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**MEETING OF THE SUPREME COURT ADVISORY COMMITTEE**

**August 13, 2004**

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Taken before D'Lois L. Jones, Certified Shorthand Reporter in Travis County for the State of Texas, reported by machine shorthand method, on the 13th day of August, 2004, between the hours of 9:01 a.m. and 4:49 p.m., at the Texas Law Center, 1414 Colorado, Room 101, Austin, Texas 78701.

# INDEX OF VOTES

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

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CHAIRMAN BABCOCK: We're on the record, and hello to everybody in Los Angeles down there.

MR. YELENOSKY: Chip, come over here again where we can hear you.

CHAIRMAN BABCOCK: I don't know who set the room up, but we'll try to make sure it doesn't get set up this way next time. You need binoculars to see people at the end of the table there.

MR. YELENOSKY: Can you come down here?

HONORABLE LEVI BENTON: Why don't they put you in the center with the court reporter?

CHAIRMAN BABCOCK: Yeah. That might be a good idea. Maybe at the first break we'll move. Would that be all right, or should I do it now?

MR. YELENOSKY: Do it now.

CHAIRMAN BABCOCK: Okay. We'll do it now. Off the record.

(Off the record from 9:02 a.m. to 9:03 a.m.)

CHAIRMAN BABCOCK: Now we're reconfigured, which is a little easier for me. Welcome everybody, and I guess some of you have met Lisa Hobbs, who is a great improvement over Chris Griesel, I think everybody will agree. And Lisa started, what, a couple months ago, three months ago?

MS. HOBBS: Yes, June 14th.

CHAIRMAN BABCOCK: June 14th. So she is the new rules attorney for the Court; and Justice Hecht will not be able to be here until noon, but he'll be here then; and Justice Jefferson said he's available to come over here at a moment's notice if we have any trouble or a fight breaks out; and he's sitting by his phone, but I think we'll try to get through things without that.

We'll defer Justice Hecht's report from the Court until he gets here obviously, and that will take us right into the pattern jury charge issues that Judge Sullivan has lead the subcommittee on, and they have prepared some written material, which you got earlier this week and have been on the website. Judge Sullivan.

HONORABLE KENT SULLIVAN: Well, I hope everyone had an opportunity to review the written materials and if you weren't here at the last meeting had an opportunity to review the discussion at the last meeting because we did cover a fair amount of ground the last time; and unless you think otherwise, Mr. Chairman, I thought we would forego retracing any of those steps and jump right into what the subcommittee considered. I think we did reach a number of conclusions.

First, of course, is the Rule 292 and Rule 226a. They will need to be amended. We've had submitted one proposal, a specific proposal relative to the amendment of 292. We have two alternatives for your consideration and debate

relative to the amendment of 226a; and if I can digress for one moment with I guess something of a paid political announcement, I thought I would also make note of the fact before we went by it that in doing this work we, of course, had to look at the admonitory instructions in toto in 226a; and while we have no proposal that we would try and make, taking it outside the scope of today's work to talk about some comprehensive amendment for those instructions, I think there are a significant number of people on the committee who think it would be a worthwhile endeavor.

PROFESSOR DORSANEO: Mr. Chairman?

CHAIRMAN BABCOCK: Yeah, Bill.

PROFESSOR DORSANEO: Just for the record, the jury charge task force that handed in its report in 1996 or 1997 did that, and that material has been included in the -- you may remember the recodification draft that was recommended to the Court about the same -- at about the same time, so maybe it should be looked at again, but a lot of work has already been done on that, and it's on the shelf.

HONORABLE KENT SULLIVAN: Just so Professor Dorsaneo doesn't think the subcommittee has been completely asleep at the wheel, the Chair and I had that very discussion earlier, so we came across that work product, and I think that a number of us are in agreement with it. One other thing before we get off that subject that I would note that I think

is useful for consideration as well is whether or not as part of this process of creating jury instructions -- and this is something that could be applicable to the PJC process as well -- is whether we should consider more of an interdisciplinary approach; by that, to have people involved in this process who have expertise in areas such as psychology, speech, communication and the like, so that we could field test or gain some scientific measurement of the effectiveness of the jury instruction; that is, whether the jurors actually understand the instructions and the likelihood that they will follow them.

Enough of the digression. As to Rule 292, I thought we would start there. I hope that everyone has had a chance to look at that proposal. That's the most straightforward proposal that's on the table, and there are actually -- excuse me -- very few changes that were proposed other than to literally insert the language from the statute and to divide the rule into section (a) and (b) for reasons that I think are self-evident upon reading the rule or the proposed rule.

The other change was a note that I guess Bill Edwards gets the credit for, and that is you'll see the words "or more" inserted because I think there was a technical correction that the committee believed was necessary. And I think you'll see it in boldface there. Mr. Chairman, I don't know how you want to proceed. Do you want to stop at this

point and take a look at 292?

CHAIRMAN BABCOCK: Yeah. Let's take a look at 292 and if anybody has any comments let's talk about it. Is everybody with us? The subsection (a) starts with new language "except as otherwise provided in subsection (b) of this rule" and then goes on to throw in the word "10 or more" and then there is a subsection (b) saying that "a verdict can be rendered awarding exemplary damages only if the jury is unanimous in finding liability in the amount of exemplary damages." It seems straightforward. Anybody have any comments on it? No objections? See, I told you this was going to be easy. Paula, you on top of it?

MS. SWEENEY: Yes, sir. I'm all over it. Where are you?

CHAIRMAN BABCOCK: We're talking about Rule 292 and the proposed amendments to 292 in order to implement House Bill 4 with respect to unanimous verdict for exemplary damages. Judge Patterson, everything okay?

HONORABLE JAN PATTERSON: Yes.

CHAIRMAN BABCOCK: This may be the first in the history of this committee, there are no comments made.

HONORABLE JAN PATTERSON: I think we're all sort of taken aback by the distances between us.

CHAIRMAN BABCOCK: Yeah, I know. Okay. Well, if we don't have any comments about it then let's go on to the

easy stuff.

MS. SWEENEY: Well, I apologize for walking in just a tad late. We might as well get it on the record. There is some considerable discussion about whether or not the predicate questions on liability should require a unanimity standard and as to whether or not that is what the Legislature, A, intended, or B, wrote, but that's the -- that's the only thing I know of that has a debate going on.

CHAIRMAN BABCOCK: Well, we talked about it to some degree last meeting, and the view of the subcommittee and I think the overall committee is that the House Bill 4 did require a unanimous finding on the liability for exemplary damages as well as exemplary damages, as to the amount.

MS. SWEENEY: Well, that's as to finding gross negligence, but not as to finding negligence and proximate cause.

CHAIRMAN BABCOCK: Right. Paula, are you talking about 226a?

MS. SWEENEY: Yes.

CHAIRMAN BABCOCK: Okay. We're not there yet.

MS. SWEENEY: Someday I will come in on time and then I will try and get it.

MR. HAMILTON: Chip?

CHAIRMAN BABCOCK: Yeah, Carl.

MR. HAMILTON: However, the use of the phrase

"unanimous in finding liability" on 292, does that necessarily include all predicate issues on liability?

HONORABLE KENT SULLIVAN: The language that was chosen is directly out of the Civil Practice and Remedies Code.

MR. HAMILTON: Out of the statute, yeah.

HONORABLE TOM GRAY: Well, that's never stopped us from modifying it before.

CHAIRMAN BABCOCK: We've never intentionally overridden the Legislature, I don't think. For example, Carl, in a public figure libel case where punitive damages can only be awarded if there's a finding of, quote, actual malice, my understanding is this would require a unanimous vote on actual malice. But that is also an element of -- in a public figure libel case, that is also an element of the claim, so it has -- it wears two hats in that context. That may be unique, but that's at least one where that would happen.

MR. ORSINGER: Chip?

CHAIRMAN BABCOCK: Yeah, Richard.

MR. ORSINGER: Because we've used the statutory language, I think we've carried forward the ambiguity that's unresolved in some of our minds, and I think that that ambiguity is going to find its expression in the other amendments we have here. I mean, it seems to me like we may not agree on what "ununanimous in regard to finding liability" means, but that is what the statute says, and we don't actually

have to resolve that here, but we are going to have to resolve that when we get down to the specifics of the jury charge.

CHAIRMAN BABCOCK: Yeah.

MR. LOPEZ: Yeah.

CHAIRMAN BABCOCK: Okay. Any more comments on 292? I knew we wouldn't get by it without at least some. Any more comments on 292? Okay. Judge Sullivan, do you want to get into 226a?

HONORABLE KENT SULLIVAN: Yes, sir.

HONORABLE LEVI BENTON: Mr. Chairman?

CHAIRMAN BABCOCK: Yeah.

HONORABLE LEVI BENTON: For one second before we get to the jury charge, I don't know that I agree with what Richard just suggested because the PJC, the suggestions in the PJC are not binding on any court, and it might be that we might want to consider adding a footnote to 292 to expressly say or ask the Court to expressly say that's their construction of it, because the PJC is not binding.

MR. ORSINGER: What I had reference to is the instructions in 226a about what has to be in each jury charge, and that's issued by the Supreme Court in connection with the Rules of Procedure and not by PJC committee.

HONORABLE LEVI BENTON: Fair enough. You know what, you're right. When you said "relative to the jury charge" I didn't think 226a. I was thinking the PJC

MR. ORSINGER: I should have been more specific. I regretted it the second I said it.

CHAIRMAN BABCOCK: Okay. Let's go to 226a, Judge Sullivan.

HONORABLE KENT SULLIVAN: Motion to strike.

CHAIRMAN BABCOCK: Yeah.

HONORABLE KENT SULLIVAN: A couple of housekeeping matters I think relative to 226a, and I guess I would go ahead and direct you to the written material so that you can follow along in the specific proposal. You'll note that there are several things that you received. One was a background memorandum and then at least two other documents containing two alternative proposals that I think both had some explanation and sample jury charge with it for illustration purposes.

In connection with the changes that are really the focus of our discussion, I think if you look at Rule 226a under section Roman III, paragraph (6), those are some specific instructions to the jurors relative to the voting requirements to reach a legal verdict, that that language will need to change because obviously we are introducing the requirement of a unanimous verdict under these certain specified conditions. So the words "unless otherwise instructed" at a minimum would have to be inserted into that particular paragraph, and there are also some other technical changes in that particular

paragraph.

As a practical matter, if you parse the existing language a person could reasonably construe the existing language to mean that if you had 10 persons in favor of all of the set of questions in a particular verdict but 11 persons in favor of one, that it was not a legal verdict. I think it's simply misleading or ambiguous language, and the suggestion was to change it so that it is technically correct.

I don't know whether I've made that clear or not, but if you compare the existing language in paragraph (6) to the proposed language, I think you'll see a modest change in the semantics of that paragraph.

The other thing that I will note that is in the proposal and this may go beyond the scope of what we have before us today and I will rely on the Chair to say so, but the language contained in the certificate several of us thought was particularly obtuse; that is, it is ambiguous and unclear what the jury is being instructed to do by way of the certificate and what they are certifying, and there is technical changes to that language that hopefully makes it clear. That is intended to be completely noncontroversial and just the use of English as opposed to Latin, if you will, so that the jurors understand exactly what they're being asked to do. It really doesn't have any substantive impact on the debate that I think we will have on the question of whether or not to predicate that we're about

to get into, but I did want to explicitly note that in passing before we went on.

Now, as previously mentioned, there are two different proposals on how to handle the necessary changes for 226a that are mandated by the HB4 unanimity requirement, and I think you would frame the issue primarily on whether or not to condition questions on exemplary damage liability on a unanimous finding of underlying liability or actual damages. Actual damage liability, of course, being the legal predicate for exemplary damages. I think it's worth noting to hopefully avoid confusion on this particular issue to say that the proposed predication of the exemplary issues on actual damage liability issues does not in any way affect the standard for actual damage liability. By that I mean that it is clear and there is certainly no dispute that a jury can still render a verdict for actual damages by a 10 to 2 vote, so I hope that is clear. And in that regard, there is a sample jury charge that was provided with the materials, and hopefully that gives some illustration of how this would -- would work.

The rationale for predication of exemplary damage liability is in two basic parts. One, the thought there is a legal requirement for it; and, second, the thought that there are practical reasons to do so. As far as the legal requirement is concerned -- and we did touch a number of these bases in our last meeting, so I'll try and just touch on it

just briefly. If you take the example of a case involving claims of simple negligence and gross negligence and you have a verdict that is returned, and on the actual damage, i.e., the simple damages case, you get a 10 to 2 verdict and on exemplary you get a 12 to 0 as would be required under the mandate of HB4, you have what is at least arguably an ambiguous situation and a potential legal conflict in those answers. That is, you do not know upon what questions the two jurors dissented; and, query, can a juror vote, for example, that there was no negligence in the original issue and then turn around and vote that the same conduct constituted gross negligence without it being a legal conflict and, at least technically speaking, a legally defective verdict.

Several of us thought that at a minimum a 10 to 2, 12 to 0 verdict being returned without predication would be a verdict subject to legal uncertainty and attack, and I think that there is at least some suggestion from fairly recent case law that suggests a clear concern about the prospect of a jury verdict that is based on an impermissible theory or some defective legal basis. I think that is at least in part a message that one can obtain from Castille and its progeny.

The other area that I mentioned is the concern over the potential for mistrial, and I think the concern is focused on fairly limited situations, but they are peculiarly the ones that are in focus in the context of the rule change

that we're talking about. That is, obviously if you had a unanimous jury verdict, it is of no moment in the context of the rule change that we're discussing. Similarly, if you have a 10 to 2 verdict and 10 people, all with a consensus that there is no gross negligence and/or no exemplary damage liability, that is of no moment. What I think you would have to be worried about is the situation where you have a 10 to 2 verdict with people believing -- let me step back. With the 10 jurors believing that there is actual damage liability and those same 10 also believing that there is punitive damage liability and then having a hard division between that group of 10 and, for the purpose of this example, the group of 2 dissenters, because without predication, you face the prospect that that jury will, in fact, be allowed to deliberate on exemplary damage liability and undermine theoretical example.

They will arguably never get to 12-0 because, again, in my hypothetical example you have a hard division, 10 to 2, and the 2 are committed to the notion that there is no negligence, much less no gross negligence, and you have a situation where it's probably going to be difficult for them to get to 10 "no" votes necessary to dispose of the exemplary damage liability issue and to render a verdict, and I hope I've explained the concern or framed it so that everyone understands what it is.

The point being is that that is a situation in

which at least several of us thought there was an enhanced chance for a mistrial and, in fact, one in which that jury shouldn't even be involved in deliberating the exemplary damage liability because of the hypothetical findings they have made, and one of the salutary effects of predication is they would not deliberate exemplary damage liability. They would simply answer by way of the first jury certificate, and the verdict would be rendered. It would be a legal verdict and would be acceptable to the court.

All right. Enough said about the first proposal. The second proposal, Alistair Dawson put in a lot of work on that, and I understand at the last minute he had an emergency come up and was not able to be here this morning. Paula, do you mind talking about that? Or I can try and phrase through the outline. Hopefully everyone has it in a written form.

MS. SWEENEY: Well, I got the e-mail this morning, so I'd rather you led off.

HONORABLE KENT SULLIVAN: Well, I think the essence of the proposal is to not predicate. You see the overview that he has provided that has the rationale for that with the notion that you could end up with 10-2, 12-0, that that is what is mandated by the statute and no more, and the question of whether or not there may be a legal defect or a problem would be taken up as we currently take up any other

issue. You wait until the jury renders its verdict and then you look at the verdict and deal with it as such.

I think Alistair's point was to say that the statute goes so far, goes no farther. It does not mandate the sort of predication that we're discussing and that it's overly aggressive for us to insert this sort of predication. I hope I've done justice to his position, but there are other members of the committee who may want to add to that.

MS. SWEENEY: The concern is that there are a lot of ways that a jury could get to a 10 -- to 10-2 negligence and proximate cause finding and still be unanimous on the gross negligence and exemplary damage findings. Alistair's example is you could easily have two jurors who agree that there is negligence and agree that there is gross negligence and agree that there should be exemplary damages awarded but disagree for some reason on the issue of proximate cause as to the underlying negligence question, and therefore, you have a 10-2 negligence proximate cause answer, which is perfectly permissible, obviously, under existing law.

And there's never -- there was never any discussion in any of the legislative proceedings dealing with this as to making negligence and proximate cause a unanimous requirement. Raising that burden was never ever the subject of discussion. It was always as to gross negligence and exemplary damage, and so what Alistair has encapsulated in his memo as

that part of the conversation is that those of us who feel that way, feel that it -- that by changing the language as to the underlying submission, this committee or the Court would be going even beyond what the Legislature did in raising the burden of proof on plaintiffs where even this Legislature didn't do so and that there are a lot of examples that could be postulated as to how you could get a 10-2 finding on the underlying liability with a 12-0 finding on gross and exemplary damages without having a conflict that would result in mistrial; and, lastly, for this committee to say, well, we're going to raise the burden of proof, we're going to make it 12-0 on the underlying liability in order to protect plaintiffs from potential mistrials or unfortunate appellate decisions is putting the cart before the horse.

This, I think, is a process that needs to work its way through the courts, and that's by the process of trial, verdict, judgment, and appeal by whichever party feels dissatisfied, not by this committee or the Court deciding that the Legislature said exemplary damages have to be predicated on a unanimous finding of gross negligence, therefore, we're going to go beneath that and even require unanimity on negligence and proximate cause. So that's the view of those members of the committee.

CHAIRMAN BABCOCK: Stephen.

MR. YELENOSKY: Of course, in one of your

examples where you could have somebody vote "no" on negligence because they don't think proximate cause exists, because the question entails both proof of negligence and proximate cause in one question, so obviously one solution for at least that example would be questions that we could perhaps work that out in some way.

But a more fundamental issue in my mind is if there is a logical conflict and if it's even one juror who thinks that it -- who answers that it is not negligent, and they are not referring to proximate cause, they are referring to negligence, and that it is gross negligence, that's a logical conflict if you understand both questions. So that juror either doesn't understand one or both questions or his or her mind operates illogically. Given that premise, why would you necessarily then default to one or other choice? Why wouldn't you then point out the conflict and get the jury to resolve it, because the reason for the conflict would be a misunderstanding of either or both questions or a illogical mental process.

CHAIRMAN BABCOCK: Judge Sullivan and then Justice Bland.

HONORABLE KENT SULLIVAN: Paula was kind enough to speak for Alistair and now on very dangerous ground I will try and speak for Judge Peeples who weighed in several times on the question of a proximate cause issue. He made the point

that if a juror felt there was underlying negligence but no proximate cause, that is a fact finder who has determined that there is no liability. And liability for this underlying claim is an absolute legal predicate for exemplary damages, so it was his view; and it's one that I share, that it is -- that it would not be legally correct to say that a juror who was voting "no" on proximate cause is not in a legal conflict.

MR. YELENOSKY: I understand that, but what about the juror who says it's black and it's white? They just misunderstand the question. I mean, they either don't understand what gross negligence is or they don't understand what negligence is, because they say something is either black or white and they say it's both black and white. Why isn't that a question that needs to be sent back, the conflict pointed out, and resolved by the jury?

HONORABLE KENT SULLIVAN: I'm not sure that that's a question I can answer. I think that's a question that's outside the box, but the presumption is that if the juror is not following instructions, for whatever reason, maybe they don't understand it, but they're not following instructions; and if we presume that, I think, if you will, all bets are off, so I'm not sure how you --

MR. YELENOSKY: Well, another way to look at it, if the first question was "Is there gross negligence?" and the second question was "Is there negligence?" and they answered

"yes" to the first one and "no" to the second one, would you default to the first answer?

HONORABLE KENT SULLIVAN: No, I think there is a legal conflict, and in my view the law now would say that if you knew that there was a legal conflict that it's not a valid jury verdict.

CHAIRMAN BABCOCK: Justice Bland.

HONORABLE JANE BLAND: Stephen, under this proposal would these instructions make it clearer to the jury that they would have to be unanimous to get to the exemplary damages and thus give them that -- or alleviate that confusion that you're concerned with? I don't know where we go with this discussion, but I do think that it's difficult to -- once a jury has rendered a verdict, to look at the verdict and then say as a trial judge off the cuff, "Here's what I think is wrong with your jury form. I need you to go back in and deliberate some more," because, you know, I think judges are just reticent to do that for fear of giving the jury a nudge, which is really frowned upon.

And so, you know, my view on it is wherever we come out, it ought to be in such a way that the jury's instructions are clear and we wouldn't be contemplating sending them back for continued deliberations based on the trial judge's analysis of whatever the jury verdict --

MR. YELENOSKY: Well, I understand, but there's

not a whole lot of analysis because we all agree that there's conflict. The question is once the conflict is recognized is there a default or is the jury asked to resolve the conflict? That's the basic question. Maybe the answer is there's a default.

HONORABLE JANE BLAND: Right. But on the other hand, the jury presumably is instructed at least on liability and gross negligence together, maybe not on the amount of punitive damages. That might be bifurcated, and so having the instructions in front of it, the jury should be able to determine that, "Hey, if we're less than unanimous on the primary liability question, we don't get to this question."

Now, that could be good or bad, depending on how much you like a jury to know the effect of their answers, but it seems to me that they're given more information under that alternative than they would be otherwise. On the other hand, I agree that the Legislature did not change the burden of proof for the underlying liability questions. It's just a question of how much information we want to give a jury.

CHAIRMAN BABCOCK: Lamont.

MR. JEFFERSON: When we talk about a conflict, are we talking about a conflict in a juror's mind or a conflict in the verdict? It doesn't bother me that there's a division among the jurors. I think it's probably unlikely, especially if there is a deep division that you're talking about, but the

verdict itself would not have a conflict. I mean, there may be -- you can surmise that some juror, some juror's decision, isn't logical, but --

MR. YELENOSKY: Right.

MR. JEFFERSON: -- there's not a conflict in the verdict there.

CHAIRMAN BABCOCK: It seems to me that when Alistair talks about trigger questions, there are two types of triggers. One seems to me to be pretty apparent. If you've got 10-2 on negligence, but then all of the sudden you jump to 12-2 on gross negligence, that doesn't seem to me to fit.

In the libel context, in the public figure libel context you could have 10-2 on falsity presumably and then 12-0 on actual malice. Well, that wouldn't work because actual malice is defined in this instance as knowledge of falsity. Well, all 12 have got to agree something is false before they can have knowledge of falsity. So you have a trigger -- you have one trigger question, but your falsity answer is a subset of that, just like negligence is a subset of gross negligence. So the question is whether you carry it farther, and let's say you have a bifurcated case and you get a 10-2 verdict, and does the judge say, "Okay, it's 10-2. It can't possibly result in punitive damages, though, because not all 12 result on all the things that you need to get to a liability case." I mean, that seems -- I mean, there are three possibilities, not two, is

what I'm saying.

Yeah, Justice Duncan.

HONORABLE SARAH DUNCAN: What if you have a simple car wreck case? Plaintiff pleads brakes and lookout negligence. Brakes and lookout are submitted, but evidence is introduced without objection of negligence in speed. Jury answers the negligence question 10-2 because two, the two who do not agree, believe there was negligence in speed but not with brakes and lookout. They could easily, I think, answer the gross negligence question "yes," even though the jury wasn't unanimous on the underlying negligence question.

CHAIRMAN BABCOCK: Let's see. Bill, I think, and then Carlos. And then Richard.

PROFESSOR DORSANEO: Well, building upon what Justice Duncan said and Lamont Jefferson said, I don't think necessarily that negligence and gross negligence need to be thought of as involving the same material fact or facts. I think we could just simply ignore the problem as we do in other circumstances and say that we just don't see a conflict under these circumstances.

Now, if you're unwilling to do that, and I perceive that a number of people would have trouble doing that, even though we do it in other contexts like percentages of responsibility and determinations of primary liability, then I think the question is what's the easiest way to do this so that

the jury understands what's involved in the verdict that they're giving with respect to the exemplary damage issue?

It seems to me that unless there's some restraint imposed on lawyers arguing that the argument about unanimity will come up pretty early in the game under this one-step process, and I'm not sure whether it would be easier for the jury to understand the issue if you do it in a one-step than it would be as just if you think there's a conflict to point out the conflict afterwards and say, "You have to change one of these answers." And I don't know that anyone other than a trial judge could speak to the question as to which one is likely to present greater difficulties, but that seems to me to be the question.

CHAIRMAN BABCOCK: Carlos.

MR. LOPEZ: I guess I have a somewhat similar view in the sense that my question is the real -- the real question is are we okay with the process. In other words, do we collectively feel that it's a problem if the following happens: The two dissenting jurors who don't believe that there is simple negligence, 10 to 2. We now go to deliberations on punitive, and they say to themselves, "Well, you know, I couldn't derail this thing at the simple negligence stage, I'm going to bring the damages down." So they start deliberating, and they are an active part of that deliberating process, perhaps influencing the others and then bringing it

down to a number that's lower than what it would have been.

I mean, I think it's a more philosophical question than anything else. Is it a conflict? I guess it is if somebody says it is. I mean, if we want to look at it that carefully. If not, we take a 10-2 verdict on simple negligence, we let them deliberate, and if they come back with a unanimous verdict on punitive then we have a verdict. I mean, if they don't, we don't. We go back to our default, which is we only cross those bridges when we get there. That's one philosophical approach.

I guess my philosophical approach in writing the charge always was one of the last things I always did was scan it for potential conflicts that are built in. You know, if they answer it this way, we're going to have a problem, and then we as lawyers would get together and try to prevent that. So I think it's more just a matter of are we okay with the idea that these other two jurors are still part of that deliberative process when it clearly wasn't unanimous?

CHAIRMAN BABCOCK: Richard and then Justice Gray and then Justice Duncan.

MR. ORSINGER: This example of gross negligence I think obscures the deeper difficulty about treating a finding of liability and a finding of liability for exemplary damages. There are three different grounds for exemplary damages in the Civil Practice and Remedies Code. There's fraud, there's

malice, and there's gross negligence; and malice is defined as a specific intent to cause harm. So we would equate that to an intentional tort. Gross negligence is no specific intent to cause harm, but there's a conscious indifference to the risk of harm, and ordinary negligence is just a failure to use ordinary care.

If you look at the restatement section of torts, they put all three of those recoveries on a continuum that's defined by the mental state of the actor. If they were just failing to pay attention in a way that an ordinary person would, of reasonable prudence or ordinary prudence, then they're simply negligent. If there's a high degree of risk and they're aware of it and they disregard it, then that's gross negligence; and if they actually intend to cause the harm, then that's an intentional tort.

It's easy to imagine situations in which 10 jurors might believe that someone was acting negligently in hitting an individual with a car, but two people might think that they were acting intentionally in hitting an individual with a car. The Legislature has told us before you can impose exemplary damages you have to be unanimous in the finding that exemplary damages are appropriate. In that situation 10 people might think that there was just gross negligence and two might think there was an intentional wrong, but they're unanimous that the grounds for exemplary damages exist; and in that

situation where we're not talking about ordinary negligence and gross negligence, you can see that there is an important distinction between the grounds for exemplary damages and the underlying liability.

I can create the same problem with fraud and malice, or fraud and negligence, where you have someone who's committed a financial wrong in the management of a partnership or a trustee. There might be a disagreement as to whether the trustee was grossly negligent or acted in a fraudulent manner, but whether they all agree as to what the underlying liability theory is, they might all agree on the fact that exemplary damages are appropriate. And so to me in our instruction we have to account for the fact that there might be two different groups of jurors who feel differently about the underlying liability, but when considered together are unanimous as to the exemplary nature of the damages.

And this is really what we got to with the E.B. case, which you all remember was the first Supreme Court case to put the rubber on the road about broad form submission, and that was a determination case involving the parent-child relationship where there were about five criteria as grounds for termination, and the jury charge allowed the jury to just conclude whether the grounds for termination exist, even though they might not all agree as to which ground it was that supported termination. And the Supreme Court said, "We don't

care if two people thought they injured the child and eight people thought they exposed the child to danger and two other people thought that they failed to support the child for two years. It doesn't matter. The grounds for termination exist."

Now, E.B. was a long time ago, and with Castille and the Harris County case, we're starting to see the pendulum swing the opposite direction, and I'm not sure that the underlying liability questions are going to be global anymore. And, in fact, I would probably if I were submitting it, I would probably submit a separate fraud liability issue from a gross negligence issue or an intentional tort versus gross negligence; but whatever it is, we've got to write this instruction with the sensitivity that the jury might disagree on the actual liability premises, but they might all be unanimous that there are grounds for exemplary damages.

CHAIRMAN BABCOCK: Okay. Justice Gray.

HONORABLE TOM GRAY: And I guess I'll push the potential for the need to get to the punitive damage question one step further down than Richard did back into the simple negligence question. As you get more claims or more defendants into the -- what has generally been referred to as the primary negligence question, or the simple negligence, you wind up with the possibility that -- everybody seems to be assuming that the two that dissent don't agree that there was negligence. There is the situation where you have multiple defendants or multiple

claims, particularly multiple defendants, and you're allocating responsibility that they -- all 12 agree that three of them are negligent, but the two may disagree as to one. And so the 10 vote -- and they allocate the negligence, for simplicity we'll just say a third each as to the three defendants that are liable, but yet, the other two that don't join in that verdict also think that those -- not only were those three liable, but there was a fourth person liable that is in the charge, but the other 10 don't and, therefore, they don't join the verdict. It's not unanimous.

If you require unanimity at that level without accounting for that possibility then you push it to the point where they don't get to it when, in fact, all 12 did agree; and Judge Sullivan is going to correct me on where my theory is wrong there, but where am I wrong in that? What am I missing in that explanation?

HONORABLE KENT SULLIVAN: The proposal takes that into account. First, under this proposal there would have to be an inquiry as to each particular defendant, and also I want to make sure that there's no confusion over the predication. You're not predicating this on a unanimous verdict as to actual damage liability. You could -- the reason for the predicate is specifically because it is contemplated that you could have a 10 to 2 verdict on part one that, in fact, did allow you to reach the exemplary damage liability

issues and to award exemplary damages.

The reason for the predicate and the effect of the predicate is to make the inquiry to the jury by way of the predicate, "Were you unanimous as to the underlying liability issue as to Defendant A and you point them to the particular issue," so it's a question of did you answer a particular question "yes," so there is no requirement here that there be a 12 to 0 vote and certification of the part one portion of the jury verdict. Am I being clear?

HONORABLE TOM GRAY: Yes. Now, I had understood that there would be separate questions as to each defendant that was found liable. I had missed the fact that the -- it only required an affirmative answer, not a unanimous answer.

HONORABLE KENT SULLIVAN: So to try and give an example, just to make sure we're all on the same page, I'll just use the negligence/gross negligence. Relative to awarding exemplary damages against Defendant A there is the predicate inquiry, "Were you unanimous in agreeing there was negligence on the part of Defendant A," in response to whatever the appropriate question is. If so -- and, of course, the predicate is a little more elaborate than that. If so, you can answer this, but if not, you can't.

HONORABLE TOM GRAY: But they would answer that question -- the predicate is such that even if only 10 answered the question "yes," they're still going to get to the punitive

damage question with regard to an individual defendant.

HONORABLE KENT SULLIVAN: If they were unanimous as to that defendant.

HONORABLE TOM GRAY: Even though there is no question in the charge that said "This defendant is guilty by unanimous verdict."

HONORABLE KENT SULLIVAN: And that really is the reason for the predicate.

HONORABLE TOM GRAY: Okay.

HONORABLE KENT SULLIVAN: There is no mechanism under our current form of charge to make an inquiry question by question as to what the vote of the jury was; and so this is a way to try and make that inquiry, given the presumption that it would be a legal defect if, in fact, you had 10 to 2 on the issue of underlying liability for a particular defendant and then a 12 to 0 on exemplary liability as to the same defendant.

CHAIRMAN BABCOCK: Justice Duncan.

HONORABLE SARAH DUNCAN: That's, I guess, my point of disagreement with what's been said. I don't think it -- you only have a legal conflict in a jury's verdict if two answers can't be reconciled uder any imaginable state of facts, and it's entirely possible, I think, that a juror could answer "no" to a negligence question and then in the next stage of the trial say, "You know, I was wrong and there is -- I should have answered that question 'yes,' but I didn't, but that's okay

because now that I think about it, it was grossly negligent." And I don't think we sitting around this table can begin to predict all of the possible circumstances that could come up in this context, and that's why I think the conditioning goes entirely too far.

HONORABLE KENT SULLIVAN: Brief response, just to add a little bit of data to this, is I think our concern there was Castille and its progeny. There are a number of cases where if the standard was is there any way to reconcile the jury's verdict with a legally permissible verdict, then, quite frankly, those cases could have been affirmed. I think everybody knows the circumstances of those cases where there were intermingled between certain acceptable theories of liability or acceptable theories of damage some that were legally impermissible, and because there was no clear road map of what the jury had done and whether or not it had relied on something that was permissible or impermissible, those cases -- I'm sorry, go ahead.

HONORABLE SARAH DUNCAN: But, Kent, the error was preserved in that case; and error is not preserved in most cases most of the time for most errors; and that's one of the circumstances I don't think we sitting around this table are entitled to assume and base a predicate conditioning instruction on, is that error will be preserved.

HONORABLE KENT SULLIVAN: I guess our assumption

was that it would be routine, given the circumstances. I mean, you would have it, I would predict, offered up in every CLE seminar in the state of Texas to object to a failure to predicate, that this would be a routine issue that is going to have to be resolved

CHAIRMAN BABCOCK: Paula, then Carlos, then Harvey, and then Levi.

MS. SWEENEY: There are lots of practical examples. Think of a psychiatrist malpractice case where the negligence issues have to do with whether or not the medication was proper, whether it was within or not within the standard of care, and your expert so testifies, and 10 jurors are persuaded that the psychiatrist was negligent in his care and his management of the medications. Two jurors aren't so sure about that, but he also engaged in -- we are getting ready to try this case -- in inappropriate sexual relationships with the patient, which is the basis of a gross negligence allegation, and everybody agrees that that's gross negligence. And here you've got, yes, that's part of your underlying negligence, but some people just don't think that qualifies or in the jury's mind is what we think of as negligence below the standard of care because it's even worse than that. It's gross negligence, so they answer differently on the two issues.

I don't think you've got a conflict there. You've got two valid verdicts. You've got a valid verdict for

damages, proximate cause of damages, and you've got a valid verdict for exemplary damages on gross negligence; and for us to be changing the requirement for the regular negligence allegations is beyond -- we're do-gooding. We're trying to fix something that the Legislature messed up by rule-making without letting the normal process of the judicial system work its way through what they did.

CHAIRMAN BABCOCK: Carlos.

MR. LOPEZ: I guess one practical solution or recommendation would be -- I agree there's going to be cases -- I think if we sit here and think long enough we're going to be able to come up with cases where it's not inherently a conflict; and, therefore, I think the discussion ends there, because the predicate in those cases cuts off what would otherwise be a valid deliberation. So I think right there you have to say "no" to the predicate question because the harder question is going to be in Chip's cases where because of the way the elements of the underlying claim, because of the elements you are headed for or potentially headed for, you know, an irresolvable conflict. I think in those cases, which I think, I think, are going to be the minority of the cases, I think the default is to say that's what charge conferences are for, and, you know, good lawyers bring that up to the trial judge's attention. If they don't, they waived it; and if they do, there it is; and, you know, it's going to be a nice

headache for the charge conference, but you come up with something that works and you move on.

But certainly the lawyers and the trial judge in that particular case are in a much better position, I think, to come up with a workable solution for that case than for us to try to sit here and think about all of the, I would say, hundreds of possible scenarios and sort of figure out where that would leave us. You know, we default back into the cross that bridge when we get there. There's no real -- I don't see a need across the board to have this predicate language in there. I do think there are going to be cases where not having it in there, there's going to have to be some other solution there, and I think it's up to the lawyers and the trial judge in that case in the charge conference

CHAIRMAN BABCOCK: Harvey and then Judge Benton, unless you --

HONORABLE HARVEY BROWN: It seems to me that there is a good process question that Paula has alluded to, and that is whether this is properly done by rule-making. It seems to me that what we're really try to do in a sense is to interpret a statute, and it seems to me that there's a pretty good argument that the interpretation of a statute should be done through a case, not through a debate on the rules. I think the courts wisely don't need advisory opinions; and it seems to me that this is an advisory opinion put into a rule

without having debates from both sides in the context of a case.

And if the Court was to change the rule, I don't know if they're changing the rule because they think it's a matter of common law right that there should be unanimity required or whether they're changing it because they view they're required to in a statute; but I'd sure like to see an opinion that talks about all those issues after a debate within the Court after briefs from all the parties that are interested in the issues, so I think we should at least talk a little bit about the processes of whether we want to get into this level of minutia in a rule

CHAIRMAN BABCOCK: Judge Benton, do you still have a comment?

HONORABLE LEVI BENTON: Yes, sir. I do think that in trial, as a trial judge, I do believe that some predicate would be necessary, but Sarah said something about having a way to determine whether there would be irreconcilable answers, and it seems to me -- and I think the subcommittee has provided for this, is maybe what we have to do, not by way of rule, but is just submit more certificates for the jury to indicate their signatures on each theory of liability that is submitted. And you still have a predicate, but that's the only way when you would be receiving a verdict is whether -- that's the only way for you to have a way to determine that there's a

reconcilable answer.

Now, having said that, I want to touch on what Harvey said, and I said this earlier, it does seem to me we're going far beyond -- this whole discussion is far beyond what ought to be in the rules. I can understand why the PJC committee when we get into the pattern jury charge text might want to have some of this in there, but I don't know that we need this in the rules. So I talked out of both sides of my mouth there, so pick which one you like.

CHAIRMAN BABCOCK: Richard and then Skip. I'm sorry, then Judge Christopher, then Skip.

MR. ORSINGER: I would like to pose Judge Sullivan a question. If a jury comes back 10 to 2 because 10 jurors think that the defendant acted with malice, but two think that they just acted with gross negligence, under this instruction do you go forward to an exemplary damage question?

HONORABLE KENT SULLIVAN: I'm not sure I understand your example, but it sounds like you're talking about two exemplary damage liability theories.

MR. ORSINGER: Right, but they're not unanimous on either one, so you've got 12 people that feel like an act occurred that warrants exemplary damages, but they haven't agreed whether it was an intentional act or whether it was a grossly negligent act.

HONORABLE KENT SULLIVAN: I presume that you

would have had a finding of underlying liability on at least one theory of 12 to 0

MR. ORSINGER: Okay. I've just given you a scenario where there wasn't. There were 10 jurors that felt the defendant acted with malice and 2 felt like the defendant acted with gross negligence, but you get a verdict based on malice, but it's not unanimous and, therefore, under this instruction you don't go forward to exemplary damages, although all 12 jurors agree that a ground for exemplary damages exists, so under this instruction, do you go forward to the exemplary damage question or not?

HONORABLE KENT SULLIVAN: I confess I'm somewhat confused by your example because our debate has been whether or not to predicate relative to 12-0 on an actual damage liability, so I'm --

MR. ORSINGER: Well, I'll throw the question out to anybody here. Under that scenario --

HONORABLE KENT SULLIVAN: I think that's an issue you have now. I mean, you can change the voting requirement to the present or to the previous 10-2, but you'd have the same issue. Now, presumably, if you have people who are looking at the same factual conduct and they think on the one hand that it's gross negligence and on the other hand it's intentional misconduct, I would find that a very difficult situation to understand. I would think that one would subsume

the other. In other words, I don't know how you -- if the jurors are being rational and consistent, I don't know how you would reach that situation

MR. ORSINGER: Well --

CHAIRMAN BABCOCK: Judge Christopher.

HONORABLE TRACY CHRISTOPHER: I find a technical problem with the predication. Basically we have to take the jurors' word for it that they have answered unanimous for A to a defendant in the liability question. I mean, if we have a, you know, eight question verdict in part one that's 10-2 and then we're instructing them to focus back on Question No. 1, which is negligence, and subpart (a), which was the negligence of Defendant A, "Now, I'm taking your word for it that you-all were unanimous on that since you're now answering this next question." You know, from a predicate point of view, I just don't think that works. I mean, normally we can double-check that a juror has followed the predicate because we have an answer. "If you've answered 'yes' to Question 1, then answer Question 2." Here we will have absolutely no way to know if the jury has really followed the instruction.

CHAIRMAN BABCOCK: Skip.

MR. WATSON: Well, I just have two questions. Excuse me. The first is, is just the underlying theory of we're assuming the premise that it's legally impossible for there to be a 10-2 verdict on underlying liability on actual

damages and 12-0 for exemplary damages. That's true in common law, but it would appear that the Legislature has changed the common law on that point. This may be an unintended consequence of that change, but they have changed it, and the assumption for there to be exemplary damages awarded that there must be liability and damages found before you can do that may no longer be in play because of this amendment, and that's a fundamental premise that we're assuming that I think has changed.

Second, and more practical, I think we have a bit of a disconnect on what constitutes liability. Liability is the existence of a duty, a breach of that duty that caused injury or damage, but we submit today damages, both the fact of causation of damages and the amount of damages, in one question when really it's two. Did it cause some damage or injury and then what amount?

Here we've got the predicate after Question 3, which is the amount of damages. It is entirely possible that 12 jurors agreed on all counts of the liability. I mean all counts of underlying duty and breach of duty, causation, and the fact that the wrong caused injury, which is the only predicate in common law for exemplary damages. They disagreed on the amount of damages for pain and suffering. I mean, this is why I think it's unworkable.

Whenever you're dealing with soft damages where

the jury has the ability to come in and say, you know, "We're going to pull a number out of the air and we're going to put that number in this blank for pain and suffering" or mental anguish or whatever it is, there is the potential for disagreement, and there is the potential to end up with a 10-2 verdict because of the difference in the amount in the damages

CHAIRMAN BABCOCK: Judge Sullivan and then Buddy and then Judge Patterson.

HONORABLE KENT SULLIVAN: Just a brief explanation. That is a point of confusion I've tried to clear up before and I have not succeeded. For some people it is not correct with respect to this proposal. It specifically contemplates what you just posited as an example. In other words, it would be perfectly appropriate to end up with a 10-2 verdict and for that jury to get to proceed to punitive damages and award punitive damages 12 to 0 with your assumption that they were -- that there were two dissenters on the amount of damages. They can do that.

MR. WATSON: Got it. Sorry.

HONORABLE KENT SULLIVAN: That's why the predicate is intended to be very narrow. I understand Judge Christopher's concern, and this proposal was something of a balancing act to make the inquiry that was felt to be legally necessary so that the jury would have made a certification that there is no legal defect, but as Judge Christopher points out,

it does not provide a trial judge with comfort, the sort of comfort that you might have if you had a vote count as to each answer, but the intent was to at least require the jury to certify that it had rendered a verdict that was entirely consistent with the law. That was the intent.

CHAIRMAN BABCOCK: Buddy.

MR. LOW: Lamont brought up a point that I would like to state again, that we should really look to the verdict, not what this one might have thought and that one, and we construe that under cases like Suggs, Arkansas Furniture, and those where specific controls over general, and we don't know a lot of things here, and that comes back to Harvey's point. Let the court determine what is a conflict, let that court and the appellate court, because every time we submit a case to the jury, there is a potential for a conflict when you talk about percentages and multiple defendants and so forth. So I think Lamont raises a point I come back to, if we look at the verdict; and we don't decide that here.

CHAIRMAN BABCOCK: Okay. Judge Patterson.

HONORABLE JAN PATTERSON: I come back to that point as well because I think that the question really is a very narrow one; and the question is, is there a universe of cases in which there may be a conflict, but not an impermissible conflict; and if there is such a universe of cases, then we shouldn't predicate it because -- and I think we

would really throw it out. But that's what I haven't heard from Judge Sullivan and Judge Peeples, is whether they -- I think everybody seems to think that there is that universe of cases, but do you-all think that there is not that universe of cases, and that seems to be the very narrow point from which you-all diverge?

HONORABLE KENT SULLIVAN: We couldn't come up with an example.

HONORABLE JAN PATTERSON: Well, and so are we talking about conflicts or impermissible conflicts? I think that's -- and undue scrutiny into the verdict, which we don't allow now.

HONORABLE KENT SULLIVAN: Well, and I think there's some debate over that in terms of the level of scrutiny the jury verdict gets, and that was the reason for raising the issue of Castille and its progeny, because some people believe it ought to have undergone any scrutiny, relative scrutiny, in jury verdicts in the last three years, but the intent of this proposal was to say when claims arise from the same underlying facts, then this sort of predicate is necessary to avoid conflict.

HONORABLE JAN PATTERSON: Well, it may be in certain circumstances advisable, I think is what I would respond.

CHAIRMAN BABCOCK: Judge Benton.

HONORABLE LEVI BENTON: Did you-all discuss at all whether you would want to have a vote count on each question?

HONORABLE KENT SULLIVAN: There was a brief discussion. Judge Peeples raised it with me just as another possible alternative, but to be candid, we just didn't go any further.

HONORABLE LEVI BENTON: It does increase the amount of time in deliberations. Arguably it would add some time to argument where a trial court would permit it, but it does seem to me that would solve many of the problems we're discussing, and it seems to me we've got -- in most cases we've got to have a predicate; otherwise, we have jurors deliberating where they need not, and they just --

HONORABLE KENT SULLIVAN: One of the practical issues that we discussed, but understanding we did not give much scrutiny to this and really the subcommittee didn't discuss it at any length. This was just a couple of people batting that idea around, was the certification process, because arguably you can have 10, 11, or 12 answering any particular question; and would you need, if you go that direction, to have a jury certificate, not just a tally but a certificate of who is answering each question? And at some point it becomes very unwieldy. So we were just uncomfortable with it, and we didn't really go anywhere with that idea. I

hope that answers your question

CHAIRMAN BABCOCK: Kent, can I ask a question, which is probably going to reveal my ignorance so late in the debate, but is the issue here that one faction believes that if you're going to get punitive damages in a case then all liability questions have to be answered unanimously, unanimously?

HONORABLE KENT SULLIVAN: No.

CHAIRMAN BABCOCK: That's not one of the factors?

HONORABLE KENT SULLIVAN: No. I think that the belief is that there must be one underlying or predicate theory of actual damage liability

CHAIRMAN BABCOCK: What Alistair calls the trigger question.

HONORABLE KENT SULLIVAN: Yes. And then the jury needs to be unanimous on at least one to provide the legal predicate for answering the questions on exemplary damages and awarding exemplary damages

CHAIRMAN BABCOCK: And so -- go ahead, Harvey.

HONORABLE HARVEY BROWN: I was going to say, what if you have a products case, and in the products case you have a negligent misrepresentation theory, you've got an ordinary negligence theory, two separate issues. You've got a proximate liability damage, say marketing defect or design

defect, and you've got a fraud theory that there was intentional misrepresentation; and the jury, you get 10-2, 10-2, 10-2, but it's a different 10-2 on all of them, but you've got all 12 jurors saying liability on one of those four. All 12 jurors believe there is gross, but not all 12 jurors agree to any one liability theory. That could easily happen.

HONORABLE KENT SULLIVAN: Well, I think you're already having to deal with similar situation, and that's already contemplated to some extent by the instructions. When we tell the jurors that they have to be 10-2, it must be the same 10; otherwise, you do face the prospect of what you're saying.

HONORABLE HARVEY BROWN: Oh, you're right.

HONORABLE KENT SULLIVAN: That, you know, you could have this evolving or constantly changing majority that reaches 10 each time, but that is not a legal verdict. We instruct the jury that it must be --

HONORABLE HARVEY BROWN: You're right.

HONORABLE KENT SULLIVAN: -- the same verdict that votes 10, 11, or 12 in favor of all of the answers that make up the verdict. So hopefully that answers your question

CHAIRMAN BABCOCK: I'm still struggling to see where the fight is. We have one group of people that think there has to be a unanimous verdict on the trigger question, or trigger question or questions; and it's the other side of the

fight that, no, House Bill 4 only requires a unanimous vote on the amount of punitive damages?

MR. TIPPS: No.

MS. SWEENEY: No

CHAIRMAN BABCOCK: Anybody believe that? Paula.

MS. SWEENEY: On the gross negligence question

CHAIRMAN BABCOCK: Huh?

MS. SWEENEY: On the gross negligence question.

CHAIRMAN BABCOCK: Which wouldn't that be a trigger question?

MS. SWEENEY: They're going back and saying the trigger to the trigger is negligence of both.

CHAIRMAN BABCOCK: Okay. So it's not part of the trigger question?

MS. SWEENEY: No, it's how many there are. How many layers of this do I have to -- and hoops do I have to jump through to get there, and you're adding another big old hoop.

CHAIRMAN BABCOCK: Well, that's what I was trying to articulate, which, frankly, I hear the argument being made that every question on liability is a trigger question because if you're missing one element of your cause of action by a unanimous vote you can't possibly have punitive damages. That's the argument.

MS. SWEENEY: Right.

CHAIRMAN BABCOCK: So it's a dispute between how

many triggers there have to be.

MS. SWEENEY: Yes.

PROFESSOR DORSANEO: Mr. Chairman?

CHAIRMAN BABCOCK: Yeah.

PROFESSOR DORSANEO: That's the one layer of the dispute. The other layer is how you're going to deal with it. If you put it all -- put Part A and Part B before the jury and you don't receive a verdict on Part A and kind of put that in the closet then it seems to me what any plaintiff's lawyer who won a punitive damages would argue would be, well, you need here to look at Part B along with Part A, and we need to get unanimous answers to the negligence question and to the gross negligence question in order to get punitive damages.

Now, you know, that's how I understood Judge Sullivan's proposal to begin with, but then maybe I have a question in the middle of this comment. Judge Christopher said that you kind of make the assumption that the two jurors who didn't vote for negligence changed their mind if you got 12 on punitive damages, but I thought, Judge Sullivan, you suggested in your response to her that the verdict wouldn't need to be changed on the negligence question; is that right?

HONORABLE KENT SULLIVAN: I'm not sure I understand your question.

PROFESSOR DORSANEO: Do they have to change the 10-2 question to unanimous in order for the verdict to look

right to you, or do you take it on faith, as Judge Christopher said, that when they got to 12 they changed their mind? Isn't that right?

HONORABLE TRACY CHRISTOPHER: No, it wasn't a matter of changing their mind. Say you have eight questions in the first issue. Liability of Defendant A, B, C, damages, several other theories, and among all those theories the jury comes up with a 10-2 verdict, but as to -- suppose we were going to ask the jury about gross negligence as to Defendant A. The instruction says, "Okay, go back to Question No. 1a and think of your answer to Question 1a, and if it was unanimous then you can answer the gross negligence question as to that defendant."

That's the current construction, and what I'm saying is we just have to sort of take it on faith that it was unanimous back there. I'm not saying that the jury has to change their mind or anything because they can have a 10-2 at the end of eight questions for whatever reason. They don't agree on the damages, they don't agree on some other defendant's liability, they agree it's negligence and they don't think it's fraud. There could be plenty of reasons without an actual change of mind.

PROFESSOR DORSANEO: Okay. So you have a problem with the certificate in Part A not being --

HONORABLE TRACY CHRISTOPHER: Right.

PROFESSOR DORSANEO: -- fully informative.

HONORABLE TRACY CHRISTOPHER: Right.

PROFESSOR DORSANEO: Okay. Now I understand, but that takes me back to the first comment. Somebody is going to get the jury to focus on the effect of a 10-2 answer to Question 1a, and I think that will happen relatively early in the game in some cases, perhaps all cases. So it seems to me, does it make sense to do that in the opening process or does it make sense to do it after somebody points out the existence of what you perceive to be a conflict and a number of other people don't necessarily perceive to be a conflict to begin with?

Frankly, I think the best thing to do would be just to ignore this problem and just say it's not a conflict and forget about it, because we just spend a lot of time and energy fooling with it. Probably not very many cases are going to come up, and I think we're making too much out of something that could be ignored altogether without doing any real harm to anyone.

CHAIRMAN BABCOCK: Justice Duncan. Then Carl. I'm sorry, Carl.

HONORABLE SARAH DUNCAN: Go ahead.

MR. HAMILTON: Go ahead.

HONORABLE SARAH DUNCAN: You go ahead.

MR. HAMILTON: I was just going to say that mechanically we now have it where we have Certificate 1 and

Certificate 2. Mechanically both of those could be combined and put at the end so that the jury knows that if they haven't done something right in the first part to answer the second part they need to go back and fix it instead of making them do the first part first and sign the certificate and then go to the next part.

PROFESSOR DORSANEO: I agree with that, too.

HONORABLE KENT SULLIVAN: Could I speak to that briefly, because we did consider that? And practically speaking, of course, the instructions will be read to the jury in toto, even in a bifurcated case. The question of exemplary damage liability would be before the jury together with underlying liability. So the jury will understand what they are being asked, and they will understand what the effect is of a particular answer. That will all be part of what is in essence a combined process.

CHAIRMAN BABCOCK: Justice Duncan.

HONORABLE SARAH DUNCAN: As I understand, to go back, you were trying to paraphrase what the disagreement is. As I understand what the disagreement is, Judge Sullivan and Judge Peeples believe that if the liability finding on negligence, let's say, is 10-2, there cannot be a unanimous verdict on an exemplary damages liability finding or amount finding, and that's the position I disagree with and I think several people around the table disagree with. I think there

are circumstances in which a jury could logically and without a fatal conflict answer a negligence question 10-2 and still have a liability finding in conflict.

CHAIRMAN BABCOCK: And so you're in the camp that thinks there has to be one trigger, you've got to get unanimous on gross negligence in order to get to punitive damages, right?

HONORABLE SARAH DUNCAN: Right.

CHAIRMAN BABCOCK: But you don't think there has to be two triggers, which is the negligence.

HONORABLE SARAH DUNCAN: No. And I think it would be generalizing from the E.B. case to all cases to do that.

CHAIRMAN BABCOCK: Yeah. I'm just thinking, again outloud, which is dangerous, but maybe it depends on the kind of case because --

HONORABLE SARAH DUNCAN: Absolutely.

CHAIRMAN BABCOCK: -- I think, again, in a public official libel case, in order to get to punitive damages you have to prove a lot of things, but one of the things the Constitution says you have to prove is actual malice; that is, knowledge of falsity or reckless disregard of the truth. That's the test. Well, so that's your trigger.

That's one trigger you've got to have, but another question that the jury has to answer is, "Do you find

that the complained of statements are materially false?" So you get 10-2 on that. It doesn't seem to me there's any room there for those two dissenting jurors to then say, "But they knew it was false," or "they were in reckless disregard of the truth." So you need two triggers in that case at least.

HONORABLE SARAH DUNCAN: And I think that's sort of the problem, is because there are cases we can envision in which there would be a fatal conflict between a 10-2 underlying liability and a 12-0 exemplary, that that is necessarily true for all cases; and that's what we're doing, is we are writing a rule for all cases; and I think the subcommittee has done a marvelous job of crafting the instruction that you're going to request in your public official libel case, but I don't think you can extrapolate from your case to all cases.

CHAIRMAN BABCOCK: Richard Munzinger.

MR. MUNZINGER: Give me an example of a case where the jury finds 10-2 on the first issue and then finds unanimity on the second issue and there is not a conflict in the two answers.

HONORABLE SARAH DUNCAN: Well, I've mentioned two. If the negligence pleadings pleads brakes and lookout but doesn't plead speed. Evidence is introduced at trial without objection on speed.

MR. MUNZINGER: That assumes that if there's one issue on negligence. That's distinct from three issues on the

specific act of negligence.

HONORABLE SARAH DUNCAN: That's correct. Right. A broad form charge on negligence. The only two negligent acts that are submitted, because they're the only two that are pleaded and they're the only two the plaintiff's attorney remembers to put into the charge, are brakes and lookout. The two jurors who don't answer "yes" to that question think there was negligence in speed.

HONORABLE TRACY CHRISTOPHER: We don't put brakes and lookout in the charge

PROFESSOR DORSANEO: Well, Harris County might put it in there eventually.

HONORABLE TRACY CHRISTOPHER: Right now we don't do it

CHAIRMAN BABCOCK: Okay. Orsinger.

MR. ORSINGER: I would like to suggest an alternative to this fight.

CHAIRMAN BABCOCK: Oh, Justice Duncan wasn't finished.

MR. ORSINGER: Well, can I go next then, please?

HONORABLE SARAH DUNCAN: And decides they were wrong in answering. Let's say you've got a bifurcated trial. Decides they were wrong in answering the negligence question.

MR. MUNZINGER: If they change their mind, presumptively if the certificate is included in the charge they

would be required to say it was a unanimous verdict the second time they reach that question.

CHAIRMAN BABCOCK: Okay. Orsinger.

MR. ORSINGER: I think we can avoid all of this and be true to the E.B. case, which is still good law, if we blow off this instruction and instead give an instruction that exemplary damages can be assessed only if you unanimously find that the plaintiff's injuries resulted from the defendant's fraud, malice, or gross negligence and then ask, "Do you find that the grounds for exemplary damage exist, exemplary damages exist?"

That's exactly what they did in E.B., only it was termination. They said, "The grounds for termination are one, two, and three. Do you find that the grounds for termination exist?" That allows you to get to exemplary damages if 10 people feel like there was fraud and two people feel like there was malice. All of them feel like the grounds for exemplary damages exist, but which ground they disagree on, but E.B. says it doesn't matter which ground they disagree on. So why don't we just say that exemplary damages are available only if you find fraud, malice, or gross negligence. "Do you find that the grounds for exemplary damages exist?" And that avoids this whole debate.

CHAIRMAN BABCOCK: Justice Duncan.

HONORABLE SARAH DUNCAN: If I could just respond

to what was said about the fraud, if you don't present that question then you do have a Castille problem if I'm on the other side because that's my right on appeal, is to be able to determine whether there is factually sufficient evidence to support the finding that underlies the jury's verdict. So whatever the pattern jury charge may say, that is the Castille problem. And I'm just saying that there could be instances in which someone would find -- would believe that there was negligence without answering either of those blanks "yes."

CHAIRMAN BABCOCK: Carlos.

MR. LOPEZ: I think -- I go back to what I said earlier. I think the solution is that in the cases where -- in individual types of cases where it's necessary, that sounds like a properly worded predicate question to put in the PJC for that type of case or as a comment or as a potential actual question, but it doesn't -- I think it's clear that -- I know Paula mentioned a case of a psychiatrist where it was clear to me that at least in that situation it would be absolute error to not let them go on to deliberate the exemplary damage question. And if that happens even once then you can't have a blanket that says you have to have this predicate all the time.

HONORABLE SARAH DUNCAN: Right.

MR. LOPEZ: And so you can't fix them -- we're not going to be able to fix them all here, and because of that, I don't think we can fix any of them here. And so we let the

PJC do that in the cases where the elements themselves create the problem in a way that is absolutely not reconcilable, and then Chip is going to -- he gets paid a lot per hour to figure out how to make that work or figure out how to not make it work.

CHAIRMAN BABCOCK: You're supposed to solve it right now.

MR. LOW: Is that a third alternative? In other words, the Chairman had an alternative or had one; Alistair had another; and is that a third, do nothing?

MR. LOPEZ: Well, I guess.

HONORABLE TRACY CHRISTOPHER: No, the minority report is no predicate.

MR. LOW: Alistair said let the conflict, you know, work, the courts work through that. That's not what was first suggested, and I'm just -- it sounds like you're saying that this committee vote not to do anything on that. Is that basically right?

MR. LOPEZ: I'm just saying that we --

MR. LOW: No, I'm not disagreeing with you. I just want to know whether I agree or disagree.

MR. LOPEZ: My position is that we can't put that predicate in.

MR. LOW: Okay.

MR. LOPEZ: We can't mandate. It can certainly

be used in some cases.

MR. LOW: But let me ask a question. We're talking about proximate cause. If General Motors makes cars, there's a suit that involves cars; and I mean, it's terrible, but probably not gross, but the evidence comes in of their conduct and they make airplanes as well, but the airplane had nothing to do with the accident. You mean exemplary damages don't have to do -- the evidence on that doesn't have to do anything with causing the accident or related to it? Which brings back what Richard says. It might not be proximate cause, but doesn't it have some relation? I mean, your exemplary conduct, so what's wrong with what Richard says?

CHAIRMAN BABCOCK: Kent.

HONORABLE KENT SULLIVAN: I think the point of disagreement probably falls in two categories. One is what constitutes a legal conflict or a potentially fatal conflict. We talk about that in the example of negligence and gross negligence, and I think we've played out what the two sides are, although I want to confess I don't totally understand how you can have a 10 to 2 negligence, 12 to 0 gross negligence from the same underlying set of facts. I truly don't understand that, but I understand that there are people who believe that. That's Question No. 1.

Question No. 2 in my mind is much like the issue posed by Bill Dorsaneo, I think, and that is the issue of what

is the reach of Castille and its progeny, what is currently required of a valid jury verdict. If I can be very informal about it, do you have to have a road map from the objective jury finding that it complied fully with the law in order for the verdict to be a valid jury verdict? I think that 15 years ago the answer was you did not need that road map if there was any way to reconcile the jury's answer that was acceptable and the verdict was a valid jury verdict. I think at a minimum that is subject to substantial question now in light of Castille, *Harris County vs. Smith,* and some of the other cases involving similar situations.

CHAIRMAN BABCOCK: Justice Duncan, and then Justice Patterson.

HONORABLE SARAH DUNCAN: As I understand Castille it's not a question of reconciling jury answers. It's a question of whether the appellant has the ability to determine what the jury decided so that the appellant can challenge the legal and factual sufficiency of the evidence to support that finding. So I don't -- I don't see that Castille really has a lot to do with what we're talking about here; and further, as I mentioned earlier, if you're going to assert Castille error on appeal you've got to preserve it, and it isn't preserved in most of the cases I see.

CHAIRMAN BABCOCK: Justice Patterson.

HONORABLE JAN PATTERSON: I think there is a

third question to add to the two, Judge Sullivan, and that is the one that I think Richard's question or statement raises starkly, and that is one on legislative intent. Appellate courts say all the time, "The Legislature spoke in this matter. They knew how to speak with a clearer voice." Here they say exemplary damages. They knew how to say something other than that, but they didn't, and so I think this does fall into a matter of -- and I think Richard's suggestion addresses that point and does exactly what the Legislature suggests without more, and this does a great deal more, and it may be necessary in many cases, but it may not be necessary in all cases, and that seems to be the open question

CHAIRMAN BABCOCK: I want to take a straw vote here in a second, but one thing that hasn't been said, and I don't know if it needs to inform our discussions or not, but in a broader sense, you know, there is a great deal of skepticism about juries and, you know, jury verdicts; and justice -- Judge Higginbotham of the Fifth Circuit just gave a speech about how horrible it is that people are opting out of the jury system and we don't have jury trials anymore. And one of the things that I think about anyway, is if we create a system where you have a -- you have a result where two jurors say that there's not negligence but then they go and say but there's gross negligence, or in the public official libel case that I've been talking about two jurors say that the complained of statements

were false but then turn around and say, "But the defendants knew they were false." I mean, that -- I mean, you can just see how that plays out with businesspeople in the general population.

And so in thinking about this, it seems to me that we have to advise the Supreme Court that they should try to have a rule that prevents that kind of facial inconsistency in terms of implementing this legislative mandate.

Having said that, I don't know that that's particularly apropos to anything other than the big picture; and, Richard, I'll recognize you in two seconds. But the straw vote I think we ought to take before our break is in a general sense do people think that we ought to move toward the majority or at least Judge Sullivan's proposal that I guess the majority of your subcommittee supported or whether -- which is the multiple trigger approach, or whether we should adopt what Alistair's first choice was, which was just a single predicate trigger as requiring unanimity because, as Justice Duncan points out, there's a way you can get there consistent with the law and with what a jury may be doing.

MS. SWEENEY: Chip, I don't think the majority of the subcommittee -- yeah, I don't think we ever took a vote. I don't think we have a majority/minority view. I don't want the record to later be misconstrued.

HONORABLE KENT SULLIVAN: And I agree with Paula

on that.

CHAIRMAN BABCOCK: So we'll call it the Sullivan/Dawson debate. Sullivan proposal versus the Dawson proposal.

HONORABLE KENT SULLIVAN: I'd like to have a vote on whether or not to call it that

CHAIRMAN BABCOCK: Too late. So before we take that straw vote, Richard Munzinger, last comment.

MR. MUNZINGER: I only wanted to speak to what I felt was a sentiment among some that we ought to finesse the issue and avoid it. I think the Legislature has spoken, and the Supreme Court ought to write a rule that attempts to comply with whatever it perceives to be the legislative intent. I don't think it's something for the pattern jury charge committee or anybody else for this thing to percolate over the years without the Supreme Court addressing it. I think we need to give them some guidance.

HONORABLE KENT SULLIVAN: Yeah. And if I could add to that very briefly, I did serve as Vice-Chair of the Pattern Jury Charge Oversight Committee last year, and in all candor, the committee that was dealing with this issue was divided much like our own. There are different viewpoints, and everyone thought they would look to this committee and the Supreme Court for guidance before they took action. So we're in something of a circular situation here.

CHAIRMAN BABCOCK: Okay. So -- and this is not binding. It's not deciding anything. It's just to give us a sense of where we are. How many people think that the Sullivan proposal is preferable? Sullivan.

HONORABLE TOM GRAY: I object to Sullivan not voting in favor of his own proposal.

CHAIRMAN BABCOCK: No, he did.

HONORABLE TOM GRAY: Oh, okay.

CHAIRMAN BABCOCK: He sort of raised his hand.

All right. The Dawson proposal?

MR. LOPEZ: Is that to not have it?

MR. ORSINGER: Well, Chip, there's a difference between the Dawson proposal and voting against the Sullivan proposal, so this is a little bit of a misconstrued vote.

CHAIRMAN BABCOCK: Well, this has decided a lot. The Sullivan proposal has gotten 15 votes and the Dawson proposal has gotten 15 votes. We'll take our morning break.

(Recess from 10:40 a.m. to 10:59 a.m.)

CHAIRMAN BABCOCK: Okay. We have a number of distinguished visitors, led by Jack London, who are here for the purposes of talking about the evidence rule that Buddy has been working with his subcommittee on and that we've discussed here a number of times. Yeah, we're going to leave Judge Sullivan for the moment in deference to our visitors; and, Buddy, why don't you bring us up to date on where we are?

MR. LOW: Yeah. All right. Let me -- just to focus back on what gave rise to this, as you know, the Federal courts have condemned ex parte conferences with the doctor in the Rule 509.

MR. HAMILTON: Can't hear you, Buddy.

MR. LOW: All right. State courts of appeal have allowed it, and Bill Edwards -- 509 and 510 provide for -- 509 is the doctor-patient privilege. 510 is professional and patient privilege, and professional includes a doctor, so we took a look at that. HIPAA is on everybody's mind, and I will tell you before I start, I'm not going to tell you I understand HIPAA, but I will tell you I probably know -- I can add that to my vast knowledge of useless information, and that's the most recent useless information.

HIPAA came about -- we discussed this earlier before, and John Martin was concerned and we all were concerned with the peer review and the ability of hospitals and doctors and committees to review the conduct of other doctors. There's a Federal statute on that, resident peer review, and the state statute adopts that, so it is in principle favorable that we have that. John came up with a provision, and you have all of these. I say John. John sat on the committee with us, and he came up with a rule which had a footnote that amended the rules -- we amended the rule basically to have a footnote, and you can -- I don't have it right before me right now, but it points

out to the lawyer that, you know, you need to look out for HIPAA.

The State Bar has worked considerably on this, and you have their reports and their rule, and basically the State Bar revised their rule to take care of our concern about the peer review.

Now, first of all, let me explain HIPAA. There have been a number of articles written about what HIPAA does and what HIPAA does not do. HIPAA is very broad and pertains basically to all medical information. Many of the articles that were written were written when HIPAA had its first version. For instance, Barbara Radnofsky, her article was written back on the first version when there was the lawsuit exception in 510. Now 510 pertains only to getting information when consent is given.

512 pertains to when the information can be given without consent, and it has a section in there that pertains to administrative and lawsuit proceedings, but it says you can get it through the legal process if -- and all through there it has notice and how you have to document everybody. So I think there's no question, none at all, to suggest you can get information without notice.

Jeff, I talked to Jeff, and he had let me know that the Attorney General is looking into this; and, I guess, Jeff, isn't it whether there's conflicts or -- between state

law and --

MR. BOYD: Preemption. Right.

MR. LOW: Now, Jeff wrote to me, and I asked him to be on -- and Jeff said he does not believe that HIPAA is inconsistent or preempts 509 and 510. I agree with that. 509 and 510 apply, but HIPAA tells you then how you can get the information. 509 and 510 just provide for the lawsuit waiver. They don't say you can get it by what method. So I agree that it does not preempt.

Now, presently there is a conflict between -- like 510 pertains to mental health. Well, the Safety Code -- let me find it here. The Safety Code was passed and it pertains to mental health, passed in '79, and it had the lawsuit exception waiver. In '95 it was amended and it took it out, so that places a conflict between 510 which pertains to health and that. There is no waiver under the current version, the 1995 version, 611.006 of the Health Code.

The Occupation Code pertaining to physician and patient, Section 159, has the exception. So there's a lot to be answered, and to amend as we did doesn't answer 510.

Now, the State Bar version is broader than the exceptions. Excuse me, broader than the privilege. 510 pertains to doctor-patient. No, 509 does. 510 pertains to the professionals. That means licensed. But HIPAA includes other information. It might be a trainer or other medical

information besides a professional. And I pointed out to them that their exception is broader than the privilege. It's my understanding their intent was to take care of HIPAA, and if you do that, you might have to put that rule under a discovery rule rather than evidence rule. They have reasons for that.

So they have been kind enough to come here, and I would ask Jack to speak to you and anyone he has, because they've done a lot of work on this over about a year and a half, haven't you, Jack?

MR. LONDON: We first began this back in 2001, which the question at that time was whether or not there should be a rule to address the emerging issue of ex parte contacts with who essentially were defendant lawyers contacting the patients' physicians ex parte, and there were split decisions in the courts on that, and the question then was whether the rules of privilege should be amended or modified to exclude from evidence any ex parte -- any information gotten in an ex parte contact and to make that privileged and, therefore, inadmissible.

And we had two long and intensive sessions. They sounded like PJC sessions this morning where all the defense lawyers on the Rule of Evidence Committee would get together and say it's not fair for the plaintiff's lawyer to talk to the plaintiff's doc and the defense lawyers don't get to. Plaintiffs' lawyers would all say, no, it is fair because

plaintiffs' lawyers need to have a big picture about their client's health, about their information being compromised. You know, we would snap back and forth, and the criminal lawyers would all buff their nails, and the divorce lawyers would all sleep, but before we ever voted on that rule -- no, I think a -- I'm hard of hearing anyway, but before we ever voted on a rule, HIPAA was passed, and from our perspective the first thing HIPAA did was it prohibited ex parte contact and wiped out that entire line of inquiry.

But then the second thing HIPAA did, was that it incorporated exceptions in how even an ex parte contact might be had within the lawsuit context. So we all started from scratch all over again. We formed subcommittees; and the subcommittees met three times, twice before your committee met last spring, once after Mr. Martin's report came raising the questions that your committee had; and what we tried to do was recognize a couple of things.

First, we're talking about an exception, a privilege; and once you talk about a privilege you're then talking about a rule of evidence, not a rule of discovery. It may delineate the scope of what is discoverable, but we're only dealing with it because it is a privilege.

And then secondly, we understand that lawyers and judges ought to recognize what the applicable rule of privilege is, but the problem with HIPAA is that doctors and

healthcare providers are the ones who are having to make the call when they're contacted out of court, whether it's by a subpoena, by deposition, or by an approved ex parte contact, what may be divulged; and the rule that we saw coming from your committee really just said "Except for prevailing state and Federal law, here are the privileges"; and they don't tell the doctors, they don't tell the hospitals, "Here's what you can and here's what you cannot give," even though it's very clear that not all medical information may be disclosed in every lawsuit.

The example that I think our committee kept getting hung up on, no pun intended, was the administration of a drug overdose. If you have a patient who has a medical complication because he was given too much Demerol and died or nearly died, all of the pulmonary records may be discoverable to see whether he had a condition that was appropriate, but if his name is Bobbitt, the fact that he was given Viagra probably isn't discoverable and shouldn't be disclosed. We as lawyers and judges ought to know that. A doctor would not know that, but a doctor who disclosed that would be exposed to penalties under HIPAA.

So we approached this with the view that we want to give guidance to judges, we want to protect the HIPAA privilege, and we want to protect the healthcare providers who are being called upon to disclose information appropriately.

On the other hand, we didn't want to restrict with some rule of evidence the disclosure of nonprivileged information, and that, finally, we wanted to give trial judges the authority to make the call for these somewhat unforeseeable circumstances that come up in every case.

Now, Chip and Buddy talked about how we had distinguished guests from out of town. I want Steve and Terry to talk, not because they're smarter or know more than me, but because they drove here through rush hour traffic past Georgetown, and no one should ever have to come to Austin on Friday morning and drive through Georgetown without talking to your committee, and so I want to start with Steve, and give your perspective on our rule and then I really want to let Terry talk. Terry was the lead draftsman with Professor Steve Goode of both the previous version of our draft rule and the rule that we have given to you.

I think that in the final analysis our rule comes down to this question: The draft rule we've seen from the SCAC is simply putting on top of Rule 509 "Except for prevailing state and Federal law here are some exceptions to the rule of privilege," and they only apply to doctors in 509 and professionals under 510, as Buddy pointed out. Rather than having an exception to an exception, our rule really addresses the scope of the evidentiary issue.

So let me start with Steve. Steve, why don't

you go, and then, Terry, you go. I'll answer questions. I don't really have a lot more to say because these guys really are more distinguished than I.

MR. STEVE HARRISON: It doesn't take me long to get my I-35 frustration talked out, so I will be very brief. We have gone back and forth with this for two years now, and we think what we've presented to you is a very good compromise that eliminates the possible mischief that can come from ex parte communications but provides a solution, court administered, where in those situations where ex parte communications may be appropriate they can at least be noticed and monitored by the court.

So I won't belabor the point. I'm sure all of you have read the rule that we have proposed. That is the compromise that we have laid out and propose to the committee, so thank you for your consideration.

MR. JACOBSON: My name is Terry Jacobson, and I practice in and around Corsicana, Texas, which is probably a little different than some of the venues you-all get to. I was the subcommittee chairman on the original ex parte issue. We had two defense lawyers, two plaintiffs lawyers, one judge, Judge Lopez at the time, and one academic; and as Jack said, we found ourselves as primarily docket-oriented. Defense lawyers wanted unfettered contact with physicians. Plaintiff's lawyers wanted to put a stop to it, and I do a little bit of plaintiffs

law and I do a little bit of defense law, and I represent 40 physicians in Navarro County, Texas, on a noninsurance basis. So I sort of had the physician's perspective as well.

And we did a lot of research. We looked at what other states had done. Some of the materials you may have received include some cases from other jurisdictions. We looked at the Federal cases here in Texas, which seemed to say that ex parte contact was not allowed. We looked at the San Antonio court of appeals cases that seem to say it is allowed, even though I think in one of the opinions one of the justices said, "Please, somebody deal with this. You know, we need to have a little help here." They're asking for some legislative or rule-making intervention.

And then HIPAA, of course, was coming out before we reached our final conclusion, but it really solved the question for us because I think HIPAA in its current form, which is the law, number one, absolutely preempts any state law which is less restrictive than HIPAA. It just says it that clearly. It's not implied where there's a little wiggle room about fields and stuff like that. It's express preemption, and it just says it.

So, that being the case, then the question became should we create a mechanism that allows for ex parte contact; and what we have done, because we had a lot of people, Barbara Radnofsky, some other folks. I think John's point was

well-taken, John Martin's, too, that there are situations where an ex parte contact between a defense lawyer and a physician can go a long way towards taking away unnecessary depositions, for example. Defense lawyer is asking, "Will you be critical of my client's treatment in care of your patient?" Stuff like that. Barbara Radnofsky made a good point about how it's massively in the cases of mass tort litigation to not have ex parte contact when you have 500 hundred plaintiffs and 2,000 doctors. That's a lot of depos to take.

So we crafted a rule that we think sort of tries to meet both circumstances. One being allowing some court-administered ex parte contact; and number two, also protecting the physician, who really is sort of innocent; and, number three, gives some guidance to the Bar. In the five county area where I practice -- and Judge Gray can, I think, confirm this -- there might be 10 lawyers of the 250 in Ellis, in Henderson, Navarro, Freestone, Limestone, and Hill County who might know what HIPAA is; and of those 10, five of them might know where to find it. So the rule that we proposed is something that actually gives more definition and structure to the average practitioner who doesn't have access to quite the libraries or the other legal resources that other people do have.

So the rule we think is a good compromise. It allows for it to happen, but it's court-administered. Steve

Harrison was often saying during our subcommittee meetings that probably 80 percent of the defense lawyers he deals with, with the structure of the order we have, there's going to be a hearing on it. They will just agree as to what can be discussed with the physician, and he'll send the defense lawyers on their way. 20 percent of the lawyers he doesn't trust, and he will want some court administration as to what's going to go into the order.

We patterned the order or the rule on a concept that Judge David Godbey has used in his court in Dallas. You all know David. He's now on the Federal bench. He actually used this and had good success with it where the order delineates what is and what is not discussable between the physician and the other attorney. It tells the physician they can talk to anybody they want to and then the judge kind of holds everybody's feet to the fire and makes sure that what's appropriate gets discussed and what's shielded doesn't. So that's what we think is the best approach for Texas, I guess, actually. I'd be glad to answer any questions you might have. Yes, sir.

MR. LOW: Yeah. Now, one thing. Your rule only pertains to civil, only pertains to I believe you said civil cases.

MR. JACOBSON: Yes, sir.

MR. LOW: Now, the Rule 509 and 510 pertains

also to administrative proceedings. Why didn't you include administrative proceedings in that as well?

MR. JACOBSON: I think we had a draft and one of the versions we sent up did have administrative proceeding in that, I think, and I don't know that we have any objection to it. Some issues that come to mind are licensing issues and also stuff like peer review between hospitals and clinics. HIPAA itself actually lets ex parte contact occur in those circumstances, so we left it out. We didn't include criminal stuff in there because there is a very broad law enforcement exception to HIPAA and some of the criminal attorneys on our committee said, "Don't mess with it. It's working fine."

MR. LOW: No, I understand. But what I'm saying is HIPAA is very broad. I mean, it doesn't distinguish between administrative, civil lawsuits, or what. It doesn't do that, but Rule 509 and 510 both say "civil lawsuits and administrative proceedings," and I'm just wondering. I mean, I don't know what administrative proceedings you would have, but are you saying then that your rule would not apply in administrative proceedings? Was that your intent?

MR. JACOBSON: No. No. That wasn't the intent.

MR. LOW: Okay. Then --

MR. JACOBSON: Like I say, one draft that we sent up to you-all did include the civil and administrative proceedings, sort of quoted the language in 509.

MR. LOW: Okay. So --

MR. JACOBSON: We aren't opposed to that. I don't think there's a reason for it.

MR. LOW: So should we adopt your rule and want it to be consistent with 509, 510, you would have no objection to that?

MR. JACOBSON: None whatsoever.

MR. LOW: Now, I also noticed that your rule -- these rules pertain to doctors and professionals and your rule pertains to all, so it is broader than the privilege, but it was your intent to give guidance in the scope of HIPAA; is that correct?

MR. JACOBSON: Well, yeah, in a sense, yes, sir, the intent was to embody what HIPAA preemptively provides for everybody. That's part of it, and also it's sort of an anomaly in the rule. 509 applies to physician-patient but frequently gets applied to chiropractors, or at least in practice people assume chiropractors and hospitals and whatnot are also sort of included within it. So we just kind of wanted to wrap our arms around the entire universe of people who might follow HIPAA, if that's a better way to approach it.

MR. LOW: Well, 510 pertains to all professionals, which include doctors as well. And 509 and 510 aren't quite the same, but they both have the lawsuit exception, and 509 for some reason includes peer review but 510

doesn't. You know, it excepts that from it. I don't understand that.

MR. JACOBSON: We didn't either. We just thought the easy thing to do was to take what HIPAA preemptively provides and make that the standard rather than trying to figure out all the nuances of some of the other rules.

MR. LOW: Now, let me explain what this committee was trying to do, and I'm going to let John speak further on it. I'm not trying to disagree with you. I'm saying what we were trying to do is to say, look, we don't know about HIPAA. We don't know everything. I mean, we read it. We see what it says, but it's changed about four times; and even the articles that were written, like Barbara's article, is no longer -- and it's not like they have to pass a new law. This is -- I've forgotten what agency, you know, drew the -- they were mandated to draw this, and they can change it.

So the committee's idea was, well, let's just tell people to beware. Let's inform them of that. Let's don't try to codify HIPAA in the rule, so it may change and then we have to change. Let's just let it be a flowing thing, and I'll let John address further.

MR. MARTIN: First let me say, I think that the current version from the evidence committee clears up a whole lot of what I was concerned about.

MR. LOW: The committee over here?

MR. MARTIN: And I'll get to where I still have some concerns; but the two biggest concerns I had were the peer review investigation and other committee privileged investigations; and I believe the last sentence of this takes care of that, although, Buddy, in your letter that's in the materials here you suggested having a footnote or a comment or something saying this means that peer review isn't covered by this and cite the statutes and so forth; and I'm certainly fine with that.

But I would -- I also had some other concerns about the last draft, some of which are -- some of which have been taken care of in here, but the concerns I still have are mostly set out in an e-mail I sent to Buddy that's in the materials. It's right before Buddy's letter near the back of the materials, and I'll try to summarize those very briefly.

The rule that they're proposing refers to "healthcare information," and that term is not defined here or in HIPAA or anywhere else to my knowledge. HIPAA uses over and over the term "protected health information," the shorthand for that has become "PHI"; and it seems to me that with HIPAA out there with the use of the term "protected health information" and if we're going to use in our rule "health information," somebody somewhere is going to argue that those are two different things and that health information is a broader term

than protected health information. And so I think either we should use "protected health information" as defined by HIPAA or we ought to have a definition of what "healthcare information" here means, because I think it's -- that argument is going to be made that they are two different things, and that's going to have to be something that would be sorted out.

Another concern I have about this, and maybe there is an answer to this, but the first sentence of the rule refers to "a party or party's representative." The last sentence of the rule does not prohibit a party, a physician, or a healthcare provider, and I'm not clear why we use "party or party's representative" in the first line and "party, physician, or healthcare provider" in the last line. Certainly it seems to me in the last line you would mean "party's representative" to include the lawyers who might be involved in some of these communications, so I have that concern there.

Another concern I have, and I'm not sure what people think this rule and HIPAA means with regard to this. I've raised several examples of situations where there are just basic underlying facts that were not privileged before and I would argue are not privileged under HIPAA. In a medical malpractice case the example I used over and over was the situation of where there is a dispute about whether the doctor left the emergency -- left the operating room during an operation or not, and why should a lawyer not be able to go ask

somebody, "Well, did Dr. Babcock stay in the OR the whole time, or did he go out for a smoke for 30 minutes and come back?"

That's not a privileged communication, and yet I'm not sure when we're just talking about something as broad as healthcare information here whether that would be covered or not. I think at our committee meeting that we had at Stephen Tipps' office that there was pretty broad agreement that you ought to be able to ask about things like that, and I would also suggest that -- and I think Buddy's letter agrees with this, that you ought to be able to -- a defense lawyer for a healthcare provider ought to be able to ask another healthcare provider, "Do you have any criticism of my client?" Again, I don't think that would be a violation of this rule or of HIPAA.

Another issue that I just want to flag, and I don't claim to know the answer to this, when House Bill 4 was passed, 74.052 of the Civil Practice and Remedies Code requires a specific form of authorization that uses language -- I don't have it right before me, but it uses language "this includes the verbal as well as the written" or something to that effect. I have heard lawyers contend that that allows once an authorization is signed -- and it has to be signed and provided before the suit is filed, I think, Paula, right?

MS. SWEENEY: Right.

MR. MARTIN: That that allows an ex parte conduct. I'm not expressing an opinion on that. I don't know

whether it does or it doesn't, but that argument is out there, and I think people need to be aware of that.

Finally, I've suggested in my e-mail that it's pretty obvious from reading this, but the last two sentences were added later at some point in the drafting process, and I think the last sentence ought to have a "however" in front of it or something to show -- because as it reads now the last sentence is directly opposite to the first sentence, and it needs a "however" or an "unless" or an "except" or something in the drafting process I think just to be consistent.

MR. LOW: That's the State Bar, the State Bar version?

MR. MARTIN: Right. Right. Right. So I think if some of those changes would be made I would be comfortable with their version. Having said all that, I still prefer what I propose, but Justice Hecht doesn't like it, so I'm not going to push that

MR. LOW: Now, he didn't tell me that. He didn't seem too enthused about it, but that is -- that's my interpretation, but the last time I interpreted what he was going to do I got reversed, so beware of that.

MR. MARTIN: Well, it's a very subtle change.

MR. LOW: But before we go, let me -- I agree with what John said, and I propose some answers, I mean, to that. I think 74.052 is in a malpractice case, but John raises

some good points, and I'm going to make a suggestion, but I need -- Jeff Boyd is somewhat familiar with this because the Attorney General has been asked to look into this, haven't they, Jeff? And you and I have corresponded. Do you have any update on that?

MR. BOYD: No, I don't. To give you, again, the background, the Legislature in the last session required the Attorney General to put together a task force of people from around the state of specialties and practices, lawyers, doctors, and others, healthcare providers, to review all of Texas law, statutory, rules and case law, and prepare and provide to the Legislature with the Attorney General's signature a report on what state laws are preempted by HIPAA and for which none of HIPAA's preemption exceptions apply and for those laws to make recommendations on how they should be changed in order not to be preempted by HIPAA.

The subcommittee of that group that I'm a part of included these Rules 509 and 510, and in that group, the group concluded that HIPAA does not preempt 509 and 510 because a physician or healthcare provider can comply with both. 509 and 510 do not require the provider to disclose protected health information, but instead address only whether or not there is a waiver of that under Texas privilege law, and so my purpose for sort of getting into this mix was to make sure that Buddy knew that at least our recommendation to the Attorney

General would be that he should not report that 509 and 510 are in any way preempted by HIPAA.

In my view what this issue comes down to for us is not -- is only minimally impacted by HIPAA, if at all. I think HIPAA complicates the analysis but doesn't dictate the result. I think the result is a question of do we want to adopt a rule that by rule addresses the question of whether ex parte communications with treating physicians should be allowed or not. By way of example, if we wanted to, the Court could adopt a rule that just requires every plaintiff in a personal injury case to sign an authorization at the beginning of the case saying that they authorize the opposing counsel to have communications with any treating physician in which information for which the privilege is waived can be disclosed. I'm just -- I'm not proposing that rule. I'm just saying that would solve any HIPAA problem. So it's really a policy issue, do we or do we not want to adopt a rule that restricts the ex parte communications?

MR. LOW: And I agree. In my letter I agreed with you that it didn't change it. It just provides a procedure of how you get it. 510 is with permission and how you get it without permission, and basically all of them are interwoven in there with notice. Judge Godbey and I have spoken several times about this and he raised the question what if there was a rule that said that you have to sign a consent,

a HIPAA consent, when you filed the lawsuit, but of course there would be arguments that that's not opening, that's closing the door to the courthouse or something, but you arrive at that.

But that is an issue, and again, as I understand it, John -- what I would propose we do, I agree with John, but I'd also agree that the State Bar approach takes care of 510. It takes care of the conflict between the Safety Code and 5 -- and 510 now, which there is a conflict. There is no way -- one of them provides a lawsuit exception, and the other one doesn't.

And I would think that if they could address or maybe if John would not mind communicating with Jack to try to address those to bring that fight to the evidence subcommittee, I think that might be the answer to that, but if you want to vote today on whether you just have what we have done or want to modify the State Bar, I'm glad to do that, but my recommendation would be that John get with Jack and they work something because it sounds like to me it would answer more problems, even though I think certainly my committee did an excellent job. Is that okay?

CHAIRMAN BABCOCK: That sounds good to me. Anybody have any problem with that? Yeah, Judge Christopher.

HONORABLE TRACY CHRISTOPHER: I don't understand the intent of the last sentence in the subcommittee's rule, the

State Bar's rule.

MR. LOW: All right. You don't understand it?

HONORABLE TRACY CHRISTOPHER: Beyond the way it's written, so I think it needs to be a lot clearer.

MS. SWEENEY: Are you-all talking about 510?

HONORABLE TRACY CHRISTOPHER: I mean, if we're sending it back, which I'm happy to do, I'm just throwing out to you that that last sentence doesn't make sense to me.

MR. LONDON: Let me ask you for some guidance. The reason that sentence is in there is to address John Martin's concern about intercommunications between peer review committees and doctors and hospitals who are separate entities, but not parties. So there's no lawsuit in the last instance. We're talking about a case in which there is no lawsuit on file, but you still have people with possession of medical information who are communicating. So there is a dissemination of healthcare information that is outside the lawsuit process. Well, this rule would not prohibit that. It brings it within the --

HONORABLE TRACY CHRISTOPHER: But why do we -- I don't understand why we have to have it in this rule.

MR. LONDON: To address John's concern with that. To take care of people who are communicating privileged information even though they may not even have an attorney at that stage.

MR. MARTIN: The problem with the rule that they submitted the first time was that if you read it literally the hospital could not conduct a peer review investigation or committee investigation or a root cause investigation of the event if a lawsuit got filed. They would have to bring it all to a screeching halt. They couldn't conduct the investigation, and that's not -- that's not a good thing for our public if hospitals can't investigate doctors.

The other thing is that -- and this is a very real situation that happens very often, particularly at hospitals where certain high risk procedures are done. People who are plaintiffs in lawsuits are being treated in that hospital while they're suing the hospital for something that happened before, and the hospital personnel need to be able to communicate about the person's healthcare information with their doctors. And the rule as drafted before would -- if you read it literally, it would have been kind of an absurd reading of it, would have prevented that.

So they have -- and, Tracy, it's not just the first part of this. This has gone through several revisions since we discussed this several meetings ago, but I think what they've done -- I agree with Judge Christopher that the last sentence needs to be made more clear. One of the suggestions I made was this "party, physician, or healthcare provider" doesn't jive with the first sentence. I think the last

sentence needed to be made more clear. Buddy suggested a footnote from that sentence citing the peer review statutes and so forth.

HONORABLE TRACY CHRISTOPHER: I mean, if that's what you're worried about, that they can't have peer review communications, I mean, it seems to me if we're talking about, you know, a situation where the way you're reading it -- maybe I'm just a little confused about the whole idea behind this exception. I mean, if you're worried that a plaintiff is in the hospital and the nurse can't talk to the doctor about the care given to the plaintiff? Under the rule? I mean --

MR. LONDON: There's a second reason behind it.

HONORABLE TRACY CHRISTOPHER: -- that wouldn't necessarily be peer review communication. It wouldn't necessarily be privileged communication, so I don't understand your little exception.

MR. LONDON: There's a second reason for that, and that's joint defense communication.

HONORABLE TRACY CHRISTOPHER: I remember the joint defense discussion.

MR. LONDON: We wanted to be sure and address that. If this or a similar qualifier weren't in there then I think we're back to John's problem. Literalistically read, you could object to communications between coparties who wanted to be cooperating in joint defense communications.

HONORABLE TRACY CHRISTOPHER: Well, I understand if we're talking about when a lawsuit is filed and we want to include the plaintiff.

MR. LONDON: Right.

HONORABLE TRACY CHRISTOPHER: That's perfectly understandable, but it sounds like you're talking about when to address, you know, peer review information where there may or may not be a lawsuit at all.

MR. MARTIN: This only applies if there's a lawsuit.

MR. LONDON: That's right.

MR. MARTIN: But if there's a peer review investigation going on and the lawsuit gets filed, one of the earlier versions that the Rules of Evidence committee or State Bar committee proposed, if you read it literally, would have meant that there couldn't be any peer review investigation.

MR. LONDON: Could have been read to stop the investigation.

MR. LOW: Judge Gaultney, I believe you had your hand up.

HONORABLE DAVID GAULTNEY: I was just going to follow up on what my concern is, and one of them is, as I understand the proposal, it's to implement HIPAA. It's not to create a new privilege under state law.

MR. LONDON: That's correct.

HONORABLE DAVID GAULTNEY: Okay. Why would this not -- as I understand it, it creates a procedure for the discovery of medical information. Why would it not more appropriately be a procedural rule rather than an evidence rule, number one, and we already do have a provision in our procedural rules in which in response to a request for a disclosure a medical authorization can be provided for medical records.

The rule as I see presented doesn't simply deal with the verbal communication of medical information. It, I think, deals with written and any communication, and I'm just wondering if our procedure currently complies with HIPAA for obtaining the written information, but I'm wondering if the focus should not be on an evidentiary rule on what comes into evidence and what doesn't but how the information is gathered, whether it's written or oral and separating discovery.

MR. JACOBSON: That argument was raised, and the privileges do two things, as Jack noted. No. 1, they control what a trial judge admits into evidence, and that doesn't preclude a physician from answering a question by a lawyer. I mean, it specifically says it's okay to do that, but the privilege is also to a large extent to control when it's discoverable, and so since there is sort of a dual purpose of the privileges we felt like we needed to look into it. It may very well be more appropriately put in a procedural rule, I

think. I don't think we have a -- I didn't have a real problem with that, but the reason that we addressed it was because the Rules of Evidence have this trial -- what gets into evidence before a jury as well as a what is discoverable kind of aspect to it, and HIPAA really did impact the issue, and the ex parte issue came to us for resolution or at least asked for our input, and because HIPAA answered that question I think fairly early, we thought we would be better off saying something rather than just sending a memo back saying, "Sorry, it's outside of our jurisdiction."

HONORABLE DAVID GAULTNEY: Well, do you agree with -- Jeff's comment I think was that really the question is not ex parte is not governed so much by HIPAA, that a written authorization could be provided or some thing around it, but it's really more of a policy question of do we want to permit ex parte communication?

MR. LONDON: Well, I think the short answer is absent there being a policy decision, our draft is at least a mischief control draft. You can always voluntarily authorize ex parte communication by signing an authorization, but at the present you can't force someone to sign one. The rules allow you to sign an authorization or provide the records. I think most plaintiffs provide the records, so you can't force someone to agree to ex parte contact absent a court order. At the same time, the rule addresses the situation where someone might come

into information outside the formal discovery process. Then the judge has to decide what to do about it. He may let it in; she may let it in. That's a case by case call. Buddy.

MR. LOW: See, and 512 has a provision, standard disclosure for judicial and administrative proceedings. Now, that's the reason I wanted to add administrative to yours, and it says, "Permitted disclosure. A covered may disclose protected health information in the course of any initial or administrative proceeding in response to an order of a court or administrative tribunal provided," and go on, "in response to a subpoena, discovery request, or other lawful process that is not accompanied by an order."

Now, that -- and, I mean, "provided if" and there are a lot of ifs down there. All of them pertain to notice. You have to give all kinds of notice and all that, so I think the question if we go to this and then somebody proposes that we have a rule that says when you file a lawsuit you have to give a HIPAA permission then that would be another issue, but I want to get over this step and then get to the next.

HONORABLE KENT SULLIVAN: I just want to briefly echo the comments from Judge Christopher and Justice Gaultney with respect to the proposed 514. As I read it through, my perception was that that last portion in the exception was intended to say certain conduct would not constitute a waiver

of the privilege, and that would be the issue for a rule of evidence, and I agree with Justice Gualtney with respect to regulating conduct of the parties and the broader issue of just disclosure as opposed to the potential admissiblity of evidence in a proceeding. It seems to me that's something for the Rules of Civil Procedure.

MR. LONDON: We had one other difficulty that this rule would address which your question doesn't quite solve. We're seeing increasing instances in which someone other than a plaintiff's medical condition is an issue. Truck drivers on drugs, doctors on OxyContin, parents, airline pilots. HIPAA applies to all of the medical records, not just plaintiff's records, and our rule theoretically would solve that issue for X in each of those instances.

MR. YELENOSKY: Just a minor point, Buddy, but the rule --

THE REPORTER: I can't hear. I'm sorry. I can't hear you.

MR. YELENOSKY: The rule purports to deal with administrative proceedings, and the Rules of Evidence don't apply to all administrative proceedings. They don't even apply in small claims court, which is a problem that existed before, but we should just at least know -- I imagine in those administrative proceedings it's just HIPAA and the Health and Safety Code would apply.

MR. LOW: But, see, the only reason I said that is Rule 509 says "administrative proceedings" and 510 doesn't; and as I said, I don't even know what administrative proceedings, whether they would use it or not.

MR. YELENOSKY: Well, you could have an employment compensation claim. I don't know if there's any worker's comp stuff going on anymore, but in those proceedings Rules of Evidence don't apply.

MR. LOW: All right. Is -- now, I think we can also face the issue once we get the rule drafted, does it belong -- where it belongs, but I think I'd like to try to work on the rule before I work on that. Is that agreeable with everybody that we do as I suggested and then we come back and present it to you?

We can decide at that point, number one, where it belongs; and if somebody wants to provide a rule that before you can file a lawsuit we can argue you have to do that. We can face that issue, but is it all right if we face this issue the way I've proposed with John and Jack working something for my committee or our committee and then present it back to you?

CHAIRMAN BABCOCK: Yeah. I think that's good. Have we gotten enough discussion on Judge Christopher's concern that the last sentence doesn't say to her what we're trying to achieve?

HONORABLE DAVID GAULTNEY: I think that -- I

think the point she raises is the concern that we're creating or we're dealing with a privilege that I don't think the rule -- I don't think the rule was designed to try to define privileges. It was designed to implement HIPAA, and so I think that's where the rule gets some ambiguity, is that it begins to look like a state privilege and, you know, like a state rule of privilege.

MR. LONDON: Of course, the last sentence was intended not to -- not with the committee thinking, "Hmm, can we create a state privilege" so much as "Hmm, John Martin has got a very good point." If we read our previous draft literalistically, it could be interpreted by hospitals, doctors, peer review folk, to say, "We can't talk anymore, a lawsuit's been filed." That's the vice we wanted to correct or address.

HONORABLE DAVID GAULTNEY: Right.

MR. LONDON: And we're certainly open to continuing to draft that to solve that problem without creating some previously unknown rule of privilege. That's not our goal.

HONORABLE DAVID GAULTNEY: Right. But I think, as I understand John's concern, it's not under HIPAA.

MR. MARTIN: Yeah.

HONORABLE DAVID GAULTNEY: I mean, you can do whatever they can do under HIPAA. If this is intending to

implement that and go broader and more restrictive than HIPAA then you are -- because I think that's one of the problems with it being in an evidentiary rule; and it's also, I think -- I think if it's not intending to change the state privilege rule where you waive when you file and it's not intending to change HIPAA and as I understand John he's comfortable under existing state privilege and he's comfortable under HIPAA, then we've got a new animal here that someone is going to read, since it's in the evidence thing, as perhaps creating a state privilege.

MR. MARTIN: I certainly don't want it to be any more restrictive than HIPAA, and I think our goal should be to draft a rule or write a rule that is not more restrictive and gives some guidance as to what they ought to be doing in this situation.

CHAIRMAN BABCOCK: Ralph had his hand up, and Richard.

MR. HARRISON: If I could just speak to that for just one moment, the reason that we added the language where the communication would be privileged is that we did not seek to create any new privilege. We were just saying that this rule doesn't prohibit these identified people as being in violation of this rule if their conversation -- if their communication is privileged in some other respect, created by some other rule. So the language -- and it may not be artfully drafted, but it was intended not to create a new privilege but

to recognize that there may be other privileges that apply.

MR. LOW: I talked to Barbara, and she says she does not attempt -- she wrote the article in the *Law Review*, you know, and nobody else is now attempting ex parte, so I think we need to make it clear in the rule that she doesn't do that. She used to take the position she could under state law and after HIPAA she can't, so I think John's point is well-taken that we're just trying to draft something that's consistent and gives guidance to the lawyers but yet doesn't cut off something that a lawyer has or hospital has a right to do

CHAIRMAN BABCOCK: Ralph and Richard want to say something urgently. Go ahead, Ralph.

MR. DUGGINS: Jack, in your -- on page eight of your letter to Buddy, I think that's where you discuss the majority of your committee wanted to tie this proposed evidence rule to Rule 215. Are there any other evidence rules that are tied to the sanctions rule?

MR. LONDON: I don't think there were any literally tied to the sanctions rule. If there are, I'm willing to be corrected, but not that I recall.

MR. DUGGINS: Okay.

CHAIRMAN BABCOCK: Richard.

MR. LONDON: In the original proposal it was going to be an automatic exclusion as a violation of HIPAA.

When this language was drafted to let people know that the trial judge could but did not necessarily have to invoke a sanction such as exclusion or a 215 excluding sanction.

CHAIRMAN BABCOCK: Richard, then Bill.

MR. ORSINGER: I'm especially troubled by everything you've written that precedes the word "except"; and I would suggest to you that you not try to -- I would suggest that you not try to restate what the privilege is, but allow the privilege to be stated in the existing rule of evidence, the state law, and the Federal law; and what you draft is an exception to Rule 509 and 510, add another exception onto the end of those two rules, and then let us worry about defining what the exception is, because current 509 and 510 are out of phase in my opinion with both the Health & Safety Code and HIPAA. But that's not your problem.

Your problem, I think is to create an additional exception to Rule 509 and 510 to permit this procedure you want; and if you guys are going to try to write a restatement of the privilege as part of your exception then you're involving yourselves in a much larger dispute, which is how should the privilege be described. So it would make your job easier and accomplishes what you want to just create an additional exception to the rule and not try to amend Rule 509 and 510 to be compliant with HIPAA or the Safety Code.

CHAIRMAN BABCOCK: Bill, you had a comment, and

then Stephen.

PROFESSOR DORSANEO: I think I may agree with what Richard said, but my comment --

CHAIRMAN BABCOCK: But you're cautious about it?

PROFESSOR DORSANEO: Yes. I'm always cautious about it. First, I'm not altogether sure I understand what he's saying and then I'm not sure whether I agree with it once I master it; but if the last sentence is going to be redrafted, I think it ought to be (1), (2), (3), move it up; and that assumes that you're not going to do what Richard said, and that's try to create specific exceptions. You could add it in as a third category by making a third category of exception by just some simple language adjustments, it seems to me.

CHAIRMAN BABCOCK: Okay. Stephen.

MR. YELENOSKY: I do agree with Richard. I don't know if another way to say it is that by making the first sentence in a negative here, I mean, you could flip that. You don't really need the last sentence if you start by saying something like "A communication that would otherwise violate a privilege or HIPAA is permitted, (1), by release; (2), by form of discovery; (3)," by whatever, but don't we need to make some reference to HIPAA, Richard, because we are trying to basically flesh out what in HIPAA is not clear?

MR. ORSINGER: Well, here's what -- we have a whole rule subsection (f) on consent. It's already written,

and written authorization is consent. So if we write this in addition to consent we've got two different consent standards, and I would argue we don't need a different consent standard. We need a consent standard that fits state and Federal law, so I really feel like we need to rewrite the entirety of Rule 509 and 510, but on your issue whether we ought to mention "subject to HIPAA or state law" --

MR. YELENOSKY: Well, not subject to, but basically what might otherwise be considered a violation of HIPAA we're laying out what you can do.

MR. ORSINGER: The problem I have with that is it might take us a year to even agree how to put HIPAA into one paragraph and then we've got to cope with the practice -- or the safety, Health & Safety Code, which is different from HIPAA but is binding to the extent that it's more restrictive, so the most I would favor personally if I was on that drafting process is to refer to them by reference

MR. YELENOSKY: Right. That's what I mean.

MR. ORSINGER: And especially because the Federal law may change or regs may issue, rather than trying to simplify HIPAA in one sentence and then also reconcile it to the state statutes

MR. LONDON: That's why we tried not to define it in the rule, because once you define it in the rule they will change it.

MR. ORSINGER: But I really do think that you guys don't need to involve yourself in a fight on what's privileged. You just want one special exception to the privilege. Isn't that really what you want? There's an exception that applies if this procedure is invoked.

MR. LOW: What they're trying to do is give guidance to the lawyers as best we can. We have something that the rule refers to, and we're trying to give guidance that's consistent with HIPAA, the rules, and everything. There's already in 509, section (5) about disciplinary proceedings. It's not in 510. But what they propose is not inconsistent with section (5), the fifth exception in 509, so what we're trying to do is when people look at this and they -- and what's given rise to the problem, they look at it and they say, "Uh-oh, lawsuit, exception. Man, let's grab it." All right. We're trying to tell people that see that, when they look at that they're going to say, "Well, wait a minute. Here's what I'm bound by," and we need to draft something that's not inconsistent with Federal or state law, but gives the same protections that John is talking about.

MR. ORSINGER: Well, Buddy, if you want to give guidance, I would suggest that you take the procedure part of this and put it in the discovery rules and that you write an exception to the doctor-patient privilege that's not encumbered with procedural rules, because this, this fuses state law,

Federal law, rules of privilege, and rules of procedure all into one paragraph.

MR. LOW: Okay. That's the very point I raised earlier. Let's draft the substance of something and then decide what needs to go where and what part. I'm not arguing with you, but I want to know, I want to know what it is before I know where to put it.

MR. ORSINGER: Okay.

MR. JACOBSON: And the question we were asked to answer is are ex parte contacts, unfettered ex parte contacts, allowed under -- or should they be allowed under Texas law. The answer is "No, unless you do this." That's -- I mean, if you could take all of this and distill it down, that's the answer to the question. So in a sense it is substantive. We don't think under the current 509 ex parte contacts are allowed unless you follow a process like one we have laid out for you. So, I mean, it is substantive in that sense.

CHAIRMAN BABCOCK: Okay. So, Buddy, your proposal is that --

MR. LOW: Let Jack and John get --

MR. LONDON: I would like to have John and maybe Richard meet with our committee

MR. LOW: Then, John, our committee would want you-all to come up with something or some differences or something and come back. But our committee, you and our

committee, will meet and make some proposals here. Is that okay with you?

MR. MARTIN: That's fine.

CHAIRMAN BABCOCK: Is that okay? All right. Harvey.

HONORABLE HARVEY BROWN: When you do that, I do think John's point about the "healthcare information" being defined in some way is an important point that it doesn't define that.

MR. LOW: I totally agree with that.

MR. LONDON: We have discussed that, and our concept is to either refer to HIPAA or put it in the note, too.

MR. ORSINGER: Well, I would reiterate, though, that if all your drafting is an exception, you're going to take the definition that 509 gives to what's confidential or what 510 gives to what's confidential. If we don't like what 509 says is confidential, we ought to write the first part of 509 that defines confidentiality, but what's happening is that we're creating a special use and then we're revising the fundamental concept of what's privileged in one little subpart when we leave the 99 percent of the rest of the rule with what we now say is a dysfunctional definition of what's privileged. I don't think you guys ought to write what's privileged. I think we ought to write what's privileged, and you ought to write a special exception to that privilege.

MR. LONDON: I wanted to make a statement, but I do think that's what the Rules of Evidence committee thinks it ought to do is address privileges, and we try --

MR. ORSINGER: But if you want to do that then you ought to rewrite the definition of privilege.

MR. LONDON: We bring them back to you-all and you-all can fix them, but that is within the scope of our research mission.

MR. ORSINGER: See, what you've done is you've redefined what's privileged for purpose of one use, and it seems more sensible to me for us all to agree on that the definition of medical privilege, which is up in the front of 509, is the same for all litigation and all uses, same for 510 on mental health; and if you guys want to participate in that, I think it's great; but don't define a special definition of privilege for this one application and leave the rest of it uncorrected.

MR. LONDON: Two quick answers. One, if you-all want to expand our mandate, I'm sure the committee will do it, but, number two, we've been at this for three years, and I envision what you're describing taking another couple of contentious years to get it back to you.

MR. LOW: Let's please try to do this and then when -- then if Richard has some suggestions we can get another, you know, either patch it or just redo it, but it's

been only two years, I'd like to get something, even if it's wrong.

MS. SWEENEY: I would like to thank the members of the committee because I really appreciate you-all's work. I don't want anything that's been said here to be construed as anything other than that. You-all have done a great job, and Buddy has done a great job, and I think this is a really, really good effort, and thank you for bringing it.

MR. LONDON: Thank you very much. Actually, Steve Harrison's feelings were hurt right until you said that. I don't take a lot of credit for what's there, but Terry, Steve, Professor Goode, the subcommittees have really worked their cans off, and the full committee has done a lot. We have really negotiated this out pretty hard. Thanks for comments. Thank you.

CHAIRMAN BABCOCK: Judge Christopher. Bill

PROFESSOR DORSANEO: I frankly would like to see or get your input on whatever problems there are with 509 and 510 because when we come back to this we will not just deal with this little piece, and if we have your advice and information, we're less likely to screw up.

MR. LONDON: Well, the reason this is in a proposed new rule, because of very finite distinctions that Buddy pointed out. 509 is only physicians and HIPAA is broader than that.

MR. JACOBSON: Chiropractors, all kinds of stuff.

MR. LONDON: That's why we initially opted to put it in a separate rule altogether. We don't mind taking a whack at the 509 modification to match HIPAA, if that's what you-all think you'd like to see us try, but let's --

CHAIRMAN BABCOCK: Let's go step by step. The Court asked us to deal with the ex parte issue, and we have been a long time at it. So let's just stick to that.

MR. LONDON: All right.

CHAIRMAN BABCOCK: And, Buddy, your idea of having them tinker with the issues that have been brought up here would be good.

MR. LOW: Right. Right. And thank you. Thank you.

CHAIRMAN BABCOCK: Yeah, we all thank you for what you've done.

MR. LOW: And Mark Sales, too.

MR. LONDON: Mark had a death in the family and couldn't be here.

MR. LOW: I understand, but he has put a lot of time in on this. He and I have put a lot of time. He has met with our committee and he's done a lot

CHAIRMAN BABCOCK: Okay. Thanks, guys, and, Buddy, are there other evidence issues that are ready for

discussion today?

MR. LOW: Okay. Let me -- thank you, Jack. All right. Let me get my stuff up. Jack, we're fixing to go next into 407b.

MR. LONDON: Okay.

MR. LOW: And this came to us from you

MR. LONDON: What happened was that HB4, the Legislature mandated an amendment to 407a in products cases, and the Supreme Court implemented that mandate. Nobody mentioned 407b, and the defense lawyers on our committee pointed out that 407b wasn't amended as we sent it to you, that there was some fairly clear question whether or not intermediate suppliers and --

MR. LOW: For the reason being that the provision said, "This shall not change products liability cases" was taken out.

MR. LONDON: That's right.

MR. LOW: So when you take that out and you look at section (b) -- I'm sorry to interrupt.

MR. LONDON: No, you can take it away. That's fine.

MR. LOW: So it was felt that an innocent seller in the chain wouldn't be taken care of because they couldn't prove a recall or certain other things because they had said, "No, this doesn't pertain to" -- products is out now, and so

you had a provision, and our committee voted unanimously to adopt to take care of that, and you'll see it's on draft two of the proposed amendment. You'll find the purchase and purchaser we include and take care of that. There was no controversy in the committee. Let's see how much controversy we've got now.

CHAIRMAN BABCOCK: Anybody have any comments on that? Richard, surely?

MR. ORSINGER: You know, Chip, I don't know enough about the issue to have an opinion, so maybe that's true on more than just this.

CHAIRMAN BABCOCK: Never stopping him before.

MR. LOW: You should have been the chairman of the committee then, because that's me.

CHAIRMAN BABCOCK: Anybody else? Okay.

MR. LOW: The other thing is 705 -- let me get refocused. There's a problem in that our 705 is Federal 703, and there is language -- the Federal rule was amended. I've given you the Federal rules, and then the State Bar committee adopted the Federal rule except they did not use the words "substantially," you know, outweighs. Our committee chose to use "substantially outweighs" for two reasons. Number one, the Federal rule said that. Number two, our 403 said that, substantially outweighs, prejudicial substantially outweighs, and so we adopted the State Bar rule with one word change, basically. In fact, ours is verbatim the Federal rule

So to underline the expert's opinion and so forth. So we adopted verbatim the Federal rule. The State Bar did basically the same thing, other than they said "outweighs," and we put "substantially outweighs," and I told you why, was because the Federal rule did it. 403 does it, and we wanted to be consistent. No controversy in our committee over that, and I'm assuming none today

CHAIRMAN BABCOCK: You're assuming because nobody said anything, so you're assumption carries.

MR. LOW: All right. I'm through.

CHAIRMAN BABCOCK: Okay.

MR. LOW: Thank you, again.

CHAIRMAN BABCOCK: Thanks. There's probably some lunch out there if you want to --

MR. LONDON: Well, we've just had ours eaten a little bit, but --

MR. LOW: Welcome to the committee.

MR. LONDON: Thank you, again.

CHAIRMAN BABCOCK: There's a short item that we can cover I think relatively quickly before lunch. Is lunch here? Do you know?

MS. SENNEFF: I don't know.

CHAIRMAN BABCOCK: You might check on that. And that is Justice Hecht sent a letter about a year ago in the wake of House Bill 4, and there was a table that was attached

to that that dealt with all the things that Justice Hecht and the Court could see in House Bill 4 that needed dealing with, but as you can tell from the letter that he sent me, he also asked us to think about whether there were any other rules that needed discussion or change in the wake of House Bill 4, and I think the first thing we need to accomplish is to determine whether in the -- first, in the view of the Court, we have gotten through the summary of the rule changes to examine and then, secondly, for the chairs of the subcommittees to report in as to whether or not they have determined whether there's any rules that we perhaps missed.

Lisa, you probably haven't had a chance to go through the summary to determine, but -- or maybe you have. No?

MS. HOBBS: No.

CHAIRMAN BABCOCK: Okay. I think that's something that before the next meeting we ought to try to do, so, Angie, write a note that Lisa and I are going to try to go through the chart. And is there any subcommittee chair here -- Pam just left on Rule 1 through 114. Richard, have you looked at your rules to see if there's anything that needs to be done?

MR. ORSINGER: You know, Chip, I haven't looked at it within the last 48 hours, but I've looked at it before, and I'm confident that between Rules 15 and 165a we addressed all of the changes that were required.

CHAIRMAN BABCOCK: Okay. Judge Peeples is not here. We'll ask him the same question.

Bobby, on 171 through 205, is there anything that -- or do you need some time to look further?

MR. MEADOWS: I'd like a little more time. I know this came up last year when I was in trial and Tracy looked for me. Did you look to see whether or not there was anything outstanding by way of letter or request?

HONORABLE TRACY CHRISTOPHER: No.

MR. MEADOWS: I think we'd like more time just to scrub that down.

CHAIRMAN BABCOCK: Okay. Let's at the next meeting report on that; and, frankly, if you spot something, the charge is to go ahead and look at it and recommend, so let us know. Ralph, how about on 215?

MR. DUGGINS: Well, I talked with Lisa about this last night, and over on page five of the table at the bottom of the page the comment from Chris about a new system of notice and pleadings in what used to be 4590(i) cases, but we're not aware that the Court has ever promulgated the standards of discovery, and so I don't know how at this point there's anything for us to do.

MS. SWEENEY: They have not.

MR. DUGGINS: That's what I'm saying. So I don't think that at this point there's anything for the Rule

215 committee to do until those are promulgated

CHAIRMAN BABCOCK: Okay. Paula, on 216 through 299a, do you need some time or have you looked at it?

MS. SWEENEY: Let me do another quick run-through of it. I'm not aware of anything else that needs doing. If anybody else is, let me know, and I'll take it underway, but certainly no other specific mandates.

CHAIRMAN BABCOCK: Okay. Sarah Duncan is Chair of the 300 through 330, and she is not here. Will somebody just make a note to see what she thinks about things?

MR. YELENOSKY: Pam's back.

MS. SWEENEY: Is it a "yes" or "no", Pam?

MS. BARON: I have no idea.

CHAIRMAN BABCOCK: Pam, the charge of Justice Hecht to us about a year ago was to look through --

MS. BARON: Well, Steve's here.

MR. YELENOSKY: I was out of the room, too, but I heard we were wanted.

MS. BARON: Yeah, we reviewed it and determined that our rules would not be affected.

CHAIRMAN BABCOCK: Great. Thank you. Mike Hatchell, maybe you could check with Sarah, tell Sarah that we need to --

MR. HATCHELL: Sure.

CHAIRMAN BABCOCK: -- look at those rules.

Judge Lawrence, anything on 523 through 734?

HONORABLE TOM LAWRENCE: Well, yes.

CHAIRMAN BABCOCK: Okay.

HONORABLE TOM LAWRENCE: There is a conflict between House Bill 4 that requires a jury charge for exemplary damages and Rule 554 which says that a justice of the peace shall not charge the jury in any cause tried in his court before a jury. To further complicate this problem is the fact that part of the cases that a JP tries are filed under what we refer to as justice court rules, which means the Rules of Procedure in 500 and the Rules of Evidence apply, but probably a half to two thirds are filed under what are referred to as small claims court, which is under the auspices of Chapter 28 of the Government Code.

There is no provision in Chapter 28 of the Government Code that speaks to a jury charge one way or the other, so presumably House Bill 4 could require a jury charge in small claims court because there's no prohibition about it, but yet be prohibited in a justice court suit, which typically are cases where you tend to have attorneys.

Exemplary damages does come up. It's not -- it's not an everyday occurrence. It does come up. I believe that generally speaking that most JPs are not charging the jury in any type of civil suit because of Rule 554, and they tend to just generally apply that to small claims court. I don't think

that there is an exemplary damage charge as far as I know that's being given out. I don't think the training center is teaching that, but we do have a conflict.

CHAIRMAN BABCOCK: Okay. Could you sort of give us -- give the full committee some sort of written outline of that conflict, and we'll discuss it at the next meeting and have your subcommittee propose what our recommendation would be --

HONORABLE TOM LAWRENCE: Okay.

CHAIRMAN BABCOCK: -- with respect to that conflict? That would be great. Elaine, 735 through 822?

PROFESSOR CARLSON: Well, there may be a conflict. It occurred to me the other day. House Bill 4 changed the appeal bonds.

CHAIRMAN BABCOCK: Right.

PROFESSOR CARLSON: And there's provisions in both Tom's rules, Rule 571 for JP proceedings and forcible entry and detainer, so we need to take a look at that. I think the statute reads "in all civil cases." It does not carve out any proceedings, JP or otherwise.

CHAIRMAN BABCOCK: Okay. Could you, as with Judge Lawrence, could you write a little outline of the problem for our next meeting and have your subcommittee propose a resolution?

PROFESSOR CARLSON: Yes, I can.

CHAIRMAN BABCOCK: Great. Thanks. Bill Dorsaneo still here? Any appellate rules? I know we've gone over a lot of appellate material on that, but anything left?

PROFESSOR DORSANEO: I don't think so, but let me run through this one more time. I noticed some of the -- there's a little remedial work that needs to be done with respect to the comment to Rule 29, the original one. We ought to spell some of the words correctly that are not spelled correctly.

CHAIRMAN BABCOCK: Yeah.

PROFESSOR DORSANEO: But as far as House Bill 4, let me just take one other look.

CHAIRMAN BABCOCK: Okay. With respect to the people who are looking, Bobby and Paula and Bill, if you spot something -- Paula is out of the room, somebody tell her. If you spot something then do the same thing that Judge Lawrence and Elaine are going to do, which is to write up a little summary of what it is and propose a solution for recommendation to the Court.

Buddy, we're going over the issue of whether House Bill 4 requires changes in the rules that the various subcommittee chairs are responsible for, and some of the subcommittee chairs have looked at it and said their rules are okay, some have said, no, there's a conflict and we need to talk about it, and a couple have said we need to look further.

On evidence rules have you looked at it and everything's okay, or do you know?

MR. LOW: Well, as far as I know everything's okay, and I apologize. I was meeting with them on what things they need to kind of work on, you know

MR. MARTIN: You were having an ex parte communication with them?

MR. LOW: Well, it was more than one person, so if that's ex parte.

CHAIRMAN BABCOCK: Richard was not there, would that be safe to say?

MR. ORSINGER: In the back part of the table that was in Justice Hecht's letter he lists a number of other House bills and Senate bills that might present the possibility that my subcommittee should suggest added to the existing rules. I don't see that there are any that conflict, but we have special statutes that in a sense create a peculiar circumstance that it might be helpful to clarify the rule. So we have not analyzed that, but we will analyze that.

MR. LOW: I have not looked at that, but I will

CHAIRMAN BABCOCK: Okay. Yeah, if you spot anything, Buddy, do a little memo to us --

MR. LOW: Yeah, I sure will

CHAIRMAN BABCOCK: -- and then have your subcommittee propose a solution. Great. That will take care

of that. Another sort of administrative item is -- and you-all can just be thinking about this, but we have this proposal from the Judicial Committee on Information Technology, which I'm very impressed with because they have their own seal, and they have proposed some rules, and Justice Hecht suggests that we have a sort of a select committee, a subcommittee of this group, to deal with this because the rules traipse over, you know, several of our existing subcommittees.

I've already had one person ask -- Andy Harwell has asked to be on this committee, and so if anybody else is interested in this, it's a project that has really got some legs to it, and this group led by Peter Vogel is working very hard and they've made tremendous progress, and I think they feel that they're at the point where some statewide rules are -- it's time for it. So this is going to be a big issue that's going to come forward, so anybody that wants to be on that subcommittee let me know.

MR. JEFFERSON: I'm in.

CHAIRMAN BABCOCK: Lamont. Okay. And you can just let me know over lunch, but I gotcha. Thank you.

Okay. So let's be recessed for lunch. We'll be back about 1:20 let's say.

(Recess from 12:20 p.m. to 1:28 p.m.)

CHAIRMAN BABCOCK: We briefly had Justice Hecht trapped, but now he's escaped again, but he is just in from

Alaska and I'm sure will be back in a second. I don't know if you-all got Lisa's letter that we received regarding Rule 103 a couple of days ago, but she has been in contact with some of the district judges, specifically Judge Lindsey from the 280th.

MS. SWEENEY: I'm sorry, this has been bothering me all day. Who is Lisa?

CHAIRMAN BABCOCK: If you had been here on time you would know that Lisa Hobbs is the new rules attorney

MS. SWEENEY: Hi, Lisa.

MS. HOBBS: Hi.

CHAIRMAN BABCOCK: Lisa, this is Paula.

MR. LOPEZ: She already knows who you are.

HONORABLE TOM GRAY: The lady with the very red face at the end of the room is Paula.

MS. McNAMARA: I was here on time, and my bad memory caused me not to remember her name.

MS. SWEENEY: Yeah, I asked Anne. She set me up. She said, "I don't know, ask."

CHAIRMAN BABCOCK: And this distinguished gentleman is Justice Hecht. You may remember him.

MS. SWEENEY: Oh, yeah, I've read about him.

MR. MEADOWS: He knows her, too.

CHAIRMAN BABCOCK: Lisa, it's not usually this bad. Okay. Tracy is saying, "Yes, it is."

She has a two-page letter that was on the

website regarding Rule 103 process service, and we have some guests here who are available for discussion if we need it, and so, Lisa, why don't you tell us what you've done?

MS. HOBBS: Okay. Well, I tried to get in touch with Richard to talk about this, too, but we weren't able to touch base, but Judge Hecht and I went to Houston. I guess we've looked at the process service issue before, and there seems to be an agreement that a statewide standard would be beneficial for the state. Currently, for a little bit of background, and I don't know how much background I need to give, but each county can have their own rule; and so if you have a private process service business, you have to comply with, you know, 264 counties rules.

PROFESSOR DORSANEO: 254.

MS. HOBBS: 254?

PROFESSOR DORSANEO: Uh-huh.

MS. HOBBS: I've been quizzed on this a number of times since I got here. And so the idea is to have a statewide standard. Harris County currently has a program set up by the Houston Young Lawyers Association to educate and then certify process servers to serve for Harris County, and this is put on by Judge Lindsey and some of the judges there in Harris County, and we went down and talked to her about that program, and based on those discussions as well as numerous discussions with the -- many of the private process servers across the

state, we have drafted three alternative rules. And they're alternatives based on how easily we could react to changes that we foresee coming up or don't foresee at this point coming up, but could come up.

The first one, alternative A, would be an amendment to the Rules of Civil Procedure, and that could be quite difficult to amend if something that we didn't think of came up. And alternative B would be a more vague Rule of Civil Procedure that would allow the Court to issue an administrative order to set up the specifics, and then alternative C would be a rule of judicial administration. But the basic idea is if you take the Harris County course you can serve for any court in any county in the state; and if you take the course that's given by the Texas Process Servers Association, then you can serve anywhere but for Harris County; and so you have two options on how you would do that.

And then I put down in there reviewing the rules we would probably want to consider if there needs to be sort of a third tier that allows a judge to -- discretion to allow a noncertified private process server to serve for his court or her court. And like I say, it's one thing to say if Jane is served -- if Jane is certified, you must let her serve, and it's another thing to say if Jane is certified, you can't let her serve. And so do we want to talk about whether there should be some third tier to this rule.

And then, finally, we want to talk about -- and I think that the process servers in general agree that there could be some sort of background check and fingerprints for private process servers, and indeed Harris County does require that, and so that's sort of another item for the committee to consider. And that's what I have.

CHAIRMAN BABCOCK: Okay. Any comments from any of our process servers here?

MR. THORNTON: We would like to comment and appreciate it.

CHAIRMAN BABCOCK: Sure.

MR. THORNTON: My name is Gary Thornton. I'm the president of the Texas Process Servers Association; and also I own Professional Civil Process of Tarrant County, Incorporated; and with the Texas Process Servers Association, our consistent main goal has been to raise the level of professionalism in the private process servers industry through training and education, so it gives us a great opportunity to come here and thank the rules committee, Justice Hecht, and you folks for recognizing this and help us to further that particular goal of ours, so we thank you for that.

We have read and appreciate what you have that you are proposing, and we do agree with you that the process should be directed by the Court and would totally agree with that. We also, what Lisa just said, we would agree that

regardless of whether it's Harris County or the Texas Process Servers Association, we would like for the requirement for a criminal background check to be consistent with both situations, and we would include that in ours.

Now, the only suggestions that we might offer in what you're proposing here is that we have some requirement that certification and training courses be held at least twice per year. We don't have an exact count, but we know we have something over a thousand process servers in the state of Texas. This, if we make a proposal of this sort and it does go into the Texas Rules of Civil Procedure, then we are going to have a fairly significant logistical situation in getting our people trained and through the classes, so we're going to have to consider that for the future.

Now, we would like to offer some considerations that recognize Harris County for their contribution to education in the private process industry because they've done a tremendous job in Harris County. We would suggest that perhaps we consider that certification and training through Harris County as well as the Texas Process Servers Association. In the proposal, as we've read it, if I understand correctly, if an individual goes through the Harris County process, that individual would be able to serve papers from Harris County and in the state of Texas, and that's certainly our objective that we're trying to accomplish.

The other side of it is if, as proposed, this goes through the Texas Process Servers Association then those people going through that training and education would serve papers from any court with the exception of Harris County. So what we've written to you and that we would propose as a consideration is that perhaps process servers residing in Harris County and the seven counties adjacent to Harris County take the Harris County course to serve papers issued from Harris County.

Our logical reason for that is probably 90 percent of the papers out of Harris County are probably served within those counties, and additionally we would ask that process servers in the other 246 counties may take either the Harris County course or the Texas Process Servers Association course and then be able to serve papers from any county, and our concern is this certainly resolves a great deal of our problem in having to apply with all of the different courts for either standing orders or individual 103, but it puts us somewhat back in the same situation because we'll still have indviduals in the state that can serve some papers but still have to go through additional training in Harris County to serve those papers.

What we would offer there, if that were accepted, is that the Texas Process Servers Association can certainly incorporate in our curriculum anything that Harris

County would require that they felt is necessary to pass on to the process servers who go through that training. I've been through both training, and as a matter of fact, am a trainer for the Texas Process Servers Association classes, and probably 90 percent of what we discuss is no different from what Harris County discusses in their classes.

The main point of difference in Harris County is a particular affidavit that the county requires and their courts require that they require to be attached to each one of the returns that we file back with the court, and I think that we can incorporate that and recognize Harris County in our training and hopefully avoid having the conflict between the two counties and who can serve from those counties. So that's all we would have to offer, and we appreciate you allowing us the time to speak to that.

CHAIRMAN BABCOCK: Thank you for coming. We did, of course, do some work on the topic several meetings ago, I think.

HONORABLE NATHAN HECHT: Yes.

CHAIRMAN BABCOCK: And Orsinger's subcommittee, as I recall, was -- he was here, but we abused him so badly that I think perhaps he --

MR. LOW: He's regenerating

CHAIRMAN BABCOCK: Regenerating.

HONORABLE NATHAN HECHT: Let me add a word. The

committee recommended that we change the rule to let any notary be a private process server. The reason for the change was to, one, come up with some statewide threshold that you could meet and then serve process so the private process wouldn't have to be meeting all sorts of different requirements in various different counties, and we couldn't think of another one, as I recall, other than notary, which was already in place that we could take advantage of that without trying to be too specific otherwise.

We've gotten a lot of letters, the Court has, from lawyers saying either do that or something else like that, and when I visited with Judge Lindsey -- and Tracy or others can speak to this, too -- she claims that the Harris County system is working awfully well, and we hate to tickle with anything that's working, but we're trying to figure out some way to work that in with the other counties in the state.

The only other requirement that we know about that the counties impose is an insurance requirement that is imposed by four or five counties, Bexar being one of them, because Richard talked about it when he was here before, the good of which was kind of difficult for me to see, because I don't know -- the process servers tell me that the beneficiary is the county, so I don't see how the county is ever going to be out anything by what a private process server does, because, as I understand it, they have immunity, but there is that issue

hanging out there about what to do about that, and these proposals would just cast that aside.

So the idea -- the reason we've come back to the committee is because it's not clear that the notary rule is enough in the direction we were trying to go, and this is a proposal that is a little unique in that it takes Harris County and then everybody else, but maybe that's a good solution.

CHAIRMAN BABCOCK: Okay. Justice Hecht, do you want Richard's subcommittee to study this further, or do you want to just talk about it now, or do you want to have the subcommittee look at it and then talk about it at our next subcommittee meeting?

HONORABLE NATHAN HECHT: I would rather talk about it some now, because we'd like to at least have a proposal in the fall.

CHAIRMAN BABCOCK: Okay. Buddy.

MR. LOW: Is there any rule or any statute that penalizes somebody that's unauthorized, you know, to serve? I get served by a guy, I might not say, "Well, show me your credentials," and it doesn't matter whether he's certified or not in Federal court. Once I get that I've got 30 days to remove. I don't care if he's illegal, and so what protects the person that's being served? Is there any penalty for being -- for serving when you're not authorized, or is there any rule that says, because I mean, that's another issue to me. I don't

know whether the person is authorized or not, and what if I'm served by somebody that's unauthorized, and then I answered. I have -- I mean, what are the consequences?

CHAIRMAN BABCOCK: Well, you might be able to bust the service, but I don't know if --

MR. LOW: Well, then it's not removal because Federal court says once you get a copy of that lawsuit, man, you've got 30 days. I don't care if it drops out of an airplane

CHAIRMAN BABCOCK: Well, it's not quite that bad.

PROFESSOR DORSANEO: They don't say that anymore, Buddy.

MR. LOW: When did they change it?

CHAIRMAN BABCOCK: They changed it by decision a couple of years ago.

MR. LOW: The rule was changed by decision. What does it say now, that you have to be --

CHAIRMAN BABCOCK: They construed the statute -- it used to be everybody worried that if you had notice, and the court construed that and said, if I'm remembering right, Bill, it said that mere notice that you read it in a newspaper or that, you know, one of your outside law firms sent it to you, that wasn't enough. It had to be properly served, but you would run the risk of not removing because you wouldn't know if

it was proper or not.

MR. LOW: Yeah.

CHAIRMAN BABCOCK: So same problem. Maybe not as bad as dropping out of an airplane, but all right. What other comments about the proposed rule? Any thoughts? Justice Duncan.

HONORABLE SARAH DUNCAN: I just have a question. If the Texas Process Servers Association agrees to adopt the affidavit that Harris County requires to be attached to the return, could we just have the Texas Process Servers Association as the certifying agency?

CHAIRMAN BABCOCK: I'm sorry. I couldn't hear you, Sarah.

HONORABLE SARAH DUNCAN: If the Texas Process Servers Association agreed to adopt the affidavit that Harris County requires to be attached to the return, could we just have certification by the Texas Process Servers Association only? To exempt Harris County from what looks like a statewide rule just runs against my nature, so I'm asking if there's a basis for the two groups to agree on what the certification process ought to be.

MR. THORNTON: We believe there is.

CHAIRMAN BABCOCK: Justice Gray.

HONORABLE TOM GRAY: What is Texas Process Servers Association? Is it a for profit organization? Is it a

state agency? What is it?

MR. THORNTON: No, sir. We are a nonprofit organization, and again, the goals of our organization are to improve the professionalism of this particular industry through education and training and to provide a network that we can share the rules of proper service and help educate our members across the state, so we are nonprofit

HONORABLE TOM GRAY: But it's a private organization, it's not state-affiliated.

MR. THORNTON: That is correct. It's a private organization. In fact, under our charter an individual does have to be a member of the association to go through the training

HONORABLE TOM GRAY: Okay.

HONORABLE TRACY CHRISTOPHER: How much does that cost?

HONORABLE SARAH DUNCAN: Is that in addition to Harris County?

MR. THORNTON: No, that has nothing to do with Harris County. It has to do with the legality of licenses to provide this training and particularly with the association that we're affiliated with private servers.

HONORABLE SARAH DUNCAN: But my question is would Harris County object to Harris County private process servers having to be members of the Texas Process Servers

Association to get certified?

MR. THORNTON: Well, I can't answer for Harris County. I would hope not, because many of our members certainly are from Harris County.

CHAIRMAN BABCOCK: Judge Christopher.

HONORABLE TRACY CHRISTOPHER: Well, just by way of background, if you want to hear a little background on it, current Rule 103 as it stands requires a written order of the court for a process server; and so what we started in Harris County was a standing order where the process servers could get on the standing order; and if they were on the standing order then they were certified to serve process; and this helped the lawyers and the process servers because they didn't have to file a motion in every court to get an order from every judge in every case they wanted to serve something in.

And then when we started to have problems with shaky services we started requiring our process servers to go through an education process before they could get on our standing order, so that's how we started it, and I don't know whether other people or other counties have had similar problems with, you know, just not good service procedures, so we started the certification process. I actually agree that I think it would be a mistake to have a rule that excepts Harris County, despite the fact that I like our service process and --

CHAIRMAN BABCOCK: But you want the state to

come to you?

HONORABLE TRACY CHRISTOPHER: No. No. I would be perfectly happy to have I guess alternative B, which would be directed by the Supreme Court, and -- in terms of rules, but I think there needs to be some oversight, and whether it's the judges in a county or whether it's the Supreme Court or the Supreme Court wants that, we just want to have the ability to make sure that the process servers do have a certain level of knowledge about what they're supposed to do, which is why when this committee, whenever that was, before I got on it a couple of years ago, suggested that we change it to any notary, all the judges in Harris County were very unhappy about it because it would essentially end our oversight over the quality of service.

And you-all here probably don't realize, but we sign an incredible number of defaults on a weekly basis; and when we sign so many defaults, you know, we're taking away people's homes, you know, we're doing a lot of Draconian things; and we want to know that the service of process has been an adequate and correct service of process. All of you here probably don't -- you know, maybe one or two times you've had to run down and try to set aside a default on behalf of a client; but, you know, on a routine basis we're doing that; and we want to make sure that -- we have wanted to make sure that there was some oversight over the process servers, so that's

the background and why we started what we did.

CHAIRMAN BABCOCK: Another apologist for Harris County, Stephen Tipps.

MR. TIPPS: No, I'm just inquiring about what Harris County does. What are the differences between what Harris County requires by way of certification and what the Texas Process Servers Association requires?

HONORABLE TRACY CHRISTOPHER: I don't know that.

HONORABLE NATHAN HECHT: Well, Harris County has their own course. They offer a course once a year that you have to attend and pass basically, although Judge Lindsey says it's not very hard to pass as long as you're there. You have to plunk down a hundred dollars for it and you have to submit to a criminal background check, which is not on the table. Nobody objects to that.

MR. TIPPS: What does the Texas Process Servers Association --

HONORABLE NATHAN HECHT: They have their own course.

MR. TIPPS: Are they similar?

MR. THORNTON: It doesn't differ significantly. As I said, there's a specific Harris County requirement in terms of a particular affidavit that need to be discussed in Harris County. Past that, we don't see a great deal of difference in the two courses of instruction.

CHAIRMAN BABCOCK: Carl.

MR. HAMILTON: I have a question about the -- is there something that these process servers learn that ought to be learned by sheriffs or constables, too, or are they just exempt because of their title?

CHAIRMAN BABCOCK: I think we might pass on commenting on that.

MR. DENNER: That's why we serve a lot of papers.

CHAIRMAN BABCOCK: Carlos.

MR. LOPEZ: In Dallas we had pretty similar issues. We were having some trouble, let's put it that way, and so we had to -- Judge Evans kindly agreed to be sort of the centralized guy to have all the affidavits come to him instead of having 13 different judges. You know, you may be authorized in six courts and not seven, so he would just -- his term became forever. I don't know how that happened, but so it's kind of centralized a little.

CHAIRMAN BABCOCK: Yeah. But do they have to take an exam?

MR. LOPEZ: No, but we do have an affidavit.

MR. THORNTON: Yes, sir. Dallas does require it.

MR. LOPEZ: Right. But it wasn't as onerous as this in terms of training, but I can't speak for them, but I

know them well enough to know they would probably be in favor of that.

CHAIRMAN BABCOCK: Judge Lawrence and then Buddy.

HONORABLE TOM LAWRENCE: Two questions. Did Harris County do this through a local rule or something less than that?

HONORABLE TRACY CHRISTOPHER: Well, 103 says that you're authorized to serve if you have a written order, and so through a -- I guess it was a local rule between all of us we all said -- you know, we signed that said, "If you're on the standing order then you're authorized to serve process in our court."

HONORABLE TOM LAWRENCE: But it wasn't a local rule that went through the Supreme Court for approval? Well, if A or C were adopted, would there be anything that would preclude another county from passing something similar to Harris County and establishing their own requirements?

HONORABLE NATHAN HECHT: Well, we're only contemplating having a two-part system because that's the status quo. That's what we have encountered, but we certainly wouldn't want there to be a 254-part system. The object is to get closer back to one, not closer to 5 or 10.

HONORABLE TOM LAWRENCE: But would A or C actually prohibit that?

HONORABLE NATHAN HECHT: Well, I don't know that they would, but, I mean, the idea is to make this the system; and the only questions, as Lisa pointed out earlier, is we would say as -- the rule would say something like to the effect, as Harris County does, if you're on this list you can serve, irrespective of what the judge thinks, unless maybe there's a good cause or something like that; and then the other question would be if you're not on the list, could a judge in Maverick County or someplace say, "I don't care. I want this guy to serve it even though he's not on the list."

CHAIRMAN BABCOCK: Buddy.

MR. LOW: Chip, what would be wrong with having a state rule that's like our Rules of Procedure and then treat it like a local rule and say unless a county got an order of the Supreme Court allowing it so the Court could supervise it, they might not allow any. If they felt it was consistent with the overall state and they would want a different rule for process and the Supreme Court could review it and they couldn't use it unless the Court authorized it

CHAIRMAN BABCOCK: That's sort of this alternative B. That's the process of that alternative B on there.

MR. LOW: Okay. I haven't read that, so somebody was thinking.

CHAIRMAN BABCOCK: Judge Bland.

HONORABLE JANE BLAND: I was going to say that the Harris County education program came up because not just of shaky service, but also I think the difference between the sheriff service and the private process servers is that there was a computer generation of an affidavit for attempting it; and it would change the place where the verification was in the affidavit; and in some instances it appeared as though the only thing that the process server was swearing to was that they indeed were the process server, not that they had served this person at this time, at this place; and so we were getting a lot of different form affidavits.

And so I think the education course was developed to try to emphasize the importance of exactly what needs to be verified, and I think that was a reason there was a focus on the private process servers, and I don't think that -- and I can't speak on behalf of the Harris County judges, but I think it's, you know -- I don't think that they would have a problem with other courses that would meet these needs; but I don't think that we should have the only oversight be the private process servers organization in terms of meeting what the judges' requirements for service are; and that's because the private process servers association is comprised of private process servers; and that doesn't really meet, I think, the concern of some of the Harris County judges, which is, you know, the need for judicial oversight of private process

service, given that we rely on these affidavits to sign Draconian default judgments, or sometimes Draconian default judgments.

So, you know, if the Texas Supreme Court or whatever organization wanted to endorse the course of a private process servers association as adequately meeting the educational needs of a court then I think that would probably be fine along with the course offered in Harris County or offered in any other county in the state.

CHAIRMAN BABCOCK: Justice Gray.

HONORABLE TOM GRAY: I share Justice Duncan's I guess you would say knee-jerk reaction to anything that identifies a specific county as an exception or their curriculum. I have grave concerns about also in the prospect of a rule, notwithstanding that they may be very qualified to do it now, it is a private entity. It is not part of the state, not regulated as such by the state. It does not appear to me to have some of the openness that we would like to see. There is a fee to join the association.

I think there's some issues with freedom of -- if these are the only people in the state that are going to be allowed to serve process other than sheriffs and constables, given that we have a greater range of people that can do that now, are there implications on freedom of association clause. I don't know who pays the fees in these things, but my

understanding is that you pay the fee to the clerk and the clerk pays the process server. Is that -- or just the party pays the process server directly?

MR. THORNTON: The party.

HONORABLE TOM GRAY: So maybe there's not a problem with the use of public emoluments for private individuals, but there are a lot of concerns, and I think if you don't have the -- more on the nature of alternative B where there are exceptions and each county can in effect opt out of this rule, and it seems to me that what -- there are very specific problems in some of the larger counties, Dallas County, Harris County, that generates the need for some type of overall administration of this process; whereas, Navarro County, where I was originally and even McClennan County now, there are people recognized that do this and it's their livelihood. They're not part of one of these associations. They're good. Why knock them out of their livelihood doing this in these smaller counties where it's not a problem?

CHAIRMAN BABCOCK: Yeah, Harvey.

HONORABLE HARVEY BROWN: I think a course is a good idea regardless of where you are in the state. Just like lawyers take courses, doctors take courses, et cetera. I don't know that we want to have the Supreme Court have to certify the course. I think the Court probably has got enough on their plate already, but maybe an alternative would be to have the

State Bar look at courses like what's offered in Harris County and what's offered by the association right now and kind of bless those courses, but somebody -- I think Jane's point is that somebody needs to make sure those are adequate courses and they do what the judges think needs to be done.

CHAIRMAN BABCOCK: Okay. Lamont.

MR. JEFFERSON: I would echo the comments of Justice Gray and Justice Duncan, but I'd also say that -- and I think Justice Gray already touched on this. Anybody who does a lot of litigation has a relationship with a process server that they've been using for a long time and that they're happy with and have not produced problems. If they're involved in a lot of litigation then they have an interest in seeing that process is served correctly and that there aren't issues that come up.

And I just don't have a handle on -- I mean, I suspect that the problems that we're talking about are not from process servers who make their livelihood as process servers. Now, that may be new entrants into the area or just ad hoc individuals who don't really know what they're doing and they haven't done it before, but I share the concern of, you know, all of the folks who are not now a part of the problem having to conform to whatever, you know, we're trying to establish. Or at least we should make that as seamless as we can so that everyone would just agree that, yeah, this is something that's good for us all, is for kind of the integrity of the industry.

CHAIRMAN BABCOCK: Robert.

MR. VALADEZ: I just had a question. Maybe you-all can answer it. Does any of this fall within the scope of the Texas commission that regulates the private investigators?

MR. THORNTON: No, it doesn't. As a matter of fact, we've been working now for over 10 years with the Legislature to look at a process that would license and regulate our industry. In fact, we see this as a possible very positive first step to further those efforts. So the answer to your question is "no."

CHAIRMAN BABCOCK: Justice Duncan.

HONORABLE SARAH DUNCAN: I think I must be confused now on alternative B in light of what Buddy said. I thought the whole point of this was that if you are certified by Harris County or the Texas Process Servers Association you can serve process anywhere in the state. If you give the Supreme Court the power to opt -- to permit a county to opt out of this then you've defeated the whole purpose of what we're trying to do, so I don't -- I don't understand that to be what alternative B is saying, and if that is what alternative B is saying, I need to know that to intelligently exercise my vote.

HONORABLE NATHAN HECHT: Well, it could go either way. It could be a component of B or not. It could be in the order or not, because there are two sides. One is if

your name is on the list a judge can't turn you down unless he or she has got a good reason, so you come in and say, "I want to serve this process in this case" in Navarro County and the judge out there who doesn't know you, but your name is on the list, he's got to let you do it. The other side, the other issue is if he wants -- if the judge wants to let someone serve process who is not on the list, can the judge do that? And, I mean, those are two separate issues.

HONORABLE SARAH DUNCAN: And alternative B doesn't decide between those two?

MR. THORNTON: No.

HONORABLE NATHAN HECHT: There's still an issue --- I mean, B is just a way to treat -- to treat the rule-making. Should we just have a clause in the rule that says, "As the Supreme Court directed by order," or whatever, and then you have an order which theoretically you could change more easily than you could change a rule, or should you put the whole thing in the rule, which makes it harder to change.

CHAIRMAN BABCOCK: David Jackson and then Carlos.

MR. JACKSON: I think absent a process servers certification board you have to have alternatives because you could create a situation with a private association where they could charge whatever they wanted to and basically control the industry by saying, "Pay these fees to be a member of our

association or you can't be a process server"; and we have process servers that we use everyday in our court reporting firm; and I would hate to have to see them be required to join a private association to keep doing their job.

CHAIRMAN BABCOCK: Carlos.

MR. LOPEZ: I've got a question about some of the specifics of the implementation. Is the good cause requirement that might lead a judge to deny someone who's already been through whatever certification we end up, if any, putting there, is that just to make sure that he's not related to the parties or something that's case specific or would there be something else I'm missing, too? Because if they've been certified and if there's a course that everybody agrees is either administered by the Supreme Court or by whoever and they've done a criminal check and they've passed everything else, why do we even need the district -- you know, why not just let them automatically be approved sort of ahead of time?

HONORABLE NATHAN HECHT: Well, the concern would be that he's on the list, but the judge gets up for breakfast and reads the paper and he's killed five people yesterday and then goes to work and as a private process server comes in and says, "Well, I'm on the list. Let me serve." And the judge says, "I don't want to do that. I think I've got good reason to take you off the list at this point."

MR. LOPEZ: Well, I guess -- okay.

CHAIRMAN BABCOCK: Judge Christopher.

HONORABLE TRACY CHRISTOPHER: Could I ask a question since I wasn't here the first time we discussed this? What was the impetus to change it to a notary to begin with, that it was too hard to get a judge's order, or why were we tinkering with the way it is now?

HONORABLE NATHAN HECHT: Because the Harris County judges require you to be on their list to serve process out of their courts; and if other counties do that or don't do that, it runs -- you run the risk that each county will set up its own requirements and people will be required to meet a whole bunch of different requirements, even though there's no reason for that.

HONORABLE TRACY CHRISTOPHER: But the rule as it is currently written requires a written order of a judge to allow you to serve process, so --

MR. LOPEZ: That's kind of what we're getting at.

HONORABLE TRACY CHRISTOPHER: So, you know, a judge in a small town knows people and knows that they're good, you know, people, you know, I assume he's got some sort of standing order, you know, assigns them automatically and lets that person, you know, go out and serve. In a bigger county where you don't know the people, you know, we set up a process so that we have some control over them, because otherwise, you

know, you have no idea when one of these 103 motions come in, you know, who this person is that wants to request service.

I'd leave it the way it is, but and -- but unless there's some, you know, clamor out there that there aren't enough private process servers, you know, being permitted. I mean, we have a huge list. I mean, I assume the other people, other counties, you know, manage this. I mean, did someone come to the committee and say, "There aren't enough private process servers. We can't -- you know, we can't get into it"?

HONORABLE NATHAN HECHT: Yes. I mean, they raised the issue, but the Court has got about 150 letters. We could go back over and bring them over here, but from lawyers that would prefer it changed to the notary public, which is what the committee recommended, so it's a big stack of letters.

MR. THORNTON: May I add to help answer her question, if it's appropriate. Let me give you an example of Tarrant County and the barriers that we have now across the state, but Tarrant County is a perfect example. In Tarrant County I apply with the Tarrant County civil district courts by application and affidavit. I go over to the Tarrant County family district court, and I have to apply totally separately, and I have to have six different judges' individual signatures, and I have to apply for those in person.

I go down to county court and do an affidavit

for them, and I have to have E&O insurance in a minimum amount. I go to the justice court there in Tarrant County, and I have to interview with that particular judge, and it's all different for each of the justice courts. We have to get a 103 for each of those and provide insurance through that particular court. None of those require education. You go to Dallas there's an education requirement.

So that's what we're up against even with the standing orders, and Tarrant County is the classic example. There are five or six different applications and ways to get those standing orders. It is a nightmare at this point.

CHAIRMAN BABCOCK: Yeah, Judge Bland.

HONORABLE JANE BLAND: To address Judge Gray's concern, could we add to alternative B, (1), (2), and (3), by order of the court, so that if somebody did not get on the central list or the list that's being contemplated, they then could go seek out an individual order for that so they wouldn't have to necessarily join the process servers association or take a Supreme Court approved course if they could get a trial judge to go along with it?

Would that -- that way you still have the ability to become part of the Supreme Court's standing order and not have to go to individual courts to seek permission, but for those that choose to go that route they can seek permission from the local judiciary?

HONORABLE TOM GRAY: You may need that for clarity, but the phrase "other person authorized by law in subsection (a)(1) may be all that is needed as long as that -- if I understand that phrase, it would be -- the other persons would be those specifically authorized by the trial court judge, but I mean, alternative B is obviously the one of the three that is somewhat palatable to me because it's the least variance from the existing rule and it allows for, I guess, free access of people that aren't -- that don't go through the association training or the Harris County training.

HONORABLE JANE BLAND: And really, that would allow -- we wouldn't necessarily have to put it in a rule because the Supreme Court could issue in their order -- you know, could direct that the following people are entitled to serve process, those that comply with this course, that course, or those that received an order from a trial court. So you wouldn't have to put it in the rule, now that I think about it.

HONORABLE TOM GRAY: It would seem to me that under alternative B if an organization wanted to make application for the ability to do it statewide, there should be a process that they could apply to the Supreme Court, and the Supreme Court under (a)(1), other person authorized by law, would issue an order, the equivalent to a current standing order in a county that that person is authorized to do it statewide, or a person that's affiliated with that

organization, but it doesn't require the court reporter that -- like Lamont was saying, that I've used for 10 years in Navarro County and very happy with to go become a member of that organization, because she already has the standing order from the district judge in Navarro County and can still do it and no problems there, but doesn't have to go to the Supreme Court to get it.

All it really does, as I see it, is allows the Supreme Court the ability to issue a statewide order that authorizes them to do it anywhere in the state, 254 counties.

MR. LOW: Richard, did you have your hand up?

MR. ORSINGER: Yes. Two things. I wanted to address Judge Christopher's general inquiry. I have been through this debate over a number of years, and it seemed to me the fundamental problem is the authorization to serve process under the rule is individual in every single court, and we have hundreds of them, and theoretically they could each have their own standards that would make it impossible to do a business statewide. I know they don't. I know that in a county like Dallas or Bexar they tend to aggregate together, but apparently in Tarrant County they haven't aggregated enough. So you still have six different levels of courts with different orders there, but the solemnity of serving process in a justice court, county court, and a district court really are the same, so they shouldn't be aggregated. I mean, they should be aggregated.

Secondly, the problem is that although under the present system it's the court that issues the process that sets the standards by which process will be served, that process may be sent from Houston to El Paso, or Houston to Texarkana or to Amarillo, and all of the Houston courts are thinking in terms of the Houston course, which is taught once a year, but the process may be served in Amarillo by somebody that doesn't attend the Houston course, and so the authorization logically probably should be done on the county where the process is served rather than the county out of which the process is issued, or should I say the court out of which it's issued.

So I think that we have a problem here that if you try to -- if you have a local process serving practice in San Antonio and you get process out of Fort Worth, you probably won't be compliant with it, none of your employees in San Antonio would be compliant with it unless you put them in a car to go up and take their course, but then they've got to go to Houston to take their course and then in San Antonio they've got to post a bond. And so it becomes impossible, really, I think to do this on a statewide basis, and what should happen, the Legislature should step in, and they ought to say, "Okay, we're going to have certain minimum requirements and if you meet them, our government agency is going to approve you and you're authorized statewide," so that's my perspective on the problem.

Secondly, if we adopt this amendment of Rule 103, we're taking out the authority of the court to appoint because under current Rule 103, subdivision (2), is "by any person authorized by law or by written order of the court," and this amendment takes out the "or by written order of the court" language. So if you want to continue the "or by written order of the court" avenue to power this authority, we need to be sure that that gets included in our amended language.

HONORABLE SARAH DUNCAN: No, I don't know that I want to. I mean, I don't do trial work, so I'm not familiar with all the horrible things that process servers do, but it seems to me that the Harris County judges have it right, that there ought to be some minimal level of education for everybody that's going to serve process, and just because I happen to like Carl a lot and think he's a good guy doesn't mean that he's had the training that ought to be required by a judicial system to serve process, it seems to me.

MR. LOW: Richard, let me ask you a question. Don't you think this committee could draw a rule just as well as the Legislature would have some uniform practice what is required so that it would be in this rule, it's been in 103, and the judge up there in Tenaha couldn't issue an order that you've got to live in Tenaha County for 10 years before you can serve, and so the court -- people don't have to keep going to the Supreme Court for every little thing and just draw a rule

statewide. You don't think we could draw such a rule on 103?

MR. ORSINGER: Yeah, we could clearly do that, and we have to eliminate opting out of it locally or else it won't have the uniform effect; but remember, Buddy, that we don't have the power here to pay for anybody to perform the oversight service, so we either have to just deputize a private organization to do the oversight or we have to have an administrative order that's sufficiently detailed that a private process could go to a private school in Dallas or Fort Worth or wherever and meet the minimum criteria that we put in this standard and then say to somebody, which under one suggestion was the clerk of the Supreme Court, "Look, I've got my 12 hours, I've got my 50,000-dollar bond or whatever the requirements are, so issue me a passport that allows me to serve process everywhere in the state."

MR. LOW: What about the State Bar? Couldn't you involve them? I mean, that's not a private organization. It's supervised --

MR. ORSINGER: I mean, you know, nobody is going to want to take this administrative responsibility on top of what they're already doing. It reminds me of what the Legislature did with MDL. They authorized this whole new layer of procedure and then didn't provide any money for anybody to do it, so the Supreme Court was gracious enough to take that on as their administrative responsibility.

Since the Legislature won't appropriate any money to afford to do this we've got to find somebody to be in oversight, and I agree it shouldn't be a private organization, because this is a state function, but I don't see the district -- any one district clerk stepping forward to do it for the state, and I don't know whether the Supreme Court clerk would step forward to do it for the whole state.

MR. LOW: Well, it sounds like to me you really can't do anything when nobody wants to work. Just basically, I mean, you're saying we've got to come up with somebody that will agree to do a little work.

MR. THORNTON: If I may offer a suggestion along those lines to move the discussion forward, and that is that the various courts are having to deal with this issue now, and it's taking a great deal of their time and effort and funds to deal with this, and today I know we're talking about what should we do and next steps are how should we do it, but one of the suggestions that we came up with before is that once we get this certification and our criminal background check then that process server goes to the district clerk of the county where he resides, presents those credentials, and they are issued that standing order from that county in which they reside.

MR. ORSINGER: So that spreads the load around the state, and it doesn't overwhelm any one employee

MR. THORNTON: Yes. And we think that's a

reasonable solution to that issue

MR. LOW: But if the standards that each one of those counties first have to abide by is uniform, I mean, that's fine.

MR. THORNTON: Absolutely.

MR. ORSINGER: Right.

MR. LOW: And they certify, then there would be a lot of district clerks working, and, I mean, why couldn't that be done?

MR. ORSINGER: It could be.

MR. LOW: If we set the standards and then it has to be certified by the district clerk, and, I mean, even if you wanted to I guess you could have it like a local rule that if somebody else had something more, you know, that operated better and they wanted that's not inconsistent the Supreme Court, you know, on approval, could do it, but why couldn't we just draw a rule where the district clerk has to certify and they do it under the same rule in every county? So then it looks like to me we need to draw up the rules for the clerk.

Bonnie. And no reflection on district clerks not working. I didn't mean that.

MS. WOLBRUECK: I guess I have to speak up for the district clerks on the same issue that everybody has spoken, is just the additional workload that's placed on a clerk that's already strapped for budget needs and adding an

additional function and duty. I mean, I know that that will always be a concern for district clerks.

Now, having said that, if there are specific guidelines, within, you know, does the clerk -- you know, what kind of funding will the county have to provide for that type of certification, that type of passport document or something, you know, there's some funding issues here for the county also.

MR. LOW: You do that with regard to you decide whether you're going to accept bonds, you look at the angle. A lot of times you decide, and I don't know of anybody that knows more about the rules of the court and so forth than the district clerk. I'm not suggesting that you've got plenty of work, but who else? I mean, we don't have any state agency, and Richard and I can't make the Legislature pass something. Yeah.

MR. JACKSON: Maybe you could make the fee relative to the cost and expense of the district clerk and it be paid to the district clerk to offset those services.

MR. ORSINGER: Great idea.

MR. THORNTON: Absolutely.

MR. LOW: And then -- but I think the main two objectives is you want to have something uniform, something that works, and something that doesn't make the Supreme Court have to look at every I and every T and see if it's crossed. Now, who's in charge of drawing that?

HONORABLE NATHAN HECHT: Lisa.

MR. LOW: Chip just walked out and I see why he walked out, but I -- until Judge Hecht punched me I didn't know what was going on.

MR. ORSINGER: We already have drafts of stuff like this that could be adapted, but I will tell you right now that the real problem is not drafting something that makes sense. The real problem was going to Bexar County and talking them out of their bonding requirement or going to Houston and asking them to allow them to have a school in any part of the state, not just a school in Houston. We have to really get buy-in probably as part of this process, I would think. At least that's the way the Supreme Court has done it when they've been doing other things that would overturn a bunch of local rules. I mean, I'm speaking for you, Justice Hecht. I don't know if you agree that that's part of it or not.

HONORABLE NATHAN HECHT: No. I mean, we're trying to be the least disruptive and accommodate what a number of good benches around the state have said is a worthy goal to try to get more education, but we don't want to do it in such a way that it volcanizes the status quo of judges as it always does with one group doing one thing and another group doing another thing.

MR. LOW: Bill.

PROFESSOR DORSANEO: Richard, didn't we make

some progress on this the last time around?

MR. ORSINGER: Yeah.

PROFESSOR DORSANEO: Why are we starting over?

HONORABLE NATHAN HECHT: Well, because number doesn't work.

MR. LOW: Right.

HONORABLE NATHAN HECHT: And so I guess we need some sense of whether -- it sounds to me like people prefer B rather than A or C, if they prefer anything at all.

PROFESSOR DORSANEO: B just passes the ball onto the next team.

HONORABLE NATHAN HECHT: Right. Right. But I don't have a good feel for whether the group thinks it's acceptable to let Harris County do their thing for Harris County and everybody else would take the association course since that's the status quo.

MR. LOW: But the problem is that you may be authorized by Harris County, but the suit may be in Fort Worth or something, so would they -- would Fort Worth require something different?

HONORABLE NATHAN HECHT: Well, we would say that they couldn't. We would stop the wording and say nobody can put any more requirements on it than exist currently, and we would do away with some of the requirements which are like the bond.

MR. LOW: And would you grandfather Harris County and --

HONORABLE NATHAN HECHT: Yeah.

MR. LOW: I've never seen a rule that --

MR. ORSINGER: Well, if you grandfather Harris County, you don't knock the guys out that are serving Harris County process in the other counties in the state. I mean, it's not just a Harris County problem. Even though the court is in Harris County, they're serving process in all the other counties in Texas.

MR. LOPEZ: But you don't have to --

HONORABLE NATHAN HECHT: But there are only two courses, the one in Harris County and the association course. That's the only -- nobody else has gone to the trouble of putting a course together, and I doubt anybody wants to, but, you know, nobody --

MR. LOPEZ: You don't have to jump through any additional hoops based on where you're serving it.

HONORABLE NATHAN HECHT: Right.

MR. LOPEZ: I mean, if you've got the order of the court where it came out of, you can serve it wherever you want, and that's all there is.

HONORABLE NATHAN HECHT: Right.

MR. LOW: Richard.

MR. MUNZINGER: Where and how often does the

association offer its courses?

MR. THORNTON: We, as a matter of fact -- and that's one of the issues that we've had in Harris County. They offer theirs one time a year. We offer ours as a minimum four times a year. Now --

MR. MUNZINGER: Where?

MR. THORNTON: We have moved them around the state. Typically we have them in Dallas, we have them in Austin, Houston, and San Antonio.

MR. MUNZINGER: That's a long way from El Paso.

PROFESSOR DORSANEO: Everything is.

MR. MUNZINGER: That's what I'm saying, but if some fellow wants to get a job to serve process and he's got to go to Dallas to get there, I can tell you there's not a whole lot of folks in El Paso that have got the money to go to Dallas.

HONORABLE TOM GRAY: That are perfectly capable of being process servers.

MR. MUNZINGER: I would be very, very loathed to say that I have to take a course in Dallas sponsored by a private organization to do something that is being done efficiently and acceptably in El Paso, Texas, today. That doesn't make sense.

MR. LOW: Well, what are you suggesting we do? What do you suggest?

MR. MUNZINGER: Well, make them offer their course in El Paso, in Pecos, and what have you if you're going to use them. I'm not meaning it in an ugly way. I just mean, hey, my folks are citizens of the state.

MR. LOW: I'm not arguing with you. I mean, I'm just wanting the answer. If they do that, that would be all right?

MR. ORSINGER: Buddy, let me make a suggestion. Why don't we -- why don't we do a list of what has to be covered in a course, no matter who the sponsor is, county, private, or whatever. It's got to be this many hours, it's got to cover these topics, and then let's let the local group -- like if the process servers in El Paso want to pay for an organization to come to their community once a year to authenticate everybody in that town or maybe the guys in West Texas all want to meet over in San Angelo or someplace, let them bring the course to them. We don't specify who has to be the course provider. We just specify what has to be the course content and then let them put the courses together themselves.

HONORABLE NATHAN HECHT: But let me -- I'm not sure I have a sense of the group's thinking on the issue of whether even though you might think it's a good idea to have this training for private process servers generally, it isn't going too far to tell the trial judges that they can't keep doing what they've been doing, which is approving anybody they

want.

Are we going to tell trial judges now -- it seems to me a pretty big step to tell a whole lot of trial judges who don't know anything about this issue, "From now on you can't do it except this way," and that's why it seems to me that down toward the bottom of page two that second issue is going pretty far.

MR. LOW: But, Judge, anything you do, that's in there; and then if we're just going to leave it up to the trial judges why wouldn't you just stop there and say leave it up to the trial judges?

HONORABLE NATHAN HECHT: Well, because already we have requirements on the other end, and the trial judges are getting together and saying, "Well, we're not going to do it -- none of us are going to do it, is going to do it until these requirements are met." But, now, if you try to accommodate that as a group, shouldn't you let the judge in Navarro County or El Paso County appoint Joe Smith if he's comfortable with Joe Smith, even though he hasn't taken the course? It seems to me it's pretty tough to tell the trial judges we're going to change this when I don't see a compelling reason for it.

MR. LOW: Then --

HONORABLE SARAH DUNCAN: I don't have a problem with that. I think it --

MR. LOW: Bill.

PROFESSOR DORSANEO: Well, years ago Elaine and I worked on a uniform local rules project, and I never saw a more disgruntled group of people than the trial judges when they were told things were going to be uniform, and I learned a lot about how judges got to be judges and who voted for them and who knew best and --

PROFESSOR CARLSON: It was very lovely.

PROFESSOR DORSANEO: I don't know who appointed me to that project, but it wasn't a very enjoyable experience.

HONORABLE NATHAN HECHT: Kind of like being on the curriculum committee at law school?

PROFESSOR DORSANEO: Yes.

MR. LOW: Anybody have anything new to add, or, Judge, what --

PROFESSOR CARLSON: I just want to ask a question. This is a one-time test one day, or a one-time course one day?

MR. THORNTON: Right now it's an eight-hour course and that's whether you go to Harris County or the Texas Process Servers Association. Now, under current requirements we would also suggest that certainly that be held on a recurring basis to recertify.

PROFESSOR CARLSON: How often would you recommend that?

MR. THORNTON: We're using as a rule of thumb

two years at this point, and that allows us for a two-year period to get an additional criminal records check if something has happened in that two-year period.

MR. ORSINGER: So you recertify every two years?

MR. THORNTON: That's what we suggest.

PROFESSOR CARLSON: Judge Christopher, is that true in Harris County?

HONORABLE TRACY CHRISTOPHER: To tell you the truth, I don't know. I don't think you have to do it every year, but I could be wrong. I think it lasts for two or three years.

HONORABLE JANE BLAND: I thought it was three years.

HONORABLE LEVI BENTON: Yeah, we do have a recertification requirement, but I don't know the period.

HONORABLE TRACY CHRISTOPHER: I think it's three.

HONORABLE NATHAN HECHT: I don't want to misrepresent Judge Lindsey, but I think she told me that they've never recertified anybody, they've just always re-upped.

HONORABLE JANE BLAND: Well, we're only in our second year of offering the course.

HONORABLE TRACY CHRISTOPHER: No, it's been longer than that.

HONORABLE JANE BLAND: Well, I know we've been planning the course for longer than that, but I thought the first course was only a couple of years ago.

HONORABLE LEVI BENTON: I will e-mail Judge Lindsey now.

MR. LOW: Looking at the problem, what is the problem with the way it is now and then go from there. Is one of the problems, Judge, that it's not uniform in each -- well, if you allow every district judge to do it, it's not going going to be uniform again, will it?

HONORABLE TRACY CHRISTOPHER: Well --

MR. LOW: Go ahead.

HONORABLE TRACY CHRISTOPHER: I think if we took alternative B, and we had (1) and we had (2) and then we have (3), by order of the court, that that would solve the problem because it would allow people in the smaller counties who wanted to use the people that they had always used to go ahead -- that they were comfortable with to go ahead and certify with them.

We could have the Supreme Court say, okay, as far as we're concerned Harris County's course is acceptable, the private process servers association's course is acceptable; and if you've taken one of those two courses, you're on the list. And then if a new company comes up and says, "Hey, I want to start offering this course," you could look at it and

decide whether you would want to approve their course. And then some private process servers who wanted to get, you know, basically certified statewide could go through that process. Then if you didn't want to get certified statewide, then you would just go back and get your order from your trial judge like you always did.

MR. LOW: Can we have a show of hands as to who agrees with that?

MR. LOPEZ: Can I ask a question about it first to clarify?

MR. LOW: Okay, just don't ask it to me.

MR. LOPEZ: Would that include -- would that grandfather in the people -- not statewide, but grandfather them in if they've already got an order out of a specific court in order to serve out of that court? Right?

MR. TIPPS: It would depend on what the order said.

HONORABLE TRACY CHRISTOPHER: I don't know how the orders work in other places.

MR. LOPEZ: Well, I don't either, but in a small county where you've been doing it for 10 years and the judge doesn't have a problem with it --

MR. ORSINGER: Can we decide that question separately? Because we may have a difference of opinion on whether we ought to make everybody do a new certification or

not, but to me your proposal has validity.

MR. LOW: Let's sever that out and let's vote on Jane's --

HONORABLE NATHAN HECHT: Tracy.

HONORABLE TRACY CHRISTOPHER: That's all right.

MR. LOW: I'm sorry. They always sit together. Excuse me. I didn't even know that Jane was here today.

HONORABLE JANE BLAND: I didn't hear that, and I'm probably glad I didn't.

MR. DENNER: Would you restate that?

MR. THORNTON: Would you recapitulate that?

HONORABLE TRACY CHRISTOPHER: Okay. Well, my proposal is to take alternative B, but to add No. (3), which is back to our old "or by written order of the court" that's in the current Rule 103, and then the Supreme Court would look at Harris County's system and say, "Yeah, that course is good, so if you take their course you're certified" and the private process service association's course, "That's good, and if you've taken that course, you're certified."

And then if some new entity wants to apply to the Supreme Court and the Supreme Court says, "Yeah, it looks like you've got a good course going there, so you're good, too," to allow for a little free enterprise and capitalism on the courses. So that's my plan.

MR. LOW: All in favor of Tracy's plan, raise

your hand.

All against that?

MR. THORNTON: Can we vote?

MR. LOW: Only two people against, three. All right. Now, Richard, do you have another proposition you wanted to do?

MR. ORSINGER: No. I like hers, but I think that we need to work with the language that goes in the administrative order about are we just going to name these two courses and then say "and anyone else that applies" or are we going to put some standards in there?

MR. LOW: You asked the question, now answer it.

MR. ORSINGER: Well, I mean, my inclination would be to put down the fundamentals that you would have to have in order to get a course approved, just so if someone wants to start one they have a road map to go by, just as an aid, and that wouldn't be that hard. We could work with Harris County and others and come up with criteria for a course that would be legitimate and long enough to ensure instruction.

MR. LOW: Anybody have any suggestions to that? Bill.

PROFESSOR DORSANEO: I think that's a good idea. I think probably most people will. One thought of potential modifications, maybe it's unwise, but how about "written order of the trial court signed before the effective date of this

rule" or some way to grandfather everybody so as not to, you know, cancel court orders that have been made, which I think would irritate any judge if there just was an order from above that some of your orders are no longer valid. We can kind of work the people into the new process. That doesn't satisfy Richard's problem of where the test should be taken, and I don't know enough about it. Is it possible to give this test on the internet?

MR. THORNTON: It is possible.

MR. ORSINGER: Is it a test, or is it a course of study?

MR. THORNTON: Well, currently in the Texas Process Servers it's a course of study. We offer a test for certification now.

MR. ORSINGER: Are you recommending that -- does Harris County have a test at the end of their course?

MR. THORNTON: They do.

MR. ORSINGER: So you have to have a test to be sure they were listening and not reading?

HONORABLE TRACY CHRISTOPHER: Right.

MR. ORSINGER: So it would be like a driver's test.

MR. THORNTON: Let me just add that you are talking about alternative B, and don't forget that there is a footnote to alternative B that still segregates Harris County

and doesn't allow process service in their county. I just want to point that out.

HONORABLE TRACY CHRISTOPHER: Well, my plan did not include footnote B. I mean, I personally think that if -- and I'm sure Tony disagrees with me, but I personally think that if we get one certification there shouldn't be a separate requirement that it's only the Harris County certification for Harris County.

HONORABLE NATHAN HECHT: If we could drive a wedge through the Houston judges, that would be --

HONORABLE TRACY CHRISTOPHER: I'm willing to accept the Supreme Court's rule that says this person is certified.

HONORABLE JANE BLAND: We just put up a good front.

MR. JACKSON: I'm still a little concerned with this requirement that they be retested every two years. I don't know of any profession that requires you to pass a test to stay employed every two years.

MR. LOW: I mean, that doesn't -- that's not within -- we've gotten past Tracy's proposal and now we're to the second one and you're saying that that --

MR. JACKSON: Well, what I heard them say is that you have to pass another test every two years or retest every two years.

MR. THORNTON: I was asked the question, and that was just a recommendation.

MR. ORSINGER: That's really not part of the rule that was proposed. So as literally adopted, you get certified once and you stay certified forever. I'm not sure I agree with that, but, I mean, we didn't address that in that motion.

MR. LOW: Yeah. If the Court wants to hear it further about whether how that kind of thing, but I think they want the overall concept I believe.

HONORABLE NATHAN HECHT: Well, I'm sympathetic to what Bill said earlier. We've talked about this at great length, and we're just kind of coming back because there have been some new developments, but I think I have a sense of what the committee likes

MR. LOW: You think you've heard enough?

HONORABLE NATHAN HECHT: Well, I'm willing to listen to more, but --

MR. ORSINGER: Well, Buddy, does -- Justice Hecht, do you want our subcommittee to try to put together some standards, or do you want to just work on that internally?

HONORABLE NATHAN HECHT: No, I wish you would.

MR. ORSINGER: Okay.

MR. LOW: And then, Jane, you'll finalize --

HONORABLE NATHAN HECHT: Tracy.

MR. LOW: How old do you have to be before you have Alzheimer's?

HONORABLE JANE BLAND: A lot younger than you are.

MR. LOPEZ: Can we take judicial notice of that?

MR. LOW: Can you finalize without the footnote? Anything else on that? Okay.

HONORABLE NATHAN HECHT: What's next?

MR. LOW: Appellate rule changes. Bill, I believe.

PROFESSOR DORSANEO: Oh. Okay. The first thing is that you probably don't have the last version, so let me pass those around. I hope I have enough copies.

MS. SWEENEY: Bill, when was the last one e-mailed?

PROFESSOR DORSANEO: Huh?

HONORABLE TOM GRAY: It wasn't.

MS. SWEENEY: It wasn't?

HONORABLE TOM GRAY: No. He's handing it out now.

PROFESSOR DORSANEO: Well, it's not that incredibly different.

MR. HAMILTON: What's the date on it, Bill? The date?

PROFESSOR DORSANEO: It's the date of August

11th, 2004. I think the one that was e-mailed was dated August 6th.

MS. SENNEFF: No, we changed that. We changed that.

PROFESSOR DORSANEO: Well, you and my secretary did things that I don't know about. At any rate, what's being passed out, I had 40 copies, so there should be enough. It's a little different. If you are using the other one it's not really going to make that much difference.

MS. SWEENEY: So, Bill, if we have something dated August 11th, that's what you're passing out?

PROFESSOR DORSANEO: Well, as I understand what Angie just said, there are two things dated August 11th, and what is being passed out with more exhibits to it is the one that I'm going to use. Trust me, it's not going to make very much difference in the discussion.

There are basically four items, each one somewhat complicated. The first one involves the Civil Practice and Remedies Code Section 51.014(d) through (f), which was passed in 2001, and as the cover memo says, it authorizes courts of appeals to permit immediate interlocutory appeals of nonfinal orders if they're not otherwise immediately appealable.

The first point is I think this is the only statute passed by the Legislature that gives courts of appeals

the ability to permit or not to permit appeals. It is more complicated than that because the statute also provides that the trial court must make an order which talks about the underlying order that will be the subject of the appeal in compliance with the statute, and the statute could be read and has been read to require the trial court to find that there's -- that there's substantial ground for disagreement with respect to the underlying order's correctness, and beyond that that the appeal -- if the appeal is taken, that will have the effect -- and I don't have the statutory language in front of me, but that that will materially advance the ultimate termination of the litigation.

There is yet another requirement that the parties agree to the immediate appeal, which makes our statute different from the Federal statute from which it was largely drawn.

Now, the problem, beyond the fact that the statute is less than crystal clear that we're seeking to address, is that there is no appellate rule which explains how you go about filing one of these appeals, perfecting one of these appeals if you like, and getting permission from the court of appeals; and as far as I can tell in the four or five times that people have attempted to take advantage of this statute, no one has done so successfully. That's perhaps because the Rules of Appellate Procedure don't say how to go

about this, and there are a couple of cases where people couldn't read the statute to conclude that agreement of the parties is necessary. Those cases are probably not that big of a deal.

There are more cases where someone filed a notice of appeal, but the notice of appeal complied with the requirements of appellate Rule 25 and didn't say enough about the issues that would need to be addressed by the court of appeals in order to decide whether to grant permission. And that's why we began to work on this draft rule.

Now, if I can go through attachment A, which is immediately after the three-page memo, you get the idea of what I had in mind, and we didn't take a vote of the entire committee, and I didn't hear back from people, so I think it's just right now what I had in mind both in terms of where to put this in the rule and how to go about it. Frankly, it doesn't want to fit into our rulebook under the current appellate rules.

When I drafted the first appellate rules, I copied the Federal Rules of Civil Procedure -- Federal Rules of Appellate Procedure in many respects, and our original appellate rules had, as they do now, two rules about perfecting the appeal. One was how, how an appeal would be perfected; and the second one, which became appellate Rule 26, would be the time for perfecting it, when perfected.

Our current rules still kind of mirror that, but the headings have changed such that the heading to appellate Rule 25 now is just "perfecting appeal," and what I would suggest in order to try to fit this into the rulebook would be to change the subheading to 25.1 from "civil cases" to "civil cases - appeal as of right." The structural change would be to keep all of what is in 25.1 with the new heading and to add a new 25.2, which is drafted along with some minor adjustment to 25.1, and entitle that civil -- no, I -- what did I do here?

PROFESSOR CARLSON: Is it "appeal by permission"?

PROFESSOR DORSANEO: Yeah, "appeal by permission."

Yeah. There's a mistake in this draft here. I apologize for that. The idea, at any rate, is to have a 25.2, which would be entitled "civil cases -- appeal by permission," and that would -- I don't know how I managed to do this, and that would begin with "petition for permission to appeal," which would not be (b). It would be (a), and (c), "contents of petition" would be (b). I've got my iteration wrong basically. Let me try to work through with it despite the deficiencies in my own draft.

25.1, which contains a number of provisions, including notice of appeal, okay, I would make a slight change in 25.1(a), and the only reason for making this change is to

make 25.1(a) and 25.2(a) look like they're drafted with the same information in them. Right now an appeal is perfected when a written notice of appeal is filed with the trial court clerk, but it doesn't say in 25.1(a) "within the time allowed by Rule 26," which strikes me as odd to begin with.

The Federal rule which bears a strong resemblance to 25.1(a) talks about the -- Federal Rule 3, I believe, talks about "within the time allowed by Rule 4," so I would suggest adding that language into 25.1(a) and doing nothing else with 25.1 other than changing the title from "civil cases" to "civil cases - appeal as of right."

Now, if you go to page two, what I attempted to do and I messed up in this draft, was to begin a new 25.2, which would be instead of "criminal cases," which would move down to 25.3, it would be "civil cases - appeal by permission." In Federal Appellate Rule 5, that is the heading, "appeal by permission," and this first subparagraph, which would be (a), would indicate the method for appealing by permission. It would be by petition, and aside from the heading, "permission for petition to appeal," the draft mirrors Federal appellate Rule 5. "To request permission to appeal an interlocutory order that is not otherwise appealable as of right, a party must file a petition for permission to appeal not later than the 10th day after the date a district court signs a written order granting permission to appeal."

Now, actually, in addition to mirroring or being modeled on Federal Appellate Rule 5, and perhaps more importantly, the language with respect to the timing comes from the statute. 51.014(f) talks about this: "If an application is made to the court of appeals that has appellate jurisdiction over the section not later than the 10th date after the date an interlocutory order under subsection (d) is entered the appellate court may permit an appeal. So this first subparagraph, which, again, would be (a) talks about using a petition and copies the statutory time period, I think, verbatim or nearly verbatim from the statutory provision, which, of course, gives us a different time for attempting to appeal under these circumstances under this statute than is normal, but the statute says what it says.

Now, with respect to the contents of the petition, what I did was to look at the notice of appeal, because it doesn't say anything in the statute really directly in (f) about the petition, but to look at the appellate rule and to pick out from 25.1 the things that are in the notice of appeal it would seem to me to be things that also want to go into this -- also ought to go into this petition, and perhaps not all of these need to be in there, but it seemed to me that these would be the things to be included. To an extent this matches the Federal rule, but it's really an amalgamation of what's in a notice of appeal and what's identified in the

Federal rules as appropriate in Federal practice with a few little exceptions.

The (5), "state that all parties agree to the order granting permission to appeal," is based on the statute. The Federal rule does not require that. The statute does. Obviously the notice of appeal provisions don't require that either. (7) is one that could involve some debate because it more clearly mirrors the Federal rule with respect to the petitions in Federal court than it does the -- than it does the Texas statute.

Now, I have, if you have the draft that I have brought with me today, an alternative to (7) over in the next memo, which would more closely track what our courts have been interpreting the statute to mean. Instead of saying "state concisely the issues or points presented," which both of them say, the Federal rule talks about the facts necessary to understand the issues or points presented and the reasons why the appeal is authorized and should be allowed. That's more general language than the language that we could use, which I've put in alternative (7), which more closely mirrors the statute and, frankly, the language in cases such as the Stolte case, written by Justice Duncan, which sets forth what the petition would say.

This raises an additional layer of complexity from my standpoint that I won't go into at this point that

doesn't really appear to have been addressed by any opinion that I've read that maybe the statute doesn't require as much as the courts have been saying on the issues because of the way the statute is worded, but at any rate, that's the contents of the petition.

The Federal rule talks about other papers; and, monkey-see monkey-do, I put in a subsection on that allowing another party to file a response or another petition not later than seven days after the initial petition is served. As I read the statute, all parties must agree to the -- all parties must agree to the order granting permission, so presumably unless somebody decided to take it back, if you could take it back, their petition or their response would just be extra -- extra information of some kind. I'm not really sure what it would be or whether that's necessary.

The length of petitions subparagraph, which again would be (d), since I started with (b) rather than the (a) in my miscrafted document here is something that's in the Federal rule and the length in the Federal rule is "a paper must not exceed 20 pages." And the justices on our committee who were there and voting thought that that was too many pages. Frankly, what these look like in Federal practice are petitions for review, are petitions for review to the Texas Supreme Court. I'm doing one right now in the Ninth Circuit in *Dukes vs. Wal-Mart*, and it looks exactly like that, and it is a

pretty lengthy item.

I'm not sure profitably if all of this can be reduced to five pages if someone is going to need to cover the issues that are in 51.014(d), substantial difference of opinion, and the second issue, substantial difference of opinion as to a controlling question of law and an immediate appeal may materially advance the ultimate determination of the litigation. Well, our subcommittee thought shorter would be better than longer, and five is certainly shorter.

I made the five pages exclusive of things in our normal way of things. "Exclusive of pages containing identity of parties and counsel, any table of contents," because I don't know whether there would need to be one, "any index of authorities," for the same reason. The issues presented, the issues presented are required to be stated in the contents provision and the signature and proof of service, so I guess this would really be about 10 pages long in terms of the actual number of pages, but the so-called brief of the argument would be pretty short.

And then bringing up the rear, if the petition is granted, how do we keep going, and it seemed to me that what we ought to do to keep going is for the appellant to do the things that an appellant would need to do at or before -- at or simultaneous with, or whatever the rules say, with the perfection of appeal by notice of appeal, which is request in

writing that the official reporter prepare the reporter's record, notify the trial court clerk appropriately, and including filing any written designations, specifying items for the clerk's record. I have "pay any required fees," rather than "pay any required fees or make arrangements with the court clerk and the court reporter that are satisfactory to them for payment of the fees." I made it "payment of any required fees." Maybe that needs some change.

No notice of appeal. That's consistent with the Federal rule. I don't know whether we need this sentence, which is copied from the Federal rule. It doesn't hurt for it to be in there. And then the appellate record must be filed; and I put "within 10 days after entering the order granting permission to appeal," because that seemed to me to be consistent with accelerated appeals; and I don't know how long this is going to take; but, you know, if not 10 days maybe some other number of days, but we have in I guess appellate Rule 35 that kind of a menu. I think accelerated appeals I think it is 10 days. This looks more like an ordinary accelerated appeal except it's a permission and by agreement accelerated appeal than it looks like anything else.

Now, there's one other issue that I'll raise that occurred to me at about the same time it occurred to me that (7) and contents could be different and more specific to our statute than to copy the Federal rule, and that is the

extension of time principle, and the Stolte case and a case out of Dallas called D.B. reach opposite conclusions with respect to whether you can file a motion for extension of time under 26.3 in this kind of statutory appeal. The D.B. case says "no," and that also by implication means that you won't have any implied motions for extension of time under the rule of *Robert vs. Dorner*.

Justice Duncan's Fourth Court's opinion in Stolte disagrees with that, and I think the members of the committee don't think it's a good idea to make it a hard and fast 10-day requirement without filing a motion for extension of time, and probably some way or another that concept ought to be put into the rulebook. I'd say consider adding it into new 25.2, but I really don't like that because it doesn't look as neat if you tried to fit it somehow into 26.3 where it appears.

Maybe something could be written into the new 25.2, if that's how you want to go, that would cross-refer to -- cross-refer to 26. But then it's starting to look like discovery rules to me where I have to go from rule to rule to rule and get lost along the way occasionally, so I would say we could put this in a new 25.2, but it looks a little bit like remodeling a house that wasn't designed to have this particular feature in it. There might be some other way to go.

At any rate, that's my -- was my best effort, and I apologize for screwing it up in terms of where 25.2

begins and the iteration (a), (b), (c), (d), instead of (b), (c), (d), (e), (f). I hope I'm not confusing people about that at this point.

CHAIRMAN BABCOCK: Justice Hecht.

HONORABLE NATHAN HECHT: I haven't gone back to look at the Federal practice, but since this has to be agreed to by the parties, what is the thinking about why one -- someone should be a petitioner and someone in a respondent position? It seems to me it's quite likely they would have different positions on why the issues are important or what significance they might have, so they probably couldn't go together on it, but if you were thinking, "Well, we just agreed yesterday. We got the trial judge to sign the order, and he says it's fine," it looks to me like there's going to have to be some agreement, but who's going to be the petitioner because otherwise you're scrambling around and on the ninth day the other side files their petition, and where are you?

CHAIRMAN BABCOCK: Wouldn't the petitioner be the party against whom the ruling went?

HONORABLE NATHAN HECHT: It could be.

CHAIRMAN BABCOCK: It wouldn't necessarily have to be, I suppose.

PROFESSOR DORSANEO: Well, yeah, it's pretty clear in the Wal-Mart case who the petitioner is in the class certification order, for example.

CHAIRMAN BABCOCK: Yeah, but I mean, you move for an interlocutory relief and you win it. It would be a rare case where you would say "but I'm not so sure about that."

HONORABLE NATHAN HECHT: And the other side agrees, and so the person that wants different relief would be the petitioner.

CHAIRMAN BABCOCK: Right. Yeah. That's right.

HONORABLE TOM GRAY: And if they both wanted relief, we have that problem now from the appeal of judgment. Can you have two appellants from the same judgment now that are crossways with each other, and so we have two petitioners, and the same thing as well in this proceeding?

PROFESSOR DORSANEO: All I did was say -- I didn't pick the first petitioner. We could do that by saying something like "agreed by the order," but still both parties could be agreed, I suppose.

MR. LOW: Let me ask you this. This is different from the Federal rule in one way. The Federal rule doesn't require any kind of agreement. It just says if somebody wants to they can petition and by order. Our rule says that the judge can do it only if both parties agree. Now, why isn't that an interlocutory appeal, which is governed by all the same rules as other interlocutory appeals, and any other appeal you don't have to ask the court of appeals for permission.

PROFESSOR DORSANEO: Because the statute says the court of appeals may permit the appeal, suggesting strongly that the court of appeals doesn't have to permit the appeal.

PROFESSOR CARLSON: And they haven't.

MR. LOW: In Beaumont -- okay. Well, I guess I'm governed by what I get.

PROFESSOR DORSANEO: People have filed notices of appeal in compliance with 25, and they have basically been either sent back to the drawing board or thrown out

MR. LOW: But it --

PROFESSOR DORSANEO: Depending upon what court of appeals you're in.

MR. LOW: But very easily like the case where the question -- Louisiana law says an agreement on certain things, void, signed in Louisiana. The question is will they be bound by Louisiana law or Texas. The trial judge rules, and the way he rules is going to determine whether we want to try a lawsuit, if it's one way or the other side, and we just agree, and we had no -- and Judge Gaultney took it, and I wasn't aware of the fact that he didn't have to.

HONORABLE TOM GRAY: You need to thank him.

CHAIRMAN BABCOCK: Justice Gray.

HONORABLE TOM GRAY: Since it does have to be done by agreement of the parties, and it is supposed to be something that's going to be advancing the litigation, I don't

understand why we would want to impose (a), within 10 days after the" --

HONORABLE SARAH DUNCAN: It's in the statute.

HONORABLE TRACY CHRISTOPHER: It's in the statute.

HONORABLE TOM GRAY: Is it in the statute?

HONORABLE SARAH DUNCAN: Yes.

HONORABLE TOM GRAY: Never mind.

HONORABLE SARAH DUNCAN: Which causes the problem that 10 days is nowhere close to a procedure, but that's what the Legislature picked.

PROFESSOR DORSANEO: One point that I want to make that's a hidden -- that I alluded to is the thing that's been bothering me about this statute that doesn't appear to have been addressed, that in (d), which is the provision of the statute. I'm sorry I didn't copy it. It talks about what the trial court order needs to say. It talks -- the order saying that the underlying order should be subject to an interlocutory appeal. It says -- there are three parts. The first part is the parties agree that the order involves a controlling question of law for which there is a substantial ground for difference of opinion. It doesn't say the trial court finds that the underlying order involves a controlling question of law for which there is a substantial ground for difference of opinion. It says that the order needs to say that the parties

agree that the order involves a controlling question of law and that the judge might have got it wrong.

Okay. Then the next one says, (2), doesn't talk about the parties, so it's talking about the judge, "An immediate appeal from the order may materially advance the ultimate determination of the litigation," something which I think the trial judge would be in a position to advise the court of appeals, because, you know, if I rule this way then things turn out differently than if I rule the other way; and then (3), the parties agree to the order; and I think all the court of appeals have done two things with this statute. One, they've assumed that the trial judge has to find not that the parties agree that the order involves a controlling question, but that the order involves a controlling question of law as to which there is substantial ground for difference of opinion and an immediate appeal from the order may materially advance the ultimate determination of the litigation, and the third thing, and the parties agree to the order. Okay. Which is an order granting permission to appeal.

Now, I don't know why, you know, this doesn't appear on the face of any of the opinions. Maybe it wasn't argued, but on the face of the statute it seems to me that maybe what the trial court's job is, is less onerous than what's being assumed. And the second part is of more significance. It's assumed that when the appellate court is

deciding whether to permit an appeal it will address those same things, the trial court's finding that there's a controlling question of law and substantial ground for difference of opinion, getting to the controlling question, and not whether the parties agree the order involves a controlling question, and then getting to the second and third items.

The statute is completely silent on what the court of appeals would use as a basis for granting or denying permission, and I think it would make sense to go back to (d) to see what the considerations would be, but when I go back to (d) I get confused about what the trial judge is finding; and if I look at the literal wording, it is at least an alternative interpretation that neither the trial court nor the court of appeals is to be giving detailed consideration about the controlling question of law and substantial difference of opinion issues.

Now, maybe that doesn't make any sense that that's the way you would do things, but you know, that's an issue on the face of the statute. I just want to throw that out. Maybe people would say all the court of appeals are right and it's not drafted all that well, but what we're talking about in (1) is what trial court finds, okay, and that extra requirement of the parties agree or that extra language is just a redundancy of (3).

So I find this all quite confusing, and I think

what we attempted to do was draft something so we could actually see somebody get to the finish line in one of these cases. I guess some of these cases where people have been told to start over they managed to satisfy what the court of appeals said the requirements are, but, you know, that first issue involves a lot of issues, including page length, the complexity of the analysis the court of appeals would go through, and that would affect how the petition rule is drafted.

CHAIRMAN BABCOCK: Bill, you have here in 25.2, renumbered (b)(7), you say "the reasons why the appeal is authorized and should be allowed and the relief sought."

PROFESSOR DORSANEO: That's one version of it, yes

CHAIRMAN BABCOCK: Okay. And that's kind of leaving it up for whatever they can think of to persuade the court.

PROFESSOR DORSANEO: Well, the reason why -- and the reason why I don't exactly like that language now, I took that from the Federal rule. Now, in the Federal practice there are more statutes that provide for permission to appeal than 28 United States Code 1292(b), which is what our statute is taken from, so when Federal Appellate Rule 5 was redrafted a couple of years ago the language was made more general. Okay. I don't think this general language is necessarily as good as the more specific language, which, again, is a couple of pages

over.

"The reasons why the order complained of involves a controlling question of law as to which there is substantial ground for difference of opinion, why an immediate appeal may materially advance the ultimate termination of the litigation, and the relief sought." The second alternative goes to the statute, but it goes to the statute under the courts of appeals' current interpretation of it, which makes whether it's "controlling question of law as to which there is substantial ground for difference of opinion" a subject of a judicial finding in the first instance in the trial court and then as part of the decision to permit the appeal in the second instance in the court of appeals.

CHAIRMAN BABCOCK: Bill, if you do it this way, though, if you do the alternative, there are cases -- I'm thinking declaratory judgment cases -- where there may be a partial summary judgement, and the parties need that issue resolved one way or the other because if time progresses, time marches on, bad things will happen to them substantively; whereas at the time of the summary judgement or the declaratory judgment, it's only perceived harm that will happen. I'm thinking of a breach of contract case where some event is going to happen two years from now. We say that when that event happens we have these rights and responsibilities; and I could foresee parties getting together and saying, "We understand

what the judge did, but we need that finally resolved now"; and your alternative wouldn't allow for that kind of a circumstance. You understand what I'm saying? Probably not.

PROFESSOR DORSANEO: No, I don't understand it. It's probably my fault, but I don't understand.

CHAIRMAN BABCOCK: No, I'm sure it's my fault. You have a dec action filed, and the request for relief is that upon the happening of these events we will not be in breach of contract. The events to occur, you know, in a couple of years, so the litigation is marching forward to that two-year period, and you litigate it and the court says one way or the other but doesn't resolve all the other issues in the lawsuit. You might want to -- you might want to get an appellate decision on that issue, even though the rest of the case isn't resolved and all parties might agree to it. But it wouldn't fit the standard you have in the alternative here.

HONORABLE SARAH DUNCAN: Why not?

PROFESSOR DORSANEO: Why wouldn't it?

CHAIRMAN BABCOCK: Because it's not involving a controlling question of law in which there's a substantial ground for difference of opinion. I mean, the law itself is just application of the facts to the law.

PROFESSOR DORSANEO: Well, that's going to take you right back to the statute, Chip, because in (d)(1), that controlling question of law -- there's an extra "s" in my

draft, so more flaws.

CHAIRMAN BABCOCK: Which one, your new (d)?

PROFESSOR DORSANEO: New alternative (7) tracks the statute, assuming that a controlling question of law to which there is a substantial ground for difference of opinion is a matter for judges and not just a matter for the parties to agree.

HONORABLE SARAH DUNCAN: Yeah, I think your scenario, Chip, comes squarely within (7).

CHAIRMAN BABCOCK: You think it does?

HONORABLE SARAH DUNCAN: That's what a controlling question of law is, is a question that depends on which way the facts are.

CHAIRMAN BABCOCK: Okay.

HONORABLE SARAH DUNCAN: So if you file a petition and say "I say the facts are A" --

CHAIRMAN BABCOCK: Right.

HONORABLE SARAH DUNCAN: -- "and, therefore, I win"; and the other side comes in and says, "Oh, no, no, no. The facts are B, and, therefore, Chip loses," we're not taking that.

CHAIRMAN BABCOCK: Right.

HONORABLE SARAH DUNCAN: And that's -- it's only a controlling question of law if the facts are relatively undisputed.

CHAIRMAN BABCOCK: Well, I withdraw my comments then. I always thought in the Federal system, which has similar language, that it had to be some, you know, kind of almost like a split in the circuits type of thing.

PROFESSOR DORSANEO: Well, Chip, if anything, I would bet that there's a split in the circuits on what a controlling question of law is, like there is usually.

CHAIRMAN BABCOCK: Okay. Sorry.

PROFESSOR DORSANEO: But I think what you said -- now I understand what you said, and I think you may well be right, that our Legislature copied Federal language, which might -- you know, might be interpretted narrowly as you have done rather than broadly as Sarah has done.

CHAIRMAN BABCOCK: Justice Gray.

HONORABLE TOM GRAY: I deal sometimes on the more mundane aspects of this, but I want to know what it is that is being filed, and the reason I want to know what it is, is because it controls two things that I've got to do, collect a fee for the state. Do I collect $75 as a petition, another $75 if it's granted like the Supreme Court does on petitions for reviews? Is it an original proceeding that I only get one $75, or is it a direct appeal where I get $125?

The next question that is also relevant to what is it, is how do I have to rule? On an original proceeding, when it's there I can enter an order that says "denied." Do I

get to write on this one "affirmed" or "reversed" and leave it there, or do I have to write a full blown opinion on the issue granted?

PROFESSOR DORSANEO: I would say you charge whatever fees you like

HONORABLE TOM GRAY: No. And there's actually -- which leads to another question.

PROFESSOR DORSANEO: Or we have to change whatever else fees.

HONORABLE TOM GRAY: Because Rule 12.1 requires the clerk to collect the fee when the document is filed, and you're giving them 10 days to do it, but that's a gnat. I wasn't -- but anyway.

CHAIRMAN BABCOCK: Richard, then Sarah.

MR. ORSINGER: You know, we really have three tread-ons we could follow. We could follow -- in terms of what's filed. We could follow an ordinary appeal with 50-page brief. We could follow the original proceeding where we attach an appendix without a record, or we could follow the petition for review process in the Supreme Court where we have something more like a 15-page statement saying, "This is why we think you ought to grant review, and if you do, we would like to have 50 pages worth of briefing because you're going to be handling it like a real appeal."

Of those choices, actually, I would tend toward

a petition process because you're soliciting the consent of the court of appeals to give you the opportunity to present your case on the merits, and we don't necessarily want to spend the money and force the courts of appeals to read the 50-page brief if they're not even really interested in it, so that doesn't answer all your fundamental questions, but it seems to me like maybe we ought to consider the petition for review paradigm.

PROFESSOR DORSANEO: That's really what this is.

MR. ORSINGER: Okay, and kind of mimic the 50, only instead of having an official appellate record, because I can tell you that the court clerk is going to have problems meeting a 10-day deadline, why don't we allow them to do an appendix like they do in mandamus where they can just attach certified copies of orders and things and not have to fool around with an official transcript

CHAIRMAN BABCOCK: Stephen.

MR. TIPPS: Well, the fourth paradigm is really the Federal model, which is a petition to the court of appeals asking the court of appeals to take the case, and I think that's what Bill is proposing.

MR. ORSINGER: What does it look like?

PROFESSOR DORSANEO: It looks like petition for review.

MR. TIPPS: It looks like what you have here. It looks like petition for review.

MR. ORSINGER: Is it 50 pages long and like a brief and what have you?

MR. TIPPS: Well, I mean, I've filed one, and the one I filed was simply a short argument that the parties and the judge had agreed that this case presented a controlling question of law, the resolution of which would facilitate a disposition of the case; but, I mean, it seems to me that the Legislature clearly was trying to follow the Federal model when it enacted the statute; and for that reason the logical thing for the Supreme Court to do in terms of rules promulgation is what Bill is proposing, and that is promulgate a rule that follows the analogous Federal rule.

MR. ORSINGER: If it's accepted do you file a full brief after that --

MR. TIPPS: Yeah.

MR. ORSINGER: -- or is your petition your brief?

PROFESSOR DORSANEO: This is about permission, not about the validity of the underlying order, although that's reasonable --

MR. TIPPS: And as far as the record is concerned there is no need to file an appellate record until the court of appeals has initially decided that this case is worthy of its attention.

MR. ORSINGER: But can you file an appendix that

contains the pleadings or motion for summary judgment or whatever or not?

HONORABLE SARAH DUNCAN: You --

MR. TIPPS: That would need to be addressed in the rule, I suppose.

HONORABLE SARAH DUNCAN: My view has always been, even before we had our appendix rule, you can always file an appendix if you want to include copies of the -- a copy of the contract.

CHAIRMAN BABCOCK: Harvey, did you have something?

HONORABLE HARVEY BROWN: I was just going to say that I agree with Stephen that this is modeled on the Federal rule. In fact, I know because I was involved in drafting, for better or worse, that came out of Houston. Craig Eiland I think was the original sponsor, and the first draft was even closer to the Federal rule than the final draft, so I think Bill's rule is really good.

The only major concern I have is I do think that the length of the petition is too short given the importance of the court taking the briefs. I think that 15 pages like you have in appellate court is a better idea. You may be able to do it shorter, but I -- when it was drafted originally I was concerned that some court of appeals might say, "Well, we don't think it's important enough to really mess with," and I think

the parties should have an opportunity to convince the court that it really is important enough for them to take the time

CHAIRMAN BABCOCK: Mike Hatchell.

MR. HATCHELL: A couple of things, one of the smallest ones being I know this is totally self-evident, but there is nowhere in the draft rule that says where the petition is filed, and I can assure you somebody is going to file it in the trial court, or maybe that's where it's supposed to be filed, but that's a small matter.

The issue of who goes first is in this instance probably a little more complicated because, first of all, it's got to have a title; and so are we just going to move the trial court title up, which may not reflect the agreement. I would suggest that the basic fundamental right to appeal has always been assigned to the party aggrieved by a ruling or order. In this instance it may well be both parties, but we also have that in our traditional thing as well.

So I would suggest that somehow or another we indicate that the same concept go forward, and it may well be a good idea to in some way or another, perhaps by comment or otherwise, permit the courts of appeals in granting this to assign the right to file first brief or establish a briefing order or something of that nature, because it can get a little strange in terms of identifying who goes first.

PROFESSOR DORSANEO: To identify who the

appellant is?

MR. HATCHELL: It could. I don't know. I mean, I personally think that our standard rules will take care of this or should take care of it, but I just hate to see us have to go through, you know, gnashing our teeth and having some opinions written about it.

CHAIRMAN BABCOCK: Ralph.

MR. DUGGINS: Well, Mike's point brings up a question I had about subpart (6), which says, "states the court of appeals to which the appeal is taken," and I didn't understand how it works when it's in one of the two courts in Houston. Could you explain how that's intended to work?

HONORABLE TOM GRAY: The two courts in Houston by statute when they file a notice of appeal with the clerk, they pick randomly out of pieces of paper. It's a statute.

MR. DUGGINS: I'm not sure this says that, though. That's the reason I'm raising it.

HONORABLE TOM GRAY: I think your point's well-taken. It also presents a problem in Northeast Texas where you have overlapping counties still, and you may have two aggrieved parties from one of these, and they may go to separate court of appeals.

MR. DUGGINS: Maybe Mike's point is you've got to specify that it's the district clerk and then the district clerk will handle it from there.

PROFESSOR DORSANEO: I think that language is the same language -- and maybe it does need some modification -- that's in the notice of appeal rule, but --

CHAIRMAN BABCOCK: You mean you'd file a -- you'd file a petition in the Dallas court of appeals that says, "We want the Tyler court of appeals to consider this judgment from Kaufman County"? I mean, that wouldn't make any sense to me. Sarah.

HONORABLE SARAH DUNCAN: I think all of these problems bring up -- refer back to what Mike just said, and it was my problem with Bill's take on this in our subcommittee meeting. If we try to incorporate into a new 25.2 every rule that applies to an appeal right now, we're going to be here for weeks. In my view, all this is is a motion requesting permission to appeal. That's all it is. If that motion is granted, it is an appeal like any other appeal, and I would treat the motion or the petition for permission to appeal just like anything else in the appellate rules.

I mean, I was shocked to discover that the Dallas court of appeals in D.B. had denied -- had said there is no extension of time to file a petition for permission to appeal. That just goes against everything we've been doing, the Supreme Court has been doing in civil cases for 15 years. So and I still think our clerks are going to have terrible trouble if we never have a notice of appeal, but that's another

argument.

I just think we need to treat this as an appeal just like any other appeal and say so in the rule, that they are governed by the same rules that any other appeal is governed by, and I'd say that from the moment the motion is filed or the petition.

MR. ORSINGER: Can I ask why you prefer an appeal to an original proceeding?

HONORABLE SARAH DUNCAN: It's not an original proceeding.

MR. ORSINGER: It is an original proceeding.

HONORABLE SARAH DUNCAN: It's not.

MR. HATCHELL: No.

HONORABLE SARAH DUNCAN: It's not.

MR. HATCHELL: No way.

HONORABLE SARAH DUNCAN: It's not seeking to compel or prohibit a trial court from taking particular action

CHAIRMAN BABCOCK: Stephen.

HONORABLE SARAH DUNCAN: It's simply reviewing the correctness of the trial court's order, and that's an appeal. It's not an original proceeding.

CHAIRMAN BABCOCK: Stephen Tipps.

MR. TIPPS: Well, I have two points. First, I agree with Sarah that what we need -- what this statute calls for is something instead of a notice of appeal that the party

that wants to complain files with the court of appeals, and the only difference is that unlike a notice of appeal in which you have the right to have your case reviewed if you properly file a notice of appeal, this petition is something that the court of appeals has to affirmatively accept. So I think conceptually that's what we're talking about.

And the other observation I'd make is to second what Harvey said about length. According to my secretary, the petition for review that I filed in the one of these that I've done was eight pages long, and as I recall that didn't seem to be too complicated an undertaking, so I think probably we would be better off with like 15 pages rather than the 5 that Bill proposes.

CHAIRMAN BABCOCK: Richard.

MR. MUNZINGER: I agree with what Justice Duncan said, except I do think there could be some confusion at the appellate level where you have, let's say, six parties to a case, and all the parties agree that whatever order it was ought to be appealed, and the order may cut more than one party adversely. There ought to be something in the rule that allows the appellate court to designate who is the appellant and set the time limits and what have you for various briefs; otherwise, it's going to be confusing as to who has the obligation to file the first brief and go forward, but I agree with the general idea that you ought to treat it like an appeal

with the remainder of the rules.

CHAIRMAN BABCOCK: Justice Duncan.

HONORABLE SARAH DUNCAN: I don't think we -- with all deference to Mike and Richard, I don't think we should say "designate who files the petition for permission to appeal." If I'm a plaintiff's lawyer and the judge has ruled that a statute of limitations applies that's in my favor and the defendant is unhappy about it, I ought to have the right to get that decided immediately and not have to use my time and my law firm's money to litigate that question; whereas, the defendant might be just tickled pink to have the wrong answer, because he knows he's going to get it reversed on appeal and by then I'll be out of money. So I think anybody should be able to file a petition for permission to appeal.

On the page length, if this is part of just the TRAP rules, you always have the right to ask for additional page limits, to ask to file additional pages. What I'm concerned about is like in Stolte, we're going to have people trying to use the statute, besides you and Harvey and Bill and Mike, we're going to have people that have no business trying to get an interlocutory appeal, but they think they do, and they want it, and I would just like to tell those people, "Nope, five pages, that's it." Now, Richard, if you come in and ask to file 15 pages or 10 pages, I'm going to say "yes."

MR. MUNZINGER: Well, but my concern is, as I

understand this rule, it requires the agreement of all parties to even get to the court of appeals. It requires the trial court to agree. In other words, without saying so the trial judge must determine that this is an order which will materially advance the ultimate termination of the case and involves a question of law upon which there is not unanimity. That's implicit in the statute.

The parties then must so promise the appellate court and they must agree to that point and then they themselves must agree among themselves that an appeal is necessary. So, now, having done all these things, taking the case where you have six parties or five parties and it may not be a limitations point, it could be a discovery point, and the discovery point can cut multiple ways. Products liability, there's a parts supplier, this, that, and so forth. All I'm saying is somehow or another give the appellate court the authority to designate who's going to be the appellant and when the brief is due and this and that and so forth so that you go forward because right now it's nobody knows who's what.

HONORABLE SARAH DUNCAN: You mean before you file a petition for permission to appeal?

MR. MUNZINGER: No. After the court of appeals has said that.

HONORABLE SARAH DUNCAN: We could do it. It would be just like a habeus corpus. We say, "Here's the

briefing schedule," and we can say, you know, "Here is who is going to file the first brief, here's when it's due, here's the page limits" or whatever, but that's a step down the road.

MR. MUNZINGER: Well, I think that was Mike's point that he was raising.

MR. HATCHELL: Well, yeah, but I think that -- first of all, I think the parties can start that out. The court has the power, and that's what I was referring to, to make such an order. Richard, I don't think that the court ought to have to try to sit down and sort out who gets to go first and who has the burden. The petition has got to be by somebody, doesn't it?

PROFESSOR DORSANEO: Yeah.

MR. HATCHELL: So that person is the petitioner, and, theoretically, they have been aggrieved. They're the ones who want it. If anybody else, I suppose, wants the right to also file an opening brief and the right to close, they can follow our two-track appeal or parallel appeal process we have now of filing a parallel petition with the court, I suppose. And then in that instance they could get together and they could ask the court for a briefing schedule or the court could impose one. We've had Dallas and other courts do that on a regular basis. But I don't think the courts ought to be required to do that.

HONORABLE SARAH DUNCAN: But what if the party

aggrieved doesn't want an interlocutory appeal, so he doesn't file anything within 10 days? Then what is now subsection (c) never comes into play, so nobody else can file another petition.

MR. ORSINGER: Well, it requires their agreement anyway, doesn't it, so if they won't play ball, nobody is going to be filing.

HONORABLE SARAH DUNCAN: It only requires an agreement in trial court, and I can agree to all the orders in the trial court all day long and still not file a petition for permission to appeal.

MR. ORSINGER: Well --

HONORABLE SARAH DUNCAN: I'm not saying that would be terribly ethical, but I could do that.

MR. ORSINGER: The party who won in the trial court might want to have the court of appeals confirm that ruling before they decide to go all the way through a jury trial.

HONORABLE SARAH DUNCAN: Right. That's my point.

MR. HAMILTON: That's the whole point. It's usually going to be the party who wins who's going to want it affirmed by the court.

HONORABLE SARAH DUNCAN: Want it affirmed, but not necessarily reviewed.

PROFESSOR DORSANEO: Well, let me respond first to Mike's first point. There should be an additional sentence that says it's filed in the court of appeals, and there is such a sentence in the Federal rule.

MR. HATCHELL: Yeah.

PROFESSOR DORSANEO: I just seem to be becoming more and more imperfect as time passes, and I didn't put it in there. I didn't call the person who files the petition the petitioner in the latest draft. It is in some of the earlier drafts because I thought that person would be the same person who would be the appellant, but after your comment I see that may not be so. So I would change the person's name to "petitioner" until we get down to the point where the appellant is identified.

Third comment, if we use -- I'm not sure I was following what you were actually suggesting, Sarah, but if we use the notice of appeal mechanism in this context and don't start this process in some other way, you start a whole bunch of other things happening, like the record getting -- having to be requested, the record getting prepared, the record getting filed, even the briefs being written even before we would have permission granted to appeal.

So I think there's more engineering if you don't do it like this than if you do it the way you're suggesting. I may be wrong.

HONORABLE SARAH DUNCAN: I'm not saying that the notice of appeal gets filed and starts the process. I'm saying when permission for appeal is granted a notice of appeal should be filed. I mean, what I would probably do --

PROFESSOR DORSANEO: Why?

HONORABLE SARAH DUNCAN: -- is attach a notice of appeal to my petition for permission to appeal so it would be ready to file when the court grants it. I talked to some of the people at the court. You know, teaching people new things is very difficult, and teaching deputy clerks around the state of Texas to start the appellate procedure when an order is signed granting permission to appeal is going to be very difficult.

It's going to be very difficult for our staff attorneys to understand that, you know, this isn't an appeal up to the point an order is signed, but now all of the sudden it's an appeal because what they're trained to do is notice of appeal and civil docketing statement, that's an appeal, or criminal docket, whatever docketing statement; and that's my concern, is that it needs to be something other than us signing one more order that turns this into an appeal. So I would say attach a notice of appeal to the petition. When the court signs the order granting permission to appeal it orders that notice of appeal filed.

MR. HAMILTON: In the trial court?

HONORABLE SARAH DUNCAN: A copy to the trial court.

CHAIRMAN BABCOCK: Yeah, Harvey.

HONORABLE HARVEY BROWN: Or on page three we could just say "a notice of appeal shall be filed" and then the notice is filed within so many days after the court order. I mean, if you're trying to get a notice of appeal in there, it seems like you're really not appealing until you get permission, so if you filed, you know, within a short time after the court gives permission and that way the clerks know what to look for and that way we know who the appellant is.

PROFESSOR DORSANEO: I can do it that way.

HONORABLE HARVEY BROWN: So it's not required notice, but it's required within a certain number of days after the order

PROFESSOR DORSANEO: I can do it that way. That's not hard.

CHAIRMAN BABCOCK: Yeah, Bonnie.

MS. WOLBRUECK: I had made myself a couple of notes, and one of my concerns was how soon I would receive that the order was signed, and I was looking in here about the appellate court notifying the trial court and if that's going to be done or immediately be done so that I can trigger that 10-day period for preparation of the record, and I don't know if the person, the petitioner, then notifies the clerk, and I

think that's what I've interpretted in this, if that's the way it was written, but the notice of appeal would certainly be much more helpful

CHAIRMAN BABCOCK: Yeah, Elaine.

PROFESSOR CARLSON: Bill, on top of page two in what you have delineated as (b), petition for permission to appeal.

PROFESSOR DORSANEO: Yeah, should be (a).

PROFESSOR CARLSON: Yeah, I understand. Fourth line down you refer to the date the district court signs a written order.

PROFESSOR DORSANEO: Uh-huh.

PROFESSOR CARLSON: And I can't remember, it's been a while since I looked at the statute. Does the statute limit the discretionary appeal from a district court?

PROFESSOR DORSANEO: Yes. When they were copying it from the Federal statute they copied the Federal trial court system. District courts only.

MR. LOW: Bill, can I ask you a question? I mean, we have a procedure right now at the Supreme Court that you can file with the Supreme Court for petition for review, and it's permissive, just like the Court may take it, just like this. How is that so different, and why wouldn't the same procedure work if you petition the court of appeals for review? I mean, and then they either -- the contents of the petition

and all that. Why couldn't you treat it just like you petitioned the Court, the Supreme Court, for review and use the same terminology?

It's not by right and they can deny it or do what they want to. Why do we follow the Federal rule when we've got a similar thing here, and the Supreme Court knows how to handle it. They do it. The court of appeals would know how to handle it. Why don't we do the same thing here? I mean, I know that's a stupid question, but maybe that's my question.

PROFESSOR DORSANEO: Well, I did not go look at the petition for review rule to copy things, but I bet if I did, it would look pretty similar to this.

MR. LOW: It says, "The Supreme Court may review a court of appeals final judgment" and so forth and that, I mean, that thing has been followed hundreds of times and most everybody understands that.

CHAIRMAN BABCOCK: Justice Bland.

HONORABLE JANE BLAND: I suggest under what's now (b), permission for petition to appeal, we say, "To request permission to appeal an interlocutory order that is not otherwise appealable as of right, a party" and then I would insert "who seeks to alter the trial court's judgment or order," tracking the language of what we require for a party filing a notice of appeal, "must file a petition for permission to appeal with the clerk of the appropriate appellate court,"

which tracks Rule 52's requirement for original proceedings since I think we contemplate that this would be presented to the appellate court, and then continue on, "not later than the 10th day after the date a district court signs a written order."

I realize that there may be slightly different motives for seeking appellate review of the trial court's order, depending on whether or not you want to uphold the trial court's judgment or not, but since the rule -- I mean, since the statute requires that the parties agree to pursue the appeal, it would seem like the burden should be placed on the party who seeks to alter the trial court's judgment or order to pursue and obtain an appellate court ruling granting the permission for them to appeal, and that would apply to a party who sought to alter the trial court's order in any manner so that, you know, if both sides wanted to alter the trial court's order, both sides could seek permission to appeal.

That would be my proposal that we would insert those two clauses to clarify who files the petition and where it should be filed.

PROFESSOR DORSANEO: Done. It's already done.

HONORABLE SARAH DUNCAN: Well, then you have a minority report from your cochair.

PROFESSOR DORSANEO: Maybe it will be undone then.

CHAIRMAN BABCOCK: Ralph, and then Richard.

MR. DUGGINS: I'm still unclear where you file the application. The statute says in (f) "the application is made to the court of appeals that has appellate jurisdiction over the action," so I'm not clear where you file it in Houston or in -- I guess you've got East Texas there are a couple of counties that are overlapping. I just think we need -- I want to be clear about what we do in those two circumstances.

CHAIRMAN BABCOCK: Stephen.

MR. TIPPS: In Houston, I think by statute, if not by statute, by rule, if it's during the first six months of the year you physically file it in the first court, and if it's in the second six months of the year, you physically file it in the 14th Court, but it then gets randomly assigned because those courts have concurrent jurisdiction over appeals from that 13-county area, so I think that's sort of in place.

PROFESSOR DORSANEO: And there are a number of other places where there is overlapping jurisdiction, but that same procedure hasn't yet been implemented there. It's been talked about, but other than that --

HONORABLE TOM GRAY: And whoever gets to the courthouse first, whether they want to go to Dallas, Tyler, or Texarkana, gets to do it under *Miles vs. Ford,* and so if two parties are aggrieved by this you're going to have the race to the courthouse in those overlapping counties.

CHAIRMAN BABCOCK: Richard.

MR. ORSINGER: I'm a little concerned about Judge Bland's suggestion that by rule we limit who can seek the relief when the statute doesn't. Now, that may, in fact, be what we do with the case on the merits. I'm not sure that the statute requires that you be the aggrieved party to seek it, but I know there's no logic in it if you win in the trial court, but here I can tell you that in my practice this probably will get used a lot if we ever figure out how to do it and people who are on the upside of the court's ruling are just as nervous about the court ruling as the people on the bottom side of it are dissatisfied with it. And I know that everything is more or less consensual anyway and so you can probably agree -- two consensual persons, you can agree to do it at all, but I would hate by rule to restrict the availability and the remedy that the Legislature didn't restrict.

PROFESSOR DORSANEO: But if you can file -- if you can just file something right on the back heels of it, a response or another petition, what difference does it make?

MR. ORSINGER: Well, because if the -- if you can only file the petition if you want to change the ruling and everybody has agreed to take it up, but --

PROFESSOR DORSANEO: I see.

MR. ORSINGER: -- the other side doesn't file it

within 10 days, then you can't utilize this remedy that the Legislature made availabe and you've already agreed on and the court approved, trial court approved.

PROFESSOR DORSANEO: That's a very good answer.

HONORABLE SARAH DUNCAN: Strategy.

MR. JEFFERSON: Doesn't the term "appeal" just suggest that you're complaining about what the trial court did?

MR. ORSINGER: Well, but, you know, the function of this is not to reverse the trial court. The function of this is to find out whether the trial court's ruling is reliable or not because if this is a partial summary judgement, you're going to be trying the rest of your case to the jury on an erroneous legal theory. It's in everybody's interest to figure that out before you try the case.

MR. JEFFERSON: I'm with you there, but it just seems to me the statute does seem to imply that an appeal is going to be taken, not to confirm what the trial court did, but to contest what the trial court did.

MR. ORSINGER: Well, maybe so, but I promise you that once the lawyers figure it out it's going to be used. I mean, the only reason that the winner in the trial court would even go along with this is because they want to learn themselves and send a message to the other side that their appeal is no good, or they want to know that themselves before they invest a hundred thousand dollars in a jury trial that may

get reversed on a legal point that could have been resolved before you ever picked a jury.

MR. JEFFERSON: I agree with you on those chords, and that's why even the prevailing party would agree to go along with this, because they need some certainty so that they know where they stand on things, but it does seem to me that, you know, the fact that it's an appeal suggests that the person complaining, as Judge Bland suggested, would appropriately be the petitioner.

CHAIRMAN BABCOCK: Bill, what do we want to do? Do we want to do some more drafting or --

PROFESSOR DORSANEO: Well, somebody needs to tell me about Judge Bland's point. I think the second part about where it's filed, there's no controversy there, but do we need to have the same standard as for notice of appeal in the petition if we're going to use petition, or are we going to just let anybody file the petition who was a party in the trial court if we get consent? I need an answer to that question. I can draft it without the answer, and you can vote on it next time. I need an answer --

CHAIRMAN BABCOCK: Let's go one question at a time. You need to know whether anybody can petition, even a winner can petition.

PROFESSOR DORSANEO: Yeah.

CHAIRMAN BABCOCK: Okay. How does everybody

feel about that?

MR. HAMILTON: Yes.

HONORABLE SARAH DUNCAN: No.

CHAIRMAN BABCOCK: Okay. There's one "no" vote. How many people think "yes"?

HONORABLE TRACY CHRISTOPHER: It's an appeal.

CHAIRMAN BABCOCK: How many people think "yes"?

HONORABLE HARVEY BROWN: I don't think we heard the question.

CHAIRMAN BABCOCK: All right. The question is how many people think, yes, anybody can appeal even if you've won in the court below? Raise your hand.

MR. BOYD: Anybody can seek application to appeal?

CHAIRMAN BABCOCK: Seek application, right. Seek permission to appeal. Levi?

Okay. How many people think "no" on that? 14 yes, 11 no, the Chair not voting, so I guess that gives the Court some sense, and then for drafting purposes you draft it for everybody.

PROFESSOR DORSANEO: Draft it either way? Let us discuss it again? You want to talk about it again next time? We're going to talk about it again next time anyway I bet.

MR. HAMILTON: It's already drafted that way,

Bill.

PROFESSOR DORSANEO: Okay. The next thing I need to know is about alternative (7). Should I copy the Texas statute's specific language about the reasons for granting permission or should I model this on the Federal rule? I would recommend copying the Texas statute myself

CHAIRMAN BABCOCK: Let's be sure we know what we're voting on. I have on page two of your memo under, as renumbered, (b)(7), some language that says, "State concisely the issues or points presented, the facts necessary to understand the issues or points presented, the reasons why the appeal is authorized and should be allowed, and the relief sought." What are we calling that?

PROFESSOR DORSANEO: That's first alternative (7).

CHAIRMAN BABCOCK: Okay. Let's call that first alternative (7).

PROFESSOR DORSANEO: The Federal model

CHAIRMAN BABCOCK: Federal model.

PROFESSOR DORSANEO: And then if you turn two pages forward, if you have the right memo you'll see an alternative (7).

CHAIRMAN BABCOCK: "State concisely the issues of points presented, the facts necessary to understand the issues or points presented, the reasons why the order

complained of involves a controlling questions of law" --

PROFESSOR DORSANEO: Take the "s" out. It's clear to me that my secretary who has been doing all this work so well for a great many years had a bad day since she's been largely responsible for better work on other days.

CHAIRMAN BABCOCK: "A controlling question of law as to which there is substantial ground for difference of opinion, why an immediate appeal may materially advance the ultimate termination of the litigation, and the relief sought." What are we calling that?

PROFESSOR DORSANEO: That's the current court of appeals interpretation of what the courts of appeals need to do in order to grant permission under 51.014.

HONORABLE TRACY CHRISTOPHER: Well, I thought you said that tracked the statutory language?

PROFESSOR DORSANEO: It does.

MR. TIPPS: That, too.

PROFESSOR DORSANEO: Well, it doesn't quite. All right. Let me just ask -- let me ask people to think -- to go read the statute and look at that (d)(1).

CHAIRMAN BABCOCK: We're just giving you direction. We're just labeling right now.

PROFESSOR DORSANEO: Well, you're not -- okay.

CHAIRMAN BABCOCK: So the first one we're going to call the first alternative, Federal model, and the second

one we're going to call current Texas court of appeals.

PROFESSOR DORSANEO: Yeah. Is that fair, Sarah?

HONORABLE SARAH DUNCAN: What's the current Texas court of appeals?

PROFESSOR DORSANEO: Is this what your opinion says?

HONORABLE SARAH DUNCAN: No.

PROFESSOR DORSANEO: Yeah, it is. I just copied it right out.

CHAIRMAN BABCOCK: All right. Let's call the second one the Cubs then. All right. Everybody that's in favor of the first alternative, raise your hand.

MS. SWEENEY: Oooh.

CHAIRMAN BABCOCK: Everybody in favor of the Cubs. On acclamation the Cubs win.

MR. TIPPS: That's a hard vote for Houstonians to cast.

CHAIRMAN BABCOCK: That may be the only thing the Cubs win this year. All right. What's the next thing you need to know?

PROFESSOR DORSANEO: How many pages.

CHAIRMAN BABCOCK: And the alternatives are 5 or 15.

MR. SCHENKKAN: Split the difference, 10, and let's all go home.

MR. JEFFERSON: 10.

MS. SWEENEY: 15.

CHAIRMAN BABCOCK: All right. Everybody for five raise your hand.

Everybody for 10? All right. 10 wins. What else do you need to know?

MS. SWEENEY: A minority vote for 15 here

CHAIRMAN BABCOCK: All right. 15 is down there.

HONORABLE LEVI BENTON: If we're going to regulate the page limit, can we also deal with the font size?

PROFESSOR DORSANEO: No. I left that. The font size will be the normal font size under the pertinent rule, which will be applicable to this.

CHAIRMAN BABCOCK: What else do you need to know?

PROFESSOR DORSANEO: I need to know whether we're going to do a notice of appeal, Justice Duncan's approach, or whether we're going to explain what happens in this (e), labeled (f). I probably need to say something about briefs if we're going to do the latter.

CHAIRMAN BABCOCK: Okay. Wait a second. The Duncan approach is one alternative. What's that?

PROFESSOR DORSANEO: That is when we get permission we file a notice of appeal and keep going in accordance with the rules

CHAIRMAN BABCOCK: All right. That's the Duncan approach, and the other approach is --

PROFESSOR DORSANEO: You don't have to file a notice of appeal ever, but we have to explain how we get back on track.

CHAIRMAN BABCOCK: Okay. That's on page three of your memo, what is now labeled (e), used to be labeled (f).

PROFESSOR DORSANEO: Yes.

CHAIRMAN BABCOCK: Okay.

PROFESSOR DORSANEO: And I think it's not quite done yet because of briefing issues. It should say something about the briefs.

CHAIRMAN BABCOCK: Everybody in favor of the Duncan approach.

PROFESSOR CARLSON: Can I ask a question?

CHAIRMAN BABCOCK: Sure.

PROFESSOR CARLSON: So is the petition for permission to appeal under the second alternative the jurisdictional implication?

PROFESSOR DORSANEO: Well, that's why I don't like doing it the other way. I don't know -- I don't --

PROFESSOR CARLSON: I don't either.

PROFESSOR DORSANEO: I can make this work, but I'm not sure that the other thing will work. It probably will. It's going to be harder to stick in here.

PROFESSOR CARLSON: And that's your concern, we've got competing jurisdictional schemes

PROFESSOR DORSANEO: Part of it, yeah.

CHAIRMAN BABCOCK: Okay.

HONORABLE SARAH DUNCAN: I don't understand that explanation.

PROFESSOR DORSANEO: I didn't give you a very good explanation because I didn't try to do it that way, and to try to fit this into the rulebook requires a consideration of a whole bunch of things that aren't immediately on the front of my mind, so I have to look over all of the details of it and see if there are any problems created. I don't think that there will be

MR. ORSINGER: Bill, let me ask this question. Is there a docketing statement that's required if the court signs an order permitting the appeal to go forward?

HONORABLE SARAH DUNCAN: That's part of the problem.

MR. ORSINGER: I mean, let's just ask ourselves that question. Is the court of appeals going to be able to function without a docketing statement?

HONORABLE SARAH DUNCAN: We functioned without docketing statements in the courts for decades.

MR. ORSINGER: But you don't function anymore without docketing statements.

HONORABLE SARAH DUNCAN: But my concern is that what the docketing statement has enabled is that a deputy clerk can sit there with one document and enter everything that needs to be entered into case management, and if all of the sudden there's an order here and a petition here, plus or minus an appendix, it's going to get like it used to be.

MR. ORSINGER: But, you know, Sarah, I would prefer that instead of attaching a conditional notice of appeal that we just say that the court will permit you to file a notice of appeal and then you file one rather than attaching a conditional one that's attributed -- the effective date is the day the order is signed, but you don't find that until four days, so your first four days are gone. I mean, it would be cleaner if we're going to require an appellate notice that the court says, "We're giving you permission to file a notice of appeal" and then go file it in the trial court like everybody else's

HONORABLE SARAH DUNCAN: That's fine

MR. ORSINGER: Just copy the court of appeals like everybody else's --

CHAIRMAN BABCOCK: Let's see what everybody else thinks.

HONORABLE TOM GRAY: If I could add one procedural thing that's going to happen there which actually mechanically works very well, is when that notice of appeal

hits the trial court and then the court -- excuse me -- hits the trial court and then the court of appeals, it's going to get a new docket number than the original permission granted, just mechanically it's going to happen, and I personally think that's a good thing, so because then everything is triggered from that date of that notice of appeal in the normal fashion --

CHAIRMAN BABCOCK: Right.

HONORABLE TOM GRAY: Briefing, records, everything rolls from that

MR. ORSINGER: And the timetable under our accelerated appeal rule is going to be invoked, though.

HONORABLE TOM GRAY: No, regular appeal.

CHAIRMAN BABCOCK: So who's in favor of the Duncan approach?

HONORABLE HARVEY BROWN: Are you proposing Richard's modification there?

CHAIRMAN BABCOCK: We're talking about in a general philosophical sense.

HONORABLE TRACY CHRISTOPHER: Having a real notice of appeal?

CHAIRMAN BABCOCK: Yeah.

HONORABLE TRACY CHRISTOPHER: Okay.

CHAIRMAN BABCOCK: Duncan approach got Duncan's vote.

HONORABLE NATHAN HECHT: Two more over here.

CHAIRMAN BABCOCK: Wait a minute. Let me go again

All right. The Dorsaneo approach?

PROFESSOR DORSANEO: Well, I'm not sure that that's my approach. I guess I'll vote for my own approach.

CHAIRMAN BABCOCK: Okay. So by an overwhelming vote of 18 to 2 the Duncan approach prevails. What else do you need to know?

MR. ORSINGER: Well, we need to resolve the question. I see this as an accelerated appeal under that rule. Justice Gray sees it as an ordinary appeal with ordinary deadlines, so I think we probably need to decide whether we're invoking the accelerated appeal rule or the ordinary appeal.

HONORABLE SARAH DUNCAN: Please don't make another -- I can't get below the black line on my docket. Everything above the black line is accelerated appeal or original proceeding, and everything below the black line are regular appeals. I can't get to regular appeals anymore.

MR. ORSINGER: But you understand you have a trial court proceeding -- just like an otherwise accelerated appeal, you have a trial court proceeding that's waiting for you-all to get to it, and you're going to treat it like it's a final judgment, and in some courts you're going to get an oral argument a year after they --

HONORABLE TOM GRAY: They better think about that when they agree to one of these.

MR. ORSINGER: But you don't have to accept it unless you want to do the work.

PROFESSOR CARLSON: Bill, does the statute say anything about that?

PROFESSOR DORSANEO: Well, how much time do you want to file the notice of appeal? Do you want to file it in 10 days?

HONORABLE SARAH DUNCAN: Yeah, that's fine.

PROFESSOR DORSANEO: And then the rest of it, whether it's an accelerated appeal or an ordinary appeal, mostly just kind of depends on what the court of appeals wants to do, but the record has to get there faster. Probably the record time is extended in accelerated appeals

CHAIRMAN BABCOCK: Okay. We're doing good, Bill. What else do you need to know in order to come back to us with a rule?

PROFESSOR DORSANEO: Well, I need to know about all the other problems in the appellate rules that have been created by this 18 to 2 vote, but we'll find out about that later, so nothing.

CHAIRMAN BABCOCK: Judge Bland.

HONORABLE JANE BLAND: One of the reasons I was in favor of the way that it's written now is because when you

go back and you file a notice of appeal in the trial court, if it does get another docketing number it could go to a different court of appeals than the court of appeals that gave the permission to appeal. So why are we putting this burden on the parties to have to go file -- go back to the trial court, file another piece of paper. Why can't the order just serve as the notice?

And as far as the clerks being able to determine it, all they have to do is look at the date of the order to determine all the other deadlines. The only thing that's jurisdictional is the notice or, in this case, the order. So the parties can get additional time to file briefs. Their appeal won't be dismissed without them getting notice. If we're going to say that in addition to this a notice of appeal can be filed, my concern is that that paper, that notice of appeal is what becomes the jurisdictional document that you get to perfect your appeal with, and we invite all of the problems that, you know, often occur with filing a notice of appeal, like the D.B. case and all these other cases; whereas, we've already got, you know, a request for appellate relief on file and apparently the court of appeals has said, "We want to take it." Why would you need to go back and do some more stuff down at the trial court? Why can't we just proceed at pace?

HONORABLE DAVID GAULTNEY: I agree with that. In fact, there were three votes in favor of that, because I

think the proposal is that the petition include everything that the notice would have, but Rule 12.1 be modified to include the petition as the initiating docketing instrument and that once the order is entered your time line starts to run from that. I don't think -- I think the filing of the notice is just going to be an unnecessary additional duplication, and I think it will be a competition as to whether or not it invokes the jurisdiction or what invokes the jurisdiction, and then a final comment while I've got the floor --

PROFESSOR DORSANEO: Clearly one of my best students.

HONORABLE DAVID GAULTNEY: Since this is an interlocutory appeal, you know, I'm sympathetic to the fact that we have all these accelerated appeals, particularly since we don't transfer out accelerated appeals, we get to keep all of them, but I think this has to be treated like an accelerated appeal. You've got a case that's getting ready to -- or trying to go to trial, the parties are trying to figure out what the ruling is.

CHAIRMAN BABCOCK: Okay. Carl.

MR. HAMILTON: Is this the kind of appeal that stops everything in the trial court, or can the trial court continue with other matters pending the outcome of this appeal?

PROFESSOR CARLSON: Or rescind the order.

MR. BOYD: The statute addresses that

MR. DUGGINS: It does as to some of the orders, but not as to all.

MR. HAMILTON: Huh?

MR. DUGGINS: It does as to -- it wouldn't under this section. There's a provision of the statute that says it does.

MR. BOYD: The statute says --

PROFESSOR DORSANEO: The statute addresses that.

MR. DUGGINS: Pardon?

PROFESSOR DORSANEO: There is an -- "An immediate appeal" -- "an appeal under subsection (d) does not stay the proceedings unless the parties agree in the district court or the court of appeals or the judge of the court of appeals orders a stay of the proceedings." So anybody can stay the proceedings.

MR. ORSINGER: No, actually it takes everybody.

CHAIRMAN BABCOCK: Justice Gray.

HONORABLE TOM GRAY: I have to say that Justice Bland raised the issue, and I agree with her on the notice of appeal issue triggering a different proceeding. I had thought about it in the context of my own court where it's a three judge court, same judges are going to hear it. There's not going to be any chance of it going to a different panel. The way to handle it and do both things would require, as you had originally suggested, I think, Bill, with having a notice of

appeal -- or maybe you did, but have a notice of appeal attached to the motion or the petition and as part of the agreement to accept it order the notice of appeal filed, and one of the requirements of the petition then would be that the notice of appeal be attached to it when the order got filed

CHAIRMAN BABCOCK: Justice Duncan.

HONORABLE SARAH DUNCAN: I agree.

CHAIRMAN BABCOCK: Oh. Yeah, Buddy.

MR. LOW: Carl asked a question about what would happen to the trial court's power and so forth. Wouldn't Rule 29.5 on the court may do all these things, he can set aside and ordinary things -- is that not going to apply? Wouldn't this be considered under the same scope as an interlocutory appeal or not?

CHAIRMAN BABCOCK: 29?

MR. LOW: Yeah, 29.5. When an appeal is interlocutory it extends the trial court's same jurisdiction and all that.

PROFESSOR DORSANEO: We've got a proposal to change that rule, too.

MR. LOW: Okay. But -- all right. Then I wasn't aware of that, but I'm going to say we've been calling it that, and somebody asked the question, and that's already answered by the rule, unless you change the name of what we do it, not an interlocutory appeal. And I don't know how you can

call it anything but an interlocutory appeal.

CHAIRMAN BABCOCK: Okay. Well, Bill?

PROFESSOR DORSANEO: Well, I'll draft it both ways. I think people will change their mind back to having no notice of appeal. I don't know what else to do other than to draft it both ways at this point

CHAIRMAN BABCOCK: Is that okay with you, Sarah, having overwhelmingly won the vote?

HONORABLE SARAH DUNCAN: Sure. You may convince me. And we're just going to add a sentence.

CHAIRMAN BABCOCK: What about Buddy's question?

MR. LOW: I'm not giving an answer, but I don't know, but all I'm saying is that somebody raised the question, Carl did, of the power of the trial court; and if we considered this an interlocutory appeal and we still have 29.5 then the trial court can do all of these things; and if that's what we want, that's fine; but if it's not --

PROFESSOR DORSANEO: Well, our committee's recommendation is to just basically --

MR. LOW: Say that it doesn't -- 29.5 doesn't apply or what?

PROFESSOR DORSANEO: Well, you'll see. It's on the bottom of page two of the second appendix, but I personally think that 51.014 has done so much to all of these issues that it would be unprofitable to try to track the statute in 29.5;

and, you know, whenever the statute, you know, deals with this question it seems to deal with it in a detailed and complicated way.

Now, granted, there are other appeals from interlocutory orders under different statutes that don't have all these special requirements, but I took the heart out of 29.5 for the most part in this draft.

MR. LOW: Okay. As long as it's clear that somebody doesn't argue what you're saying and somebody else says, "No, 29.5 applies because it's interlocutory appeal," and say, "Wait a minute. There's a conflict." I just raise the question.

CHAIRMAN BABCOCK: Bill, what else?

PROFESSOR DORSANEO: I don't have anything on that other thing, but I've got other rules. You want to go through those?

CHAIRMAN BABCOCK: What's everybody's preference? We've been going for a while. Do you want to take a short break or do you want to slog right through and quit at a quarter till 5:00?

MS. SWEENEY: Slog on

CHAIRMAN BABCOCK: Slog through?

MR. LOW: Yeah.

CHAIRMAN BABCOCK: Okay. Keep going, Bill.

PROFESSOR DORSANEO: Well, I think I'm going to

-- because of the importance of the issue and with your permission, go to Rule 28. I'll mention, the 12.1 we've already talked about. You can look at attachment B. Rule 26.1, that's self-explanatory as to what was suggested there. Rule 28 I think is -- an issue is whether we ought to add to the accelerated appeals rule another subsection dealing principally with termination of parental rights cases, but the more I read these statutes I think the matter is more complicated than that.

Right now in the Family Code, there are -- there is a chapter and a section in Chapter 109 that treats termination of parental rights orders or appeals in a suit in which termination of the parental rights -- parent-child relationship is an issue as accelerated appeals. Now, the statutes -- and I didn't bring 109.002, but it's quoted in the memo at the beginning. It basically says an appeal -- it basically says what I copied into the draft proposed rule change. "An appeal in a suit in which termination of parent-child relationship is in issue shall be given precedence over other civil cases and shall be accelerated by the appellate courts."

And then another sentence to kind of explain what the first sentence means, "The procedures for an accelerated appeal under the Texas Rules of Civil Procedure apply to an appeal in which the termination of the parent-child

relationship is at issue." Now, the procedures for an accelerated appeal in the current -- in our rulebook are not numerous, okay, but the one key point is that you have 20 days in terms of a timetable under Rule 26; and by reading the remainder of the rules, motion for new trial doesn't have any effect. So it's 20 days, and that's what Justice Gaultney was explaining at the last meeting either on the record or off the record, is that people are not used to the idea that final orders are subject to accelerated appeal timetables and that that is causing a lot of trouble.

Now, it's slightly more complicated than that because in another chapter of the Family Code, which deals with other orders, and I think maybe other orders beyond what my draft talks about that you have a similar statement, but these are cases where we have the Department of Protective and Regulatory Services, which is sometimes called other things, appointed as the managing conservator without terminating parental rights. That's accelerated appeals, and I guess under that Chapter 263 some of those other orders under Chapter 263 might be accelerated appeals, too, when you read 263.405 together with 263.401.

So the key question is -- I think the key points are, one, should we put a special section in the rulebook dealing with these particular kinds of now accelerated by statute appeals in order to keep people from screwing up; and

then the second point would be how do we do that in a way that is faithful to the statutes; and I don't think I have completely performed that latter task yet. I at least want to go back and look at Chapter 263 from beginning to end. My current belief is that you have to look at 401 in order to understand what 405 really covers. I think I can figure this out. Maybe Richard can help me since he's our designated family law expert occasionally.

So the first issue I think we're ready to deal with. The second one probably has to wait till more drafting.

CHAIRMAN BABCOCK: Okay. Any comments on the first issue? Skip.

MR. WATSON: What do you propose to fix it, Bill? That's what escapes me.

PROFESSOR DORSANEO: I propose to copy language from at least 109.002 into the procedural rulebook under a heading "termination of parental rights." So if somebody doesn't read the statute because they're thinking under normal accelerated appeal logic that that's only for interlocutory orders and not final orders, they won't commit malpractice basically.

MR. WATSON: I've done that. I've been in those and cut people off on that. Your proposal makes it sound like that the statute which says it should be treated as any other accelerated appeal might not be effective if we don't amend the

rule to say, "Lookout, this statute is out there," and there's always going to be a gap there, but before the time comes up when we get the rule amended when the Legislature meets and adds another statute to this list of accelerated appeals by statute.

PROFESSOR DORSANEO: Well, they may do that. They may add -- what the Legislature is doing in classes of cases, they're changing the the time for perfecting the appeal not by cross-referencing the accelerated appeal rules but just by putting a date down.

MR. WATSON: Right.

PROFESSOR DORSANEO: Now, my proposed change to 26.1 is intended to give notice that you better be wary of that, but I'm not sure that they're going to be doing, you know, "This is governed by accelerated appeal." It doesn't seem to be their style of making them go faster. It doesn't really make them go much faster anyway.

MR. WATSON: Couldn't this be the kind of thing where we just drop a comment down or something and, you know, that puts the "Watch out, gotcha"?

PROFESSOR DORSANEO: My view was that -- you know, I read all of the cases that are printed in hard copy, and there are a lot of these cases, a lot of termination of parental rights cases. I mean, there are three or four every advance sheet, I think, and I think this is a real problem. If

I thought it was just some technical oddball thing, you know, something about election contests or something like that, I might -- where people are more likely to be aware of the specific requirements, I might be less concerned about it, but I think this is a big problem

CHAIRMAN BABCOCK: Justice Hecht.

HONORABLE NATHAN HECHT: I agree it's a problem, and I agree it's going to be a bigger problem as the Legislature keeps putting different deadlines on that, on the time for appeal. One way -- you might think more than one way to deal with it is by changing Rule 26.3 to make the giving of extensions of time for filing the notice of appeal under different conditions or more leniently. It now says you can get an extension if within 15 days you file the notice. Well, that would take care of the parental notification cases because nobody thinks they've got 35 days to file it. Everybody thinks they've got to do it --

PROFESSOR CARLSON: What if they file a motion for new trial?

HONORABLE NATHAN HECHT: Well, you might have to -- one way to do it might be to tinker with that. I'm just worried that there are going to be so many different variations on this theme that the only way you're ever going to be able to deal with it is by giving people -- cutting them some slack, because the notice of appeal time does not speed the case up

appreciably

CHAIRMAN BABCOCK: Justice Gaultney.

HONORABLE DAVID GAULTNEY: I think giving extension of time would help in some instances, but for some reason -- and I read a lot of these cases, too. It seems to me the problem may have been the recent amendment of the Family Code or whatever; but you're seeing a lot of instances or several instances in which termination I guess is viewed as a final judgment, a final order; and these statutes provide that these are final orders, these are final judgments; and so you get motions for new trial filed and the notice is not filed till, you know, substantially later and beyond the time where a motion for extension of time could help usually. So my only feeling on this was that perhaps in this instance, given -- really, given the importance of the issue, that we could actually point it out in the rule.

CHAIRMAN BABCOCK: Yeah, Elaine.

PROFESSOR CARLSON: Justice Gaultney, is the source that a motion for new trial does not extend the time to perfect the accelerated appeal of a termination ruling, is that a matter of the Family Code or is that a matter of our appellate rules?

HONORABLE DAVID GAULTNEY: I think it's a matter of perhaps both. As I recall, first of all, the accelerated appeal is not going to do it, and the statute says the

accelerated rules are going to apply. Also, I believe in one of the statutes, I'm not sure which one, I think it's the one dealing with the Department of Protective and Regulatory Services --

PROFESSOR DORSANEO: 263.045.

HONORABLE DAVID GAULTNEY: It does say, as I recall, that motion for new trial will not extend time, as I recall.

PROFESSOR CARLSON: Thank you.

CHAIRMAN BABCOCK: Yeah, Richard.

MR. ORSINGER: Even if we don't have a whole separate subpart for termination cases I think we ought to at least change appellate Rule 26 to have a separate line item to say that these termination cases you have to give your notice of appeal within 20 days. Right now it just says it's within 30 days unless you fit in one of the following categories, and (b) is in an accelerated appeal, and apparently the people who are handling these appeals who are typically not appellate lawyers or they may even be appointed lawyers who are mostly trial lawyers, and this might be the first appeal they've ever done. I don't know that they're snapping onto that, and at the very least we ought to say, "In a termination case governed by Chapter so-and-so of the Family Code," so at least the deadline -- when they go look for deadlines they will see it.

To me we ought to agree to do that, whether we

agree to have a whole subpart on all the rest of it, because I think a lot of these, I'm hearing from the staff attorneys on the various courts of appeals a lot of them they're dismissing for want of jurisdiction.

MR. WATSON: Oh, yeah, they are.

MR. ORSINGER: And that's the worst -- I mean, we're talking about a constitutional right here. Heck, three members of our Supreme Court want to find fundamental error to reach issues that are not preserved. What's more fundamental than the right to appeal at all? So I would say regardless of how we feel about the larger issue of what Bill has said, at the very least we ought to give everybody a clear heads-up that their appellate deadlines are -- their perfection deadline is 20 days.

CHAIRMAN BABCOCK: Skip.

MR. WATSON: The big problem is -- the little bit I've seen of it, and I'm not trivializing what's happening. It is a big deal, and it's one that we need to find a way to fix. It's a matter of how. My experience has been it's the fact that the rules on the accelerated appeals say that the time that filing the motion for new trial or to alter or amend, you know, the judgment do not affect the time for filing the notice of appeal.

That's the one that's killing them, and so we need to deal with it somehow in both places, and that's -- in

my trying to think through what Bill was trying to do, you know, I was coming up with, okay, do we put it in both rules that this isn't going to affect it or do we just drop a comment down or do we put it in the accelerated appeal one and then put a comment down in the motion for new trial? I don't know which is the best way to do it, but the one that's killing people is that they think that they just filed a motion for new trial after the final judgment ordering the termination, and by that time the 15 days to request a late-filed notice of appeal is long gone. It's all over.

PROFESSOR DORSANEO: After hearing what people have to say, I think that all of this stuff is not greatly drafted. The cross-reference in the statutes looks like it's trying to be a cross-reference to 28.1, which is about interlocutory orders. So it's really just, I guess, the second two sentences that the Legislature means to have applicable to termination orders that are final orders, but that's to a certain extent guesswork because they must have had something in mind. That's probably it.

Quo warranto, in quo warranto, filing a motion for new trial will not extend the time to perfect the appeal either, but then there's a big "but" and some other stuff. Maybe it would be good to have a separate section about effect a motion for new trial, huh? Before record and briefs.

MR. WATSON: Bill, I think that's as important

as the first thing you're talking about. I really do.

MR. ORSINGER: Really what Skip is saying is that since this is a final judgment they're looking at Rule 329b.

MR. WATSON: Correct.

MR. ORSINGER: And so what we ought to do to really get the signal to the people where they read it is to either put a comment or a subdivision in 329b saying that the filing of a motion for new trial will not extend the time for perfecting an appeal in the following cases: Accelerated appeals under Rule 20a, you know, termination cases under Family Code section so-and-so. That's where -- if Skip is right and they're blowing it because it's a final judgment and they're filing a motion for new trial, that's where we need to say it.

PROFESSOR DORSANEO: Well, you know, I thought for years we ought to take that appellate stuff out of 329b myself, but --

MR. WATSON: That's the reason I said comment, Bill.

MR. LOW: But, Richard, if we put one in there like that then we've got to include every other thing like that, because if we overlook one or one is put in we don't know about it, then it's misleading. So if you name one, it's like you've got to be sure and name them all, and, you know, that's

fine if we can do that.

MR. YELENOSKY: There's one in here you mentioned, mental health commitments. That's a 10-day appeal --

PROFESSOR DORSANEO: Yes.

MR. YELENOSKY: -- and the judgment can be commitment for a year to the mental hospital, 10 days to appeal that.

PROFESSOR DORSANEO: Well, I tried to deal with that in the comment; and I understand there's another one in the Elections Code that has five days, from a footnote in D.B.; and I don't know if there are many more of these animals out there; but the 329b problem, I think that does need to be -- does need to be fixed, but I think there may be other things that need to be done to 329b. That appellate language is in there, it's in there from before appellate rules really.

CHAIRMAN BABCOCK: Justice Duncan.

HONORABLE SARAH DUNCAN: That's my problem, is while I recognize the constitutional dimension of termination cases, whomever is appealing, their case is important. It may be just as important to them as a termination case, and I'm not in favor of doing it for one, and I've been in favor for ten years of having a comment that collects all the cases and that the Supreme Court knows we've got to go through this comment every legislative session and see if anything else has been

added to it by statute.

CHAIRMAN BABCOCK: Anybody else got any comments? Bill.

MR. LOW: If you're going to put a comment, you might just put there are orders that appear to be final that may, you know, be governed by that and then the statutes must be referred to that involve it or something like that, but don't name one, I mean, and if people don't know what statutes affect it then, you know, I don't know.

PROFESSOR DORSANEO: Well, you could -- I mean, it's easy to put comments to Rule 26. Then you go why is quo warranto over here singled out to have a special paragraph? I mean, that really seems like a thing that will never happen.

MR. LOW: It really is, but --

HONORABLE SARAH DUNCAN: It's a whole different type of proceeding.

PROFESSOR DORSANEO: But it's accelerated primarily because of the statute, isn't it?

HONORABLE SARAH DUNCAN: I don't think so. I think it's --

MR. LOW: By putting it there, maybe that's what misled all these other people. They don't see the other things, so maybe that's causing a problem.

PROFESSOR DORSANEO: You could either change 28 or change 26 or both. You either -- the way the Legislature

has speeded things up, sometimes they said, "This is governed by the rules for accelerated appeals," and I agree with Justice Gaultney that they probably do mean no motion for new trial to extend anything, no necessity to make findings of fact, but you can if you want. On other occasions they just say, "Well, you just have to file a notice of appeal within 10 days" or something shorter, picking their own new, shorter timetable.

My plan or suggestion was to deal with those different approaches in different rules, to deal with the shortened timetable in 26.1 by adding a (d) that said, you know, like Hillstreet Blues, you know, "Be careful out there because you might be on a faster track than you think you're on" and give some notice in the comment, which presumably we could write at least once to be reasonably comprehensive and not be able to correct it every time.

You know, what it takes me -- I do remedial work on my own stuff when statutes come out. It usually takes me two sessions, right, to get things straight. You know, you get them straight, but then by the time you get everything down it takes another two years or another year before you catch up, and I think that's happened to a lot of people in a lot of different contexts.

CHAIRMAN BABCOCK: Okay. Is the sense of our committee, full committee, that 28.3 with the comment is a worthwhile thing to have? Is there any dissent from that?

Okay. Is there any specific language that we don't like in the rule that Bill has drafted?

PROFESSOR DORSANEO: I have a question of whether you -- how closely you want me to track it. Do I need to put in the precedence language, which really doesn't do anything other than encourage the court of appeals to give this special attention but doesn't mandate any particular time. My thought would be that that language, although it's in the statute, maybe is not necessary and --

CHAIRMAN BABCOCK: Well, this is just an advisory rule, really.

PROFESSOR DORSANEO: Huh?

CHAIRMAN BABCOCK: Isn't this just really an advisory rule that "Hey, watch out"?

PROFESSOR DORSANEO: Well, no, it's an advisory -- the statute is some advisory to the court of appeals and then some you have your -- it will be 20 days and other procedures will apply, and that's what's creating the problem, and these are mandatory appeal perfection requirements.

CHAIRMAN BABCOCK: Justice Hecht.

HONORABLE NATHAN HECHT: But I assume that the purpose of the Legislature in choking times and making accelerated appeal rules applicable is to speed things up, and that's a legitimate concern, but you -- I doubt their concern is or I doubt that their goal is that people can take strategic

advantage of this and lie behind the log, particularly repeat litigants like -- I'm not criticizing DPRS, but they do these cases all the time, so they know the rules and they can sit there and wait until the time has run and then say, "Well, King's X. You blew it."

And maybe some consideration should be given to saying that the same procedures apply, and if somebody wants to pursue -- if somebody wants to speed it up, they should complain about that. They should say, "Don't wait for the motion for new trial to be ruled on." They should call it to the court's or the appellate court's attention in some way so that if a person is not gunning fast enough because he just doesn't know any better, then this would call it to their attention; and if he's not going fast enough because he's dragging his feet, then it would force the mechanism to go faster.

But there ought to be some way to take out the "gotcha" part of it where it never happens. And other than just, you know, abject incompetence and bad faith, but I wouldn't -- I'm worried about just trying to marginalize it and saying, "Well, we'll make a note here and then it's going to only happen to the people who can't read the rule"; but, you know, a lot of those people are not going to think to read this rule about that. They're not even going to look at the comment, and I wonder if we shouldn't look -- at least consider

a more aggressive mechanism that says, "Yes, if you want things to move along quickly, all you have to do is say so and by law they will move quickly," but if nobody says anything, we're just going to chug along by the ordinary rules and nobody is getting hurt because that's the best anybody wants.

And I'm not sure whether the Legislature has by referencing the accelerated rule, accelerated appeals rules, intended to incorporate those procedures as they stand into the statute or whether they mean for the rules process to make sure that these are accelerated in the appropriate way, if you see the difference. In other words, they can say, "Apply the rules that you usually use for accelerated appeals," but then if we go back in and change those rules then arguably we've changed the status that they were trying to incorporate in the statute, but I doubt they were trying to do that. I imagine what they were trying to do instead was to say this thing should go fast, and it's up to you to figure out how to make it go fast.

MR. LOW: Are you suggesting that, in other words, it's an accelerated appeal, but unless somebody files notice that they are going to take advantage of that, that it's not invoked and then you would go under the other?

HONORABLE NATHAN HECHT: Right.

MR. LOW: In other words, propose a little -- the Legislature said, and that's what it is. You've got it, but you don't have to take advantage of everything you've got.

So in order to take advantage of it, you've got to file a notice.

HONORABLE NATHAN HECHT: For example, we get petitions all the time where for one reason or another the parties aren't interested in moving it along, but there's a statute that says you will stop everything else you're doing and rule on this before you quit work that day, literally. I mean, it just says "Stop and rule on it," but the parties haven't called it to anybody's attention. Well, maybe it's because they're trying to settle or maybe it's because, you know, they want something -- waiting for something else to happen, so there may be reasons, because usually if somebody is in a big tooth they come in and say, "We need to know by day after tomorrow and we're entitled to know that because we've got a statute here that tells us that we get that."

So I wonder whether this automatic stuff that's hidden in the rules and is made worse by accelerated appeals from final judgments shouldn't have to be invoked, somebody ought not to have to come up and say, "Look, we're putting this on a fast track. Now you know. It better be done by this deadline."

CHAIRMAN BABCOCK: You think you do that by rule?

HONORABLE NATHAN HECHT: Yeah.

MR. LOW: Because under the Government Code, if

we say to the extent this may be inconsistent, if we pass something like that and it is inconsistent and under the Government Code that trumps over, you know, the Legislature, I've forgotten what section. I don't think it's inconsistent, but if the Legislature does, we have to give them notice we've done that, and then once we do that, they don't like that, they can do something about it. I don't think they would, and to that extent it wouldn't be a conflict, so we can do it, don't you think?

CHAIRMAN BABCOCK: Stephen.

MR. YELENOSKY: Well, if we can do it by rules, it seems only to make sense because surely the Legislature didn't intend to create a "gotcha" for parents who have just lost their parental rights or the person who has just been committed. They intended to give that person an opportunity to more quickly potentially reverse that decision. So it should be a situation where the lawyer knowingly can move quickly, and if the lawyer doesn't move quickly because he or she doesn't know, perhaps their client has a malpractice claim that they didn't do it more quickly, but they don't have a claim they lost their opportunity to get the kids back. They just have a problem that it was too slow

CHAIRMAN BABCOCK: Skip.

MR. WATSON: I want to be clear on what Justice Hecht is thinking about. Everything Steve said I'm sure is

absolutely correct. I also think in the point about the kids that it's not just for the parents. It's for the kids to find out as quickly as possible who mama and papa are and not be in limbo.

Now, if that's the case and the statute says you are going to use the rules on accelerated appeals and there's no way to finesse that, then it sounds to me like what perhaps you're suggesting is to say you go into the accelerated appeals rules and make them an opt in/opt out type of thing where you invoke the accelerated appeal for it to happen, otherwise I don't see how you line up with the statute that says these rules shall apply.

HONORABLE NATHAN HECHT: No. What I'm saying is the Legislature is doing one of two things. When it says, "Treat this as an accelerated appeal," whatever that means, then as the rules stand now that means 1, 2, 3, 4, 5; and so they either mean by that reference 1, 2, 3, 4, 5, or they mean treat this as an accelerated appeal, whatever that may come to mean from time to time, which may be 1, 2, 3, 4, 5, 6, or we may take 3 out, so that it's not a static thing.

And because they're trying to lift this process out of the rules to fit different kinds of litigation, it may be necessary to adjust those procedures in response to that, and I'm not sure that that's contrary to the legislative purpose. So I'm not saying you could opt in or opt out.

You've got no choice. But unless somebody complains, we're going to go -- we're going to assume that everybody wants to go by the normal process; and surely there's an ad litem in a parental termination case, and you have the parents, and you have the department; and so everybody has got a seat at the table; and if somebody wants to go faster, all they have to do is say, "Go faster" and they would be entitled to that. But until somebody said that, you wouldn't lose you're rights by filing a motion for new trial. Maybe the other side wishes that a new trial would be granted and doesn't mind waiting to see what the judge wants to do

PROFESSOR DORSANEO: The problem is you can't go faster after you've already not gone fast enough.

HONORABLE NATHAN HECHT: Well, you have to say from that point forward

PROFESSOR DORSANEO: I would like to draft it like that, because, frankly, despite the language in these statutes when we had this discussion, I think based on your interpretation of legislative intent you could just simply say that you can do it this way or you can do it the other way unless somebody complains, and I won't call it optional because that would be the wrong thing to call it, but I'll draft it like that.

HONORABLE SARAH DUNCAN: Well, I have a question. Are you saying that if a statute gives a party five

days to perfect an appeal that we can somehow write the interlocutory appeals rules to obviate that?

HONORABLE NATHAN HECHT: Well, we've already got in the accelerated appeals rules that you can file for an extension of time within a certain period of time under certain conditions.

MR. ORSINGER: But you set that at 90 days.

HONORABLE NATHAN HECHT: I think if the Legislature says five days, no bounty, if they go through in detail and say, "We want it like this and there's no two ways about it" then I don't know there's anything you can do about that. But I think if they just incorporated the accelerated appeals rule and say, "This should be treated as an accelerated appeal" then they're leaving it up to the rules to say what those procedures were. So if we came in and said, "Well, we think -- it's always been 15 days to file a motion for extension, but we've thought about it some more and now we think it should be 20 or 10," that the statute, having been passed while it was 15, doesn't keep us from changing it

CHAIRMAN BABCOCK: Well, Bill, do you think you can take a run at that languagewise?

PROFESSOR DORSANEO: Yes. But I -- yes, I do

CHAIRMAN BABCOCK: Okay. Well, listen, we've absolutely worn out our court reporter. Sorry about that.

THE REPORTER: That's okay.

CHAIRMAN BABCOCK: One order of business before we adjourn, I've had several people come up to me and volunteer for the special subcommittee on the electronic filing, and I've also thought that it was important to maybe have a couple of either court of appeals judge or at least a former district judge. So I thought Orsinger, since he's already Chair and he volunteered, could continue as Chair, and Lamont Jefferson can be vice-chair, and Andy Harwell and David Jackson and Bonnie Wolbrueck and Justice Bland and Carlos Lopez, and anybody else who wants to join that group just let me know.

There will also be a couple of ex officio members, Peter Vogel, who is Chair of the committee; and, Lisa, you told me somebody else.

MS. HOBBS: Maybe Margaret Bennett.

CHAIRMAN BABCOCK: Mary Margaret Bennett?

MS. HOBBS: Margaret Bennett.

CHAIRMAN BABCOCK: Margaret Bennett. If you'll take into account those people and give Richard the information, and so hopefully you-all can report to us on that at our next meeting, and Justice Hecht.

HONORABLE NATHAN HECHT: Did we talk about destruction of court records?

CHAIRMAN BABCOCK: We haven't talked about that

HONORABLE NATHAN HECHT: Can I just take two minutes?

CHAIRMAN BABCOCK: Sure, yeah.

HONORABLE NATHAN HECHT: And say back in the late Nineties we had a task force to consider when and under what conditions the trial courts could destroy records, everything they've got, which is court filed pleadings and things like that, discovery, when sometimes it was filed and sometimes it went over the years, and exhibits that were maybe used at trial or offered in motion for summary judgement or whatever.

The committee reported back that we ought to be pretty free in allowing the clerks to do that if they want to, and Judge Mark Davidson filed a dissent, and there was some concern on the Court that we might be moving too fast here and we might be destroying a bunch of stuff that we shouldn't be throwing away, so we didn't do anything. And now time has passed us by, and it is possible for the clerk -- for some of the clerks at least to digitally image the court file itself, the pleadings and orders and that sort of thing. It's possible for them to do everything except for the exhibits, but they don't want to go to the trouble of doing discovery, and there's nothing left to do about exhibits.

So, anyway, the problem has now reduced itself somewhat, at least in major cases, and the Harris County District Clerk, Charles Bacarisse, has proposed a little different document destruction and exhibit destruction policy

that perhaps the clerks would give notice and it would be printed in the *Bar Journal* that if the lawyers don't come get their exhibits within a certain amount of time they're going to be destroyed, except a judge could stop it if it was a historic file or some other reason like that.

But, anyway, we need to get that back on track because while the clerks are doing what they can to try to minimize the storage expense of records, this is still a problem. So back here on the back shelf before you leave, please, are some proposals in that regard, and we'll want to get feedback on that at the next meeting.

CHAIRMAN BABCOCK: Great. All right. We'll do it.

Well, if there's nothing else, we'll be adjourned; and thanks, everybody, for coming; and there's no meeting tomorrowing as we've previously told everybody.

(Meeting adjourned at 4:49 p.m.)

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**CERTIFICATION OF THE MEETING OF THE SUPREME COURT ADVISORY COMMITTEE**

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I, D'LOIS L. JONES, Certified Shorthand Reporter, State of Texas, hereby certify that I reported the above meeting of the Supreme Court Advisory Committee on the 13th day of August, 2004, and the same was thereafter reduced to computer transcription by me.

I further certify that the costs for my services in the matter are $ 1,973.00 .

Charged to: Jackson Walker, L.L.P.

Given under my hand and seal of office on this the 27th day of August, 2004.

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