Yeah. I don't want to --
16 I almost hesitate to bring this up, but I think it could
17 be important. The interlocutory appeal has been
18 challenged unsuccessfully, but nevertheless challenged, on
19 the basis that it gives special rights to the media and
20 not to the general public. 99 percent of the applications
21 under this rule are going to be made by the media as we
22 understand them, but should we be making a policy decision
23 that let's say Gilstrap decides that he's going to do
24 something productive with his life and is going to make
25 some movie about judicial proceedings and so he wants to

1 get some footage.

2 Now, he's not by any stretch of the
3 imagination a member of the media, but he's got a -- you
4 know, he's got a worthwhile, worthy idea, and so he -- you
5 know, he wants to get in there and film some trials, and
6 he's not going to be disruptive. He's going to have a
7 little camcorder and just be in there and do it. Why
8 shouldn't he be able to make an application and get in
9 there if he'll behave himself? Justice Duncan, do you
10 have a reason?

11 HONORABLE SARAH DUNCAN: I don't think
12 that's all that far off the mark. I mean, I could imagine
13 independent documentary types wanting to get some footage
14 of X, Y or Z.

15 MR. LEATHERBURY: An electronic Vanessa
16 Leggett.

17 CHAIRMAN BABCOCK: Yeah. That's where I was
18 headed. Harvey.

19 HONORABLE HARVEY BROWN: Well, wouldn't the
20 definition of "media" be broad enough to cover all that? I
21 mean, it's got "in-house publication, professional
22 journals, any education media."

23 CHAIRMAN BABCOCK: Well, I mean, I was
24 trying to draw an example with Frank, who's just a lawyer
25 who's got an idea that maybe he's going to do a

1 documentary someday, and he wants to get in there, and if
2 the judge starts cross-examining him and says, "Well, wait
3 a minute. Have you ever done a movie before?"

4 "No, sir."

5 You know, "You got any experience doing
6 this?"

7 "No."

8 "Are you a member of the media?"

9 "Well, I don't consider myself to be."

10 Skip.

11 MR. WATSON: Well, I was just thinking I
12 think almost exactly the same thing but in a different
13 vein. We've always had the courthouse regulars or
14 watchers who sit in the back and take copious notes of
15 everything that goes on in every trial in the courtroom;
16 and I don't think we're too far off from the point where
17 that person would be able to bring in a digital media
18 camera that's the size of their palm and very
19 inappreciably or even potentially secretly videotape the
20 proceeding and beam it wirelessly to a website where it's
21 on the web; and, you know, perhaps five years ago I would
22 have thought that was farfetched, but we have personal
23 websites now with continuously streaming video from a web
24 cam; and we now have the ability to have very small
25 digital movie cameras that are wirelessly beaming to

1 remote locations; and I was just sitting here wondering
2 are we excluding those people and creating a monopoly for
3 the conventional media or should we perhaps be envisioning
4 any electronic, even sound recording, whether it's just by
5 the microcassette recorder that's sitting in somebody's
6 purse in the courtroom. How are we dealing with those
7 things?

8 CHAIRMAN BABCOCK: That's an even better
9 example than the one I was able to concoct, and I think it
10 seems to me that the interests of the judicial system are
11 the same in both cases. I mean, it really doesn't matter
12 if the visual image is coming over the internet so people
13 in China can see it as well as everybody that's got a
14 computer in Lubbock County or whether or not it's coming
15 over a television set. The impact on the judicial system
16 is going to be the same.

17 MR. WATSON: Right.

18 CHAIRMAN BABCOCK: So why wouldn't we have a
19 rule that would not be limited to, quote, traditional
20 media, but rather would cover anybody who wants to take a
21 camera in there.

22 MR. GILSTRAP: I admire you, Chip, for, you
23 know, raising this issue of principle, but the answer is,
24 is because every nut who has some project is going to be
25 in there. I mean, that's the reason. You're going to

1 open the -- what you're going to do is say anybody can do
2 it. That's where this inquiry ultimately leads to,
3 anybody who wants to go in and be part of the media is
4 part of the media and you're going to have all sorts of
5 disruptive types that are going to want to do it. I think
6 that battle is being fought in other areas like
7 interlocutory appeal. I'm sure some other areas where
8 they have -- I think they have press shield laws where
9 they grant a shield only to members of the press, you
10 know, who's a member of the press.

11 Maybe we just need to kind of go with the
12 flow and let those battles be sorted out in other flora
13 and eventually we'll have an answer.

14 CHAIRMAN BABCOCK: Sarah.

15 HONORABLE SARAH DUNCAN: If there's a
16 disruption you deal with a disruption.

17 MR. WATSON: I'm just saying you should --

18 CHAIRMAN BABCOCK: In that case with the,
19 you know, camcorder is in there, you know, waving it
20 around like that, it's not going to be in there very long.
21 Yeah, Skip.

22 MR. WATSON: Well, I'm just saying shouldn't
23 we make it clear that this is including every attempt to
24 make an audio or visual or still photography.

25 CHAIRMAN BABCOCK: That's the issue I was

1 trying to raise. I don't want to prolong the discussion,
2 but it seems to me that's an important issue.

3 MR. WATSON: To me it is.

4 CHAIRMAN BABCOCK: Carl.

5 MR. HAMILTON: Current rule focuses on the
6 act of broadcasting, televising, not who does it, but just
7 that.

8 CHAIRMAN BABCOCK: Right. That's right.
9 Richard.

10 MR. ORSINGER: That means -- or what happens
11 if a party wants to have a tape recorder on the table to
12 record the proceedings?

13 CHAIRMAN BABCOCK: He's got to apply to the
14 judge. Wouldn't he today?

15 MR. ORSINGER: I don't know, because that
16 would be electronic recording, and the court can grant it
17 only to members of the news media, so have we not just
18 said that a party can't tape record their own trial and,
19 you know, what if you're in an associate judge's court
20 with no court reporter but you want to have a cassette
21 recording to listen to, or what if you're visually
22 impaired and you want to have an audio to listen to
23 because you can't read the transcript.

24 I mean, maybe we ought to be careful here to
25 say that the only people in the world that can tape record

1 or video are TV stations, radio stations, and then
2 educational. Furthermore, why shouldn't private
3 individuals be able to tap into a pool? If there's a pool
4 and if we've got two TV stations but there's someone who
5 is avidly interested in the subject, why can't they get
6 the feed, too, or a photo -- I mean a dub of it?

7 CHAIRMAN BABCOCK: Well, because, just to be
8 the devil's advocate, because it is rare, very rare, that
9 any pool is going to do gavel-to-gavel coverage. The
10 number of trials where that happens you can count on a
11 very few fingers, but the documentary, Skip's, you know,
12 courtroom watcher, or Frank the documentary guy with no
13 press or media background or experience, you know, wants
14 to be in there to cover the whole thing, and so a pool is
15 not going to help them.

16 MR. ORSINGER: Okay, but what I'm saying is
17 that the way this is written, even if somebody just wants
18 to get a dub of the media pool tape they can't. You may
19 not know this if you haven't read it yet, but if you're
20 not part of this, you're not part of the media. You don't
21 get a stream access, and you can't get dubs of what they
22 recorded either. So we have exclusions at all kinds of
23 points of private individuals, including litigants,
24 really.

25 CHAIRMAN BABCOCK: Bill.

1 PROFESSOR DORSANEO: Should there be some
2 limitation on the purpose for which this process is being
3 used? Should there -- it strikes me that there might --
4 that there ought to be some limit on gathering information
5 and just using it for some improper purpose, but maybe the
6 regulation of that limit should be left to a later stage
7 in the analysis.

8 CHAIRMAN BABCOCK: I think you start
9 running --

10 PROFESSOR DORSANEO: This kind of public
11 purpose makes me begin to wonder who the public is.

12 CHAIRMAN BABCOCK: Right.

13 PROFESSOR DORSANEO: I kind of think I'm
14 part of the public and every person, every nut, is part of
15 the public, too, but what the nut would do with the
16 information might create problems. I would prefer to --
17 that the problems be dealt with -- I think I'm just
18 thinking about it for the first time right now, but it
19 seems that to try to say there has to be some public
20 purpose doesn't advance things very much.

21 CHAIRMAN BABCOCK: Stephen.

22 MR. TIPPS: I think we're back to the issue
23 of scope, and it seems to me that these rules are being
24 drafted to deal with the question of media coverage of
25 judicial proceedings, and I'm not sure we ought to try to

1 address anything other than media coverage of judicial
2 proceedings, and one thing we could do in the first
3 sentence of "Application, notification of parties," is
4 simply say, "Coverage of judicial proceedings may be
5 granted to members of the news and educational media" and
6 leave out "only."

7 CHAIRMAN BABCOCK: Yeah. Frank.

8 MR. GILSTRAP: As a practical matter, is
9 there a cost factor involved? I mean, you know, they had
10 a camera in the courtroom for O. J., and that was churning
11 out images everyday. That costs money. How is it paid
12 for? If there's some high-profile trial and it costs a
13 lot of money to have a camera in the courtroom the whole
14 time and I'm just some guy off the street, do I get a
15 piece of it? Do I have to pay for it? I mean, I just
16 don't know -- have any idea what the practicalities of the
17 media feed are.

18 CHAIRMAN BABCOCK: Well, one practicality,
19 Frank, is that it does cost money, and the media will
20 rarely do gavel-to-gavel unless it's a Court TV or unless
21 there's an O. J. type case. You know, they want to get in
22 there for a limited period of time, get their visuals,
23 their film, and then get out and then go onto the next
24 one.

25 MR. GILSTRAP: In time for the 6:00 o'clock

1 news. That's the typical thing that Judge Peeples talked
2 about the last time.

3 MR. EDWARDS: How does that work in the
4 pool? I mean, who decides what's going to be taped?

5 CHAIRMAN BABCOCK: Well, there's usually --
6 when there's a pool there's usually an agreement among the
7 media as a condition of access. They're either going to
8 get shut out or they're going to agree that one -- and
9 sometimes, you know, if there's -- sometimes you will have
10 rotating pools, like Channel 11 KHOU will say, "I'll be
11 there from 9:00 to noon" and then KTRK will take over at
12 1:00 and KTRC will take over at 3:00, and that doesn't
13 work very well either, but sometimes that's how it
14 happens.

15 But let's take a break. This is hurting my
16 head. 10 minutes.

17 (Recess from 11:00 a.m. to 11:21 a.m.)

18 CHAIRMAN BABCOCK: Okay. Let's get back at
19 it. As everybody knows, we've got a lot of business to
20 conduct and get through today, so here's the game plan.
21 We're on the record, right? Here's the game plan. We're
22 going to keep talking about this until lunch and then
23 we'll break and then we're going to take up after lunch ex
24 parte communications and physician/patient
25 confidentiality, and we have, I think --

1 HONORABLE JAN PATTERSON: That ought to be
2 short.

3 CHAIRMAN BABCOCK: Buddy and Mark Sales are
4 here, and they've both done a lot of work on this, and
5 then at 3:00 o'clock we're going to talk about this Item
6 2.8, the e-filing project, pilot project in Fort Bend and
7 Bexar Counties. The Chief Justice has asked us to be sure
8 that we deal with that this afternoon, and we have people
9 who want to attend and need a time certain to be here. So
10 that's what we're going to do, and hopefully we can get
11 through that quickly and then get back to some of these
12 other issues, but it's likely that we're going to be
13 meeting in the morning to finish all this stuff up unless
14 we just blow through these other items very quickly, but
15 maybe I should ask -- maybe I should ask about that.
16 Justice Duncan, Rule 13, is that going to --

17 HONORABLE SARAH DUNCAN: Short.

18 CHAIRMAN BABCOCK: -- take a lot of time?

19 HONORABLE SARAH DUNCAN: Short.

20 CHAIRMAN BABCOCK: Short? Okay. And, Mike
21 Hatchell, the judicial administration?

22 MR. HATCHELL: That will be very short.

23 CHAIRMAN BABCOCK: Very short, and Bobby
24 Meadows is not in the room. He's out on the phone. And
25 Rule 76a, Richard, that's kind of in a preliminary stage,

1 isn't it?

2 MR. ORSINGER: It's very preliminary. About
3 all we can do is kind of report back the limited
4 information we have, and we're still waiting for an
5 interim committee report to come out of the House, which
6 won't be due until December 1.

7 CHAIRMAN BABCOCK: Okay. So that's pretty
8 short. Well, maybe we will get done today.

9 MS. SWEENEY: Did we just finish that item?

10 CHAIRMAN BABCOCK: Excuse me?

11 MS. SWEENEY: Did he just finish that item?

12 CHAIRMAN BABCOCK: I think Item 2.7 we're
13 done with. So good job, Richard.

14 MR. ORSINGER: Okay.

15 CHAIRMAN BABCOCK: See if you can do a
16 little better on this other one.

17 MR. ORSINGER: I'll take whatever
18 compliments I can get.

19 CHAIRMAN BABCOCK: And Richard has asked me
20 to re-emphasize that this is not his rule. He's feeling
21 attacked and unappreciated.

22 HONORABLE SCOTT BRISTER: I'm sorry. I
23 missed, Chip. How much longer are we going to go on
24 electronic media?

25 CHAIRMAN BABCOCK: We're going to go 'til

1 lunch.

2 HONORABLE SCOTT BRISTER: Okay.

3 CHAIRMAN BABCOCK: Is that long enough or
4 too long?

5 HONORABLE SCOTT BRISTER: Well, I mean, if
6 we're going to vote it up or down, that's fine, but if
7 this is just the second meeting in a row we're going to
8 spend the whole time talking about preliminary stages, I
9 think we're spending too much time on this, is my feeling.
10 Move to some of these others that we have been carrying
11 over for four meetings in a row and talk about electronic
12 media more in detail when we're ready to finish it.

13 CHAIRMAN BABCOCK: I am not opposed to that.
14 Sarah.

15 HONORABLE SARAH DUNCAN: Some of these
16 things that we can get done and get done quickly, let's
17 get done with it.

18 CHAIRMAN BABCOCK: Okay. I'm for that. Is
19 that all right with you, Justice Hecht?

20 JUSTICE HECHT: Great.

21 CHAIRMAN BABCOCK: Okay, Richard?

22 MR. ORSINGER: Oh, hey, yeah.

23 CHAIRMAN BABCOCK: You're on the griddle.

24 MR. ORSINGER: I've got a lot of rocks over
25 here, so I've got plenty to do.

1 CHAIRMAN BABCOCK: Well, then, Sarah, since
2 you're the one that wants to move onto other things, why
3 don't we move onto your thing?

4 HONORABLE SARAH DUNCAN: It's quick.

5 CHAIRMAN BABCOCK: And there was nobody --
6 I'm not aware of anybody outside of our committee that
7 wanted to be here for that, are you, Deb?

8 MS. LEE: No.

9 HONORABLE JAN PATTERSON: Chip, Bobby's back
10 on 202.

11 CHAIRMAN BABCOCK: Excuse me?

12 HONORABLE JAN PATTERSON: Bobby's back on
13 202.

14 MR. MEADOWS: You asked about 202.

15 CHAIRMAN BABCOCK: Yeah.

16 MR. MEADOWS: Not much has changed on 202
17 from where we were last time at the very tail end of our
18 session in September. I did receive the correspondence
19 that was with the Governor from the committee, and
20 yesterday, which I received a letter from a Mr. Hughes in
21 McAllen or Harlingen, which I have read this morning.
22 It's available on the table, but, I mean, I really
23 couldn't even pick it up on my computer before I came;
24 and, you know, it basically restates with some application
25 the issues that were raised in the earlier correspondence

1 and that were addressed by Paula and Ralph Duggins in kind
2 of pieces; but that's the extent of it.

3 And the committee did meet and talk about
4 this and reach the preliminary view that not much needed
5 to be done, but these issues are in more detail now as a
6 result of Mr. Hughes' letter, but the committee has not
7 had a chance to talk about them because the letter arrived
8 late yesterday. So the question is, you know, what would
9 you have us do at this meeting with that?

10 CHAIRMAN BABCOCK: Well, you know, if we're
11 not ready, if we're not sufficiently down the road to talk
12 about it, and it doesn't look to me like we have any
13 proposed language or anything, so I would say we just
14 disposed of that agenda item. Anybody disagree? Stephen
15 Tipps.

16 MR. TIPPS: Just a question. Is the letter
17 from the Governor available somewhere?

18 CHAIRMAN BABCOCK: Yeah. It's in the --

19 MR. MEADOWS: I think it's now on the --
20 among the committee materials.

21 MR. TIPPS: On the website? I didn't get
22 it, but I may have --

23 MR. MEADOWS: But you really need to read
24 the letter from -- I think it's Richard Hughes.

25 MR. MARTIN: Roger Hughes.

1 CHAIRMAN BABCOCK: Right, Roger Hughes.

2 MR. MEADOWS: Roger Hughes, excuse me, and
3 it's on the table today. What I think we should do, Chip,
4 is I should reconvene the discovery subcommittee after the
5 committee members have had a chance to read Mr. Hughes'
6 letter and see if that takes us to a different place,
7 because you'll remember it was the view of the committee
8 at that time that we didn't need to do anything different.

9 CHAIRMAN BABCOCK: Justice Hecht, is that
10 acceptable to just carry that over 'til a later time?

11 JUSTICE HECHT: Yeah. Uh-huh. But I do
12 think we need to take it up fairly early next year to
13 decide what to do with it.

14 MR. MEADOWS: Well, I can certainly get the
15 discovery committee together to talk about Mr. Hughes'
16 letter, and if anyone else wants to weigh in on it, we
17 would be glad to hear from you. We really just have three
18 letters. We have Paula's response to developments along
19 -- you know, the suggestion that we look at 202, and Ralph
20 sent a letter, and we really now have Mr. Hughes' letter,
21 which really I think explains why the Governor expressed
22 an interest in it.

23 CHAIRMAN BABCOCK: Okay. Well, we got that
24 one checked off the --

25 MS. SWEENEY: Could I ask who's on the

1 subcommittee? Who's on the subcommittee?

2 MR. MEADOWS: Well, Bill Edwards, Harvey
3 Brown.

4 CHAIRMAN BABCOCK: We'll have that for you
5 in two seconds.

6 MR. MEADOWS: John Martin. These are people
7 that were on the call. I'll just get you the list.

8 MS. SWEENEY: That's great. Thanks.

9 CHAIRMAN BABCOCK: The committee is Steve
10 Susman, Bob Meadows, Alex Albright, Harvey Brown, Linda
11 Eads, Bill Edwards, David Jackson, Joan Jenkins, John
12 Martin, and Judge Medina.

13 MS. SWEENEY: Thank you.

14 CHAIRMAN BABCOCK: That's the subcommittee.
15 Okay. Moving right along.

16 HONORABLE SARAH DUNCAN: Moving right along,
17 there is a copy of -- on the table in the back, a copy of
18 our report and a redlined version of the proposed Rule 13.
19 The first page is titled "Report of the TRCP 300-30
20 subcommittee, visiting judge peer review."

21 At the end of our last meeting there were
22 just a few outstanding issues. One was in 13.1(c) whether
23 the reference to section 74.055 of the Government Code
24 meant that this proposed rule was limited to visiting
25 judges in the trial courts. I think it's pretty clear if

1 you read 74.055 that it must be because 74.055 talks about
2 presiding judges and administrative judicial regions,
3 which I think we would all understand to mean trial
4 courts.

5 In response to an e-mail, Chief Justice
6 Cayce said he was sort of hazy on why the Judicial Council
7 intended to limited it to the trial courts, but in support
8 of that he said he doesn't really perceive a problem in
9 the appellate visiting judge arena, and Stephen Tipps
10 agreed with that idea, so I guess one -- one thing we need
11 to vote on is whether this rule should encompass visiting
12 judges in the appellate courts.

13 The second issue was the fairness of not
14 providing the visiting judge with a copy of the materials
15 that were submitted to the visiting judge peer review
16 committee. If you look at 13.3(d)(2) we are proposing
17 that a new subsection (2) be added in the notice that goes
18 from the peer review committee to the visiting judge
19 stating that the peer review committee is going to propose
20 an unfavorable recommendation. We suggest that that
21 letter notice also have to state a summary of the reasons
22 for the proposed unfavorable recommendation. And that's
23 it.

24 So I guess we just need to vote on whether
25 it should incorporate appellate court visiting judges and

1 then the redlined version of the rule. If we decide that
2 it should incorporate appellate court judges there are
3 going to have to be some changes to the rule, but because
4 a majority of my subcommittee didn't think it should
5 include appellate court judges I haven't made -- suggested
6 those changes.

7 CHAIRMAN BABCOCK: Okay. Should we talk
8 first about that issue then, the appellate court judges?

9 Okay. Discussion about whether the
10 appellate court justices should be included. Judge
11 Brister.

12 HONORABLE SCOTT BRISTER: Well, I mean, I've
13 basically banned visiting judges from our court, so I
14 can't really say.

15 CHAIRMAN BABCOCK: You've already made that
16 decision in a certain respect.

17 HONORABLE SCOTT BRISTER: Not because some
18 of them aren't qualified. I just felt we ought to do our
19 own business. If we can't do our own business, we ought
20 to fix it some other way. On the other hand, the reason
21 we're caught up today is because we had visiting judges
22 for two years.

23 HONORABLE SARAH DUNCAN: If I could read
24 Chief Justice Cayce's e-mail.

25 CHAIRMAN BABCOCK: Yeah. Sure.

1 HONORABLE SARAH DUNCAN: I'll read -- it
2 follows on Stephen Tipps', so with Stephen's permission
3 I'll read Stephen's first.

4 MR. TIPPS: Go.

5 HONORABLE SARAH DUNCAN: Is that okay with
6 you?

7 MR. TIPPS: Yeah, you have my permission.

8 HONORABLE SARAH DUNCAN: "I think that peer
9 review is significantly less important at the appellate
10 level than at the trial level. I hear complaints about
11 incompetent visiting trial judges all the time. I never
12 hear that about visiting appellate judges. In addition,
13 the public has much more contact with trial judges than
14 with appellate judges, making peer review more important
15 at the trial level than a public -- from a public trust
16 perspective.

17 "Finally, lawyers and their clients see much
18 more of what trial judges do, making peer review more
19 practical at the trial court level. While most of a trial
20 judge's work is done on the bench in public view, most of
21 an appellate judge's work is done privately in chambers."

22 And from Chief Justice Cayce, "To add to
23 Stephen's comments, there is inherent peer review system
24 already in place in an appellate court environment, the
25 other justices who sit with the visiting judge to whom the

1 visiting judge is accountable. Unlike the visiting judge
2 in the trial court, the appellate court visiting judge
3 must routinely answer to other judges who have a direct
4 interest in the quality and confidence of the visiting
5 judge's performance. This system of accountability
6 minimizes the potential for damages caused by a bad
7 appellate court visiting judge.

8 "Also, once the word circulates among chief
9 justices and justices about an inferior visiting judge,
10 the opportunities for assignments in other courts dry up
11 fairly quickly. I cannot recall whether we intended to
12 include appellate court judges. Maybe David Peeples'
13 memory is better. Whether we did or not, however, I would
14 now vote not to include them in the proposed rule because
15 I think it's unnecessary to do so for the reasons stated,
16 among others."

17 CHAIRMAN BABCOCK: Okay. Any other
18 comments? Judge Patterson.

19 HONORABLE SCOTT BRISTER: Is this a public
20 report or is this just an internal report? The peer
21 review rating of favorable or unfavorable, is that meant
22 to go just to the person that appoints them or is that
23 meant to be public?

24 Because it is true there's a difference
25 between appellate courts and trial judges, but when you

1 appoint a visiting judge on the appellate court you
2 appoint them to sit with you on the opinion. When you
3 appoint them for a -- when a presiding judge of an
4 administrative region appoints them it's to go try a case
5 over there. It's not going to affect me, but as this
6 committee voted over my vigorous objection, not only do
7 you appoint a visiting judge on an appellate court to sit
8 with you on the case, but the majority -- that will make
9 up a majority en banc and so that you'll have, as we had
10 in a couple of cases in Houston, where four or five of the
11 elected judges vote one way and are overruled by the
12 unelected judges, visiting judges, who vote with the
13 minority.

14 CHAIRMAN BABCOCK: Boy, you just won't let
15 it go, will you?

16 HONORABLE SCOTT BRISTER: Well, it's -- you
17 know, I mean, that's one of the reasons we don't have them
18 anymore on the 14th. We can fix that problem. We're not
19 going to be overruled by unelected judges. I -- you know,
20 you don't want to elect your judges then we can set up
21 another system, but if you're going to elect judges to
22 then have the law be something that the elected judges say
23 it shouldn't be is just a big problem with that.

24 MR. SOULES: The committee recommends that
25 the appellate judges not be included; is that right?

1 HONORABLE SARAH DUNCAN: That was the
2 majority vote of the subcommittee.

3 MR. SOULES: That doesn't need a second, but
4 I'll second it anyway.

5 CHAIRMAN BABCOCK: Any further discussion
6 about this?

7 HONORABLE SARAH DUNCAN: As far as the
8 confidentiality is concerned, if you look at subsection --
9 I don't think that is squarely addressed by these rules,
10 but if you look at (g) (2), the presiding judge must
11 forward copies to the administrative director of the
12 Office of Court Administration and to the visiting judge,
13 and then look at 13.5(a), "Confidentiality in general."
14 The proceedings are confidential, so I think it's implied
15 that their recommendation itself is confidential.

16 HONORABLE SCOTT BRISTER: Oh. I mean, I
17 would oppose that. I don't want to get into it too much,
18 but the fact of the matter is the chief judge could
19 appoint visiting judges to make the outcome come out
20 different than it would with the court en banc. It's no
21 secret that a lot of the courts of appeals in Texas are up
22 in the air right now. Ours really aren't, but they are in
23 Beaumont, San Antonio, and Austin and El Paso maybe; and
24 if the chief judge can appoint visiting judges to change
25 the outcome of the cases, same way as the presiding judge,

1 he ought to be held accountable for that.

2 There ought to be a report that shows when
3 you do it, and people ought to be allowed to run against
4 you on that or any other reason they can come up with. I
5 just think it would be a crime to say a system like that,
6 that is subject to -- though, I don't think it's being
7 abused, it's subject to abuse for sure, and to say, well,
8 it's going to be all private and nobody is going to say
9 anything about it, I wouldn't be a part of that.

10 HONORABLE SARAH DUNCAN: I think I must have
11 missed the first part of what you said, Scott. If you
12 could --

13 HONORABLE SCOTT BRISTER: Let's say a court
14 is split three-three.

15 HONORABLE SARAH DUNCAN: You're talking
16 about an appellate court?

17 HONORABLE SCOTT BRISTER: Right.

18 HONORABLE SARAH DUNCAN: So you're assuming
19 that this rule would apply to an appellate court.

20 HONORABLE SCOTT BRISTER: I think the -- it
21 ought to -- there ought to be a system of reporting, and
22 it should not be kept private about appellate judges.

23 HONORABLE SARAH DUNCAN: So, one, you think
24 the rule ought to apply to appellate visiting judges; and,
25 two, the recommendation, whether favorable or unfavorable,

1 should be public.

2 HONORABLE SCOTT BRISTER: Absolutely.

3 CHAIRMAN BABCOCK: I'll call on you in a
4 second, Paula. The threshold question which has been
5 moved and seconded is that this peer review, visiting
6 judge peer review rule, would not be applicable to
7 appellate judges. That's the current motion, right?
8 Sarah, right?

9 HONORABLE SARAH DUNCAN: That's my
10 understanding of what the motion is.

11 CHAIRMAN BABCOCK: Okay. Paula.

12 MS. SWEENEY: My comment has to do with the
13 confidentiality aspect, which I guess we'll get to in a
14 second.

15 CHAIRMAN BABCOCK: Yeah. Let's go to that
16 next. Richard.

17 MR. ORSINGER: I do think we should have a
18 peer review process, although as a practical matter at the
19 appellate level, the litigants and the lawyers will know
20 so little about how an opinion was written or voted on
21 it's likely the input to the peer review committee is
22 going to be from other members of the court, but it seems
23 to me that one of the advantages of having a peer review
24 process with privacy in place is that a justice could say
25 something about the quality or competency of one of his

1 colleagues without having to be embarrassed or have the
2 disincentive of them not having the person find out about
3 it.

4 And I don't think that litigants or
5 appellate lawyers are going to be feeding information to
6 the peer review committee as it would be other members of
7 the court who feed it in, but just to say that if I'm on a
8 panel with a judge from another city and I can go to the
9 chief justice and complain that they're lazy or
10 incompetent or don't understand what they're doing, to me
11 a lot of judges may not do that because they don't want to
12 be that personal about a person in a conversation that
13 can't be kept confidential with a presiding judge who may
14 be a good friend of the justice you're complaining about.
15 So I see that there's a public reason to have it apply.

16 CHAIRMAN BABCOCK: So you're in favor of
17 applying peer review to appellate judges?

18 MR. ORSINGER: Yes, and maybe the procedure
19 would be a little bit different because the litigants and
20 lawyers are not going to probably know that, just the
21 judges who work with them.

22 CHAIRMAN BABCOCK: And Sarah said if it's
23 applicable then she's going to have to -- we're going to
24 have to craft some language. Skip.

25 MR. WATSON: I was pulled into a hearing at

1 the last minute when the subcommittee met and was unable
2 to participate, and I apologize for that. I agree with
3 Richard and with Judge Brister that it should apply to
4 appellate judges. I think it's a -- perhaps a difference
5 in perception around the state that many good judges seem
6 to be knocked off of appellate courts in part because of
7 just political affiliation, but in our part of the country
8 occasionally a not-so-good judge is knocked off the court
9 because the word gets out that this is not -- a
10 not-so-good judge, and remarkably those are the judges
11 that we tend to hear back are being appointed to clear the
12 dockets in Dallas or Houston or other places, and I have
13 gotten calls from judges on other appellate courts saying
14 that "X, Y and Z are under consideration, what do you
15 think?"

16 And it's sort of a very awkward situation to
17 put an appellate lawyer in of just how truthful does one
18 be with a confidential call from a justice on another
19 court who is considering appointment of other judges; and
20 I would just as soon there be a system for doing that,
21 because I believe that those calls ought to be made to the
22 judges that worked on the court with that judge, and I
23 don't know how candid they would be; but judges that are
24 simply lazy, either in work habit or intellectually lazy,
25 that just don't want to be bothered with making decisions

1 and let briefing attorneys and law clerks write the
2 opinions and sign them with little or no deliberation, are
3 known to their fellow justices who do work.

4 And I realize that there are courts in this
5 state in which every judge is a good judge and every judge
6 does work and that frame of reference may not be there,
7 but that's a problem. There are, in my personal opinion,
8 some judges who are sitting on appointments to cases who
9 from a qualitative basis might not pass a peer review if
10 one was conducted by that court.

11 CHAIRMAN BABCOCK: Sarah.

12 HONORABLE SARAH DUNCAN: I -- it's hard for
13 me to even look at this issue because, like Scott's court,
14 we pretty much don't use visiting judges anymore and in
15 large measure because there seemed to be so many problems
16 associated with using visiting judges, like getting
17 opinions back.

18 HONORABLE SCOTT BRISTER: That's a problem.

19 HONORABLE SARAH DUNCAN: But looking at it
20 from my perspective as an appellate lawyer, I agree with
21 you. I think there needs to be a regularized process for
22 transmitting information known to a few to the many in
23 decision-making positions. You know, if -- if a visiting
24 judge formerly defeated in West Texas applied to our court
25 and we were in a position that we were looking at visiting

1 judges, I would want to know that he or she was incredibly
2 rude and offensive and unprepared in an argument that you
3 had with that judge in West Texas, and at this point in
4 time there's really not a process for communicating that
5 information other than to call somebody and really put
6 them on the spot.

7 The problem, I think, is who's going to be
8 the peer review committee. It shouldn't be -- for an
9 appellate court I don't think it should be on a local
10 basis. These are people who are submitting their name
11 for -- to sit on any one of 14 courts. And I -- you know,
12 my view is it should incorporate them, and I have had some
13 pretty big problems with visiting judges, both as a lawyer
14 and as a judge.

15 HONORABLE SAM MEDINA: Sarah, why would it
16 not be local, a local issue?

17 HONORABLE SARAH DUNCAN: One, because there
18 are not that many, and, two, because the information is
19 dispersed throughout the state, wherever they've been
20 sitting; and, you know, you could do it on a local level.
21 I think there's going to be enormous repetition.

22 HONORABLE SCOTT BRISTER: It's hard to
23 balance. The majority of our cases are criminal, so
24 that's easy. You get somebody from the Harris County
25 D.A.'s office who's on all the cases and knows all of it.

1 But who do you get from the defense Bar to do it, because
2 there's a hundred of those people, and maybe on their case
3 this judge was just fine, but on somebody else's they were
4 terrible. But you can't have four defense attorneys and
5 one D.A. on the thing because then you're going to get a
6 particular kind of visiting judge.

7 You know, just if it's the people with the
8 cases that are going to be decided by the appellate court
9 saying whether you're favorable or unfavorable you may end
10 up with the ABA problems where things besides who's
11 qualified and not qualified get considered sometimes when
12 they vote.

13 CHAIRMAN BABCOCK: Buddy.

14 MR. LOW: My question is what goes into the
15 review? Say if you sit on the court with a judge. I
16 don't think what you-all talk about or you say -- if you
17 say, "It will be a cold day in July before I'll ever do
18 that." Should those judges -- that gets into what you're
19 doing in your chambers in appellate court, and I don't
20 think that things like that should be known. There's a
21 group -- remember, Judge, when the Ethics Committee got
22 sued, and they wanted our records, and it was some idea
23 that they ought to be able to get what the Supreme Court
24 discusses and does.

25 I just think that you should not be talking

1 about if some judge -- now, maybe you can say he's lazy,
2 but then it's a question of how far do you go and who says
3 it, but I don't think you should get into what goes on
4 when three judges, whether they're competent, incompetent
5 or not, what they say in their decisions, in reaching it.

6 CHAIRMAN BABCOCK: Sarah.

7 HONORABLE SARAH DUNCAN: My idea for who it
8 would be, to answer my own question, is if it's going to
9 be peer review, it seems to me that it ought to be peers.

10 MR. LOW: Uh-huh.

11 HONORABLE SARAH DUNCAN: And, you know, I
12 don't so much care who the appellate judges are, but I can
13 foresee that there would be one statewide peer review
14 committee for appellate visiting judges, and it might be
15 that you would have a member of the Court of Criminal
16 Appeals, a member of the Supreme Court, and a member of an
17 appellate court, plus or minus a prosecutor, plus or minus
18 a defense attorney. So I don't think it's -- I don't
19 think it's a problem that can't be resolved, but I think
20 it's a different set of considerations if we're going to
21 put appellate judges into this.

22 MR. WATSON: I agree.

23 CHAIRMAN BABCOCK: Paula, and then Judge
24 Peeples.

25 MS. SWEENEY: This discussion has morphed

1 over into the confidentiality area, so I don't know that
2 by rule we can create a privilege. That strikes me as
3 confidentiality might be different, but I don't know that
4 privilege, especially as it's construed currently, is
5 something that we can by rule create and --

6 HONORABLE SARAH DUNCAN: Isn't that what the
7 evidence rules do?

8 MS. SWEENEY: I'm sorry. I'm getting some
9 very bad news that I have to go take.

10 JUSTICE HECHT: Scott, how does -- maybe I
11 should know this, but maybe you don't, but how do judges
12 get appointed to visit on a court?

13 HONORABLE SARAH DUNCAN: Chief Justice
14 Phillips.

15 HONORABLE SCOTT BRISTER: Well, it varies on
16 the court.

17 JUSTICE HECHT: Doesn't the Chief --

18 HONORABLE SARAH DUNCAN: Yeah. We make a
19 request for a visiting judge.

20 HONORABLE SCOTT BRISTER: As was -- if you
21 remember, we had a lawsuit before I got there on the 14th
22 Court that said courts of appeals are governed the way the
23 majority of the judges say they're governed. Now, most of
24 the courts of appeals have not adopted a majority rule
25 governance, but mine has, so at the same time, I have to

1 sign the authorization as the chief before they get paid,
2 so we're in the ticklish situation that a majority of
3 members of my court can appoint a visiting judge, but I
4 can say, "They ain't going to get paid."

5 JUSTICE HECHT: Well, but don't you have to
6 ask our Chief for the appointment?

7 HONORABLE SCOTT BRISTER: We send in a list
8 to Tom that says, "These are the people that can be
9 appointed to the 14th Court as visiting judges," and then
10 you-all approve that list, but you-all don't approve
11 appointment for us anybody that we don't ask you to.

12 JUSTICE HECHT: Right. I was thinking
13 there's kind of a built-in peer review a little bit.

14 HONORABLE SCOTT BRISTER: I mean, it seems
15 to me the peer review for the trial judges is the
16 administrative judge. That's who ought to know since
17 that's the one doing the appointing, and, you know, a
18 different question maybe about who ought to gather it or
19 something like that. Obviously I'm not in favor of a
20 system where somebody just sends me a note saying, "This
21 is who's favorable. This is not -- who you can appoint"
22 because that ought to be left up to the court, but I am in
23 favor of a system where people who do get mistreated or
24 abused by a system ought to have some chance to get that
25 information out there.

1 CHAIRMAN BABCOCK: Frank.

2 MR. GILSTRAP: I don't think the presence or
3 absence of a peer review system is going to affect Judge
4 Brister's problem with visiting judges. I just don't
5 think it's going to have anything to do with it. That
6 leaves the issue of whether or not we should adopt a
7 formal system or whether the informal old boy system is
8 the best we can do, and frankly, I don't have a feel at
9 all based upon what I've heard, and I'm not ready to vote
10 on that. Maybe we need to eat the elephant one bite at a
11 time and try to do trial judges, because I think we're a
12 lot closer on that.

13 MR. SOULES: Right.

14 MR. GILSTRAP: And then, you know, we could
15 decide later to do appellate judges, but the fact that we
16 do trial judges doesn't mean or not mean that we're going
17 to do appellate judges.

18 MR. SOULES: Right. Let's vote.

19 CHAIRMAN BABCOCK: David Peeples had a
20 comment.

21 HONORABLE DAVID PEEPLES: For a couple of
22 reasons I think I would be in favor of limiting this first
23 step to trial courts and not taking it to appellate
24 courts. First of all, I think there's a greater need for
25 peer review of trial courts because your colleagues -- we

1 know less about how the person next door is running his or
2 her court because if I go into somebody's court their
3 behavior changes. I don't do it in the first place.

4 Fellow judges cannot know what another judge
5 is doing in the courtroom, but on the appellate court your
6 colleagues know exactly what you're doing. They know if
7 it takes you forever to get the opinion around, and they
8 know what it says when they get it. So I think there's a
9 greater need for peer review at the trial court than at
10 the appellate court level.

11 There's a second thing. Most people on the
12 receiving end of an appellate opinion, they care about the
13 result. They care about the philosophy of the judge. I
14 mean, that's what peer review really is going to be about
15 on the appellate level, and I don't think that's a very
16 legitimate peer review inquiry. At the trial court level
17 you're interested in work habits, competence, temperament,
18 and things like that. Those are legitimate inquiries for
19 peer review, and I don't think that really applies at the
20 appellate level to the same extent as it does on the trial
21 court level, so I think there's a greater need for it at
22 the trial court level than at the appellate level.

23 HONORABLE SARAH DUNCAN: Luke has a motion.

24 CHAIRMAN BABCOCK: I think there is a
25 motion, and it's been seconded. Skip, you want to add

1 anything?

2 MR. WATSON: No. No. I just was going to
3 say I agree that we need to separate the two, but in
4 separating them I don't necessarily agree with all that
5 Judge Peeples was saying. I think we need to come back
6 and revisit it after we get finished with the trial judge
7 peer review.

8 CHAIRMAN BABCOCK: Everybody in favor of
9 excluding appellate judges from at least this effort to go
10 forward on peer review, raise your hand.

11 Opposed? By a vote of 20 to 2, the Chair
12 not voting, the motion is carried. So we will exclude
13 appellate judges from the peer review rule.

14 PROFESSOR DORSANEO: And I presume the
15 appellate subcommittee can take up this subject and put it
16 on its agenda.

17 CHAIRMAN BABCOCK: Certainly. Is that
18 acceptable to you, Justice Duncan?

19 MR. SOULES: Would you consider a rule that
20 says, "Absent recusal, disqualification, or disability, a
21 majority of any panel must be elected sitting judges"?

22 HONORABLE SCOTT BRISTER: I'm all for it,
23 but I know some appellate judges that are not.

24 CHAIRMAN BABCOCK: There has been some
25 debate about that in this committee, and we can -- that's

1 another thing we can put in the hopper, if the Court wants
2 us to.

3 HONORABLE SCOTT BRISTER: It kind of depends
4 on how bad your backlog is.

5 CHAIRMAN BABCOCK: Okay. Judge.

6 HONORABLE SARAH DUNCAN: I just realized I
7 had several drafts of this going on my computer at once,
8 and I put a sentence in one draft, and it didn't get
9 carried over in the draft that had this other sentence in
10 it. So, with that mind, before we can really vote on this
11 redlined version of proposed Rule 13 I think we need to
12 add a subsection (3) to subsection (g), to fit with our
13 vote at the last meeting. 13.3(g) new (3).

14 At the last meeting we voted that an
15 unfavorable recommendation would be binding on the
16 presiding judge, so I think we need to add a subsection
17 (3) that says, "The presiding judge may not appoint a
18 visiting judge who has received an unfavorable
19 recommendation."

20 MR. HAMILTON: Did you say (b) or (e)?

21 HONORABLE SARAH DUNCAN: (g).

22 PROFESSOR CARLSON: Page four.

23 HONORABLE SARAH DUNCAN: As in "gone." New
24 subsection (3).

25 CHAIRMAN BABCOCK: Is this the draft dated

1 September 9th, 2002?

2 HONORABLE SARAH DUNCAN: It is.

3 CHAIRMAN BABCOCK: Okay. Richard.

4 MR. ORSINGER: The -- there's biennial peer
5 review, right, Sarah? So a judge comes up every two
6 years?

7 HONORABLE SARAH DUNCAN: Uh-huh.

8 MR. ORSINGER: Now, if someone is approved
9 they can always fall off the wagon, but if someone is ever
10 disapproved by the peer review committee and can never be
11 appointed by any presiding judge then you'll have no
12 record to ever put them back on. In other words, once
13 you're dropped off, even if you quit drinking or whatever
14 your problem was, you can't get back on because you can't
15 serve as a judge to show that you're doing better than you
16 did in your last two-year cycle, and so I don't know how
17 you fix that, but that is the practical effect that if you
18 blow it you've blown it for good.

19 I -- Ralph is showing me a section here
20 where it says that you can amend your recommendation, but
21 since you haven't been trying any cases since you got
22 busted then what do you do? You just come back and say
23 "Not on the basis of the fact that I'm being a good judge
24 now, but on the basis I've cleaned up my life, give me
25 another chance"?

1 MS. SWEENEY: How do lawyers get their
2 licenses back when they have been disbarred? Because it
3 would be analogous in that you presumably haven't been
4 practicing law, but there's a mechanism for petitioning.

5 MR. EDWARDS: They apply for reinstatement.

6 MR. ORSINGER: Well, and what is the
7 procedure when someone has been -- when somebody is
8 impaired because of substance abuse or something like
9 that? Isn't there some method to suspend them and then
10 bring them back without actually taking their license
11 away?

12 MR. SOULES: Right.

13 MR. EDWARDS: There's an automatic
14 suspension if they're impaired.

15 MR. ORSINGER: I don't know. I mean, how
16 does it work for somebody that's --

17 CHAIRMAN BABCOCK: Sarah.

18 HONORABLE SARAH DUNCAN: I don't know, but
19 what we might could do is put in a new section under
20 subsection 13.3(f). It now has a provision that the
21 visiting judge who has received an unfavorable
22 recommendation can request reconsideration, but there's a
23 time limit, not later than the 180th day after the date
24 that the committee issued its recommendation. Maybe we
25 could put in a new subdivision (3) that says after a judge

1 has received an unfavorable recommendation they can apply
2 for another peer review process, basically to try to get a
3 favorable recommendation.

4 MR. SOULES: That's all right.

5 PROFESSOR CARLSON: After some time period?

6 HONORABLE SARAH DUNCAN: After six months or
7 a year or whatever.

8 CHAIRMAN BABCOCK: How does that sound,
9 Richard?

10 MR. ORSINGER: Well, you know, I think to
11 the extent that it's a motion for rehearing of an adverse
12 determination you should require them to come forward
13 quickly, but to the extent it's changed circumstances and
14 new factors to consider, you should allow them a longer
15 time frame or maybe have no limit on that, so I would be
16 in favor of saying you can't -- you can file a motion for
17 rehearing any time you want, even four years later.

18 CHAIRMAN BABCOCK: I think you misunderstood
19 Sarah. She meant not sooner than six months. I mean,
20 after six months you could re-apply.

21 HONORABLE SARAH DUNCAN: Right. Right.

22 MR. ORSINGER: Well, I know, but the way I
23 read (f)(1) right now it says that if they have given you
24 a negative recommendation you've got to come back in and
25 ask for a new hearing within six months.

1 HONORABLE SARAH DUNCAN: But the next
2 provision says, "The peer review committee may, either in
3 response to a request for reconsideration or on its own
4 initiative at any time, serve the presiding judge with an
5 amended recommendation," and we could put something in
6 there that says, "The visiting judge who's received an
7 unfavorable recommendation can start a new peer review
8 process."

9 MR. ORSINGER: That would be okay for me,
10 but just my experience in the family law arena, you ought
11 to say something like there needs to be changed
12 circumstances. You don't want somebody coming back to
13 relitigate the same thing time after time, so if it's a
14 motion for rehearing there ought to be some kind of
15 reasonably short time period to bring your evidence
16 forward and get a new determination. Then once it's all
17 lost and you're on a hiatus and you come back after a year
18 and a half and you've got your life straightened out, it
19 ought to be for changed circumstances rather than going
20 back and relitigating everything that you already lost.

21 HONORABLE SARAH DUNCAN: Well, maybe a new
22 14.4 that says "changed circumstances."

23 MR. ORSINGER: Just a suggestion, but it
24 seems to me that there are -- there could be judges --

25 HONORABLE SARAH DUNCAN: Rehabilitation.

1 MR. ORSINGER: Yeah, who rehabilitate. I
2 mean, they truly have a problem. They finally realize
3 that, they change their life, and they're ready for
4 responsibility again.

5 CHAIRMAN BABCOCK: Okay. Stephen.

6 MR. TIPPS: I have a question, because I
7 don't know what section 74.055 of the Government Code
8 says, but we define "visiting judge" as someone who's
9 eligible for assignment under that section and then we in
10 the next section require that visiting judges be peer
11 reviewed. Would the fact that someone had got an
12 unfavorable recommendation and therefore could not be
13 appointed take him out of the definition of a visiting
14 judge or would he automatically be reviewed in two years
15 anyway?

16 HONORABLE SARAH DUNCAN: 74.055 just says
17 that the presiding judge has to maintain a list of those
18 people that are eligible to serve, of former and retired
19 judges of whatever level they retired at.

20 MR. TIPPS: And does this decision -- does
21 the unfavorable recommendation mean that that judge is not
22 eligible to serve?

23 HONORABLE SARAH DUNCAN: Uh-huh.

24 MR. TIPPS: Well, then in that case somebody
25 who got an unfavorable recommendation as a result of one

1 peer review is going to be peer reviewed two years later
2 anyway.

3 HONORABLE SARAH DUNCAN: That's the -- well,
4 they're going to be -- that's right.

5 MR. TIPPS: Under 13.2.

6 HONORABLE SARAH DUNCAN: That's right.

7 MR. ORSINGER: Well, the problem is, though,
8 if you've been precluded from presiding, what is there to
9 review?

10 MR. TIPPS: Right. I understand that.

11 MR. ORSINGER: That's what I'm saying. In
12 other words, you don't have a track record to come back
13 and say, "I'm doing a good job now. Let me work."

14 MR. TIPPS: But you would have an
15 opportunity to make your argument that you're no longer
16 impaired or that you've cleaned up your life or whatever,
17 if that was the problem.

18 HONORABLE SCOTT BRISTER: Wait. This
19 doesn't say if you get unfavorable you can't be appointed.

20 MR. EDWARDS: I thought I heard that would
21 be added.

22 MR. ORSINGER: Sarah's oral amendment.

23 HONORABLE SARAH DUNCAN: I was suggesting
24 that we add in a new subsection (g)(3).

25 MR. ORSINGER: Audible? Do you call it

1 audible?

2 HONORABLE SCOTT BRISTER: I think we need to
3 ask, David, do you want to -- I mean, you've got to say
4 who gets appointed. Do you want to see that with a
5 committee?

6 HONORABLE SARAH DUNCAN: Scott, we voted on
7 that the last meeting.

8 HONORABLE SCOTT BRISTER: That we're taking
9 that away from the judges? Have we asked the presiding
10 judges what they think about it?

11 MR. ORSINGER: We know what they're going to
12 say, so we're not asking them.

13 HONORABLE DAVID PEEPLES: That doesn't
14 bother me, but my reasons for opposing that were basically
15 this. When you up the consequences of an unfavorable
16 ruling, recommendation, to that level, that is, taking
17 away somebody's ability to work, you make it less likely
18 that the committee is going to criticize someone, and
19 you're taking away the chance of having something kind of
20 like probation. So I think what some committees may do is
21 say, you know, "I'm going to give this guy a favorable
22 recommendation, but we're going to criticize him" instead
23 of saying "unfavorable," and that's fine.

24 In other words, where there's a will there's
25 a way. I mean, if you're under the impression that people

1 are just going to say "yes" or "no" and let the chips
2 fall, I think that's opiate. In some cases that probably
3 is not going to happen because the consequences are so
4 Draconian of an unfavorable recommendation, because I
5 think there will be sometimes where they simply say
6 "favorable, but we have a concern about so-and-so."

7 HONORABLE SAM MEDINA: Especially where you
8 live in smaller communities. It's going to happen a lot.

9 HONORABLE DAVID PEEPLES: But that's fine.

10 CHAIRMAN BABCOCK: Bill.

11 PROFESSOR DORSANEO: Sarah, in the
12 considerations in 13.3(b) section, and actually in (a),
13 maybe something could be done -- broaden the performance
14 standard, the factors, (1), (2), (3), (4), would seem to
15 be applicable to the situation where somebody hasn't
16 necessarily been performing during the two-year period,
17 temperament, demeanor, mental, and perceptual capacities,
18 knowledge of the law, those kinds of things can change
19 just because someone's changed. Maybe they are no longer
20 depressed, the problem has gotten resolved, or whatever,
21 but the use of the word "performance," which doesn't
22 necessarily even seem to be connected with all or each one
23 of (1), (2) and (3), (4) is a limiting word. Maybe some
24 other -- something broader than an examination of the
25 exact performance of the judge on the bench could be used.

1 "Ability to perform" or something like that.

2 HONORABLE SAM MEDINA: I am not sure what
3 "performance" means.

4 PROFESSOR DORSANEO: All these peer review
5 standards that are used in other contexts limit themselves
6 to the performance of the person.

7 HONORABLE SARAH DUNCAN: That's why this
8 says "competence and performance." Even if you haven't
9 performed you may be competent.

10 MR. ORSINGER: Well, but look at the
11 introduction to (b). "In evaluating the visiting judge's
12 performance." That kind of makes it look like what you're
13 evaluating is performance, and these are --

14 PROFESSOR DORSANEO: And it says in (a)
15 "performance."

16 HONORABLE SAM MEDINA: I'm sorry, you-all.
17 What do we mean by -- I don't want to open up something,
18 but what do we mean by "performance"? I mean, football
19 coach, say, "Well, he's not performing." I guess that's
20 what we mean.

21 PROFESSOR DORSANEO: It means "behavior," it
22 seems.

23 HONORABLE SARAH DUNCAN: Well, we actually
24 discussed this at the last meeting. The initial Judicial
25 Council proposed rule had -- in subsection (4) had only

1 "competence," and some members of the subcommittee felt
2 there was no difference between competence and
3 performance. Some of the rest of us felt there was a big
4 distinction between confidence and performance and
5 somebody might be -- and the impaired judge might be a
6 good example, might be entirely competent to perform well,
7 but performs horribly in truth.

8 HONORABLE SAM MEDINA: Okay.

9 HONORABLE SARAH DUNCAN: But I see what you
10 mean about "performance" in (b). Maybe there's a better
11 word.

12 PROFESSOR DORSANEO: "Competence" would be
13 better I think.

14 HONORABLE SARAH DUNCAN: Yeah.

15 PROFESSOR DORSANEO: And then you could take
16 performance into account in evaluating competence. That's
17 how I would look at it. I wasn't here for this
18 discussion, though.

19 MR. ORSINGER: Well, you know, to me the
20 word "competence" is not sufficient standing alone
21 because, you know, we care what they do while they're
22 judges, and someone may be competent and may be arrogant
23 or demeaning to the participants or arbitrary in the
24 exercise of their discretion or whatever, and certainly
25 there has to be a lot of latitude, but to me we shouldn't

1 just say, "Are they competent?" There's more to this than
2 just the capability of doing the good thing.

3 HONORABLE SARAH DUNCAN: Well, what I would
4 suggest to you is factors (1), (2), (3), (4), and (5) are
5 all relevant to a competence determination; and, for
6 instance, temperament and demeanor are part of being
7 competent to do the job. Performance is part of being
8 competent to do the job, and any other factor that may be
9 relevant in evaluating --

10 CHAIRMAN BABCOCK: Well, where does lazy fit
11 into this?

12 MR. ORSINGER: No, it really is performance.

13 MR. WATSON: Performance.

14 CHAIRMAN BABCOCK: It's under "performance."

15 MR. WATSON: A person can be perfectly
16 competent but then the question is are they doing the job,
17 you know.

18 CHAIRMAN BABCOCK: Right.

19 HONORABLE JAN PATTERSON: Timeliness would
20 go under that as well.

21 CHAIRMAN BABCOCK: Excuse me?

22 HONORABLE JAN PATTERSON: Timeliness.

23 CHAIRMAN BABCOCK: Timeliness would be under
24 that.

25 HONORABLE SARAH DUNCAN: Don't you think

1 that would be "any other factor that may be relevant in
2 evaluating a judge's performance"?

3 MR. WATSON: I bet you that covers it.

4 MR. ORSINGER: The thing is if you switch
5 "performance" in (a) and (b) to "competence" it's almost
6 like you're asking for a neurological examination and if
7 their knee jerks and all of that then they're competent,
8 then -- I mean, to me they need to be performing up to
9 acceptable standards.

10 CHAIRMAN BABCOCK: Well, but, Richard, it
11 doesn't mean that competence is the be all and end all. I
12 mean, the fact that the guy's not crazy doesn't mean he
13 makes it over these other hurdles, but I do think that it
14 is such an important factor whether the judge is
15 hard-working -- in fact, all of these judicial polls
16 always have a category, hard-working, which gets into
17 Judge Patterson's timeliness, and that seems to me to tie
18 back to performance. I'm arguing in favor of what you're
19 trying to do.

20 HONORABLE SARAH DUNCAN: My apologies to the
21 chair. I only thought this would be short.

22 CHAIRMAN BABCOCK: That's okay. It did
23 occur to me about 20 minutes ago. Yeah.

24 MR. SOULES: Isn't what you're evaluating is
25 the judge's performance of the judge's duties? I mean,

1 big picture. And then you've got some factors that say
2 how that gets decided, but it says "judicial duties," how
3 he performs his judicial duties. "Performance" is the
4 right word. For example, in 13.2 where this all begins,
5 that's the right word.

6 CHAIRMAN BABCOCK: Right.

7 MR. SOULES: That's what we're measuring.

8 MR. ORSINGER: Well, what do you do about --
9 and this has happened. You have somebody who is
10 recurrently arrested for DWI, but always gets it
11 dispensed. That may not be affecting their capacity on
12 the bench, but it certainly fits into some of these
13 factors, and what if you have somebody that's making
14 irresponsible statements to the press, but in the
15 courtroom they're making a really good record. If you
16 look at the record you don't see anything that's out of
17 line. Are we only interested in how they rule while
18 they're in a courtroom?

19 CHAIRMAN BABCOCK: Well, I think you get the
20 habitual arrestee problem under (5), and I think you get
21 the irresponsible comments to the press under (b)(1) and
22 (b)(5) as well.

23 HONORABLE SARAH DUNCAN: But what if we
24 changed it to say, (b), "Considerations. The peer review
25 committee must consider the following factors in

1 evaluating the visiting judge's competence and
2 performance," and the same change in subsection (5).
3 Because I'm beginning to hear that, unlike most of the
4 members of my subcommittee, there are several members of
5 this committee that do distinguish between competence to
6 perform and performance.

7 MR. SOULES: I agree with what you just
8 said, Sarah, Justice Duncan.

9 MR. GILSTRAP: You're going to have to
10 change that earlier in 13.3(a).

11 MR. SOULES: It is both things.

12 CHAIRMAN BABCOCK: Would that fix it,
13 Richard?

14 MR. ORSINGER: I like that.

15 HONORABLE SARAH DUNCAN: And in (a)(2), as
16 Frank points out, "competence and performance."

17 CHAIRMAN BABCOCK: Uh-huh.

18 MR. SOULES: And 13.2.

19 CHAIRMAN BABCOCK: Yeah. I like it. Buddy.

20 MR. LOW: Chip, are these people subject to
21 the same -- the Judicial Commission for Misconduct of
22 being incompetent, and these people have been elected
23 before?

24 HONORABLE SAM MEDINA: Yes.

25 MR. LOW: And yet I sure have been in some

1 courts where the man that was elected was totally
2 incompetent, but we're going to put all these rules on
3 somebody that comes to visit, because that person is
4 subject to the same thing. I'm not suggesting something,
5 just the thought occurs to me that they have the same
6 thing. They can be kicked out. They can't serve and so
7 forth, and we're imposing a stricter rule than maybe an
8 elected judge because some people don't really want a
9 judge and they just elect people that aren't qualified.

10 HONORABLE SARAH DUNCAN: But I think, Buddy,
11 you've put your finger on what is the difference. The
12 elected judge is elected.

13 MR. LOW: Right. I understand that.

14 HONORABLE SARAH DUNCAN: And we may all
15 disagree with the view of the electorate --

16 CHAIRMAN BABCOCK: For better or worse.

17 HONORABLE SARAH DUNCAN: For better or for
18 worse, but these people are getting the privilege of
19 serving as judges without being elected.

20 MR. ORSINGER: And sometimes have been
21 unelected, I mean, which bothers me even more.

22 HONORABLE SARAH DUNCAN: That's right.

23 MR. ORSINGER: Sometimes the voters have
24 thrown them out, but like Friday the 13th, they keep
25 coming back.

1 CHAIRMAN BABCOCK: That is true. Carl.

2 MR. HAMILTON: I think if we're adding that
3 paragraph (3) that you mentioned earlier --

4 HONORABLE SARAH DUNCAN: I don't know.
5 We've never taken a vote, Carl.

6 MR. HAMILTON: Well, I'm just saying if
7 we're adding that then that's inconsistent with (e)(2) and
8 we'll need to change (e)(2), which says "the presiding
9 judge should not assign."

10 CHAIRMAN BABCOCK: Stephen.

11 MR. TIPPS: Well, in that regard and at the
12 risk of making this even longer, I listened to what David
13 had to say with regard to the pressures that would exist
14 on the part of the peer review committee to make not an
15 unfavorable recommendation, but a favorable recommendation
16 with criticism; and what we currently have in (e)(2) is a
17 provision that says the committee may only say "favorable"
18 or "unfavorable." Do we intend that to mean that
19 "favorable, but this criticism" is not an option?

20 CHAIRMAN BABCOCK: In practice, Judge
21 Peeples, would there be any prohibition under this rule
22 from having a favorable recommendation made but either
23 orally or as part of the written favorable recommendation
24 that, you know, "You're favorable, but you just barely
25 made it, and you better watch out because next time, you

1 know, two years from now, you keep up this same behavior
2 and you're in trouble"?

3 HONORABLE DAVID PEEPLES: I think that would
4 happen. You know, in the criminal system we do not say,
5 "You've either got to acquit this person or give them jail
6 time. We allow probation."

7 CHAIRMAN BABCOCK: Right.

8 HONORABLE DAVID PEEPLES: And I just think
9 that's one of the realities of life. Now, having said
10 that, I think for a visiting judge to get an unfavorable
11 recommendation and then for me to go ahead and continue to
12 assign that person, that would be -- it shouldn't be done.

13 CHAIRMAN BABCOCK: Right. Right.

14 HONORABLE DAVID PEEPLES: So I guess I'm
15 saying if there's an unfavorable recommendation, I can
16 live with the idea that that person can't be assigned, but
17 I think that when those are the consequences I think these
18 committees, when faced with the choice, I mean, they've
19 got to make a choice --

20 CHAIRMAN BABCOCK: Right.

21 HONORABLE DAVID PEEPLES: -- sometimes
22 they're going to say, "We just can't do that to this
23 person, but we don't want to say 'favorable' and just be
24 done with it," and I think under the table they'll say,
25 "You survived this time, but here are some problems."

1 That's going to happen, and I think that may be the best
2 we can do.

3 CHAIRMAN BABCOCK: And that's going to
4 happen without us having to write in the rule, "By the
5 way, you can go slopping around the courthouse."

6 MR. ORSINGER: Well, we're saying that all
7 they can do is send back a one word response, and what
8 Steve is saying is maybe you could say "favorable, with
9 some qualifications," with some comments.

10 MR. SOULES: You could say "favorable, with
11 or without conditions."

12 HONORABLE SARAH DUNCAN: Yeah. And why --
13 you know, John Cayce is not here, but David is here. Why
14 does this say that the recommendation is limited to
15 favorable or unfavorable?

16 HONORABLE DAVID PEEPLES: I don't remember.

17 MS. SWEENEY: That's the same language as
18 the CQJ uses in Dallas. That may be where it came from.

19 HONORABLE SARAH DUNCAN: Maybe all we need
20 to do is strike "only."

21 MS. SWEENEY: Dallas is "qualified" or "not
22 qualified," but same kind of concept.

23 MR. ORSINGER: If you strike the word "only"
24 then they would be free to say, "Well, we've given them a
25 favorable recommendation, but we think there's

1 deficiencies in the following areas," and the presiding
2 judges may or may not care about those deficiencies.

3 CHAIRMAN BABCOCK: How does that sound?

4 Good?

5 HONORABLE HARVEY BROWN: I think if you do
6 that some of the judges might be more interested in the
7 confidentiality. I think if it's a thumbs up or thumbs
8 down that's kind of known by whether you're on the list or
9 not, but if it's "We think you need to work on A, B, and
10 C," I would suspect some of those judges would like that
11 to be confidential.

12 CHAIRMAN BABCOCK: Let's talk about
13 confidentiality. We haven't voted on confidentiality,
14 have we? How do we feel about confidentiality? Ralph.

15 MR. DUGGINS: I thought this was the subject
16 of a lot of discussion last time because we talked about
17 how long the record should be maintained, and I thought
18 that was under (h) where it says, "The record must be
19 retained for so long as the visiting judge is eligible."
20 Am I wrong on that?

21 CHAIRMAN BABCOCK: That's what Footnote 8
22 says.

23 HONORABLE SARAH DUNCAN: We did talk about
24 that, but -- and we did vote on that, that we think the
25 recommendation needs to be maintained as long as they're

1 eligible to sit, but we didn't talk about confidentiality.

2 MR. ORSINGER: There's two different kinds
3 of confidentiality. One is confidentiality of what people
4 say to the peer review committee, which we need so that
5 they are not afraid to speak the truth; and the other one
6 is confidentiality of the recommendation, which
7 apparently, you know, has some kind of quasi-governmental
8 force to it; and I would have a completely different
9 attitude about confidentiality of a favorable
10 recommendation with certain caveats than I would
11 protecting the rights of individual litigants and lawyers
12 and other judges to make confidential statements to the
13 commission -- committee.

14 CHAIRMAN BABCOCK: Elaine, what do you think
15 about this?

16 PROFESSOR CARLSON: I think it's a
17 fascinating issue. No, I think Richard's comment that he
18 favors nonconfidentiality insofar as a recommendation
19 comes from his perspective as a lawyer. I think the
20 judge's recommendation suggests that -- stems from the
21 judge's perspective. I guess I would favor
22 confidentiality of both of the items that Richard
23 described.

24 MR. ORSINGER: But, you know, Elaine, I'm
25 going to have the right perhaps under some circumstances

1 to decide whether to strike one of these visiting judges
2 on kind of a peremptory challenge basis, and if I don't
3 know the person but I know that they've been recommended
4 as being available subject to certain caveats, might
5 influence my decision on whether I strike them or not.
6 Frankly, if you're going to take a position as a public
7 servant and you're going to make decisions that affect
8 people's lives and you're there with some kind of
9 probationary period subject to certain qualifications
10 about things you do bad, why shouldn't the litigants and
11 the lawyers know?

12 MR. SOULES: Right. Absolutely.

13 CHAIRMAN BABCOCK: Judge Brown, who used to
14 be a judge but now is a lawyer.

15 HONORABLE HARVEY BROWN: You fall back to
16 kind of David's comments. The penalty may become so
17 severe that they don't even feel free to give a comment.
18 If it's public then they're not going to even want to give
19 a suggestion that the person needs to work on.

20 CHAIRMAN BABCOCK: All right. Anybody else
21 on this?

22 MR. SOULES: What's the level of
23 confidentiality of decision of the Judicial Conduct
24 Commission?

25 MR. ORSINGER: It's confidential unless they

1 just state that it's public. They can make a confidential
2 determination or they can make a public determination or
3 they can take your bench away from you.

4 MR. SOULES: Well, I guess that's pretty
5 public.

6 MR. ORSINGER: But they decide whether it's
7 public or not.

8 MR. LOW: Well, you don't get their report,
9 do you?

10 MR. SOULES: No, just the decisions. I'm
11 just asking about the decisions they make. When they make
12 a decision that a judge is going to be on suspension, is
13 that public?

14 MR. LOW: That is, as I understand it, but
15 the workings of it and what people have told them and
16 their working papers, that's not.

17 MR. SOULES: No. That's where Richard is
18 drawing the line, I think, making the decision public.

19 MR. LOW: Okay. All right.

20 MR. SOULES: But not the process. But not
21 the process.

22 MR. LOW: Okay.

23 MR. ORSINGER: Their annual report, which I
24 haven't read recently, but I have read before, will say "A
25 judge was cited for doing so-and-so" but they will not

1 tell you who it is, but it's in there so that if you want
2 to find out what kind of problems judges are having you
3 can see. But then they might say, "This one judge did
4 this wrong thing, and we feel like there's an appearance
5 of impropriety," and they make a public statement; or if
6 it's bribery or something like that, they will make them
7 get off the bench, and that action is public.

8 CHAIRMAN BABCOCK: Okay. I think we ought
9 to try to get an expression of the committee on whether we
10 think the confidentiality provisions in 13.5 are
11 appropriate or not.

12 HONORABLE SARAH DUNCAN: Can I suggest we
13 need to add something, because as this discussion has made
14 clear, 13.5 is not clear as to -- I mean, it's clear that
15 the materials collected by the peer review committee and
16 information provided to the peer review committee is
17 confidential.

18 CHAIRMAN BABCOCK: Right.

19 HONORABLE SARAH DUNCAN: But it doesn't
20 anywhere say that the decision, the recommendation itself,
21 is confidential. So I think we need a subsection (c) that
22 says recommendation of peer review committee's
23 recommendation either is or is not confidential, and it
24 might be that that's a two-part vote.

25 CHAIRMAN BABCOCK: Okay. I think that's a

1 good point. Harvey.

2 HONORABLE HARVEY BROWN: There is a
3 compromise, and that is to give the peer review committee
4 the option of issuing a public or private recommendation
5 so that they could decide whether it's going to be
6 confidential or not. Just another thing to think about.

7 CHAIRMAN BABCOCK: Let's vote first on the
8 materials, and that would be 13.5 as written without the
9 proposed additional subsection (c).

10 MR. WATSON: But voting for it doesn't mean
11 we're excluding an addition?

12 CHAIRMAN BABCOCK: Correct. If you're in
13 favor of 13.5 subpart (a) and (b), which has the effect of
14 making confidential the materials that are provided to the
15 peer review committee, raise your hand.

16 Opposed? By a unanimous vote, the Chair not
17 voting, 24 to nothing it passes.

18 Now, subparagraph (c), which would say that
19 the recommendation itself is confidential, everybody who's
20 in favor of making the recommendation itself confidential,
21 raise your hand.

22 HONORABLE DAVID PEEPLES: Chip?

23 CHAIRMAN BABCOCK: Yes.

24 HONORABLE DAVID PEEPLES: I think we ought
25 to deal with what Harvey Brown just suggested, which is

1 give the committee the discretion to decide.

2 CHAIRMAN BABCOCK: Okay. Do you want to
3 vote on discretionary, confidentiality before we vote
4 on --

5 HONORABLE DAVID PEEPLES: Let me just say, I
6 think the way this is probably going to work is that there
7 will be a gradation of cases, some where it's just a slam
8 dunk favorable, some where it's unfavorable and they will
9 do that, but there will be some in between where they want
10 to in effect put the person on probation and maybe make it
11 public.

12 CHAIRMAN BABCOCK: Okay.

13 HONORABLE DAVID PEEPLES: We have no
14 experience with this, but I think there will be times
15 where they will let someone continue to work but just want
16 to say privately off the record, just hush-hush between
17 you and me, "You've got some problems here, and, you know,
18 we're not giving you a clean bill of health necessarily."
19 That, I think, will happen.

20 CHAIRMAN BABCOCK: Right.

21 HONORABLE DAVID PEEPLES: And I don't think
22 we ought to try to stop it from happening.

23 CHAIRMAN BABCOCK: Okay. So does everybody
24 feel like we ought to vote on the recommendation is
25 confidential at the discretion of the peer review

1 committee? Judge Patterson.

2 HONORABLE JAN PATTERSON: Well, if I can
3 speak up a little bit in response to Judge Peeples. I
4 think that that puts in the hands of the peer review
5 information that perhaps ought to be accessible to
6 litigants and that litigants are the ones who ought to
7 make those decisions and have access to that relevant
8 information, and I think that that leaves it a little bit
9 too much up to the committee if we're going to have a true
10 process; and I agree with Richard's comments that these
11 are important issues and they will be dealing with other
12 people's lives; and in balancing those factors, I would
13 balance them in favor of future litigants' right to know.

14 CHAIRMAN BABCOCK: So you would be opposed
15 to making the recommendation confidential, period, and you
16 would be against making it confidential at the discretion
17 of the committee?

18 HONORABLE JAN PATTERSON: I think I am
19 leaning that way.

20 CHAIRMAN BABCOCK: You're going to have to
21 jump off the fence here in a second.

22 HONORABLE JAN PATTERSON: I understand. I
23 still have a couple of minutes.

24 CHAIRMAN BABCOCK: Paula.

25 HONORABLE JAN PATTERSON: What are your

1 thoughts on that?

2 MS. SWEENEY: The question I have, because I
3 appreciate the dilemma you identified, is couldn't the
4 peer review body do what you're saying, which is say,
5 "Look, it's public. We're going to go ahead and give you
6 an approval, but, listen, you almost didn't make it." In
7 effect, that de facto could happen with still a public
8 finding.

9 HONORABLE DAVID PEEPLES: I think there's no
10 way to stop that from happening.

11 MS. SWEENEY: Well, we want it. We want it
12 to happen.

13 CHAIRMAN BABCOCK: Yeah, we want it to
14 happen.

15 HONORABLE DAVID PEEPLES: And anything that
16 they say in writing I think ought to be available to the
17 litigants. I'm just saying I think the way this is going
18 to work, there will be times when they don't want to say
19 it in writing but they will privately say, "Next time
20 you're liable to lose this if you don't shape up on A, B,
21 and C," and we can just remain silent about that. But I
22 just don't think you can tie the hands of the committee
23 and prevent them from saying something privately, but if
24 they choose to say "favorable with conditions" or
25 "unfavorable," that ought to be not confidential. It

1 ought to be available.

2 CHAIRMAN BABCOCK: You know, I was trying to
3 sit here and think about, well, if it's favorable, the
4 person will -- the judge will continue to sit. If it's
5 unfavorable, he won't for a period of time, but what if he
6 runs for election? You know, the peers that said, you
7 know, the judge should not be sitting in cases, well, if
8 you make it confidential, the public doesn't know that,
9 and they may elect the guy, and he's sitting there with an
10 unfavorable ruling. Anyway. The public liked him anyway,
11 I understand.

12 MR. ORSINGER: As I envision the operation
13 of this rule, each administrative judicial region will
14 have its own peer review committee, and that peer review
15 committee will report back only to that administrative
16 district judge, and if it's confidential, I can see then
17 that some judges for the same problems are going to be
18 okay to sit in some areas and not others, or I mean, it's
19 not so -- if it's not public and there's not even any
20 sharing going on between the administrative regions that
21 somebody has been disqualified in five of the areas, but,
22 you know, my peer review process hasn't even been
23 implemented, is this the kind of system we want to have in
24 place?

25 CHAIRMAN BABCOCK: Sarah?

1 HONORABLE SARAH DUNCAN: Sure.

2 CHAIRMAN BABCOCK: Have surgery before you
3 talk?

4 HONORABLE SARAH DUNCAN: Wouldn't it be
5 relevant information to a peer review committee in
6 Administrative Region Four that the peer review committee
7 in Administrative Region One gave this person an
8 unfavorable recommendation? Now, it's only going to be
9 one factor.

10 MR. ORSINGER: How are they ever going to
11 find that out, Sarah, if there's only six people that
12 know?

13 CHAIRMAN BABCOCK: She's agreeing with you.

14 MR. ORSINGER: Or maybe seven.

15 HONORABLE SARAH DUNCAN: Thank you. Thank
16 you.

17 CHAIRMAN BABCOCK: You're misunderstanding
18 her again. Would you guys get on the same page, please?

19 MR. ORSINGER: Okay. I'm sorry.

20 HONORABLE SARAH DUNCAN: I'm saying that
21 whether it's for purposes of elections or another peer
22 review committee's seating I think the recommendation
23 itself needs to be public.

24 CHAIRMAN BABCOCK: All right. Well, we've
25 got a bunch of different ways we can vote on this. We can

1 vote at the discretion of the committee, we can vote it
2 ought to be public, or we can vote it ought to not be
3 public, just as long as we vote real quick so we can eat.

4 MR. GILSTRAP: Why don't you have a threeway
5 vote and then have a runoff between the top two?

6 MS. SWEENEY: Can I make a motion that it be
7 public?

8 HONORABLE SARAH DUNCAN: Second.

9 MS. JENKINS: Second.

10 CHAIRMAN BABCOCK: All right. Well, we've
11 got a motion for that. All right. Everybody that thinks
12 it ought to be public raise your hand.

13 MR. SOULES: The decision, right?

14 MR. ORSINGER: Yeah.

15 CHAIRMAN BABCOCK: Everybody that thinks it
16 should not be?

17 The motion carries by a vote of 22 to 4, so
18 it will be --

19 MR. EDWARDS: The Chair not voting.

20 CHAIRMAN BABCOCK: Huh? The Chair not
21 voting, sorry. 22 to 4.

22 MS. SWEENEY: And by "it," and if I might
23 clarify what I meant by "it," "it," the finding.

24 CHAIRMAN BABCOCK: The finding, the
25 recommendation. That's a good clarification. Sarah, how

1 much more do we have to go on this rule?

2 HONORABLE SARAH DUNCAN: That's it, but
3 given the changes we've made, I think it might be easier
4 for everybody -- well, no, it doesn't really matter. We
5 can vote on the redlined version or the subcommittee can
6 take it up and clean it up a little bit. It's at your
7 pleasure.

8 CHAIRMAN BABCOCK: Does anybody see any
9 other major problems in this before the cleanup? Judge
10 Peeples.

11 HONORABLE DAVID PEEPLES: I don't know about
12 major. I'm looking at 13.2.

13 CHAIRMAN BABCOCK: All right.

14 HONORABLE DAVID PEEPLES: Let's say I'm a
15 retired judge and I'm going to sit mainly in the Bexar
16 County region, but if I don't submit myself for approval
17 all over the state, then if something comes up in another
18 part of the state I don't think I can go there, because
19 you've got to be peer reviewed everywhere you're subject
20 to assignment, and you don't know -- I mean, you just
21 don't know where you might need to be assigned sometimes
22 on an election contest or whatever. Like I went to
23 Houston one time and sat for a week. I haven't done it
24 since. Do I need to submit myself in the Houston region
25 on the outside chance I might want to go there sometime?

1 And if I don't, I couldn't get assigned there in an
2 emergency.

3 MS. SWEENEY: Could we build in like a full
4 faith in credit clause?

5 HONORABLE DAVID PEEPLES: We might want to
6 talk about that in subcommittee, but I think that might be
7 a problem.

8 CHAIRMAN BABCOCK: Sarah.

9 HONORABLE SARAH DUNCAN: I thought when you
10 filed your whatever it is you file, your certificate with
11 Chief Justice Phillips, I thought that meant you are
12 subject to assignment anywhere in the state of Texas.

13 HONORABLE DAVID PEEPLES: It does, but we're
14 changing that if we say that you can't go somewhere unless
15 you've been peer reviewed there, and I think 13.2 pretty
16 much says that, doesn't it?

17 MR. SOULES: "Peer reviewed in each region
18 where he's subject to assignment." It does say that.

19 HONORABLE DAVID PEEPLES: Another way to do
20 it would be, you know, everybody has got a home base.
21 You're peer reviewed in your home base; and anywhere
22 you've sat and people know about you they have an
23 opportunity to evaluate you; and, frankly, if somebody in
24 Houston has had a case before a judge from San Antonio and
25 didn't like it, didn't like that judge in performance, I

1 imagine that person will put it on the calendar to have
2 some input when peer review comes up in San Antonio.

3 MR. GILSTRAP: Where does it say you can't
4 serve?

5 HONORABLE SARAH DUNCAN: I was going to say,
6 where are you gleaning --

7 HONORABLE DAVID PEEPLES: The first sentence
8 in 13.2.

9 HONORABLE SARAH DUNCAN: Okay.

10 CHAIRMAN BABCOCK: The fact of the matter --

11 HONORABLE SARAH DUNCAN: It just says there
12 has to be a peer review process.

13 MS. SWEENEY: In each administrative region.

14 PROFESSOR DORSANEO: It should say "peer
15 review where the judge has served," though I don't agree
16 with that at all.

17 MR. ORSINGER: Because it's the people who
18 are the targets of the judge that ought to be the other --

19 HONORABLE SARAH DUNCAN: How many
20 administrative judicial regions are there?

21 HONORABLE DAVID PEEPLES: Nine.

22 CHAIRMAN BABCOCK: So you're subject to
23 being assigned in every one, aren't you?

24 HONORABLE SARAH DUNCAN: Yes. And why
25 shouldn't you -- if you're a retired judge and you think

1 you're only going to work in Bexar County, why shouldn't
2 you be subject to being peer reviewed in each of the nine
3 judicial regions so that you -- let's say that you retire,
4 and everybody would agree that you should get an
5 unfavorable recommendation. Why should you have a buy
6 time in there that until I sit there and get peer reviewed
7 and get an unfavorable recommendation I can sit there?
8 Why shouldn't you have to go through the peer review
9 process in all nine regions, given that that is
10 effectively your jurisdiction?

11 HONORABLE SCOTT BRISTER: Because it's going
12 to take time and money. Who are these committees that's
13 going to do all this work? I mean, they have to interview
14 all the judges, all the parties, all the colleagues, and
15 the judges are not going to know. The whole purpose of
16 having a visiting judge sit there is so we don't have to
17 know. I mean, this is going to take -- this is a big
18 administrative burden. Do you think these Bar polls are
19 free? They spend thousands of dollars getting Bar polls
20 on elected judges. Who are we going to bill for all this?

21 MR. SOULES: I think the judge ought to be
22 subject -- must be reviewed in the region of his residence
23 and may be reviewed elsewhere.

24 HONORABLE DAVID PEEPLES: In other words,
25 allow the other areas to review people that have sat

1 there.

2 MR. SOULES: Yeah. That's fine, if they
3 want to.

4 HONORABLE DAVID PEEPLES: Yeah.

5 MR. ORSINGER: Well, who is "they"? I'm
6 okay with that if lawyers --

7 MR. SOULES: The peer review committee.

8 MR. ORSINGER: Well, see, I don't like that.
9 In other words, if I'm a lawyer and they keep sending some
10 retired judge in on us, and we locally in the Bar don't
11 like it, the lawyers ought to be able to force our local
12 peer review committee to do a peer review on that judge.

13 CHAIRMAN BABCOCK: Skip has had his hand up
14 for about half an hour.

15 MR. WATSON: Just two things that I'm
16 wondering about. When we had the initial vote on the
17 confidentiality the actual existing or former district
18 judges kind of split on that. One thing that flashed
19 through my mind was that relates to this, if there is a
20 local peer review and I -- you know, 80 courtrooms is kind
21 of foreign to me, but let's say smaller administrative
22 district, is it possible that because it's going to be
23 public and because the peer review is going to be done by
24 the people who formerly sat with and drank coffee with
25 this judge that it's more likely that a favorable rating

1 will come out of that so as not to embarrass them. I
2 mean, I'm talking -- I know you guys are not human, but if
3 you were human and those factors entered into it, how
4 would that affect you? I really don't appreciate that and
5 understand it.

6 CHAIRMAN BABCOCK: Sarah.

7 HONORABLE SARAH DUNCAN: This discussion has
8 been really interesting to me, and I think that the
9 problem comes -- is coming from the fact that there is a
10 different peer review committee for every administrative
11 judicial region. If these guys are subject to assignment
12 anywhere in the state, why isn't there for them a central
13 peer review committee? And that never occurred to me
14 reading the Judicial Council's draft, I think because when
15 you read something you think it must be true and right,
16 but now that I think about if they are subject to
17 assignment anywhere in the state, why shouldn't there be
18 one peer review committee that looks at everybody that's
19 retired or former or files whatever they file with Chief
20 Justice Phillips, and that way you would negate all of the
21 duplication. You would have maximum communication and you
22 would have maximum consistency.

23 CHAIRMAN BABCOCK: Buddy Low.

24 MR. LOW: But what would be wrong with
25 Luke's suggestion? You are peer reviewed by the people

1 that know you best, but if you go someplace else and
2 you've sat, they may; and all peer reviews are available
3 to all districts, but don't just have one.

4 HONORABLE SARAH DUNCAN: The problem I would
5 have with that is being peer reviewed by the people that
6 know you best, because there is just --

7 MR. LOW: I might have a problem with that,
8 too, myself, but I don't know if others would. But I
9 might.

10 MR. WATSON: Sarah, what's your problem with
11 it?

12 HONORABLE SARAH DUNCAN: What you were
13 talking about. Exactly what Skip was talking about.
14 These are the people that you've known since, you know,
15 you were four-year-olds and you've been drinking and
16 carousing and having fun for the last 50 years.

17 CHAIRMAN BABCOCK: Speak for yourself.

18 HONORABLE SARAH DUNCAN: It's a very
19 difficult -- I think it would be a very difficult thing in
20 a small community to get an unfavorable recommendation
21 even for a judge that should get one if it's the people
22 you have been drinking coffee with for 30 years.

23 CHAIRMAN BABCOCK: Frank.

24 MR. GILSTRAP: I don't see anything in 13.2
25 that requires peer review as a prerequisite for serving as

1 a judge. I mean, I think there was some suggestion, and
2 I'm not reading 13.2 that way. If we're going to keep the
3 committees in each judicial district, I think it makes
4 sense that once you've gone to Beaumont and served you're
5 subject to peer review down there. Maybe you were good
6 when you were in San Antonio and in Beaumont you stayed
7 drunk. I mean, you know, there's nothing wrong with that.
8 If you get unfavorable recommendation there, you don't
9 come back.

10 MR. SOULES: The place to do this is in the
11 state Commission on Judicial Conduct. Now, how we do
12 that, whether the commission itself has to do it or
13 whether they can set up a peer review committee within
14 their auspices I don't know. This is going to be a huge
15 transaction cost anyway, travel and what have you, so
16 someplace it's going to have to get funded, but that
17 commission already is doing --

18 HONORABLE SCOTT BRISTER: Collecting that
19 stuff.

20 MR. SOULES: -- some of the things that we
21 were trying to get done in this peer review already, and
22 their authority does extend to every judge who wants to
23 register to be assigned. Every former judge that wants to
24 register to be assigned has to register there, so I think
25 Sarah's point is well-taken, have one review and have them

1 structure it and get funding and do it.

2 MR. EDWARDS: How many judges do we have
3 registered like that now, just out of curiosity? Does
4 anybody know?

5 MR. SOULES: Oh, it's a bunch.

6 MR. EDWARDS: I mean, are we talking about a
7 hundred or a thousand?

8 MR. SOULES: We've probably got a hundred
9 with appellate judges.

10 HONORABLE DAVID PEEPLES: Maybe a couple
11 hundred, give or take 75.

12 CHAIRMAN BABCOCK: Other than this problem
13 with 13.2, is there any other major problems? And I
14 appreciate Judge Peeples saying that maybe this wasn't a
15 major problem, but looks like it is, but any other major
16 problems in the rule as drafted that we need to discuss
17 today? All right. I think --

18 MR. EDWARDS: One other thing. Do you think
19 we ought to ask for or have some sort of extensive
20 analysis on what this thing is going to cost?

21 MS. SWEENEY: Fiscal note.

22 MR. EDWARDS: Fiscal note, before we
23 recommendations?

24 MR. SOULES: Well, let's recommend that the
25 Commission on Judicial Conduct do it, and if they think

1 it's going to cost too much, they're going to tell us to
2 change it.

3 CHAIRMAN BABCOCK: Well, the Court asked us
4 to come up with a rule, and I guess --

5 MR. EDWARDS: I guess they can add what they
6 want.

7 CHAIRMAN BABCOCK: I guess they can ask --
8 if they want to ask us whether we think it's going to cost
9 any money, and the answer is "yes," and how much, I mean,
10 I don't think we could possibly know that.

11 HONORABLE DAVID PEEPLES: Chip, 13.4(c)
12 deals with that. The people on this committee don't get
13 paid for their time, but they get their expenses from the
14 regional funds.

15 MR. EDWARDS: Yeah, but you're going to have
16 an administrative expense of keeping the records.

17 HONORABLE DAVID PEEPLES: You go to the
18 Office of Court Administration, which is already there.

19 MR. EDWARDS: But it's going to put more
20 burden on them, so it will be a cost impact on that,
21 depending on how many you've got and how much detail.

22 CHAIRMAN BABCOCK: Okay. So, moving
23 forward, I think we're going to have to spend a little
24 more time in the subcommittee on 13.2, but otherwise, with
25 the changes that we've made today, the rule is acceptable

1 to this committee. Is that a fair recitation of what
2 we've done?

3 All right. In that event we're going to
4 break for lunch, and I'd like to come back at close to
5 1:15 if we can so that we can get the evidence rule and
6 give it the time it deserves.

7 (A recess was taken at 12:43 p.m., after
8 which the meeting continued as reflected in
9 the next volume.)

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2 CERTIFICATION OF THE MEETING OF
3 THE SUPREME COURT ADVISORY COMMITTEE

4 * * * * *

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6
7 I, D'LOIS L. JONES, Certified Shorthand
8 Reporter, State of Texas, hereby certify that I reported
9 the above meeting of the Supreme Court Advisory Committee
10 on the 8th day of November, 2002, Morning Session, and the
11 same was thereafter reduced to computer transcription by
12 me.

13 I further certify that the costs for my
14 services in the matter are \$ 1,215.00.

15 Charged to: Jackson Walker, L.L.P.

16 Given under my hand and seal of office on
17 this the 25th day of November, 2002.

18

19 ANNA RENKEN & ASSOCIATES
20 1702 West 30th Street
21 Austin, Texas 78703
(512)323-0626

22

D'Lois L. Jones
D'LOIS L. JONES, CSR
Certification No. 4546
Certificate Expires 12/31/2002

23

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25 #005,082DJ