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MEETING OF THE SUPREME COURT ADVISORY COMMITTEE

October 21, 2006

(SATURDAY SESSION)

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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 21st day of October, 2006, between the hours of 9:08 a.m. and 11:23 a.m., at the Texas Law Center, 1414 Colorado, Room 101, Austin, Texas 78701.

INDEX OF VOTES

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

Documents referenced in this session

06-5 Letter from Justice Hecht (9-22-06)

06-8 TRAP subcommittee report (10-19-06)

06-9 TRE subcommittee report (9-29-06)

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CHAIRMAN BABCOCK: Justice Hecht sends his regrets. He has been called to a funeral in Dallas this morning, so we will labor on without him, and Bill Dorsaneo says that the remainder of the TRAP rules will take 15 minuteS, so, Bill, you're on the clock.

PROFESSOR DORSANEO: All right. Page five of the little abbreviated memorandum, we were still on Rule 49, and particularly 49.8, and right now 49.8 talks about extensions of time to file motions for rehearing or further motions for rehearing. The issue is whether we should extend the extension of time provision to motions for en banc reconsideration. I think the committee thought, not strongly, but that would be okay, but I personally think it would be okay if it wasn't okay.

PROFESSOR CARLSON: Yeah.

CHAIRMAN BABCOCK: So you feel strongly both ways. Anybody have any comments on that? Or is it too early to delve into extensions of time for en banc reconsideration?

PROFESSOR DORSANEO: Do the justices care?

HONORABLE JANE BLAND: I couldn't hear you.

HONORABLE TOM GRAY: Could I get you to just summarize that one more time?

PROFESSOR DORSANEO: Do you want somebody to

be able to ask you to extend the time for en banc reconsideration or not? As an appellate lawyer I might think I might get hired, you know, kind of in between and maybe there would need to be -- I would want an extension of time.

HONORABLE TOM GRAY: I don't see any reason to draw a distinction between this one type of motion than every other motion that has a deadline at the court of appeals. So for consistency, if for no other reason, we ought to have the opportunity for the 15-day extension.

CHAIRMAN BABCOCK: Fair enough. Any other comments? Justice Bland, you're nodding your head in agreement?

HONORABLE JANE BLAND: Yeah.

CHAIRMAN BABCOCK: Okay. Any other comments? How many people are in favor of this change? Raise your hand.

How many opposed? So it's unanimous 14-nothing, 49.8.

PROFESSOR DORSANEO: 49.9 is just something that I think is necessary to kind of make it clear what's not required. It now says "a motion for rehearing is not a prerequisite to file a petition for review," and we've already probably voted this, approving the language of 49.7, but it seemed to me that it ought to be in here,

too, say that "a motion for rehearing is not a prerequisite to filing a motion for en banc reconsideration as provided in 49.7 or a petition for review."

CHAIRMAN BABCOCK: Okay. Makes sense. Any comments on this? Discussion? All right. All in favor of the change in 49.9, raise your hand.

All those opposed? That passes by a vote of 18 to nothing. Okay. You're on a roll.

PROFESSOR DORSANEO: Do you want to do 53.7 again? We already did that, but I don't know if we did it completely formally. Can I do it again? It won't take long.

CHAIRMAN BABCOCK: I don't think we voted on it here.

PROFESSOR DORSANEO: The idea here is that the City of San Antonio case says that a motion for en banc reconsideration is a motion for rehearing within 53.7. The committee thought it would be better to say in so many words that a motion for en banc reconsideration is the type of motion that 53.7 triggers from.

CHAIRMAN BABCOCK: Okay. Discussion on that? Is everybody reading it to follow what's going on here?

PROFESSOR CARLSON: Yeah.

CHAIRMAN BABCOCK: Yeah?

PROFESSOR CARLSON: Yes.

CHAIRMAN BABCOCK: Okay. Everybody in favor of the change to 53.7 raise your hand.

All those opposed? 18 to nothing in favor.

PROFESSOR DORSANEO: Now, the last one is a little bit harder for me to explain because I didn't have it completely drafted and it's not on your paper right now completely, but in reading the City of San Antonio case and our prior work and the Court's prior orders amending 19.1 -- and I'm going to read 19.1 to you because it's not even -- I don't have a current version of it. May I borrow your rule book, Buddy?

In 19.1(b), which is the thing that we worked on a while back to try to deal with this problem where we dealt with it incompletely, we changed 19.1(b) to say that "plenary power of the court of appeals over its judgment expires," in (b), "30 days after the court overrules all timely filed motions for rehearing," and then the language is "including motions for en banc reconsideration of a panel's decision under 49.7."

Now, it seemed to the committee, I think, certainly it seemed to me, that it's better to think of motions for en banc reconsideration as distinct motions, and everything that we've done so far doesn't treat the

language "motion for rehearing" as necessarily including these motions for en banc reconsideration. So I would -- I suggested in the committee and suggested in this end (b) thing that we change 19.1(b) to say "30 days after the court overrules all timely filed motions for rehearing and all timely filed motions for en banc reconsideration." Instead of saying "including" just say "and," "and timely motions to extend time to file a motion for rehearing or a motion for en banc reconsideration under 49.8," and that's meant to make it clearer what we're talking about in terms of the 30 days after part of 19.1.

Now, the same problem exists in 19.1(a) in a slightly different guise. It says now "60 days after judgment if no timely filed motion to extend time or motion for rehearing is then pending." It would be better if it said, "60 days after judgment if no timely filed motion for rehearing," comma, "motion to extend time to file a motion for rehearing, or motion for en banc reconsideration is then pending." So what I want to suggest is that we say -- we say the three types of motions in 19.1(a) and 19.1(b) without trying to make the language "motion for rehearing" cover motions for en banc reconsideration by treating them as a subspecies of motions for rehearing. Whether you think they should be thought of that way or not, just say "motion for en banc

reconsideration."

HONORABLE SARAH DUNCAN: Well, what about a motion to extend time to file a motion for en banc reconsideration?

PROFESSOR DORSANEO: In --

HONORABLE SARAH DUNCAN: (a).

PROFESSOR DORSANEO: In (a) you would need -- maybe it should be changed to a different order. Okay. You're right. It should be changed. "Motion for rehearing, motion for en banc reconsideration, or motion to extend time to file motion for rehearing or motion for en banc reconsideration." Just put them all in there in each section.

CHAIRMAN BABCOCK: Okay. Frank.

MR. GILSTRAP: Bill, that makes sense to me. Let me ask you this, and maybe I don't understand this, and maybe there are others who don't either. Here and in 329(b)(e) we have a situation in which the court continue to have power, plenary power, over the case even after all the motions that you can file are overruled and done with. What's the purpose of that period, having that plenary power for that period?

CHAIRMAN BABCOCK: Justice Gray.

HONORABLE TOM GRAY: We mess up. We make mistakes, and we realize that sometimes when we see it

come back to us, either in the digest or the advance sheet, whatever, you know, the *Texas Lawyer* things. You read it again, you go, "That's not what we meant," and we just need that opportunity to be able to pull it back.

MR. GILSTRAP: All right.

HONORABLE TOM GRAY: Redo it.

MR. GILSTRAP: Thank you. I understand now. I think it's a good proposal.

CHAIRMAN BABCOCK: Okay. Bill, do you suggest either flipping (b) in front of (a) or?

PROFESSOR DORSANEO: No. What I want to do is just say -- I tried to say it more clearly. "60 days after judgment if no timely filed motion for rehearing," comma, "motion for en banc reconsideration --"

CHAIRMAN BABCOCK: Okay.

PROFESSOR DORSANEO: "-- or motion to extend time to file a motion for rehearing or motion for en banc reconsideration is then pending."

CHAIRMAN BABCOCK: Gotcha.

PROFESSOR DORSANEO: And then (b) would --

CHAIRMAN BABCOCK: Track the way it is.

PROFESSOR DORSANEO: -- track it in terms of identifying the motions we're talking about.

CHAIRMAN BABCOCK: Perfect. Any other comments?

MS. BARON: It's a timely filed motion, right?

PROFESSOR DORSANEO: Yeah. Yeah. Concept would be timely.

CHAIRMAN BABCOCK: Okay. Any other discussion about this? All right. Everybody in favor of these changes to 1901 -- 19.1, raise your hand. You got your hands raised down there, Jane and Tracy?

HONORABLE STEPHEN YELENOSKY: Looks like it's going to be a close vote.

HONORABLE TRACY CHRISTOPHER: If Jane's voting for it, I'm voting for it on TRAP.

CHAIRMAN BABCOCK: All right. Anybody opposed? 20 to nothing in favor. And, Bill, did you intend to skip over 52.3?

PROFESSOR DORSANEO: No, I didn't. I forgot. I forgot it. Thank you. 52.3, the issue is whether we ought to say something different from what it says now with respect to the verification of a mandamus petition. Now it says, "All factual statements in the petition must be verified by affidavit made on personal knowledge." I don't know whether it says "by an affiant competent to testify to the matters stated" and you're not supposed to -- if you're the lawyer doing the mandamus petition to just verify the whole -- all the factual

statements in the petition, you know, if you don't have any personal knowledge and don't have any basis for doing that.

So that creates some problems for lawyers in that position, and most of us try to be careful not to verify something when we are not in a position to do so and get somebody else to do it. We'll maybe change the nature of the verification to use different language or whatever, but the recommendation is to say instead of what it says now, "All factual statements not otherwise supported by sworn testimony, affidavit, or other competent evidence must be verified by an affidavit or affidavits made on personal knowledge by affiants competent to testify."

So just the idea would be all of this needs to be -- all of this needs to be supported by somebody's oath who was in a position to give the oath.

CHAIRMAN BABCOCK: Okay. Judge Christopher.

HONORABLE TRACY CHRISTOPHER: What is "other competent evidence"? This one interests me.

PROFESSOR DORSANEO: An exhibit. Maybe we don't need to say "other competent evidence," but I was thinking about exhibits, which might be thought of as part of sworn testimony or part of the -- huh?

MR. LOW: It might not.

PROFESSOR DORSANEO: Or part of the affidavit, but --

MR. SCHENKKAN: Certified copies.

PROFESSOR DORSANEO: That's what I was thinking of. There might be something else.

MR. SCHENKKAN: Certified copies of public records.

MR. GILSTRAP: 680 has "affidavit or verified complaint," and that's the one analogous situation where you have to verify an injunction, complaint for injunction.

CHAIRMAN BABCOCK: Richard.

MR. MUNZINGER: What would be wrong with deleting the words "by sworn testimony, affidavit, or other" so that it would read "not otherwise supported by competent evidence"? Sworn testimony in an affidavit are presumptively competent, and it seems to me it's repetitive, although it may be teaching something to the uninformed practitioner to have that string of words in it, but "competent evidence" it seems to me includes the others.

CHAIRMAN BABCOCK: Anything about that?

PROFESSOR DORSANEO: I agree with that, just to give somebody some sort of an idea what it means.

HONORABLE TRACY CHRISTOPHER: Bill, can I

ask another question?

PROFESSOR DORSANEO: Yeah.

HONORABLE TRACY CHRISTOPHER: If there's a certified copy of the order you're complaining of, is that it? That's all you need to do to file a mandamus?

MR. GILSTRAP: If it supports the allegations necessary for mandamus.

HONORABLE TRACY CHRISTOPHER: Isn't the attorney supposed to say, "This order is an abuse of discretion," and that's the purpose of the affidavit, the verification requirement, to know someone has looked at it and made the determination, and they put that in their petition for mandamus rather than just attaching a copy of the order? Isn't that the point of the verification?

MR. GILSTRAP: No, the point of it, the attorney just says this is what happened in trial court, this is the order that was entered, and these are the other facts of the litigation. I don't think he verifies that this is an abuse of discretion.

HONORABLE TRACY CHRISTOPHER: Well, what's the point of the verification?

MS. BARON: I can tell you. The problem with mandamus is that you invent your own record. You don't have the court clerk preparing that record, you don't have a court reporter necessarily preparing the

record, so what you have are a whole bunch of pieces of paper that have come from a lot of different places, and you're making your own record. So I think the concept is that somebody has to come in and say all of these papers are the real papers and come from whatever we did in the trial court because we don't --

HONORABLE TRACY CHRISTOPHER: But all you have to do is --

MS. BARON: Because we don't have a title like we usually do in an appeal.

HONORABLE TRACY CHRISTOPHER: And if you get a certified copy, then according to this there wouldn't be any need for any verification. I mean, you have to have a written order that you're --

MS. BARON: Well, I still --

HONORABLE TRACY CHRISTOPHER: -- appealing generally. There are some exceptions, but generally you're supposed to have a written order for a mandamus, and if you get a certified copy of it, which you should have, and you should be able to get a certified copy of any pleading that you file.

MR. GILSTRAP: The affiant sometimes doesn't have knowledge of all the facts, all the whole chain of facts you need to get mandamus. There might be a gap in there. So you maybe get someone else to sign an

affidavit, but you could fill that with a certified copy of a document to plug in that particular gap. I don't think you could get mandamus simply based on a certified copy. You'd need an affidavit, too, but the problem is the affiant doesn't always have personal knowledge of everything. It's just like an injunction when they come into your court and sometimes people put together two or three affidavits to verify the complaint.

HONORABLE TRACY CHRISTOPHER: No, I agree with you. But it seems to me the way this is written, the change, that all you would need to do is attach a certified copy of the order, which I would be against.

PROFESSOR DORSANEO: Well, the petition is going to state other facts about what happened, and this is an original proceeding. It's going to state other facts, and the idea is that somebody needs to support those facts by the appropriate oath.

MR. GILSTRAP: Somebody can come in with an affidavit, but the affidavit wouldn't state all the necessary facts and be verified, so therefore, they don't get mandamus, even though they have an affidavit.

CHAIRMAN BABCOCK: Pam.

MS. BARON: Well, you're still going to certify as to kind of the history of the proceeding that isn't reflected in the document. Whether or not there was

an evidentiary hearing won't be reflected in certified copies unless you actually have a reporter's record from an evidentiary hearing. Issues on what the lower -- if it's in the Supreme Court, what the court of appeals did, you may not have certified documents of all of that, but even now when you sign the affidavit -- and, actually, I'm one of those people I never swear. I refuse to sign the affidavits. I get somebody else to do it, because all I have are a bunch of pieces of paper that the trial lawyers handed me and I don't --

HONORABLE TRACY CHRISTOPHER: But, see, my point is I think the trial lawyer ought to have to sign the mandamus application, not you, and I think the appellate practice of letting the appellate lawyers just make these wild statements that bear no relationship to what's happened in the trial court is wrong, and I see it.

PROFESSOR DORSANEO: But the appellate courts are not going to want to have trials, okay, and that's the alternative.

CHAIRMAN BABCOCK: Pete had his hand up a minute ago, and then Justice Bland and Justice Gaultney.

MR. SCHENKKAN: I just want to see if this illustrates -- see if this illustrates the problem and might require one or more affidavits based on personal knowledge that wouldn't be taken care of by the certified

copies of documents and leaving aside the question of who signs the document, where I agree with Pam that I find myself often not the one who knows the facts and am not able to truthfully say I have personal knowledge.

The mandamus concerns discovery requests. The documents have been ordered to be produced. The side resistsing production of them says that they are -- that it is a statutory violation and would be a criminal violation for them to hand over the documents of this type. You've got to see what's in the documents to know that that's the case. Someone has to say, "Here are some of the documents in question."

HONORABLE TRACY CHRISTOPHER: No, I don't mind adding stuff to it. It's just the way this is written it allows you to only have certified copies of the documents.

MR. STORIE: I don't think so. I don't think so.

HONORABLE TRACY CHRISTOPHER: Well, that's the way it's written. You know, as long as it's rewritten so that's not it, I'm okay with it.

CHAIRMAN BABCOCK: Justice Bland.

HONORABLE JANE BLAND: Well, it seems like, you know, mandamus practice, even though it's really grown, they are extraordinary writs; and I think when this

all started the idea was we did want somebody to swear to the truthfulness or verify the truthfulness of the contents of the petition because it may not accurately reflect what actually happened in the trial court; and so I think that really is the purpose of it, it is to say that what I have in here is true and correct; and if you have documents that you're relying on then your petition should say "these documents state." It shouldn't assert these things as fact if you can't say that they're fact based on your personal knowledge, and so by changing it to this we're saying basically that somebody can file their petition and they could take the position that all of this stuff that's attached supports their petition, but the petition doesn't accurately reflect what happened in the trial court, and there's nobody that's had to verify it.

It's just one of those reminder steps for other things that we have verifications for that, you know, we want to be sure because we don't have a record that petition accurately reflects what happened in the trial court.

CHAIRMAN BABCOCK: Okay. Justice Gaultney, you had your hand up minute ago or maybe --

HONORABLE DAVID GAULTNEY: Yeah, I see the verification as having two purposes. One, as Pam says, we don't have a record. The trial lawyer doesn't have time

to get a record sometimes. I mean, there is an order, a discovery order, saying "produce privileged documents tomorrow," and so there is an effort then to get the -- something together, and so one purpose of the affidavit, as I see it, is to have the attorney verify that these are -- this is the record of what happened when in the trial court, and it may even come out of the lawyer's file, I guess, but it's an affidavit establishing that.

The second thing I think it does is that there are sometimes gaps in what the record that is there in terms of the proceeding, so I think it serves two functions. I don't have any problem with the proposed amendment. I think "competent evidence" is not necessary. I mean, I'm not sure that that -- what you -- any statement that a lawyer makes hopefully is a true statement, so -- but what we want is someone focusing on saying, "This is the record that we're going to present to you as an accurate record. Anything not reflected in that record, which I have to fill in because there's nothing there, I have to give you the facts of what happened, I'm verifying with this affidavit."

That's -- I think the problem that sometimes occurs with lawyers is they say, "Do I have" -- "I have this affidavit I have to sign that says I have to verify to all these facts that my client knows or this client

knows or whatever, and I can't get that done this quickly," and yet I'm being asked by the rules to sign it, or is the court of appeals going to deny the petition because the affidavit is defective, and I think that's the problem, and so I would support the amendment. I think we can work on the language. I agree that "competent evidence" is not precise.

CHAIRMAN BABCOCK: Justice Gray, then Judge Christopher.

HONORABLE TOM GRAY: I had a mechanical issue I resolved.

CHAIRMAN BABCOCK: Judge Christopher.

HONORABLE TRACY CHRISTOPHER: Well, I don't mean to be rabid about appellate practitioners versus the trial practitioners --

CHAIRMAN BABCOCK: Have you been mandamused recently?

MR. GILSTRAP: How refreshing.

HONORABLE TRACY CHRISTOPHER: But I look at this note, you know, as to why we're being asked to consider a change to this rule, and it says, "Some appellate practitioners have asked the Court to modify this rule," which suggests to me that it is the appellate lawyers who do not want to swear that the petition is true and correct because, of course, they weren't there, they

don't know what happened. Okay.

I don't think that we should eliminate that requirement, and I think an appellate practitioner can get the trial lawyer to sign the affidavit of what was true and correct so that we don't have a situation where the appellate practitioner is swearing to something when they weren't there. It kind of reminds me of appellate practitioners who come in at the jury charge stage and argue that there was no evidence to support this issue. It just irritates me. I'm sorry.

MS. BARON: Ow.

HONORABLE TRACY CHRISTOPHER: And it's not right, because you don't know that there was no evidence to support it.

CHAIRMAN BABCOCK: Pam.

MS. BARON: You know, I think I saw the comments that requested this change, and I didn't initiate this comment.

CHAIRMAN BABCOCK: It was Orsinger, right?

MS. BARON: I can't remember who it was, but it was never the way I understood the verification requirement, because what it suggested is that when you verify that all the facts in the petition were true that you were actually verifying the testimony at trial, which, you know, was the witness' obligation to be truthful as to

the evidence at trial, and I never really felt like whoever was signing the affidavit was swearing to sworn evidence that you've attached or made part of the record, that you were really just verifying that, you know, you took that out of the materials that you had. Is that your understanding of the comment, Bill?

PROFESSOR DORSANEO: I didn't bother to read the comment.

MS. BARON: You didn't read the comment.

PROFESSOR DORSANEO: Because I don't know where those comments came from.

MS. BARON: But that's not what an affidavit is doing in that situation, is it?

PROFESSOR DORSANEO: No. When I do -- and I haven't done one of these in awhile, but the affidavits that I would do would say something like this draft. Okay? I'd swear that it's supported by personal knowledge or by sworn testimony or by an affidavit or by something else. Huh? And I'd swear to what I could swear to.

MS. BARON: But if you're saying all the facts in the petition are true, are you saying that all of the witnesses' testimony was true?

PROFESSOR DORSANEO: No., I'm not saying that. No.

MS. BARON: I don't think so, right?

PROFESSOR DORSANEO: I'm just saying that that's --

HONORABLE SARAH DUNCAN: That was the testimony.

PROFESSOR DORSANEO: That that's the testimony.

MS. BARON: That that's the testimony, right.

MR. GILSTRAP: It depends on the facts in the petition. I mean, if you're alleging that Joe Blow bought Block Aid, couldn't you say these facts are true you are alleging -- you're verifying the facts in the petition. You're saying that --

PROFESSOR DORSANEO: If I understand it, if there is a dispute about what happened then you're not supposed to get mandamus. Mandamus is not suppose to be for resolving disputes.

CHAIRMAN BABCOCK: Judge Patterson had her hand up, and then Justice Gaultney.

HONORABLE JAN PATTERSON: I did not read this as allowing license so much as I have assumed that it allows flexibility and precision to allow those who have the information to be the ones to verify, so to me it allows them to be more precise and candid.

CHAIRMAN BABCOCK: Justice Gaultney.

HONORABLE DAVID GAULTNEY: I agree with Pam and Bill about what its function is, but I think it serves an additional function of gap filling. But the rule, I think the problem the proposed rule is trying to address is that 52.3 as it's currently written, if you're not perhaps an appellate practitioner or you don't do this routinely, it says, "All factual statements in the petition must be verified by affidavit based on personal knowledge," so someone is filling out their petition of mandamus, and they put a statement of facts in there about whatever the issue is. You know, just reading that they might think they've got to verify personally that those factual statements are correct, so I think what the proposal does is say "no, you don't."

HONORABLE STEPHEN YELENOSKY: They do. They do.

HONORABLE SARAH DUNCAN: But -- but --

CHAIRMAN BABCOCK: Justice Bland, then Justice Duncan.

PROFESSOR DORSANEO: Well, somebody does.

HONORABLE JANE BLAND: How about can we say, "All factual statements in the petition must be verified by an affidavit made on personal knowledge, sworn testimony, or other competent evidence," and just make it that way and then there's no idea that you can -- that you

can fill in the -- that you don't need anything to support what happened in the trial court.

MR. GILSTRAP: The reference to affidavit is redundant, and there's two of them, and you don't need but one.

HONORABLE JANE BLAND: Right. Right. And you should give everybody the universe from which -- if it truly is to sort of cover the types of evidence that can be used and how that can be proved up, then you should do it inclusively, and then you won't have this problem of somebody thinking they could skip.

PROFESSOR DORSANEO: The sworn testimony might be an affidavit.

MR. GILSTRAP: Yeah. Yeah.

PROFESSOR DORSANEO: Okay. So there might be sworn testimony --

HONORABLE JANE BLAND: When I think of sworn testimony I think of evidentiary hearing, testimony under oath; and if you're talking about an "affidavit," comma, "sworn testimony," I think that's what most people will think. But if you want to call it, you know, evidence given under oath or something, but you have affidavit and sworn testimony separated out here in the rule as it exists.

PROFESSOR DORSANEO: Well, the sworn

testimony part is -- there might be something in the record that I'm making up that involves sworn testimony. Huh? So I'm going to make a record reference to that.

HONORABLE JANE BLAND: Right.

PROFESSOR DORSANEO: Okay.

HONORABLE JANE BLAND: Right.

PROFESSOR DORSANEO: And that ought to be fine. There might be an affidavit in that --

HONORABLE JANE BLAND: Right.

PROFESSOR DORSANEO: In that evidence.

HONORABLE JANE BLAND: Yeah. We can have both.

PROFESSOR DORSANEO: And then other stuff that's not already verified that's referenced in the statement of facts and the petition needs to be supported by somebody's affidavit.

HONORABLE JANE BLAND: Well, that's what I'm saying, if you instead of saying "not otherwise supported by," which I think leads people -- maybe leaves people with the impression that they can use this to get around having to personally verify it.

HONORABLE SARAH DUNCAN: Well, they can.

HONORABLE JANE BLAND: Which they can, focus on what has -- "all factual statements must be verified." How do they have to be verified? They can be verified

either by an affidavit, by sworn testimony, or by competent evidence.

HONORABLE SARAH DUNCAN: But that's not a verification.

HONORABLE JANE BLAND: Well, if you -- okay. "Must be supported --"

HONORABLE SARAH DUNCAN: I think we have a major disconnect here.

HONORABLE JANE BLAND: "Must be supported by an affidavit." You don't want to use verification because, I understand what you're saying, that that's different.

HONORABLE SARAH DUNCAN: What we've got now is -- if I'm filing a petition I have to verify that all of the factual statements in the petition are accurate. Whether I'm the trial lawyer or an appellate lawyer makes no difference. There are a lot of things I can't verify. I can't verify that this is, in fact, a business record of Defendant Three. I can't verify that there was an evidentiary hearing or there wasn't if I wasn't there, and filing a petition for writ of mandamus is like a motion for summary judgment.

HONORABLE STEPHEN YELENOSKY: Exactly.

HONORABLE SARAH DUNCAN: Every single sentence I write I have to have some evidence, competent

evidence, to support that sentence. I may or may not have personal knowledge of it, but I have to have some proof of it, and I think all that's trying to be done here is recognize that and recognize that not all factual statements in the petition are going to be verified by the person who signs a verification as to some of them.

There may be 15 types of evidence that support this petition, and I think all we're trying to do is recognize that and say the person who signs the verification doesn't have to say all the factual statements are true. They can say that these factual statements are true and then I have this proof of that factual statement and this proof of that factual statement, and without that flexibility people are perjuring. They're lying. That's the problem.

CHAIRMAN BABCOCK: Judge Yelenosky, then Judge Sullivan.

HONORABLE STEPHEN YELENOSKY: Well, yeah, I mean, unless either the trial attorney or the appellate attorney was a witness in the case then they can't swear to anything except what they -- what transpired in the case.

HONORABLE SARAH DUNCAN: What they can swear to.

HONORABLE STEPHEN YELENOSKY: And what I

hear people saying, well, it's been fast and loose as to what personal knowledge is --

MR. JEFFERSON: That's right.

HONORABLE STEPHEN YELENOSKY: -- and appellate lawyers or trial lawyers have been signing off on things, which if presented to a trial judge in a summary judgment would be obviously not personal knowledge.

CHAIRMAN BABCOCK: Kent.

HONORABLE KENT SULLIVAN: I think that what we're talking about when you sort of cut to the chase here is a question of form, and that is this is another court document that we have created for which we require something that we call, quote, a verification, close quote, and in many respects they are, I think, outnumbered. The summary judgment analogy -- and I don't know who gets credit for that -- I think is very apt.

CHAIRMAN BABCOCK: Sarah.

HONORABLE KENT SULLIVAN: What would be the point of us if we decided in a summary judgment context to say that a lawyer ought to provide a verification for the summary judgment? I'm talking about a separate page where the lawyer says, "Everything in my summary judgment motion is true and correct." That is really essentially what this practice has come to.

I think that what we would be better off doing -- and I agree with Judge Christopher's point -- is just to have a rule that clearly says -- I think Justice Bland said the same thing -- that just makes absolutely clear in terms of change of practice that if we're not going to have a verification -- which I agree is outmoded, it's extremely cumbersome in terms of the function that it's trying to serve -- is that you have to have appropriate proof for everything that is a requisite of the mandamus and get rid of this one size fits all, you know, animal that we call a verification, because it really doesn't do the job.

There's almost no situation, I think, anymore in most documents where the verification -- you put lawyers in a box almost every time you require they verify the court pleading like this because there's almost no case in the situation of any factual complexity where one person, much less the lawyer who is now being injected into this process, can truly verify all that needs to be verified by personal knowledge. We probably would be better off getting away from it and saying that if indeed you are in a situation where one person can provide that personal knowledge verification, that it's a one person affidavit that's slapped and attached to it and proves up all the necessary facts then you go on, but the

verification, it seems to me as a matter of form, is in large part outdated, outmoded, and we probably ought to recognize it.

HONORABLE SARAH DUNCAN: I think it always was. I mean, it has been for the 20 years I have been doing original proceedings.

CHAIRMAN BABCOCK: Jody.

MR. HUGHES: I just wanted to give an idea from the Court's perspective what the concern was they were looking to on this issue. I think Justice Duncan put her finger on the problem, which is the complaint came from appellate practitioners, and we were already noticing that people routinely -- and to be fair, I did it when I was in practice -- kind of modified the affidavit requirement because you don't feel comfortable saying, "I know these things are true based on my personal knowledge" when you don't know that, but it's really not appellate practitioners versus trial practitioners. It's things that most of the facts you're talking about are not things that the lawyer has personal knowledge of and I think it's just a thing for the Court, whether it's a court of appeals or the Supreme Court, they just don't want to deal with fact issues. They want to see a supportive record. You know, if a witness is lying underneath you should be able to say, "This is what the witness said under oath,"

put it in your mandamus, and the lawyer is not personally guaranteeing.

HONORABLE KENT SULLIVAN: And that's why as a matter of forum we shouldn't pretend that most cases fit into that format where we expect that one person, i.e., the lawyer, will actually be able to do that. Virtually all cases do not fit in that category, it seems to me.

CHAIRMAN BABCOCK: Bill.

PROFESSOR DORSANEO: Well, that's exactly what this is trying to. I hear Jane saying that she doesn't like the "not otherwise" language, and, you know, that language could be, you know, taken out of there. The reason I wrote it that way is it seemed to me there are, in fact, a lot of cases where the lawyer does have personal knowledge of everything, you know, in a lot of discovery cases or whatever, but there are a lot of cases when they don't. I guess Pam rarely does. Huh?

MS. BARON: Never.

PROFESSOR DORSANEO: She's taking over stuff.

CHAIRMAN BABCOCK: No comment out of Pam.

PROFESSOR DORSANEO: You know, to me I would put all, you know, four things in there. I see four things, sworn testimony; an affidavit, which might be sworn testimony, but I feel better saying "affidavit."

Huh? I mean, it is sworn testimony, but I feel better saying "affidavit" so somebody is clear that an affidavit counts. I like saying "or other competent evidence." The reason I like saying it is I'm not sure what that covers, but I know if it's good, if it's other competent evidence, I want it covered. I mean, certified copies would be an example and maybe even stipulations or --

MR. GILSTRAP: All the stuff in 166(a). That's what it covers.

MR. STORIE: Yeah.

CHAIRMAN BABCOCK: Justice Duncan.

PROFESSOR DORSANEO: But I don't care whether it's -- I don't care what the sequence of these four or "verified by an affidavit or affidavits." I don't care what the sequence is. I don't care whether it says "verified by an affidavit or affidavits supported by sworn testimony, affidavit, or other competent evidence." I don't care which way it says it.

CHAIRMAN BABCOCK: Justice Duncan. No, actually, Judge Christopher HAS had her hand up for a long time.

HONORABLE TRACY CHRISTOPHER: Well, I'm trying to understand the problem that we're trying to cure; and it seems that Jody says that there's not enough evidence supporting the mandamus petition; and if we're

trying to cure that, I'm happy with that, that we need more affidavits and more evidence and more personal knowledge. I'm happy to see that --

MR. HUGHES: That's not the problem.

HONORABLE TRACY CHRISTOPHER: -- but I didn't see that in this fix here.

CHAIRMAN BABCOCK: Jody says that's not the problem.

HONORABLE TRACY CHRISTOPHER: Well, what -- I didn't understand what you said then.

MR. HUGHES: Okay. The problem is, is that this requirement, the words of this rule, do not match I think what the courts are looking for. They're not looking for -- as I've always understood this and I think as most people understand it, they're not looking for the lawyer or whoever it is to personally say this is true. They want a factual section of the mandamus to be supported by some sworn evidence or testimony in the record, be it an affidavit, be it trial testimony, be it by the lawyer in some instances where there there's not a record.

I mean, I think there are things that a lawyer can say and swear to. You know, there was no hearing on this matter. That would be an appropriate thing for a lawyer to make a factual affidavit on, but

it's not -- I guess the problem is that the language of Rule 52 doesn't match that in the sense of it's requiring somebody to be swearing to the court of appeals everything behind this is true, and if your mandamus petition is supported by either a record containing the sworn testimony that supports it or other appropriate documentation, then it just is creating this mismatch, and the lawyers are reacting to it by not following the form.

HONORABLE TRACY CHRISTOPHER: Well, that sounds like an incomplete record, which means more record, and so I'm really trying to understand what the -- I mean, do any of the appellate judges here deny a mandamus because the verification is poor? Or --

CHAIRMAN BABCOCK: Will you guys yield to Justice Duncan here for a second?

HONORABLE SARAH DUNCAN: Just to say what the problem is, the problem is, I think, that the rule only recognizes one form of proof of factual statements in a petition for writ of mandamus, and that's a verification, one verification. The problem is that one verification in most cases won't prove all the factual statements in a petition, and I think the Court lawyers want the rule to recognize that there may be any number of these types of proof of the factual statements in the petition. It's just getting real.

PROFESSOR DORSANEO: So one fix is to say "an affidavit or affidavits." That makes it clear, okay, that we're talking about more than one affidavit, but beyond that we're saying it doesn't have to be affidavits.

HONORABLE SARAH DUNCAN: Right.

CHAIRMAN BABCOCK: Richard Munzinger.

MR. MUNZINGER: I think the rule as Bill has drafted it meets every criticism that has been voiced by every person present. It's very clear to me when I read this that every factual statement in a petition for mandamus must be supported by competent evidence; and if the competent evidence is not sworn testimony, affidavit, an exhibit, or something else, the lawyer filing it or someone else must give an affidavit supplying that fact and the affidavit must be based on personal knowledge.

Every criticism that has been voiced by every person in this room this morning and every appellate lawyer who has had a question about it in my personal opinion is satisfied by the rule as written.

MR. LOW: Amen.

HONORABLE SARAH DUNCAN: I like Richard's even better. "All factual statements must be supported by competent proof."

HONORABLE STEPHEN YELENOSKY: Yes.

HONORABLE SARAH DUNCAN: Period.

HONORABLE STEPHEN YELENOSKY: I like that.

CHAIRMAN BABCOCK: Frank.

MR. GILSTRAP: Bill, why do we have the two affidavits? In other words, I guess, I mean, what you're saying is I guess an affidavit that maybe was filed in the trial court or something.

PROFESSOR DORSANEO: Right.

MR. GILSTRAP: But, you know, I mean, wouldn't it make just as much sense to say "sworn testimony, affidavit, or other competent evidence," period? Because, you know, you've got an affidavit from the attorney if you need one or from someone else. You've got the verification, which is an affidavit. I understand where this is coming from, and I understand historically why we're here, but it seems confusing and redundant to someone who isn't familiar with the history.

CHAIRMAN BABCOCK: Justice Gray has had his hand up for a long time. I skipped him. Sorry.

HONORABLE TOM GRAY: That's okay. I think this actually fits better in the conversation now after Richard's comments. It seems to me that what we need to do is move that first sentence under 52.3 that is part of the more or less preamble down to the part of the form and contents of the petition to which it actually applies, which is the statement of facts in (g), because I really

don't understand why if there's a section of the petition that has "the petition must give a complete list of all parties and the names and addresses," that would be something that I would need to have verified proof of.

That seemed -- I mean, the whole conversation that we've had has been directed towards what are the facts upon which the petition is based. If that's down in (g) then it puts the emphasis of what it is we're trying to do in the part of the petition to which it relates, so the statement needs to be moved. I was actually thinking that you could just say down in (g) kind of the statement that was bandied about earlier that "The petition must be supported by a record," which has the verification with regard to each of the items in the record, but I think one of the things that makes this very complicated is that that first sentence to me seems to be out of place.

CHAIRMAN BABCOCK: Okay. Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: Well, I just want to second what Justice Duncan said. I mean, nobody can deny that it would be a correct statement to say all factual statements in the petition must be supported by competent evidence, period. Everything else is trying to address practitioners who have been doing something one way and telling them you can continue to do that or you

can do something more. To me, I think we ought to just put that in a comment and let the new lawyers growing up read exactly what we mean, which is competent evidence, and not have to deal with all the baggage from all the lawyers who have either been playing fast and loose with it or have been doing it right and worrying about it.

CHAIRMAN BABCOCK: Pam, which are you, fast and loose or worrying?

MS. BARON: Both, I guess. I want to agree with Judge Christopher in one respect, and I think it's that we need to maintain a verification requirement. It's just what we need to debate is what the contents of the verification need to say, because I don't think we want people filing these requests for extraordinary relief without at least making some representation to the appellate court that they have reviewed carefully the contents in some way, and so I think the way this is written it could avoid having to verify because it just says all statements have to be supported by certain types of competent evidence, but not that anybody has to actually go through the petition and make sure and tell the court, "I've looked at it, and yes, these are supported by competent evidence." So maybe we do need to rewrite this sentence so that it says you have to verify that it's supported by competent evidence.

CHAIRMAN BABCOCK: Lamont.

MR. JEFFERSON: Yeah. It seems to me it's a question of accountability. I mean, the whole idea was we want someone to verify because it's so easy to file a mandamus and you don't have the clerk doing it, and so we had this requirement that it must be sworn to. The added language is going to make it a lot easier for you to get into -- you'll sign it yourself. So for the appellate practitioner to get the affidavit because the affidavit doesn't mean anything.

MS. BARON: Well, I'm not even sure it requires an affidavit as it's written.

PROFESSOR DORSANEO: Doesn't.

MR. JEFFERSON: Or a verification.

MS. BARON: Or a verification of any sort.

PROFESSOR DORSANEO: Doesn't. It can be written to say the affidavits that I write don't say that I have personal knowledge of everything except, you know, all of the facts. They say that everything in here I have personal knowledge is supported by competent evidence.

CHAIRMAN BABCOCK: Buddy.

MR. LOW: See, competent evidence might be a part -- you might get the court reporter to give you three pages of testimony.

CHAIRMAN BABCOCK: Right.

MR. LOW: That's competent evidence, but it's not admissible because it hasn't been verified that that was the record. So if you just say competent evidence I think you short circuit something.

CHAIRMAN BABCOCK: Yeah. Okay. Are we ready to vote on this?

PROFESSOR DORSANEO: Yeah.

HONORABLE TRACY CHRISTOPHER: What are we voting on?

MS. BARON: Yeah, what are we voting on?

MR. JEFFERSON: So the question is whether we vote on this change which will --

HONORABLE TRACY CHRISTOPHER: This change as written?

MR. GILSTRAP: Change as written, yeah.

CHAIRMAN BABCOCK: Yeah. Unless the chair wants to modify the language.

PROFESSOR DORSANEO: I don't want to right now.

CHAIRMAN BABCOCK: Until you see what the vote is.

All right. Everybody in favor of the changes to 52.3 as written raise your hand.

All opposed? By a vote of 14 to 6 it passes.

PROFESSOR DORSANEO: Last subject, motions to seal in the court of appeals. I don't have a proposal on this because we ran out of time, but Jody has gotten a lot of information together. Do you feel comfortable sharing that with us about where things stand?

MR. HUGHES: Sure. I actually just did a survey of the clerks of the court of appeals, courts of appeals, and asked them a couple of questions. One was what they do with records from the trial court that were sealed in the trial court under 76a.

Two is what they do with records that were not sealed under 76a but for which a party on appeal or an original proceeding has made a motion to seal in the appellate courts, and then I just -- I asked them also about sort of as a side note about in camera review of discovery on appeal, since that seemed to be kind of related, and just tried to get a feel for how often this comes up.

And it seemed like most of the responses were not uniform, but they were fairly consistent in terms of how they treat these items. Most of them said if they get sealed records under 76a from the trial court that they have a -- they leave them marked as sealed, that they have special jackets or things like that that they use to keep the general public out of them. On appeal the

parties will usually have access to them. Most of the courts deal with motions to seal in the appellate courts on an ad hoc basis and didn't seem to be, you know, any consistent standard or anything like that. I mean, nobody really talked about a standard. I think it just depends on what the parties are arguing and what the facts are.

PROFESSOR DORSANEO: So it's not like 76a at all, is what it boils down to.

MR. HUGHES: Well, certainly not in terms of public -- I mean, there's no --

PROFESSOR DORSANEO: So the question is -- I mean, I thought maybe you'd have something to say about this, should we have a 76a like rule or just a rule that says, "Seal it if you feel like it."

CHAIRMAN BABCOCK: In the Federal system there is a lot of sealing going on. I mean whole briefs are being sealed in the Fifth Circuit, for example, on -- with no rule or no standard to guide anybody by. I don't sense that that's happening in the state system.

PROFESSOR DORSANEO: Across the United States there is an attitude about that the parties want to make the litigation secret.

CHAIRMAN BABCOCK: Right.

PROFESSOR DORSANEO: And that's fine, and I have gotten requests for information about 76a and

wondering in Texas is all this stuff really public.

CHAIRMAN BABCOCK: Yeah.

PROFESSOR DORSANEO: And they find that to be kind of remarkable that parties can't litigate in secret.

CHAIRMAN BABCOCK: Well, of course, 76a was spawned by a case that I handled where the parties had done exactly that. They had gone in after -- as part of the settlement and basically wiped the case off the face of the earth. They sealed all the pleadings, all the orders of the court, and the judgment. The only thing that was left was a little computer entry in the clerk's office that there had been this Tuttle vs. Jones, was the name of the case, and the newspaper long after the judgment came in and tried to get it unsealed and that went to the Texas Supreme Court, decided it on a technical issue, not on the merits, and then the Legislature passed the statute and said that the Court shall pass a rule dealing with the sealing of the court records and settlement agreements, and that's what led to 76a. Frank.

MR. GILSTRAP: Maybe we could eat the elephant one bite at a time. The first problem is where you have ongoing litigation and the documents have been ordered temporarily sealed or they have been, you know, submitted in camera and it goes up to the appellate court,

and when the record arrives in the appellate court there is no rule as I understand about sealing those records, and we've all heard stories about, well, the in camera documents were in the appellate court and the appellate court gave them up, and obviously we don't want that happening, so it seems to me that maybe is the place to start. If it comes up and it's sealed then there ought to be some mechanism for preserving that status until somebody wants it changed. It seems to me that's where you start.

The larger question is, well, once the appellate proceeding is over does it remain sealed. That's a bigger issue and maybe we don't have to quite address that today because that does bring in all these larger, you know, social concerns that we're talking about, but maybe we can start simple.

CHAIRMAN BABCOCK: Well, but there are three distinct types of things that are eligible for sealing. One is the evidentiary material, the factual matter that is typically produced in discovery or in depositions or even in trial testimony. The most -- the case where the greatest need for secrecy is usually in trade secret litigation where you don't want to give up your trade secret just because you have to prosecute a misappropriation claim in court, but then you also have

another species of documents in the court of appeals which are the pleadings; in other words, the briefs, the motions, and the disposition of the briefs and motions, that is, the orders and the judgments of the court, and that should almost never be sealed in my judgment. A lot of that's going on in the Fifth Circuit. I don't have a sense it's going on in Texas state court.

HONORABLE STEPHEN YELENOSKY: Well, under 76a you cannot seal records. Right?

CHAIRMAN BABCOCK: That's right, under 76a.

MR. MUNZINGER: No, that's not right.

CHAIRMAN BABCOCK: But there's no comparable rule in the appellate system, comparable to 76a.

HONORABLE STEPHEN YELENOSKY: Well, I thought 76a excluded court orders from sealing.

CHAIRMAN BABCOCK: It says you may never seal a court order.

HONORABLE STEPHEN YELENOSKY: That's right.

CHAIRMAN BABCOCK: But there's nothing in the appellate --

HONORABLE STEPHEN YELENOSKY: Right. I understand.

CHAIRMAN BABCOCK: The TRAP rules comparable to 76a, so my point is that what Frank says is right insofar as it goes, that material treated as confidential

in the trial court probably presumptively should be treated as confidential in the appellate court, but that's not the end of the story. There are also other things --

HONORABLE STEPHEN YELENOSKY: That are created like --

CHAIRMAN BABCOCK: -- that people might want to put under seal in the appellate court, and maybe there should be a rule saying either you can or you can't and what the standard is. Judge Christopher.

HONORABLE TRACY CHRISTOPHER: I support a rule in the appellate court with it. I think that would be useful. One of the things from a trial court perspective that I kind of find difficult is they give you in camera documents to review, you make a determination. Maybe you say five of them are not privileged and ten of them are and you make your order, and then you've kind of got the documents, and it's really unclear as to how they're supposed to get up to the court of appeals, whose duty it is to send them up there. And then kind of the weird thing is the court of appeals will make a ruling, and they might tell me to do something with the documents, but I don't have them anymore because the court of appeals hasn't sent them back to me or, you know, they're somewhere in the netherworld of between us, or maybe they've gone back to whosever documents they were.

So I definitely think it would be nice to have some sort of orderly procedure on how to deal with the in camera up to the appellate court and back, because, you know, that's everyone's right on privileged documents, and a lot of people take advantage of that, and that's fine, but, so I'd like to see that, but was it a couple of years ago Justice Hecht said we were going to look at 76a because 76a and I wasn't here when you-all put it together. 76a is kind of hard to deal with on the trial court level when you have trade secret documents attached to discovery responses and motions for summary judgment and things like that just in terms of getting the whole temporary seal mechanism going, and like people will send in agreed protective orders to me that say, you know, "We agree we're going to send this in and any attachments are going to be under seal." I'm like, well, you know, 76a hasn't been followed, so I don't really think you can do that.

HONORABLE STEPHEN YELENOSKY: Exactly.

HONORABLE TRACY CHRISTOPHER: And I would like lawyers to be able to do that frankly, because I don't see overdesignation of stuff in the trial court level in terms of, you know, this is my list of customers, this is my profit and loss statement, this is my confidential price list. It's -- I'd like to see it

worked on. So I wouldn't want a complete repeat of 76a in the appellate court.

CHAIRMAN BABCOCK: I tell you what, you-all better have some healthy appetites for rules if you want to repeat what we did in 76a. It was a torturous process.

HONORABLE STEPHEN YELENOSKY: Well, I disagree. I think that parties will agree to whatever makes sense to them in the particular situation. The last time the parties would have agreed to seal the verdict because post-judgment they settled the matter and part of it was, "Well, we'll seal the verdict because, geesh, the verdict found that my client committed fraud and I don't want that out." And they would have done that, and I said, no, you have to have a 76a hearing, and ultimately I didn't seal it because I thought that's exactly what 76a is intended to prevent, and they would have argued and did argue that somehow all these things were trade secrets. Now, one document did say --

PROFESSOR DORSANEO: Client had committed fraud is a trade secret.

HONORABLE STEPHEN YELENOSKY: Exactly. Exactly. And I do think and I know that some judges do allow them by agreement to seal those things, and I think it's contrary to 76a, and I think that we should have 76a.

CHAIRMAN BABCOCK: Justice Duncan.

HONORABLE SARAH DUNCAN: I hate to say this --

CHAIRMAN BABCOCK: But go ahead.

HONORABLE SARAH DUNCAN: But we've already done this. We sent the Court a rule with I think it was the '97 amendments on, it was a sealing rule in the appellate courts.

PROFESSOR DORSANEO: You know, I couldn't find it, but all of my copies of rules don't have tables of contents, because we didn't make any.

HONORABLE SARAH DUNCAN: I think I've still got what we sent the Court with the '97 amendments. Our court has actually had some sealing problems, and we had to develop our own rule, so I disagree with the Court's previous conclusion that this isn't necessary. I think that's why the courts of appeals have -- and as far as parties over or trial judges oversealing, we had a case involving USAA where they wanted to seal everything and got an order from the trial court agreeing that everything that was filed was presumptively under seal, was filed under seal, every response to discovery, employee manuals were under seal, and put the burden on -- there was a suit, USAA suit against a local television reporter for libel, a lot of stuff, and it put the burden on the defendant television reporter to do something to get it

unsealed without ever holding a 76a hearing, and apparently this is not infrequent.

I mean, you know, they were able to -- USAA was able to say to my -- I was just appalled. "Well, we've done this in other cases. What's the problem here?" I think it's a big problem.

HONORABLE TRACY CHRISTOPHER: Well, but that's -- that couldn't have been agreed to because you've got it as an appellant issue, right?

HONORABLE SARAH DUNCAN: It wasn't -- well --

HONORABLE TRACY CHRISTOPHER: I'm just talking about --

HONORABLE SARAH DUNCAN: They said they wouldn't produce anything at all.

HONORABLE TRACY CHRISTOPHER: I'm just talking about the routine business dispute where they want to attach to a summary judgment some profit and loss statement that they consider proprietary and confidential, and going through the whole 76a for that document is burdensome.

HONORABLE STEPHEN YELENOSKY: It's not burdensome. I've done 76a on those. They set the hearing, and if nobody cares, nobody shows up. I mean, it's just one more short hearing.

HONORABLE TRACY CHRISTOPHER: You have to go through that before you file your summary judgment to get this document sealed. You have to do the temporary seal. Then you've got to do all of these notices, send it to the Supreme Court for --

CHAIRMAN BABCOCK: Yeah, Bonnie.

MS. WOLBRUECK: I just wanted to note that whenever you're talking about these issues, it would be nice to clarify the issue for the clerk's records. I know I have an awful lot of questions sometimes from clerks of what we have sealed documents, of what to do whenever it comes to the appellate record going to the court of appeals, and we usually handle that document by document, and we'll go back to the trial court and say, "Okay, what do we do with this document that's been sealed, do we unseal it, send a copy, do we send a sealed copy, do we send it unsealed?"

There is an issue there that we're having to deal with quite often, so maybe some clarification on how to send that document to the appellate court in the first place, does it go under seal or does it go open; and right now, you know, we usually go back to our trial judges and say, "Okay, we're not sure what this document is, how important is it that it remain sealed or not sealed," and you know, maybe some clarification on what the clerk's

record should do would be helpful.

CHAIRMAN BABCOCK: Okay. Tracy, in addition to the '97 amendments that were sent to the Court, several years ago -- maybe before you were on this committee, but while I was chair, so it was in the last seven years, we also talked about 76a and made a recommendation to the Court about the problem that you're coming up with, the routine discovery type thing that maybe ought not to get a full blown treatment. My recollection was we thought that in those routine kind of cases a party agreement would be okay unless somebody like the press or some public interest group or somebody came in and challenged it and invoked 76a in which case then you've got to go through the --

HONORABLE STEPHEN YELENOSKY: How would they know to invoke it?

CHAIRMAN BABCOCK: Well, how do they ever know?

HONORABLE STEPHEN YELENOSKY: Well, the posting is probably inadequate, but at least there's an effort to -- there's a burden on a party who has the knowledge to put a notice out if you're saying, "Well, we'll do it in secret and we can do that unless somebody objects," that doesn't make a lot of sense to me.

CHAIRMAN BABCOCK: Well, typically these

things happen in court, but --

HONORABLE STEPHEN YELENOSKY: Right.

MR. GILSTRAP: They have their sources, you know.

CHAIRMAN BABCOCK: Functionally secret, but the bigger problem, the one that Justice Duncan is talking about, is there are some litigants, for whatever reason, want to litigate to the extent they possibly can in secret.

HONORABLE STEPHEN YELENOSKY: Oh, yeah.

CHAIRMAN BABCOCK: And they will coerce the other party and say, "Look, I will make it way expensive for you to litigate this case unless you agree that everything we do is in secret." And so the other litigant, who may or may not have as many resources will say, "Okay, no skin off my nose. At least I'll get the information and then we can slug it out about whether I get to use it in court," and so they'll agree to that, and then this whole proceeding goes on in secret until, you know, somebody cries "uncle," and then it winds up in the appellate court. And that's a big problem, and there is way overdesignating of confidential information going on because it's easier. Because if I've got to go through in my massive discovery and really pluck out the very few things that are truly confidential, that takes a lot of

time and nobody wants to do it, but they don't want to miss anything that's confidential so they just say everything is confidential, and that's the problem.

But that's not the problem exactly on the table right now, and we do have to get to Buddy, so could I suggest this? Bill's committee has been charged to -- subcommittee has been charged to study this by the Court. The Court is interested in having something on this, so maybe you-all could come back with maybe a concrete rule we could shoot at.

PROFESSOR DORSANEO: I think what we'll do is we'll check all of the records of this committee and the recommendations and the discussions that have been made and see what we've done before and see whether we need to do something more than that.

CHAIRMAN BABCOCK: Yeah, I can recall it coming up twice before, once in the last seven years and then once in '97.

HONORABLE SARAH DUNCAN: If I could just also add, you know, it's always true when we talk about any topic, I think, that we are limited by our collective knowledge, which is not perfect. There are -- you know, when you say you can't seal any order under 76a, that's just not true anymore. We seal parental notification orders as does the Supreme Court. We've got right now a

sperm donor case in which the parties have requested that we use initials, that the record be sealed, so our knowledge is imperfect of the types of cases that are out there until we happen to get involved with them.

HONORABLE STEPHEN YELENOSKY: But parental notification is a specific case that has specific rules for secrecy that go beyond 76a, but doesn't the very language of 76a exclude from those items that can be sealed court orders? I mean --

CHAIRMAN BABCOCK: What I was referring to is the (2) sentence of 76a, "No court order or opinion issued in the adjudication of the case may be sealed."

HONORABLE STEPHEN YELENOSKY: Exactly.

HONORABLE SARAH DUNCAN: Right, but the --

CHAIRMAN BABCOCK: Statute overrode that.

HONORABLE STEPHEN YELENOSKY: Right, but 76a is pretty clear. There may be exceptions by statute but --

CHAIRMAN BABCOCK: Yeah. So Justice Bland.

HONORABLE JANE BLAND: Well, since the Supreme Court wants us to take a look at it, why don't we get a proposal going and then we can revisit this when we actually have something to look at?

CHAIRMAN BABCOCK: Right. And what the Court has asked us to do, just so we're clear, is to

consider whether there should be a 76a-like rule in the TRAP rules for the appellate courts, right? So, yeah, Buddy.

MR. LOW: You mean for -- is there anything filed originally that's sealed? I don't know of anything that would be, and the rule -- is that true?

HONORABLE TOM GRAY: In a mandamus the records asserted privileged documents.

MR. LOW: All right. I understand.

HONORABLE TOM GRAY: But that's the --

MR. LOW: All right. So we would need it for that, but right now the trial court retains jurisdiction. Then there's an appeal --

CHAIRMAN BABCOCK: Right.

MR. LOW: -- that's severed by the rule. Then once its severed the court of appeals can issue such orders to modify or send back or do that, but it remains sealed. Nothing says the court of appeals can just unseal it. They can send it back.

HONORABLE SARAH DUNCAN: Orsinger says no.

MR. LOW: No, Orsinger hadn't written a rule.

HONORABLE SARAH DUNCAN: When you say "like 76a," are you contemplating that there would be a hearing in the appellate court on whether to seal it?

CHAIRMAN BABCOCK: No.

HONORABLE SARAH DUNCAN: Or notices?

CHAIRMAN BABCOCK: I'm not contemplating anything, but I'm just saying that the charge was generally --

HONORABLE SARAH DUNCAN: We're talking sealing, not --

CHAIRMAN BABCOCK: Sealing, but, for example, I think it's horrible what's going on in the Federal court. You know, briefs and orders and the adjudication of cases are being sealed.

HONORABLE JANE BLAND: But, Chip, as you pointed out, you don't have any knowledge of that happening in the state courts.

CHAIRMAN BABCOCK: No, I don't.

HONORABLE JANE BLAND: I don't either, and to be honest, if this stuff is all unsealed at the trial court level because we have Rule 76a it's very unlikely something that was unsealed at the trial court is going to be requested to be sealed at the appellate court, so instead of a 76a-like rule it's really a mechanism for preserving what was determined under Rule 76a up through the appellate process.

CHAIRMAN BABCOCK: Yeah. The exact -- yeah, I think you're right. The exact charge is the committee

is asked to consider whether the appellate rules should contain a provision that governs requests to seal records in the appellate courts. I mean, that's what we've been asked by the Court to study. Justice Gaultney.

HONORABLE DAVID GAULTNEY: I think, Jody, the responses that you got from the clerk is that's a very rare occurrence, right?

MR. HUGHES: Yes, with a caveat. Most of them said it was rare, but several of them, including some who said it was rare, said it was on the rise, so rare but rising.

CHAIRMAN BABCOCK: Rising tide. Frank.

MR. GILSTRAP: With regard to our charge, are we going to address the problem of documents coming up that are already sealed or in camera, the issues that Judge Christopher mentioned? I mean, that's not strictly within it, but it seems to me --

PROFESSOR DORSANEO: Yes.

MR. GILSTRAP: -- that would be kind of a segue into it and one thing that would be easy to do.

CHAIRMAN BABCOCK: Yeah. I think these charges are not meant to be bills of particular. We have some discretion on what we study. Let's -- thanks, Bill. That's a great report that took an hour and 15 minutes. So, Buddy, but -- but through no fault of yours, I might

add, but, Buddy, I know we're going to whiz through these evidence rules.

MR. LOW: Well, let's see how we whiz. The first rule is a new rule, 904, and it pertains to affidavits proving services and so forth. We worked on that once before. It went back to the State Bar of Texas committee, and they worked on it for a year or so and sent a rule back to us.

If you will turn to attachment two, right before attachment two there is a letter. This is attachment one, but at the back of it there is a letter from Bruce Williams to me outlining what the problems are. One, the statute does not have -- that very thing does not have a counter-affidavit, so people are putting in their counter-affidavit things that aren't proper like, for instance, that this medical treatment was rendered necessary because of this accident.

These affidavits don't get to that. You have to bring a doctor to do that, but basically if you filed and we give the correct form of the affidavit, which is the first part of one here, and it tells what the affidavit must do, the counter-affidavit. Another problem they had was that somebody would just object, file an affidavit and say this is not proper, and then you've got to bring the people to prove these services and so forth

which was a waste of time and expense.

So, now, by the counter-affidavit you have to come in and say what's wrong and what's not fair or what you object to. Once you do that then the person that files the affidavit can rely on that affidavit only. The counter-affidavit can rely on his or they can bring proof if they want to, but remember that this does not answer the question and is so stated in the comment -- it's not where somebody can say "and this was rendered necessary by this accident." That's one the Beaumont court pointed that out, I think. Judge Gaultney I guess was on the court, but I'm not sure.

So basically you'll see why the State Bar -- incidentally it was involved for a couple of years and this was a unanimous vote of their whole committee. Our committee looked at it, and Bill found a couple of sentences that were left out on the counter-affidavit that they had overlooked. I sent it back to them. They said, "You're right, we did that." We made some other changes. They sent it back and said, "We've met, and your changes are good." So this is a product of a pretty lengthy period.

My committee didn't meet by phone. We met in Houston, and it's been -- we can go over line by line, but I think it would certainly be unnecessary. The first

thing is do we want something like this. Now, what I have attached is, first, the rule. Then I have also attached the portion of the Government Code that allows us to do this. The rule, the affidavit, and I have attached also the -- yeah, that's 22.004 of the Government Code. Then I have attached the part of Civil Practice and Remedies Code after that, which now exists, which we will be amending by rule, and my committee uniformly, unanimously recommended this.

CHAIRMAN BABCOCK: Bill.

PROFESSOR DORSANEO: I think I understand, Buddy, about the reasonableness. That's not a problem. The cases sometimes say that necessary means made necessary by the occurrence in question, like you had to go to the doctor because they ran you over.

MR. LOW: No. No.

PROFESSOR DORSANEO: That's not what you mean in this rule by "necessary"?

MR. LOW: "Necessary" means it was necessary for the treatment, but doesn't mean what caused the treatment.

PROFESSOR DORSANEO: Okay.

MR. LOW: And that's stated in the -- the only thing, we had some question and we didn't change their comment, and the more I've read the comment, it's a

little bit lengthy, but it does explain it's new in the law, and I think the comment is fine. It explains the reason and what we're doing, and it doesn't just apply to medical. It doesn't apply to -- it applies across the board, but not to sworn account, and it's not foreign to what the Practice and Remedies Code says now. It just addresses some evils so that you follow this affidavit, you won't be putting in there -- people trying to sneak in their affidavit that this was rendered necessary because of this accident. You can't do that on this.

CHAIRMAN BABCOCK: Pete, then Bill.

MR. SCHENKKAN: I have some concerns aout the breadth of the rule as drafted that focus on (d).

MR. LOW: All right. On (d)?

MR. SCHENKKAN: Yeah. This rule does not affect the admissibility of other evidence concerning reasonableness and necessity, not identified as to which the services --

MR. LOW: Well --

MR. SCHENKKAN: Let -- if I can, let me just get them all on the table, Buddy.

MR. LOW: Okay. I'm sorry.

MR. SCHENKKAN: Of the services for amounts charged or both and then except that an opponent of an affidavit may not contest reasonableness and necessity of

the services unless he does certain things. We're working off a statute, which Buddy has provided several pages farther in, four sheets of paper. The third sheet of paper after this and then on the backside you'll find 188.002, form of affidavit.

MR. LOW: Right.

MR. SCHENKKAN: And the form of affidavit says, "The service I provided was necessary, and the amount I have charged for the service was reasonable at the time and the place provided," so, you know, it seems to me that the -- the wording of (d) departs from the language of the statute in a way that I'm not sure is intended, but whether or not it's intended I'm not sure it's necessary and helpful.

MR. LOW: Okay. The reason for that is this statute doesn't really clarify what happens if you don't file a counter-affidavit. If you don't file a counter-affidavit you can't question it, and so this -- the statute as written was very, according to what we felt and the State Bar felt, insufficient, and that's why it addresses, because of what you're speaking of, because if you don't file a counter-affidavit --

MR. SCHENKKAN: But why not limit that effort? I appreciate the effort to say what happens if you don't file a counter-affidavit. Why not limit it to

what the affidavit is allowed to do under the statute, which is not to establish everything, but only to establish the -- that the service was necessary and the amount charged was reasonable.

MR. LOW: That's what --

MR. SCHENKKAN: So how about the admissibility of the other evidence concerning the reasonableness of the amount charged and the necessity of the services, and then the opponent may not contest the reasonableness of the amount charged or the necessity of the services unless the opponent does X. This is not an unimportant issue. There are contexts in which the services are necessary, but the degree of the services is not reasonable. There are circumstances in which the amount charged is reasonable in the sense that that's what this provider of health care services usually and customarily charges, but no one pays that provider that amount for those services, Medicare, managed care contracts, workers compensation, division of workers compensation, other government authorities set a different amount that is the amount that is actually due for the services, and the difference between the two makes a difference, including in a case that's pending before the Texas Supreme Court right now.

CHAIRMAN BABCOCK: Tom Riney.

MR. RINEY: I've got to go catch a plane in about five minutes. Let me just list some concerns. We all know the background of this. This was primarily so that in intersectional collision cases someone didn't have to go depose everybody that treated someone and to make the case economically unfeasible to proceed. It, of course, is not restricted to that. The biggest problem I think is generally medical malpractice cases where you may have hundreds of thousands of dollars of medical expenses. Oftentimes in medical malpractice cases the reason the person came to the health care provider is because they were sick to begin with, so you have unsegregated medical expenses in that bill. 200,000 may be for an underlying condition, 400,000 may be as a result of the alleged malpractice.

This statute or the statute, the affidavits have been submitted, first of all, the case law is those affidavits are no evidence of causation, but then you're fighting that in motion in limine and so forth and things; but the problem now, as has been pointed out, we have the new statute that says that the only thing that you can recover is what is paid or incurred as related to medical expenses under the Civil Practice and Remedies Code.

Now, this makes no segregation for that. So here's what you get. You get a medical -- you may get

literally a million dollars in affidavits for medical expenses; but the fact of the matter, the only amount that has been, quote, charged or incurred may be $400,000 for the managed care providers and for what the patient has done. So then these affidavits, you have had in the past no way to challenge that. In fact, you say a million dollars is reasonable, but it ought to be admissible the fact that you only charged $400,000 for those services.

The other problem is that, of course, to support the affidavit you can get some records clerk that doesn't have a clue about medical expenses. There is at least one case that says that if you do a deposition on written questions to say, "I don't know what the charges are for, I don't know anything about the medical expenses. All I know is that I work here, and that's what our records show, and I don't know if that's actually what was paid by the patient or their insurance carrier or not."

One case at least says that is not a counter-affidavit, therefore, it does not come into evidence. However, that specific court said that it is, quote, other evidence, which I think is allowed by (d), which would then allow it to come in, although I'm not sure of the way (d) is phrased. So you have a whole lot of complicated issues here. I haven't had time to study this, but it seems to me it does begin to address some of

those issues. It doesn't address all of them. I don't know that that ought to be the purpose of this particular amendment, but this is not just an issue involving a few dollars. It can involve hundreds of thousands of dollars; and, remember, the original procedure was you put the affidavit in there, the counter-affidavit destroys the affidavit. It no longer comes into evidence, and I haven't analyzed that to see what the effect of it is here.

CHAIRMAN BABCOCK: Okay.

MR. RINEY: Those are problems. The person proposing the affidavit doesn't have to have someone that's qualified. The person opposing an affidavit must have a qualified expert.

CHAIRMAN BABCOCK: Buddy.

MR. LOW: What was happening is they were making a counter-affidavit, not attaching, just saying, "I object to this as not fair" and then you've got to bring somebody. I mean, and it was wasting -- it's not -- maybe one shoe doesn't fit all, but that was what they were seeing the most.

MR. RINEY: In other words, the opponent of the affidavit would just give an affidavit and say, "This is no good" and knock it out.

MR. LOW: Yeah, right.

MR. RINEY: Yeah.

MR. LOW: The affidavit, the way it's drawn, says the amount I charge. In other words, not what the service is worth or reasonable and necessary. I mean, now, if it comes in and under now you could show in evidence that there was a collateral source that paid or something like that, that would not --

MR. RINEY: Right.

MR. LOW: It doesn't eliminate that, but -- and the other problem was that by not having a form of the counter-affidavit people were just putting all kind of things, and they would slip in there even in the affidavit that it was caused by the accident or --

MR. RINEY: Right.

MR. LOW: -- slip in the counter-affidavit that it wasn't.

MR. RINEY: And this allows that language to be stricken, as I read through it.

MR. LOW: Yeah.

MR. RINEY: For example, the affidavit is "All of these expenses were incurred as a result of a car wreck," and it includes flu slots, dental bills as it often does --

MR. LOW: Yeah, they were doing that, and you can't do that. You have to follow this form. I mean,

and this form means that, yes, you treated that person and you charged him this much, and it was reasonable and it was necessary for his treatment, but he might have had -- it's not like a Tyler Mirror instruction where you say you can't consider this condition and that, that. I mean, so it gives also the option of if a counter-affidavit is filed then as a practical matter -- and they really attack it pretty hard then -- and somebody by sworn testimony attacks certain elements of it then probably you're going to end up having to bring the provider, and that's okay, but you don't have to. The person that countered it then can bring live their testimony, but at first to get the thing going they have to make their counter-affidavit and it has to be proper, and by not having a proper counter-affidavit in the Remedies Code people were just shooting in the dark, and they say "we object," and no question, so we've gotten the form.

I'm not an advocate one way or another. I mean, I'm just -- this is something the State Bar -- and it sounded good to our committee, and there may be things that we haven't considered, and that's why we're bringing it before the large committee.

CHAIRMAN BABCOCK: Okay. Judge Christopher and then Judge Yelenosky.

HONORABLE TRACY CHRISTOPHER: I just kind

of -- I'm trying to understand why this is an improvement over what we already have.

HONORABLE STEPHEN YELENOSKY: Yeah. I agree.

CHAIRMAN BABCOCK: Judge Yelenosky nods his head in approval of your comment.

HONORABLE STEPHEN YELENOSKY: Well, and also I think (d)(2) is contradictory to the statute. The "or (2)" is a contradiction to the statute, and obviously we can't do that, but all of the points that were brought out about problems with the statute I think are perhaps misinterpretations of the statute. I mean, all it is is basically you don't have to bring your doctor unless the other side meets a certain threshold that forces you to bring your doctor in, and it doesn't eliminate the paid and incurred debate that can come later perhaps. In some courts that's going to be a post-verdict issue, depending on how you look at paid and incurred, but I don't see the problem.

MR. LOW: This has nothing to do with bringing your doctor. You're going to have to bring a doctor or somebody --

HONORABLE STEPHEN YELENOSKY: Well, to prove up the reasonableness and necessity.

MR. LOW: -- to say that this accident

caused that.

HONORABLE STEPHEN YELENOSKY: No, no, no. No, but it does on the point of reasonableness and necessity of those bills; and if they don't contest that, that doesn't mean -- at least in my opinion, doesn't mean they're foreclosed from arguing that all those were reasonable and necessary causes that were collateral sources, and under the statute they only get what was paid or incurred. That was one point he made, but how is (d)(2) consistent with the statute?

MR. LOW: It may not -- I don't know, but --

HONORABLE STEPHEN YELENOSKY: Because it gives you another way of contesting.

MR. LOW: Under the Government Code, the Supreme Court has the rule-making authority to do that, under Government Code 22.004. 22.004 is in your packet.

HONORABLE STEPHEN YELENOSKY: How is that --

CHAIRMAN BABCOCK: But, you know, you don't do that unless you talk to the legislator who is the sponsor of the bill repealing.

MR. LOW: That is the practical thing, and also, it has to go before it's done, it goes and the -- if the Court wants that they would certainly follow that. I mean, we've gone through that battle --

CHAIRMAN BABCOCK: Yeah.

MR. LOW: -- a long time, so certainly, they wouldn't -- we've never proposed that. We've done that before under 22.004, but not without getting consent before we did it and that, so if the committee wants to do this, that's the way it would handle. If they don't, then we don't need to say anything to anybody.

CHAIRMAN BABCOCK: Yeah. Yeah.

MR. LOW: But I felt personally that it was an improvement in giving a counter-affidavit that was giving the problems, and the statute does not give a form of counter-affidavit.

CHAIRMAN BABCOCK: Jim and then Judge Christopher.

MR. PURDUE: The statute doesn't give a counter-affidavit, so in that way I guess the rules could fill that gap, but this proposed rule fundamentally changes a bunch of things that are in the statute. It changes the deadline from 30 days to 60 days for the filing of the affidavit. It changes the allowance in the counter-affidavit, which is supposed to be on file at least 14 days. It just omits, just deletes that, and so you-all have more institutional knowledge than me about what this committee has done in the past, but this does not track 18.001, and it doesn't codify Turner vs. Peril, which is probably the most seminal case on the issue. I

mean, it's just making it up whole cloth. Now, that may be something we can do. I've never -- I don't know, but there are things in here that are a significant change from present practice under 18.001.

I like the idea of having a counter-affidavit form and having somebody tie to that. That makes some sense because there is abuses of the counter-affidavit practice right now that undermine the purpose of 18.001. I mean, Tom said the purpose of 18.001 is to reduce your expenses in litigating the issue, but this thing goes well beyond the scope of 18.001.

CHAIRMAN BABCOCK: Buddy.

MR. LOW: I didn't get to the details of the days and so forth. I was first trying to see the concept, and then we can -- that's the reason I said I'm not going line by line, because I don't want to go line by line when the committee might want to throw the book away. I mean, you know, there's no need to do that, and so you're absolutely right. I don't disagree with anything you said, but I think the first point would be do we want to amend or follow the right process to amend and have the rule not necessarily exact language or days, but the concept that's being done here, do we want to do that or do we want to leave it as it is?

CHAIRMAN BABCOCK: Judge Christopher.

HONORABLE TRACY CHRISTOPHER: At least where -- at least in Harris County the counter-affidavit misuse has gone away because of the case law. Now, you know, maybe it's still a problem someplace else, but we -- you know, for the most part counter-affidavits are not made on personal knowledge as required, and, you know, they don't come in because they're no good under the case law. Maybe when the State Bar first started studying this issue --

HONORABLE STEPHEN YELENOSKY: That's right.

HONORABLE TRACY CHRISTOPHER: I know it's been a long time coming, it was a problem.

MR. LOW: That's not true. They met within two months ago, and unfortunately all of them weren't from Harris County. They were from a lot of other counties, and they were having that problem.

HONORABLE TRACY CHRISTOPHER: Well, I mean, you know, we have a lot of counties represented here. Is it an issue in other counties?

CHAIRMAN BABCOCK: Good question. Steve says --

HONORABLE STEPHEN YELENOSKY: All I can speak for is my court, not a problem.

CHAIRMAN BABCOCK: Frank, do you have any sense of what's going on in Dallas/Fort Worth?

MR. GILSTRAP: No.

CHAIRMAN BABCOCK: One way or the other?

MR. GILSTRAP: No, I don't.

MR. LOW: Most of the people here aren't going to deal -- I mean, unless the judges see it, aren't going to deal with this because most of you are dealing with bigger -- this is -- you see this mostly in the smaller cases. I mean, not --

HONORABLE STEPHEN YELENOSKY: But we judges see those. I mean, I do. I see the smaller car accident cases.

MR. LOW: Well, I'm saying -- I'm just saying, that's why I said the judges would know, but they felt this was a problem. They had about a 35-man committee.

MR. JEFFERSON: Yeah, I think it is an issue statewide, at least a subject of discussion in San Antonio, and that's why Tom Riney was so vociferous about it.

CHAIRMAN BABCOCK: Ralph, do you have any --

MR. DUGGINS: I don't ever see this. I asked Elaine whether or not this is limited for personal injury -- to personal injury cases or not. I just don't know anything about it.

MR. LOW: It's not. It's not. Services

rendered.

MR. DUGGINS: Any service? Legal services?

MR. GILSTRAP: Yeah. Yeah. Strikes close to home, doesn't it?

MR. LOW: It's just the way --

HONORABLE STEPHEN YELENOSKY: Anything but sworn accounts in a civil action.

MR. GILSTRAP: Its use in legal services is limited by the fact that you've got to do it 30 days before trial.

MR. LOW: Well, we're consistent -- the statute reads that way now, services. So that wasn't changed. If we need to limit it, I guess we have the authority to do that, but it's always been services. So do we want this concept or, you know, this --

MR. PURDUE: Buddy, was it the sense of the State Bar committee that -- I mean, I know you made the issue about the causation sneak-in, but the case law deals with that real clearly, too, so I know that the report here talks about abuses on both sides of the rule, and I, again, I mean, there is a concept in the rule that I like, because it does -- it does solidify the practice, but it is -- it's not codifying the law or the practice in some way.

MR. LOW: Right.

MR. PURDUE: So I'm just curious what the abuses were that they specifically thought they were solving.

MR. LOW: Well, the letter they wrote to me is all I know, and I put it in your packet, so I've told you everything I know.

MR. PURDUE: Okay. I read it. I just --

MR. LOW: Yeah. Okay. What is the case you're talking about is inconsistent? That's not an area of my expertise. I haven't discovered what my expertise is, but --

CHAIRMAN BABCOCK: You're a generalist, Buddy.

MR. LOW: Yeah. Okay. But what is the case you were talking about?

MR. PURDUE: Turner vs. Peril is the case that deals with a nonqualifying counter-affidavit where what a defendant did is they went out and got an orthopod to sign a counter-affidavit saying, "I read the affidavits, and I don't think they're reasonable and necessary," and he just filled in the blank of the provider eight different times and that there was -- it wasn't even orthopedic services, and the Dallas court said that's not a counter-affidavit, that that doesn't qualify, and so that case out there really deals and I think lays

the law out on, you know, what doesn't get you there.

MR. LOW: Well, but isn't that a question of 702 whether the person -- isn't that a 702 question?

MR. PURDUE: Well, actually, it goes back, counter-affidavit, I mean, within the statute, 18.001(f) says, "The counter-affidavit must give reasonable notice, and it must be made by a person who is qualified by knowledge, skill, and experience." So it incorporates a 702 standard into who's going to be giving it, but, you know, just on the first glance one of the concerns about this counter-affidavit proposed is it kind of has just this blank on "qualified by knowledge, skill, experience, and training in opposition to the matters in the contained affidavit because I specifically take exception to the service rendered or charges made because" and just leaves a blank, and I mean, that's almost exactly what they did in Turner and they said was insufficient.

MR. LOW: Well, but a custodian, for years we've allowed -- we've had affidavits from custodians.

MR. PURDUE: And that's because 18.001 allows you to use a custodian to prove up your medical bills.

MR. LOW: And this allows it, too, a custodian.

MR. PURDUE: You would totally gut 18.001 if

you took that out, but my point is, is that it seems to allow a counter-affidavit -- I mean, of course a counter-affidavit should be from a medical provider. That should be the initial hurdle, and that's in the statute, but it allows somebody to file a counter-affidavit contesting the services on a pretty broad form basis. That's exactly what Turner vs. Peril says you can't do.

MR. LOW: I don't -- I disagree with that because there's nothing here gets around 702 qualifications, 702, qualification of a witness as well as the testimony, and it's like any other affidavit that's filed. You can attack it. I mean, we've got nothing in here that says you can't attack an affidavit or counter-affidavit or object to it, but I haven't prepared one in 94 years, not yet to 95, but I'm talking about -- and odds are I won't in the next 94, so personally I don't care. If the committee thinks it's something bad, I can forget it, get in my car, and go home. If they want to work on it or want it as it is, I'm ready to do whatever. I'm your servant. Bill.

MR. WADE: I was just going to say, Bruce Williams and his committee, if you'll read his letter, you will see that they considered Turner vs. Peril and hoped to address that in this thing by giving a form of a counter-affidavit and it might be best on our part rather

than just to perhaps vote it down today, to defer this and allow people on this committee to review it. I think we owe that to the State Bar committee because they worked long and hard on this, and if you'll read Bruce's letter, he felt it was a unanimous vote of their committee, and he considered that in itself a monumental event, and so I would urge, Mr. Chairman, that perhaps we table this to the next committee -- to the next meeting and let everyone completely review it, and that way we can say to the State Bar committee that we didn't hurriedly vote this thing down and we gave it full consideration.

CHAIRMAN BABCOCK: Yeah. Great. Frank.

MR. GILSTRAP: I agree with that. I think -- I'd just like to kind of put this on the table. Tom Riney mention this, and that's, you know, you've got this business about paid or incurred, and, you know, I'm aware there's some variation in how the judges are doing that. Some are putting it before the jury, some are doing it post-verdict, but in a perfect world you would be able to resolve that issue too by affidavit, to segregate what was paid and incurred what was not, you know, if it goes in front of a jury, so I just -- maybe we need to bear that in mind, too, if we come back to this issue.

CHAIRMAN BABCOCK: Yeah. Ralph.

MR. DUGGINS: If it is tabled, what about

inviting Bruce or the chair of that committee to appear and perhaps put a little bit more meat on the bone, because it doesn't seem like there's a great deal of understanding.

CHAIRMAN BABCOCK: Yeah. I think that's a great idea. Pete.

MR. LOW: That's fine.

MR. SCHENKKAN: I just want to make it clear, I didn't mean to leave the impression that I thought the right thing to do was to vote the whole thing down. I don't. I think we ought to adopt a rule that provides for counter-affidavits that track the statute, not go farther than the statute as it is presently worded does.

If the statute is wrong, the Legislature needs to fix the statute, and maybe we can make a united front with the Bar suggesting to the Legislature that they do need to make a change, but right now, this is -- the statute is limited to the reasonableness of the amount charged and the necessity of the service, and each of those words is an important word in many different legal contexts, and I don't think we should by our rules -- I say "our." The Texas Supreme Court should not by its rules, nor is it empowered by its rules, to change substantive rights.

The preventing you from proving something more than what the Legislature has allowed you proof by affidavit or required you to contradict by counter-affidavit is a change in the substantive right we shouldn't do. So I'm not saying if we were going to vote today to vote the whole thing down I'm saying delete (d) or reword (d) to track the statute. The one other change from the statute that's been identified so far, or Jim Purdue identified, and that's the change in the dates from at least 30 to at least 60 for the first affidavit.

I think the word "at least" in the statute may allow the Court to do this, and it also falls more in the truly procedural category, and it has a good common sense explanation. Moving it out from 30 allows the counter-affidavit, which the statute says the counter-affiant has to furnish at least 30 days after he gets the first one to comply with both deadlines, when he got it and before the trial. So there's some -- I'm not even sure I'm against the 60 days. All I'm saying is the only thing I would vote down today if we were voting today is (d) as worded, not the concept and not the rest of the wording.

CHAIRMAN BABCOCK: Yeah. I think Bill has got a good idea. And Ralph, too, that maybe if Buddy is in agreement --

MR. LOW: Yeah, I am.

CHAIRMAN BABCOCK: Maybe pass it on to the next time and have Bruce show up, and to me the big concern is overturning or repealing a statute. The Court doesn't like to do that, and if they do do that, it's got to be for a really, really good reason. And then some members of this committee have got to go talk to the legislators, and that's a big deal, and I wouldn't want to do it without careful deliberation.

MR. LOW: I understand. And, of course, I'm not arguing that we're allowed to do it under the Government Code.

CHAIRMAN BABCOCK: Well, I think we are.

MR. LOW: I know we have this procedure --

CHAIRMAN BABCOCK: Not we, but --

MR. LOW: -- but it's not substantive of the Court. This could be very well because some of us here testified about -- before the Legislature because they were a little upset at the Court, and the question they asked was, you know, "You say you can make rules that are procedural, but not substantive. What is the difference," and I can only tell them that if it's in the Rules of Procedure maybe it's procedural, and so I didn't really give them a good answer for that, and I don't have an answer for this either.

CHAIRMAN BABCOCK: Yeah. Okay. Well, we'll pass this on to next time. And does the court reporter need a break, or can we keep going?

THE REPORTER: I can keep going.

CHAIRMAN BABCOCK: Keep going, all right.

MR. LOW: Would you pause just one minute and let me make a note so I can write Bruce or call him and let him know? One of the concerns was that the dates or day, the time changes, right, Jim, you were concerned about time changes?

MR. PURDUE: I was concerned about moving that out that far.

HONORABLE STEPHEN YELENOSKY: He's also concerned that the counter-affidavit suggests something is adequate that the case law says is not and in that way makes the problem worse.

MR. LOW: Okay. I'm not following what -- but that's --

MR. PURDUE: Buddy, I'm going to draft a letter, and I'll send it to you about my concerns about the draft if that's okay.

MR. LOW: I'd like to write him pretty quick, so anybody that has any concerns, drop me -- e-mail me or something and so I can get with him. The other, amend the statute.

CHAIRMAN BABCOCK: Judge Christopher.

HONORABLE TRACY CHRISTOPHER: Well, I'm concerned about the time limits, too, especially since yesterday we didn't agree to increase the notice for trial past 45 days, so you could fall into a nice trap here that you're supposed to do it 60 days before trial and you only get 45 days notice of a trial.

MR. PURDUE: Yeah.

CHAIRMAN BABCOCK: That's the whole purpose of these rules. These guys from New York can't come down here.

MR. SCHENKKAN: That's right. Raise the barriers for entry.

MR. PURDUE: Anybody else remember what happened yesterday?

MR. LOW: Any other concerns, you know, just drop me a note or let me know because Bruce is a good person to work with and his committee is certainly.

CHAIRMAN BABCOCK: Judge Christopher.

HONORABLE TRACY CHRISTOPHER: I'd just like to ask the committee and I don't know whether -- I mean, I know we've kind of gone round and round on the causation idea, but is the idea of the counter-affidavit to say the chiropractic treatment up to date that they billed $500 for is too high? It's really only a 200-dollar

chiropractic bill. Is that -- I mean, or the MRI that, you know, they got billed $3,000 for, that's unreasonable. An MRI is only $1,500 in Harris County, Texas.

HONORABLE STEPHEN YELENOSKY: Or they didn't need an MRI.

HONORABLE TRACY CHRISTOPHER: Well, okay. That's the question. Is the counter-affidavit to say --

MR. LOW: You're supposed to be specific.

HONORABLE TRACY CHRISTOPHER: -- you know, $400 is too much for a chiropractic visit, $3,000 is too much for an MRI, or is the counter-affiant supposed to say all this man had was a neck strain; therefore, the MRI six months later was unnecessary?

HONORABLE STEPHEN YELENOSKY: Either one.

MR. LOW: Either way. But what was happening, they just object, "We don't think this is right," and they were not being specific, and then it caused somebody to have to bring witnesses.

HONORABLE TRACY CHRISTOPHER: So unnecessary and -- well, of course, let's talk about -- and this happens a lot in car wreck cases, okay, and this is what the affidavits are supposed to be used for. You do have maybe a neck strain and you get conservative treatment and six months later, nine months later, a year later, you've gotten -- you're going to the orthopedist, you've got the

MRI, you have the neck surgery. Okay. That's sort of your kind of time line. Well, neck surgery might have been due to degenerative changes, not really car wreck.

HONORABLE STEPHEN YELENOSKY: That's not an affidavit thing in my opinion.

HONORABLE TRACY CHRISTOPHER: Well, but --

MR. LOW: No. That's not contemplated in --

HONORABLE TRACY CHRISTOPHER: So we have our counter-affidavit man who says, "MRI not necessary for this car wreck."

MR. LOW: No, you can't say that.

HONORABLE STEPHEN YELENOSKY: No, no, no. That's a causation issue. All he can say is MRI is not necessary for the symptoms presented or for what he --

HONORABLE TRACY CHRISTOPHER: That's presented --

MR. MUNZINGER: But is that found in the text of the rule?

HONORABLE TRACY CHRISTOPHER: -- is causation.

MR. LOW: It's in the note.

HONORABLE STEPHEN YELENOSKY: Well, I mean, you can say that the MRI was not necessary for the degenerative condition presented or, fine, it was necessary. We just don't think the degenerative condition

is causally linked.

HONORABLE TRACY CHRISTOPHER: Well, see, that's what I want to understand, what we're trying to do with the counter-affidavit because those are big differences.

HONORABLE STEPHEN YELENOSKY: Well, I think it's --

MR. PURDUE: That's why one of the concerns in the letter from the State Bar committee, to me is a false concern. Your affidavit proves up reasonable and necessary, but if I bring in an affidavit from a hospital and there is a pregnancy test and I'm trying to prove an anesthesia malpractice case, just because that's in the bill --

HONORABLE STEPHEN YELENOSKY: Doesn't mean --

MR. PURDUE: -- doesn't mean I'm going to get that as an element of damages.

HONORABLE STEPHEN YELENOSKY: Right.

MR. PURDUE: So because until I have a doctor link up what's proven up to the injury caused, the fact that it's proven up by affidavit still doesn't support the verdict. So the idea that just because it's in the affidavit gets you there is a false concern. I'm not trying to get the pregnancy bill as an element of my

damages, and so I see that in the letter, but I don't know that that's something you can even do if you wanted to.

HONORABLE STEPHEN YELENOSKY: Or if you are trying to get that as an element of your damages the other party isn't required to file a counter-affidavit in order to knock it out.

MR. PURDUE: Right. Right.

CHAIRMAN BABCOCK: Richard Munzinger.

MR. MUNZINGER: The questions that we're asking, if and when we get around to doing this rule, need to be answered in the rule itself in its text or in the comment, because all of these questions are raised by generality of the language used in the rule.

HONORABLE TRACY CHRISTOPHER: Yes.

MR. MUNZINGER: And they cause anxiety to those who are going to be paying the bills or defending or prosecuting the cases. It isn't clear in the comments, in my opinion, nor in the text of the rule, the answers to the questions that have been raised here, and it should be because it's just going to cause problems if you don't.

HONORABLE TRACY CHRISTOPHER: If we're going to make some substantive change, I'd like some answers rather than more generalities.

CHAIRMAN BABCOCK: Kent.

HONORABLE KENT SULLIVAN: I just want to say

I think Jim Purdue's comment really nailed it squarely, and this is a rule that needs a comment that essentially provides the same information that he just laid out, because, consistent with Richard's comment a moment ago, there is just a lot of anxiety. The rule is not clear in terms of the impact I think either for practitioners or for some judges, and the end result is what you see, overbreadth in terms of response, and the rule becomes somewhat self-defeating because the whole intent was efficiency. I think if practitioners really understood the rule the way Jim just articulated it there would be much less anxiety, and that sort of clarity is what we need in our rule.

HONORABLE STEPHEN YELENOSKY: I just don't understand why they don't understand it.

HONORABLE KENT SULLIVAN: Well, it doesn't matter. To me that's the point, as long as people don't understand then they need more clarity. I mean, if there is any significant number of people that don't understand then you need further explanation, because the point is to have real breadth of understanding of what the import and impact of the rule is.

HONORABLE STEPHEN YELENOSKY: Well, that's what the appellate decisions do.

MR. PURDUE: Right.

CHAIRMAN BABCOCK: I missed Pete a minute ago. Sorry. Pete.

MR. SCHENKKAN: I think what Jim did is very helpful on the clarity on the necessity of the services part, but the statute and any rule has two parts. The necessity of the services and the reasonableness of the amount charged, and the amount charged requires a similar level of clarification, precision in the text to track the statute either as it now exists or as it is amended so that it achieves what it really intended to, and -- and/or explanation in the comment.

The amount charged by most health care providers of most types under most legal regimes, whether they are Federal or state regulatory regimes, Medicare, or whether they are contractual, managed care, the amount charged is supposed to be what that provider usually charges. That's all. It says nothing on its -- by itself about what amount is due.

MR. PURDUE: And I'm very familiar with that issue and let me weigh in, I mean, in advance of the next discussion on the rule. I would hope that this committee does not get into rule-making that precludes a completely unanswered question in the law. I mean, it's one thing to codify law that's established, but to -- for this -- and I haven't been here long enough, but the idea that we're

going to make a rule that deals with that exact ongoing litigation on which there is not a public opinion would I think be very concerning.

MR. SCHENKKAN: And I'm with you. I'm just saying let's not inadvertently make such a change by departing from the wording of the statute to a wording which would at least look like it resolved the issue.

CHAIRMAN BABCOCK: And not to --

MR. PURDUE: Unless I win the debate.

CHAIRMAN BABCOCK: Not to comment specifically about that, Jim, but sometimes the Court prefers to make a rule rather than -- rather than establish something by case law, and sometimes they prefer the other, and, you know, we just have to get direction from them as to which way they want to go.

MR. LOW: Is one of the concerns that it matters not what the reasonable charge and what they charge, but what the person paid, is that --

HONORABLE STEPHEN YELENOSKY: That's the paid and incurred issue, but I think there's a question of law there, but I don't see where -- well, anyway, can I ask Jim a question?

CHAIRMAN BABCOCK: Yeah.

HONORABLE STEPHEN YELENOSKY: Do you think it's fair, Jim, to say what the what this -- the

affidavits go to and the only issue that is resolved by them is the same question that is asked by and needs to be resolved by an insurer who would pay the bill? In other words, was it a necessary medical treatment and was it a reasonable charge? The insurer does not ask whether that treatment came from a de -- came from a car accident, came from this, that, or the other thing. Would that be a fair way of looking at it?

MR. PURDUE: That's a way to look at it. I don't know -- I've always viewed it as essentially allowing you to satisfy the old line of cases that requires your measure of medical expense damages to be reasonable and necessary.

HONORABLE STEPHEN YELENOSKY: Right. Well, my point --

MR. PURDUE: As opposed to just the fundamental question of proximate cause.

HONORABLE STEPHEN YELENOSKY: Right. Well, my point is just that because an insurer who is going to pay for the medical treatment is obligated to pay for it generally if it's reasonable and necessary, I guess, or, I don't know, I think that's probably what the insurer's standard is. If it goes beyond that then it's not in the purview of the affidavits.

MR. SCHENKKAN: But, Judge, to take an

example of workers compensation payments, which come into many other cases because of the subrogation rights of the workers compensation insurer to all the first dollars are covered from the third party liability in the auto wreck, the worker is injured while driving on the job. He's entitled to his workers compensation benefits, including a hundred percent of his medical care, but the workers compensation insured is subrogated to his rights against the other driver who was at fault in the accident. That workers compensation insurer does not pay what the health care providers charges.

HONORABLE STEPHEN YELENOSKY: Well, I'm sorry.

MR. SCHENKKAN: He pays what the statute says he's supposed to pay.

HONORABLE STEPHEN YELENOSKY: I'm not getting to that issue. I'm just assuming the hypothetical insurance company, not any particular insurance company, who is obligated to pay for reasonable and necessary medical charges that one incurs to put aside -- I'm just trying to separate out the causation issue.

MR. SCHENKKAN: Okay.

HONORABLE STEPHEN YELENOSKY: And that's why I'm saying I don't understand why practitioners can't readily separate out the causation issue.

MR. PURDUE: I think that should be -- that's fundamental if you understand the case law, and causation is separate from what is proven up by the affidavit. Unfortunately, health insurers deny bills that are reasonable and necessary all the time, so it's dangerous to think about it in that paradigm, but you're right in what you're trying to do as far as separating the two.

CHAIRMAN BABCOCK: Okay. Buddy, let's --

MR. LOW: In other words, we could clarify like the comment, and Richard perhaps is right. I read it as saying it doesn't address any other issues, which to me would include causation, but we could be more specific and say it doesn't address the issue of causation and basically that might clarify that.

CHAIRMAN BABCOCK: Good idea. Hey, Buddy?

MR. LOW: Yeah.

CHAIRMAN BABCOCK: What about adding this provision to Rule 606?

MR. LOW: Oh, are you ready go there? I've got to get my mind off of that specialty now, going to something else. All right. 606, competency of jurors as a witness. We amended this rule back, I don't know, six or seven years ago where we allowed a juror to testify whether he was qualified or not. In other words, lived in

another county or that kind of thing. And the Federals are amending -- their rule is not like ours now. I have attached for your review -- and I'm sure you all read it last night -- Federal rule and attached for your review our existing state rule, which you've read, and I've attached the proposed rule of the State Bar, which my committee voted not to -- not to approve.

CHAIRMAN BABCOCK: You're talking about adding the thing about the mistake --

MR. LOW: Yes.

CHAIRMAN BABCOCK: -- and entering the verdict?

MR. LOW: That part about a mistake. And let me explain. It's pretty clear in Texas law and has been for sometime that with all jurors, all twelve jurors, testify that they made what we call a clerical error, when the Federals did this they put it out for comment, and they had it clerical error. Well, a lot of people felt clerical error could mean that the issue had a double negative, and they really wrote it in right, but that's not what they interpreted it to mean. Well, the feds didn't want you to attack your own verdict. They wanted to stick with what our state law is, that it was recorded incorrectly.

Now, as there are a couple of -- couple of

cases on that, and they state that the law all the way back to England has always been that if all jurors testified that this was not recorded correctly, it was a clerical error, then the trial court can grant a new trial. He can't correct that.

That's the law as it stands now under Kayla vs. Houston in a case that our chief justice was involved in as a lawyer, Stone v. Moore, and we all called it clerical error. I mean, that's what it's known as. So the law is pretty clear on that, and our committee felt that it was clear, and we didn't want to change something that's already in practice and can be done.

Now, you don't know that unless you know the law. You don't know it just from the rules, so there could be the school of thought that we ought to put it in the rule. If we did put it in the rule, we might want to use some different language, but the first question is do we want to put that in the rule when it's pretty clear and there's a great body of Texas law that clarifies that. And Chief Justice Jefferson's case is Butt, B-u-t-t, Grocery v. Pais, P-a-i-s, 955 Southwest 2nd 384, out of San Antonio -- no, San Antonio court. My good friend didn't anticipate in that case.

CHAIRMAN BABCOCK: Was your subcommittee unanimous in --

MR. LOW: Yeah.

CHAIRMAN BABCOCK: -- not wanting to add that?

MR. LOW: Yeah. That's correct, isn't it?

MR. WADE: Yes.

CHAIRMAN BABCOCK: And how many people participated in that?

MR. LOW: Seven or so.

CHAIRMAN BABCOCK: Okay.

MR. LOW: But see, basically as you'll notice here, what the State Bar committee is recommending is not to make the changes that the Federals are making. It was basically, let's see, the Federal -- their change is, let me see, like in the Federal statutes 606 has whether extraneous, prejudicial information is properly brought to the juror's attention. That's not the way it's in our statute. Our rule is different now. And the real issue is whether or not this is a way of attacking the verdict or the recording of the verdict and whether we want to put it in the rule.

CHAIRMAN BABCOCK: Justice Bland.

HONORABLE JANE BLAND: Well, I agree with the subcommittee's recommendation because in our Rules of Civil Procedure we already have a way for jurors to speak up if the verdict is inaccurately --

MR. LOW: Right.

HONORABLE JANE BLAND: -- recorded. Under Rule 293 it says "When the jury agreed. When the jury agreed upon a verdict," I'm reading, "They shall be brought into court by the proper officer and they shall deliver their verdict to the clerk, and if they say that they all agreed the verdict shall be allowed by the clerk. If the verdict is in proper form no juror objects to its accuracy, no juror represented as agreeing thereto dissents therefrom, and neither party requests a poll of the jury the verdict shall be entered upon the minutes of the court."

And then in Rule 295 we have a procedure for correcting the verdict if the verdict is defective, not just because it was recorded inaccurately, but other things like jury conflicts, and to me this is a better way of taking care of this because it's right at the time the jury reaches a verdict, before anybody has been released, before they're released from their obligations about talking about the verdict or anything, and so it's an opportunity -- and it also precludes -- or not precludes, but hopefully prevents a mistrial because it contemplates that the judge and the lawyers who are there can fix whatever the problem is without putting everybody to the expense of a second trial, so that's why I would agree

with the subcommittee.

CHAIRMAN BABCOCK: Okay. Kent, and then Ralph.

HONORABLE KENT SULLIVAN: I was just going to say call the question.

CHAIRMAN BABCOCK: Yeah, okay. That's where I was headed.

MR. DUGGINS: Well, question, would those, what you just read, apply in a criminal case since the Rules of Evidence -- won't they apply both in criminal and civil?

CHAIRMAN BABCOCK: Yeah.

HONORABLE KENT SULLIVAN: Yeah.

MR. DUGGINS: And I ask it only because we had a criminal case in Fort Worth about a month ago where the jury gave six months and intended to do six years, and they said, "There's nothing we can do about it." I don't have any idea about criminal law, but I'm just asking.

MR. LOW: What happened? I'm sorry.

MR. DUGGINS: They made a mistake and gave the defendant six --

MR. LOW: But they were already discharged?

MR. DUGGINS: Yes.

MR. LOW: Well, the case law is pretty clear that they can grant a new trial. I don't know. That's

not a Court of Criminal Appeals case.

HONORABLE KENT SULLIVAN: I would also argue in favor of Justice Bland's point, and that is, a prosecutor feeling that something was, you know, dramatic could, you know, have the jury polled, could raise a question at the time. That's the best time to do it, and presumably -- I'm not an expert in criminal procedure, but I suspect that in addition to Rules of Evidence there is a counterpart there that will allow that.

MR. LOW: There are a couple of cases where that happened. They asked, and the jurors a lot of times they don't read, they say, "We waive the reading of the question, read the answer." "Yes, yes," this, that, so forth, so they don't know and then it's discovered later, so that's why they allow that, and the cases do say that that is -- that should be done.

They should know before they leave because we don't like -- our policy is against impeaching your own verdict, and sometimes people get influenced by someone else or their conscious bothers them and they think, "Oh, gosh, I wish you had gotten this money" or hadn't gotten it or something.

CHAIRMAN BABCOCK: Justice Gray.

HONORABLE TOM GRAY: I was confused, Justice Bland, because the subcommittee has recommended no change

to the rule, but I thought you were saying to change the rule according with the language as drafted? I just --

HONORABLE JANE BLAND: No.

HONORABLE TOM GRAY: Because you see it on the front line I'm interested in what you're saying.

HONORABLE JANE BLAND: No. I'm saying no change to the Rule of Evidence because the Rules of Civil Procedure already have a mechanism in place --

HONORABLE TOM GRAY: Okay.

HONORABLE JANE BLAND: -- for lawyers to address mistakes in the verdict, and I think it's a better way of doing it because it's at the time the verdict is announced and the judge reads it.

CHAIRMAN BABCOCK: And, Judge Gray, she used to sit on the frontline, but now she sits on the same line you sit on.

HONORABLE TOM GRAY: What I meant to say is she has seen it from the frontlines.

CHAIRMAN BABCOCK: Frank.

MR. GILSTRAP: So where we are is there a judge-made exception to Rule 606(b) allowing to inquire into the validity of the verdict for clerical error, and that's settled, we're satisfied with it. We haven't had the controversy that the Federal courts have had over clerical error, and so it ain't broke, we don't need to

fix it. Is that where we are?

MR. LOW: Yeah. That's the idea. One of the cases, older cases, they go back to --

CHAIRMAN BABCOCK: Buddy, you're winning.

MR. LOW: I don't care. I'm fair and impartial.

MR. DUGGINS: I move we adopt the subcommittee's --

CHAIRMAN BABCOCK: Yeah. Everybody in favor of the subcommittee's proposal, which is not to adopt this language, raise your hand.

MR. LOW: That means they don't want me to talk anymore.

CHAIRMAN BABCOCK: Any opposed? All right. 17 to zero. Let's go to 609 and then we can go home.

MR. LOW: All right. 609 is, again, the State Bar is not recommending the changes that the Federal rules are that are going to be in December of this year. You'll see the first page there, the next page is how the Federals are amending their rules, and our rule is much, much different.

As you'll see, the next page after the Federal rule and the way they're amended, you'll see as the Federal rule as it exists, and the Federal rule as exists and as they're amending is different from ours. We

talk about a felony or crime involving moral turpitude. Basically what the feds have gone to is a two-prong situation where you have first a crime, a felony, imprisonment for, what, a year or more or something, and you have a 403 test. Then they have a crime that the elements are obvious from the face of the crime involving truthfulness, and that doesn't go to a 403. That's just plain.

Well, what the State Bar is committing is -- is recommending is they want to change credibility for character for truthfulness. Well, that's only adopting one phase of the feds' rule, and we use credibility. We tell the jurors they are the judge of the credibility of the witnesses, and my committee saw no reason to change credibility to character for truthfulness.

CHAIRMAN BABCOCK: Okay. Any discussion?

MR. LOW: Still don't want to hear any more from me.

CHAIRMAN BABCOCK: All right. Everybody who is in favor of the subcommittee's recommendation not to change 609, raise your hand.

Anybody opposed? Okay. By a vote of 15 to nothing. Now, Buddy, thanks. That's great -- we got two of the three done, and we'll do 904 next meeting. Justice Duncan has got something she wants to bring to our

attention.

HONORABLE SARAH DUNCAN: Well, I'd just like to read something into the record on the verification requirement for a mandamus original proceeding. This is the proposal of Judge Christopher, Judge Bland, Judge Baron, and myself.

MS. BARON: I got a promotion.

HONORABLE SARAH DUNCAN: That we delete the first sentence in 52.3, change subsection (g) to read, "The petition must state concisely and without argument the facts pertinent to the issues or points presented. Every statement of fact in the petition must be supported by citation to competent evidence included in the appendix or record."

Change subsection (j) to subsection (k) and add a new (j) entitled "Verification." "The person filing the petition must verify that he or she has reviewed the petition and concluded that every factual statement in the petition is supported by competent evidence included in the appendix or record," and we think that will resolve the concerns of Judge Christopher and Judge Bland that what the petition says happened is, in fact, what happened, but also resolve the appellate -- the person signing the petition's concern that they not be required to verify things that they don't know happened.

CHAIRMAN BABCOCK: Thanks, Sarah. And, Jody, you ought to make a note when you-all are considering this that there is some alternate language; and the vote, the final vote, just so the record is clear, was 13 to 7, not 14 to 6, because Justice Duncan changed her vote at the last, but timely changed her vote.

MR. GILSTRAP: Chip, could Justice Duncan maybe e-mail that proposed language out?

HONORABLE SARAH DUNCAN: Certainly.

MR. GILSTRAP: Thank you.

HONORABLE SARAH DUNCAN: I'm sorry Professor Dorsaneo isn't here, but he --

CHAIRMAN BABCOCK: No problem. The record is what it is, and thanks a lot, and the next meeting Angie, is --

MS. SENNEFF: December 8th.

CHAIRMAN BABCOCK: December 8th.

MS. SENNEFF: Here.

CHAIRMAN BABCOCK: Here. December 8th, here. Thanks for everybody who is left for staying.

(Adjourned at 11:23 a.m.)

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REPORTER'S CERTIFICATION
MEETING OF
THE SUPREME COURT ADVISORY COMMITTEE

* *

I, D'LOIS L. JONES, Certified Shorthand Reporter, State of Texas, hereby certify that I reported the above meeting of the Supreme Court Advisory Committee on the 21st day of October, 2006, Saturday Session, and the same was thereafter reduced to computer transcription by me.

I further certify that the costs for my services in the matter are $ 745.50 .

Charged to: Jackson Walker, L.L.P.

Given under my hand and seal of office on this the 7th day of November, 2006.

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