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MEETING OF THE SUPREME COURT ADVISORY COMMITTEE

June 2, 2006

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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 2nd day of June, 2006, between the hours of 9:04 a.m. and 11:38 a.m., at the Texas Association of Broadcasters, 502 East 11th Street, Suite 200, Austin, Texas 78701.

INDEX OF VOTES

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

Documents referenced in this session

06-4 Proposed Rule 21 draft (6/1/06)

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CHAIRMAN BABCOCK: All right. Everybody ready to get started? Thanks for being here today. This, as you can tell, is going to be a short meeting. We will certainly be done by noon and probably before that, and so without further adieu Justice Hecht will, as is tradition, give us his report on what's happening.

HONORABLE NATHAN HECHT: I only have to tell you that --

CHAIRMAN BABCOCK: Easy.

HONORABLE NATHAN HECHT: -- which some of you may know, that our former rules attorney, Lisa Hobbs, is expecting in August. She is now general counsel to the Court, so that's an exciting time for her; and one of our members, you may have heard, Kent Sullivan has decided to be First Assistant Attorney General to Greg Abbott, which I called Greg the other day and told him that if he had any more positions open over there I'd give him a list of the judges we would prefer he pick from and leave our good ones alone, but we're going to miss Kent on the bench, but he'll make a wonderful contribution over in the Attorney General's office.

CHAIRMAN BABCOCK: Great. Rule 21, whether we -- yes.

HONORABLE DAVID PEEPLES: Before we move

away from that, could I make a request? I would be interested in seeing a list, if it could be gotten, of the various proposals we've voted on and sent to the Supreme Court and we've never heard anything back on.

HONORABLE NATHAN HECHT: Okay.

HONORABLE DAVID PEEPLES: Just a list.

CHAIRMAN BABCOCK: Over what period of time?

HONORABLE DAVID PEEPLES: Pick a date, but at least five years.

CHAIRMAN BABCOCK: From the date of the recodification?

HONORABLE DAVID PEEPLES: Well, five is a good number, but --

HONORABLE NATHAN HECHT: Okay.

HONORABLE DAVID PEEPLES: There is a lot of it, and frankly, some of them don't deserve to be implemented, but I would just be interested in seeing --

HONORABLE NATHAN HECHT: Okay.

HONORABLE DAVID PEEPLES: -- a list of them, and I think all of us would like to know what's happening.

HONORABLE NATHAN HECHT: I would be happy to before the next meeting.

CHAIRMAN BABCOCK: Okay. Next meeting, so don't miss it.

MS. SENNEFF: August 18.

CHAIRMAN BABCOCK: Huh?

MS. SENNEFF: August 18th.

CHAIRMAN BABCOCK: August 18th and 19th. Okay. Back to Rule 21, and it's Richard Orsinger's subcommittee, but I think Judge Sullivan has been carrying the laboring oar. Who wants to talk about it?

MR. ORSINGER: Just to lay some groundwork, at the meeting, the last meeting we had, on April 14 of 2006 we took a vote on Judge Sullivan's suggestion that we shorten the -- pardon me, lengthen the minimum notice required for a hearing, and by a vote of 26 to 6 it was agreed to lengthen it, but the question of whether it would be 5, 7, or 10 days was somewhat in dispute, and we took a vote on 10 days, and it won by 14 to 13, and there were arguments for shorter days.

And then we had the issue about the response deadline being three days before the hearing and a lot of timing issues relating to that, like if you served your response by mail does that mean that it had to be done six days in advance, how are we going to handle weekends, what are we going to do with the fax rule on both of these rules, because if minimum notice is 10 days, do we want to add three days for mail and fax or do we absorb that out of the three; and with that stage being set then Judge Sullivan has recrafted this rule and is going to explain

it this morning.

CHAIRMAN BABCOCK: Judge Sullivan.

HONORABLE KENT SULLIVAN: We have an updated version of the proposal that was laid before this committee the last time. There are a few changes. I don't know to what extent the subcommittee had some opportunity to look at this and whether there is any additional work product that we ought to consider because all I've attempted to do is, through the help of various people who have commented and stealing ideas from one place or another, just try to update and further clarify the proposal that was on the table before.

A couple of things I guess I would point out in terms of what was made available to everybody yesterday and I guess this morning, in the list of exceptions there is some attempt, I guess, in that first paragraph to provide some greater clarity. There are a few language changes made at the suggestion of various individuals, but nothing substantive. With respect to the list of exceptions there are four that are explicitly shown. There are -- so there is some difference.

Under subsection (3), it specifically references written motion and leave of court for cause shown. It was at the suggestion of various individuals that we not use the term "good cause." That can be the

subject of some additional debate today, but to intentionally lower the standard and simply say "for cause shown"; and No. (4) was "upon order of the court for cause stated and entered of record." The intent there, again at the suggestion of various individuals, was to ensure that the court had discretion to take action even in the absence of a written motion.

HONORABLE STEPHEN YELENOSKY: How many days do have you to give notice of the written motion to get an order shortening the period?

HONORABLE KENT SULLIVAN: There is nothing specified. It's like any emergency motion you would file now. I mean, that's the intent, and let me say one thing, is that there is no question that any new rule will raise some questions and is bound to have some degree of ambiguity. Obviously the advantage point from which I start is the question of can we improve upon what we've got in terms of a rule intended for statewide application and against the backdrop of a rule that is -- that has some significant age on it and really was not crafted in an era that contemplates interstate and even international commerce and dispute resolution.

I went through that before in the context of some of the remarks we made in the last hearing, so I won't repeat any of that, but I hope we don't let --

what's the old saying -- the perfect become the enemy of the good, because I do think that having something to provide some greater certainty, some enlargement of time and some sense of order with respect to increasing the expectation that everyone would know what was at issue in a hearing before the court, would improve circumstances and it would certainly be an improvement I think from the trial judges' perspective to have all of the materials that are going to be at issue in the hearing available to the court for review in advance of the hearing. That's the intent. That's the backdrop of this.

One last quick point was there were some issues raised the last time about trying to clarify that no written response is required, that this was not some sort of a paper work requirement for increase in paper work or a burden, and that was intended to be resolved by way of pointing to any desired written response, making it -- intending to make it clearer that if someone simply wants to appear at the oral hearing and make oral argument they could.

I will tell you that I tried to access the website and pull up the transcript and just wasn't able to do so when I needed to, and I did go back subsequently. I was able to catch it later, and I think it was -- I think it was Pam's language that was even more explicit on that

point, which is also fine, that she had made a suggestion at the last hearing, which I couldn't remember and couldn't access when I needed to, to the effect of making it very explicit that there was no waiver of your right to appear and make oral argument by not filing a written response, although I would hope that would not be an issue, and I actually have that language now if someone wants to substitute one for the other, but that's where I am, Mr. Chairman.

CHAIRMAN BABCOCK: Okay. Great. The -- has everybody received the input of some members of the family bar who yet again want to be exempted from the rules?

MR. ORSINGER: We didn't -- I was not able to get the proposed draft circulated to the entire family law counsel until late yesterday, and only the ones who were still around at 5:00 o'clock who cared responded. I expect to have a deluge of e-mails today.

CHAIRMAN BABCOCK: I thought I saw the hand of Richard Orsinger at work in these e-mails.

MR. ORSINGER: Well, it's the question of whether you want them inside the tent or outside, and so the four or five e-mails I did get, which I forwarded to Jody and he's printed up here, I think were opposed to a 10-day period because of the kind of sensitive nature of some of the matters that come up in family law court. I

received one that was kind of lukewarm or ambiguous and suggested that the family law judges adopt the submission docket like they have for civil cases in Houston; and then we did get one e-mail that I had nothing to do with from Judge Martin, who is a senior judge or retired judge and who apparently has quite a background, if I remember this correctly, if this is the right one, in family law matters; and he was -- as you can see from his e-mail here, he was opposed to lengthening those matters for family law.

Now then, a factor to consider is that in the past there have been exceptions made for family law practice. The Rule 76a is a perfect example of it. Cases that are brought under the Family Code are exempted from the public notice requirements to seal court records, and there are, of course, legitimate public policy reasons to maybe protect the kinds of issues that are litigated in family law cases and treat them a little bit differently from tort and contract litigation.

On the other hand, there is a view that we should write a rule that will apply to most of the practice, and in the Bexar County courts the bulk of the cases that are being heard now are family law by a wide margin; isn't that right, David?

HONORABLE DAVID PEEPLES: (Nods head.)

MR. ORSINGER: I mean, I've heard something like 85 or 90 percent of the docket is family law now. Is that an exaggeration?

HONORABLE DAVID PEEPLES: The nonjury docket that's probably correct.

MR. ORSINGER: Now, in a lot of other larger cities they differentiate civil courts from family law courts, but I suspect that the family law docket does consume quite a larger part of the civil trial docket than it used to because of mediation, arbitration, and the diminishment of med mal cases and bad jury verdicts on plaintiffs' cases generally. So in a sense the rule we crafted, probably you're going to primarily have an effect on family law cases; and then I guess one last thing to remember is, is that if the family lawyers get too upset about a rule they typically will go to the Legislature for a fix; and there is nothing sure about going to the Legislature for a fix, but if this committee or this -- if the Supreme Court adopts a rule that the family lawyers truly find intolerable collectively they will probably go to the Legislature for an exception, so in a sense that's a safety valve if it's the decision to apply the rule across the board and then they just can't live with it. So I guess the e-mails kind of speak for themselves, and I'll forward to Jody more, and he said if we get a lot of

them he'll summarize them and submit them rather than giving you copies of all of them.

CHAIRMAN BABCOCK: Richard, what's your feeling? You do a lot of family law practice.

MR. ORSINGER: You know, Chip, I think that in some courts it's going to make a big difference and others it won't. Like in Dallas, for example, sometimes it takes two weeks to get a hearing in a family law court. In most of the cities that have dedicated family law courts each judge runs their own docket, unlike San Antonio where there is a central assignment and you can get a hearing on a motion in three days. You just -- any day of the week, unless it's a judicial conference week, you can get a hearing in three days on a motion, but in Dallas and in Houston and other places with the dedicated family courts that run their own dockets you can't get a hearing on three days and often not inside 10 days anyway. So if you're in a court where your next hearing date is out 10 days to two weeks, unless it's an emergency this isn't going to affect the practice other than it's going to make lawyers do their written work in advance of hearing.

CHAIRMAN BABCOCK: Uh-huh.

MR. ORSINGER: And that is a little bit of a concern for me for family lawyers because a lot of family

lawyers are not making enough money on the case and the clients don't have enough money to really warrant the same preparation that you would get representing a commercial client or an insurance company, and so a lot of family lawyers I think tend to deal with tomorrow's problems today and they will deal with next week's problems next week, and so if you have a response deadline that is three days and if we add three -- if we make it six because it's going to be served by fax, then I think a lot of family lawyers are not going to get responses filed.

Now, after the current generation of family lawyers gets old and retired and the new ones come on board with that rule I'm sure it will no longer be a problem, so I'm sure that time will correct that, but I think a lot of the reaction of the family lawyers is, number one, emergencies come up a lot, and number two, they're not used to preparing their cases that far in advance, so I don't know.

HONORABLE STEPHEN YELENOSKY: Richard, the other central docket, in Travis County, by local rule the announcement period starts, they pick their time, and you've got to set it before that anyway, so it comes out to 10 days in Travis County at least, just to make a point that we differ from Bexar County on that, and that applies to family cases because we don't have dedicated family

courts.

MR. ORSINGER: Yeah.

CHAIRMAN BABCOCK: Could exempt family cases in Bexar County.

MR. ORSINGER: No, I don't think you should do that. Don't try to take away the central assignment docket, please, but I think that, you know, we can practice law the same way that everybody else does.

CHAIRMAN BABCOCK: Yeah, Judge Christopher.

HONORABLE TRACY CHRISTOPHER: I actually went and read through the local rules book to see what other counties are doing because --

CHAIRMAN BABCOCK: You're easily amused.

HONORABLE TRACY CHRISTOPHER: I was -- I read the transcript and was -- you know, felt that Houston was sort of getting a bad wrap on requiring responses and the 10-day requirements, so I wanted to see if we were the lone county doing this, and we're not. So I would just like to put that in the record that we're not.

And, for example, Angelina says "motions and responses shall be in writing." Okay. Brazos requires at least 10 days notice for a hearing, as does Comal. Crockett, the date has to be agreed for a hearing, and Bexar says three business days between service and the hearing date. Dallas says "briefs not filed and served

likely will not be considered." El Paso says "failure to present a response with supporting authorities in a reasonably timely manner may cause such arguments to not be considered by the court," and they have the same system that we used to have in Houston where you first put it on submission and then you have to request a hearing, and you get at least 10 days to even request a hearing in El Paso.

Fort Bend has the same language that Harris County has, "failure to file a response may be considered a representation of no opposition." Galveston has that same language. Guadalupe, hearing date must be agreed. I really like those small counties that require that. I don't know how that works.

We've talked about Harris County. Harrison requires at least 10 days notice. Jefferson requires 10 days notice in civil cases. Montgomery has the same failure to file language, no opposition, response two working days before. Smith, 15 days submission docket and you have to request a hearing before you actually ever get a hearing, with the response two working days before and the failure to respond equals no opposition language. Upton, Sutton, Pecos, and Reagan all have to have an agreed hearing date.

So Harris County is not alone in, A, requiring responses be in writing and, B, having the time

limit extended in most cases, but I did want to ask about -- and then so many of these counties have separate rules for family courts; and I focused mainly on looking at the civil court rules versus the family court rules in terms of what I looked at; and so I guess what I would like to know with respect to the family court, rather than exempting them totally with respect to this is there a class of motions like -- because I don't do family work and I'm not really sure what they're all talking about, but everyone is always talking about temporary orders in the family law local rules, which I assume those sort of things would have to do in an emergency basis, but I would think most motions in family court, you know, discovery disputes, any other sort of, you know, routine motion that we see in civil could be subject to the same 10 days. I don't understand why that would have to be different, and I guess I just don't know enough about family law practice to understand that.

MR. ORSINGER: Let me respond on the temporary orders. Usually the temporary orders are the first thing that are heard in the case, and usually they're heard as a result of the service of the citation and a TRO, and the TRO expires at the end of 14 days, and so you're always struggling with getting the hearing set out far enough to get service but within the 14-day period

when the TRO expires. It would be completely unworkable to require responses on temporary restraining order hearings to be filed three days in advance of the hearing, especially if it means six unless it's hand-delivered, because sometimes people don't get served until three or four days before the hearing, and sometimes they don't get a lawyer hired until one or two days before the hearing.

HONORABLE STEPHEN YELENOSKY: You said temporary restraining orders. Do you mean the temporary orders? Because temporary restraining orders are usually --

MR. ORSINGER: The temporary restraining order as a matter of custom is always accompanied by notice of a temporary hearing.

HONORABLE STEPHEN YELENOSKY: Right, but you said to file a response in advance of the hearing on the temporary retraining order.

MR. ORSINGER: Oh, let me restate it. Thank you. To file a response in advance of the hearing on the temporary orders, which involves formalizing the temporary restraining orders, so if we absolutely have to have an exception in family law probably that's it. If you create a stated exception that emergency motions do not have a 10-day minimum requirement or a three-day requirement for filing a response, that probably would be workable, but I

think that lawyers will overuse what constitutes an emergency, but even if you don't state that exception, I believe that they're going to create that exception anyway by filing emergency motions for this and that and the other.

HONORABLE TRACY CHRISTOPHER: What I'm saying is, is there a way to describe the kind of motions in family court that you consider on a routine basis need to be heard on a shorter time rather than exempting family completely --

CHAIRMAN BABCOCK: Judge Sullivan.

HONORABLE TRACY CHRISTOPHER: -- from it.

HONORABLE KENT SULLIVAN: I think consistent with Judge Christopher's remarks just a moment ago, that problem that Richard is identifying is one that already exists in all of those counties, because effectively you are asking to be exempt from all of those local rules that she began by reciting, so it's a problem that is already out there in specie.

HONORABLE TRACY CHRISTOPHER: Well, I can't represent that everything I recited applies to family.

HONORABLE KENT SULLIVAN: No, I --

HONORABLE TRACY CHRISTOPHER: Because, you know, some divisions have civil rules and family rules --

HONORABLE KENT SULLIVAN: Right.

HONORABLE TRACY CHRISTOPHER: -- like Harris does, for example. I don't think our language about failure to file a response is in the family courts. I could look, but I don't think it is.

MR. ORSINGER: Without knowing, I'll bet you some small amount of money that it doesn't apply to temporary hearings because you never know when you're going to effect service. If the other spouse is trying to avoid service you may be tracking him for four or five days and get him one or two days before the hearing.

HONORABLE KENT SULLIVAN: Let me ask one quick question about this, because this was identified and described in the context of the issuance of a TRO and the necessity of a hearing, which, of course, I think of in the context of the rules dealing with both TROs and temporary injunction hearings. Do they encompass the sort of relief that you're talking about, Richard? In other words, are these hearings already dealt with by way of existing rules on TROs and TIs?

MR. ORSINGER: I don't have an answer to that.

HONORABLE STEPHEN YELENOSKY: They are in Travis County. Does anybody here practice family law in Travis County, because I get a little small diet of it, but I can't see -- I mean, they have to comply, as I said,

with central docket rules generally, and they don't have to comply with them when there is a real emergency.

TROs are signed routinely -- actually, we have a standing order so we no longer really sign TROs. You get a standing order. They can come in and get an order setting a temporary orders hearing prior to the answer, but that would fall in this rule because it's an order of the court setting the hearing. They come in on emergency writs of attachment to get the children, which are emergencies. They come in on TROs to stop the other -- the other spouse from taking the laptop and all the client confidential information that the estranged attorney husband has on his laptop. All of those things happen in the general course of dealing with emergency matters. In Travis County that goes to a particular judge who is assigned for emergency matters, and it's outside of the central docket.

HONORABLE KENT SULLIVAN: Would exceptions (1), (3), and (4) be enough to not sweep that in and take care of it?

HONORABLE STEPHEN YELENOSKY: Well, exceptions (1), (2), (3) and (4) sweep it in because some of them are also by agreement on temporary orders.

CHAIRMAN BABCOCK: Alistair.

MR. DAWSON: That was going to be my

question. Why can't the exceptions address the situation where you've got these emergency family motions. It seems to me writs of attachment and trying to protect the kids, you know, court has got ample latitude to say, you know, we're going to waive the 10-day rule.

CHAIRMAN BABCOCK: Buddy.

MR. LOW: We don't have a provision in our rules like we do in Appellate Rule 10(e). Appellate Rule 10(e) has a 10-day provision, but says expressly that an exception is an emergency. We don't have that and our courts may create that and so forth, and I think we should also -- I don't have any suggestions; but it should be pointed out, as Kent earlier pointed out, that most of the local Federal rules, Federal courts, have 10 days, but they have what is called a hotline. You can get a hearing like that. We don't have a hotline.

Secondly, I think we should at least show on the record that we did read Federal Rule 6, which gives five days. Nobody has discussed that. The Federal rule itself is five days, and the Federal rule says an exception is ex parte. That is Rule 6. Federal Rule 78 provides that the judge at any time, as the judge considers reasonable, may set a hearing. In other words, it's not cause. The judges just set it, so I think we should also consider something besides just the effect of

the family law, but we should consider what the Federals have done and what they're now doing, and I don't have any suggestions, and I'm not against it, but I just want the record to show that those are things that are in existence now that we need to be cognizant of.

HONORABLE STEPHEN YELENOSKY: Ex parte, there is no notice of hearing.

MR. LOW: Well, but, see, we don't have any such thing in the state rule. Federal rule does provide ex parte.

HONORABLE STEPHEN YELENOSKY: I'm just saying this rule wouldn't apply to something that's ex parte.

MR. LOW: Well, you're not supposed to have ex parte at all.

HONORABLE STEPHEN YELENOSKY: TRO says you have can ex parte.

MR. ORSINGER: Why wouldn't you have to meet the notice requirement on an ex parte? It's not evident to me that this language doesn't require 10 days notice of a hearing even if it's set ex parte; and, furthermore, the response deadline, which doesn't exist under the current rules, it's not apparent to me that your response isn't due at least three days in advance of a hearing that was set ex parte.

MR. LOW: But, Chip, I really want to see if we should provide, quote, for an emergency, like the -- and I can tell you that whatever we do is not going to change locally what is being done. They're going to have hearings at short notice, and this is going to be as long as you allow local rules.

HONORABLE STEPHEN YELENOSKY: I didn't understand the ex parte part. People come in with TROs and ask to have them signed, and they don't get three days notice or --

MR. LOW: Well, Rule 6(d) of Federal court say "as written motion other than one which may be heard ex parte."

HONORABLE STEPHEN YELENOSKY: Oh, well --

MR. LOW: I don't know -- I don't know what they're talking about. I don't find any cases on it, but they recognize it I guess. I don't know.

CHAIRMAN BABCOCK: Judge Peeples.

HONORABLE DAVID PEEPLES: Yes. I think what the status quo right now is that by local rule in family law cases and sometimes in civil cases generally, different counties have said we're going to require more notice than three days, and I'm thinking the way this proposed new Rule 21 is drafted, if we go with 10 days, the courts could say by local rule in family law it's

three days. I mean, that would be an order of the court, so I think that if we draft it that way courts could opt out of the 10-day rule in family law or other matters for something shorter. That's point one. I think --

CHAIRMAN BABCOCK: Would there be any reason why a county couldn't opt out of the 10-day rule?

MR. ORSINGER: Well --

CHAIRMAN BABCOCK: If we wrote it that way.

MR. ORSINGER: Theoretically it requires the Supreme Court's permission to opt out of a statewide rule, although I have found that many family law judges are not aware of that limitation on their power.

CHAIRMAN BABCOCK: Okay.

HONORABLE DAVID PEEPLES: Just to be sure we know what temporary orders and TROs are about in family law cases, the ones I've seen, the ones that are issued ex parte say things like no violence, don't strip the bank accounts, things like that, and there is a long list of them; and then the three days or less sometimes temporary orders hearing will deal with things like who gets to live in the house right now, who gets the car, not the several cars but the car, who is going to pay the bills, who is going to, you know, have access to these children while we're getting you a more complete hearing; and those, you can call them emergencies or not, but those have to be

heard quickly; and I think family law ought to -- you know, the typical things in family law ought to be shorter than 10 days, but I can't see how family law discovery would be different from ordinary discovery. Richard, do you?

MR. ORSINGER: No.

HONORABLE DAVID PEEPLES: Family law discovery, it ought to be like civil discovery.

CHAIRMAN BABCOCK: Yeah.

HONORABLE DAVID PEEPLES: But these garden variety temporary orders hearings have to be heard quickly.

CHAIRMAN BABCOCK: Pete Schenkkan.

MR. SCHENKKAN: It seems to me that what's achieved by this rule if we adopt it is two things. One is it sets a default or a benchmark or starting point of 10 days with the writing and the opportunity for response, and the other is that it contemplates that exceptions to that will be justified in writing by the judge. I think both of these are beneficial steps and then that the need to have flexibility of various kinds, and we've heard discussions of needs for several different kinds of flexibility. We've heard discussion of need for flexibility for an entire county that operates a particular part of its system on the basis that at least

some may think needs some matters to be handled more promptly.

We've heard that some -- in some counties the family law judges only do family law and it's judge by judge. That judge may need to adopt an order that says in my court in my family law cases we do it this way. And we hear of the need for in individual cases for matters to be done more rapidly than this, some of which any of us would probably agree constitute emergencies and others of which may not constitute emergencies, but may satisfy someone's standard of cause.

It's my notion that as drafted Kent's proposal allows this. Anything that is an emergency is clearly covered within "for cause shown," and so is a lot more that is not an emergency, but the judge has to say so, and that's true whether he's doing it in a specific case where someone has come in and said, "I need this done in less than 10 days because under (3)" or whether she's doing so because this is the way she runs her entire family law docket in that county, and she does it under No. (4), order of court for cause shown.

The only concern I have about whether we get everything we want as far as that's humanly possible and mindful of the notion that we don't want the perfect enemy would be No. (1) where it ought to be "only as otherwise

provided for by these rules" or whether it's broader than that and says "otherwise provided by law," which includes these rules and some statutes that Judge Martin calls attention to or refers to and to the possibility of local rules, if they have been properly submitted to the Supreme Court for its review and approval.

CHAIRMAN BABCOCK: Okay. Harvey had his hand up and then Judge Yelenosky and then Lonny.

HONORABLE HARVEY BROWN: One point that's similar to something Pete said, and that is I think the word "cause" is a more liberal and easier standard to meet than an emergency, so I think that's a better word than what the Federal rule has; and second, if we're concerned about maybe courts may feel the need to do this with some type of standing order then (4) would probably limit the court's ability to do that, I think, because "for cause stated" to me seems to indicate cause in that particular case, so if you wanted to give the court more flexibility to have some type of standing type of order for a particular type of problems like David listed you could just say "upon order of the court" and take out the "for cause stated," and that would give even more ability for the court to be flexible.

CHAIRMAN BABCOCK: Okay. Judge Yelenosky, then Lonny.

HONORABLE STEPHEN YELENOSKY: Well, that actually is what I want to speak against, because in general it has to do with the philosophy about local rules and standing orders. Standing orders are just things that judges want to do that they don't want to submit to the Supreme Court for approval in my opinion, and it's a false dichotomy. Then you have the courts that don't submit even local rules for approval, but we wouldn't now allow a local -- I don't think the Supreme Court, this is my guess, would approve a local rule that says under the current rules instead of three days notice you get 30 minutes notice.

They wouldn't approve that as a local rule, and calling it a standing order doesn't change the fact that it shouldn't be done, so I don't think we should -- if we think that there is a large area of practice in which there should be a shorter period, then that shorter period either should be stated in the rule or somehow circumscribed in the rule, and there shouldn't be just this blanket possibility of a standing order that essentially denies the litigants in a particular locale the amount of notice that everybody everywhere else gets, and I think that in a lot of locales where they don't submit their local rules, you know, people really are in a position to complain about that, and that's a real

problem.

I know we do. In fact, we recently submitted ours, and there was a particular problem we hadn't foreseen regarding notice involving visiting judges, and so the process proved useful, but that's a whole other topic, and I don't know if Justice Hecht wants to speak to that about local rules, but it's a concern of mine that we don't have uniformity across the state because they aren't submitted or they're called standing orders and there is some rationale that they don't need to be submitted.

CHAIRMAN BABCOCK: Lonny.

PROFESSOR HOFFMAN: I think, following on that point, I guess the comment I was going to make is I'm not persuaded yet, though I'm happy to be, that what currently exists is not adequate to achieve what you think individual judges may want to achieve; and sort of following that point, Judge Sullivan, I guess what I'm confused about is it sounds like some of the best defenses for objections to uniformity are already embodied here, which feels like we're circling back around to where we already are, so if the court can modify it and shorten it here and they can do that already in the rule, what do we gain?

HONORABLE KENT SULLIVAN: I think you gain a

lot. I think that Pete, you know, dealt with that in some of his remarks. I think three days is too short for the baseline timetable for hearings in a court of general and plenary jurisdiction. It does not give you -- particularly when the relief sought can be significant, I think it's too short.

PROFESSOR HOFFMAN: Right, and so the current rules let you change that, either by case-by-case or standing order for a local rule.

HONORABLE STEPHEN YELENOSKY: Well, not change the language.

HONORABLE KENT SULLIVAN: No, I think you've got to justify the change.

PROFESSOR HOFFMAN: Of course you can. It says at least three days. So you can always make it longer.

HONORABLE KENT SULLIVAN: That's the whole idea.

HONORABLE STEPHEN YELENOSKY: Right, but we need a baseline. We don't want to be getting -- if the norm is that you need more than three days, we don't want to get written motions requesting more time.

HONORABLE KENT SULLIVAN: Right.

HONORABLE STEPHEN YELENOSKY: I mean, that just wouldn't work.

HONORABLE KENT SULLIVAN: To me that's backwards, and the question is what is the default timetable going to be.

CHAIRMAN BABCOCK: Elaine.

PROFESSOR CARLSON: Rule 3a at least in theory as is written precludes any local rule that varies the time periods provided by the statewide rules. I realize reality may not mirror the rule, but that was the intent, that we don't have different dates in different counties.

Rule 680 that deals with temporary restraining orders provides that if it's issued ex parte then the order itself has to state the date for the hearing on the temporary injunction, and that is to be held as soon as practical, so presumptively that would trump 21, I think, on the time period; but every restraining order must set a date for a hearing; and Rule 681 dealing with just temporary injunctions, not TRO, simply provides that notice has to be given. So the way I'm looking at the structure of the rules, that then would revert to Rule 21 for the time period for the temporary injunction unless you go in and come within some of Judge Sullivan's proposed exceptions.

Rule 21a provides for the extension of time, of course, and how you serve your motion, and I guess that

wouldn't change under this. This would say you get 10 days and then you hook up with Rule 21a and add on the additional days. What I hear Richard saying and I think is a concern is -- and I agree, Judge Sullivan, three days is a very short period of time, but do we really want to enact a rule that requires in effect two hearings if you want to get your motion heard earlier? And while that's not a problem in a large commercial case, it certainly would be expensive in a domestic case, so I wonder if we just get to the number. You're shaking your head "no."

HONORABLE KENT SULLIVAN: Well, it doesn't. I mean, the whole idea is that you file a motion -- it happens all the time now when --

PROFESSOR CARLSON: What if I want to do it in four days under your proposal?

HONORABLE KENT SULLIVAN: File a written motion, you state cause. If the judge agrees with you, signs an order saying it's granted.

PROFESSOR CARLSON: So that can be done ex parte without any hearing? The lawyer just goes to the judge ex parte and presents --

HONORABLE KENT SULLIVAN: Well, no, I don't contemplate that. It's like written submission. That does happen, and what generally happens in terms of actual practice I think is that you'll make an attempt to get the

lawyers on the phone and give the other side some opportunity, but it's not routine, and someone has to justify in writing why it is they want to deviate from the rule.

PROFESSOR CARLSON: And that's fine, but you're still requiring two written motions, so do we have the right day with 10 days?

HONORABLE KENT SULLIVAN: With all due respect, I think you could encompass it all in one. You can file one document and take you up -- you know, as long as it's clearly marked, you could take up both points. I really don't see this as something that increases the paper work. I really don't. I think it increases the minimum time due, and it also increases the likelihood that you will see whatever written response someone desires to file in advance of the hearing so that both the judge and the movant have some opportunity to address that.

I mean, as I mentioned before, I think what happens now in practice too often is that you've got a situation where people actually create subsequent hearings or follow-up because they say, "I just got this, I want more time," and we end up with that, or you end up with the judge who is just handed it, the movant who is just handed it, and the judge says, "Well, I have no idea

what's in here. I will look at it and then I will rule." Suddenly the movant then is scrambling to decide was there something in there that I really need to respond to that's incorrect or whatever? So either way I think you find people under the gun, so to speak, for reasons that are not helpful that do not further the administration of justice. I just think some clarity and something that is more organized would advance this process significantly.

CHAIRMAN BABCOCK: Following up on Elaine's point, though, if I have a motion that I prepare the substance of the motion and I want to get it heard in three days and so I put in the motion there is cause to have it heard within three days, how do I get that motion set? I mean, I suppose I could call up the other side and say, "Hey, would you agree to hear this thing in three days," and they say, "Hell, no, we're not going to do that. That's ridiculous." So then how do I get it set? Do I ever get it set?

HONORABLE KENT SULLIVAN: I think it's exactly the same way you get something dealt with now that you claim is an emergency. The exact problem that you're identifying already exists because people say that they need a hearing on less than three days notice, or in the case of some of the counties Judge Christopher pointed to on less than 10 days notice or whatever the local rule

calls for that's more than three days, so I agree with you there is some ambiguity there, but it already exists. That's my earlier point about I don't think we should let the perfect become the enemy of the good, so there are idiosyncratic procedures, I think, that exist that deal with that.

Generally speaking, my experience has been that somebody files the motion that they often ask the clerk or the coordinator will the judge read it, is the judge willing to take it up, and then that judge -- you know, in a more perfect world -- I mean, my practice was, assuming that it was worth consideration, then you get both parties on the phone. Sometimes it would be summarily denied, if on the face of the motion you could tell that there was no cause at all for shortening the time period, but that's my response.

CHAIRMAN BABCOCK: Justice Gaultney had his hand up about 10 minutes ago.

HONORABLE DAVID GAULTNEY: Well, it's a minor point, but the rule as I read it does two things. One -- it creates two concerns. One is that you might want to shorten it, shorten the time to 10 days, and we need a procedure for allowing that to happen. The other is that you might want to actually enlarge the time for a response. That's the three-day problem, and we have Rule

5 in terms of enlargement of the time for the response. The rule as it's currently written says "as otherwise provided by these rules." Now, does that incorporate Rule 5 for enlarging the time for response or not? That was my only question.

CHAIRMAN BABCOCK: Okay.

HONORABLE DAVID GAULTNEY: But I will say that I'm in favor of the rule. That's just a friendly --

CHAIRMAN BABCOCK: Carl. Carl, then Pete, then Buddy.

MR. HAMILTON: As I read the rule, there are two ex parte proceedings before the court. One is under (3) on a written motion and one is under (4) if it's not a written motion, and if we're talking about (3) being all in one document I think it ought to say "upon leave of court for good cause shown in the application," because the rule starts out with an application to the court and then we switch over to (3), filing a motion, which makes it sound like they are two different things. If they're all going to be in the same document it might ought to say "upon leave of court for good cause shown in the application," and then that one document would have an affidavit or something attached so that the court could ex parte shorten the time for that motion without having a hearing on that.

CHAIRMAN BABCOCK: Okay. Pete. Do you have something?

MR. SCHENKKAN: Just -- again, I think what we achieve by doing this is we change the default setting from 3 to 10, and that's helpful, and then we need mechanisms to allow it to be changed from 10 in either direction if necessary. It sounds to me like Rule 5 adequately covers enlargement and is contemplated to be cross-referenced here, and for shorter what we've done here is we've allowed full flexibility to make the change, but we do require an explanation. That's not in there now. That is some deterrence against the kind of abuses that -- I know it's anecdote, not data, but I experience them. It's not perfect, but I don't know what is. I'd like to see us at least make the people who want, you know, to have -- who file motions in Cameron County courts at law in a case they know I'm representing the other side recite in the motion why it has to be decided in three days before I've even heard it's been filed, and maybe that will achieve some deterrence. Maybe it won't.

CHAIRMAN BABCOCK: Justice Hecht.

HONORABLE NATHAN HECHT: Just one other wrinkle. Of course, a three-day period is most -- is usually five because you don't count Saturdays and Sundays. Of course, you don't count holidays either, but

we figured out if you serve it on Monday or Tuesday it's going to be three days; if you serve it Wednesday, Thursday, or Friday it's going to be five days. A seven-day period is usually seven because unless it ends on a holiday you're not going to run into a weekend problem and you do count Saturdays and Sundays, and then a 10-day period is kind of, you know, going to be frequently longer but sometimes -- sometimes not, and I just mention that there is a project under way in the Federal system to try to lengthen these periods and omit the provisions that don't count intervening Saturdays, Sundays, and holidays, so to get it closer to what the period actually is; and to do that, of course, the period needs to be 7 days or 14 days or some multiple of 7, so that it works out that the period is usually what the period is stated to be as opposed to frequently longer because it ends in the weekend. I just -- that's going on out there, too.

CHAIRMAN BABCOCK: Buddy.

MR. LOW: Chip, let me -- I agreed with Pete, and the reason I brought up those other provisions, Harvey is in error when he says the Federal rule has emergency. It's our appellate rule is the only reference to emergency. Federal rule says "as a judge considers reasonable," and I think that Kent has probably done a better job by showing cause shown, but those are the

exceptions, and I think he's improved upon that on our appellate rule, which has to be an emergency, and upon the Federal rule which says judge considers reasonable, so I think he's improved.

CHAIRMAN BABCOCK: Judge Yelenosky, then Alex.

HONORABLE STEPHEN YELENOSKY: Well, if the problem we're addressing is three days is too short why isn't the proposal merely to replace the word "three" with "ten" in Rule 21, because everything else that's been discussed is addressing a nonproblem? We already know how to shorten from three days. There are mechanisms in place. If we're going to change the wording, it seems to me we're going to have unintended consequences. 21 has worked fine. Everybody knows how to shorten it from three days now. The only question is do we want to make them shorten it from 10 days. Now, of course, the written response part is new, but why all this discussion of how are people going to shorten it, what are the exceptions. That exists now for a three-day rule.

CHAIRMAN BABCOCK: Alex.

PROFESSOR ALBRIGHT: I have two questions. One, on No. (4), does that contemplate a blanket order that covers the group of cases or does it have to be filed in the record of each particular case?

CHAIRMAN BABCOCK: I think Kent's thought was that it had to be case-specific, could not be a blanket order; is that right?

HONORABLE KENT SULLIVAN: I think it's a decision you have to make, in all candor. In other words --

CHAIRMAN BABCOCK: As written?

HONORABLE KENT SULLIVAN: -- that's a policy decision that has to be made by the Court, and I'm not sure which is the best answer for that.

CHAIRMAN BABCOCK: But the proposal you have, Kent, is that it's a case-specific. Subpart (4) is case-specific, right?

HONORABLE KENT SULLIVAN: My original intent was case-specific, and certainly it would be my intent that if there were to be exceptions larger than that blocks of cases that they ought to be as narrow as possible. They ought to be narrowly crafted, but it's a policy decision.

PROFESSOR ALBRIGHT: And then second, okay, there are TRO and injunction rules that -- with different time periods that would apply as opposed to this, so if you did have an injunction, which would take care of a lot of these --

HONORABLE KENT SULLIVAN: Yeah, the intent

in No. (1) is to cross-reference all of those rules, and I would certainly accept Pete's proposed amendment that would broaden it and say "as otherwise provided for by law." The TRO/TI rules deal with different time lines. The summary judgment rules deal with different time lines, the venue rules deal with different time lines. There are many rules that are explicit about such things, and it was attempted to just categorically exempt all of those.

PROFESSOR ALBRIGHT: Then the next thing I'd like to bring up, you know, somebody mentioned it earlier, but we have the faxing problem that if you fax you have to add on three days. I probably get four phone calls a year kind of in spurts of just lawyers who call me and say, "Why in the world is there this fax rule? That's the craziest thing I've ever heard of," and then the next question is why haven't we dealt with e-mail?

I tend to say Judge Yelenosky's idea is better for now, if we want to now just extend the time from 3 days to 10 days as the default rule. I think Rule 21a, Rule 5, they all have a lot of issues that need to be addressed, and I think it's -- to rewrite a chunk of Rule 21, and I don't have the rules right in front of me, but there is all of these rules that are related. They are very hard to find which rules applies, and we have to keep cross-referencing each other, and I think it would not be

difficult to have a -- to have a rewrite of those rules; and that's another one, as Judge Peeples says, I think we've done it before, if we can unearth it and see what we did. I would just hate to rewrite one chunk and still leave some of these glaring problems out there. We still have the three-day rule, you know, you count weekends if it's less -- if it's three days or not, but it doesn't apply to something --

HONORABLE STEPHEN YELENOSKY: Five days or less.

PROFESSOR ALBRIGHT: And all that.

CHAIRMAN BABCOCK: Thanks, Alex. Richard Munzinger.

MR. MUNZINGER: I was going to say the same thing she did. If the problem is that we believe that three days is insufficient time, why not just change the number from 3 to 10 and not have unintended consequences. I agree that the rule is perhaps archaically expressed, but we may be causing problems that we don't anticipate, and I think Judge Yelenosky's idea of just changing 3 to 10 accomplishes the immediate purpose and leaves us free to study any side effects. Obviously the bar statewide has gotten along with the three-day rule, and there aren't any problems or we would have been told about it or the Court would have been told about it. I think Judge

Yelenosky's suggestion is a good one.

CHAIRMAN BABCOCK: Tommy.

MR. JACKS: Two things. One, I agree with all of that. Two, I have read (4), and I think (4) should be read not to require that it be a particular -- directed at a particular case. One issue we haven't talked about is that in the urban counties it's common to consolidate classes of cases, particularly mass torts, in one or a few courts, be it Vioxx cases or asbestos cases or what have you, and frequently those courts will issue an order that applies to a broader category of cases, and everyone understands that those are the rules for those cases, and that shouldn't -- it's not a standing order in the sense that it ought to be sent to the Supreme Court or anything --

HONORABLE STEPHEN YELENOSKY: Right, I didn't mean that. Standing orders that apply to either one case or a class of cases I think are true standing orders.

MR. JACKS: Right.

HONORABLE STEPHEN YELENOSKY: But what I don't think are standing orders are something that says --

MR. JACKS: Countywide orders --

HONORABLE STEPHEN YELENOSKY: -- "In this county you have so many days."

MR. JACKS: Right. And so just to the extent we're making a record here, I wouldn't want the record to be read as being that (4) applies only to a single cause number.

CHAIRMAN BABCOCK: Okay. Good. Pete.

MR. SCHENKKAN: Let me say, if all we do is change it from 3 to 10 I still think that's a good thing, and I wouldn't want to have the perfect be the enemy of the good and keep us from doing that, but there are a couple more things that Kent's proposal addresses that that doesn't do that are deliberately consciously considered and proposed and we've discussed to some extent, and I just would like us to think carefully which way we really want to go on that.

One difference is as Rule 21 is presently worded the shortening of the time is "unless otherwise provided by these rules," which has a counterpart here even broader, "or shortened by the court" with no requirement for cause shown. I think it is better to require a cause shown to shorten it below the default.

The second, which I know was a significant portion of the original presentation for the proposal, was to try to get people to put with their motion a substantial whatever they're going to say, which is overlaps with what's already in the rule and require a

response with the exceptions noted to try to facilitate, if there is not an exception that's appropriate under the circumstances, proper motions briefing on both sides before the motion is heard by the court, which I do think is in the -- is of a benefit to the administration of justice.

Now, again, I don't want the perfect to be the enemy of the good if the sentiment of this group is that 10 days alone is the only change we're prepared to make or 10 days and shorten only for cause shown, those would both be good even if we don't do the briefing as well, but I personally favor all three.

CHAIRMAN BABCOCK: Alistair, then Kent, and then Tommy.

MR. DAWSON: I guess I have a question for Kent. There are other provisions in Rule 21 that are not addressed here. For example, certificate of service and serving all the parties and what have you. Did you intend to not include those in your rule or were you really focused on the notice requirement, the 10-day notice requirement?

HONORABLE KENT SULLIVAN: I'm sorry, which rules are you talking about? 21(a), (b), (c)?

MR. DAWSON: There are other provisions in Rule 21 that are left out of your rule. My question is

was that intentional or inadvertent?

HONORABLE KENT SULLIVAN: You have to be more specific.

MR. DAWSON: For example, it lays out that you've got to serve all the attorneys in the charge. The third and fourth paragraphs, for example, of Rule 21, are not addressed in your --

CHAIRMAN BABCOCK: Yeah, there are five paragraphs in the current Rule 21, and the question Alistair is asking is do you intend to replace all five paragraphs or only paragraph (2)?

HONORABLE KENT SULLIVAN: The intent was only to replace those comparable -- the comparable portions of it.

MR. DAWSON: Paragraph (2).

CHAIRMAN BABCOCK: That would be paragraph (2).

HONORABLE KENT SULLIVAN: I thought that was clear, but it was perhaps in the very first draft we put out the time before that had I think a redlined version.

CHAIRMAN BABCOCK: Yeah, I think that was clear last meeting. This June 1 draft would suggest that you're trying to ditch all five paragraphs and replace it with this, so that's a fair comment. It's only to replace

paragraph (2).

MR. DAWSON: I would also point out that --

MR. LOW: It does replace paragraph (1), too.

MR. DAWSON: -- if you only change the 3 days to 10 days and you don't --

HONORABLE KENT SULLIVAN: It would replace paragraph -- I'm looking at Rule 21 now. It would replace paragraph (1) and (2).

MR. LOW: Right.

HONORABLE KENT SULLIVAN: The remainder, there are, I guess, what, three other paragraphs, beginning with "if there is more than one other party represented." That was not intended to be affected.

MR. DAWSON: Okay.

MR. LOW: It just shortens -- excuse me.

HONORABLE KENT SULLIVAN: It talks about who you serve, certificate, etc., as I recall.

CHAIRMAN BABCOCK: Are you -- paragraph (1) has got a bunch of stuff in it.

MR. DAWSON: I would think you would only want to replace paragraph (2), Kent.

HONORABLE KENT SULLIVAN: I'm sorry, did I misstate it? You're right. It's paragraph (2), excuse me.

PROFESSOR ALBRIGHT: Part of paragraph (1).

MR. LOW: There is part overlap.

CHAIRMAN BABCOCK: Tommy, did you have something?

MR. JACKS: I did, and this is responsive to Pete's and Kent's advocacy for a response -- written response provision in the rule. I mean, it seems to me, one, as has been pointed out, in counties where the judges want that they've done it by local rule. Certainly in most all cases now of any complexity there is a level three discovery control plan, which many courts broaden to be a scheduling order which includes things that go beyond the discovery control plan, and certainly a judge in any case could impose such a requirement in such an order, and so it's a need that if felt by the judge can be met in other ways it seems to me, and the more I think about it the more I'm drawn to Judge Yelenosky's suggestion that we simply replace the number 3 with 10.

CHAIRMAN BABCOCK: Yeah, Pete,and then Judge Christopher.

MR. SCHENKKAN: Let me just respond briefly to Tommy's point. Of course that's right that if the judge in a particular case wants it, the judge can solve it. My concern is the flip side, the judge who does not want it or not -- I don't think the judge actually cares

much one way or the other, but the practitioners in the county are perfectly happy to take advantage of the practitioners from elsewhere. By the fact that there is no requirement of a response it doesn't seem important to allow real notice and meaningful time for the respondent to even hear that the motion has been filed. If the rules contemplate there will be a time for response it's a lot harder to say, well, you know, it got there 24 hours before we actually had the hearing.

And so, again, I don't think it's going to stop the abuses. I don't think it goes, Tommy, to the situation you're talking about where the judge who has a large complex case with many parties well-represented and hears, you know, proposal for a comprehensive docket control order, it's not going to interfere with that in any way, but it sets a better default rule that says the assumption is there is going to be time for the respondent to respond. That's what we're expecting.

CHAIRMAN BABCOCK: Judge Christopher, then Tom Riney.

HONORABLE TRACY CHRISTOPHER: Well, as I read through the local rule book I really felt sorry for lawyers because it was --

CHAIRMAN BABCOCK: For the first time.

HONORABLE TRACY CHRISTOPHER: -- so

difficult.

MR. DAWSON: Make sure that's on the record.

HONORABLE TRACY CHRISTOPHER: Because it was so difficult to find out how to do anything in any particular county; and, you know, I don't know what the solution is, but in terms of -- because we have by local rule extended time and then we're going to by local rule shorten time and then we're going to have these standing orders in counties where the judges think, you know, 10 days is too long, you know, it's going to be seven in my court, it's going to be three in my court, and we're going to have the flip of what we have now; and although I require 10 days in my own court, and even though it's not required in Harris County to have 10 days, so I'm one of those judges that's, you know, not playing by the rules, and occasionally I'll have lawyers say to me, "Well, but, Judge, the rule only requires three days." And I'm just like, "Well, hmm, I want 10," so, and --

CHAIRMAN BABCOCK: "And I don't feel sorry for you a bit."

HONORABLE TRACY CHRISTOPHER: But I do feel sorry for the lawyers that we have institutionalized such chaos through our local rules. Just getting a hearing, if you read that local rule book, just getting a hearing, depending on what county you're in and what court you're

in, you might call the clerk, you might call the bailiff, you might call the court coordinator, you might call the secretary; and I assume in some counties you call the judge to find out, you know, what dates the judge is available because he has none of those other four people helping him, you know, set anything; and it's -- if you're only asking, you know, when can I have a hearing, that, you know, can be exempted from the ex parte rules because you're just asking for a technical thing.

I don't really know what the answer is, but I just -- as I started to look through this project and I sort of support what other people have said, that we have so many conflicting time rules and notice rules already that I'm not really sure this is going to help us.

CHAIRMAN BABCOCK: Okay. Tom.

MR. RINEY: I think the purpose of the proposed amendment is a good one, and I think most good lawyers would certainly try to comply with that purpose, but even good lawyers occasionally are going to, I think, do something that's going to result in some unintended consequences. For example, as I see it the movant has to file any materials in support of the motion 10 days before, and we've got four exceptions. Well, if the movant gets the response and realizes there is additional authorities that need to be presented to the court, as I

am reading rule, and I may be overlooking something, the movant would then have to jump through one of the four exceptions to even present a written reply to the response.

Secondly, we have four exceptions for the 10-day notice for the motion, but with the exceptions, as I read it, and I may be overlooking it, but they don't apply to the three-day response time. So it doesn't seem fair to have exceptions for one and not the other; and finally, again, good lawyers are going to -- may discover a good argument that needs to be presented to the trial court, and I would think if I were the trial judge I would want to hear all the pertinent authority even if someone had missed a deadline, whether it be -- sometimes it could be due to carelessness, but I still think the trial court would want to hear it. Well, one of them is that the court can do that, but for cause stated and entered of record. Now, if I'm the trial judge I'm thinking if it has to be entered of record that implies that someone gets to take a look at it and see whether that was a good reason or whether I did the appropriate thing, so I think it presents an additional problem for the trial court.

I think that, again, the purpose is good, but we're going to complicate it to the point we're going to take away from what the purpose is, which is people

ought to be able to present all the pertinent authority to the trial court so the trial court can make the correct decision.

HONORABLE STEPHEN YELENOSKY: And if we don't have it at the time of the hearing we're likely to say, "Okay, submit something after the hearing. I'll take it under advisement." So it doesn't even stop after the hearing.

CHAIRMAN BABCOCK: In the situation that Tom poses you would have a motion with supporting affidavits and materials filed with the court, a hearing set 10 days thereafter. Three days before the hearing the nonmovant would file their papers and then you would see something and say, "Whoa, I need to tell the judge another case" or something else and so you a day before the hearing file a reply brief or whatever you may file. Would it not be incumbent on the nonmovant then to say, "Hey, I haven't had my requisite 10 days notice with this reply brief" and then the judge either agrees or not, sets the hearing off or not?

MR. ORSINGER: Or strikes the response. You don't give the judge the authority to permit filing like that. In other words, I think someone would try to use that to get the movant's response stricken because we don't specifically authorize the court to allow either --

CHAIRMAN BABCOCK: Yeah, the movant's reply.

MR. ORSINGER: -- a late filed response or a late filed reply to a response.

CHAIRMAN BABCOCK: Right.

MR. ORSINGER: If you're going to give the -- I don't think you ought to impair the court's discretion at all, but if you're going to impair the court's discretion and create the exceptions, the exceptions ought to apply to the reply and response as well as the original motion.

CHAIRMAN BABCOCK: Hugh Rice Kelly.

MR. KELLY: First of all, with regard to whether we have the written motion, leave of court to shorten the time, if you don't have a provision like that you're not really going to have the 10-day be your default because a lot of judges are going to say, "Well, I think three days is fine" and will always approve it, so you get back to what Judge Christopher said. If you make people do it one-by-one and show cause, 10 days really will be your default, just administratively. The second thing about it, this is not really a briefing rule. It says you've got three days to supply your response. Well, it doesn't say you can't also supply one more brief.

CHAIRMAN BABCOCK: Yeah.

MR. KELLY: Or that you can't hand one at

the time of the hearing or that you can't have a rebuttal brief and a surrebuttal and all that other stuff, and while I don't appear in front of judges anymore, the ones I did will take the briefs anyway, and nobody is going to reverse them on it no matter when they come in.

CHAIRMAN BABCOCK: I think I missed somebody. Judge Sullivan had his hand up first and then Judge Yelenosky, then Harvey, and then Justice Duncan.

HONORABLE KENT SULLIVAN: Well, I think the issue had been raised by earlier comment to the effect of, oh -- of a concern that you couldn't do anything, again, that somehow it would restrict your ability to point out the existence of a case or something that had been, you know, raised by something filed and that there would be some argument, I guess, that you hadn't filed it on time in terms of it meeting the deadline for filing a response, or I guess perhaps even filing it on time in terms of the 10-day notice provision for the filing of the motion, and I guess the quick comment that I wanted to make is you've already got that issue. In other words, you have the issue with respect to the three-day notice rule.

If someone is doing something that is truly a surprise and someone is doing something that someone can argue should have been a part of the motion and is a core point of the motion and affects the issue as to what

relief the court might consider or might grant or otherwise, that it should have been the subject of the notice provision, and the notice provision is currently three days. If you change it to 10 days, if you change it to include some sort of notice provision relative to the response, it just -- it carries with it the same issue that you already have.

That's my point, is that whenever anyone appears on the day of the hearing, even under the current rule, and hands something to the judge, there is an issue as to whether one or more of the parties really should have gotten notice that that was going to happen and if it truly affects the hearing, as the notice requirement contemplates, the affecting of the hearing, and so it doesn't change anything in my view. That's an issue that you're always going to have with respect to any notice provision for any motion or any response. And to state on the record, it's certainly not something I contemplate that you couldn't hand somebody a case or that, you know, sort of supplementation. Again, it's only an attempt to provide some more orderly administration of justice. That's all.

CHAIRMAN BABCOCK: Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: Well, I don't know what kind of motions we're talking about, but the

ones where I would be concerned about a response getting to the movant ahead of time are already taken care of, dispositive motions, motion for summary judgment, another rule deals with that. If it's evidentiary they need to see what you've got, but the idea that -- I mean, you've already conceded you could hand somebody something. Well, even if you didn't concede that, the respondent clearly can say whatever they want. I mean, they can cite cases orally.

I just don't see the point of -- I mean, it's inherently arbitrary because there is a response and then there is a potential for reply to the response and a surreply and blah-blah-blah. At some point you need to get before the judge and argue about it. I mean, we're always talking about -- lawyers talking about the good old days without discovery, just go to court and try the case. Now we're setting up a cumbersome mechanism for motions which largely are not motions where you need to have such a cumbersome mechanism of response ahead of time, and where you do it's taken care of by the summary judgment rule.

CHAIRMAN BABCOCK: Harvey, then Justice Duncan, then Justice Bland.

HONORABLE HARVEY BROWN: I -- when I was in Harris County as a judge I thought requiring a response

was a good idea. I now don't think that because I've been in small counties where things are done very informally, and sometimes it's easier just to have the hearing, because we'll hear five or six things, and it's very simple, it shortens the time, it saves money. But I think the rule accomplishes that, and I like the way it's worded where it says "any desired written response" because that means I don't have to spend that money to file a response, but it also means that if I do the other side is entitled to some notice I'm going to do it.

I get phone calls from lawyers on Daubert hearings and discovery hearings asking my advice about things someitmes, and they'll say, "I have my response ready. Should I file it today or should I file it the night before so the other side doesn't see it, or they get it late and they don't have time to do something?" Daubert is not covered by the rules on that. Discovery isn't covered by the rules on that, and that just invites gamesmanship, and then for the lawyer who gets it without a default rule there is tremendous stress.

I think the judge will probably give me some time to respond, but I don't know the judge will give me more time to respond, so that night I pull an all-nighter, and I do the best I can in the circumstances, hoping I'll get time to do more and do it better later, but I better

do something just in case the judge doesn't give me that time. So I just think the sanity of practice should suggest that three days is minimally fair, but if you don't want to file anything this takes care of that by saying "any desired response."

CHAIRMAN BABCOCK: Justice Duncan.

HONORABLE SARAH DUNCAN: I'm confused.

CHAIRMAN BABCOCK: Justice Duncan, not usually confused.

HONORABLE SARAH DUNCAN: Frequently, perpetually confused, and I am so glad I don't practice in the trial courts because I don't -- all of the local rules -- I was just using Judge Christopher's local rules book. All of those rules that have different time periods than the Rules of Civil Procedure, were those approved by the Supreme Court?

HONORABLE TRACY CHRISTOPHER: If they are in that book they were approved.

HONORABLE SARAH DUNCAN: I guess I'm very literal. When I read Rule 3a and it says a local rule can't alter a time period in the Rules of Civil Procedure, I read that literally. I think that's a huge problem, because if the Supreme Court is going to continue approving local rules, and I'm not here trying to tell the Supreme Court what to do --

HONORABLE NATHAN HECHT: God bless you.

HONORABLE SARAH DUNCAN: But if the past practice prevails in the future and it's going to continue to approve local rules that vary the time periods in the Rules of Civil Procedure, this is as meaningless as the current rule is and just as misleading.

The other, as much as I agree with Judge Yelenosky that the unintended consequences of chockablock amending rules are very concerning, if we change 3 to 10 in the existing rule we're going to run right back up into Judge Martin and Orsinger's concerns in family law cases, so that as much as I agree with I think the motivation of your comment --

HONORABLE STEPHEN YELENOSKY: Well, then that problem --

HONORABLE SARAH DUNCAN: -- I'm not sure it's achieving anything.

HONORABLE STEPHEN YELENOSKY: That problem should be addressed by addressing that problem, which is to add something about family law, not to rewrite the words that apply to everything else; but as far as this not making a big change, the Court, as far as I know, has never approved a local rule which shortens the time period below three days, so if you create a civil procedure rule that's 10 days, it is going to make a difference because

they aren't going to be able to have local rules less than 10 days. They might be able to have them, if the Court continues its practice, of 12 days or 15 days, but they won't have them less than 10.

HONORABLE SARAH DUNCAN: But if "alter" really means "shorter," can we please amend Rule 3a to say "shorter" and not "alter"?

CHAIRMAN BABCOCK: Justice Hecht.

HONORABLE NATHAN HECHT: Let me just say that some of the rules probably predate the approval process, which is only about 15 years old, I think, or 12, 15 years old. But then, also, you know, as we have heard, there's 650 trial judges in the state and 254 counties, and most of them -- I'd say right at 99 percent -- think that the way they do it is the best way to do it on any given subject.

CHAIRMAN BABCOCK: 99 percent?

HONORABLE NATHAN HECHT: Yeah.

CHAIRMAN BABCOCK: May be short.

HONORABLE NATHAN HECHT: And so rather than try to push one or appeal, I mean, there just has to be some accommodation to legitimate varieties in practice; and, you know, some of the local rules, as you've heard, call for setting hearings by agreement. Well, I would think that there would be areas in the state where that

would be fairly difficult to do, but by the same token there are lots of other areas in the state where it would be outrageous if you didn't, and so I mean, to the extent that we can sort of at least normatively but maybe a minimum or some -- move people toward thinking in terms of this is sort of the period that I'm looking at, that's a good thing. Whether we can make a rule across the state, I don't know.

CHAIRMAN BABCOCK: Justice Duncan.

HONORABLE SARAH DUNCAN: The third thing is I haven't heard any discussion of what Justice Hecht was talking about, the seven versus -- 7 or 14 days versus 10 days, which I thought was a good comment.

CHAIRMAN BABCOCK: Yeah. My sense was that the number of days was almost still sort of on the table in light of our vote.

HONORABLE SARAH DUNCAN: Okay.

CHAIRMAN BABCOCK: But others may feel differently. Justice Bland had her hand up a minute ago, but now she's --

HONORABLE JANE BLAND: I'll stand down.

CHAIRMAN BABCOCK: -- whispering to Judge Sullivan. Richard.

Let the record reflect.

MR. ORSINGER: Chip, I've got a couple of

things I'd like to share and be sure are in the record. I think that the proposal represents a shifting in a focus from oral persuasion to written persuasion in our civil state litigation, which is something that's already occurred in Federal courts. There has been a shift toward Federal to written persuasion.

CHAIRMAN BABCOCK: Not all Federal courts. Northern District of Illinois is totally an oral docket.

MR. ORSINGER: Well, I don't think that's representative, but it's certainly not representative of the Texas Federal practice.

CHAIRMAN BABCOCK: Fair enough.

MR. ORSINGER: In my opinion written persuasion is more expensive than oral persuasion. It requires more preparation in advance, it requires that you look your cases up in advance, think your arguments through in advance, and --

CHAIRMAN BABCOCK: Heaven forbid.

HONORABLE STEPHEN YELENOSKY: You mean you don't prepare before you speak?

MR. ORSINGER: I know that the lawyers around here don't go to a hearing --

CHAIRMAN BABCOCK: Let the record reflect that Justice Hecht has left the room.

HONORABLE JAN PATTERSON: As we have

suspected, Richard.

MR. ORSINGER: The lawyers around this table probably don't have a problem with having four or five hearings in a day with different clients, each of which have paid you a retainer and you'll never get paid any more than your retainer, but that's family law practice for a lot of lawyers.

CHAIRMAN BABCOCK: Yeah.

MR. ORSINGER: And I think that it's bad policy to move this state litigation to a written practice, and it's especially bad policy to move family law litigation to a written practice, and I don't think people will voluntarily go there. They will only go there if the judges refuse to let their positions be heard because they haven't put everything in writing, and I really -- that's a very philosophical question, but I don't think it's a wise thing for the bulk of the state court cases.

The judges don't have the power to read these in advance. I don't know how Judge Sullivan does, but the judges I'm in front of call a docket that have -- well, in San Antonio they have 125 cases and the presiding judge may handle 30 of those. Other judges may handle three or four in the first two hours of the day before they start back into their jury trial. In Dallas the

typical docket for family law is, you know, a dozen to two dozen cases; and I think it is imaginary to think that any of those judges are going to read any applications or any responses before the hearing because they don't know which lawyers are going to show up, who is going to reset, who is not going to be ready; and if they read all those responses they would be reading probably 60 motions and 60 responses and may end up having a hearing on three of them. They're just not going to do that, so I think that's an illusion.

There is also another philosophical point that this proposed change is encroaching on the trial court's discretion by introducing a requirement that cause be shown or cause be stated. Under Rule 21 as it now exists the three-day rule can be shortened by the court. That's all it says, "shortened by the court." We're now going to require cause. Why are we requiring cause? There isn't going to be any appellate review of good cause. In fact, we're not even calling it "good cause," so I suppose bad cause would be just as justifiable as good cause.

CHAIRMAN BABCOCK: As long as you call it cause.

MR. ORSINGER: But why are we creating a potential argument over whether there is good cause or not

good cause when the trial judge is the final arbiter of whether the cause is justified or not? I just don't like that philosophically either, and then if you apply this whole process to the injunction issue, right now -- I think Elaine pointed out -- there is no explicit indication that a temporary restraining order that sets a temporary hearing is not under Rule 21, but Rule 680, which is the TRO, when it talks about setting the temporary hearing it says, "The application for a temporary injunction shall be set down for hearing at the earliest possible date and takes precedence over all matters except older matters of the same character," so you have a charge to the court to set the temporary hearings quickly when they've issued a TRO.

Now, if you go back to Rule 21, since the court is setting the hearing by TRO then I think it complies with Rule 21 that this -- it says, "not less than three days unless otherwise provided by these rules or shortened by the court." We don't litigate this now because three days is so short, but we may start litigating it when you get to 10 days. I would assume the TRO signed by a judge setting a temporary hearing is a shortening of the response deadline or the filing deadline, notice deadline, by the court, but then it's going to be for good cause shown or stated.

CHAIRMAN BABCOCK: For cause.

MR. ORSINGER: Or cause. I'm sorry. Cause shown or stated. I'm sure the committee that drafts the family law practice manual, which is the real way that this rule is going to get implemented, is through the family law practice manual, is going to want to know what cause must be shown in a temporary restraining order to justify setting a temporary hearing with less than 10 days notice on the respondent when you don't even know when the respondent is going to get served, and if you file on a certain day, you get your TRO signed that day.

The clerk usually won't get the TRO out until the next day. So the process goes out, you're already down to 13 days left and if you've got to give 10 days before the 14th hearing, you really have three days to get service or you're not in compliance with Rule 21. So I think the TROs are all going to have to find -- the order signed by the judge are all going to have to find cause to have less than 10 days notice or else we're always going to have to be resetting our temporary injunction hearings and reissuing our subpoenas, so I wish somebody would tell us what you have to show to show cause.

CHAIRMAN BABCOCK: We're going to take a 10-minute break and then Justice Bland will start with her

comments.

(Recess from 10:29 a.m. to 10:51 a.m.)

CHAIRMAN BABCOCK: Okay. First up is going to be Justice Bland, but before she speaks, here is the plan, and actually, you're going to have to defer to a couple of announcements. Judge Yelenosky wants to correct the record on something, and Lonny wants to put something on the record and then Justice Bland, but as you can see, Justice Hecht had to duck out to go participate in a panel at the appellate conference; and as I understand it, a number of people have got to leave at 11:40 for the judiciary luncheon, so what Judge Hecht would like us to do is complete our discussion about this rule by 11:40; and he would like to hear people's thoughts about the 7 days versus 10 days issue, so we'll talk about that, but, Judge Yelenosky, you want to say something?

HONORABLE STEPHEN YELENOSKY: Yes. Lonny, as you suggested, I didn't know what I was talking about or I would admit that I didn't, but in a particular area, not everything. As usual, it's family law, which is my Achilles tendon and why I wish somebody here practiced family law in Travis County. I called our court coordinator, and it is true that family law is on our central docket for things that are over three hours, but it is not true -- well, it's still central docket, but the

announcement requirement does not exist for family law matters of three hours or less such that they can get a hearing on three days notice, and our court coordinator says there does seem to be more reason or at least more demand for such in the family law context. Everything else I said was absolutely on point, but I did want to correct that because it supports the suggestion that the default period for family law perhaps should be a shorter period.

CHAIRMAN BABCOCK: Okay. Lonny, did you want to second that?

PROFESSOR HOFFMAN: Sure. I'll second that he said something that he doesn't know. I would also like to say it seems to me -- I made the comment to Richard at the end of our last meeting that the glaring omission of e-mail and how we deal with e-mail transmissions, is that we don't deal with it, seems to be much more glaring and that now building on Alex's point from before, it would seem to me anomalous for us to make this change to the rule and not address what are the more kind of glaring things that are left out, and I want to add to that by saying not only do we not address e-mail but I think the rules currently deal with fax transmission incorrectly.

It seems to me fax is immediate in the same way that e-mail is immediate in the same way that personal

service is immediate and that we ought to treat them that way. Again, I'm not suggesting we ought to open the debate further to that, but I do think that Alex's instinct is just dead on right that we ought not to make this change until we have thought about that as one other. If we are going to make this change, though, today in one form or another, or propose this change, I think we do need to be very -- give some attention to the effect of the fax and mail added rule because what it does, as Richard has said before, is it probably turns the 10 into a 13 and the 3 into a 6, and so we ought to be cognizant of that.

CHAIRMAN BABCOCK: What we're going to drive toward is a discussion about whether or not it be 7 days, 10 days, or 14. That seemed to be the range that Justice Hecht was interested in; and the second point, whether it's the sense of this committee that we ought to just change one word in Rule 21 as has been suggested by some people or whether we should have the more robust change to the second paragraph of Rule 21 as suggested by Judge Sullivan with a few friendly amendments today. So that's what we need to be focused on, and with that, Justice Bland, sorry to delay your comments so long.

HONORABLE JANE BLAND: Well, I propose that you refer to Professor Albright and Professor Hoffman the

task of crafting rules that would help us address e-mail and facsimile.

CHAIRMAN BABCOCK: Well, I talked to Professor Hoffman about that, and they're going to talk to Justice Hecht and Jody and make sure that the Court wants them to spend the time doing that, and if the Court does then there is no better people to do that, so --

HONORABLE JANE BLAND: Well, and to our discussion before the break, I think that there are lots of very important motions that are considered under the rule that are separate from family law motions that need more time for people to gather evidence and affidavits and that kind of thing. Motions to strike all of your experts, motions to dismiss under 4590i, motions to compel arbitration, motions for sanctions, motions to disqualify, you know, there are just a lot of really important motions out there that would benefit from a judge having the opportunity to review the materials and having both sides afforded the opportunity to get to the judge as complete a record as possible and then allowing, you know, for a hearing to go forward after there has been time to sort of set up the issue in a way for a judge that is interested in reading the materials to have that opportunity to do so.

So I think there is important concerns on

the family law side, but I also think there is some important concerns for lengthening the time period, and it would seem like the family law concerns really deal with ancillary relief, equitable relief that's already taken care of under TROs. And if you get a TRO you're required to then set a hearing date, and it just, you know, seems like -- if the hearing date has to be extended because the other side hasn't gotten service and they're complaining that they haven't had adequate notice, well, maybe they need some time to prepare for the TI; and if that's the case then the judge can extend the TRO; but, you know, I think that in the system that we have right now we're sort of saying, well, everything has to be done within three days and it's the exception for it to be longer; and it really probably should be the opposite.

CHAIRMAN BABCOCK: Given those comments, Judge Bland, are you a 7, 10, or 14 person?

HONORABLE JANE BLAND: I don't feel strongly about that.

CHAIRMAN BABCOCK: Okay. Are you a one word change in paragraph (2) or are you a let's rewrite paragraph (2)?

HONORABLE JANE BLAND: I think I'm with Pete. If we can get -- if the one word change is what the committee thinks is what they're prepared to do right now,

then the one word change. If the committee feels comfortable with what's written I think it's clearer and probably doesn't really -- you know, it's clearer, and I think it provides for the response, which is good, so that would be my preference, but --

CHAIRMAN BABCOCK: Okay. Good. Judge Christopher.

HONORABLE TRACY CHRISTOPHER: Well, I would be in favor of 10 versus 7 based on practicalities. I think it's ashame that a lot of the trial judges don't have the opportunity or ability to read what lawyers spend, you know, their time and effort writing; and the reason why I started with a 10-day requirement was because -- and I have hearings on a Monday, so that means the lawyers can file something on Friday, you know, 10 days before that Monday, so that he will file it Friday at 5:00, and the clerk's office will look at it on Monday, and they will process it, and it will go into a bin that in a day or so before my own clerk picks it up and ever gets it into my courtroom. Okay.

So from just a practical paper handling matter I urge the 10-day versus the 7 days because the 7 days we're getting much shorter in terms of trying to get the paper to the judge. With respect to the 3 days mentioned here in the -- in Kent's rule, I like what some

of the local rules say, which is, you know, two business days or two working days or, you know, something like that so that you don't have to cross-reference three days. It doesn't really mean you can file it Friday at 5:00 p.m. for the Monday hearing in terms of a response because a response filed Friday at 5:00 p.m. is not useful to me, and even though lawyers should know that Friday at 5:00 p.m. isn't three days before Monday under our rules because of the holidays I think it makes it a lot clearer if we say two business days or three business days before the date of the hearing.

CHAIRMAN BABCOCK: Okay. So you're a 10-day Sullivan --

HONORABLE TRACY CHRISTOPHER: Yes.

CHAIRMAN BABCOCK: -- with modifications perhaps.

HONORABLE TRACY CHRISTOPHER: But I'll take just the one word.

CHAIRMAN BABCOCK: Stephen Tipps.

MR. TIPPS: I'm a 10-day Sullivan proponent as well. Largely because I think that it's a good thing to have a rule that at least creates a presumption that the parties will file a response sufficiently in advance of the hearing so that the other side gets to see it and the judge gets to see it.

I am a little troubled by this draft, though, because it would seem to preclude the judge from considering a late filed response under any circumstances, and I'm not sure that that's a good idea, and so I would suggest we consider the Sullivan draft but append to the end of the second paragraph something like "except with leave of court," so that the party -- the would be respondent would have to worry about whether or not anything that was filed late would be considered because the judge might not grant a leave of court, but on the other hand, the judge would have the discretion to consider something filed late if that seemed to be the right thing to do.

HONORABLE KENT SULLIVAN: Accepted.

CHAIRMAN BABCOCK: Alistair.

MR. DAWSON: I think the one word change from 3 to 10 in the rule loses a lot of the advantages that we're trying to accomplish here. It doesn't -- as others have pointed out, it doesn't provide for a response to be filed sometime in advance of the hearing, so you're going to have at least some lawyers are going to continue the practice of potentially waiting to the last minute to give you a response, and that's one of the things we're trying to avoid with this proposed language.

The other thing is, is that it doesn't

require some kind of cause to shorten the time period, so you could have around the state judges just issue standing orders that say, you know, you can have shorter hearings, or shorter notice requirements in my court, so you've lost that opportunity; and so if we agree that as a general rule it's good to have a procedure where there is a motion and all the stuff is filed and the other side gets notice of it and then you file your response and so the court has a chance to read it and what have you before the hearing, if that's part of what we're trying to achieve, then you should replace all of I think paragraph (2) with some variation or modification to what Kent had proposed.

And my second comment is that with respect to 7, 10, or 14, given that there is a three-day -- if you go with the 3-day response requirement, I think 10 is better than 7 or 14.

CHAIRMAN BABCOCK: Okay. Jim, do you have your hand up?

MR. PERDUE: I did, and I joined Judge Sullivan in this rule last time, but I raised the issue of waiver on this response language, and I keep coming back to that, but I thought that Mr. Orsinger raised a great point, which was the extension concept is one thing, but this now has this idea of a written response, which moves the whole motion practice into a theory of written

advocacy versus hearing advocacy, which is a different change from the concept of more notice to a hearing such that the issues can be fully joined at the hearing, and I -- the more I sit and chew on this idea that regardless of how you write the language, and the express intent stated by Judge Sullivan is that there is not a waiver created by this second paragraph of the proposed rule, I continue to be very concerned at this idea that you're not going to truly be able to join the issue in an oral hearing, but for essentially having this thing fully briefed, and that does not seem to permit a practice within the flexibility across the state.

Harris County doesn't look like Bexar County, doesn't look like Travis County, doesn't look like Tarrant County, and we've heard about all different experiences throughout the state. This is the way you practice in Harris County, but I don't know that it is applicable across the state, so I'm coming back to the idea of 10 days, but a one word change as opposed to the overall proposal here because I think there is two policy ideas. There is extended notice, which is a good one, but this move to a full written practice for every single motion is concerning, and I don't know how to write it. I haven't been able to figure out how to write it to resolve that concern.

CHAIRMAN BABCOCK: All right. Thanks, Jim. Judge Sullivan.

HONORABLE KENT SULLIVAN: Quickly, I am very comfortable with both the ideas expressed by Stephen Tipps and by Judge Christopher in terms of justifying business days as opposed to just saying three days. Three business days or two business days.

CHAIRMAN BABCOCK: Okay.

HONORABLE KENT SULLIVAN: With respect to Jim's question, I went back and looked at some of the language that Pam proposed last time, I think. Would it be solved if the language was changed to something like as follows -- again, I am stealing this from her, but something like, quote, "If a respondent desires to submit a written response in addition to oral argument," comma, "such response must" whatever. Does that deal with your problem or is your problem more significant than that?

MR. PERDUE: That does seem to address the problem. The thing that I got -- I kept getting caught up with was this idea of "or other materials." I mean, I understand the idea of briefs and evidence, but other materials that need to be three days in advance of the hearing and then my consistent concern of the movant's argument, I didn't get that three days in advance, therefore, the court should not be able to consider that,

and therefore, regardless of how relevant it is and regardless of how controlling it is, it is not appropriately before the court on the day of the hearing; and as long as you can deal with that issue, and that's the primary concern that I continue to come back to, then if there is language that can address that that would get there; and the idea here is to -- I know you keep talking about encouraging a written response so that the issues are at least joined to some idea, but --

HONORABLE KENT SULLIVAN: And if I can interject this, because this is really important and we've said it a couple of times, but I think it's very significant. This is not a paper work proposal at all. It is really intended to suggest if you are going to file a written response then do it and do it by a timetable so that everyone knows what's going to be done. This is the Harvey Brown issue, when he talked about somebody who had it ready, it was going to be very substantial, and they decided, as is a commonplace issue now I think in our courts, with increasingly sophisticated and consequential motions being filed under a three-day time period you are dealing with "I will file it at the last moment in an attempt to lie behind the log and gain some advantage of surprise." I do think that's an issue, but it's not intended to require anybody to file anything if they don't

want to.

MR. PERDUE: Well, and the 3-day notice, moving 3 to 7 or 10 days for the movant deals with that gamesmanship and now you have the issue of the reply being used as a gamesmanship process of essentially handing it to the judge the day of.

HONORABLE KENT SULLIVAN: But isn't that always the issue?

MR. PERDUE: And that's always the issue, but my concern is just the reality of practice. Let's say you have 10 days, you work up a response but then something else comes up, more evidence comes in, a case that you just find, and then all of the sudden the argument is "We can't hear that" or "I'm not going to entertain that," and that seems to encourage kind of a form over substance issue to deal with the gamesmanship issue but doesn't seem to achieve the other overall goal of teeing the whole thing up properly, and so the "if" language being the most permissive seems to at least get there, my concern is out there.

CHAIRMAN BABCOCK: Okay. Carlos and then Richard and then Pete.

MR. LOPEZ: I guess there is some concern being expressed that perhaps the problem is more -- that the solution is bigger than the problem, and I think if

you're going to analyze it that way then it's helpful to figure out how bad is the problem, so I want to echo what Kent is saying. I can't speak for everywhere else, but I can speak for Dallas, and it's got an epidemic. I mean, it happens all the time. People have their response ready to go, and they sit on it, and they don't send it to you, and they hand it to you when you walk in the courtroom, and it's a farce. Everyone knows that's what's happening. You prepare for it, and you don't go in there thinking you've got them now, they didn't file a response. You know you're going to get handed a response as you walk into the courtroom. So what I do, I get there 20 minutes early hoping that opposing counsel is there 20 minutes early, and I'll ask him, "Where is the response?" And sure enough, he'll go "Here it is." At least I get 20 minutes.

MR. GARCIA: Well, then you're lucky, because I'm sitting there for three hours and they hand it to me when it's my turn. "Here it is."

MR. LOPEZ: Again, I can only speak for my personal experience, but both off the bench and on the bench, but the real problem is, is that the trial court's interest in, quote, doing the right thing and making the most intelligent decision is aligned with the person who is abusing and filing it at the last minute, because if

it's just law -- I mean, if it's evidence that's one thing, but if it's just law and it's just argument, well, then the trial court is not doing themselves any favors by ignoring it because the appellate court is not going to ignore it.

HONORABLE STEPHEN YELENOSKY: Exactly. That's the problem.

MR. LOPEZ: So you're never going to get a real hammer or teeth into this until -- and I know it's controversial, until we say, you know what, you purposely do it and you just lie behind the log because you know you can get away with it then you've created some kind of waiver, and I realize that creates probably as many problems as it solves, but the rest of it is just dressing until you do that because --

HONORABLE STEPHEN YELENOSKY: But what about another penalty --

MR. LOPEZ: I know --

HONORABLE STEPHEN YELENOSKY: -- other than waiver? Fine them.

MR. LOPEZ: I know one judge out of 13 that would look at them and say "What part of that rule" -- we have a local rule in Dallas, as you mentioned, that it said -- the local rule says if you file it less than the three days it likely will not be considered. There is

only one judge out of 13 that followed that rule, and everybody knew it, so, you know, it was just everybody knew that was a farce.

HONORABLE STEPHEN YELENOSKY: Penalty won't be imposed. A different penalty might. "Give me your brief and that will be a thousand dollars," but "Don't give me your brief" is not going to happen.

CHAIRMAN BABCOCK: Richard.

MR. MUNZINGER: Addressing the 7 or 10-day question, if you have this rule that says the reply must be served three days before the time specified for the hearing, if you serve by fax that means you must serve your reply six days prior to the hearing. If you have a seven-day notice period, the party who is served the motion has one day to prepare the response, if my math is correct; and if you have a 10-day period he has four days to prepare a response, which brings me back to my support of Judge Yelenosky's position. I'm unaware that we're dealing with a crisis in the trial courts about doing justice, and I think that doing all of this amendment to the rule is going to create more problems and more uncertainty than simply changing the word from 3 to 10 or whatever number of days we choose.

CHAIRMAN BABCOCK: Okay. Pete. Pete, then Hugh had his hand up.

MR. SCHENKKAN: I do think there is a real world need for flexibility for the case that the movant finds, having now read the response that the movant gets sometime before the hearing as opposed to when they walk up to counsel table because it's their turn, and that could be a case that they just didn't find before because they didn't look in the right place and respondent did a good job of finding a line of attack, a line of reasoning, that they hadn't covered; or it could be what somebody suggested, that a brand new case just came out or whatever; and in that case the judge is going to want to hear the case, of course; and the practicality is, is it the kind of new case or material that really ought to be that's the end of the matter, regardless of the fact that they found it this late, should have found it earlier, or whatever; but, actually it's a Texas Supreme Court case and it's on point, what difference is further discussion going to make? It's going to get accepted as brought in, or is it the kind of thing it's from one of the courts of appeals, it's 20 years ago, it's not quite on point but the language is very good.

Well, maybe we ought to hear -- maybe the movant ought to have a chance to respond to that. The flexibility to handle that is I believe contemplated by Kent's proposal, except as -- "except upon agreement of

the parties," in a lot of case what the judge is going to do is look at the two lawyers and say, "Anybody see any problem here with my giving this lawyer -- you know, with no hurry, right, we can take three more days and give him a chance to respond to this"; or the other way around, say, "Well, I know this is a surprise to you, but don't you agree it looks pretty well on point? Do you want more time to do look at it or do you think we're ready to go ahead and move to a decision on this?" A lot of them are going to get worked out that way on the spot because of the nature of whatever it is is brought in at the last moment by the movant in reply to the response; and if not then "upon order of the court for good cause shown," I believe the judge says, "I think this is all I need to hear about this. This looks dispositive to me. I don't think I need any response." That's the cause for saying we're not going to do anything else.

CHAIRMAN BABCOCK: Okay. Hugh Rice Kelly.

MR. KELLY: The concern about late filed authorities -- and so many of us have seen motions where the lawyer will come in, and he's got the Xeroxed cases and wants to argue those cases, and that's in substance the answer. Wouldn't Stephen Tipps' amendment that said "except by leave of court" cover it? I just think it would be a rare judge that would say, "No, I don't want to

see the case law," so, or hear, you know, very basically informal kinds of arguments. I'm just thinking that Stephen's additional clause on what Judge Sullivan said ought to address most of your problems.

CHAIRMAN BABCOCK: Okay. Judge Patterson, then Judge Gaultney.

HONORABLE JAN PATTERSON: Well, that's part of my point. I do think that's a good addition, Stephen's suggestion, because we deal with deadlines all of the time, and it has never prohibited any court, whether an appellate court or district court, from accepting a case or an argument, but I am convinced there is a waiver aspect that we want to take care of while we can. I'm actually persuaded by all of you every time you speak because I think that there is a lot to say for this rule, there is a lot to say for just the one word, but I think where I come out is I do like the rule and I like the 10 days. I think there is a lot to say to throw out a default time of 10 days that is sort of an institutional speak in favor of a little bit of length of time and sanity.

I am concerned about family court cases, though, and I think that we really need to keep in mind that an increasing number of our cases deal with family law cases, a huge, huge, amount, and probably motions

other than temporary orders as well. I think there is another aspect of this that speaks in favor of the 10 days, and that is that I think we've all had clients who have said in the courtroom, "Can they do that?" when something is popped at the last minute and -- or a surprise this or that, "Can they do that?" And I think the perception of fairness in the courts and orderliness is very important for the sake of the lawyers and judges, but also for the sake of the litigants.

So I think that this adds that notion that it's not -- we're not going to leave it to gamesmanship or last minute or your lawyer has more resources than I. There is an element of preparation to it. I think it reduces the amount of chaos in our lives, whether it allows the judges to prepare, the lawyers to prepare a little bit, or the litigants to have a period of 7 to 10 days to deal with something that's dumped in their lives. I think we don't always keep in mind of how disruptive and chaotic something like that can be in the life of a litigant to have a three-day response.

I also think it doesn't -- I mean, we haven't spoken to this issue, but certainly going from 3 to 10 days does not introduce any amount of delay in the process. I think we can all agree that the system is not delayed for that reason, so I -- I do worry about what

Richard said. I don't want this to be viewed as increasing costs, but I don't view it as increasing costs. I do view it as another option. I mean, if nothing else, you can list your points and it gets there in writing if you need to. I think our system is not oral friendly for other reasons besides this, and I think that probably has to be addressed in other ways, and I do worry about that quite a bit.

CHAIRMAN BABCOCK: Judge Gaultney.

HONORABLE DAVID GAULTNEY: Hugh made one of the points I was going to make, and I was particularly interested in your comment about other materials, not case law because I think that's -- the court is going to consider that routinely probably, but other materials, like you mentioned depositions or something like that. And I was wondering does the "upon leave of court" satisfy your concern on that in terms of giving the court discretion to consider it?

And I guess my second question is, Rule 5 anticipates that -- because I think what this three-day deadline is, I think it's a deadline. It gives you time by which you have to do something, and so I think Rule 5 says, well, if you've got a deadline under our rules in which you've got to do something and you don't get it done then on motion -- and it doesn't require a written motion

-- on motion and good cause the court can enlarge the time. So if you show up at a hearing and you've got that dispositive thing that really can't be disputed by the other party, would the language that Steve suggests and also Rule 5 solve the problem?

MR. PERDUE: I've written it, and I'm getting -- for example, on a big Daubert motion where you come in with a Power Point or something to help explain it. Is that inappropriate because you didn't send the slides to the opposing counsel? That's other materials, and that just seems to increase the game, and I'm -- both sides have issues here, and I understand it. I can show you what I wrote, but I mean, I'm working through it.

CHAIRMAN BABCOCK: Buddy.

MR. LOW: Let me ask --

MR. PERDUE: Well, you say that until the objection comes up.

MR. LOW: Kent, as I understand it, you've agreed that No. 1 should be "by these rules or by law." I mean --

HONORABLE KENT SULLIVAN: Right.

MR. LOW: That's not in there, and as I understand, you've also agreed that No. (4) could be written three days upon order of the court or for cause entered, in other words copy the same exception, not

change the language, just put it there; and that seems to be addressing what most are concerned about. I mean, you've agreed to that, did you not?

HONORABLE KENT SULLIVAN: Yes.

MR. LOW: That's all.

CHAIRMAN BABCOCK: Sarah, and then Tommy.

HONORABLE SARAH DUNCAN: What if -- I don't think that the one word change to Rule 21 is going to cut it in light of the concerns expressed by Richard and Judge Martin, but what if -- and this is a three-step process, so stay with me. What if we change 3 to 7 or 10? I don't care about the number of days in 21, add supporting materials, to get those filed within the 10 or 7 days, add to 21 "if in addition to presenting oral argument at the hearing a party plans to file a written response, it must be filed and served no less than three days," or "three business days," whatever. I don't care about the number of days. "Before the time specified for the hearing unless it's filed later with leave of court," and then amend 3a to say that the local rules can't shorten the time in the Rules of Civil Procedure except as the Court deems necessary in family law matters in either case-specific or standing court order that's filed in the record of the case.

CHAIRMAN BABCOCK: Okay.

HONORABLE SARAH DUNCAN: I think that resolves --

HONORABLE STEPHEN YELENOSKY: Make a motion. You've got 10 minutes.

HONORABLE SARAH DUNCAN: -- all the problems except what Jim was just talking about about the Power Point presentation, defining "supporting materials."

CHAIRMAN BABCOCK: Tommy.

MR. JACKS: Well, until Jim Perdue raised it I hadn't focused as carefully as I should have on this business of "written response including other materials," and when I think of so many hearings where neither side submits briefs but both sides show up with -- certainly with cases, frequently with -- I know Mike McKetta shows up with a flip book which has his cases and kind of his cavilization of what he wants them to say. There may be at some hearings a need for brief evidence and exhibits, and lawyers just show up and do this stuff, and if you introduce the idea that that has to be served three, and three really means six, days in advance of the hearing, you're drastically altering the practice in a broad swap of cases, and I think that's a colossally bad idea.

CHAIRMAN BABCOCK: Richard.

MR. GARCIA: Could you change "material" just to "evidence," because I don't think anyone is

suggesting demonstrative aids or Power Points or case -- excerpts of cases need to be produced ahead of time, but if you've got evidence, you really should produce that ahead of time.

HONORABLE STEPHEN YELENOSKY: In what instance would it be evidence? It's not summary judgment, it's not presented live. Affidavit evidence?

MR. GARCIA: Affidavit, deposition excerpts, whatever, just evidence. Not arguments.

MR. ORSINGER: So now we have to put all of our evidence in writing before the hearing?

HONORABLE STEPHEN YELENOSKY: It's going to be oral live testimony.

MR. ORSINGER: Well, what does evidence mean? Does that mean that I have to premark all my exhibits and give them to the other side three days before every hearing? Does that mean that I have to summarize what my witnesses are going to say? I thought we had the rules of discovery to allow people to figure out who the witnesses were and let them figure out on their own, take a deposition or something. Why would we have to submit our evidence in advance of the hearing?

CHAIRMAN BABCOCK: Well, that's what this rule requires as proposed.

MR. ORSINGER: I don't think so.

CHAIRMAN BABCOCK: Well, it says "affidavits or other materials."

MR. ORSINGER: Well, you know, that's fine if you're going to have an affidavit practice. Even the discovery rules require you to do that a little bit before the hearing, but "evidence" is broader than affidavits.

CHAIRMAN BABCOCK: Broader than "other materials"?

MR. ORSINGER: Evidence is exhibits that get marked and authenticated by witnesses, and if you say that we're going to have to include all of our evidence in writing delivered to the other side three days before the hearing then I don't even want to be in this state when this rule gets issued.

CHAIRMAN BABCOCK: Justice Bland.

HONORABLE JANE BLAND: I agree with Richard. I never thought that this was intended to include evidence that would be presented at an evidentiary hearing, and if it is then I'm out.

CHAIRMAN BABCOCK: Well, it says "affidavits." That's evidence, right?

HONORABLE JANE BLAND: Well, affidavits aren't evidence usually. They're not admissible as evidence, and they're used in support for various sorts of motions and briefs; but I think when you get to an

evidentiary hearing, you know, you're submitting documents, depositions, testimony; and none of that stuff is to me a response to a motion. That's your evidence, and you might make a response, and you might include affidavits, and if you're just going to decide it on the affidavits you probably should put those into the record three days in advance of the hearing, but --

CHAIRMAN BABCOCK: Can you see that someone would make the argument that "other materials" would --

HONORABLE JANE BLAND: Yes, and --

CHAIRMAN BABCOCK: -- include evidence?

HONORABLE JANE BLAND: -- maybe we should just say --

MR. ORSINGER: Sure.

HONORABLE JANE BLAND: -- "response."

CHAIRMAN BABCOCK: Okay. A lot of hands up. We'll just go around this way. Justice Duncan.

HONORABLE SARAH DUNCAN: I know we're just showing our various focuses in law. As long as we're going to do evidence, if I'm going to be up against a motion to dismiss my med mal case because an expert report hadn't been filed, I want to know what cases from what court you're relying on as to when that time period is going to pass and what the trial court's options are and what the other party's options are in that 120, 180 days,

depending under what statute we're under. I want to know your cases, and I think that's all that really matters in that dismissal hearing and motion for extension hearing.

This is getting really complicated.

CHAIRMAN BABCOCK: As only we can. Judge Yelenosky. Wait, wait a minute. Alex had her hand up. Sorry. We're going to go around the room and then we're going to vote.

PROFESSOR ALBRIGHT: Well, one thing, I don't know if you-all have ever been defendants personally in a lawsuit, but there is nothing more terrifying than the thought of your lawyer having to write responses to every motion because it's going to cost you a fortune. So, you know, moving to this written practice, as everybody said, is just terrifying; but then just, you know, in my rules mongering way, don't use the word "business days." We don't use "business days" anywhere else, and that then -- how does that fold into 21a and 5? It just doesn't work.

And then you also have to remember response. Remember there are rules that require responses at different times other than three days, like summary judgment and venue, so you need a proviso "unless as provided" --

HONORABLE KENT SULLIVAN: It's in there.

That was the very first exception noted.

PROFESSOR ALBRIGHT: On the response?

HONORABLE KENT SULLIVAN: Yeah.

PROFESSOR ALBRIGHT: It's not in there. It's not in here.

MR. ORSINGER: It clearly doesn't apply to the response. It's worse than not clear. It clearly doesn't apply to the response.

PROFESSOR ALBRIGHT: It's further up on the page, and it looks like it's just for the motion.

MR. SCHENKKAN: That would be addressed if we moved all the response stuff up above where it excepts so that the exceptions apply in parallel to both motion and response, all four exceptions.

PROFESSOR ALBRIGHT: Yeah, and then I've been playing with the, you know, if you mail all this stuff how that works, and I'm not really sure how it would work in practice, but it's something to be thought about. I don't want to get into it.

CHAIRMAN BABCOCK: Thanks, Alex. Alistair.

MR. DAWSON: Yeah, my interpretation was that the filing the supporting briefs, affidavits, and other materials was intended to whatever you attach to your response -- you know, if you had a brief that was supporting it, if you had deposition testimony or

documents or exhibits, and the notion was that all of that ought to be filed at the same time, and I support that, because otherwise then, you know, lawyers that want to engage in gamesmanship, they'll file their response but they'll keep, you know, all of their, you know, briefs or they'll keep their evidence or they'll -- and they'll hand that up at the hearing, and really you haven't accomplished anything, and so I'm not sure what the language should be, but, you know, any material -- you know, supporting materials or other materials submitted therewith or some kind of language.

I'm sure Judge Sullivan and others can figure that out, but I don't think it should be nor do I think it was intended to cover live testimony or, if you're having an evidentiary hearing, the exhibits that would be introduced at an evidentiary hearing. I think it's intended to cover those -- and it should cover those materials that one party believes are supportive of the positions asserted in the response.

CHAIRMAN BABCOCK: Who was next? Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: Well, let me just ask, what are we trying to accomplish in the next five minutes? A vote, an ultimate vote, or some straw vote?

CHAIRMAN BABCOCK: Yeah, we're going to take two votes, two series of votes.

HONORABLE STEPHEN YELENOSKY: But it won't get us to the end of the game?

CHAIRMAN BABCOCK: The first is going to be how many people think it ought to be more than 10 days and how many people think it ought to be less than 10 days, how many people are happy with 10. That would be one set of votes. The second set of votes will be how many people think there ought to be a one word change in this paragraph.

MR. BOYD: Chip, to clarify on the record then, we're not going to vote whether there ought to be a change at all?

CHAIRMAN BABCOCK: We did that last time.

MR. BOYD: Right.

CHAIRMAN BABCOCK: We did that last time.

MR. BOYD: So for purposes of this vote --

HONORABLE STEPHEN YELENOSKY: Will we get a vote on a one word change plus an exception for family law?

HONORABLE SARAH DUNCAN: A slight modification, how about a one word change plus an amendment to 3a to permit a local rule for shorter periods of time in family law matters as the Court deems

necessary?

HONORABLE STEPHEN YELENOSKY: Or some mechanism for family law matters.

CHAIRMAN BABCOCK: Okay. We can take some additional votes but those are the two --

HONORABLE STEPHEN YELENOSKY: I just want to know --

CHAIRMAN BABCOCK: Those are the two that the Court wanted to hear what the results were.

HONORABLE STEPHEN YELENOSKY: Okay. Just because we're about to end I just wanted to know what would be most advantageous to speak to.

CHAIRMAN BABCOCK: Yeah. Unless anybody has any strongly held views that they want to express on those issues maybe we could vote now.

HONORABLE JAN PATTERSON: Or other materials.

CHAIRMAN BABCOCK: Huh?

HONORABLE JAN PATTERSON: Or other materials.

CHAIRMAN BABCOCK: Or other materials that they may want to --

HONORABLE STEPHEN YELENOSKY: Well, I just want to --

CHAIRMAN BABCOCK: Although that should have

been done three days ago.

HONORABLE STEPHEN YELENOSKY: I just wanted to know what we are going to be talking about so I can make this short. One word change with some accommodation for family law. The response issue is obviously a quagmire that requires more time than we have to address here.

CHAIRMAN BABCOCK: Yeah. Yeah.

HONORABLE STEPHEN YELENOSKY: But the bottom line on that is judges want the law; and if the other side has a response that's dispositive and you can't say anything about it, you ought to lose; and if you need some time to say something about it, a good judge will give you that time; and we shouldn't be writing rules for bad judges.

CHAIRMAN BABCOCK: Although -- Richard.

MR. ORSINGER: I looked at Rule 120(a) on special appearance, and subdivision (3) says, "The affidavits, if any, shall be served at least seven days before the hearing," so let's be sensitive to the fact that we'll have a conflict between 120(a), and I hope that the specific would prevail over the general, but I know that it will probably take a bunch of mandamuses to figure that out. And then I don't know what the venue response deadlines are, and I wasn't able to read them. Elaine,

maybe you remember. I don't know if there is a different time --

PROFESSOR CARLSON: 45, 30, 7.

MR. ORSINGER: Okay. So we probably need to admit on the record that we either should specifically except other deadlines or reconcile which one will prevail or fall back on the specific controls over the general, which would be the worst choice, I think.

CHAIRMAN BABCOCK: Okay. First vote is going to be how many people think it should be more than 10 days, raise your hand.

HONORABLE TOM GRAY: That's if it's done?

CHAIRMAN BABCOCK: Yeah, if it's done how many people think it should be more than 10 days? That's one vote.

How many people think it should be less than 10 days? That's all right. Multiple volting is fine. Six and a half for less than 10 days.

HONORABLE STEPHEN YELENOSKY: Splitting the vote?

CHAIRMAN BABCOCK: And how many people think 10 days is like Goldilocks, just right?

Okay. There are 26 votes for 10 days.

Now, how many people favor a one word change to paragraph (2) of Rule 21, inserting the word "ten"

where now the word is "three"? Everybody that's in favor of that.

HONORABLE SARAH DUNCAN: All by itself, no other --

CHAIRMAN BABCOCK: Yes. We'll get to family law in a minute.

PROFESSOR ALBRIGHT: This is assuming there is going to be a change, right?

CHAIRMAN BABCOCK: Yes. All right. There are 20 hands raised for that.

How many people favor some version of the Sullivan expansion on that second paragraph?

HONORABLE STEPHEN YELENOSKY: He's multiplying his vote.

CHAIRMAN BABCOCK: Okay. There are 14 votes for that, the chair not voting, so the majority of our committee thinks that a one word change.

Now, how many people think that family law should be exempted from our proposed 10-day limit?

MR. ORSINGER: Can we make it not as rigid as exempted because Sarah wants to give local option to the family law judges, for example, and that might be perfectly acceptable?

CHAIRMAN BABCOCK: Okay. How about we put it this way?

HONORABLE TRACY CHRISTOPHER: But, Chip, but doesn't Rule 21 if we just make that one change already allow that, because it says "or shortened by the court"? I mean --

HONORABLE STEPHEN YELENOSKY: Well, except for the problem that I said, which is that if that's your interpretation it invites shortening for all kinds of purposes.

HONORABLE TRACY CHRISTOPHER: Well, yes, which is why we wanted the change.

HONORABLE STEPHEN YELENOSKY: Which I think is a bad thing.

CHAIRMAN BABCOCK: Let's frame the issue this way. Assuming the rule, Rule 21, is going to be as-written with only one change, that being 10 days instead of 3 days, how many people think that the family -- the family practice ought to be accommodated in some way? Okay. How many are in favor of that?

MR. GARCIA: You mean in addition to the way it already is?

CHAIRMAN BABCOCK: 16 raised their hands for that.

How many people disagree with that proposition? 14 on that, so 16 people think that family -- the family practice ought to be accommodated

because of this one word change that we're suggesting and 14 people think it should not, so that will take care of it.

I think there is some judges that have to go to -- as Sarah Duncan leaves the room and other judges leaving the room, and thanks, everybody, for being here, and we'll see everybody in August, and I appreciate the discussion today. It was great as always.

(Adjourned at 11:38 a.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 2nd day of June, 2006, and the same was thereafter reduced to computer transcription by me.

I further certify that the costs for my services in the matter are $ 743.50 .

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Given under my hand and seal of office on this the 15th day of June, 2006.

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