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MEETING OF THE SUPREME COURT ADVISORY COMMITTEE

May 13, 2011

(FRIDAY SESSION)

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Taken before *D'Lois L. Jones*, Certified Shorthand Reporter in and for the State of Texas, reported by machine shorthand method, on the 13th day of May, 2011, between the hours of 9:02 a.m. and 4:58 p.m., at the Texas Association of Broadcasters, 502 East 11th Street, Suite 200, Austin, Texas 78701.

INDEX OF VOTES

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

Documents referenced in this session

11-07 Memo from Judge Peeples re: letter rulings (5-12-11)

11-08 Proposed amendment to TRCP 116 e-mail from Richard Orsinger (5-12-11)

11-04 Ancillary Proceedings Task Force draft (January 2011)

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CHAIRMAN BABCOCK: Welcome, everybody. As I think everybody knows, we're going to be here both today and tomorrow, so it will be great to spend most of the weekend with everybody. I want to thank Buddy for stepping in for me on short notice last meeting in March, and for those of you who have asked, my daughter got through the surgery very well, and she's recuperating, and everything is good, so thanks for everybody who asked. With that, I'll turn it over to Justice Hecht for his report.

HONORABLE NATHAN HECHT: I'm here alone today. Kennon has departed after her commitment to us has long expired, and she is going to start work with Scott, Douglass & McConnico in another week, and so we wish her well, and I have secured a replacement that we'll make an announcement about next week, and it's a very qualified person and I hope will do as good a job as Kennon did, although that would be -- she's got big shoes to fill.

Our Court's general counsel Alice McAfee also left to return to private practice, and the Court's mandamus attorney, Jen Cafferty moved over to the counsel position, so we're also hiring a mandamus attorney, and we did that yesterday, too, and there will be an announcement about that on the website here in a couple of days. So we wish Kennon nothing but the best. I called her yesterday

about a rules question for today, and she took the call even though she was on a boat off Key West, loud music playing in the background, and she was cogent, and so she's always the rules attorney.

We have the recusal rules in the field, and I told Judge Peeples this morning that we've only received a couple of comments and none of them substantive especially, and so we'll have a report on that after the full period has run, but I don't anticipate much reaction to those rules. Everyone seems to think they're a welcome improvement. I think that's the status of things at the Court. I'll be happy to answer any questions at the end.

Let me tell you a little bit about the status of things across the street at the Legislature. Last night was the deadline for House bills to pass the House, so we can begin to breathe a sigh of relief at what's going on over there. We have tried very hard this session to secure funding for legal services. Not to belabor this, but the IOLTA program, which has been the principal state funding source for legal services since the early Eighties is just down to nothing because of interest rates, and we hope that will get better soon, but it hasn't, so we got $20 million out of the general revenue last session, which was half the reduction in IOLTA, about half, a little more than half, and we were told, of course, that that was a one time deal

and we understood that, but this time we were looking for something to replace the $20 million, and we have a couple of vehicles that we are hopeful about as the session draws to a close. The good news is that the Legislature does not question the mission of legal services as some legislators did 15 and 20 years ago, so that's really an improvement over the way things have been, so we're hopeful of getting some money out of the process before it ends.

A number of bills have passed or seem likely to pass that are going to require considerable work from this committee in the months ahead, and let me just mention a few of them before -- for now and then I'll send Chip a formal letter eventually, but here's kind of what's on the horizon: House Bill 906 has left off trying to expedite post-trial proceedings in parental rights termination cases and has tossed that ball to us. So they have repealed the problem provisions in Section 263.405 of the Family Code and instead have added a provision, "The Supreme Court shall adopt rules accelerating the disposition by the appellate court and the Supreme Court of appeals in those cases."

So this has been a very challenging area of procedure and I think will require our best efforts. We'll be aided in this by the Department of Family Protection Services, but I think it's going to be hard to serve both

expedition and protection of the rights of indigents in this -- in these cases, but we very much need to do that. Appellate courts have had several cases, way too many in this area, and it does not -- it does nothing to serve the cause of expedition for cases challenging the constitutionality of the statute to go repeatedly to the Supreme Court, so we've really got to do something here.

House Bill 274, the popularly known or unpopularly known "loser pay" bill, requires the Supreme Court to adopt rules in two respects. One is to adopt a sort of Rule 12 dismissal procedure, Federal Rule 12 dismissal procedure, and another provision of the statute requires the Court to adopt rules for efficient and cost effective resolution of cases involving less than a hundred thousand dollars, and I think the concern is that the discovery changes of the late Nineties have not done enough to move these cases along, that a lot of the courts' business is being lost to arbitration, and we need to really take a hard look at these cases and see what we can do. There's no time limit on these provisions, but certainly we want to be -- have something in place well before the next session. That statute also provides for interlocutory appeals certified by the trial court and removes the requirement that the parties -- excuse me, I've got allergies this morning -- that the parties agree, so

we'll have to look back again at TRAP 28.2 and make some adjustments in it.

Senate Bill 142 provides for a number of changes in foreclosure law and adopts some provisions for homeowners associations to foreclose to enforce their assessments and requires the Court to write rules for that, so we'll probably look at that in connection with the foreclosure rules that have already been approved and see if we can piggyback onto that. Then Senate Bill 1717 has two provisions of note. It's a very long sort of judicial system cleanup bill by Senator Duncan and requires the Court to adopt rules for small claims cases in the justice courts and sets standards that these rules have to follow. So that's a welcome change as well because I hope that we will be able to adopt rules in accordance with the statutory directives that will be helpful to the justice courts and will move those cases along.

There is also an administrative provision that requires the Supreme Court to adopt administrative rules to determine when cases need additional resources. They are so large, for want of a better word, or more resources consuming, whether it's because of the issues or the number of parties or whatever, that they need additional resources, so we'll have to take a look at that.

And I think House Bill 906 I believe has

passed. It looks as if House Bill 274 will pass. I have not heard anything about Senate Bill 142, the foreclosure bill. I think Senate Bill 1717 will pass, and then the only other bill that I'm aware of at this point is Senate Bill 791, which is an interesting bill by Senator Duncan that allows the legislators to register their requests with the secretary of state to receive electronic copies of all rules changes promulgated by the Court. So this is kind of a movement to the electronic age, I guess. We've been trying to do that in the past just on our own, and getting everybody's e-mail address is not always easy, but I hope this will make it possible for those changes to be more widely circulated. So I think those are the bills that I know about, but I think they'll be -- there are no deadlines on any of them, so we don't have to worry about end of the year deadlines as we have in the past, but there's certainly a large amount of work there to be done.

Then just on a personal note, Pam Baron's paper, "Texas Supreme Court Docket Analysis," presented in September 2010 won the 2011 Franklin Jones Best CLE Article award.

(Applause)

HONORABLE NATHAN HECHT: Past recipient, Richard Orsinger on that.

CHAIRMAN BABCOCK: No applause, please.

MR. ORSINGER: No applause necessary.

HONORABLE NATHAN HECHT: And you-all need to tell us these things, but Pete came up to me last night and said, though this is sort of remote from the announcements that we usually make, his brother Robert's wife has released a book. We think it was yesterday, entitled "The Queen of Kings," which is a story of Cleopatra as a vampire. It is the first in a series of three for which the movie rights have already been purchased, and it looks as if Robert's wife is off to glory, just as Pete's older son is, and we were asking ourselves why was it that we couldn't get ideas like this.

CHAIRMAN BABCOCK: Although we've been accused of sucking the blood out of people in the past.

HONORABLE NATHAN HECHT: That's right.

CHAIRMAN BABCOCK: Well, if we get to do book things, everybody buy "Signs of Life" by my niece as featured on the Dr. Phil show in the coming weeks.

Okay. Elaine, we ended with you, and I know that Dulcie Wink and Pat Dyer and David Fritsche are going to be here, but I don't see them.

PROFESSOR CARLSON: 11:00 o'clock.

CHAIRMAN BABCOCK: 11:00 o'clock. Okay. So we're going to go to other things first, right? Okay, great. So, Judge Peeples, I guess the appellate procedure

on final court orders is in your bailiwick.

HONORABLE DAVID PEEPLES: And I haven't been thinking of this in terms of appellate procedure, although it seems to me both appellate and trial court because we're talking about appellate timetables and plenary power on these, so it really is both. I said just about everything I have to say in that one-page memo that you got yesterday, which at the bottom of the page has just some proposed rules or principles for discussion. I would point out that even though we've been talking about letter rulings, really it's very timely because it's more than that because of the electronic age and e-mail, and I guess judges could put rulings on a web page or, you know, communicate that way. We have handwritten orders, and we might want to think about how those ought to be treated.

Richard Orsinger and I were talking yesterday about this. It is certainly not my intent by what I have drafted here to change any of the rules that deal with whether rulings have to be in writing and signed or whether an oral ruling will suffice and that that's something that we ought to keep in mind, and I was just thinking about the various kinds of rulings that can be dealt with. Obviously, you know, final judgments and orders and so forth, summary judgments, but discovery rulings, settings, continuances, that kind of thing, new trial orders, and you

know, ruling setting aside a previous ruling, whether it's technically a new trial or not, rulings in a nonjury trial. The division of property in a divorce case a lot of times get done this way, and so that's just what occurred to me this morning. So the various contexts in which this can come up it seems to me is a pretty broad area. That's all I have to say right now.

CHAIRMAN BABCOCK: Okay. Judge, do we want to take the -- the proposed language at the -- in your one-page memo of May 12 and discuss that? Is that --

HONORABLE DAVID PEEPLES: That's what I have in mind because I thought that my assignment from the last meeting was to get some language on the table for discussion. At some point it seems to me that's helpful.

CHAIRMAN BABCOCK: Yeah.

HONORABLE DAVID PEEPLES: That's what I had in mind.

CHAIRMAN BABCOCK: All right. Does everybody have Judge Peeples' May 12th memo? Okay. Let's invite comments about subsection (1), issuance of ruling. "Rulings may be announced from the bench or by formal written order, letter, or memorandum, electronic mail, or other reasonable means." Any comments on that?

CHAIRMAN BABCOCK: Yeah, Frank.

MR. GILSTRAP: I think the proposed rule

advances the ball, and it clarifies -- it clarifies the problem that was discussed during the last meeting, but it still boils down to one question, and that is what is a formal written order.

CHAIRMAN BABCOCK: What was the what?

MR. GILSTRAP: What is a formal written order?

CHAIRMAN BABCOCK: Yeah.

MR. GILSTRAP: And, you know, and it kind of -- you know, and the controversy is now over this, is this a formal written order, and maybe that's an easier problem to deal with, but it's still a problem that, you know, I don't -- I don't have a clear answer to, and I'm not -- you know, when we were doing the final judgment rules or we discussed it we talked about, well, this is what a judgment has to contain, but I don't -- if the letter says to the attorneys, "And I hereby grant the summary judgment motion. Plaintiff recovers a thousand dollars in costs. All of the relief is denied," signed judge, is that a formal written order? Well, it's not a formal written order maybe because it has a letterhead on it, but it has everything else that's required in a formal written order. You know, I think we're still -- we're kind of kicking the can down the road and still having to answer the question, what is a formal written order?

CHAIRMAN BABCOCK: I'm going to guess that by using the term "formal written order" in subsection (1) and then describing a bunch of other things the intent was to distinguish a formal written order from, for example, a letter as you describe or a memorandum, but, Judge Peeples, is that what you had in mind?

HONORABLE DAVID PEEPLES: Yes. The next two words, three words in that sentence are "letter or memorandum," but, you know, Frank is right. The term "formal written order" is not defined other than by the context in which it's used.

MR. GILSTRAP: So the intent is that if it's a letter or memorandum or e-mail or an announcement from the bench it is not a formal written order. That's kind of the thinking behind it?

HONORABLE DAVID PEEPLES: Yes. And when I think formal written order I think of a pleading, something with the style that's typewritten and signed. That's just my subjective intent there.

CHAIRMAN BABCOCK: Okay. Other comments about subsection (1)? Yeah, Sarah.

HONORABLE SARAH DUNCAN: I'm not certain, but I would think Judge Peeples doesn't mean it has to be typed because there are a lot of orders that are handwritten.

HONORABLE DAVID PEEPLES: You know, you're

right about that, and something that happens occasionally, you know, there will be a settlement or something, and they'll just write it up right there, and nobody brought their laptop and a little computer and so they write it on a legal pad, and it's -- if it were typed it would be a very good formal written order, but it's in handwriting. Should that be sufficient? And what's at stake there is if it's not -- I mean, if it's -- in terms of the content it's got everything you need, style of the case, complete relief, signature, date, and all that, but if it's handwritten and we say that's not enough, that means that case is kept open.

HONORABLE SARAH DUNCAN: And if --

HONORABLE DAVID PEEPLES: Judge still has jurisdiction.

HONORABLE SARAH DUNCAN: And it means that a party who agreed to terms in open court could come back later and say -- and try to get out of it because there's not a judgment.

HONORABLE DAVID PEEPLES: Yeah, well, in that situation you would get into the set of rules that deals with whether it's been rendered and whether it's been made the judgment and they can back out or not.

CHAIRMAN BABCOCK: But the issue that Sarah raises is not -- is not in this subpart (1), right? You

don't say it's got to be typewritten. You just say it has to be a formal written order.

HONORABLE DAVID PEEPLES: Right.

CHAIRMAN BABCOCK: I mean, you orally said what you thought was a formal written order, but, I mean, if it's in handwriting and it's got all the other formalities and it's in the court file, I would think it would pass muster, but, no, you don't think so, Sarah?

HONORABLE SARAH DUNCAN: Oh, it always has before.

CHAIRMAN BABCOCK: Yeah.

HONORABLE SARAH DUNCAN: And that's why when David said "typed" it kind of caught me up, and I was like that's going to exclude -- not a vast number, but some fairly important of the moment judgments.

HONORABLE DAVID PEEPLES: The other side of that is if you've got the situation I just described, and the judge signs it, and we call that a formal written order that starts the timetables running and people think, well, you know, we'll type it up and send it over, and they forget, or somebody won't approve it as to form or whatever, and the timetables are running. There is that danger. I mean --

CHAIRMAN BABCOCK: Okay. Any other comments about subsection (1)? Yeah.

MR. HUGHES: Well, it's just I'm -- maybe I'm missing something here, but I don't see any requirement or any indication for nonoral rulings to be approved by the court in some manner. I mean, when the judge speaks from the bench there is a court reporter typing it down, and one -- I would assume that formal written order or letter memorandum means something signed by the judge, but it doesn't say that, but once we get over into e-mail and other electronic means, I mean, we have a cartoon posted in our lunchroom that says, "Nobody knows you're a dog on the internet," and meaning is that nobody sees you sign something, the e-mail, and anyone can type your name on your computer and send it, and I've also seen -- I can't say this is everywhere, but busy judges just phone in and tell their clerks to stamp something, you know, the rubber stamp signature, and I've just gotten used to that on routine orders setting hearings and the like, but I'm a little worried that just the way it's written here there must be some indicia that the judge has approved it.

I know that when it's in court and when I get something signed by the judge or from the judge's office with a rubber stamp signature on it, but when we start talking about e-mail and other reasonable means, I'm a little worried that we're losing the indicia that this is coming from the court, that this has been approved by the

judge, and I think that's important because there are rules other than ones that trigger deadlines. I mean, suppose the judge decides to impose sanctions, and, you know, strikes a defense and awards some money and you just get the notice by e-mail. It's not signed by anybody. Do you -- I mean, is this from the court? You know, some sanctions orders can be mandamused, and do we now instead of attaching this certified copy of the order we attach a sworn copy of an e-mail to the -- as the record of the judge's ruling? So that's my main concern here.

HONORABLE SARAH DUNCAN: I would add to that, how are you going to swear to it? You don't -- I don't know if it came from a dog or Judge Peeples, so how do I swear that this is an authentic e-mail from -- order from Judge Peeples?

MR. HUGHES: Exactly.

CHAIRMAN BABCOCK: Only thing you can swear to is you got something that purports to be from the court, which may or may not be. It's a pretty good point. Yeah, Justice Christopher.

HONORABLE TRACY CHRISTOPHER: Well, I mean, I think most judges that communicate via e-mail important matters like rulings print and put it in the file so that it is in the file if it is intended to be a ruling as opposed to just a communication about scheduling things. I

mean, I don't know any judge that rules on something via e-mail and doesn't make a record of it in the court file somehow, so I -- I mean, to the extent that you want to put that in the rule you could, but, I mean, I think in practice if it's a ruling, that's how judges handle it. Same thing with when I fax something to a lawyer or I put it in the file after I faxed it to them back before we did e-mail, so --

CHAIRMAN BABCOCK: Yeah. Yeah, Judge Peeples.

HONORABLE DAVID PEEPLES: What I tried to do in paragraph (1) there was not -- was simply to capture and list the various ways that I think judges communicate their rulings. I did not intend in that paragraph to say anything about do they have effect or not, but simply, "This is how you can tell people what your ruling is," and of course, really from the bench is by far the most common it seems to me, but I send out e-mails before when I've been studying something and said, "Here's my ruling, one, two, three, four, five, so-and-so prepare an order," without putting it in the file because I knew there would be an order later on. The important thing was to let people know what had happened. I just think in this diverse state a lot of things happen locally that are not uniform statewide.

CHAIRMAN BABCOCK: Uh-huh. Yeah. Richard Munzinger, and then Frank.

MR. MUNZINGER: Only that Judge Christopher says she would put it in the file, how do the lawyers know that it went into the file and that it was the judge's intent that it was a formal ruling that did indeed intend to start time limits or to affect substantive rights if the letter that the judge writes doesn't say "Mr. Smith can draw the order," that leaves the intent of the letter open to the reader. You don't know, I don't know, if I get such a letter whether the judge filed it with the clerk unless it says so or unless I call the clerk or send a messenger to go look at the records. E-mails don't ordinarily go into the record, but if one is filed then the judge says, "Well, I intended that." The problem is one of, it seems to me, expressing the intent of the court's action in some kind of document or other notice to the practitioners that gives them fair notice that something substantive has occurred that either does or may seriously impact some right that you or your client has.

CHAIRMAN BABCOCK: Frank.

MR. GILSTRAP: I think the debate might be suffering from a case of mission creep. We started out with Justice Gray's question of whether or not a letter ruling starts the appellate timetable. Now we've gone on

to say, well, how can a judge announce his or her rulings, and I don't know that that's really part -- necessarily part of the problem that Justice Gray raised. We might could simply get rid of (1), and in (2) add the words, "A ruling from the bench, a letter, memorandum, or electronic mail, is not a formal written ruling." And that would solve the problem without having to get into this other area of, well, if the judge -- if the judge sends out an e-mail has he rendered judgment, that type thing, which seems to me another problem that maybe should be left to another time.

CHAIRMAN BABCOCK: Yeah. Justice Bland, and then Sarah.

HONORABLE JANE BLAND: Well, if we're going to draft a rule that talks about orders, I think that Judge Christopher's idea of putting something in the rule about it being filed as part of the record of the court is important, because even if it's an informal order, it would seem that it would need to be in the record somehow, either if it's made -- pronounced in open court then it would have to be on the reporter's -- with the court reporter, or if it's a letter or a memo or something like that, it would need to get filed in the papers of the court because otherwise there would be no way of reviewing it and no way of enforcing it.

CHAIRMAN BABCOCK: Sarah.

HONORABLE SARAH DUNCAN: I don't know what an informal order is, first of all, but second of all, if Andy or Bonnie were here they would be jumping up out of their seats and telling us -- explaining to us that they have no discretion to refuse something presented for filing, so the dog could have written the e-mail and then trotted over to the court and presented it for filing, and I'm sure there would be a filing fee, and we have no way of knowing whether it was the dog who wrote that e-mail or Judge Peeples or presented it for filing or got it into the file.

HONORABLE JANE BLAND: Except there's laws against falsifying government records, and there's also the idea that once it's part of the file then the public and the other parties in the case are presumably on notice. They get a postcard notice that order is signed, and so that's some protection against a false or fraudulent order.

CHAIRMAN BABCOCK: A nonelected dog, for example.

HONORABLE JANE BLAND: Right.

HONORABLE SARAH DUNCAN: Heaven forbid.

CHAIRMAN BABCOCK: Justice Christopher.

HONORABLE TRACY CHRISTOPHER: Well, there's also the Uniform Electronic Communication Act which says if I send an e-mail that has my name on it, it is presumed to

be from me and signed by me. So, I mean, and we have that act in Texas, so, you know, y'all are -- need to kind of step up to the electronic age. If I send an e-mail with my name on it, it's from me; and, yes, somebody could falsify an e-mail from me; and, yes, people can falsify an order from me; and, you know, I've seen fake orders with my signature on it filed in things. So, I mean, I don't think that there's anything different between an e-mail versus a signed order in terms of being fake. If it's fake, it can be discovered as fake.

CHAIRMAN BABCOCK: Okay. Judge Peeples, did you have anything else that you wanted to say?

HONORABLE DAVID PEEPLES: No.

CHAIRMAN BABCOCK: Okay. Yeah, Richard Orsinger.

MR. ORSINGER: On the -- on subdivision (1) it seems to me that all of these methods are currently in use around the state in various places and that we don't do any damage by recognizing that they're legitimate, although they will continue even if we don't include this section. It only really would make a difference if we prohibited anything but a signed typed order, but I really don't see that there's any big threat here, because I think this is going on all over the state every day.

CHAIRMAN BABCOCK: Yeah. Jan.

HONORABLE JAN PATTERSON: I don't think it's a problem either if it's in handwriting because we have recognized those; and it seems to me that if the parties intend for it not to be a formal agreement, that they will not sign it before they ask someone to go off and type it and to present it. I mean, usually the parties say, "Here's our agreement, let's put it -- let's have it typed up" or they sign it, the handwritten copy, and it's then the formal agreement. But I don't think they sign it most of the time. I haven't seen where they execute it and then go off and repeat a process.

CHAIRMAN BABCOCK: Judge Wallace.

HONORABLE R. H. WALLACE: I don't know how pervasive this problem is. In my own personal experience it's not, and I was looking at Judge Peeples' memo back in March where the first thing to consider was if it ain't broke, don't fix it, and I'm really -- in my own personal experience it's not broke, so --

HONORABLE JANE BLAND: We got voted down last time.

HONORABLE R. H. WALLACE: Did we get voted down last time? Okay, I'm sorry. Shows what my memory is.

CHAIRMAN BABCOCK: Okay. Let's go on to subparagraph (2) and talk about that a minute. "Formal order required. Rulings that start timetables, including

final judgments and orders overruling motions for new trial must be contained in a signed formal written order." Yeah, Professor Hoffman.

PROFESSOR HOFFMAN: I mean, I guess this is where I would see the problem, and I think Frank hit it on the head when he started this conversation. (1) and (2) are linked at the hip there because the idea behind (2) is to then say of all these various ways in which rulings can be issued, the only ones that start timetables are these formal ones, these formal signed written ones, and that raises all these questions then about what do we mean by formality, and it seems like our conversation before was a start. Maybe it's also a finish that instead of focusing on formality maybe we should be thinking about more of the substantive more verifiable ways to distinguish between orders that we want to start timetables and that we don't. The one that Judge Christopher has talked about is the idea of it being in the file. I guess my reaction is, again, building on what Frank said and what Tracy said is let's move away from the distinction between formality, what it means for something to be formal, and instead focus on the something that's more verifiable and then treat that as the trigger.

CHAIRMAN BABCOCK: Okay. Bill Dorsaneo.

PROFESSOR DORSANEO: Well, two points. I

wasn't here last time, but it's clear from this language, is it not, that we're not talking about rulings that stop timetables? Okay. We're only talking about starting a timetable rather than, as in one of the cases that Justice Gray sent us, the letter says, "I will withdraw my ruling and the summary judgment previously signed," which if that's at present withdrawal, which was an issue in that case, that stops the timetable. I see that's a good distinction between starting and stopping timetables, because I would be disturbed if a letter -- if this letter stopping a timetable wouldn't stop the timetable, because that would fool me or at least a lot of people.

HONORABLE DAVID PEEPLES: Chip?

PROFESSOR DORSANEO: But the other thing is we do have -- we do have rules on the subject. We have 306a where we're talking about judgments and we're talking -- although the rule doesn't say so in so many words, we're talking about final orders, and those -- those do have to be signed, and I suppose they ordinarily are what Judge Peeples would consider, you know, formal, because ordinarily they have a caption on them, although I'm not sure 306a requires that, and we have the same -- it does require signature and an indication of the date of signing, and we have appellate Rule 4.2, which does the same thing.

That's a large part of the job, I think, and maybe takes care of many of these things without doing anything at all, but I would like the point -- I would like to validate this case. I don't know whether Justice Gray, you know, still dislikes it or dislikes it as much as his dissenting opinion indicated, but I -- I think you ought to be able to stop a timetable by a letter. I think you ought to be able to do a lot of things by a letter. I don't think you ought to be able to start a timetable unless you're doing it in accordance with the rules we have now for final orders, 306a(1) and the 4.2 in the appellate rules.

CHAIRMAN BABCOCK: Judge Peeples.

HONORABLE DAVID PEEPLES: It may -- and it might be helpful to talk about paragraphs (2) and (3) together.

CHAIRMAN BABCOCK: Okay.

HONORABLE DAVID PEEPLES: Because my intention was for (2) and (3) to cover the entire universe of possibilities; and if it's covered by (2), it's not covered by (3) and vice-versa. I didn't say it exactly that way, but that's the intent --

CHAIRMAN BABCOCK: Yeah.

HONORABLE DAVID PEEPLES: -- because we need to cover everything, it seems to me.

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

HONORABLE DAVID PEEPLES: And what Bill was describing I think would be covered by (3).

CHAIRMAN BABCOCK: Paragraph (3), "Formal order not required. Rulings that do not start timetables, including orders concerning discovery and scheduling, those granting a new trial or setting aside an earlier order, and other interlocutory rulings may be contained in a letter or memorandum signed by the judge without a more formal writing."

PROFESSOR DORSANEO: Okay.

HONORABLE SARAH DUNCAN: What --

CHAIRMAN BABCOCK: That seems to exclude electronic mail or other reasonable means, subparagraph (3). Was that intentional?

HONORABLE DAVID PEEPLES: Yes.

MR. GILSTRAP: And rulings announced from the bench, too, it excludes that.

CHAIRMAN BABCOCK: Excludes that, too, right. Okay. Frank.

MR. GILSTRAP: I think I agree with Professor Dorsaneo that if we adopt this rule we've got to look at 306a and make sure the two fit together. Maybe some of this belongs in 306a. With regard to proposed subparagraph

(2), we're talking about, for example, severance orders, if a severance order severs out one case, one part of the case where it's identifying the judgment, that's a formal -- that's got to be a formal written order because it starts the appellate timetable.

One thing more -- and this goes back to a comment from Justice Bland. I really think we need to think about the -- having a requirement that the judgment or an order that starts the appellate timetable be filed. I mean, you know, in Federal courts it has to be entered, and there's a reason for that. I've had a couple of cases, one right now that's going on, where you have a judgment or order that starts the appellate timetable that gets signed -- maybe there's a hearing and then a month later the judge signs the ruling, and the attorneys are calling in and they say, "Well, it's -- you know, we're looking at the file, it's not there. It hasn't been ruled on." Turns out it has been signed, and it's sitting on the judge's desk or maybe the judge moved to another office or something, and about six months later it shows up, and it's too late, and it's a problem that does come up, and, you know, so while we're here we might want to think about actually having the judgment filed in the record before the appellate timetable starts.

HONORABLE TOM GRAY: Did somebody mention

mission creep? Oh, yeah, it was Frank, that's right.

MR. GILSTRAP: Guilty.

CHAIRMAN BABCOCK: Let the record reflect. Okay. Yeah, Judge Brown.

HONORABLE HARVEY BROWN: Is the word "timetables" in parts (2) and (3) meant to be -- to refer to appellate timetables? I only ask because I think of a timetable as including a discovery order that says you have 10 days to answer or 30 days to answer and then I see in part (3) you say I'm not including discovery orders.

HONORABLE DAVID PEEPLES: My intention -- and maybe it's not expressly stated -- was appellate timetables and plenary power, trial court jurisdiction timetables, those two. I hadn't thought about the discovery schedules and so forth.

CHAIRMAN BABCOCK: Yeah, Justice Christopher.

HONORABLE TRACY CHRISTOPHER: Just kind of throwing another sort of wrinkle into it, what about mandamus from interlocutory orders? Are we still requiring them to be signed, or can we mandamus from an oral bench ruling or an e-mail?

CHAIRMAN BABCOCK: E-mail. Yeah.

MR. HUGHES: Well, my experience is that an oral ruling that would be subject to mandamus if it were reduced to writing probably can. The problem is, and I've

seen this happen, is that if you file the mandamus before it gets reduced to writing or before there's a chance, somehow the written order will look different than the oral order and perhaps solve a few problems, but I don't think in practice I have seen courts say, "I'm sorry, we have to wait for a written order, but you're going to have to come up with some sort of transcript of the ruling." I can see a court saying, "We want some sort of official record of it."

CHAIRMAN BABCOCK: Skip.

MR. WATSON: I understand the structure, and I like where we're going. It may just be me, but I'm a little confused by the interplay between (1) and (3). It throws me off a little bit to think that I may or may not be talking about different things between the types of rulings identified in (1) and the types of rulings identified in (3) as formal orders not required. It looks to me like that they're saying the same thing, but (3) is leaving out, you know, "from the bench, electronic," et cetera, et cetera, and I'm just wondering if what we really need here is just (2), (3), and (4), with (3) being slightly expanded to make it very clear that these other means are ways that are -- you know, are things that formal orders are not required and these other ways are acceptable. To me it would be clearer to begin with (2)

and to fold (1) into (3).

CHAIRMAN BABCOCK: Okay. Richard.

MR. MUNZINGER: Use of the words starting -- or "start timetables" I think is unduly restrictive and could lead to confusion. A judge enters a judgment. A party files a motion to modify the judgment. The court grants the motion to modify. That both stops the first timetable and starts a new timetable. Is that an order starting a timetable, stopping a timetable? What is it? And perhaps the language should be "affecting a timetable" as distinct from "starting a timetable"; and it would reduce the confusion in the rule, because obviously rulings concerning discovery and what have you are different; but those that affect my right to appeal, when my notice of appeal is due, et cetera, an order modifying a judgment starts everything over again, both stops the first timetable and starts the new one. So I think the use of the words "starting the timetables" would be better if it were to say something along the lines of "affecting a" -- I don't know that it would even be a timetable. "Affecting a time for action" or something along those lines.

CHAIRMAN BABCOCK: Judge Peeples, what do you think about that?

HONORABLE DAVID PEEPLES: Well, the problem with that is if you look in the middle of (3), "An order

granting a new trial or setting aside an order affects the timetable." It stops the timetable. Doesn't it? I mean, I hadn't thought about a modification that both stops the timetable that's running and restarts it, which would put it under both paragraphs. I hadn't thought about that.

MR. MUNZINGER: Well, but that is what a motion to -- a granted motion to modify a judgment starts the running of the timetable and starts a new timetable. I just had an appeal where that -- it's not an issue, but at least I calculated my notice of appeal from the order granting the motion to modify the judgment, and if you read this the way this is written, I think you could have some confusion as to whether that's a section (1) or a section (3) order.

CHAIRMAN BABCOCK: Okay.

HONORABLE DAVID PEEPLES: We could say in (2) "rulings that start or restart timetables" to try to deal with your issue.

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

MR. MUNZINGER: It probably is an improvement. I still think that "affecting" certain -- maybe "certain timetables." I haven't really given it that much thought as to all timetables that can arise from the entry of order.

CHAIRMAN BABCOCK: You say "affect certain timetables," then which timetables are you talking about?

MR. MUNZINGER: Maybe the problem might be if you added something to section (3) about extending the time for appeal or something, but that makes these rules very cumbersome.

CHAIRMAN BABCOCK: Judge Peeples, what about the point that was made that if you just leave it generically "timetables" that, you know, discovery -- I mean, trial setting affects timetables. It affects when you have to do things if there's no scheduling order.

HONORABLE DAVID PEEPLES: Well, I don't know how many drafts there were before this, you know, in the last day or two, but one or more of them had "appellate and plenary power timetables," and in an effort to make it more concise I cut that kind of stuff out, and I just hadn't thought about what Harvey Brown mentioned when I did that. You can always add those terms back in if that's what you want to do. Or have a comment. You know, to me that's a matter of drafting.

CHAIRMAN BABCOCK: Okay. Jan.

HONORABLE JAN PATTERSON: I do think there is a virtue in paragraph (1) of having the universe of identifying the means by which something can be delivered, so I -- and to me that makes (2) and (3) more clear rather

than less clear.

CHAIRMAN BABCOCK: Uh-huh.

HONORABLE JAN PATTERSON: The only other question I have about paragraph (1), though, is whether we ought to bite the bullet, and are there other reasonable means, or what does that add?

CHAIRMAN BABCOCK: Well, for example, we don't -- we don't say faxes, and a lot of orders get transmitted by fax, so that would be another -- -- that would be another reasonable means.

HONORABLE JAN PATTERSON: But aren't those usually written orders, letters, or memoranda?

CHAIRMAN BABCOCK: Generally, yeah.

HONORABLE DAVID PEEPLES: Facebook, web page, telephone call.

HONORABLE JAN PATTERSON: Now, are those reasonable means? That's the question.

HONORABLE DAVID PEEPLES: I stuck "other reasonable means" in there because I just don't think you ought to freeze something like this where technology may take it further, because as Richard Orsinger said a while back, a lot of things are happening across the state and if you go back maybe 10 years, I don't know when I started announcing things by e-mail, but that's a very -- it's so easy, and you get everybody, and you're not talking ex

parte to anybody, and everybody gets the same thing, so I just think we want to leave room for growth, and that's the reason for that catchall language.

CHAIRMAN BABCOCK: Yeah. Yeah. That makes some sense. Okay. What about subparagraph (4)? Yeah, I'm sorry, Sarah.

HONORABLE SARAH DUNCAN: Hold on just a second. That -- Judge Peeples, didn't you say earlier that when you send out one of these e-mails you don't print it and put it in the file?

HONORABLE DAVID PEEPLES: Yeah. I did say that.

HONORABLE SARAH DUNCAN: So then the e-mail itself is not an order. It's simply a communication of a ruling.

HONORABLE DAVID PEEPLES: It's very analogous, it seems to me, to at the end of a hearing in open court, "Has everybody had their say? I'm doing, one, two, three, four, and five. I'm granting one, two, and three and denying four, five, and six," and most careful judges will say, "Mr. So-and-so, will you prepare an order?"

HONORABLE SARAH DUNCAN: Well, that --

HONORABLE DAVID PEEPLES: And an e-mail, to me, is just very much like that.

HONORABLE SARAH DUNCAN: It is to me, too, but that to me is where the discussion is getting somewhat confused. I think we need to distinguish what is the order versus permissible means of communicating an order, because which one of those we're talking about demands completely different levels of attention, it seems to me.

CHAIRMAN BABCOCK: Judge Evans.

HONORABLE DAVID EVANS: The only difference I would say, Judge Peeples, is that when you do it from the bench the reporter is probably present and takes it or could be present to take it, and so there's a reporter's record that memorializes the ruling, and I'm troubled that the e-mail rulings are not put in the file. I join the judges in the corner that I'm not sure how you have a court system that doesn't record the actions of the court and have them available to the public.

CHAIRMAN BABCOCK: Sarah.

HONORABLE SARAH DUNCAN: I think judge -- what -- correct me if I'm wrong, Judge Peeples, but I thought what you were saying is that the e-mail is not the ruling. It's simply a communication of the ruling, and you're waiting for a written order to be presented for you to sign. So in that case it's not --

HONORABLE DAVID EVANS: It's similar, though, because when you make the oral pronouncement and you say,

"I want -- prepare the order and send it in," you have outlined how the order is going to be structured, but you haven't given the exact executive language or executing language that's going to go into the order, and so what you'll really find is that the order amplifies or clarifies the oral ruling, and oral ruling is an interim order that just holds the parties in place until you get that written one in, and it's a reference point to go back to. That's my experience.

CHAIRMAN BABCOCK: Justice Christopher, then Justice Bland.

HONORABLE TRACY CHRISTOPHER: Well, there's a difference between "I'm ruling A, B, C, please send me an order" versus "I grant the motion to quash" e-mail. No further anything is required after I say, "I grant the motion to quash," unless somebody just wants me to sign something, you know, so that they want to mandamus me in connection with, you know, granting a motion to quash. I mean, that's -- those are two different things.

CHAIRMAN BABCOCK: Well, but they may want to later on appeal say, you know, "I tried to subpoena this witness that I thought was critical, and she granted a motion to quash, and it's nowhere in the record."

HONORABLE TRACY CHRISTOPHER: Well, that's -- I mean, if I say, "I grant the motion to quash," I put it

in the file. So, I mean, we go back to the if it's a ruling it needs to be put in the file. If it's just a communication with the expectation that something will happen after then it doesn't. You know, send me an order granting the motion to quash, so then the important thing is the order granting the motion to quash. It's very difficult to write a rule governing these sort of problems; and one other thing, I think we have a case about it because it was troubling, is where the judge grants a temporary injunction from the bench, but doesn't sign it for a couple of days; and in the meantime the person who was in the courtroom heard the judge grant the temporary injunction, goes out and violates what was allegedly granted from the bench. You know, so it's hard to write a rule that covers every single one of those permutations.

CHAIRMAN BABCOCK: Justice Bland.

HONORABLE JANE BLAND: Well, to me we might be getting off track, creating some sort of dichotomy between formal orders and informal orders, because to me an order is something capable of being enforced and capable of being reviewed, whether by members of the public or an appellate court; and if we have something called informal orders that are not reviewable because they're nowhere to be found and not enforceable because they don't have all the indicia of an order then we're setting up something in

the rule that we really don't want to encourage. So I guess I disagree with trying to delineate some informal communications by the court as orders.

CHAIRMAN BABCOCK: Okay. Richard Orsinger.

MR. ORSINGER: I don't see an e-mail sending around a judge's ruling to be any different from a phone call in which the judge states the ruling. You can't file a phone call. You can't file somebody's notes of a phone call, unless it's the judge. That kind of stuff does happen. In fact, it happens even in the courtroom when you're having a hearing where there's no record being made and the judge makes an oral ruling and there's no official record of it, and so to me the question here is can we -- if we've tolerated the practice of oral communications as being effective orders then is there some reason why we can't use a written form that doesn't have a signature, like an e-mail, as a form of oral ruling.

And also, I would point out there's a parallel. You know, in Texas the oral judgment, the oral rendition, is the real operative legal event, and the judgment that's typed up and signed is just the written memorandum. If you go study criminal law, you'll see that someone who's been sentenced to prison and they never reduce it to writing, they'll sign that years later, and it's still a conviction effective back to when the oral

rendition occurred. To me there's a parallel there. It's the judicial act of announcing a ruling is the order and then everything else is just a memorandum of that. That was on that one point.

Secondly, I -- someone that may be more current on appellate law correct me, but I believe the case law is still that an oral granting of the new trial is not effective until the judgment is signed, that it must be reduced to writing and signed by the judge. Is that still the law?

MS. BARON: Yes.

MR. ORSINGER: If that's still the law then this would change that, and I'm in favor of changing that because I don't think people should think that they have a new trial because the judge said they did and that -- and it's not a new trial because it's just in the docket and not on a separate piece of paper that somebody sent a runner down later on to get signed.

The third and last thing is on paragraph (3), the last clause, after the comma, I think we get into trouble if we try to give examples of what is not a formal order, because this list is incomplete, and even though it says "may be contained," a lot of people have their reaction when they look at a list of thinking that the list is somehow exclusive, and I'm suggesting that instead of

listing a couple of examples of what is not a formal order by saying -- what right now we say "may be contained in a letter or memorandum," let's just rewrite that by saying that "These kinds of orders are not required to be in a formal order," and then you can refer back to paragraph (2) to find out what a formal order is, and you can refer back to paragraph (1) to find out what your alternatives to a formal order are, and that eliminates having to make that clause "may be contained in" duplicate everything that's already in No. (1).

CHAIRMAN BABCOCK: Buddy.

MR. LOW: Yeah, I have a question. Judge Peeples, did -- and I'm not recommending this, but did you consider when you said "must be contained in a signed formal written order" that there must be words to the import of "the following constitutes a formal written order" or "the above constitutes," so that there's a flag and when you see that you know, you can recognize? Was that something that's considered or was considered?

HONORABLE DAVID PEEPLES: You know, I'm tempted to echo Justice Stuart. "I know it when I see it," a formal written order.

MR. LOW: Yeah.

HONORABLE DAVID PEEPLES: And I think we all have that idea. You know, when you're drafting something

you can chase down every little side trail, and it gets longer, and I didn't do that.

MR. LOW: Well, no, I understand that there would be -- I mean, what if you didn't put it in there, has all the markings we consider but you didn't have the magic language? I understand the downside of it. I just wondered if that was one of the things that was considered. That's a question, and I'm not recommending.

CHAIRMAN BABCOCK: Justice Bland, and then Sarah, and then Skip.

HONORABLE JANE BLAND: With respect to a judge giving direction on a phone conference, that is not an order. If a party -- that's like saying "move along" to an objection to the evidence at trial. If a party wants to turn that into an order so that they can either enforce it or challenge it, they're going to say, "Judge, I'm going to send you a written order to get signed." That's different than an oral pronouncement from the bench, whether it's sentencing or anything else, where you have an official court reporter who reduces the judge's words to writing, and I think the latter can be an order, but I don't think a communication that's not filed with the court, has no ability to be reduced to writing by a certified court reporter, and is not in writing itself is an order; and whether it's done as a matter of common practice is not

something that we necessarily want to adopt and encourage in the rules, because the rules ought to require parties to get this stuff in a way so that somebody can challenge it if they want to or enforce it if they need to.

CHAIRMAN BABCOCK: Okay. Sarah, then Skip, then Justice Christopher, and then Justice Gaultney.

HONORABLE SARAH DUNCAN: I agree, and as I said earlier, I think also in response to something Judge Bland said, I don't understand an informal order. I don't understand what that is, so I was just looking up the definition of "formal," and of course, one of the ways you can define something is to say what it's not. Well, what formal is not is casual, so what we're saying is not formal and informal orders. We're saying formal orders and casual orders. If it's an order, it's an order. Whether it's formal or casual, it's an order, and I think -- I think Jane has done a good job of defining what are the essential attributes of an order. It's capable of being reviewed, not just by an appellate court but by the media, by the public. It's capable of being enforced. It's capable of being understood.

I mean, I'm thinking about the temporary injunction, and one of the reasons that we require this to be in writing is so that people will know exactly what they can and they can't do with respect to the subject matter of

the injunction. So I -- this informal order terminology is just very bothersome to me because that would mean a casual order, and I don't think we have formal and casual orders in Texas courts.

CHAIRMAN BABCOCK: Skip.

MR. WATSON: I was just wondering if it might be possible to simplify it to go at kind of the object we were originally aiming at, to say something like, "an otherwise enforceable order" or "for an otherwise enforceable order to start or extend the appellate timetable, it must be reduced to writing and signed and may not be a letter." To me that -- I mean, it's inartful, but it captures the nugget of what I think we're trying to say. Just a suggestion.

CHAIRMAN BABCOCK: Justice Christopher.

HONORABLE TRACY CHRISTOPHER: Well, I was just going to bring up another -- you have a phone conference. They're in the middle of a deposition. I generally ask the court reporter that's there to take everything down so that there is a -- you know, a written record of my ruling, so it's not from the bench, but you know, I consider it the same thing, so I think that would fall under "other reasonable means," but, you know, certainly that's a ruling that's appealable, just like a ruling admitting or denying evidence in a trial is

appealable, you know, ultimately down the road.

CHAIRMAN BABCOCK: Justice Gaultney, did you have your hand up or was it --

HONORABLE DAVID GAULTNEY: I did. I agree with Skip. The -- and I agree with Frank that I think there's a little bit of mission creep going on here. Paragraph (4) indicates to me that you're really not trying to address whether an order is enforceable or whether it preserves error. I mean, I think the rule that's really intended to deal with the problem with being able to perfect an appeal timely, and I think Skip's proposal is good. It needs to be in writing. You need to be able to understand it's an appealable order, whether it's an interlocutory order or whether it's a final order.

I think the difficulty is the case that the professor referred to where you have something that stops the appellate timetable, and that should be -- that doesn't need to be in writing. I mean, if the judge clearly indicates -- it does now, but we could do a rule that says that type of ruling stopping appellate timetable, that the default position is it doesn't have to be in writing, so you don't have a situation that you have a document that looks very formal, it says all relief -- you know, "This is intended to be a final, appealable order," and then you have a hearing at which the court makes it very clear that

the motion for new trial is granted or the motion to modify is granted. You know, at that point, that ought to be -- that ought to stop the appellate timetable, and you shouldn't have to -- because you didn't file an appeal you shouldn't be out of luck.

To me I think we're in a little bit of a mission creep, and I think if we look at -- if we look at paragraph (4) then we understand, I think, that the purpose of Judge Peeples' rule is not to establish what's enforceable or what preserves error. I mean, we could do that if we want to, but I'm not sure that's the problem that brought the discussion to the table.

CHAIRMAN BABCOCK: Okay. Roger.

MR. HUGHES: I want to echo the concerns raised along about mission creep, and as I think a practical suggestion might be to limit rather than try to define the format or an acceptable format for all rulings of any sort. It might be better just to limit this to amending the rule about the format for a judgment and for orders modifying the judgment or granting a new trial altogether and limit it just to that and let practice and practicality dictate how the other rulings get memorialized and entered into the record.

CHAIRMAN BABCOCK: Okay. Frank.

MR. GILSTRAP: I agree with what Justice

Gaultney and Roger said. If you look at paragraph (4), I think you can take the word "as governed by other law and" out of it, and it reads "whether an order is enforceable and whether it preserves error does not depend on its form." And I'm not -- I'm not sure that's true. It's a very far reaching statement. You know, what we're trying to do, we should have a negative statement there. Maybe that needs to say, "This rule does not affect the enforceability of an order or whether it preserves error."

CHAIRMAN BABCOCK: Sarah.

HONORABLE SARAH DUNCAN: I thought we understand, Roger, why -- where did he -- or anyone else, why should an order granting a motion to modify not be captioned in writing, signed, and filed? It's just as -- it's just -- it's functionally indistinguishable from a judgment, so why is it somehow less significant and requiring less procedure? Bill has the answer, of course.

HONORABLE DAVID GAULTNEY: Yeah, I should not have just thrown that motion in. I was trying to bring it into the conversation. My real concern is granting a motion for new trial, and that's really the focus of what I --

HONORABLE SARAH DUNCAN: So you think that --

HONORABLE DAVID GAULTNEY: -- meant to say. I was talking about a motion to modify because Richard raised it as an interesting type of ruling that kind of does two things, and I think it ought to be in the discussion about whether it needs to be in writing or whatnot, but my real concern is, is that we not -- that we fix the situation where a party thinks that an appealable order has been set aside or that the appellate deadline has been stopped based on something the trial court ruled on and, therefore, sacrifices their opportunity to file a notice of appeal.

HONORABLE SARAH DUNCAN: And you think that should not have to be captioned or in writing or signed or filed?

HONORABLE DAVID GAULTNEY: I haven't thought about the motion to modify. That --

HONORABLE SARAH DUNCAN: I'm talking about new trial.

HONORABLE DAVID GAULTNEY: The new trial.

HONORABLE SARAH DUNCAN: That's what you were just talking about.

HONORABLE DAVID GAULTNEY: Yeah, and I think, for example, this opinion that, you know, where a judge wrote a letter saying, "I will grant the motion for new trial," I think everybody thought that the judgment was

gone at that point or at least the need to file an appeal, and I think that's another thing, is we -- I think we can write a rule that's very narrowly written in terms of affecting appellate time deadlines, because that really is the only problem we're trying to fix and that is keep the power in the trial court as long as the trial court intended to stop that, to set it aside, whatever the thing is, to set aside the judgment so that the appellate timetables don't run.

I think the default is -- I just think it -- it's an injustice when everybody knows that -- or everybody thinks that an order or judgment has been set aside, but it doesn't quite get done in writing in time, and the notice of appeal gets missed. That's the only point I was trying to make, and I think that's -- if I recall correctly, I think that's the issue that brought this discussion to the table, and, yes, there are a lot of other issues in terms of preservation of error. They're out there, but -- and if we want to discuss them, then certainly we can, but I didn't understand that to be the focus of the rule that Judge Peeples is putting on the table.

CHAIRMAN BABCOCK: Professor Dorsaneo.

PROFESSOR DORSANEO: I think maybe that -- maybe that approach is a good approach, so that we identify, you know, what the current law requires when it

requires a written order to be signed within a certain period of time, you know, granting a new trial. Otherwise, it's overruled by operation of law and you're, you know, maybe out of luck. If you don't like that rule then you vote on that, say we want to change that. Justice Gray's memos and his dissenting opinion, he cited Goth vs. -- I don't know how to pronounce this name, Toucherer, and for -- where the Supreme Court said that letters to counsel are not the kind of documents that constitute a judgment, decision, or order, at least when you're talking about starting timetables.

You know, do we like that, or do we not like that? Because that's -- that seems to me to be the starting point, and maybe -- maybe it's too tough a job to try to do what Judge Peeples tried to do, which is to solve all these problems in a draft order without taking on problems in the step by step way as we normally do. I don't -- I don't like the idea that there needs to be a written order to -- for new trial. I don't like that either. I don't see why -- why that level of formality is required.

HONORABLE SARAH DUNCAN: Why would it not be?

PROFESSOR DORSANEO: I would think differently about a motion to modify because it's a more complicated thing that I don't think can be done, except in

written form. I guess while we're talking about this, is that judges do not proceed by what we've been calling formal written orders most of the time now. Is that wrong? I mean, do you use e-mail? Do you use letters a lot? In the 10th Court of Appeals district, from reading the cases it looks like there's a lot of work done by letters, and that's not something that I'm really familiar with, but if it's done by letters then the rules ought to say how it's done by letters and what the effect is. If it's done by e-mail, the rules ought to say how you do that and what the effect of using that mechanism is, and then if there are things we just simply don't like or we think is too much formality in the case law -- which probably is old-fashioned. You know, it's not quite as old-fashioned as saying we need to put a scrawl on it, draw a scrawl or get a seal, but, you know, it's -- the Supreme Court cases are coming from the days of yesteryear. They're not coming from the future.

CHAIRMAN BABCOCK: Well, we can agree on that, I think. Justice Christopher.

HONORABLE TRACY CHRISTOPHER: Well, one other thing while we're discussing the whole area, we didn't discuss docket sheet rulings, which, you know, in my court we don't pay any attention to, but, you know, that seems to me that ought to be a ruling.

PROFESSOR DORSANEO: Yes, those are bad cases, too.

HONORABLE TRACY CHRISTOPHER: I agree, but, you know, that's my court's ruling, but, you know, if I wrote down "motion for new trial granted" on the docket sheet, put my initials next to it, you know, what does that do?

CHAIRMAN BABCOCK: Frank and I once had a case about that, long time ago. I forget which side he took, but it was the wrong side. Kent.

HONORABLE KENT SULLIVAN: It seems to me as a theoretical matter this could be an issue in Federal court as well as state court. Does anybody believe -- has anyone ever experienced it in Federal court?

PROFESSOR DORSANEO: You can't tell the Federal judges what to do. The rules are written so they do what they want, and they'll make it final in some other manner.

HONORABLE KENT SULLIVAN: Well, but, no, the question of, you know, memorializing the ruling and that sort of thing, as a theoretical matter could be --

MR. GILSTRAP: In Federal court it has to be entered.

HONORABLE KENT SULLIVAN: I'm sorry?

MR. GILSTRAP: In Federal court it has to be

entered. It has to be entered somehow on the court's formal record. The judgment dates don't run from the time the judgment is signed. They run from the time the judgment is entered.

PROFESSOR DORSANEO: Clerk enters it.

MR. GILSTRAP: Yeah, by the clerk.

HONORABLE KENT SULLIVAN: And is it your thought that that has ended all -- it's that specific point that has ended all ambiguity in Federal court?

MR. GILSTRAP: It certainly simplifies problems involving timetables.

HONORABLE KENT SULLIVAN: Well, I'm just -- I was actually going a different direction, but if that provided absolute clarity, that may be an interesting thing to look at. I don't know.

CHAIRMAN BABCOCK: Did somebody else have something? Justice Gray. You started this whole mess. Your last comment before we take a break.

HONORABLE TOM GRAY: Well, and I intentionally sat mute, which is fairly hard for me to be mute at this proceeding, but --

CHAIRMAN BABCOCK: Well, now's your chance.

HONORABLE TOM GRAY: -- so that it could develop, and when we last parted this subject I thought the mission was going to focus on what it takes -- because the

problem that I was trying to grapple with and bring some certainty to for the parties that were being affected by uncertainty in whether or not something was a ruling, and I -- it's been a long time since I've read my dissent in the case, but my recollection was that there was one side that, based upon the existing case law, was perfectly content to sit there and knowing that there was not a final judgment and not -- or knowing that there was a final judgment, until an order that actually granted the new trial was signed by the trial court and based upon the language of the letter would not have thought that that had happened, but I thought the focus should be -- and after the discussion last time it really kind of solidified it for me, is what is it about anything that makes it an order that will preserve error or affect an appellate timetable or affect any timetable?

But the -- my focus, of course, was on issues in the appellate arena, and after hearing the discussion I sort of came up with the concept of a rule that would in effect be appended to the preservation requirement in the appellate rules, because what goes on at the trial court I will concede there's probably 999 rulings out of a thousand that we never see. Even in those cases that we see we don't see the majority of the rulings that are made, because they are inconsequential by the time it gets to us,

and so what I want to make sure is that the parties that are going to pursue -- that think the issue is big enough to pursue on appeal is that they take the action at the trial court to make sure that it is perfected, preserved, and can be the basis of a complaint for appeal and that when it gets there I understand it, and so in my inept effort I have attempted to frame it as follows.

"To perfect the preservation of a complaint for appeal or to be the basis of a complaint on appeal or that affects the time within which to take an action on appeal, a ruling or judgment must identify the proceeding to which it is related, identify the party or parties to which the ruling applies, state the order of the court, identify the effective date of the order, identify the date the ruling is made and bear the mark of the trial court making the ruling, and the ruling or judgment of the court other than those recorded by a certified court reporter on the record must be reduced to writing and filed with the court clerk." At that point it's in the record, the ruling is made, I know when it was made. I know by the mark it can be a e-mail signature. It can be something else that comes up on Facebook page. It can be a little iconic photo of the judge, I don't care, but we will reintroduce the mark of the trial court as being effective in legal proceedings, and that -- I mean, I could have never done

even this without the conversation that was going on, but the focus really is about the preservation and the certainty that the parties need to be able to know that when they get up on appeal I'm not going to say, "This is not a ruling" or "This is not preserved" or et cetera.

CHAIRMAN BABCOCK: Okay. We're going to take a break. Let' keep it to 10 minutes this time.

(Recess from 10:23 a.m. to 10:37 a.m.)

CHAIRMAN BABCOCK: Richard, can you take us through 116 real briefly?

MR. ORSINGER: Yes, sir, I can.

CHAIRMAN BABCOCK: And then at 11:00 o'clock we'll get onto the ancillary rules report.

MR. ORSINGER: All right. I'll go ahead and start then. You-all will recall, those of you who were here at the last meeting, that we discussed a proposal that issued -- or the suggestion issued from someone in the Supreme Court clerk's office, the Texas Supreme Court, that we consider looking at the rule on citation by publication that was tied to the print publishing and the fact that many newspapers are going electronic. So we had a discussion about it, pros and cons, and the thrust of the main support for the committee was to go ahead and take the first steps into an electronic environment, but not to force everyone out of print and into electronic, but to

force everyone to do electronic in parallel to print if electronic was available and the idea that nobody is ready to go entirely electronic, and the idea is if you made electronic optional in addition to print no one would ever use electronic.

That's kind of the way it is right now, and so the majority of the vote, for what that's worth, was that we ought to go ahead and require that you continue with your paper -- newspaper publication of your citation by publication, but that you also require electronic publishing in addition to that where it's available. So I have got some language here that I'm proposing as alternatives, which is just contained in e-mails, not a lot of formality here, and you take the -- the basis of Rule 116 would remain the way it is, that you must publish the notice once each week for four consecutive weeks with the first publication at least 28 days before the return day of the citation. That remains unchanged.

The add-on part then I'm suggesting either option one where you can have the electronic would be either the electronic newspaper or the Office of Court Administration website, or option two would be both the electronic newspaper and the option -- Office of Court Administration website. There is no such website yet, and the Office of Court Administration is too busy with the

session to really think seriously about what they might do to offer a website for citation by publications in all Texas courts, but they seemed amenable to it in my discussion with them on the telephone discussing the funding. It's their view that the Supreme Court would not be able to impose new filing fee requirements to generate money to maintain such a website, and I think that it was their tentative view that the Supreme Court couldn't even divert the current use of filing fees to the OCA for that purpose, but nonetheless they seemed to be willing to bring on a prototype website that would then be used to check out the technology and what kind of search capabilities could be conducted, and so it's just an idea. The OCA website is just an idea. It's way premature probably to put it in a rule, but it's not premature for us to write it down and consider it and submit it to the Supreme Court.

So David Peeples said he would like to know how much this is going to cost everybody if we adopt this rule that they have to do it electronically as well as by a newspaper, and so I checked around for some of the big newspapers. The San Antonio situation has -- they have a large newspaper called the *Express-News*, which owns a smaller newspaper called the *Daily Commercial Recorder* and the *Daily Commercial Recorder* is a law newspaper where the legal notices in Bexar County are all published just by

tradition, and the bankers and other people who are interested to see about liens and lawsuits, they all subscribe to it and they all look through it for names that they recognize.

The *Daily Recorder* has a website where they put that same information, but that information is not available to the public, but it's only available to the subscribers, so the electronic publication as well as the paper publication, only available to subscribers. Since the newspaper is -- the *Commercial Recorder* is affiliated with the *Express-News* you can, if you buy space for legal publications for certain -- for publications of notices in the *Daily Commercial Recorder*, you can put it up at the *Express-News*' website, and the cost for that is $37 for a 14-day period, which would mean $74 added on if you had to publish in the *San Antonio Express-News* website, but if you were to choose to publish in the *Daily Commercial Recorder* there's no additional cost, as I understand it, for the person who buys the newspaper notice.

Now, the *Dallas Morning News*, which publishes legal notices in the Dallas area, will duplicate that notice online for $25. However, it's $25 per publication, so if you have four print notices then you would pay $25 to have each print notice replicated. That's a total of $100, but if you're thinking ahead, if you tell them you want to

maintain that posting for a whole 28-day period and you tell them in advance they'll just charge you one internet fee. So if you think ahead and you say, "I want to buy four weekly citations by publication and I want to put it on the internet," it's an extra $25.

The *Fort Worth Star-Telegram*, if you buy -- and I have the pricing in here for the citation in the newspaper as well, but our focus here is the additional cost on the electronic. You can get the additional electronic publication for $10 per publication, and if you tell them in advance that you want it to stay on for the whole 28-day period it's only 10 total. So we're looking at $37 in San Antonio, if you go with the *Express-News*, $25 in Dallas, $10 in Fort Worth; and then if you go over to Houston you find out that there's no additional charge for the *Houston Chronicle* to put their public notices on their website.

So in my view we're talking about a fairly nominal additional cost. In talking to some of these people I've also found out that they don't have any experience in people publishing citations by publication in their electronic newspaper because, as they say, that's not valid, and what they mean by that is that it doesn't do you any good to publish it in the newspaper -- the electronic version of the newspaper, and it costs money in some places

to do it, and so nobody ever does it. There may be an example that we could find, some of you who are on the internet today, where maybe you could find a citation by publication, but the guys that are in the departments that take the orders say that they just really don't see any demand for that. So we would be creating the demand for that, which you may oppose or may support, but anyway, that's the cost of what we're talking about, looking in some of the big counties right now before there is a big demand.

The option one just says, here on the page two of the e-mail, "In addition to the publication outlined above," which is the print requirement, "the citation shall also be published in the electronic version of the newspaper or in the" -- should say "on the internet website maintained by the Office of Court Administration as a repository for this purpose, if either is available. The electronic publication shall be for a continuous period of 28 days before the return day of the citation." That last sentence means that the electronic publication runs overlapped in time with the newspaper printed version, and the idea here is that you can opt either for the electronic version of the newspaper if it has one or the OCA website if it has one, and if there's only one available, that's the one you use, and if neither is

available then you don't have to do it.

Version two is identical to version one except that it requires that the citation be published at the newspaper website if available and on the OCA website if available, and I think option two obviously is premature because we don't have a website yet, but it's there for us to evaluate, so that would be a way that we could prompt everyone to move into the world of electronic publishing of these notices. In my personal opinion it will eventually replace newspaper printing, and in many instances right now it's probably more reasonably calculated to give notice than the newspaper is, and my ultimate hope in having the state website is that some of the secretaries of state around the United States will all get together with some of the groups like Google and Yahoo and MSN that do -- conduct internet searches and incentivize them somehow so that if a person puts their name or their spouse's name or their friend's name or their defendant's name into the internet they can use the Google or the Yahoo to find out where they might have had citation by publication or if someone puts their own name in. Ultimately that's the real way I think people are going to find out in the future about when they've been sued.

CHAIRMAN BABCOCK: You're talking about when you say to Google, "I want an alert if any -- my name is

mentioned, or Justice Hecht is mentioned"?

MR. ORSINGER: Yeah, that would work, too. That wasn't what I had in mind, but that would certainly work. If you have -- unless your name is very common, if you put an alert into Google every time your name appears anywhere on the internet you'll get an e-mail over it.

CHAIRMAN BABCOCK: Yeah.

MR. ORSINGER: It could be on Ebay, and it could be -- it could be anything, but if your name is Jones or Smith you will have too much information, but if your name is more limited than that then that might work, but I was thinking more that there's some motive somebody has to search someone out. Like let's say I'm a businessman, and I'm about to enter into a contractual situation with somebody. I would like to know whether they show up on the internet as being somebody that's a deadbeat by having been sued a bunch of times, or a creditor that's making a loan, or if you're trying to collect a judgment against somebody, or if you're just a person and you think, "Boy, that real estate investment went south, but I haven't received any citations. I wonder if I've been sued." You could stick your own name in there and then hopefully it would come up on your search software.

Initially I don't think that will work. Initially you're probably going to have to go to the OCA

website and search on the website, and I think that that's a fine way to do it until we can finally plug into the capability of searching the entire internet, but these are all possibilities. Some might argue it's premature for us to even being doing this, but, you know, eventually, this will seem like a natural thing, and somebody is going to have to think it through and get up the prototype and see how it would work and communicate with the search people, and eventually the newspapers' circulation is going to drop so low that we can't perpetuate our belief that it's reasonably calculated to give notice to the absent defendant, so I feel like it's ultimately going to happen, and it's a question of do we want to do anything about it now or do we want to do it in this way.

CHAIRMAN BABCOCK: Okay. Any comments on that?

HONORABLE DAVID PEEPLES: I've got a few. It seems to me -- and I appreciated a lot of the insights you gave us, Richard. It seems to me that if someone is going to get -- find out they've been sued on the internet it's not going to be because they log on to the *Express-News* online and go to the notices section to see if they've been sued. It seems to me it will happen if they Google their name and they're on a website somewhere or they find out that way. Although if you're on there very much you might

be number 150 and then you've got to -- it's hard to get there. The thought that I have is if we're really serious about notifying -- notifying people that have been sued, we would do something other than publication.

Now, I grant you that banks and other institutions do look at -- try to find out because they're professionals in this area, but individuals it's just surreal to think that anybody finds out in any significant numbers that they've been sued by this, and I think -- I mean, if we're interested in trying to let people know when they've been sued, we would look at Rule 106, alternative methods of service, and require the judge who is authorizing citation by publication or is going to grant the default judgment to be more creative in finding out how you could get this person. There's a great statement in -- it may be in the Mullane case, but some of the Supreme Court cases the Supreme Court of the United States says what you need to strive for here is the method that if you really wanted to contact this person you would use it, and that's never publication.

I mean, if you -- if there are contests and I'm going to win a bunch of money by notifying somebody and I really want to find that person, would I do it by publication? No. I would find out who their relatives are and get an alternative order saying you can serve under the

catch-all provision in 106, serve aunt so-and-so or last known address, you know, regular mail and please forward or whatever, but you wouldn't do publication; and so I simply say that if the law is serious about trying to notify people who have been sued and we don't know where they are, publication would be the last thing they would do or it would be way down the list; and judges are in the habit, it's just routine, where do I sign; and I submit that it's a rare trial judge who really scrutinizes these things from the get-go, and that's where we ought to look, I say 106, if we want to get these people. And, I mean, it's probate, they want to notify creditors. The most common I've seen is, you know, in family law when you're terminating someone's parental rights. Statistically that may be the most common. Gosh, the situations are almost infinite.

CHAIRMAN BABCOCK: I had always thought, probably wrong, but I had always thought that one of reasons you do publication is because you know where the -- you know who the person is, you know how to find them, but you can't serve them. He's evading service, so then you do it by publication. Does that not happen?

HONORABLE DAVID PEEPLES: I'm saying you go to Rule 106, and you do an affidavit, "I've tried. He's avoiding. Can I tack it on the door? Can I throw it over the fence? Can I give it to someone over 16?" And I've

done this --

CHAIRMAN BABCOCK: Or the dog that's issuing all these orders.

HONORABLE DAVID PEEPLES: Or, you know, somebody else, an employer or a relative, and in family law, unless it's a situation where boy gets girl pregnant, it's a one night stand that she maybe doesn't even know his name, and in that situation publication may be all you've got, but if there's been any kind of relationship she's got a name, maybe she knows where he lived, and she may know some relatives.

CHAIRMAN BABCOCK: Publication, "If you had a one night stand with me, about seven or eight months ago."

MR. ORSINGER: "Picture enclosed."

CHAIRMAN BABCOCK: Anybody -- Lonny.

PROFESSOR HOFFMAN: I'm going to pause before --

CHAIRMAN BABCOCK: Yeah, make a good break between that.

PROFESSOR HOFFMAN: Okay, so I guess my point would be -- and I'll try to defend it -- is this looks great, but it looks like an idea that seems that we're only going part way on. Why don't we actually take this first small step but with a plan of taking a larger step? The larger step being why do we need it to be in addition to

the publication outlined above? Why not, as you were suggesting, move to a system in which there was a single place, the OCA's nonexistent but soon to exist website, hopefully, that all notice goes to, and so -- I mean, if you think about -- this reminds me of a scene from one of those Star Trek movies where they ask in the future, you know, do you -- I can't believe the state of medicine, you know, that exists today if you think about how far we've advanced that we would allow, as David says, notice by publication.

The most famous -- one of the most famous civil procedure cases I teach is *Pennoyer vs. Neff*, and Mitchell comes up with this wonderful idea. He doesn't just put notice in the newspaper, which was the *Oregonian*, which both today and back then was the paper of general circulation, but he found this obscure religious quarterly, and that's where he let Neff know he had sued him, and it's only marginally better to add it into the *Oregonian*, right, because nobody is going to look for it; and so the idea, this is one of those things of, wow, why didn't I think of that idea? It seems so wise to have a single place.

Now, that said, there would need to be a lot of education and sort of awareness, and we might analogize this to I discovered the other day that I had $400 sitting in with the comptroller. I didn't know. Maybe I should

have, but I didn't know that when money is lost and it doesn't go to you, the check doesn't make it to you, it sits with the comptroller as unclaimed. So it turns out the comptroller's had this money for a while. I didn't know there was a central repository, I guess I was suppose to, but if we had a system, and we had some education to get there it seems like there. Now, in terms of the money, holy cow, if your numbers, Richard, on the additional cost of the electronic are modest, which I would agree with, the numbers on the print cost are unbelievable. So I hate to -- maybe that means this committee would do our part to push newspapers right over the edge. I don't know what kind of revenue they make for this.

MR. ORSINGER: We would have to find another place to meet also.

PROFESSOR HOFFMAN: Yes, but this is a lot of money.

CHAIRMAN BABCOCK: No, we're with the broadcasters, not the newspapers.

MR. ORSINGER: Okay.

PROFESSOR HOFFMAN: So I would suggest the funding would be quite easy to fix that problem. I wouldn't think we would have a funding problem at all to go that system. Anyway, those are my thoughts.

CHAIRMAN BABCOCK: Thank you. Bill.

PROFESSOR DORSANEO: If it's done electronically would we be concerned or as concerned about the -- its form or its length? You know, we are -- citation by publication now is not very informative. If we did it in some different manner with the new technology, could we make -- would it matter if it was longer?

MR. ORSINGER: My answer to that is no. I mean, if you wanted to you could require that the actual pleading be put in there, and it really -- the disk storage space is the cheapest thing you can buy in the world really, and the effort is to get it loaded. If it comes in a file that you can just load like a PDF file then it doesn't matter whether it's one page or five pages or ten pages.

CHAIRMAN BABCOCK: Buddy.

MR. LOW: One of the problems with the internet, this was also intended and used to a large degree to sue unknown heirs, and you might have an uncle you wouldn't have -- you wouldn't think about looking at his name on the internet, but that was a big reason. I think Elaine has an amendment to 106 and 244 that really meets some of the discussion we've had here and some of the problems.

MR. ORSINGER: We can shift to that if you don't mind. It's technically --

MR. LOW: No, I'm not trying to shift.
MR. ORSINGER: -- not on the agenda.
MR. LOW: Just before I forgot about it I wanted to mention it.
HONORABLE JAN PATTERSON: Richard, what are other states doing?
MR. ORSINGER: Other states are not doing it is what it appears to me.
HONORABLE JAN PATTERSON: Not making changes?
MR. ORSINGER: No. I wasn't able to find anybody that had done this at the procedural level. I found individual courts that have made rulings that have migrated to Westlaw, and I've found some AG opinions about what constitutes adequate notice, and I'd say the most active area is notice that's given in class actions in Federal court, and 10 years ago internet notice in addition to the *New York Times* or *Los Angeles Times* was okay, but over the last 10 years I think that there's been a general drift to favor electronic communication over the print so that the print is like there either as a vestige of the old methodology or that some of the new class actions are entirely by electronic, and so that's like -- that doesn't establish a precedent for an entire procedural system of bringing defendants in, but it does show that the judiciary has become more tolerant of the idea that electronic

communication may be a more effective way to give notice to at least a large number of people.

CHAIRMAN BABCOCK: Justice Christopher.

HONORABLE TRACY CHRISTOPHER: Well, the whole idea behind publication in a newspaper is that you live there and you read the newspaper and you get notice of the suit, so I'm not really sure why an OCA website would be useful. To me if we really wanted to explore electronic service by publication, we should discuss with Google or Yahoo that when you sign in knows that you live in Houston and sends you targeted advertisements directed to Houston. I mean, you know, that would be more inclined to get you notice. Oh, here's the latest citation du jour, I mean, and they know your name when you sign into these services. You know, having an OCA website that someone would have to go find and look up and review, that's not designed to give anybody notice.

CHAIRMAN BABCOCK: Justice Gray.

HONORABLE TOM GRAY: Adding onto that, it's the fundamental concept that the OCA website, you have to take an affirmative act to go search it to find a lawsuit against you. My understanding of the posting by publication was, I guess, more antiquated than Tracy's, and that was, you know, presumably you moved from the area or they would have been able to find you, but presumably

there's still somebody there that knows you and maybe knows where you are and maybe cares enough about, you know, you one way or the other that at least you might want to -- or maybe it's an enemy of yours that wants to do -- you know, get in your face about it, but that would notify you that a notice had been posted in the local paper.

It really applies, like Buddy was talking about, to unknown heirs. That's a rich source of generating the identification of descendants whose married names have changed and whatnot over the years, and so I think any change that would drop notice by publication in the area last known, if you will, where the defendant was, is the antithesis, as David Peeples was talking about, of what we're trying to do here. It's if you don't want to get in touch with them, post it on that OCA website where they have to come to you looking to determine whether or not they have been sued.

CHAIRMAN BABCOCK: Sarah, did you have your hand up?

HONORABLE SARAH DUNCAN: Yeah. I think we shouldn't forget that Apple just got sued for reputedly tracking through iPhones and iPads, so maybe a locator, a sign-in locator at Google might not work. Maybe.

MR. ORSINGER: Chip?

CHAIRMAN BABCOCK: Yeah, Richard.

MR. ORSINGER: To me the most likely way that this is ever going to actually make a difference is if you had a central repository for each state and jurisdiction in the United States, which is like 54, 56 however many there are including all the offshore stuff, if each one of them had a central repository then I think you could motivate the internet-wide search companies to include those databases in their searches, but if you have to convince them to go to every single county in Texas and search for names at that local electronic website for that small circulation newspaper in West Texas, I don't know that they'll ever do that.

So one advantage of the OCA website is to aggregate the information in a place where it actually becomes accessible to the world, which is different from saying accessible to people that live in the county. I'm not against it being accessible to people who live in the county, but I do think that it is more likely that it will trigger discovery if it's accessible to the world. So -- and if the OCA website is free and if we require them to do a duplicate filing with the OCA website and allow them to still use the local newspaper or whatever then we have an -- we haven't done anything other than increase the load for some employees over at the Office of Court Administration, but we're setting it up for where access

could be worldwide.

CHAIRMAN BABCOCK: Well, what's the cost to OCA to do this?

MR. ORSINGER: Well, they haven't explored that, but it didn't seem like an intimidating amount to them. I mean, it would be --

CHAIRMAN BABCOCK: Any amount these days is intimidating. Poor Rick Barnes is not going to get paid a fair wage.

MR. ORSINGER: And, Chip, Elaine had suggested that we consider some amendments to two other rules that have already been mentioned, so I think at some point we should discuss them as well.

CHAIRMAN BABCOCK: Okay. But not now.

MR. ORSINGER: Okay.

CHAIRMAN BABCOCK: Okay. Does anybody want to take a vote on whether this is -- what Richard just said is a good idea, expanding notice by publication to some central website?

MR. LOW: In other words, not changing, but giving additional.

CHAIRMAN BABCOCK: Right. Yeah. Not change the 116, but to add a paragraph.

MR. ORSINGER: Well, and, Chip, there's a difference between the two options.

CHAIRMAN BABCOCK: Right.

MR. ORSINGER: One is that you can pick either the newspaper or the state website, and the other one is that you have to pick both, and I'm assuming that the OCA is not going to have a charge and that it's really just an additional place, but if they have a charge, you know, then that may make a difference.

CHAIRMAN BABCOCK: Richard Munzinger.

MR. MUNZINGER: There is no existing state website; is that correct?

MR. ORSINGER: There's a state website, but not for this purpose.

MR. MUNZINGER: That's my -- that was why I asked the question. If we're going to vote we're voting on a nonexisting website.

MR. ORSINGER: Yeah, but it's going to be implemented by a Supreme Court that's not going to implement it today. It's going to implement after there is an OCA website, so I think you should make the -- I mean, what we need to do here is express what our thoughts and desires are and then the Supreme Court is going to decide whether they want to do this at all or whether they want to wait and have a prototype up for three years with voluntary compliance or whatever, but I think we ought to make a recommendation and then they'll decide when it's proper to

execute it.

CHAIRMAN BABCOCK: Justice Bland, did you have your hand up?

HONORABLE JANE BLAND: The idea that the OCA should have more added to its current mission that it can barely accomplish given its very limited resources and staff just is not a good idea without some way of funding it or some determination of the cost, and I don't think we can create by rule something that doesn't exist.

CHAIRMAN BABCOCK: Kent.

HONORABLE KENT SULLIVAN: Just listening to the comments, two things occur to me. One is circling back to Judge Peeples comments about to what extent are we really serious about wanting to find somebody and a second comment from Justice Christopher about Google and what Google can do these days, and I really do wonder. I think we've proven by some of our comments that we really don't know anything about this -- about the state of the art; and I readily concede that I don't; and if we are serious, to echo Judge Peeples, I really wonder if we wouldn't want to try to get some input from someone who really had some expertise with -- you know, two phrases coming to mind, state of the art and best practices. And why not get input from people who really understand, really know the area, and find out what they would recommend? Knowledge is

power.

CHAIRMAN BABCOCK: Okay. Anybody else? Let me see if I can refine the question a little bit. The letter from Justice Hecht to me, and therefore to our committee, was whether notice by publication under 116 would be better, quote, "if published on a website accessible to the public." So it seems to me that's -- ought to frame what our vote is, whether we think that's a good idea or not. And it could be any website. It could be OCA, it could be the Supreme Court's, it could be a district clerk. It could be any website, but is that something that we would recommend to the Court should be done?

MR. ORSINGER: To me that's not specific enough, because I don't know whether you're talking about each county has a county clerk, each county has a district clerk, each -- then you've got every single department of the state. You've got private newspapers of general circulation, private newspapers of limited circulation. So are you saying that the plaintiff can pick any one of those they want? Because then no one knows where to look, because it could be in hundreds of different places, and you just have to guess, guess, guess, guess, guess until you finally --

CHAIRMAN BABCOCK: Sort of like now, like it

could be in hundreds of newspapers.

MR. ORSINGER: Well, there's probably one or two newspapers of general circulation in a particular county. There may be more in some counties, and that's probably true, but in terms of websites that are available to the public, well, first of all, every website is available to the public unless they require a subscription.

CHAIRMAN BABCOCK: Right.

MR. ORSINGER: And so I think that that's so general that it wouldn't allow a potential user to know where to go to see the citation.

CHAIRMAN BABCOCK: Okay. Buddy, did you have your hand up?

MR. LOW: No, I was just trying to phrase the vote, whether or not we do what we're doing and add to it, if electronic notice is practical and available, will that be authorized by the rules, and I guess if it's not then it wouldn't be used.

CHAIRMAN BABCOCK: Yeah. Good point. Yeah, Jan.

HONORABLE JAN PATTERSON: I guess I want to speak up in favor of newspapers and to some extent nonelectronic, because I do think that there may come a time where this change is appropriate, but I'm not sure we're at that point. This is a traditional means of

service. There are alternative methods that can be obtained if necessary; and judges should be proactive in participating in that process; and if we do some further research, it seems to me that we don't comprehend the manner in which that notice is implemented, that there are people in the neighborhood, there are relatives, there are lawyers who represent heirs in probate courts, people who search these notices traditionally within a vicinity that has been effective. So I'm not sure that we know or that we can say that the notice has not been effective. The rules do provide for other methods of service, and there may come a time -- and I'm thinking that we're not quite at that time yet, and I want to protect newspapers for now.

CHAIRMAN BABCOCK: Okay. Justice Christopher.

HONORABLE TRACY CHRISTOPHER: Well, I think Harvey and I were saying that we never can remember a defendant who actually answered a lawsuit after being served by publication. Okay. And that the only way that we ever found a defendant is after we got an ad litem appointed who would go out and talk to the relatives or go to the employer or, you know, take the steps to actually find someone.

HONORABLE JAN PATTERSON: Or post default.

HONORABLE TRACY CHRISTOPHER: Right. So, you

know, adding electronic service by, you know, publication, unless we do something that's really designed to get people's attention, as Kent was saying, where we -- you know, we investigate just publishing to some amorphous website is just not going to do anything.

CHAIRMAN BABCOCK: Yeah. Yeah, David.

MR. JACKSON: I could see a circumstance where if you -- you know, it's an evolution process, but your publication notice would require that you put the link in there, and it could be a page on OCA's website. It doesn't have to be a brand new website or an isolated website, but a page that you could hyperlink on every publication notice that would educate the public on going there. People would see that, okay, they've got all these heirs, this money is out there. They click on that link, go see if it's somebody they know. I think later on down the road that would become a more popular practice.

CHAIRMAN BABCOCK: Uh-huh.

PROFESSOR HOFFMAN: As my comments about the comptroller and my experience there suggest, I agree with that sense, but I think -- I think if I heard the letter question right, it's what's the sense of this committee about whether we ought to move from where we are, which is by all accounts the least effective means of giving notice, and trying to improve upon that and without having

committed -- we're not committing ourselves to an OCA website. We're committing ourselves only to a process, which as Kent says, we hope to learn more as we always carefully consider things before we ever render rulings on this committee.

CHAIRMAN BABCOCK: Bill.

PROFESSOR DORSANEO: If you look at how old Mullane or Mullane is, you know, we're talking approximately 70 years, and the Supreme Court has done a little bit on notice, the notice half of due process in that time period, but not really very much. I think it's incumbent upon people working in the judicial system to work on this a little bit to try to figure out what's -- what Mullane would say now if it was talking about the types of notice giving mechanisms that are available. I mean, you know, Mullane is talking about mail as if that's some, you know, new thing that can be used in lieu of a personal delivery. One of these days probably not too far in the future we're going to read the Supreme Court Reporter and find out that all of this citation by publication has violated due process for a number of years. Why not get it a little ahead of the game here instead of reacting to what's probably inevitable?

CHAIRMAN BABCOCK: Judge Peeples.

HONORABLE DAVID PEEPLES: I endorse

wholeheartedly what Bill just said. Rules 109 and 109a are the rules that tell judges and lawyers what they're supposed to do to justify citing by publication, and you look at those rules, they are one big paragraph with a bunch of different things in there. We could at the very least reformat those to, you know, "You must do the following: A, B, C, D, E." It just makes it easier to read. I mean, that would be a step in the right direction.

PROFESSOR DORSANEO: And then the rule book is not the only place. Richard, you probably talked about the Family Code provisions, which are the least desirable provisions in terms of giving people notice. I mean, it's publication once, isn't it, under the Family Code, Title 1 and Title 2?

MR. ORSINGER: I don't recall, I'm sorry to say.

PROFESSOR DORSANEO: Well, I gotcha there, didn't I?

CHAIRMAN BABCOCK: But you made him mad. He got all red in the face. Probably can't see that. Elaine.

PROFESSOR CARLSON: You know, nothing in Mullane suggests that the defendant has to go get their notice. I mean, that's what troubles me about this proposal. That's a very different spin than due process has ever taken on in my view.

CHAIRMAN BABCOCK: When was that case decided?

PROFESSOR CARLSON: A long time ago, but I don't think that --

HONORABLE DAVID PEEPLES: 1950.

CHAIRMAN BABCOCK: 1950?

HONORABLE DAVID PEEPLES: And the Supreme Court of the United States has decided six, eight, maybe ten cases since then and almost without exception -- I mean, they're all dealing with situations where somebody, you know, they're foreclosing and shutting off some third lienholder or just giving notice or whatever, and the Supreme Court has in most of those cases said, "You did something better than publication, but you could have done better, reversed, and do it better the next time." I mean, they have been trying to tell us, and that's why Bill is so right. We ought to be proactive here and instead of just going down the path of least resistance be proactive and try to make this more realistic, and the main thing to do I think is to tell trial judges and lawyers before you're entitled to do publication, if we're going to keep on doing it, you need to establish a few things to show that you've done enough. I don't think an ad litem -- truly an ad litem helps, but my gosh, that's -- somebody has got to pay for that. They don't work for free.

HONORABLE JAN PATTERSON: And that options are available before notice by publication. I agree with David.

CHAIRMAN BABCOCK: Elaine, and then Justice Brown.

PROFESSOR CARLSON: I don't have anything against the concept of giving notice electronically, but the reason, without going into the alternative proposals, I agree with Judge Peeples on a 106b method is if you know someone has an electronic address or on Facebook or e-mail address or something, then to me the court could assess as to that type of defendant it's reasonably effective to give this defendant notice by this other means of service, which is very different than saying to the general public, "Go look up at the OCA web page and see if you're being sued," and I just think it's more in line with the norms of due process to handle it through 106b and, as you say, Judge Peeples, 109 and 244.

HONORABLE DAVID PEEPLES: And 109a. They're both right there.

CHAIRMAN BABCOCK: Justice Brown.

HONORABLE HARVEY BROWN: I was just going to say the same thing. I think the point's been made that the publication doesn't work, but we need something better. It seems like we should start with 106 and 109.

CHAIRMAN BABCOCK: Maybe we could write on their wall. "You have been sued." Yeah.

MR. GARCIA: There is another feature with Google, and I know that I have a Google alert set up for me that any time "Roland Garcia" appears anywhere on any website, I get an alert and a link to what it is, and so, you know, just posting something in the newspaper without an electronic version of it also is only halfway because a lot of people nowadays do Google alerts, and you'll know instantly if something is being posted with your name on it. I get a lot of other Roland Garcias who are deadbeats, so you've got to filter that out, but at least you get notice of it.

CHAIRMAN BABCOCK: Okay, good. Richard, frame a vote.

MR. ORSINGER: Well, I mean, gosh, I don't know whether -- maybe Justice Hecht could give us -- do you want a vision from us, or do you want something concrete, because I think that we probably -- I mean, I'm not sure the majority would think that we should even look forward to the electronic as an alternative to publishing. Maybe that would be the most thing that we can do right now, or do you want a proposal of a rule that would be a target that we could change over time?

HONORABLE NATHAN HECHT: Well, it is still

sort of in the developmental stage, and I take the point that we ought not to let a movement to electronic notice be -- make us feel like we've solved the problem and we don't need to worry about it anymore when there are other things that need to be done, but as between continuing with service by publication in newspapers, the existing rule, and service by publication electronically, which does the committee think is better? I mean, should we -- it seems to me that we are talking about two different things. One is how to solve the problem of notice altogether, but the question that came to us originally was do we really want to continue with service by publication in the newspaper when electronic means might be available. So I guess it would be helpful to the Court to know whether we just don't think it's useful to change Rule 116 right now or whether we should look at a website with -- sponsored by OCA.

CHAIRMAN BABCOCK: And the way the charge to the committee was drafted and the way you've just said it is different from what Richard came up with. What you just said was either/or, either newspapers, continue with newspapers, or go to a website.

MR. ORSINGER: See, and my conclusion from the debate last time was that nobody, except maybe a few radicals, were interested in cutting off print and moving by requirement to electronic, but that those who thought it

ought to be offered as an option, an add-on, print plus, no one will ever elect the option of the plus because they're not required to and it costs $25 or whatever, so the last time we had a vote, and I forget the split, was the only way to really get people to dip into the water of this electronic publication is to require it in addition to the newspaper, and that forces everybody to go to a newspaper and say, "I want you to reduplicate the notice electronically," and then the OCA website came up as a result of just after thought from the last meeting that maybe there's a value in having a central repository.

I think that the view that people are not going to check the central repository is probably true. I mean, Lonny's experience that he didn't discover the state had his money, that website's been there ever since you moved to Texas, but nobody ever checks it, and then they also put it in the newspaper once a year, and nobody ever checks that either. But, at any rate, the idea is that we can be moving along, we could be pulling it together if we require electronic in addition to print, so the either/or I think is a losing vote. The mandatory electronic only is a losing vote, and the only issue is whether we ought to do nothing or whether we ought to add electronic publishing on top of the requirement of print, it seems to me.

HONORABLE NATHAN HECHT: Well, and I recall

that discussion, and I didn't mean to make that the only issue. I think maybe a vote on option two is -- would be helpful. Okay.

CHAIRMAN BABCOCK: Okay.

HONORABLE JAN PATTERSON: And is it clear that the court has the option to order the additional if that would -- under 109? Doesn't 109 put the onus on the judge to order appropriate notice?

HONORABLE NATHAN HECHT: Well, this would be to change Rule 116 --

HONORABLE JAN PATTERSON: I understand.

HONORABLE NATHAN HECHT: -- as provided in option two.

MR. ORSINGER: This would be a requirement, not discretionary.

HONORABLE NATHAN HECHT: Why would the Court not have the power to do that?

HONORABLE JAN PATTERSON: Oh, no, I was just talking about a -- not the Court, but a court.

CHAIRMAN BABCOCK: Justice Christopher.

HONORABLE TRACY CHRISTOPHER: Well, I think we would have to know whether a static website like the OCA would be any better than publication in a newspaper, and we don't have that data here to review. We don't know which would be better, so I mean, how can we vote that we should

move to one or the other?

CHAIRMAN BABCOCK: Well, option two is that -- option two is print plus electronic.

HONORABLE TRACY CHRISTOPHER: Yeah, but that wasn't the way Justice Hecht presented it.

HONORABLE NATHAN HECHT: But I'm saying now a vote on option two would be helpful.

CHAIRMAN BABCOCK: Okay. Gene.

MR. STORIE: Yeah, and it's obviously something we don't know because it's never been done, but I see at least some possibility that individuals won't check, but maybe someone else will, like a credit monitoring service. I mean, if my name, you know, pops up as a potential creditor somewhere and I've got some sort of fraud service, which I now have due to my information being exposed, but besides the point, there may be some possibility that it will be better than what it is now for publication, which we all agree that it's pretty much worthless, and I was honestly kind of shocked to see that San Antonio has a special paper that's not even read by ordinary people, so your odds are even worse there in Bexar County.

CHAIRMAN BABCOCK: Justice Christopher.

HONORABLE TRACY CHRISTOPHER: Well, I would like to reiterate what Justice Bland said, that in terms of

money priorities in today's day and age of limited money when the OCA budget has been cut a lot in the proposed budget, a lot, and they're trying to get some of it back during this whole legislative session, but it's huge. I mean, for example, the OCA used to give the appellate judges new computers, you know, when our computers got to be five years old. Well, now they're not going to do that anymore, so we have to find money --

CHAIRMAN BABCOCK: So it's personal.

HONORABLE TRACY CHRISTOPHER: No, this is serious, though. I mean, when you're talking about using state resources for something about the -- through the OCA, you have to consider that, what is a good use of OCA's money. There is absolutely no evidence whatsoever presented here that this would be a good use of OCA's money, and I can tell you that there's a lot of other things that OCA -- for example, our TAMES thing, which is going to be this great electronic docket sheet for all appellate judges. Well, you know, it's two years behind times because of money funding. So why would we want to even think about this when we don't have any idea that it would be useful?

CHAIRMAN BABCOCK: This is just a hunch --

HONORABLE TRACY CHRISTOPHER: From a money point of view.

CHAIRMAN BABCOCK: This is just a hunch, but I think you're going to vote against option two.

HONORABLE TRACY CHRISTOPHER: You know, in a perfect world if we had all the money in the world, sure, but we don't, and we've got to prioritize.

CHAIRMAN BABCOCK: Okay. I'm just guessing one vote against option two already. Lonny.

PROFESSOR HOFFMAN: Although I'm in favor of not acting as the Republicans in Washington are also doing, so I would agree with you there. I don't think that you have to vote against this proposal because of what Tracy just said. I just think you have to say if we're going to potentially do this we have to be cognizant of the fact that right now OCA is strapped and that we couldn't thus implement it by saying, you know, do this on your existing budget, but that's not a vote against the idea of being more creative and more thoughtful about how we give this least good form of notice.

So, for instance, this is literally, you know, right now but we could think of lots of things, but as an example, we could change the requirement for publication notice so we don't eliminate it but we limit it to one line that said, you know, "You defendant so-and-so have been sued" and then say, "Go to OCA's website for details." If you look at the cost of what it costs to do

publication, right now it's a hundred bucks at the *Houston Chronicle* for a hundred lines. That now becomes one line. So that $99 that you're no longer spending can now be applied as a fee that the OCA has. I mean, yeah, I'm making this up as I go, but the point is voting against it if you think it's a bad idea, if you think it's a bad idea to do more than we already do, but don't vote against it, it seems to me, if you say to yourself, "I've got to be careful that I don't strap OCA too much on this." If it isn't feasible that's a different issue, but not an issue of whether it's normatively a good idea to do.

CHAIRMAN BABCOCK: Yeah. Judge Lawrence and then --

HONORABLE TOM LAWRENCE: I don't know that it has to be OCA. I mean, it might make more sense to have it on the secretary of state website or some other website. I don't know that we have to vote that it has to be just OCA. It could be any state website, governmental website.

CHAIRMAN BABCOCK: Justice Bland.

HONORABLE JANE BLAND: The judicial budget is a zero sum game, so if we announce to OCA that the Texas Supreme Court adopts our recommendation, that they have prioritized this as something that OCA ought to devote its resources to, they have a couple of employees putting together this website and monitoring it and updating it and

interfacing with people as they need to file something. That is less people and less funds available to decide cases, and we don't have enough. We don't have enough people to help us decide cases. We don't have -- and so it is -- it is an important consideration, because by doing this we leapfrog lots of other existing priorities, and so for those of us that work in the judiciary who are being taxed with figuring out where to cut, yes, it's a critical concern to us that we would put in an unfunded priority in a Supreme Court rule.

CHAIRMAN BABCOCK: Justice Christopher, did you want to -- you had your hand up.

HONORABLE TRACY CHRISTOPHER: Well, I think that pretty much covers it. Although, you know --

CHAIRMAN BABCOCK: Yeah, you guys often vote alike.

HONORABLE TRACY CHRISTOPHER: You know, we have the idea that, you know, setting up a website is cheap and easy, and it's not. I mean, you know, having just had to do one for a campaign, it's not cheap and easy to set up a website, and it cost me money every time I wanted to add something to the darn website. Okay. I mean, you know, to vote on something in a vacuum when we don't know the cost is how we get into trouble.

CHAIRMAN BABCOCK: I'm sensing website anger

here.

HONORABLE TRACY CHRISTOPHER: I'm just --

HONORABLE JANE BLAND: No.

CHAIRMAN BABCOCK: Gene, and then Roger.

MR. STORIE: And it still says "if available," so if it's not available because of funding or any other reason then there's not going to be any cost. I mean, it's an idea.

CHAIRMAN BABCOCK: Roger, and then Bill, and then --

MR. HUGHES: Well, you know, I want to ditto what Justice Christopher and Justice Bland said, and there's one other thing we haven't mentioned. How are you going to certify compliance by the OCA? They're not going to do that for free, because somebody has got to fill out the forms and apply the seal and send it to the trial court or the litigants to certify it was done, because now when we have substitute service on the secretary of state, and or on the secretary of transportation after the process server fills out the return of citation you get a suitable for framing certificate from the secretary that they have done what the statute required them to do, which you can then present to the trial judge. Well, now with publication, you know, either the newspaper gives it to you as part of the fee or you just bring in a newspaper and

show the judge, but so it's not just the expense of the website. There will be an expense of certification.

CHAIRMAN BABCOCK: Bill Dorsaneo, and then Richard, and then we'll vote.

PROFESSOR DORSANEO: One, I don't -- assuming that this is going to be a public agency that does this, there's no reason why the agency couldn't charge some sort of a fee like the newspapers charge a fee, some of them fairly -- well, not all, but some of them a fairly large fee, it seems to me. Secretary of state's office seems to be the most logical office to do this to me, and I don't even know why it couldn't be done by a private business, quite frankly. In fact, it seems like a potential business idea, I'm sitting here thinking about it.

MR. ORSINGER: Don't say anything more.

CHAIRMAN BABCOCK: We're already privatizing a government function that doesn't exist.

PROFESSOR DORSANEO: Well, I -- that puts me on the wrong side of where I am, but it seems like a pretty common idea.

CHAIRMAN BABCOCK: Yeah. Richard, and then we'll vote.

MR. ORSINGER: So we could take "Office of Court Administration" out of the proposal and just put "state" and let the state or Supreme Court figure out which

department does it.

CHAIRMAN BABCOCK: So you're amending option two to say "state"?

MR. ORSINGER: Well, I mean, the only reason that I stuck that in there was because they were willing to do it, but it doesn't matter. I mean, it makes sense to me that --

CHAIRMAN BABCOCK: Yeah, by blowing off Justice Bland and Justice Christopher.

MR. ORSINGER: Well, I didn't realize all the blow back we were going to get from the appellate judges.

CHAIRMAN BABCOCK: They want their new computers.

HONORABLE TRACY CHRISTOPHER: We would like TAMES, which is, you know, a work in progress.

CHAIRMAN BABCOCK: Yeah. Okay. So you say put "state" in there instead of "OCA."

MR. ORSINGER: And then whatever agency is willing to work with us on that then they --

CHAIRMAN BABCOCK: That won't irritate our two members at the end.

MR. ORSINGER: Okay.

CHAIRMAN BABCOCK: Okay. So the vote is we're going to change "OCA" to "state", and with that amendment how many people are--

HONORABLE DAVID PEEPLES: Will we get a chance to -- is this the last we're going to deal with this issue and we're never going to 109 and 106?

CHAIRMAN BABCOCK: It's the last we're going to deal with it today.

MR. ORSINGER: I have 109 right here if the Chair wishes to talk about it. It's been distributed.

CHAIRMAN BABCOCK: We may come back to this.

HONORABLE DAVID PEEPLES: So if a person is embarrassed that the majestic state of Texas is nibbling around the far edges and ignoring the real central issue a person should vote no on this proposal?

CHAIRMAN BABCOCK: Well, in the sanctity of the ballot box --

HONORABLE TRACY CHRISTOPHER: Yes. Yes. Yes.

CHAIRMAN BABCOCK: -- you can vote no for whatever reason, even if they're -- whether they be rational or irrational.

PROFESSOR HOFFMAN: That never stopped them in the past.

CHAIRMAN BABCOCK: A no vote is a no vote. So everybody in favor of option two as amended, raise your hand.

MR. MUNZINGER: Is this no or yes?

CHAIRMAN BABCOCK: This is yes.

PROFESSOR DORSANEO: It's a vote for due process, people.

CHAIRMAN BABCOCK: And everybody opposed to option two as amended, raise your hand.

MR. PERDUE: Right versus the left.

CHAIRMAN BABCOCK: All right. The votes are in, and there are 11 "yes" votes and 16 "no" votes. So the Court is now informed, although we don't know the rationale for the "no" votes in all instances. And, Judge Peeples, to your point, I think we certainly can come back to the other rules. We have guests here who were promised an 11:00 o'clock start, and in keeping with our tradition, it's now 11:40, so --

HONORABLE TRACY CHRISTOPHER: We're on time.

CHAIRMAN BABCOCK: Let's quickly move to the ancillary rules, and when last we spoke about these rules, I could read from the transcript that Mr. Munzinger was speaking with his usual passion. It just poured out of the transcript, so we can -- and the last thing he said is we all should think about this over the weeks to come, so hopefully we have, and, Elaine, you can take us through it.

PROFESSOR CARLSON: Dulcie is going to pick up where she left off.

MS. WINK: It's always dangerous to do this,

but from the last meeting there were two things that I think were voted on that should be modified only slightly, and one of them I don't think is going to be an argument. There were points where the language says, "On notice to the party or its attorney." The refinement suggested at the last meeting was "notice to the party's attorney." Since the rules already require us in the ethical rules to talk to the party's attorney if the party is represented, I think the language would be better both here as well as throughout the rules if we just leave it "notice to the opposing party or to the affected party." Is that okay with y'all? I don't see any resistance to that.

CHAIRMAN BABCOCK: No resistance --

HONORABLE TOM GRAY: Could you give us some direction of where in the materials you are?

CHAIRMAN BABCOCK: -- to switch the last vote.

MS. WINK: Absolutely. If you look back to, for instance, injunction Rule 1(b) where it says "without notice," as I'm suggesting it would now say, "If the temporary restraining order is sought without notice to the adverse party, the applicant must also demonstrate the specific facts that," colon, et cetera. So by giving notice to the adverse party, the ethical rules would require us to notify the adverse party's attorney if they

were --

MR. BOYD: We still didn't find where you are.

HONORABLE TRACY CHRISTOPHER: Can you talk up a little?

MS. WINK: The very first page of the proposed injunctive rules as they were originally sent to you. Injunctive Rule 1(b), as in boy.

HONORABLE TRACY CHRISTOPHER: Dulcie, can you talk a little louder, please?

MS. WINK: Oh, I'm sorry. Okay. We've added -- we've added and moved things around. I apologize. Hang on. If you look at -- we added a notice provision -- hang on just a minute. Let me give you a better example where you can see it in something that you already have. Take a look at --

PROFESSOR HOFFMAN: Is it 1(a)(5) that you're talking about?

MS. WINK: Yes, actually look at 1(a)(5). We've simply moved things around, but look at 1(a)(5) where it says, "If sought without notice to the adverse party or its attorney," it would just say, "If sought without notice to the adverse party" and go on from there. Again, if the adverse party has an attorney, we're required to notify them, so it would cover those situations.

I still don't hear any disagreement, so I'm going to move on to -- and I'll pass this back to you. If you take a look for just a moment at what was originally in your draft of the rules on page two for injunctive Rule (d), 1(d), that defines the order, I want us throughout this discussion to just keep a couple of things in mind, so I'll get everybody back to the point. One is the issue that these proposed rules will finally -- if they're accepted and if the Court adopts them, they will finally have a comprehensive list for what should be in these injunctive orders. In the past when the lists weren't available, either a party would present a proposed order or the Court might accidentally issue a proposed order that didn't have something that is required by one of the rules, which are spread out all over the place right now in the injunctive rules, and as a result that order would be considered void from the very beginning. That was discussed.

We also discussed a very important principle at the last meeting, which is the judges have had concern and I think there was agreement among the group that when the parties have come to an -- to an agreement, whether it's an agreed temporary restraining order or agreed temporary injunction, if something in that order doesn't -- is incomplete or fails to have something that is required

by the rules currently, and it didn't have this good list, then we would have the same problem, the order would not be enforceable. In last week's or last month's discussion, what was decided was that if -- if we were going to exempt -- you know, what goes into this order, if you're exempted by statute, that's fine. If it's -- you know, if it's an agreed order, we'll exempt that as well from this list. What I would propose is that we not exempt everything from this list.

HONORABLE DAVID EVANS: I concur. Having brought it up and gone back and revisited, what I do in my orders is we waive the agreement as to the reasons for the issuance.

MS. WINK: Exactly.

HONORABLE DAVID EVANS: And that addresses what Justice Gray brought up, that if they can waive the reasons -- a statement of the reasons for the issuance, but they don't waive anything else, and that leaves *Ex Parte: Slavin* in place, leaves a trial date in place, and I think that meets -- I mean, having brought it up I would --

MS. WINK: I think we're on the exact same page, so if you look at what is shown on your page two for Rule 1(d), if you look at sub numbers (2), (3), and (4), those are the -- those are the troublesome areas, right, that the parties ought to be able to agree to, if the

Supreme Court agrees with this. So what I've recommended is that (2) simply be revised, and it would say, "State," comma, "unless pursuant to an agreed order," comma, "why," and a colon, and that would be followed by an (a) and a (b) and a (c). The (a) being "immediate and irreparable injury, loss, or damage will result if the temporary restraining order is not granted." The (b) would say "The applicant has no adequate remedy at law," semicolon "and," and the (c) would say, "The applicant has a probable right to recover on a cause of action." Is that what we were trying to accomplish?

HONORABLE DAVID EVANS: That's the order we currently write, that we currently put in.

MS. WINK: And I am proposing that we do that if there's agreement, and I've already got it predrafted. We'll face it again in injunction Rule 2, and I've already looked at that as well.

MR. MUNZINGER: Could you state the language again that you're proposing, please?

MS. WINK: Yes, sir. No. (2) in what you show is (d), 1(d), No. (2) would say, "State," comma, "unless pursuant to an agreed order," comma, "why: (a), immediate and irreparable injury, loss, or damage will result if the temporary restraining order is not granted; (b), the applicant has no adequate remedy at law; and (c),

the applicant has a probable right to recover on a cause of action."

CHAIRMAN BABCOCK: Richard.

MR. MUNZINGER: You say, "State," comma, "why, except pursuant to an agreed order," comma. It seems to me that the rule is now contemplating two orders, the temporary order and a second order embodying the party's agreement. If you're going to use that language why would you not say "State why," comma, "unless agreed to the contrary by the parties" or "unless the parties have agreed otherwise" or something along that lines instead of using language that contemplates a separate order. What you're contemplating is an agreement, not an order, it seems to me, unless I misunderstood.

HONORABLE DAVID EVANS: In the order I put in last week -- I should have brought it and I tried to retrieve it a few minutes ago -- we stated that under 683 the rule requires that -- I believe I'm correct, 683 requires the reasons be stated for the issuance. "The parties have agreed pursuant to Rule 11, as indicated by signatures below and made on the record, that the reasons do not need to be stated" and that they are -- language to that effect, better stated than that, and that they are waived, and that the agreement -- and that "This order is enforceable, notwithstanding the fact that the reasons

aren't stated."

Now, I'm not -- I think all it has to do is -- the only thing that is an impediment to getting an agreed order is sometimes the stating of the reasons if you want an enforceable order, and so I agree in principle that the way to do that is deal with (2), (3), and (4), that they can be -- that they're -- that they can be omitted from the order by agreement, and the order is still enforceable. How that language works out I'm not sure, but I agree with that.

CHAIRMAN BABCOCK: Yeah.

MR. GARCIA: Sometimes the agreements are not really an agreement. It's just an agreement to form because you've worked out the issue, but you don't really want to agree to the relief as an agreement because you still have a TI hearing and permanent injunction hearing and then you have to deal with an agreement, so I don't know where that falls into this.

HONORABLE DAVID EVANS: Well, the only agreement -- and that's what we dealt with on that, Roland, is they just agreed to the omission of those reasons.

MR. GARCIA: Oh, okay. That's different. Yeah.

HONORABLE DAVID EVANS: Yeah, agreed to omission of the reasons as to enforceability and then could

go on and litigate their position.

CHAIRMAN BABCOCK: Well, is that agreement as to form, or is that agreement as to the -- I mean, you often -- you often go in and say, "Look, I'll agree to this until we get to the TI hearing."

HONORABLE DAVID EVANS: Right.

CHAIRMAN BABCOCK: But that's different than a form agreement. One's substance, one's form. That's the point Roland is making. Yeah, Jeff.

MR. BOYD: But can there be one where I say, "No, I object to you granting the temporary restraining order" --

CHAIRMAN BABCOCK: Right.

MR. BOYD: -- and the judge says, "Well, thank you for your objection, but I'm going to grant it." Will you agree to the form of it? Can we then agree that the order doesn't have to lay out the reasons?

HONORABLE DAVID EVANS: Hmm.

CHAIRMAN BABCOCK: Yeah, Roger.

MR. BOYD: Because I don't want you saying you handled that --

HONORABLE DAVID EVANS: I'll sign it.

CHAIRMAN BABCOCK: Right.

MR. BOYD: -- and you know, if you're going to enter the order I'd rather you not say all the stuff the

plaintiff wants you to say.

MR. HUGHES: So, yeah, I think that the rule should make clear that the party is agreeing to this as a matter of form, that they're not actually agreeing that there is any -- that those reasons exist, because then they get -- they get bushwhacked when they come to the TI hearing.

CHAIRMAN BABCOCK: Right. Frank, did you have your hand up?

MR. GILSTRAP: (Shakes head.)

CHAIRMAN BABCOCK: No. Did anybody over there have their hand up? Okay. All right. So anybody opposed to this modification?

MR. BOYD: So maybe that middle ground covers both circumstances. In other words, maybe it should say, "State, unless the parties agree to the omission of these reasons, each of the following" or something, so the rule allows you -- so if it's an agreed order that's going to cover it. If it's not an agreed order but we agree not to put the reasons in, it's still going to cover it.

CHAIRMAN BABCOCK: Yeah, Sarah.

HONORABLE SARAH DUNCAN: I must be missing something. How is that going to be reviewed?

MR. BOYD: It's not.

CHAIRMAN BABCOCK: There are some limited

circumstances where it could be reviewed, but, yeah, Frank.

MR. GILSTRAP: Well, the temporary restraining order is not going to be reviewed. The problem is I think we're setting the pattern for the temporary injunction.

CHAIRMAN BABCOCK: That's right.

MR. GILSTRAP: And really when you think about it maybe we ought to go backwards, you know, but we're probably not going to do that, but the same problem is going to come up on temporary injunction where it can be reviewed and --

CHAIRMAN BABCOCK: I hope we're not going backwards.

MR. GILSTRAP: -- what does that agreement mean? I mean, does it mean that on appeal you can't complain that there weren't any reasons for the issuance?

HONORABLE DAVID EVANS: Frank, let me just say where the review is going to come on is habeas.

MR. GILSTRAP: Is where?

HONORABLE DAVID EVANS: What I would perceive is, is that the review on an agreed temporary injunction would not be an interlocutory appeal because the parties agreed to that, pending the status for the permanent, which you omitted the reasons. Where it would come in is on habeas or contempt proceedings as whether or not the order

is enforceable or not. That's where the review would come I think on that. I think on that -- on what the problem that I've tried to address.

CHAIRMAN BABCOCK: Richard Munzinger.

MR. MUNZINGER: Well, I think the agreement that we're talking about is an agreement that allows the entry of a temporary restraining order to preserve the status quo pending the hearing on the temporary injunction. Those are two separate proceedings. The appeal, the interlocutory appeal, theoretically is going to come from the granting of the temporary injunction. The lawyer who need enters into the agreement needs to be very careful that his agreement isn't so broad that it obviates or removes his right to appeal on the temporary injunction or complaint in the absence of findings on these three requisite requirements. A man who agrees that the other side has a probable right to recovery is a dang fool. I mean, I can't imagine agreeing to such thing on a temporary injunction.

I can for tactical purposes or other purposes see why I would agree to it on a temporary restraining order. "Let's get the trial over with, Judge, and get this case on. I'm agreeing to do that." You just need to be careful with your language in the agreement. I don't think that the agreement with temporary restraining order is

going to affect the temporary injunction. I still think that the language that is being proposed is problematic because it contemplates a second order as distinct from just a general statement that to the effect "unless the parties agree otherwise," or words to that effect, the language that's being proposed contemplates a separate order, as I heard it, setting out the parties' agreement.

MR. BOYD: Couldn't the parties just sign this order to demonstrate their agreement?

MR. MUNZINGER: That's my point. I'm addressing the language, not the concept.

CHAIRMAN BABCOCK: Okay. Yeah, Justice Christopher.

HONORABLE TRACY CHRISTOPHER: I think that's a good point. I mean, I think you should just say -- you know, keep (2), (3), (4), or alternative language would be, you know, "I agree to waive these requirements," and then you sign it so that it's all in that order, because it's -- otherwise, you're not really sure that they've done it.

CHAIRMAN BABCOCK: Okay. Yeah, Bill.

PROFESSOR DORSANEO: Maybe I'm getting ahead of myself here, but what about (7)? I don't want to agree to that either.

MR. GARCIA: No, she's only talking about (2), (3), (4).

PROFESSOR DORSANEO: I know. Why isn't it (2), (3), (4), (7)?

HONORABLE DAVID EVANS: Bonds have never been a problem. In my experience on the bench, so far the only problem we've ever had is that no one wants an agreed order that states the reasons for its issuance since it is then the public record and the opposition can flash it around. And so that -- that's been the -- and the other problem has come is that there are a lot of cases out there when the orders have been tried to have been enforced and -- there are a few cases, I'm sorry, where agreed orders have been tried to be enforced that didn't have the reasons stated; and they were held to be unenforceable; and so what had happened, you had language that was clear enough in the order prohibiting conduct, signed by a judge, agreed to by the parties; and the time came for contempt and the parties said, "Na-na-na-na-new-new, you didn't have the reasons in there"; and the lawyer who agreed to it and who couldn't enforce it by contempt is turning around to his client saying, "Oops, I messed up"; and that's -- it's not so much about the court. You know, for us, it's a problem, but we're used to the technicality of the reasons being stated. It's just that result seems bad to the attorneys that are practicing and to the parties who are relying on that order to preserve status quo while the litigation is going on.

CHAIRMAN BABCOCK: Richard.

PROFESSOR DORSANEO: But if this gets changed, won't the bond come in as a problem later?

HONORABLE DAVID EVANS: I think we could agree to bonds, and, yeah, you could add bonds to it. That would be all right.

PROFESSOR DORSANEO: Okay.

CHAIRMAN BABCOCK: Richard.

MR. MUNZINGER: Perhaps the problem could be solved in the introductory sentence of subsection (d), as in dog, "A court may grant the application with or without written or oral notice to the adverse party or its attorney," period. "Unless provided otherwise by the Texas Family Code or other statute or a written agreement of the parties in the order itself or another order, every order granting an application shall," and then you've allowed people to agree to anything they want in all eleven subsections, and you've told the appellate courts that you can enforce an order that does not have these where the parties have clearly agreed that they are unnecessary.

CHAIRMAN BABCOCK: Yeah, Dulcie.

MS. WINK: I would not recommend putting it in the introductory language, okay, because it would cover literally everything, and there are things in here that are constitutional in nature. All right. When we talk about

describing in reasonable detail and not by reference to the petition or other document, the act sought to be mandated or restrained --

MR. MUNZINGER: I agree with you.

MS. WINK: There is so much in here that really has other constitutional, very well-established case precedent, I wouldn't change them, and I would -- I would also recommend considering don't make the bond thing something that everybody can agree to waive. If parties want to agree to minimal bonds or property in lieu thereof or cash in lieu thereof, I can see that, and I think the courts can address that, but, again, we are talking about injunctive relief, and we are talking about something that is extraordinary in nature, and there needs to be some protection in these moments for the thing having been granted perhaps in error, even over the agreement of the parties, and I say that because I see so many situations where people are standing and often we've got one or two or more parties who don't really have the economic resources to protect themselves in this situation, and they get -- they feel forced into these agreements in order to buy themselves time to have only one big hearing or big argument and to really prepare for one temporary injunction hearing, for instance, and you know, I would like for the law to continue to protect those parties by way of security

and the parties have to post it.

CHAIRMAN BABCOCK: Okay. What else? Yeah, Frank.

MR. GILSTRAP: As I understand the current law, and someone will tell me if I'm wrong, the temporary order or the injunction doesn't have to state a probable right of recovery; is that right?

MS. WINK: It does have to state a --

MR. GILSTRAP: It does. The temporary injunction order says "reasons for its issuance." I think there are cases that say you don't have to say a probable right of recovery. Now we're putting in probable right of recovery. Aren't we making it harder to agree?

MS. WINK: The case law does require all of those issues.

CHAIRMAN BABCOCK: So there.

MR. GILSTRAP: Different cases.

MS. WINK: It's a good point, and it has been raised in precedents, because those are the elements necessary to be established for the injunctive relief.

CHAIRMAN BABCOCK: Lonny.

PROFESSOR HOFFMAN: Going back to your first and noncontroversial point, would you also change that first sentence of (d) so it just said "the adverse party"?

MS. WINK: Yes. I've done a search

throughout the rules for that.

CHAIRMAN BABCOCK: Frank, in thinking about it, I can think of some types of cases where probable right is not required, but as a general rule I thought it -- I thought it was.

MR. GILSTRAP: It may -- it has to be in the order is what we're talking about, has to be in the order, if -- that's what you're telling me.

CHAIRMAN BABCOCK: Yeah.

MR. GILSTRAP: Okay.

CHAIRMAN BABCOCK: Yeah, Bill.

PROFESSOR DORSANEO: 683 doesn't say that, Frank.

MR. GILSTRAP: Yeah, it doesn't.

PROFESSOR DORSANEO: Like your Corpus coliseum case. You just went through this, could've come out the other way.

MR. GILSTRAP: It just says "reasons for issuance," and that means irreparable harm. It doesn't mean anything else.

PROFESSOR DORSANEO: But shouldn't it be a requirement?

MR. GILSTRAP: Okay. Okay. Maybe it should, but what I'm saying is if we're now saying we're going to require it and we're saying we're having trouble agreeing,

we're making it harder to agree. If everybody is hung up on agreement --

CHAIRMAN BABCOCK: Richard, and then Roger.

MR. ORSINGER: I'm confused on Rule 2(d)(4) about a requirement that the temporary injunction say why the applicant has a probable right to recover. Why would a defendant ever agree to an order that acknowledged that the other side had a probable right to --

CHAIRMAN BABCOCK: Are you talking about 1(d)(4) or 2(d)(4)?

MR. ORSINGER: 2(d)(4).

MS. WINK: We may have different considerations when we get to temporary injunctions.

MR. ORSINGER: Well, I heard it mentioned, and so I didn't know whether that's part of the discussion or whether that was just -- what do they call it -- we were taking a deviation, a detour.

CHAIRMAN BABCOCK: Well, it's also in 1(d)(4).

MR. ORSINGER: Well, I think we're -- are we allowing them to waive that for the temporary restraining order by agreement or does that -- are we saying that an agreed temporary restraining order must state a probable right of recovery?

MS. WINK: What I -- your question is very

good. What I have recommended for this refinement in the language is that we allow the parties to agree to omit the language of "the applicant has a probable right to recover on a cause of action."

MR. ORSINGER: In a TRO?

MS. WINK: In the TRO sense.

MR. ORSINGER: But not in the temporary injunction.

MS. WINK: I haven't even gotten to the temporary injunction sense.

MR. ORSINGER: I'm reading ahead, but someone mentioned it, and so I'll just hold my -- I'll just wait until it's proper to discuss.

CHAIRMAN BABCOCK: Roger.

MR. HUGHES: Well, there is a hidden assumption here that I think is causing some difficulties. When we say that "the parties by agreement," the question is what are they agreeing to? From the defendant's point of view or the respondent, respondent just maybe said, "Listen, I'm agreeing you can have your order for now. I'm not agreeing you're entitled to it. I'm not agreeing that you've proven anything. I just want to postpone the fight for another day," and from the plaintiff's point of view, there -- it's like, "I proved my case. You're just agreeing that I don't have to set it

out, the reasons, in writing," and so, you know, it's one of those ambiguities. Is the agreement that the order issue without proof of the grounds simply by virtue of the agreement that's the consent of the parties that justify it; or is the agreement, "Okay, you proved your case. I just don't want it in writing"? And it's -- it gets back to a conceptual thing. Do we really want courts issuing TROs by agreement, or do we want them to have a basis for it, and we're just omitting stating the grounds out of, you know, we're trying to protect people's names pending the final hearing? I can see either one.

CHAIRMAN BABCOCK: Sarah.

HONORABLE SARAH DUNCAN: If I could add to that, we had a client who --

THE REPORTER: Speak up, please.

MR. MUNZINGER: We can't hear you, Sarah.

HONORABLE SARAH DUNCAN: We had a client who it was an agreed TRO. It was an agreed temporary injunction. There were then enforcement orders for failing to turn over property that they didn't own or have a right of access to. Now, that's -- I think that's -- that's almost a worst case. I'm sure there are worser case, worser cases, but it's almost a worst case of why -- I'm sure everyone around this table and certainly our panel understands what a probable right of recovery on a cause of

action -- all right, you're supposed to have a cause of action to get one of these things. Believe me, there are a bunch of lawyers all around the state who don't understand these three requirements. They don't know what they mean. They just know that they either want something affirmative to happen or something to stop happening, so at least make them go through the exercise of identifying what the three things are, the three requirements. So I second what Roger says.

CHAIRMAN BABCOCK: Richard.

MR. MUNZINGER: Yeah, but, once again, what's prompted this whole discussion is that one of the parties, typically the -- in the discussion the defendant doesn't want to have all of this proof and doesn't want to have all of these findings articulated in an order and would rather say, "Hey, Judge, I'll agree to -- let's set this case in 30 days. You don't need to go through all of this stuff. Let's have an order and have a trial in 30 days." If you have a rule that says you must have these findings in the TRO, you can't accommodate that party and you can't accommodate prompt justice because the person is forced to fight over something he or she doesn't want to fight over, for whatever reason.

CHAIRMAN BABCOCK: At that time.

MR. MUNZINGER: Yes, at that time. They're

going to fight over it in the temporary injunction hearing. So the amendment to the rule in my opinion makes imminent good sense that you allow a party to agree that these -- whatever features are not constitutionally required can be waived by that party in the temporary restraining order.

CHAIRMAN BABCOCK: Judge Wallace.

HONORABLE R. H. WALLACE: Well, I agree with that, and that's most often going to come up in the context of a -- of the parties wanting a continuance, not only for the TRO but for the temporary injunction hearing as well, which we can get to later, because as a practical matter what will happen is the plaintiffs and defendant will get together, decide what they can live with and not fight over until a later day, and I agree we ought -- they ought to be able to agree to that without all of this other language.

CHAIRMAN BABCOCK: Okay. Yeah, Richard Orsinger.

MR. ORSINGER: I'm not sure why we restrict what the scope of the parties' agreement would be. You know, you can waive every constitutional right that I know of except for the right to a mandatory review by the Court of Criminal Appeals of the death penalty. Everything else, as long as it's a knowing and conscious waiver, constitutional or not, is waivable. It seems to me like if an agreed TRO doesn't have the requisite detail, well, that

means you can't put somebody in jail for violating it; but that doesn't mean that TRO wasn't valid if somebody decided that they were going to agree to it and someone else decided to take the risk that it couldn't be enforced by contempt; and as I look down all of these I can't see a single reason why two consenting people shouldn't be able to eliminate all of these requirements; and if we are taking the power away from people because it's constitutionally required before it can be enforced, why are we taking that power away from them? I mean, what is the public policy to say that two people with lawyers that are thinking this thing through have decided that they don't care whether it's enforceable or whether it --

CHAIRMAN BABCOCK: Well, why do it then? I mean, why would anybody ever consent to (5), I mean to waive (5)?

MR. ORSINGER: Well, maybe they wouldn't, but I mean, my question is not why would somebody waive it, but why would we prohibit somebody from waiving it when they want to? Maybe somebody is going to pay somebody $10,000 in exchange for some preliminary arrangement, or maybe somebody agrees to put something in escrow in exchange for a preliminary arrangement. I mean, not all temporary orders have to be enforced by putting somebody in jail, and I'm not getting why people can't do what they want with

these TROs.

CHAIRMAN BABCOCK: Judge Evans.

HONORABLE DAVID EVANS: Well, I think only -- if the question that Richard is asking is why couldn't they agree to waive No. (5), which is to state in reasonable detail and not by reference what acts are supposed to be restrained, they could enter into an agreed order and a judge could sign that, but my -- my point was in the context of the cases that have held that an agreed order is not enforceable if it doesn't state the reasons, and I don't think you could ever enforce an agreed order that didn't describe with specificity what acts were prohibited. I mean, even if it was agreed to, it just couldn't be enforced under Slavin. I guess you could enter into it, but --

MR. ORSINGER: Well, it can't be enforced by contempt.

HONORABLE DAVID EVANS: Well, I've lost my train -- I'm back with your consenting adults, and I don't know where --

MR. ORSINGER: It can't be enforced by contempt with Slavin.

CHAIRMAN BABCOCK: It's another one of those vision things.

MR. ORSINGER: It can't be enforced by

contempt because of the due process problems, but there are other ways that something can be enforced, and it could be --

HONORABLE DAVID EVANS: Well, under current law a temporary injunction is not a basis for an action -- a violation of a temporary injunction cannot be a basis for recovery of damages. The fines that are assessed go to the state, not to the individuals, and you can either -- there's nothing -- there's nothing weaker in Texas law than a temporary injunction when it comes to a business party that's trying to enforce it. The Supreme Court has acted within the last 10 years on the issue or denied writ on a case that you can't recover damages for breach of a temporary injunction. It's a pretty weak deal when you've got a lot of money riding.

CHAIRMAN BABCOCK: Bill Dorsaneo.

PROFESSOR DORSANEO: Well, I agree with Richard. I don't see why they couldn't be -- couldn't be enforceable as a contract. I mean, maybe the courts are reading the wrong rule. Why not read Rule 11 instead of this rule?

HONORABLE DAVID EVANS: I didn't say I agreed with the opinions. I just said --

PROFESSOR DORSANEO: It seems like -- and this is an area that's confusing generally. In family law

it's pretty confusing with respect to, you know, certain kinds of agreements. We used to call them agreements incident to divorce, but now some of them are called agreed parenting plans, and those are not enforceable as contracts because the statute says they're not. Okay. And that might be a better way to proceed, if you wanted to go that way, but I don't see why contract law is eliminated from this entire field of human endeavor and why you have to try to navigate through these technical requirements that are crafted as if they're going to be the process of adjudication rather than agreement.

HONORABLE DAVID EVANS: Well, I would probably go back and look at my -- I'm not sure that an agreed injunction couldn't -- I don't think we've seen a case yet on enforcement under Rule 11 yet.

CHAIRMAN BABCOCK: Richard, will you yield to Dulcie for a second? She wants to --

MR. MUNZINGER: Sure.

MS. WINK: I just want to answer your question, Bill, and yours as well, Richard. The way -- throughout the history we have to remember that the injunctive relief is an extraordinary area of relief; and the requirements of meeting the technicalities that are in the current and existing rules are mandates, not all -- you know, alternatives; and if those are not met, the case law

has interpreted that to be that it is a nullity, that that order is a nullity; and further, the courts who have said, "I understand you agreed to it, but the order is a nullity," the cases tell us it's interpreted as you've agreed to nothing. So that's why it's a little different than the case law issues on contract.

Now, let me add one area of complexity for everybody to think about. Even with this refinement, if we go this direction, I think you're going to see a huge increase in TRO actions, because people are going to learn I can put pressure on somebody and force them into an agreement that they're not entitled to for 14 to 28 days, and a lot can happen in that time. So, Judges, keep that in mind.

CHAIRMAN BABCOCK: Okay. Richard.

MR. MUNZINGER: Well, the only reason that I can see why you would exclude No. (5) from the parties' agreement is that it implicates the court, the court's authority, and whether or not a person may be punished or not punished by having violated the order. A court has an interest in seeing to it that its orders are intelligible and honored and are sufficiently specific to require both intelligibility and being honored and obeyed, and parties ought not to be able to finesse that problem and put it off to another day a week later or eight days later for a

tactical reason.

CHAIRMAN BABCOCK: Yeah. It seems to me (5), there's a certain institutional interest in (5), but anyway --

HONORABLE DAVID EVANS: I might just respond on this agreed --

CHAIRMAN BABCOCK: Yeah, Judge Evans.

HONORABLE DAVID EVANS: Whether it's going to increase litigation or not, as a trial judge that plans a docket, we set temporary injunctions for a 30-minute period, not because we believe they'll take 30 minutes to try, because we know from experience, I run specialized court, civil only, and so we set discrete hearings. We don't have a docket call like Travis or Bexar, and I set them on 30-minute increments because we know they're all going to be agreed to.

CHAIRMAN BABCOCK: You're talking about TROs or --

HONORABLE DAVID EVANS: Temporary injunctions are all going to be agreed to. We rarely have to try those, and as soon as we see who answers we can tell you locally whether we're going to try it or not. I mean, it's almost that clear, because you can see who the players are and how heavy the action is going to be. Most of our stuff is all agreed on temporary injunction. That's what we deal

with.

MR. GARCIA: TRO.

HONORABLE DAVID EVANS: Well, the TRO -- the TROs are rarely agreed to. They're signed by the judges, but by the time it gets around to the temporary injunction, the temporary injunction is agreed to. We just don't try that many of them. I try -- we'll have the stats, but out of a docket we don't try that many. They reach a status quo. Typically the lawyer tells the judge, "My hero is not going to do this anyway. He's not stealing those trade secrets, isn't doing it, and he's not going to use it, hadn't been doing it, so we'll agree to it. If that makes you feel better on the record, that's great," and we go on down the road, and we wait until the discovery goes on. Now, there are exceptions that when they do happen, week, 10 days is gone, you know, by -- you're there.

CHAIRMAN BABCOCK: Okay. Yeah, Frank.

MR. GILSTRAP: These cases that say that even though the parties agreed, you know, the order is not enforceable, would they -- would the result be changed if the rules said the parties could agree?

HONORABLE NATHAN HECHT: Yes. I think so.

MR. GILSTRAP: Would that solve the problem?

HONORABLE NATHAN HECHT: Well, the result would change. It would change the result of cases with

rules.

MR. GILSTRAP: I'm saying prospectively. They're not coming from other sources like the Constitution or something.

HONORABLE NATHAN HECHT: Well, if there were a constitutional problem, they would, but, I mean, generally speaking the rules will change the cases.

MR. GILSTRAP: Okay.

MR. ORSINGER: I mean, to me that's something we need to discuss. Are we here just to clarify the language but not improve the law, or can we actually change some practice that's been in effect for 60 years and make it better? Because I hear a lot of the response to proposed changes around here is that that's not allowed. Well, that's not allowed because we didn't allow it, but if we allow it, it would be allowed.

CHAIRMAN BABCOCK: You know, you've done it again.

MR. ORSINGER: So it seems to me like we ought to remember that we have the opportunity to recommend that things be done differently if it's better.

HONORABLE JAN PATTERSON: So is it a mission creep or a creepy mission?

MR. ORSINGER: I don't know what the mission was.

HONORABLE JANE BLAND: As long as it doesn't cost the state any money, Richard.

CHAIRMAN BABCOCK: Getting back to (5), if you said that by agreement you could -- you could eliminate the requirement that the TRO describes in reasonable detail what's being restrained and then the plaintiff comes back into court on contempt on a motion to show cause and says, "This order that doesn't say what the defendant's restrained of is being violated because he's now doing what I -- what my TRO application said he couldn't do," and that would be okay?

MR. ORSINGER: No, you would have a due process problem with that.

MS. WINK: Right.

CHAIRMAN BABCOCK: Well, but we agree.

MR. ORSINGER: No, the 14th Amendment is still out there. You can't put somebody in jail if you haven't given them notice -- the requisite notice of specificity.

CHAIRMAN BABCOCK: But we agreed that I waived notice.

PROFESSOR DORSANEO: Agreed to what?

CHAIRMAN BABCOCK: I agreed that the reasons didn't have to be described, the conduct.

HONORABLE DAVID EVANS: No, the conduct

doesn't have to be described.

CHAIRMAN BABCOCK: The conduct doesn't have to be described. I've waived that. You just said freedom of contract that you can waive due process. You can do that.

MR. ORSINGER: You can sue for breach of contract, but I don't think that you can -- I personally think that that requirement comes to us out of the 14th Amendment of the U.S. Constitution, and I don't think you could waive that in advance.

CHAIRMAN BABCOCK: Well, I thought you were in favor of being able to waive that.

MR. ORSINGER: I said that people should be permitted to enter into these agreements, but somebody is at risk that they're not going to get jail time enforcement of their order, but if that's what they want to do, let them do it.

CHAIRMAN BABCOCK: Lonny.

PROFESSOR HOFFMAN: This seems like a funny way that the conversation has now shifted. What I thought you were going to say is not the constitutional point, but that as a practical matter how are you going to get the judge to enforce that which -- you know, "Stop doing that," and so you say, "Well, they're not stopping that." Judge says, "They're not stopping what?" And so since we know,

as Judge Evans said, you almost never -- I think you said you never see motions --

HONORABLE DAVID EVANS: Well, there are more agreed injunctions than there are contested by far.

PROFESSOR HOFFMAN: No, no, no, but your point earlier was that you don't ever see people coming in to enforce an agreement that was breached. It seems it doesn't happen, but if it does, in the rare case, you would think that in the interest of making sure that you get what you want, you said it specifically. If you didn't, well, that was your choice, and there may be a cost to that in terms of the enforcement, but it's not -- it may also be a constitutional question, but you have a bigger hurdle. You can't -- how are you going to get the judge to enforce and then stop that?

CHAIRMAN BABCOCK: And the proponent on the show cause comes in and says, "Judge, it's quite clear what you restrained him of, take a look at my petition. I asked that he be restrained from A, B, C, and D. You granted an order. He waived the -- he waived (5) here, so it's not in the order, we agree with that, but he knew what he was being restrained of because it's in my petition." So what happens then? Justice Gray.

MR. ORSINGER: Contempt denied happens then.

CHAIRMAN BABCOCK: Huh?

MR. ORSINGER: Contempt denied happens then.

MR. HUGHES: Not necessarily.

CHAIRMAN BABCOCK: Justice Gray.

HONORABLE TOM GRAY: There is a lot of this that we don't ever see in the appellate court; but it seems to me that if you don't have (5) as an element of what the order must contain, anything else is just a Rule 11 agreement or an agreement on the record that you're going to have a breach of contract for; and it's going to be a year or 18 months developing; and the whole point of the TRO is speed, and if it gets violated or contempt, I mean, just, to me, I understand Richard's argument that you ought to be able to waive that; but if you waive that at the contest of requesting a temporary restraining order, what you've really done is waived your right to have certain conduct prohibited by the court, and that takes it out of being a TRO.

CHAIRMAN BABCOCK: Gene.

MR. STORIE: And I can understand that, but what I'm not sure I understand is why you can't do it by reference just to save some paper.

MS. WINK: When the writ is served it -- the easiest way -- the easiest way to do it is to make sure the order is attached, which we're requiring with the drafts here, so that it's very clear and indicated in the order

what the person is restrained from doing, prohibited from doing, or mandated to do. So that's actually been a longstanding requirement. This is nothing new, but sometimes the petitions and the exhibits to the petitions are extremely long.

CHAIRMAN BABCOCK: Frank.

MR. GILSTRAP: Why can't we simply say -- following (d), put "provided that items (2), (3), and (4) may be omitted from the order by agreement of the parties." Doesn't that solve the problem?

CHAIRMAN BABCOCK: That's where we started, I think.

MR. GILSTRAP: I know, but there were some problems about the phraseology.

CHAIRMAN BABCOCK: Yeah.

MR. GILSTRAP: That way it's clear the parties can simply agree to omitting them from the argument or from the order.

CHAIRMAN BABCOCK: Somebody wanted to add (7) to that. Bill.

PROFESSOR DORSANEO: Dulcie, I don't remember, did we have a separate temporary restraining order from the order granting the application for a temporary restraining order?

MS. WINK: No.

PROFESSOR DORSANEO: Or is it just this order now?

MS. WINK: It's the same thing.

PROFESSOR DORSANEO: Once upon a time there were orders granting and then there were the thing itself.

MS. WINK: I apologize. The writ itself, the temporary -- the order granting the application is not the TRO. The TRO is the writ itself that is issued by the clerk's office with the order granting attached.

PROFESSOR DORSANEO: And that's going to need to be not by reference to the order.

MS. WINK: Correct. Well, no --

PROFESSOR DORSANEO: Well, that's getting too crazy.

MS. WINK: It -- it's common practice right now.

PROFESSOR DORSANEO: I know it's common. There are lots of things that are common.

MR. ORSINGER: Well, I think -- isn't the TRO just a piece of citation that -- or process that sits on front of the order, and the TRO refers to the order for details?

MR. GARCIA: Yes. That's correct.

MR. ORSINGER: Dulcie?

MS. WINK: I'm sorry, I --

MR. ORSINGER: I think the TRO is just a piece of process. I think the operative -- even though technically the TRO may not be effective if it's -- pardon me, the order may not be effective if it's not served with the TRO cover sheet, I'm not even sure of that, because a lot of these orders say that they're enforceable even if they're not served. So the orders themselves purport to be enforceable even without the service of the TRO, but to me the TRO itself is always going to incorporate the order, because the TRO is just a piece of paper that gets stapled on the front of the order.

CHAIRMAN BABCOCK: Okay. Dulcie, do we have any -- anything other than (d) to discuss on Rule 1? Were there other issues from last time?

MS. WINK: If we can get some, some -- if I could propose a vote on language for 1(d) then we would be moving to where we left off on the motion to dissolve or modify, so we're almost at the end of Rule 1.

CHAIRMAN BABCOCK: Okay. So we would go to (g).

MS. WINK: Yes, sir.

CHAIRMAN BABCOCK: Okay. What sort of vote do you envision?

MS. WINK: I would propose the refinement in the language to say the following: "Unless the parties

agree to the omission of the language," comma, "state why," (a), (b), and (c). Those (a), (b), and (c), what you currently see about the "Immediate and irreparable injury, loss, or damage will result if the temporary restraining order is not granted"; (b) would be "The applicant has no adequate remedy at law"; and (c) would be "The applicant has a probable right to recover on a cause of action."

MR. GARCIA: Say that language one more time.

MS. WINK: Yes. "Unless the parties agree to the omission of the language," comma, "state why," colon, sub (a), "Immediate and irreparable injury, loss, or damage will result if the temporary restraining order is not granted"; (b), "The applicant has no adequate remedy at law," semicolon; and (c), "The applicant has a probable right to recover on a cause of action."

MR. GILSTRAP: And leaving out why.

MS. WINK: No, why is in the introductory reason, "state why," colon.

MR. GILSTRAP: Okay. Okay.

MR. ORSINGER: And the rest of them would be unchanged?

MS. WINK: Well, I'm taking out "state why," "state why," "state why," if I'm making them "state why," (a), (b), and (c). Otherwise the language is the same.

MR. ORSINGER: And then we're still going to

require (5), (6), (7), (8), (9), (10), and (11).

MS. WINK: Yes, the rest -- the rest right now are not taken off the table to be required.

CHAIRMAN BABCOCK: Yeah, Richard.

MR. MUNZINGER: I just don't like the use of the phrase "omission of the language." I would rather just simply say, "Unless the parties agree to the contrary," colon, sub (a), "state why"; sub (b), "state why"; sub (c), "state why."

MS. WINK: I'm okay with that.

PROFESSOR HOFFMAN: It would help a little bit with Roger's point that agreeing to omission of language may be easier to stomach than agreement which leaves open this uncertainty of are you agreeing to the substance of terms or are you just agreeing to it by form. Maybe it doesn't fix it, but it seems like it gets a little closer to it being an agreement as to form.

MR. ORSINGER: And is the consequence of this vote mean that none of the other provisions could be waived by agreement?

MS. WINK: Yes.

MR. ORSINGER: Well, has anyone thought about whether setting the date and time for the temporary hearing can be --

MS. WINK: Before we go there I think you

ought to see if we agree to these being agreeable content.

MR. ORSINGER: Okay.

MS. WINK: And then take each one that you want to discuss otherwise --

MR. ORSINGER: Okay.

MS. WINK: -- separately so that we can have good clear rulings. Not that I'm trying to do your job.

CHAIRMAN BABCOCK: So that's the vote. So everybody in favor of what Dulcie said, raise your hand.

MR. GARCIA: Well, she said several things, though, so --

CHAIRMAN BABCOCK: Her proposed modification.

MS. WINK: My original proposed language.

MR. GARCIA: Omission of language.

MS. WINK: Yes, omission of the language.

CHAIRMAN BABCOCK: All right. Everybody opposed?

19 to 3 in favor. Okay. So now we want to talk about other things like (1), (5), (6), (7), (8), (9), (10), (11)? Yeah, Richard.

MR. ORSINGER: I would be in favor of (6) being waivable. You know, people can -- we even allow it over here that you can agree to a TRO that lasts longer than 14 days. I don't think we should require them to agree on a temporary hearing if they're agreeing to --

PROFESSOR HOFFMAN: I don't think the TRO can by law last longer than 14 days times two.

MR. ORSINGER: Well, look over here on (e)(3). The parties may agree to extend the duration beyond, but I can tell you in the family law practice people will agree to TROs that have longer duration than 28 days, and I don't think that's prohibited. I'd be curious to hear what your opinion is.

MS. WINK: It is. It is prohibited, and this is because, keep in mind, that the temporary restraining order ordinarily is not appealable, and so when that extends beyond the total of 28 days, whether by extension or otherwise that the court can grant without the agreement of the parties, then it is determined to be in effect a temporary injunction and appealable, et cetera. So what I would recommend is that you not change that. The parties may get ahead of the temporary injunction hearing date and agree to it, just as Judge Evans has said.

CHAIRMAN BABCOCK: Okay.

HONORABLE DAVID EVANS: You know, I'm -- just as a practical matter, I'm not sure that -- you think that if it goes longer than the 28 days that the period of time for setting the hearing by agreement makes it subject to an interlocutory appeal and converts it to a temporary injunction?

MS. WINK: Yes, sir.

HONORABLE DAVID EVANS: Even though there's been no evidence taken?

MS. WINK: There is case law to that effect, yes.

CHAIRMAN BABCOCK: So on day 29 we can appeal it.

HONORABLE DAVID EVANS: If the parties came to me and said, "We need about a month before we start to do depositions before we have a temporary injunction hearing, and we've got to go do this" --

MS. WINK: The parties can agree after the 28 -- they can agree to more than that, more than 28 days.

HONORABLE DAVID EVANS: After the 28th day?

MS. WINK: Yes. The parties can agree to an additional extension of time.

HONORABLE DAVID EVANS: Okay.

MS. WINK: But the court can't grant more than a total of 28 days otherwise. Otherwise --

MR. GILSTRAP: We're allowing the parties to agree to more than 28 days. That's what we're talking about, aren't we? We're allowing the parties to agree to two months.

MR. ORSINGER: Well, I mean, (e)(3) says that you should be able to. I happen to think you can do that

right now. I think the parties can agree to have a TRO in effect until whenever they get a temporary hearing, but (e)(3) is -- I guess Dulcie is saying it's a change in the law, but it does allow parties to extend a TRO beyond the 28th day. The question I have -- and this is a real simple question -- is why do the parties have to agree on a trial -- on a hearing date in order to get an agreed TRO, and what if the judge is not even available on that date? I mean, what if you can't get an agreement, or what if you can't get the judge to give you a setting on that date? Why are we requiring this? Why are we forcing them to agree to a hearing that neither one of them want on a date within 14 days that the court may not even have?

CHAIRMAN BABCOCK: Roger.

MR. HUGHES: Well, I get back to what was said earlier. This is not a garden variety remedy. We are interfering with people's liberty rights, and to a certain extent we're interfering with their family rights, and we're interfering with their property rights. I don't see a real benefit to the larger community by making this remedy easier to get and enforce; and if people want orders that aren't mere contracts that can be enforced by a remedy and damages, but they want the power of contempt, then maybe we ought to make it difficult, because they're not -- they're calling on the entire -- they're calling on the

judiciary to remove people's liberty or property and interfere with their families; and you know, if it means people have to cut short their vacations, et cetera, et cetera, then that might be the price to pay for having this very extraordinary remedy available; but I'm not sure why we want to make it easier to get.

And the other thing about, you know, setting of the date, you know, well, we'll just agree to put it out there to when we can get to it, then I think you're running right into the rule that says we look past the label you put on it. This is a temporary injunction. It just has a termination date rather than a trial date, and it gets appealed and then somebody says, "Well, I'm just going to take this up on appeal, not even wait for the hearing date." So I think -- and I think for the court's purposes it's a good idea to have a quick date on these to get people to come to an agreement. I mean, the longer -- the further out you put the date for hearing on a TI, the longer it's going to take for them to come to an agreement.

CHAIRMAN BABCOCK: Frank, and then Judge Peeples.

MR. GILSTRAP: Two points. I'm not sure how you're forcing people to do anything if they agree. I mean, people can just not agree. The second thing, I think an agreed -- if you agree to a temporary injunction you

can't appeal it anyway, right?

MS. WINK: If you agreed to one of longer extended --

MR. GILSTRAP: No, I go in, we have a temporary injunction hearing. I agree that until the pendency of trial I'm going to be enjoined. We both agree. Can one party turn around and appeal that? He agreed to it. So I don't see the problem if it's -- if it's really a temporary injunction and they agree to it, what's the problem?

PROFESSOR HOFFMAN: Two quick things. One is what I said earlier or I thought I said earlier in terms of the limitation on it can only be 28 days total, which is what I thought the law was. Under Rule 680 now it actually says --

MS. WINK: We've already made changes to that. The rule says now "is for a like period," so if the first one was only 10 days, if the court granted one for 10 days, it can only grant one extension other than by agreement for a like period. We've already made revisions to that so that the duration rules would literally say the duration of the TRO may not exceed 14 days from the date of the issuance. Then it says, "The court may extend the duration of a TRO for one period not to exceed 14 days, and the reasons for the extension must be stated in the order";

and then part three of that part of the rule that we've now got in place is that the parties may agree to extend the duration beyond the above-referenced time periods unless the extension is post --

CHAIRMAN BABCOCK: Unless what?

MS. WINK: The part -- well, the change didn't come out very clear. "The parties may agree to extend the duration beyond the above-referenced time periods."

CHAIRMAN BABCOCK: Period. Okay.

PROFESSOR HOFFMAN: So, I'm sorry, just to finish, I actually was --

CHAIRMAN BABCOCK: Yeah, I'm sorry.

PROFESSOR HOFFMAN: So the current law says -- and it sounds like it's no different under your proposal, but in any event the current law says, "No more than one extension may be granted unless subsequent extensions are unopposed," suggesting that you can ask for it to go on and on. So I do think we need to think about that the existing law does that. That said, I must say I am sympathetic with Roger's point, the idea -- and it seems consistent with a point you were making earlier in terms of this extraordinary relief. When I think about, Frank, what the Supreme Court has done recently in the arbitration context about regarding saying where we think people have

agreed and giving up all sorts of rights, it makes me uncomfortable to think that if we're going to have this broad power that it could be agreed, whatever that means, for effectively eternity.

Now, that said, that does bump up against what does appear to me to be existing law, so my two points are, one, you need to get a better handle on what the existing law allows, but then as we're thinking about this as a matter of what we want, I do think that there is a lot of wisdom in Roger's concern about getting parties to agree to things in a coercive or nonequal bargaining power way.

HONORABLE DAVID PEEPLES: The word "coercive" needs to be elaborated on. We practice in different parts of the state, and you lawyers are thinking in terms of the judges you appear before. That's what I think when I hear Roger talking, and if you can agree on everything, the judge can coerce an agreement a lot more easily, and I'm just wondering if that is a concern for lawyers in certain parts of the state.

MS. WINK: I have run into that situation, knowing that the existing law said I can't agree to this, I've literally got to have these things in the order, and you know, for whatever reason it was a Friday afternoon at 4:00 o'clock, and that particular judge was saying, "Parties can agree to anything. I'll sign the agreed," and

the problem was what he was suggesting could not be done.

HONORABLE DAVID PEEPLES: Or I'm thinking of a judge who doesn't want to try this case and twists arms to agree on things, and if the law says you can't agree on some things, it's easier to insist on a hearing in some courts.

CHAIRMAN BABCOCK: That's a good point, and with that point let's take our lunch break.

(Recess from 12:34 p.m. to 1:26 p.m.)

CHAIRMAN BABCOCK: Okay. Everybody ready? Moving right along, and when Judge Peeples and Ms. Baron are ready to go we are going to talk about big thoughts here as opposed to line-by-line analysis, and moving right along to a big thought issue about Rule 1, subpart (g).

MS. WINK: The big issues on 1(g) draft are these: Often because the TROs may be granted without notice there may be need for the other party to be heard and to resolve some issues and get things a little bit better set. So we do have the motions to dissolve or modify, which is in the existing rules, right, but this gives the court the ability to address changes that need to be done quickly on a TRO situation. It also -- the last sentence -- the last sentence is there to effectuate equal dignity of pleadings. In other words, to get the TRO people were supposed to be pleading with a verification or

an affidavit, so it requires the motion to modify to be equally supported by verification or affidavit. Is there anything you see in particular in 1(g) that you think needs to be discussed or modified?

CHAIRMAN BABCOCK: Frank.

MR. GILSTRAP: Unlike the temporary restraining order, the motion to modify requires production of evidence, so why do we need a verification? Let me hear the evidence.

MR. BOYD: Well, TRO requires verification. You have to have evidence, affidavit.

MR. GILSTRAP: Yeah, but you don't hear evidence on a TRO.

MR. BOYD: Right. Yeah, I might question whether testimony should be in there, but it does make sense to require a sworn affidavit -- in other words, do you want to have an evidentiary hearing with witnesses on a motion to modify when it wasn't necessary to get the TRO, but it does make sense to require the motion to be supported by affidavit or verification.

MR. GILSTRAP: I'm saying you ought to do one or the other. I mean, if you're going to hear evidence you don't need verification.

CHAIRMAN BABCOCK: Well, Richard.

MR. ORSINGER: I'm not entirely sure that

every motion to dissolve is going to be based on a fact hearing, and this -- the way this is written it allows you to present the evidence either by affidavit or through evidence, and so I could see the two lawyers getting together and somebody produces an affidavit without it, and the judge says, "Well, then I'm going to dissolve my TRO." We're not really requiring a fact hearing where they swear in witnesses, are we? That's just an option.

MS. WINK: No, you're right.

MR. ORSINGER: So if it's an option, does it matter if one of the options is affidavit and the other option is testimony?

MR. GILSTRAP: Okay. I see what you're saying, and it's disjunctive.

MS. WINK: Yes.

MR. GILSTRAP: If you're going to put on evidence, you don't necessarily have to have an affidavit.

MS. WINK: Correct.

MR. GILSTRAP: Okay.

CHAIRMAN BABCOCK: Judge Peeples.

HONORABLE DAVID PEEPLES: It is so easy to get a TRO, I think it ought to be equally easy to get it set aside, and I know we tell judges, you know, don't do these ex parte, try to get the other side, but in the real world there are going to be a lot of TROs that are issued

ex parte where there was not a -- a very serious effort to talk to the other side, and so you grant it, and one reason you grant them so easily is you know they're easy to set aside because it's interlocutory and you've got the discretion to do it, and I don't know how many times this has happened to me, but you do that, and you believe the person who told you something, and you grant a TRO, and later that day or the next day someone says, "Did they tell you that it's been posted for foreclosure six times and this is the seventh time that they're trying to get it" or "They haven't made payments for two years." Well, they're telling you some things you did not know, and I think (g), as I read it, ties the judge's hands or tries to, and that makes it harder to set aside something that you probably shouldn't have granted in the first place, and I think that should not be done.

CHAIRMAN BABCOCK: That's a big thought. How would you fix it?

HONORABLE DAVID PEEPLES: Well, I wouldn't -- I would make it clear that the judge has the discretion to just set it aside instanter. I'm not sure how much of this you want to put in the rule, but I don't want language in the rule that appears to tie the judge's hands and commit the judge to two days and all this other stuff because sometimes there's just not time to talk to the other side,

and you've got a plausible story, you grant it, and when you hear the rest of it faster than two days you think, "My gosh, I've been had," and the right thing to do is to set it aside and maybe set a hearing three or four days down the road or something, and I just -- language that appears to tie the court's hands it seems to me is a mistake. We don't have this right now, do we? Is the -- are the judge's hands tied?

MS. WINK: Actually, I think we do. Let me pull this up.

HONORABLE DAVID PEEPLES: Well, I think it's not observed. If it's in the rules it's not honored.

CHAIRMAN BABCOCK: Justice Bland.

HONORABLE JANE BLAND: I agree with Judge Peeples.

CHAIRMAN BABCOCK: Yeah, in the speech arena, which Sarah Duncan alluded to earlier, occasionally, not very often, but sometimes somebody will sneak in there and get a prior restraint and, boy, the media defendant is going to want to be in there the next nanosecond. Judge Sullivan picked up -- when he was a district judge picked up the pieces of that within 24 hours I think. Yeah, Richard.

MR. ORSINGER: At the policy level are we saying that the evidence to set aside a TRO has to be

broader or weightier than the evidence that it took to grant it or should they be the same?

MS. WINK: No. For pleading purposes the evidence should be of equal dignity, right. If you're going to file a motion, verify it. That's what I would recommend.

MR. ORSINGER: Well, the TRO doesn't require what the last three lines require, does it? It doesn't -- or does it? Or which one of these does it require? "The motion to set aside the TRO must be supported by specific facts that are proven by an affidavit, verified denial, testimony, or other evidence." Do we require that of the TRO issuance?

MS. WINK: Of the pleading to support it, yes. Whether it's the application you have to verify and you have to set forth the facts that satisfy each of the elements, so it seems pertinent you've got to keep the equal dignity of pleadings, and what the existing rules say is, you know, you've got to have -- you don't want to have somebody who's gone to the trouble to file verified pleadings or pleadings that are supported by an affidavit and then have somebody come in very quickly and say, "Hey, this is all wrong, Judge," and the judge be able to turn it over without making sure they've met at least the same standard.

MR. ORSINGER: Well, we would compare Rule 1(b) to Rule 1(g), and 1(b) requires verification by persons with personal knowledge of relevant facts.

MS. WINK: We've taken out that "personal" word.

MR. ORSINGER: You took out the personal knowledge? I was looking at the revised one here, I think.

MS. WINK: Right.

MR. ORSINGER: Okay, sorry. But at any rate, they don't match. I wonder if there would be any value in having (g) match (b) by saying that a motion to set aside a TRO must be verified or supported by affidavit.

MS. WINK: I think you're saying the same thing. When you look at 1(b) -- or, I'm sorry, yeah, 1(a), here's the application, here's what you have to plead, here are the issues, right, and then the verification language in 1 that you're seeing says those facts supporting the application have to be verified or supported by affidavit of one or more persons with knowledge of relevant facts.

MR. ORSINGER: Having knowledge of relevant facts?

MS. WINK: Yes.

MR. ORSINGER: And all I'm saying is, is it seems to me like (g) actually requires something different and more than (b).

MR. GILSTRAP: It permits something.

CHAIRMAN BABCOCK: Frank.

MR. ORSINGER: It permits it, but doesn't require it?

(Multiple simultaneous speakers)

THE REPORTER: Wait, wait. I can't get everybody.

CHAIRMAN BABCOCK: Yeah, one at a time, guys.

MR. GILSTRAP: To get the TRO you have to have a sworn pleading, and you can't hear evidence.

MR. ORSINGER: Okay.

MR. GILSTRAP: To dissolve the TRO the judge could either say, "There's a sworn affidavit, I'm going to dissolve it on that basis," or "I'm going to hear evidence." He has the option to hear evidence to dissolve it.

CHAIRMAN BABCOCK: Justice Brown.

HONORABLE HARVEY BROWN: I was going to make that point, and I think one of the advantages of that is if you have that prior restraint and you run down to the courthouse so fast you don't even have time to draft an affidavit, you throw something together quickly, and you pop a witness on the stand.

CHAIRMAN BABCOCK: Yeah, in that instance you just say, "Look, this is media defendant" or any defendant,

really, "and they're restraining speech, and here's the Supreme Court case that says you can't do that."

HONORABLE HARVEY BROWN: Right.

CHAIRMAN BABCOCK: It's a matter of law. It's not a factual --

HONORABLE HARVEY BROWN: Right, but if there's an evidentiary issue, instead of taking time to write up a long affidavit you just rush down there and put on a witness.

CHAIRMAN BABCOCK: Yeah. Yes.

MS. WINK: Exactly.

MR. DYER: The current rule contains the same language with regard to the first two sentences on the motion to dissolve or modify. I don't see how it ties the court's hands because it says "two days' notice or shorter if the court directs." If the media defendant wants to run down to the courthouse the minute after the TRO has been granted, the court can just direct or call up the plaintiff's attorney and tell them to come on down.

CHAIRMAN BABCOCK: Which rule are you reading from?

MS. WINK: 1(g).

MR. DYER: It's the tail end of current Rule 680. And the other aspect that was brought up about the court ruling instanter, I don't know, I kind of wondered if

you were also saying sua sponte. I think that's a different issue. I think both parties ought to be down there, but I think that this gives both sides -- gives the restrained party the chance to go down there immediately.

CHAIRMAN BABCOCK: Does 680 have a requirement that the motion to dissolve be verified?

HONORABLE DAVID EVANS: No.

MS. WINK: It's elsewhere. I wish I had brought it. It's somewhere else in the rules where you get --

HONORABLE JANE BLAND: It's in 690.

MS. WINK: Is it 690? And, again, we're only talking about facts, right? Chip, your suggestion that, you know, we've got a prior restraint, there's no fact that's going to change that. You wouldn't have to present evidence or a sworn motion.

CHAIRMAN BABCOCK: In most instances.

MS. WINK: Yes. Yes.

CHAIRMAN BABCOCK: Not in all.

MS. WINK: But in some occasions there's going to be a question of fact, and we're making sure that the parties have made equal dignity of proof there, and then the court can act as quickly as it wants, and it can act on affidavits, just like it could at the TRO step, or it could act on the testimony of a witness.

CHAIRMAN BABCOCK: 690 appears to me to apply to injunctions, not TROs.

HONORABLE JANE BLAND: Okay. So we're only talking about dissolving TROs and not dissolving injunctions?

CHAIRMAN BABCOCK: Well, it's in the section regarding -- never mind, you're right.

HONORABLE JANE BLAND: I thought we were --

CHAIRMAN BABCOCK: Yeah, you're right.

HONORABLE JANE BLAND: But it is a lower -- all it requires is a verified denial rather than affirmative proof by affidavit or evidence.

CHAIRMAN BABCOCK: Right.

HONORABLE JANE BLAND: And so it would seem like that's easier -- an easier burden than an affidavit or evidence if you're trying to get something quickly done. The other point is that if the judge grants the temporary restraining order and then has some reason to question the veracity of the affidavit or the -- why wouldn't the judge be able to dissolve it? I mean, why should we require --

CHAIRMAN BABCOCK: Right.

HONORABLE JANE BLAND: -- a full evidentiary hearing or affidavits?

CHAIRMAN BABCOCK: Yeah. Bill.

PROFESSOR DORSANEO: Well --

CHAIRMAN BABCOCK: I assume that was a rhetorical question.

HONORABLE JANE BLAND: Right. I mean, we dissolve things all the time when we realize that, oh, we took a wrong turn.

CHAIRMAN BABCOCK: Yeah.

HONORABLE JANE BLAND: Not all the time, but occasionally.

CHAIRMAN BABCOCK: Bill.

PROFESSOR DORSANEO: I see where the language "verified denial" probably came from, but I would say at the end, "A motion must be verified, supported by affidavit, testimony, or other evidence." The verified denial, I mean, it's --

MR. GILSTRAP: Yeah, that's the wrong word.

PROFESSOR DORSANEO: It may well be that it's not a denial that you have. You say, "Well, I have this, you know, agreement that said we could do this that nobody mentioned to you" or "I had this release that they signed," which wouldn't exactly be a denial, but --

CHAIRMAN BABCOCK: Yeah. Okay. Any other comments?

MR. LOW: Chip?

CHAIRMAN BABCOCK: Yeah, Buddy.

MR. LOW: Judge Peeples raised a question

that says "a party may move." By implication are you saying, like Judge Peeples said, he found out he made a mistake. He can't just dissolve it? You would certainly have to give notice, but does that by implication prevent a judge from doing it?

MS. WINK: Actually, that was raised at the last meeting. I apologize for not reminding you of this. The current draft that you don't have before you says, "A party or person bound by a temporary restraining order can move." So that took in the input from the last meeting.

MR. LOW: Okay. Well, I don't remember everything that happened at the last meeting.

CHAIRMAN BABCOCK: Well, but that's not directly address -- that does not directly address your point because a person bound --

MR. LOW: No, my point is Judge Peeples said what if he found out, my god, this has been done seven times, I made a mistake. The parties aren't moving. Can he -- certainly you would have to give notice so the parties would know they're not bound, but can a judge dissolve it? Here it says a party may move to dissolve. Does that mean a judge couldn't do it on his own with notice or what?

CHAIRMAN BABCOCK: Yeah, the -- I had a case once where the trial judge granted one ex parte --

MR. LOW: Yeah.

CHAIRMAN BABCOCK: -- and was falsely told that the defendant agreed to it, and when the judge found out the next day that defendant had not agreed to it on his own motion dissolved the TRO.

MR. LOW: See, this makes it -- this doesn't say he can do that, and I just wonder by -- is that a problem?

CHAIRMAN BABCOCK: Richard.

MR. MUNZINGER: If a judge has plenary power over a final judgment and has the authority to enter any order to preserve his jurisdiction, or why would he not have the power to set aside a previous order? To me he's got the power to do that whether we say it or not in this rule.

MR. LOW: I think so, but, Richard, there will be things also you would certainly have to give notice so the parties would know or that, and by implication it -- by implication this could be argued, what I'm saying. Maybe that's not a good point, but it does concern me.

CHAIRMAN BABCOCK: Well, it would be easy to fix it by saying a party -- "a person bound by the order or the court on its own motion."

MR. LOW: On its own. That would be what I would -- what I would suggest.

CHAIRMAN BABCOCK: That's not a bad idea. Yeah, Judge Peeples.

HONORABLE DAVID PEEPLES: I want to make this point, too. From the judicial viewpoint, if I know I can cure a mistake I'm much more likely to grant relief in the first place.

MR. LOW: Right.

HONORABLE DAVID PEEPLES: And I think that's a good thing, because sometimes it needs to be done, and, I mean, I take the position that Richard Munzinger just expressed. It's interlocutory. I can set it aside and just do it if I need to, but it eases -- I mean, it's easier to get the judge to take action in the first instance if a judge knows I can correct a mistake quickly if I have to, and I think that's a good thing both ways.

CHAIRMAN BABCOCK: Richard Munzinger.

MR. MUNZINGER: If you're going to add some reference to the court's power sua sponte to set aside an order, be careful in drafting it, in my opinion at least, that you don't make that authority contingent upon two days' notice to a party. You don't want to tie a judge's power on his own orders to giving notice to somebody.

MR. LOW: I agree.

MR. MUNZINGER: And you wouldn't want to tie the effectiveness of the order to somebody having notice of

it.

CHAIRMAN BABCOCK: Yeah.

MR. LOW: Yeah.

MR. MUNZINGER: You want to be careful about that.

CHAIRMAN BABCOCK: Good point.

MR. GILSTRAP: I'm not sure that the judge is going to set aside his order. I need to have notice of it.

MR. ORSINGER: Before or after?

MR. MUNZINGER: The effectiveness of his setting it aside should not depend upon your notice of it.

MR. ORSINGER: You need notice before or after he sets it aside?

MR. DYER: How do we know what the judge's decision is based on? Are we saying that the judge can just set it aside for any reason and the parties --

MR. MUNZINGER: Why not? He can do that to his final judgment. He can do it to his temporary injunction. He can do it to a contempt order. He can do it to anything he wants. He's the judge, for 30 days.

CHAIRMAN BABCOCK: You hand-deliver a letter to the court at 9:00 a.m., and you say, "Your Honor, I represent the XYZ Company. You entered a TRO ex parte last night. I understand it was represented to the Court that the XYZ Company consented to the TRO. This is to advise

the Court that the XYZ Company did not and does not consent to that." Now, upon receipt of that letter, can the judge dissolve the TRO?

MR. MUNZINGER: Why not?

CHAIRMAN BABCOCK: I would think he could.

MR. DYER: Well, if it's within the judge's powers anyway for the very reasons you suggested, why do we need to add it to the rule? Because we'll have to add to it all of these other rules that speak about modification or dissolution.

MR. MUNZINGER: I agree with that observation. I think it's an unnecessary addition to the rule.

CHAIRMAN BABCOCK: Richard Orsinger.

MR. ORSINGER: You know, there's a difference between (d) and (g). (d) actually is a restraint on what the judge must have before the judge can grant a TRO, and (e) tells you what has to be in the motion in connection with the judge's dissolving the TRO. I don't think we ought to change (g) into a rule that has a bunch of conditions on dissolving the TRO. I think we ought to leave the judge out of it. Whatever you want to require of the movant, the court ought to be free to set it aside. The court may turn on the TV that evening and find out that there's a huge public outcry over granting the TRO and may

go into the courtroom the next morning at 9:00 and set it aside. I think they have the right to do that. I don't think we should require that it be based on proof or anything else, to dissolve it. I feel differently about granting it.

CHAIRMAN BABCOCK: Okay. Any other comments? Yes.

MR. FRITSCHE: I'm thinking about rewriting the rule a little bit to address Judge Peeples' concerns, because when you read (g) the "on two days' notice" is out of place. It seems to me -- and I've kind of redrafted or rearranged the wording. Let me just read this out loud. It's kind of a stream of consciousness, but basically in (g) we're saying, "A party may move for dissolution or modification of the TRO. If the grounds for the motion to dissolve or modify are based on an issue of fact, the motion must be supported by specific facts shown by affidavit, testimony, or other evidence. The court must hear and determine the motion as expeditiously as possible. After hearing on two days' notice to the party who obtained the TRO or shorter if the court directs, the court shall determine the motion or the court has authority to" -- and I haven't gotten that far, "has authority to dissolve the motion sua sponte." It just seems the "two days' notice" is out of place at the very beginning of (g).

CHAIRMAN BABCOCK: Okay. Yeah, Richard Orsinger.

MR. ORSINGER: There's two things about that. In response to that suggestion I'm really nervous about any suggestion that the court has to do something after something is done. I think the court should be able to dissolve a TRO even if nobody files anything. Another thing is, is that I don't know that I like the word "hear" in here. "The court must hear and determine," because hear usually insinuates that there's a hearing, and I don't know that we're anticipating hearing. It may be that the judge is just going to receive this in chambers and rule without a hearing.

And then I guess the last thing I'll say is that practices vary around the state, as we've all figured out about this whole TRO practice, but in the Dallas area typically what happens is you get a phone call around 3:00 o'clock saying that "We are headed to the courthouse to ask the judge to set aside the TRO, and if you'd like to be here, this is your notice," and usually that notice is given after they're in the car while you're still in your office or you're in a deposition. So what happens is that you end up having an ex parte hearing on dissolving the temporary restraining order on 45 minutes notice, delivered to someone that's not available to go down there, and the

judges will decide whether they're -- I mean, it's not ex parte in Dallas because you were given notice even if you couldn't come, but at any rate these practices vary all around the state, but I don't think that the way we're envisioning that this rule is going to be implemented is necessarily the way it's going to happen at all.

CHAIRMAN BABCOCK: Okay. Anybody else have any other comments about this? Yeah, Richard.

MR. MUNZINGER: I do have a question. I am assuming that based upon the discussion the rule is going to be edited, rewritten, and brought back for consideration later.

CHAIRMAN BABCOCK: That would be my expectation.

MR. MUNZINGER: I just wanted to point out that I do agree with this concept of two days' notice to the party that suggests that you have to give two days' notice before you file the motion, and I think that's not what the intent is. The intent is two days' notice before the hearing, if there is a hearing.

CHAIRMAN BABCOCK: Yeah, Justice Bland.

HONORABLE JANE BLAND: I agree with Richard that a lot of these motions to dissolve are not done in two days. They're done in hours.

CHAIRMAN BABCOCK: Right.

HONORABLE JANE BLAND: And I think, again, we're making it more difficult to dissolve or modify the order than it was to get it in the first place, and that to me doesn't make a lot of sense --

CHAIRMAN BABCOCK: Yeah.

HONORABLE JANE BLAND: -- given the way that sometimes these things are entered without a lot of thought and without a lot of information.

CHAIRMAN BABCOCK: Right. If it's ex parte, there's been no notice to the other side. Judge Evans.

HONORABLE DAVID EVANS: I'd just eliminate this part of the rule about notice on the motion. The parties know that under motion practice they can file a motion and they know they can ask for an expedited hearing that the judge can set. I just don't know that it has to be in the -- in this portion of the rules, and I will say, Richard, I think Justice Bland is right. We hear these things within an hour and a half after we think we've got something that was uncontested, we get informed that people were available. We'll have people back down there to talk about it and see what the problem was.

CHAIRMAN BABCOCK: Yeah.

MR. DYER: But don't you run into local rules that will not hear any motion unless it's 10 days' notice, and it's real hard even if you file an emergency motion.

Then they tell you, "Well, that's also subject to the 10 days' notice," and sometimes you can't get it done. If the rule itself --

HONORABLE DAVID EVANS: I'm not familiar with that problem. I am familiar with the -- I think I'm correct, the general rule requires three days notice unless shortened by the judge for good cause shown, and that's enough. I mean, that's enough for me to shorten it to an hour and a half, if that's what's appropriate under the circumstances.

MR. DYER: But the way this rule is drafted right now I don't have to move the court to shorten the time. The rule itself provides two days or shorter as the court directs, so I can go straight to the court, and the court directs by saying, "Call the other attorney, we're going to hear this thing."

HONORABLE DAVID EVANS: And that's true, and it does. It does give a shorter time. And that may be a sufficient for majority to say, "Well, now we've got the judge tied to not letting it go more than two days," but I think the judge is sitting there looking at the basis for shortening the time and can make a decision as to whether or not it's an emergency that even needs to be heard on the third day or in 25 minutes, and I just don't -- that's my thought on it.

CHAIRMAN BABCOCK: Yeah, I wonder if the issue of the judge dragging his or her feet is not taken care of by the sentence that says, "The court must hear and determine the motion as expeditiously as practicable." How can you say anything more than that really? I don't know.

HONORABLE DAVID EVANS: I think you would on a -- I just I think this is surplusage to me on what normally goes on, but if it's felt by the practitioners that there's a bad judge problem out there then maybe that's what they need to do.

CHAIRMAN BABCOCK: Yeah. Bill.

PROFESSOR DORSANEO: This is -- I'm getting a feeling of nostalgia here, but the first rule project that I ever worked on with Luke Soules was in 1976 on the Committee on Administration of Justice, and we did attachment, garnishment, and sequestration rules that we're kind of going back to again, and those rules say on modification, "Unless the parties agree to an extension of time, the motion must be heard promptly after reasonable notice to all parties, which may be less than three days," okay, which had civil procedure Rule 21 in mind. So I'm sure all of the other of these rules we'll be talking about, you know, reasonable notice which may be less than three days, which is Luke Soules' original rule-making work in 1976.

CHAIRMAN BABCOCK: Richard.

MR. ORSINGER: I would certainly support that. I don't like the idea that two days is sort of a minimum here. I realize that it's a minimum subject to being shortened, and I've already said it's my belief it's going to be shortened down to moments, not days, but it does -- it does seem to me that it would support someone saying, "Judge, you can't set that hearing for two days," and I don't know that that's fair. The other side got it without any notice at all in some situations, and so the role that two days' notice or shorter requires somebody to go to the court and say, "Judge, I need this."

"Have you given notice?"

"Yes, well, I gave them 45 minutes' notice."

"Well but you need to give them two days' notice."

"Well, but there are reasons why you should hear it on less than two days."

"Well, you can't tell me about that until the other lawyer is here; otherwise, it would be an ex parte communication as to why it needs to be less than two days." So then they wait for the other lawyer to show up, and in arguing over whether they should wait two days they're arguing the merits of the motion to dissolve. So to me the minimum of two days is not reality. It's not good policy.

We ought to just take it out and say that the court should dispose of it. The language that they worked out to make it constitutional on the other would be fine with me, too.

CHAIRMAN BABCOCK: Elaine's got the answer.

PROFESSOR CARLSON: I don't have the answer, but that is the current rule, Richard. I mean, Rule 680 currently mirrors that language. "On two days' notice to the party who obtained the TRO without notice or such shorter notice to that party as the court may prescribe." So if you're telling me you're hearing these shorter now, you'd hear it shorter under the parallel language --

MR. ORSINGER: Exactly.

PROFESSOR CARLSON: -- but if the sense of the full committee is it should be some other time period, I'm just telling you that's why the two days period is in there. It mirrors --

PROFESSOR DORSANEO: And the reason it's in there is because it's in Federal Rule 65, which somebody mindlessly copied more or less.

CHAIRMAN BABCOCK: And who would that mindless person be?

PROFESSOR CARLSON: It's got to be Bill.

PROFESSOR DORSANEO: We don't know.

CHAIRMAN BABCOCK: Nobody fessing up.

MS. WINK: I think he's made an admission to

us here.

CHAIRMAN BABCOCK: I think the only guy on this committee that's been here that long is Dorsaneo.

PROFESSOR DORSANEO: No, not even. Roy McDonald was in charge of these rules actually, and he hasn't been with us for quite sometime.

CHAIRMAN BABCOCK: Well, what's the appetite for the committee? Should it be at any time, or should it be two days with shorter if the court directs, or should it be silent? What should it be? Richard Munzinger.

MR. MUNZINGER: If silent it's got to be subject to the three-day rule.

CHAIRMAN BABCOCK: Yeah.

MR. MUNZINGER: Because all motions are required to give three days' notice --

CHAIRMAN BABCOCK: Yeah. That's a good point.

MR. MUNZINGER: -- unless there's some emergency, what have you, so silence is equal to three days. Two days is indicating something extraordinary under the rules themselves.

MR. ORSINGER: But if you just say "at any time" and then say "as expeditiously as practicable" then basically you're not putting a minimum time on it, but you are emphasizing it should be done quickly.

MR. MUNZINGER: No, but I would argue that the rule places -- "It's a motion, isn't it, Mr. Munzinger?"

"Yes, Judge."

"Well, aren't you supposed to give your three days' notice to your adversary on a motion, Mr. Munzinger?"

"Yes, sir."

"Well, then he's entitled to three days' notice. I can't do this."

CHAIRMAN BABCOCK: No, but, Richard, the second says the rule should say "at any time." It should replace the "on two days' notice" with "at any time a party may move for dissolution or modification."

MR. MUNZINGER: Sure, that says I can file the motion, so I've got a motion pending. It's a motion. "It's three days' notice, Mr. Munzinger." You can move it any time, but that doesn't change the three-day notice rule, and that's what my adversary is going to say to the judge. "You can't grant that ex parte motion of his, Judge, and you've got to give me three days' notice." The rule either needs to say on shorter notice than the standard required for other motions, otherwise it's going to be interpreted as requiring three days' notice.

CHAIRMAN BABCOCK: That's a good point. Levi.

HONORABLE LEVI BENTON: How about "with the same level of dispatch afforded the issuance of the restraining order, but in no circumstances ex parte"?

MR. MUNZINGER: I don't have any problem with that. I mean, I do see a problem if you don't specify that you are contemplating notice less than three days because the rules have a built in three-day notice provision.

CHAIRMAN BABCOCK: That's a good point. Silence equals three days. That's right.

MR. MUNZINGER: Yeah.

CHAIRMAN BABCOCK: Yeah, Jan, and then Richard.

HONORABLE JAN PATTERSON: I agree with that, and I think I like the balance in this rule, and I think that David Fritsche's proposed rewriting of it is a better balance, but I think that the two days, and it makes it clear that it's shorter if necessary, and I think that's a clear direction to the court. I think it's also a clear direction to the court to hear it as expeditiously as practicable, and I even like the suggestion that there be affidavit or testimony or other evidence because, one, the reason we might have this problem is because a lie was told or -- but we need evidence in response to that, and it doesn't say that it has to be much.

It can be an affidavit, it can be testimony,

it can be a variety, but that way everything turns now on real evidence, an affidavit which may have been the problem with the original ex parte submission, and it's only called for if it is a -- if it's based on matter of fact. So that should be a matter of some type of proof, so I think this elevates the process, and it provides a good balance of speed. It makes it easy to modify or dissolve, but it elevates the process.

CHAIRMAN BABCOCK: Richard.

MR. ORSINGER: On Levi's point about it shouldn't be done on an ex parte basis, in this particular situation where there's no minimum notice period is it just notice of your request -- I mean, you can make an ex parte request to have an immediate hearing. You just can't have the hearing without notice to the other side.

CHAIRMAN BABCOCK: Yeah.

MR. ORSINGER: And since we're not saying minimum three days' notice, it could be minimum 15 minutes notice, and you can't get down there in 15 minutes, so it becomes functionally ex parte, even though it's not technically ex parte, but, you know what, this is going on all over the state. They do it different ways in different counties, but they're all doing it right now, and so I'm not seeing any terrible injustices. The solutions to it are different depending on which county you're in, but we

are essentially having immediate on-demand motions to dissolve TROs all over the state right now under the rules we've now got, and I guess it's working okay because I've never heard of anybody having a problem.

CHAIRMAN BABCOCK: Judge Peeples.

HONORABLE DAVID PEEPLES: Something else that's going on, I can't say all over the state, is judges cutting to the core, and maybe there are lawyers there and they've got some witnesses and so forth, and the judge says, "Let's don't hear from the witnesses right now. What do you say, lawyer so-and-so? What do you say?" And you just cut through it, and this right here -- you know, affidavits, gosh, that costs money and takes time to get your client in, and sometimes you need to dissolve the TRO so they can go ahead with a foreclosure at 10:00 o'clock. There's just not time.

CHAIRMAN BABCOCK: Bill, and then --

HONORABLE DAVID PEEPLES: This is one for trusting the judges, it seems to me.

CHAIRMAN BABCOCK: Bill.

PROFESSOR DORSANEO: Richard, if it does happen that you're getting this notice, and I don't suppose the current rule says "reasonable notice," it says "two days' notice or shorter," that it? Well, somebody could literally interpret that as, well, I can just give you

notice when I'm in the car.

MR. ORSINGER: Well, they do do that, yeah.

PROFESSOR DORSANEO: That doesn't strike me as something we ought to encourage --

MS. WINK: It's shorter if the court grants.

PROFESSOR DORSANEO: -- that somebody is making something of a charade out of a notice requirement when that's unreasonable to do that. I think the language in the other rules that I mentioned, you know, a little bit jokingly, is better. I think reasonable notice is the right standard. Reasonable notice might be very short under particular circumstances. If we need to have a hearing, you know, really before you can provide somebody with a -- you know, with notice that's likely to get them here for the argument, and then I think, you know, "which may be less than three days" is perfectly adequate, because it deals with Rule 21 and that's consistent with all the other rules we're going to be reading here, too. So it's not just because Luke Soules wrote it. I think it's because it makes sense as the right standard.

CHAIRMAN BABCOCK: Okay. Richard, and then Justice --

MR. MUNZINGER: Rule 21 says -- in pertinent part "shall state the grounds, therefore, shall" -- I'm sorry, I lost my place. "An application to the court for

an order and notice of any hearing thereon not presented during the hearing or trial shall be served upon all other parties not less than three days before the time specified for the hearing, unless otherwise provided by these rules or shortened by the court." So that's Rule 21. So Rule 21 contemplates the situation that Judge Peeples -- who learns now that this debtor has six times prevented the foreclosure sale, and he's learned that at 9 o'clock on Tuesday morning, and the foreclosure sale is set at 10:00 o'clock. Judge Peeples has it under Rule 21 within his power to say, "Call your adversary to tell him to get here in 10 minutes or 15 minutes because I'm going to set this aside if he ain't here, or if he is here." Or do it by telephone. And then Judge Peeples can rule under Rule 21 because the court has shortened the notice. That would be my interpretation of that rule. So if the rule that we are now discussing by its silence incorporates Rule 21, it would include the power to shorten the time period by definition.

CHAIRMAN BABCOCK: Justice Christopher, and then Justice Gray.

HONORABLE TRACY CHRISTOPHER: I like having the two days in there because it impresses upon the judge the need to act quickly. If you're just reasonable, well, you know, I'm reasonable. This was reasonable notice. I

mean, when you have two days in there, it -- you know, it says this is an extraordinary situation, I've got to put it to the top of my docket, I've got to hear it. It seems to be working. We have the same two days, you know, in the rule now. It seems to be working. It's generally shorter than two days on a motion to dissolve, and you know, throwing you back into the regular rule or reasonable notice doesn't impart the urgency.

CHAIRMAN BABCOCK: Okay. Justice Gray.

HONORABLE TOM GRAY: I was just trying to tinker with the language, and I'm not sure how much is in this current draft from where you are now, but in the comments of leaving the two days out, "A party may move for dissolution or modification of the temporary restraining order at any time," remembering at least as drafted this applies to the party that got the TRO as well as the party that it is against, because you could be -- you could come in asking for an enhancement or a greater burden under the TRO. So this is not just the party against whom the TRO has been granted, and then a sentence that would say something along the order of, "Upon notice" -- well, let's see, "The court may determine the motion upon notice, if any, as determined by the trial court as appropriate under the circumstances."

And that seems to get the expedited concept

that the trial judge may need as an impetus for doing this, but since that's what the trial courts are doing anyway, I mean, it's basically the trial court's determining what level of notice is appropriate under the circumstances, and that seems to be what's working. Now, we can change this even though it's in -- the way it's in the rules now and do what seems to be working in the field.

CHAIRMAN BABCOCK: Okay. Yeah. Judge Brown. Justice Brown.

HONORABLE HARVEY BROWN: I guess it shouldn't say "verified denial" then because it could be the plaintiff that's making a motion to modify.

HONORABLE TOM GRAY: I think they already talked about taking the words "verified denial" out.

HONORABLE HARVEY BROWN: Right. Right. But I wasn't sure how we were fixing that, but good point.

MR. ORSINGER: But that's all disjunctive, so verified denial is one option, but supporting affidavit is another option that would work for the plaintiff.

HONORABLE HARVEY BROWN: Or just verified pleading.

MR. ORSINGER: Okay.

CHAIRMAN BABCOCK: Justice Christopher.

HONORABLE TRACY CHRISTOPHER: Well, I mean, if you're coming in for a TRO, you could just move ex parte

for a new TRO. You don't have to give two days' notice to anybody. I mean, so that's -- that's kind of -- the way the rule is currently written it refers only to the adverse party who has gotten the TRO against them who wants to change it, so I think it should stay that way. If you've gotten a TRO, you haven't served the person yet, you know other bad facts are happening, you just come in with a new application, an amended application, and you get another TRO with more things in it and then try to serve them.

CHAIRMAN BABCOCK: Richard.

MR. ORSINGER: You know, this causes me to want to bring up expressly something that's kind of tacit, which is that it's always been my view that once there is a party or a lawyer on the other side that you can't go down to the courthouse and get a TRO without giving them notice or you have a problem with ethics rules about ex parte communications with the court. It's always been my view the reason you don't have that problem when you're the plaintiff is that the defendant hasn't been served yet and they don't have a lawyer, but once they've been served, once they're a party then in my mind the ethical constraint for both the lawyer and the judge are triggered, and I don't know whether this is an effort for the rules to reflect that you must give notice to somebody else if they're -- if they've been served and especially if they

have a lawyer, but it does seem to me like if everyone agrees that it's impermissible ex parte communication to go to a judge in the middle of a pending suit and ask for a TRO to be issued, our rule ought to be consistent with that.

Let me also remind you, I was very surprised when he said it, but Judge Steve Yelenosky, who is a judge in Travis County, told us that he won't grant a TRO even to a plaintiff where the defendant hasn't been served yet unless they get him on the phone or give him notice to come to the courthouse or get them on the phone and he can talk to them, and he doesn't even take sworn testimony. He just listens to what the lawyer says, talks to the guy on the telephone, and decides whether to grant a TRO or not. So I know that in his view he doesn't even like to grant a TRO to a plaintiff with no defendant yet without hearing from the defendant, so that hadn't been mentioned before. I've always thought there was sort of a parallel between the notice requirement and the ethics rules, but I think we ought to make it explicit.

CHAIRMAN BABCOCK: Buddy.

MR. LOW: Yeah, it says "on two days' notice to a party who obtained the temporary restraining order." What if I get one and I find out 30 minutes later or a day later that my client lied and the facts weren't -- I'm duty

bound to inform the court, so I think it's up to me to move to dissolve it. But this doesn't -- it says "the party who obtained it." You've got to give notice to that party, so what if they say "two days' notice to opposing party" or something, because otherwise I'd be giving notice to myself.

CHAIRMAN BABCOCK: Well, that's what Justice Christopher said, though, that you can always -- I guess your point was you can always as a plaintiff amend your TRO or do something.

MR. LOW: Well, you can't amend the TRO if signed by the court, so you can't -- a plaintiff can't amend it. I've got to ask the court to amend it.

CHAIRMAN BABCOCK: Yeah, good point. Richard Munzinger.

HONORABLE TRACY CHRISTOPHER: You file an amended application, and you ask for more relief, and you come down and you dissolve the other one and do a new one before anybody is served.

MR. LOW: But I find out my client lied, and I have a duty to file something with the court right then. Who do I give notice to? It says the party I'm moving to dissolve it or something. I give notice to myself because I'm the one that obtained it.

HONORABLE DAVID EVANS: You know, if this

is -- if this rule requires the judge to set it within two days, I don't read it that way. It requires the moving party to give two days' notice.

MR. LOW: Notice.

HONORABLE DAVID EVANS: So you can go down there and file it and get a hearing date and give two days' notice. If you want the judge to hear it within two days you need to say that the judge must hear it within two days.

CHAIRMAN BABCOCK: Richard Munzinger.

MR. MUNZINGER: I was just going to speak to Richard Orsinger's --

HONORABLE DAVID EVANS: All we're supposed to do is hear it as expeditiously as practicable.

PROFESSOR DORSANEO: And that language might only modify "determine."

HONORABLE DAVID EVANS: Yeah. So if that's what you want to do, is require us to hold it within two days, prioritize the docket, and take us over and do all that, go ahead. Okay.

CHAIRMAN BABCOCK: Richard, were you done?

HONORABLE DAVID PEEPLES: I want to raise the question of whether it's a good use of our time to talk about commas and placement of words rather than the heart of the matter.

CHAIRMAN BABCOCK: Yeah, we've wandered away from our big thoughts thing. I was going to assign some homework and suggest that maybe this subsection (g) get redrafted overnight, and we can look at it in the morning, but in order to make the redrafting appropriate, the two days -- two days' notice concept is in the current rule. It seems to be working okay. You don't want -- you do want to give a signal that it's less than the three days that is the default position under Rule 21, and I started out being skeptical about the two days' notice, but now I think maybe that makes sense. Does anybody want to direct our scriveners to do something other than the two days' notice?

I don't see anybody with their hands up in the air on that, and I think a point was well-taken that the "as expeditiously as practicable" may only modify "determination" as opposed to "hearing," and that ought to be fixed.

MS. WINK: Chip, notice it says "hear and determine." The court must hear --

MR. ORSINGER: You could fix that grammatically by saying, "The court must," comma, "as expeditiously as possible," comma, "hear and determine the motion."

CHAIRMAN BABCOCK: Right.

MR. ORSINGER: And then that would cover it.

CHAIRMAN BABCOCK: That would take that ambiguity away from it. And then the open issue, because I haven't heard consensus on this, is whether or not there has to be an affidavit or testimony or other evidence. Is that -- do we agree that that should stay in, or should it -- the current rule does not have this, right?

MS. WINK: Correct.

CHAIRMAN BABCOCK: The current rule just says "verified denial."

MS. WINK: Correct.

CHAIRMAN BABCOCK: So should we add this requirement to motions to dissolve or modify? What's the consensus on that? Consensus to leave it in or to take it out? How many people say leave it in? Leave it in, one, two, three, four, five, six, seven, eight, nine. Take it out?

Well, the vote, there is nine, leave it in, and eight, take it out, but if the Chair votes, it would be nine to nine, so there's some direction for the Court from our committee, and for the time -- for your homework assignment, take out "verified denial" but leave the rest of it in.

MR. GILSTRAP: Babcock's rules of order.

CHAIRMAN BABCOCK: Huh?

MR. GILSTRAP: Babcock's rules of order.

CHAIRMAN BABCOCK: Yeah, my rules of order. Let's go to the next big thought.

MS. WINK: I don't think there are any issues on sub (h), correct? We've discussed it before, 1(h). If not, we're ready to move to injunctive Rule 2, monumental moment. Do you see any problems with the application? Because it is -- it mirrors for the most part what we've done in the TRO, within the TRO rule, and it stays parallel for the most part with existing language. The last -- let's see, okay, I'm not seeing any challenges to the application.

MR. GILSTRAP: Wait a second, wait a second. Are you asking about subpart (a)?

MS. WINK: Yes, sir.

MR. GILSTRAP: Okay. Yeah, I have a question. The purpose of a temporary injunction is to preserve the status quo. Orsinger and I are fighting over ownership of a house, and I want to tear the house down. He goes to court and says, "Wait a minute, I don't want him to tear the house down until we decide who owns it," so the judge enters a temporary restraining order, and to do that he's got to show the grounds for the injunctive relief. He's got to show why irreparable harm -- he'll suffer irreparable harm. He doesn't have to say no adequate remedy at law because the statute doesn't say apply that to

real property, but why should he have to show a probable right of recovery? Why should he have to show that he owns the house? That's something that's going to be decided later. The question now is whether the house should be torn down. Why do we need to -- why do we need to go on and require the applicant to show that he owns the house as well?

MR. LOW: But somebody that had no connection to the house, they come in and do that, and they can stop you from tearing it down?

MR. GILSTRAP: You're afraid of some type of fraudulent claim or something like that?

MR. LOW: Well, you don't want to rely on that. I mean, people -- I've heard fraud is committed regularly and you know --

CHAIRMAN BABCOCK: It's your house and you mean you can't tear it down if you want to?

MR. GILSTRAP: Well, I mean, we dispute over whose house it is.

CHAIRMAN BABCOCK: Well, but he's got to -- but to keep you from tearing it down then --

MR. GILSTRAP: Well, that's something that's got to be decided by the court later, who owns the house. Now we just don't want it torn down.

CHAIRMAN BABCOCK: Richard.

MR. MUNZINGER: The rule says state why the applicant has a probable right to recover on a cause of action, and the Supreme Court has held several times that in order to get an injunction you must have a cause of action. There is no right to get an injunction unless you have a cause of action. I have that case now on appeal now in the El Paso Court of Appeals in a case of first impression under partnership laws, whether or not one partner owes duty X to another partner, is there such a cause of action; and that's my defense, I don't have any obligation to do this. So they clearly have to show that they have a cause of action in order to obtain an injunction. That's a basic requirement of a number of Texas Supreme Court cases.

MR. GILSTRAP: I understand. I'm just wondering -- I'm asking why it should be. That's my question.

MR. MUNZINGER: Well, because I'm a free person, and if I'm the partner and I've got a right to do something, who are the courts to tell me to quit doing it? This is America, for god's sakes.

MR. GILSTRAP: Okay. I forgot that argument.

MR. MUNZINGER: Hey, are we free or aren't we free? You know, you're free, and the courts ought not to be able to tell you not to do something if they don't have

the authority, and you ought not to be able to get a judge to tell me not to.

CHAIRMAN BABCOCK: Don't get him stirred up.

HONORABLE TRACY CHRISTOPHER: Well, you know, I mean, I agree. Lots of times people will come in and -- like a noncompete is the biggest one that we see in ancillary court, and there's legal impediments to the enforcement of the noncompete, so you don't grant a TRO. So you have to show probable right to recover, and if there's legal impediments on the noncompete, then off they go competing, and if I was wrong in not granting the TRO then you'll get damages.

MR. BOYD: In fact, I would say if we were going to change the TRO rule to make it workable, and maybe not TI, but I would say, "A judge may not grant a TRO solely on the basis that the judge believes it's important to maintain the status quo," because everybody always confuses the purpose of a TRO with the grounds for a TRO, and you get into a TRO hearing and all the plaintiff argues is, "Judge, we've got to maintain the status quo." I bet 10 percent of any TRO that I've ever been a part of did the applicant truly have to show a probable right of recovery or irreparable harm if the TRO wasn't granted. So I say that a bit facetiously, but I think this question that Frank has raised kind of demonstrates what I think is the

weakness, why I think the TRO rule is too easily manipulated to begin with.

CHAIRMAN BABCOCK: Judge Peeples.

HONORABLE DAVID PEEPLES: Jeff and Frank have raised a real good question here, and as I see it is, you know, I think Frank is saying if the consequences are huge, the judge ought to be able to err on the side of preserving the status quo even if the judge is not convinced the plaintiff will probably -- has a 51 percent chance of winning. I think that's what you're saying.

MR. GILSTRAP: Yeah.

HONORABLE DAVID PEEPLES: And, you know, consider the stakes are not that great if I postpone a foreclosure until the next month. Those are small stakes. Tearing down a house or starting, you know --

MR. GILSTRAP: That's irreparable harm.

HONORABLE DAVID PEEPLES: -- bulldozing trees, that's bigger, and I'm inclined to agree with Frank that the court ought to have the discretion to weigh the importance of the status quo and not be bound by some rule that says no matter what the stakes, I don't care if they're big or little, plaintiff, you've got to convince me that you're probably going to win at the permanent injunction stage; otherwise, I don't have the discretion to preserve the status quo. I think that's what Frank is

saying, and if he is, I think it's a serious -- it deserves discussion.

CHAIRMAN BABCOCK: Richard.

MR. MUNZINGER: I don't want to wrap myself in the flag all the time, but, really, think about this for just a second. Judge Peeples says, "Well, it's just a foreclosure and so the stakes aren't that great." Maybe, maybe not. Maybe I have a contract to sell that piece of property, which I own, and the debtor hasn't paid the debt on and has restrained me six times from foreclosing on it, and I've got an opportunity to make a million dollars, but if I don't sell it before X day I won't get that opportunity. Is that a small stake?

What you're doing when the courts intervene in people's transactions, whether they're -- and divorce is a different animal. Child custody is a different animal, but the ordinary thing of business is and the ordinary thing of commerce is leave people alone as best you can, government, and if you do, you'll have prosperity and activity and what have you. If you don't and you get judges involved in it, you're going to tie everything up. These are free people. That's why the Federal courts and the state courts -- I've had a law license for 40-some-odd years. I went to law school and I was told you can't get the courts involved and get a temporary injunction unless

you prove a probable right to recover, and that's true in the state and Federal courts. It's phrased differently, but the standard in effect is the same. Leave free people alone. Don't make it easy for judges to come in and stop commerce.

CHAIRMAN BABCOCK: Judge Peeples, do you want to give him his million bucks back?

HONORABLE DAVID PEEPLES: That's the freedom of the strong to exercise their will over the weak, and we need to give judges the discretion to not let that happen, and if you can convince the judge there have been six foreclosures and I've got this big deal, I think a lot of judges, most of them I hope, wouldn't grant it, but to tie their hands when the stakes are truly big seems to me is not a good thing.

CHAIRMAN BABCOCK: Kent.

HONORABLE KENT SULLIVAN: Frank, is your problem with the standard a probable right to recover as opposed to saying a requirement of making a prima facie showing? I mean, we're not talking about eliminating any showing, are we, or are we?

MR. GILSTRAP: I could go that far. I could go that far. I think Judge Peeples could, too, in some instances, if you're about to have the house destroyed. Maybe I don't have time to come in and show probable right

of recovery.

HONORABLE KENT SULLIVAN: But wouldn't it be reasonable to -- I mean, even under your scenario to at least require some prima facie showing. I mean, we're talking about a temporary injunction here, not a TRO, right?

MR. GILSTRAP: Right. Right.

HONORABLE KENT SULLIVAN: Okay.

CHAIRMAN BABCOCK: Roland, and then Richard.

MR. GARCIA: What I've noticed is it's very hard for the judge, just hearing five minutes of argument, to make a judgment call on a probable right to recovery. There's always two sides. So that's where you factor in the bond amount as the protection. You know, the judge may be right, the judge may be wrong, but the bond amount will protect the weak over the strong, et cetera.

CHAIRMAN BABCOCK: Yeah. Richard, and then some other people over here. Jeff.

MR. MUNZINGER: Again, I remember as a boy walking by the courthouse in El Paso, and there was a statue of justice, and it was a woman, and she had a blindfold on her eyes and a sword and some scales, and the scales were even, and she was blind. She wasn't supposed to know who was in front of her and regardless of who was in front of her was supposed to have equal scales. They

were equal.

Now, Judge Peeples is Judge Peeples, and his wife will tell you that he is human and that he is capable of making an error, and he will tell you -- because I know him. He will tell you "I'm human," but here is my point, why would you give a human being the unfettered authority to take people's rights away from them when for centuries the common law has said "don't do it"?

CHAIRMAN BABCOCK: Jeff was next, and then Roger.

MR. BOYD: Yeah, but my experience has been in the theft of trade secrets situations that someone mentioned, employee is leaving employer, there is no noncompete, but the employer wants to stop them from all the business they've been started and they run in, or even in defense of some state actions back when I was at the AG's office, but I've argued more than once, "Judge, on the one hand my client doesn't care if you enter an order telling him not to beat his wife because he doesn't beat his wife. On the other hand, he doesn't want you to enter an order telling him not to beat his wife because he doesn't beat his wife, and entering an order that under the rules has this probable cause basis implies that there's some reason why people might think he does."

That's why I think it doesn't work when

courts just simply say, "I've only got five minutes to hear this. I've got to maintain the status quo. What's it going to hurt?" It hurts a lot more than -- I think Judge Peeples was saying, well, can't I consider really what's at stake, tearing down a house versus -- there's always a lot more at stake than it may appear.

CHAIRMAN BABCOCK: Roger, and then Richard, then Bill, and then Buddy.

MR. HUGHES: Two things.

CHAIRMAN BABCOCK: You're batting cleanup, Buddy.

MR. LOW: All right.

MR. HUGHES: I don't see how you could ever prove -- in theory I don't see how you can prove an irreparable harm without a probable right of relief, because usually the existence of the injury is tied to the existence of a cause of action. I mean, as they said earlier, if it's his house, he can tear it down if he wants. It's only irreparable injury if it quite possibly is not his house.

And the second thing -- and this is -- I know this may be a round about why argue, leaving it as a statement as a probable right of relief is to impress upon -- shall we say to set the bar high for the fact finder, because I can tell you when you get up on appeal

the court of appeals only looks to see if there's -- they don't weigh the evidence. They look to see there is a prima facie case of right of relief or not. If there's a prima facie case right of relief, we don't weigh the evidence. That's what the trial court did. So in some sense all the trial court needs is a prima facie case. That's enough to survive it on appeal, and how much after that? Well, you know, I think there's some meaning in the phrase of a probable right of relief. If the judge goes, "Yeah, well, there's something there, it would get past summary judgment, but I sure wouldn't buy it," is that really going to be enough to hold everything up? I mean, for some judges it may be, and there may be nothing we can do on appeal, so I -- I think that sort of thing argues in favor of leaving the statement as probable right of relief.

CHAIRMAN BABCOCK: Richard, and then Bill, then Buddy, then Kent.

MR. ORSINGER: I wanted to expand the discussion just a little bit, and I've got three points. The first one, did we already fix the idea that when we say "application," that "may be sought by motion or application," application includes your pleading, and you don't have to file an additional document?

MS. WINK: Exactly, and that stuff that we talked about will it be a footnote or comment, I've already

moved to where that will be in this rule as well as the other in comment form.

MR. ORSINGER: Good deal. Okay. Now, then on (a)(1), which is now talking about what the application must contain, and we've been debating on what the grounds for granting relief are, so we've gotten ahead of ourselves, that really comes under (d), but "State why immediate and irreparable injury," that's both must be pled and it must be found, or at least the order must recite why, and I would just ask this question, why does a temporary injunction require proof of immediacy?

MS. WINK: This is not a change from existing language --

MR. ORSINGER: I know that.

MS. WINK: -- and law.

MR. ORSINGER: I know that, but I don't accept that as a constraint on our debate.

MS. WINK: Okay.

MR. ORSINGER: And so I'm raising the question of why does a temporary injunction have to be -- why do you have to prove immediate harm? A temporary restraining order has to be immediate because it's only evanescent, but a temporary injunction may be enforced for a year and a year and a half, and if I can show that nine months from now if my case isn't resolved by then that I'll

be harmed, I'm not sure I understand. Are we saying that -- is the immediacy requirement really what we want for a temporary injunction, or is that just something that we have for TROs that we don't need for temporary injunctions.

And then the third point I wanted to make is that I'm not entirely sure that all injunctions are in favor of the plaintiff. There's sometimes where injunction could be issued to preserve evidence. There's sometimes where a defendant might want to enjoin certain actions of the plaintiff that are going on that have nothing to do with the ultimate right of recovery but merely that this person that sued us is doing these unlawful things, and we want to stop it while the lawsuit is going on. I can envision situations where the defendant might want to get an injunction or where someone might want an injunction that's ancillary to the proceeding rather than derivative of the ultimate relief granted, like just preserving evidence, for example. So if we -- does everyone have to show that they're going to recover something out of a lawsuit before they can get an injunction, I ask?

MS. WINK: In a word, yes, and let me answer the two issues that you've presented. The reason we have the immediacy element is because we don't need injunctive relief for things that are past. If we don't have ongoing

wrongs and ongoing problems there's no need to worry about preserving the status quo. So the immediacy language also goes to those issues of proof. It also goes to the issue of do I really need to preserve the status quo between now and trial. Now, the issues you brought about I might be in the lawsuit and a defendant who wants an injunction, under existing law if I have a counterclaim I have the right to plead for that injunction if there's appropriate grounds for injunctive relief.

By the other token, the types of relief that you're asking for that might be ancillary to a lawsuit, such as to preserve evidence, those fall under the court's general jurisdiction to take -- to take action necessary to -- necessary over their case, what they can sanction a party for destroying evidence, they can preserve the evidence, they can do what's necessary in the case. When it comes to the injunctive relief issue I think we're talking about two different issues.

MR. ORSINGER: So an order that a judge would issue that says you're not allowed to destroy evidence, that's not an injunction?

MS. WINK: It works somewhat like an injunction, but technically speaking, no. The court is making a ruling as a sanction and/or to preserve evidence for justice.

CHAIRMAN BABCOCK: So oftentimes not done as a sanction, but often done by TRO.

PROFESSOR HOFFMAN: But if it's prelitigation.

CHAIRMAN BABCOCK: Prelitigation. Bill.

PROFESSOR DORSANEO: Well, this is very interesting sitting here listening to this, because luckily we --

CHAIRMAN BABCOCK: Well, we're glad you're amused.

PROFESSOR DORSANEO: We have a five-hour civil procedure first-year course at SMU, so I actually teach Federal Rule 65 and preliminary injunctions, and listening to all this it occurred to me that our method of reasoning is considerably different from at least some of the Federal circuits, because what we call probable right and then probable injury are not regarded as components or separate elements that need to be met, but as factors that need to be taken into account under a balancing test such that if the judge looked at the -- who is going to win this case, you know, is this a shitty case or a possibly good case or a great case, and I think many times it's going to come out, hmm, this is a pretty interesting figure as to who is going to win this case. If you look at that as a factor you'd say, okay, that's 50/50, so I'll multiply .50

times the harm to the plaintiff if the injunction is not issued. Okay.

And then I'll do the same on the defense side, but if the harm is a lot more on one side than the other, well, that would determine the balance, you see. But if it was a crummy case, even if the plaintiff's harm was significant, point, you know, 1 times significant won't yield you on the balance, you know, more than .9 times a -- you know, a different number, and I think that's the way the Federal courts look at it. They also take into account the public interest in some circumstances. So that matches what Kent said about do you mean prima facie case, do you mean probable this and that?

It matches what the -- Judge Peeples is saying and what Frank is saying, and we probably can't reinvent the whole system and redo the whole thing, but maybe we need to do some adjusting as -- there will be in many cases, oh, I can't tell who's going to win this case, right? Huh? But I can see that if I don't grant a preliminary injunction, a temporary injunction, there's going to be real harm here. Okay. Well, that ought to be a case where preliminary injunction is appropriate in my view, but if it's a crummy case, okay, so I can see they don't have a case or they can't really win this case or what they're claiming is harm isn't really any harm, you

know, that is in the running, well, that's different.

Judge Posner has this -- he puts this in mathematics. Of course, he would, but I understand it better now after listening to y'all talk.

CHAIRMAN BABCOCK: Buddy.

MR. LOW: One of the --

CHAIRMAN BABCOCK: The education of Bill Dorsaneo.

MR. LOW: -- things that Jeff raises, I disagree with Judge Peeples on, and I seldom do that because I'm always going to be wrong, is what's important to one might not be important to another. General Motors, it might take a big loss to be that important to them, but to an individual just being enjoined from doing something may be really important, his world, and our rules don't distinguish between amounts of recovery and so forth. Now, Judge Peeples says that it shouldn't -- you shouldn't have probable recovery. It doesn't say that the burden of proof -- it doesn't say a prima facie case like we used to have in venue, and the judge has much discretion in determining whether it's just totally fraud or there's testimony that if believed would support a recovery, so the judge has much discretion in that, and you can weigh all those things, but there's nothing wrong with probable recovery being in there.

CHAIRMAN BABCOCK: Kent Sullivan. And then Judge Wallace. You didn't have -- Judge Wallace.

HONORABLE R. H. WALLACE: I think you have to keep the probable right of recovery or probable right of relief because, like Judge Peeples said, some cases, maybe as a foreclosure, and you say, "Okay, I can grant this and if I'm wrong, you know, they can foreclose next month," but there's other cases where I've seen them where there's no question that somebody was going to suffer irreparable harm. The question was who's right and who's wrong, who is ultimately going to win on the merits of this lawsuit, and that's where you basically try your whole case at the temporary injunction hearing, and it usually turns on whether there was a probable right of -- you know, who's going to win, so I don't see how you can eliminate that as a factor. It would be nice if we had some kind of a sliding scale, I guess you call that judgment maybe, but I think you have to --

CHAIRMAN BABCOCK: Frank, you get to pull your house down. Or you get to pull Richard's house down. Yeah, Justice Gaultney.

HONORABLE DAVID GAULTNEY: Well, I think the problem in Frank's example is the issue is moot at that point. I mean, you might have been able to prove it up at trial, you know, if you had gone through the process, but,

you know, the house is destroyed.

CHAIRMAN BABCOCK: Well, now we're talking about damages here.

HONORABLE DAVID GAULTNEY: Well, maybe.

MR. GILSTRAP: The house is -- loss of the house is irreparable harm. You can't be compensated for losing your home by damages.

CHAIRMAN BABCOCK: Well, we can make you feel better.

HONORABLE DAVID GAULTNEY: I think we think of it as an equitable remedy. The approach that he's talking about the Federal courts using makes sense. I mean, this is a factor in the consideration, and irreparable harm is also a factor. It's an equitable remedy. The court is trying to maintain the status quo until it can actually decide the case, and it's not deciding the case on the preliminary injunction.

CHAIRMAN BABCOCK: Richard the First, then Richard the Second.

MR. ORSINGER: The mootness issue has bothered me, but I didn't express it, but it's been mentioned. You know, the appellate court has the authority to issue an injunction to preserve its jurisdiction without regard to whether they think the appellant will likely win or not win. I don't think we make a provision for that in

our rules that a trial court can issue an injunction and preserve its jurisdiction. It probably has that power inherently regardless of what our rules say, but would anyone -- I mean, maybe the debate would be different if the issue was that if the act is not enjoined then it will destroy the court's jurisdiction and that this is assuming that damages are not an adequate remedy, because if damages are an adequate remedy I guess it doesn't really matter if they destroy the subject matter or not; but real estate, by law damages are not an adequate remedy. So it seems to me like we should at least recognize that the trial courts have the power to issue an injunction to preserve its jurisdiction without regard to likelihood of success, because the appellate courts do.

CHAIRMAN BABCOCK: Richard Munzinger, and then Justice Christopher.

MR. MUNZINGER: Well, first, in response to Richard Orsinger, I think it is a basic principle of law that all courts have the authority to issue those orders necessary to preserve their jurisdiction, but if you want to do that and pervert the injunction rules with that concept, think about this for just a minute again, and I'm really being very serious about it. I'm not trying to wrap myself in the flag, but look, you've got people that are -- they own property, they're dealing in contracts,

they're doing this, they're doing that; and suddenly one of the parties comes and says, "Government, come in and stop this person from doing this. Government, restrain this person from buying or selling or painting or not painting or doing or investing or inventing or licensing. Stop it." And the question then becomes "Why should I?" And the answer should be "Because you are more likely to win in the long run than the other guy." That's Texas law today. These are the words that we've used for a long, long time.

So the question then is to the plaintiff, you better shoot all your guns at the temporary injunction hearing, and those of us who practice know this. You don't hold back in a temporary injunction hearing. You have got to fire your best shot, and if your best shot isn't good enough to restrain a free person or entity from doing what it's going to be doing, so be it. I hear a lot of talk here about changing the substance of the rule to prevent harm; and my answer to that is, again in all due respect, what makes judges better qualified to do this than anybody else? Leave people alone, and honor the law as it is. The plaintiff can prove his or her case, and if they can't, they can't, and the other person goes on with their right.

If you say, well, but then I lost my jurisdiction, well, but at the same time your loss of jurisdiction, trial court, comes at some commercial

expense, real meaningful potential harm to free people who have worked hard for their property or for their right to publish or their right to create. They've worked hard for it. Who qualifies you to take it away from them? The law. Well, then honor the law.

CHAIRMAN BABCOCK: All right, Justice Christopher. Respond to that.

HONORABLE TRACY CHRISTOPHER: I was just going to -- many times the temporary injunction hearing is the end of the case, so to say, Justice Gaultney, that it's not, I mean, as a practical matter many times it's the end of the case. You hear all the evidence on the noncompete or you hear all of the evidence on, you know, whatever it is, and you make a ruling, and if you let the person go off and compete, that's generally the end of it. If you don't, they're stuck not competing, and by the time trial rolls around the year has gone by, and that's the end of the case. So I think it's very important to have probable right of recovery in, and, of course, one of the things -- this is just sort of a practical thing that we used to always tell the new judges that would come in, is if you're unsure, offer them a trial in 45 days, and they work like dogs for the next 45 days to get all their discovery done, and they have a real trial and then with some interim protection in that 45-day time period, but that -- to me

it's key to have that in there.

CHAIRMAN BABCOCK: Okay. Justice Hecht.

HONORABLE NATHAN HECHT: Could I say that on some of these things we do talk about whether we should revisit the procedural way we've done things and we shouldn't be bound by the case law up until now, but on the substantive basis for granting temporary injunctive relief, I think it's probable, to use a word that's being thrown around, that the Court will go with the -- with the law, to the extent it can be determined. This is not something we're going to change by rule, I wouldn't think; and there's some ambiguity in the case law; and probably the Federal law is more developed, because for one thing the Supreme Court of Texas does not have jurisdiction over most of these cases, so we just don't have much of an opportunity to address it. So to the extent that we're going to say anything about it in the rule, which the Federal rule doesn't do and our rule hasn't, we probably ought to get as close to existing law as we can, if we can tell what that is.

CHAIRMAN BABCOCK: Okay. Very good. Anything else about Rule 2(a), which we've been talking about, and how about -- how about (b)? Are there any big issues to talk about on (b)?

MS. WINK: The only issue is whether you want

to make it parallel to the changes that we have made in injunction Rule 1, meaning take a look at the draft you have, make a little line through the word "personal" on the second -- on the second line and a little line at the end of the second line from the word "that are admissible in evidence," kind of pencil through that, and see if you're happier with it in that form. If you take those -- if you strike those two issues out, that's how it is in the TRO rule, the parallel TRO rule that you've discussed at length.

MR. GILSTRAP: Could you go over that again?

MS. WINK: Yes.

MR. GILSTRAP: I'm sorry. Please.

MS. WINK: On the second line strike the word "personal," and beginning at the end of that line strike the words "that are admissible in evidence." That's how the TRO rule currently is with your approval, and unless somebody gives me really strong reasons otherwise, I would go on that again.

CHAIRMAN BABCOCK: Yeah, Roger.

MR. HUGHES: Well, maybe, once again, I'm imprisoned by local practice, but usually people will roll the application for the TRO, the TI, and the pleadings all into one document, and there will be one verification or one affidavit, and so I'm wondering what's to be gained by

having one standard for verifying an application for TRO and another for a TI unless perhaps in other parts of the state they are separate documents.

The other thing is that I'm not sure what's to be gained by requiring the facts and the verification to be admissible in evidence because my recollection of the Rules of Evidence is they generally are kind of just sort of guidelines at pretrial hearings and that the court can loosen them up a bit and that the Rules of Evidence permit that. So I'm not sure what's to be gained by requiring them to state facts that are admissible in evidence when you get to the hearing and they aren't -- they don't have to be admissible into evidence under the strict Rules of Evidence.

The other thinking is I have a personal preference for affidavits based on personal knowledge rather than repeating hearsay and et cetera, et cetera, but if -- but what I understand to be the procedure, and tell me if I'm wrong, is that simply a verified pleading is your ticket to punch to get to the hearing, and that the -- and that the -- whether the order rises -- stands or falls on appeal will depend on the evidence at the hearing rather than the evidence in the petition.

CHAIRMAN BABCOCK: Okay. Richard Orsinger.

MR. ORSINGER: I would support the idea that

verification for the temporary injunction is identical to the TRO. I think that in many instances it's just the pleading serves as the verification for both of those, and I don't think that it helps -- we certainly don't want people to have to file three documents to get to a temporary injunction, and I don't really think they ought to plead different things in different ways in their pleading, and I will also say that probably most of the injunctions that are issued in Texas are family law injunctions, and it's not saved by the exclusion to the Family Code, and the form book has all the allegations necessary to get an application for a TRO or an injunction in the pleadings. They don't provide for you to do a separate document for each, so I think that the bulk of the TROs and temporary injunctions that are sought in the state are patterned after the family practice manual published by the State Bar of Texas, and it's all going to be in the pleadings, and so it seems to me like the allegation requirements and verification requirements should be identical so that you only have to do one set of pleadings and you're done.

CHAIRMAN BABCOCK: Does anybody really disagree with that? Yeah, Judge Wallace.

HONORABLE R. H. WALLACE: Well, I don't know why, because the temporary injunction you've got to have an

evidentiary hearing.

MR. GILSTRAP: Yeah.

CHAIRMAN BABCOCK: Right.

HONORABLE R. H. WALLACE: Whereas for the issuance of the TRO, that's ex parte. I mean, I think you ought to have the affidavit. The current rule just says a temporary injunction has to be verified by affidavit, which can be a one paragraph affidavit. I may be wrong, but I think there's even case law that says even an unverified affidavit can be cured by the evidence that you put on at the hearing.

CHAIRMAN BABCOCK: Right.

HONORABLE SARAH DUNCAN: Right.

HONORABLE R. H. WALLACE: So, I mean, I don't -- other than having a verified, I guess, application, I don't know why for temporary injunction you need this other language, because, like you said, it's going to stand or fall on the evidence that's offered at the hearing on that.

CHAIRMAN BABCOCK: Yeah, Frank.

MR. GILSTRAP: Well, I think that's just historical. I mean, the rule has always said that you have to have a -- you can't have an injunction without a verified pleading, and over the years the -- you know, the case law has said you have to support the temporary

injunction with evidence heard in court and not by -- you can't issue temporary injunction based on affidavit, so there's certain redundancy here. I mean, if there's no temporary injunction, strictly speaking I don't really see why you need an affidavit because you're going to hear the evidence anyway. Maybe that's some kind of threshold requirement to get to the courthouse door, that we're not going to hear your temporary injunction without a verification, but strictly speaking, there's no need for it. I mean, if you're not going to get a TRO, you can hear the evidence and then the affidavit becomes surplusage.

CHAIRMAN BABCOCK: Bill.

PROFESSOR DORSANEO: Two historical points here. One, this verification language that's on page four under temporary injunctions is the same language that was added to the other ancillary proceedings rules when they were revised in -- effective -- could it be that long ago? 1977, and at the bottom of -- and this language was put in every one of the rules. Luke and I put it in every one. At the end of the rule on the application for writ of sequestration, "The application and any affidavits shall be made on personal knowledge and shall set forth such facts as would be admissible in evidence, provided that facts may be stated on information and belief if the grounds of such relief are specifically stated." Now, that was not and is

not now, I don't think, in the injunction rules.

MS. WINK: Correct.

PROFESSOR DORSANEO: Something similar, which I like instead of dislike, happened on the motion to dissolve or modify the temporary injunction, where it does talk about reasonable notice, you know, which can be less than three days. So that's the first historical point. This language, you know, probably ought to be the same as the language for the temporary restraining order for a bunch of reasons, and this alternative language has a different genesis. It may be superior in some sense to the language that we've talked about so far, but probably not, okay, probably not.

The second historical point is it's always been a little bit confusing about what Rule 682 means, no writ of injunction shall be granted unless we have a petition verified by affidavit and complaining -- and containing a plain and intelligible statement. It's my understanding that when the 1940, effective in 1941, rules were adopted, instead of just mindlessly adopting Federal Rule 65 we did kind of an amalgamation; and the practice went to be more like the Federal practice where you got a temporary restraining order on affidavits, but then you had a hearing for a -- for a temporary injunction, which the Federal courts call preliminary injunction. I'm not

completely positive about that, but I don't think that that was Texas law before, so I don't think you -- I don't think that you had for these preliminary injunctions actual evidentiary hearings until the 1940 rules were adopted, and that's -- that's why the verification doesn't make sense for temporary injunctions, because we have -- because we have evidentiary hearings, but that's also why, if we didn't have them once upon a time, the rules spoke broadly about -- the rules spoke broadly about verified pleadings, but that's probably not a complete -- completely accurate historical view, but I think it's -- it's part of it anyway.

CHAIRMAN BABCOCK: Roland.

MR. GARCIA: I would agree with the comment that you don't need language of the verification or requirement of a verification just for the temporary injunction. A party has every right to not seek a TRO and just, you know, put allegations for a TI in a permanent injunction and may never have a hearing on the TI, it just never gets set, and it doesn't automatically get set by the court. That's only if you get a TRO. So the verifying something that doesn't need to be verified I think creates a step that doesn't exist now, and we -- I think it made sense to put the verification in the dissolution, but that was pertaining to the TRO in our last discussion. Those

are two separate -- it's two separate deals.

CHAIRMAN BABCOCK: Roger.

MR. HUGHES: Well, I can suggest one purpose for retaining the requirement of verification on personal knowledge, and that is even if people don't ask for a TRO, if they want a TI, they're going to pursue it rather quickly. That's been my experience, in which case you're not going to have a lot of time to do discovery. As has been noted earlier, the TI is usually -- the TI hearing is the lawsuit for all practical purpose; and if a person could say, well, what I'm going to do is I'm going to file the lawsuit and then we're going to have a TI hearing three days after you appear and you won't have time to do discovery and there will be no affidavits attached in my petition, it could put you at somewhat of a disadvantage.

Now, I suppose that could be cured with the trial judge saying, "No, I think you get to do a little discovery first," or "We're going to do discovery, truncated discovery first," but I think it could serve the purpose of at least you know who the witnesses are because they just -- they gave the affidavit attached to the petition. That could be one reason to retain it.

CHAIRMAN BABCOCK: Yeah, Dulcie.

MS. WINK: And, by the way, existing Rule 682 says that no writ of injunction shall be granted unless the

applicant is presenting his petition to the judge verified by his affidavit. Our existing rules require the verification language, the sworn pleadings, whether it's a TRO or a temporary injunction, as well as permanent injunction. So this is pleading rules, and, Bill, the issue you brought out about plain and intelligible statement of the grounds, that has been interpreted by our appellate courts to mean each of the elements, imminent irreparable injury, no adequate remedy at law, probable of recovery.

PROFESSOR DORSANEO: I agree with that, but I just don't consider myself bound in these meetings by what someone else has ruled.

MS. WINK: I understand. I understand.

CHAIRMAN BABCOCK: Richard.

MR. ORSINGER: To speak to what Roger was saying about whether to require personal knowledge or not, as you know from my previous comment, I think the verification requirement should be identical for temporary injunctions as it is for TROs so that they would have to be pled separately; and the debate that led to our conclusion to drop "personal" out of there was because sometimes you're going to seek emergency protective relief because you hear by hearsay that something is about to happen but you can't force people to answer your questions, give

depositions, sign affidavits; and so you go to court saying, "I have a reasonable ground to believe that this is going to happen if the court doesn't intervene."

By the time you get to the temporary injunction hearing you're going to replace the granting of relief with sworn testimony. So in a sense this personal knowledge provision will be replaced in the hearing with witnesses that if they don't testify from personal knowledge, there will be an objection, their testimony will be excluded, and the evidence won't be considered. This is just a pleading requirement, and so it seems to me that if the pleading requirement is just going to be one pleading requirement for both the TRO and temporary injunction it should not require personal knowledge in the pleading requirement, but obviously in the hearing a witness can only testify if they have personal knowledge, and I think it really cures the problem. So to me it's a question of whether there should be different verification requirements for a TRO from a temporary injunction, this whole issue of personal knowledge versus not.

CHAIRMAN BABCOCK: Rusty.

MR. HARDIN: Would it be appropriate to call the question?

CHAIRMAN BABCOCK: It might be, I don't know. Judge Peeples is out of the room. He hates it when we do

that, but is there any -- is there any substantial sentiment for not agreeing to this language or not having the language as proposed? I mean, I've heard people say --

PROFESSOR DORSANEO: What language, the verification?

CHAIRMAN BABCOCK: -- maybe we could do it better.

MR. GARCIA: The verification language?

MS. WINK: Let me be specific, Chip.

CHAIRMAN BABCOCK: Subpart (b) with the -- subpart (b), Rule 2(b), with the personal -- the word "personal" and quote "that are admissible in evidence," quote, words deleted.

MR. GILSTRAP: Chip, I think, I mean --

CHAIRMAN BABCOCK: Apparently not, Rusty.

MR. GILSTRAP: -- we have to decide whether or not the TRO and the temporary injunction have the same language. That's one question. The second question is do we require personal knowledge?

PROFESSOR DORSANEO: Yes. Those are the two questions.

MR. GILSTRAP: Yeah. Yeah.

MR. ORSINGER: We're post-hearing now.

MR. GILSTRAP: In the affidavit. In the affidavit, yeah.

MR. ORSINGER: Okay.

CHAIRMAN BABCOCK: We're post what hearing?

MR. ORSINGER: Well, people are mixing up what you must plead with what you must prove. You're not going to get your temporary injunction unless you have real witnesses that testify to admissible information.

CHAIRMAN BABCOCK: Right.

MR. ORSINGER: But the question is, is there something so special about the granting of temporary injunctions that we should require that the application for them be sworn, and I think a lot of people could feel either way. I mean, it's going to issue on the evidence, not on the pleadings anyway, so does it matter if it's sworn, but if it's got to be sworn, I'm advocating that the standards be identical to TRO so we don't have multiple pleading standards for what's essentially the same relief, just for a longer period of time.

CHAIRMAN BABCOCK: And that's what Dulcie was advocating.

MS. WINK: In fact, the remainder of the language after the semicolon should all be stricken, too, because that was taken out of Rule 1 as well. And just so that you-all have it, the remaining language that is in your Rule 2, sub (b), after the semicolon that refers to pleading on information and belief that is not in the

current rules was put in the draft because there are cases out there that say, "Hey, you can't plead on information and belief for these, but if you come to a temporary injunction hearing you can overcome that with evidence," but if we're going to be parallel, you take out the word "personal," you end it at "knowledge of relevant facts" and then it will match Rule 1, and I think we'll be better.

CHAIRMAN BABCOCK: So you put a period after "facts" and delete everything else?

MS. WINK: Yes.

CHAIRMAN BABCOCK: All right. Here's what the vote's going to be. Everybody that thinks subparagraph (b) should read as follows: "Verification, all facts supporting the application must be verified or supported by affidavit by one or more persons having knowledge of relevant facts," period, end quote, raise your hand.

Everybody that's opposed to that, raise your hand.

MR. JEFFERSON: I'm confused.

MR. ORSINGER: I think there's a misunderstanding. My version of 1(b) still has something after the period.

MS. WINK: We ruled it out. It doesn't reflect our current changes that we have put into the -- since our meetings.

MR. ORSINGER: Okay.

MS. WINK: I'll bring you a redline next time.

CHAIRMAN BABCOCK: We were voting on what I just read, what I just said. And what I just said, there were 16 people in favor of it and 6 opposed, and so that's the sense of the committee by us.

PROFESSOR DORSANEO: Are we voting on the language or voting on whether we could have a verification and the language, too?

CHAIRMAN BABCOCK: We were voting on the language.

PROFESSOR DORSANEO: Suppose I wanted to vote not to have verification at all for --

MR. GARCIA: Yes, we need a vote on that.

CHAIRMAN BABCOCK: All right. Everybody that thinks the verification requirement should be deleted from the rule regarding temporary injunctions, raise your hand.

All those opposed? There were 8 in favor and 15 opposed.

PROFESSOR DORSANEO: So 15 are overruling established law.

CHAIRMAN BABCOCK: The eight. 15 are overruling the 8.

MR. HARDIN: Established law has verification.

HONORABLE TRACY CHRISTOPHER: Look at 682.

CHAIRMAN BABCOCK: Let' move on quickly.

PROFESSOR HOFFMAN: You meant 15 are overruling common sense.

CHAIRMAN BABCOCK: Whatever.

MR. GILSTRAP: You want clarity there.

CHAIRMAN BABCOCK: Any big issues on notice and hearing?

MR. ORSINGER: I have a comment.

CHAIRMAN BABCOCK: Yeah, Richard, what's your comment? Is it a big issue?

MR. ORSINGER: Comment is whether "in the hearing" is surplusage because I think it kind of goes without saying when you say "cannot be granted without evidence" that it would be evidence presented at the hearing. I'm a little concerned about what we mean by "each element." Is that already in the current language, "each element," because I don't know if "each element" means what's listed in (d) or whether "each element" means what the common law requires or whether "each element" means what we require in the application. And I don't know if it's in the current law or not, but I think there's some ambiguity in my mind as to what you mean when you say "each

element."

CHAIRMAN BABCOCK: What you're talking about is the sentence that says, "An application for temporary injunction cannot be granted without evidence of each element in the hearing."

MR. ORSINGER: Yeah, and I'm saying we don't need to say "in the hearing." We all know that evidence is presented in the hearing. The question is "each element." Is it each element that must be pled under (a)(1) or each element that must be recited under (d)? I'm sorry, is it each element that must be pled under (a) or each element that must be recited under (d) or each element that the case law says is an element to securing a temporary injunction?

MS. WINK: Your elements are under (a). Those are what you must prove.

MR. ORSINGER: That was not at all clear to me.

MS. WINK: Right.

MR. ORSINGER: So -- and let me ask you that. Why would it be (d)? This (d) is what sets out the findings that drive the issuance of the order --

MS. WINK: Because --

MR. ORSINGER: -- and why wouldn't we care about proof of what the court must find and not proof of

what the plaintiff must plead?

MS. WINK: Oh, it's in there, but when I go to a hearing I'm not going to be proving up, "Judge, I think the hearing date should be X and Y." That's the judge's job. There will be things in the order that the parties have never had the burden to prove because they're really in the court's gamut, so the elements are listed in (a), the same things we've been talking about every time, the plain and intelligible statement, imminent and irreparable injury, no adequate remedy at law, probable right of recovery.

MR. ORSINGER: Is that -- do you think that there's any advantage in telling people that that's what you mean by "each element," is each element that must be pled under (a), or you think it goes without saying?

MS. WINK: I'm comfortable, if you're more comfortable saying "each element of the application."

MR. ORSINGER: Well, it would help me. I don't know if anybody else has that same --

MS. WINK: Okay.

MR. ORSINGER: -- issue or not.

CHAIRMAN BABCOCK: Bill Dorsaneo.

PROFESSOR DORSANEO: At least we talked about this issue, but I agree with Roger that the verification ought to be the same for temporary restraining order and

temporary injunction; and we took out the word "personal" in temporary injunction, which I think will actually not accomplish anything; and we have it in (b) -- we have it in 1(b); but then there's this additional sentence, unless I'm reading the wrong draft or I'm not keeping up to date, "Pleading on information and belief is insufficient to support the granting of the application."

MS. WINK: Bill, you're looking off of the old draft that doesn't have the comments. What we just voted on a moment ago makes 2(b), the verification language, precisely the way it actually is in our current working draft here in Rule 1, which is "All facts supporting the application must be verified or supported by affidavit by one or more persons having knowledge of relevant facts." So they are parallel now.

MR. GILSTRAP: And we're leaving out personal knowledge because --

PROFESSOR CARLSON: That was the vote at the last meeting.

MR. GILSTRAP: Yeah, we're leaving out "personal." It's "knowledge of relevant facts," right?

MR. ORSINGER: Which knowledge could be hearsay.

MR. GILSTRAP: I understand.

MR. ORSINGER: Which may be grounds for a

TRO, but is not grounds for a temporary injunction.

PROFESSOR DORSANEO: Well, no court, unless they read this transcript, will read "knowledge" in a Texas rule to be information and belief. We don't allow information and belief very often, and every time we do it's spelled out in a rule or statute, and I just think judges think "knowledge" means personal knowledge for affidavits. So if you want to change it then change it, not kind of take out a word and keep the change a secret.

MR. GILSTRAP: Under these rules will testimony based on information -- or an affidavit based on information and belief be sufficient?

PROFESSOR DORSANEO: Like in New York.

MR. GILSTRAP: I mean, I don't know.

MS. WINK: Well, let me answer it this way. Because the rule will be silent, we will be stuck with existing case law, and there are some cases that say you're not allowed to plead on information and belief, not for injunctions, but when you get to the level of an evidentiary hearing, which is the temporary injunction hearing, that can be overcome by the evidence.

PROFESSOR DORSANEO: Well, actually those cases -- those cases may say that, but they say you don't need a verification if you have a hearing.

MR. GILSTRAP: I'm confused. I've been

through the debate, and I think we need to clarify it.

CHAIRMAN BABCOCK: Okay. What are you confused about?

MR. GILSTRAP: I'm confused about whether or not the affidavit can be based on information and belief for the temporary restraining order and the temporary injunction.

MR. ORSINGER: I haven't reread that transcript, but my recollection of the debate was we dropped the word "personal" out because we were worried that someone might need a TRO based on what is reported to them, but by the time they get to a temporary injunction hearing they're going to have to put them under oath and offer nonhearsay evidence, and so I thought we dropped "personal" out so you could get a TRO based on the fact that person A told me that person B is about to do something. That's why I thought we dropped "personal" out.

MR. GILSTRAP: And the affidavit for temporary injunction is going to be different from that or is going to be the same?

MR. ORSINGER: I'm hoping they'll be the same because the affidavit for temporary injunction, in my opinion, is kind of irrelevant. What matters is the evidence at the temporary injunction hearing. So to me I don't see any reason to have a different pleading

requirement or even a sworn pleading requirement at all for temporary injunctions.

MR. GILSTRAP: But we voted to have them sworn pleadings, so it seems like they ought to be the same.

MR. GARCIA: Maybe we should revote.

MR. ORSINGER: Yeah, right, but my view -- I think our debate mixes the pleading requirement with the proof requirement. You know, we've decided at a previous meeting that we're not going to say that you have to have personal knowledge to support a TRO. I think that's good policy. I think it's irrelevant on a temporary injunction, because you won't get the injunction until after the hearing, at which point the pleading is irrelevant and the evidence is what controls.

CHAIRMAN BABCOCK: Levi.

HONORABLE LEVI BENTON: There's a reason why the affidavit or verification requirements ought to be different. If I'm trying to get a TI against your client and I can't ever satisfy the pleading requirement and I've never filed anything that satisfied the pleading requirements, that will cause you and your client to expend a different level of resources than if I have satisfied it. So why cause the defendant or why cause someone who has their rights, as Richard would say, to begin to expend

resources if right out of the gate you can't satisfy the pleading requirement? Because if you -- if I have satisfied the pleading requirement and you know you've got that TI hearing coming up in two weeks, well, then you've got to gear up, you know, and how am I going to defend this, but, you know, if you're looking at -- I hope I'm being clear. You're looking at me like maybe --

MR. ORSINGER: Well, I would think if you can meet the sworn pleading requirements of the TRO that you should be able to meet the sworn pleading requirements of the temporary injunction.

HONORABLE LEVI BENTON: But for the TI it ought to be on personal knowledge and not on information and belief.

MR. GILSTRAP: You wind up with two affidavits then, one for the temporary restraining order and one for the temporary injunction.

HONORABLE LEVI BENTON: Right.

CHAIRMAN BABCOCK: Okay. We're backsliding a little bit here. Let's -- yeah, Elaine.

PROFESSOR CARLSON: I think some of the confusion -- and, Bill, in response to your comments -- was some of these things we voted on last time Dulcie has gone back and she's changed her version, and she's of the mind that we all remember that and that we would not revisit

something we already discussed. Those are two hellacious assumptions, as we see from this discussion, but I don't want you to think it's anything to hide the ball.

MS. WINK: Note the spelling of the word "assumes." It's all on me.

PROFESSOR CARLSON: So perhaps in the future -- I've always told my students, just kill the tree -- we'll reissue as we go through each meeting the revisions that reflect the prior discussion and votes. Is that correct, Dulcie?

MS. WINK: Yes, absolutely.

CHAIRMAN BABCOCK: Justice Brown.

HONORABLE HARVEY BROWN: The only thing I wanted to say is I think Bill's point just for moving the word "personal" doesn't signal enough of what we're trying to do is a good point. I think most people if they see the phrase "having knowledge of relevant facts" will automatically read into that personal, because that's what we're used to, so I do think the clause after the semicolon should be both for TROs and TI so that they're identical.

CHAIRMAN BABCOCK: Okay.

MR. GARCIA: With "personal" or no "personal"?

HONORABLE HARVEY BROWN: No "personal."

CHAIRMAN BABCOCK: The suggestion has been

made that in (c) that we say "without evidence of each element of the application" or "of (a) above" or something along those lines. Is everybody agreeable about that? That makes sense to me. "Element" could mean a lot of things. Any other comments on (c)? Justice Christopher.

HONORABLE TRACY CHRISTOPHER: I just wondered why we had that extra sentence in there under notice and hearing. It seemed to me sort of kind of an odd evidentiary thing to throw in the middle of notice and hearing, so I -- and I just wondered what the thinking was to have that sentence in there.

CHAIRMAN BABCOCK: Which sentence are you talking about, Judge?

HONORABLE TRACY CHRISTOPHER: The last one. "An application cannot be granted without evidence of each element."

MS. WINK: In this draft, as well as in the attachment and other rules, anything that had to do with the timing of the notice and standards of the hearing went into the notice and hearing subpart. That's why it's in there, and it's just telling us that the court's got to have evidence of each of those elements.

HONORABLE TRACY CHRISTOPHER: Yeah, but I just don't think it belongs there.

CHAIRMAN BABCOCK: You're not against the

sentence; you just question where it's placed.

HONORABLE TRACY CHRISTOPHER: Right. And it's kind of a simplified version of what a judge does when they listen to the evidence at a TI hearing.

CHAIRMAN BABCOCK: Yeah.

HONORABLE TRACY CHRISTOPHER: You listen to evidence from both sides, and you weigh the evidence, and you make a decision, so this sentence to me is -- it seems out of place.

HONORABLE TOM GRAY: Wouldn't you want the burden of proof in there, too, if you're going to have the requirement for evidence?

HONORABLE TRACY CHRISTOPHER: Right. I mean, it's too short to really cover the subject.

MR. HARDIN: And you don't think the subject necessarily needs to be covered.

HONORABLE TRACY CHRISTOPHER: Not in a rule like this.

CHAIRMAN BABCOCK: Okay. Other people feel that way?

MR. GARCIA: So take that out?

CHAIRMAN BABCOCK: Jan.

HONORABLE JAN PATTERSON: You could include that sentence after (4) under "application" or as a (b) so that it references the application and those elements.

CHAIRMAN BABCOCK: Include it where, Jan?

HONORABLE JAN PATTERSON: In paragraph (a) under "application," someplace in there, I don't know whether it's numbered or not, and say "An application for temporary injunction cannot be granted without evidence of each of these elements."

CHAIRMAN BABCOCK: I see.

HONORABLE JAN PATTERSON: And that way it references (a) and it references those elements because element is a phrase that has many meanings, and this is not one of them.

CHAIRMAN BABCOCK: If you're going to put it somewhere, Justice Christopher, that looks like a good place to put it.

HONORABLE TRACY CHRISTOPHER: Yeah, but it just strikes me as an incomplete sentence, incomplete statement of what happens.

HONORABLE JAN PATTERSON: Yeah, it doesn't have burden in it either, but if it's going to go any place, it ought to not be in that paragraph.

HONORABLE TRACY CHRISTOPHER: I mean, you know, for example, the movant puts on evidence. If you think it's insufficient you can shut down the hearing, you know, basically directed verdict, denied, okay, but other -- if they've, you know, met their threshold then you've

got to let the other side put on their evidence, got to have a full evidentiary hearing, and there's some case law out there that I can think of right off the top of my head where judges don't seem to think they have to have a full evidentiary hearing if they're going to grant a temporary injunction. So, you know, "Well, I've heard enough. I've heard, you know, a couple of witnesses here, a couple of witnesses here. I've heard enough, I'm granting the" -- well, it's not. It's like a trial, unless you've clearly told everybody ahead of time each side only has two hours to present your case you get to put on your evidence.

CHAIRMAN BABCOCK: Rusty, then Bill.

MR. HARDIN: I think this is sort of like one of those admonitions that always annoys me. There's a lawyer where you have all of these motions in limine trying to get the other side to be sure to be ethical. I mean, isn't this really just sort of telling the judge to do their job, and isn't that kind of offensive? I mean, isn't this what judges do? So why do we need a sentence in there to say it?

CHAIRMAN BABCOCK: Good point. Bill.

PROFESSOR DORSANEO: Well, I don't like the sentence, but I think if that's what we're going to say Texas law is that it's an important sentence, and I am not going to give up on my idea that maybe we can satisfy

probable right without exactly winning that element if the case is really strong otherwise. I think that's a very compelling argument that would likely be accepted by a really smart court, but if people want to cut that -- if people want to say, no, we're not going to let you make that argument then this is an important sentence that I would regard as bad law, for the future.

MR. HUGHES: Well, what I saw is, is an admonition not to consider the evidence attached to the motion or the application, that you're going to have to have a real evidentiary hearing and that the affidavits filed aren't going to be evidence, and that's the law now. Now, if you take that out, you're going to have somebody -- you're going to have the applicant stand up and say, "Your Honor, I want you to take judicial notice of my affidavits. That's my evidence, thank you very much," and the other side will argue so you haven't offered any evidence, and I would say, "Well, yes, I did. I just offered affidavits, and that's enough, because there is no rule that says I can't rely on just the affidavits attached to my petition." And believe me, the "there's no rule against it" argument does carry sway with some people.

CHAIRMAN BABCOCK: Orsinger.

MR. ORSINGER: Then perhaps what we should do is just say that -- write that sentence that -- that at the

hearing the proponent must offer evidence in support of each element. I don't think it's necessary to say that you can't grant it. To me under (d) it's implicit that if your order has to state the immediate injury and why there's no adequate remedy at law and why there's a probable right of recovery, it's implicit that there must be evidence to support all those specific recitals. So to me the sentence is surplusage compared to (d)(2), (3), and (4), except for Roger's point that maybe someone might be misled into thinking the affidavits suffice. I think a hearsay objection takes care of that, because affidavits are hearsay, but if there's some risk of that then we should probably just say that each element must be supported by evidence.

But, on the other hand, doesn't that go without saying, I mean, that you're supposed to prove -- offer evidence up to support what your relief is, so it gets me back to thinking do we really need to say it.

CHAIRMAN BABCOCK: We really do or do not?

MR. ORSINGER: I'm asking the question. I don't think we need to say it because it's implicit in stating why there's an immediate and irreparable injury and why there's no adequate remedy and why there's a probable right to recover. I think it's implicit that there's supposed to be evidentiary support for those findings, and

then when you go up to the court of appeals they're going to look and see if there's evidentiary support for those findings, and we don't need to remind everybody that that's the way the legal system works.

CHAIRMAN BABCOCK: Justice Christopher.

HONORABLE TRACY CHRISTOPHER: Well, I mean, you know, we don't tell people how to put on a trial in terms of you've got to have evidence of everything before you can win your trial, so why do we put that in this rule? And if someone offered an affidavit into evidence and the other side doesn't snap to it and object and say it's hearsay, well, then hearsay is considered under our evidentiary rules. So they have put on some evidence at that point if you haven't objected to the affidavit, so --

MR. GARCIA: So take it out.

HONORABLE TRACY CHRISTOPHER: So take it out.

CHAIRMAN BABCOCK: Okay. So you're in the take it out vote. Justice Gray.

HONORABLE TOM GRAY: Well, the one thing that it does do, in responding to Professor Dorsaneo's comparison, it does make it clear that the temporary injunction is an elemental analysis and not a factor type analysis, that you do have to have evidence of each of the elements and somehow the irreparable injury and the maintaining the status quo doesn't overcome the complete

absence of evidence of not having any probable right of recovery, so it does achieve that objective. Whether it's clear that it achieves that may be arguable, but it does do that.

CHAIRMAN BABCOCK: It seems to me we ought to have a vote on leave it in or take it out. So everybody that's in favor of leaving this sentence in, raise your hand.

MR. GARCIA: Well it's leaving it in and where does it go?

CHAIRMAN BABCOCK: Well, it's going to go I think probably in (a).

PROFESSOR DORSANEO: If it's gone, it's gone. Maybe we're there.

CHAIRMAN BABCOCK: But leave it in somewhere. So that's the vote, leave it in somewhere.

MR. GARCIA: Okay.

CHAIRMAN BABCOCK: Everybody in favor of that raise your hand. Not all together now.

All right. Everybody that thinks we should take it out? The most lopsided vote of the day, 5, leave it in; 18, take it out. And why don't we take a recess so our court reporter can recover from this grueling debate that we just had.

(Recess from 3:25 p.m. to 3:46 p.m.)

CHAIRMAN BABCOCK: Everybody ready? Come on, Jane.

Apropos of some other work we have undertaken from time to time, the Chief Justice wrote a concurring opinion that was released today in the case of *NAFTA Traders vs. Margaret Quinn*, that I think we all should -- you all should read, since I just read it, but it deals with arbitration and the right of private parties to contract to appeal arbitration results and makes comments about the flight from our public system of justice which has many benefits, outlined by the Chief, to private justice systems like arbitration and raises the -- some of the things we've talked about in terms of improving the efficiency of our courts, but largely falling on deaf ears in this group, as our chief justice friend from Colorado will attest to, but anyway, it's a very interesting opinion, and I ask you to take a look at it. So with that, back to ancillary rules, and we are now on (d), the order.

MS. WINK: Yes.

CHAIRMAN BABCOCK: And that should be easy since we've already gone over this, right?

MS. WINK: It should be, and in fact --

CHAIRMAN BABCOCK: But with us nothing is easy.

MS. WINK: Here's how I would look at it,

Chip. What we've done on the order section of Rule 2 is -- it incorporates everything that we've talked about in the prior two meetings, right? So just FYI, if we had issues with the way the order was stated before in Rule 1 we've also addressed that in Rule 2, so we don't have to go back to that. The exceptions being situations where in a TRO situation you're setting the date for the temporary injunction hearing. The order on the application for temporary injunction instead sets the trial on the merits, right? The only decision to be made is whether you want the temporary injunction order to give the ability of the parties to have the agreement to exclude the language as we discussed this morning on the temporary injunction order for the elements imminent and irreparable injury, et cetera. I would recommend that we not do that here. I don't think it will be accepted by our Supreme Court. I could be wrong, though. That's just my betting prediction, but I want to present that to you so that I know your input on it.

MR. BOYD: Can I ask why you don't think it would be accepted so we would understand?

MS. WINK: Because it is a big change from existing law in the world of injunctions.

MR. BOYD: But if it is agreed to by the parties what practical impact does that change create?

MS. WINK: The practical impact comes to is there actually an imminent injury, an irreparable injury, no adequate remedy at law? Is there really a probability of recovery. You know, when we have the opportunity for an evidentiary hearing and the time to prepare for it and if necessary the discovery to prepare for it, do we skip the requirement of the judge explaining in the order and stating why those issues are met? I know the parties may choose, and I understand the concerns because I've been there before. The parties may not want to see that in the order, but the reality is that's what's required to have this extraordinary writ, and I don't want to encourage litigants to go willy-nilly to try to get an agreed or push through an agreed order that doesn't go there at all. Short-term, that's one thing. Between temporary injunction hearing and trial it could be many months. That's a different thing.

CHAIRMAN BABCOCK: Justice Christopher.

HONORABLE TRACY CHRISTOPHER: Well, I think we ought to be allowed to -- parties ought to be allowed to agree to waive it on a temporary injunction basis for the same reason, you know, "I'll agree not to beat my wife because I'm not doing it," and that saves time and money that we don't have to have a full evidentiary hearing on it, and "I'm agreeing not to beat my wife until the trial,"

you know, and I mean --

CHAIRMAN BABCOCK: And then watch out.

HONORABLE TRACY CHRISTOPHER: -- and that just saves a lot of time and money to be able to waive that requirement.

CHAIRMAN BABCOCK: Justice Bland.

HONORABLE JANE BLAND: I agree with Judge Christopher. It may be that it's never been in the rule that people could waive those things, but a lot of these injunctions get -- temporary injunctions get hammered out by agreement, and that is a very useful tool for getting the parties to hammer it out by agreement, and I understand why we need guidelines about what conduct we're enjoining in the order, but I don't see why we need recitals about what led us to this point.

CHAIRMAN BABCOCK: Okay. Lonny.

PROFESSOR HOFFMAN: So I have a question, which is, would it be better if parties wanted to agree to that to let them just enter into a private agreement and not have the court's stamp on it, and would it -- and what would be the consequences of doing that? So in other words, my question is, is if parties come in and say, "We want to agree to an injunction, we want your stamp, but we don't want these elements to be in there," could the court just say, "That's fine, but go away, do that yourselves."

CHAIRMAN BABCOCK: Jeff has got the answer to that.

MR. BOYD: Yeah, because you don't have the power of contempt to enforce it, which is what the plaintiff wants. I mean, if I'm the plaintiff trying to stop the guy from intermeddling in the partnership's affairs, and he says, "Okay, look, I'll agree to an order that stops me from doing it, but only if that language isn't in there saying that the court thinks I would be liable." I need the contempt power. He needs the lack of that finding; and I guess I would say in response to the issue you raise, it seems to me that the only reasons I can think of that it ought to be in the order is if the court of appeals needs to see it to confirm that, yes, the court found what needed to be found, which is unnecessary if the parties agree to it, or if the parties need it in there; but beyond the court of appeals and the parties I don't know why you would need it in there.

PROFESSOR HOFFMAN: So if I could follow up, that seems like a partial answer to me. Let me see if I can explain why. Why couldn't you have the parties agree privately to whatever and then in the agreement if there is a violation of this we're not waiving our right to go to the court and then invoking the power of the court subject to a finding of irreparable injury, probable -- whatever

the elements are.

MR. BOYD: Because then it takes two violations to get contempt, but if I'm the plaintiff I want contempt on one violation. It's a court order.

MR. ORSINGER: It's worse than that because it may be that they'll destroy the subject matter of the litigation and just take the damages on the contract. I mean, the injunction is theoretically to do something -- to stop something that if it's done you can't recover from it, and if all you do -- if all you have is a contract not to do it then the question is can you recover by breach of contract when you couldn't have gotten it for damages in the first place.

CHAIRMAN BABCOCK: Justice Bland.

HONORABLE JANE BLAND: I think the whole point is a lot of these cases stem from a contract where the parties have already agreed to these things in a contract, but there's been some sort of conduct that leads someone to believe that there is breaching going on right now that's not reparable, so I want an agreement that you're not going to call on customer X anymore until we get to trial; and the other side says, "Yes, I'll agree to that." Well, then if they call on customer X between now and the trial they've violated the court order. They've already breached the pre-existing contract, but they

want -- well, yeah, I mean, if they prove it, then you want the ability of the judge to hammer the party for violating the court's order, not just for breaching a contract.

CHAIRMAN BABCOCK: Buddy.

MR. LOW: What if the agreement says, and it's approved by the court, "violation subject to contempt of court"? What if you agree to that and the court approves it? Then can't the court enforce it with contempt?

MR. ORSINGER: It better have order language in it approving.

MR. LOW: I don't know about the language. I know about the intent.

MR. ORSINGER: No, the language is important because the 14th Amendment requires that you specifically state what's prohibited before you can put somebody in jail for violating it.

MR. LOW: Well, I guess that's what they're enjoining them from, for something specific like beating your wife, so you can't beat her, but you can shoot her or something. Some of these people that are under injunction, like one the other day killed his wife because he was prohibited from beating her up.

MR. ORSINGER: Probably so.

MR. LOW: But couldn't you put -- would that

not be subject to contempt if you had the proper language in the agreement and the court approved it, and it says, you know, contempt of court, violation will constitute contempt of court? Wouldn't that be an enforceable agreement with contempt of court?

MR. ORSINGER: If it doesn't say it is ordered, in my opinion, it is not enforceable by contempt.

CHAIRMAN BABCOCK: Justice Christopher.

HONORABLE TRACY CHRISTOPHER: Well, I mean, there's case law that -- you know, if you call it an agreed injunction and it doesn't have these elements in it, you cannot get contempt, so I don't see how if you just called it an order and said, "Don't do this," that you could get contempt if you haven't met the elements of an injunction. So that's why we need it in the order that you can agree to that. You know, we need it in a rule that you can agree to it. "I agree that I won't do these things."

MR. ORSINGER: Well, would that be enforceable by contempt if you waive these three findings in your agreement? Can you still get contempt enforcement?

HONORABLE TRACY CHRISTOPHER: Well, I would hope so if it's in the rule. I think what it is right now, the case law says the -- you know, the rule says these elements have to be in the order, if these elements were in the order, therefore, no contempt.

MR. ORSINGER: You're attempting to change that law.

HONORABLE TRACY CHRISTOPHER: I am, yeah. I would.

MR. BOYD: But what your waiving by agreement is not what the court has ordered, but the inclusion of the basis for that order, so the court -- even if you agree to it, the court can still -- has the power and jurisdiction to enforce his or her order because that's going to be in there. What we're talking about waiving are the grounds on which the order is based.

CHAIRMAN BABCOCK: Yeah.

PROFESSOR HOFFMAN: Let me --

CHAIRMAN BABCOCK: Jan first.

PROFESSOR HOFFMAN: Sorry, sorry, sorry, sorry.

HONORABLE JAN PATTERSON: I think for these reasons we should keep this language: One, it is existing law; two, you can still agree to the elements here and the language that should be included, which doesn't have to necessarily be comprehensive, although it sets forth the basis for it; and, three, I think it goes to legitimacy and transparency. So I think I urge that we keep the language as it is.

CHAIRMAN BABCOCK: Okay. Lonny, and then

Richard.

PROFESSOR HOFFMAN: So I just was going to ask what -- if you think that the -- if you think that the standards perform an important function because they provide judicial oversight for this extraordinary remedy, then it seems like the argument for keeping it in is strong, but let's try this example. Okay. So I download something from iTunes, and the proprietor of iTunes says, "Sign this agreement before you do so," and the agreement says that if you do anything improper with this, you know, share it with someone else, I can get an injunction against you as well as some other relief, and it says, "You're going to agree to waive in advance any showing on my part of irreparable injury, probable cause." Is that agreement enforceable under the language that we're talking about, and if there's a chance that it is, I'll return to what I said before, which is are we worried that the standards are there for a reason, which is this judicial oversight problem. I don't know if that's real problem or not, but --

CHAIRMAN BABCOCK: Okay. Anybody else? Richard.

MR. ORSINGER: Couple of things. Dulcie, on (d)(5) my copy says "not by reference to the petition," which we have not been using. Is that still in there, or

have you substituted "motion or other application"?

MS. WINK: That's -- it still says "and not by reference to the petition." Just as the rule does on Rule 1 that we --

MR. ORSINGER: We can't do that, because we -- we are now allowing applications or motions. You don't even mention petitions --

MS. WINK: I see what you're saying.

MR. ORSINGER: -- which has been part of my beef about it. In Rule 1 I believe we only talk about --

MS. WINK: Wait. Before you go on, Richard, it does say "without reference to the petition or other document." Perhaps we should say "application or other document."

MR. ORSINGER: And then I think you ought to define "application" to include whatever you consider. As long as it includes a pleading I'm on board. And then on (6) there's a sequencing problem that the temporary injunction shall apply until the trial on the merits. The truth is you don't always get a rendition at the trial on the merits, you sometimes get it after, and in my view the temporary injunction shouldn't be replaced -- shouldn't dissolve, shouldn't disappear until you have a judgment to replace it.

MR. GILSTRAP: It should say "until further

order of the court."

MR. ORSINGER: That's what I'm going to suggest, "until further order of the court" or "until rendition of judgment." It's the rendition of judgment is the judicial event that produces the final adjudication to replace the temporary adjudication. It's not just the trial, and sometimes even in bench trials they're recessed for two or three weeks in between, so we've got to have a cut-off. You see what I'm saying?

MS. WINK: I do, and that's an issue. This is from existing law, and I've had an issue with that, too, so I understand the need for change.

MR. ORSINGER: Okay. So now is the time to fix it. I think Justice Hecht will allow us to fix problems in the existing language, right?

HONORABLE JUSTICE HECHT: (Nods head.)

MS. WINK: Okay.

MR. ORSINGER: And then on the issue about whether parties can agree, number (4) is a real problem if you ever want anybody to agree to a temporary injunction because that says that the injunction has to state why the plaintiff is probably going to win, and I don't think that the defendant is ever going to be able to agree and sign a piece of paper that's backed up by the court that's going to be shoved down their throat at trial as to why the

plaintiff is probably going to win. That's, you know, preponderance of the evidence. That's admitting that you're going to lose the lawsuit, and so if you want people to agree to injunctions, you can't say that they have to admit they're probably going to lose or else they can't -- they just can't justify that with their clients. The clients can't understand why their lawyers are giving up at the temporary injunction stage, so to me there's an important reason if you want agreed injunctions at least to take out (d)(4), if you don't just take out (d)(2), (3), and (4). I'm in favor of taking (2), (3), and (4) out, but I'm definitely in favor of taking (4) out.

MS. WINK: And, in fact, it's (2), (3), and (4), which I brought back up to you to say do we want to do it like we did in Rule 1 where we took each of those, which is (2), (3), and (4) here, and gave the ability to agree not to include --

MR. ORSINGER: But I've heard a lot of agreements about why it's important for even agreed injunctions to have (2), (3), and (4) in it, and then particularly with regard to (4) I think that what that means is they can't be agreed injunctions, because nobody that's representing the defendant is going to go in at the start of the case and admit that the defendant is probably going to win. It's just never going to happen. So if

that's --

MR. HARDIN: Unless they have really good insurance.

MR. ORSINGER: I mean, even if your client consented to it, which most clients wouldn't, I would still think it would be dangerous for the lawyer to agree.

CHAIRMAN BABCOCK: Yeah, Sarah.

HONORABLE SARAH DUNCAN: But I have always thought that part of the reason this has to be in the order is so that not just the lawyers and the clients understand the requirements for temporary injunction, but so the judge signing the order does, and it might be in a particular case that the parties would come in and say, "Judge Peeples, we've come to an agreement on our request for temporary injunction," and he looks at these requirements, and he's like, "Wait a minute, this is a breach of contract suit. How are you going to show irreparable harm," and decided he really didn't want to sign that.

CHAIRMAN BABCOCK: Yeah, he's putting his name on it.

HONORABLE SARAH DUNCAN: And also, I was thinking during our break, I'm sure everybody around this table knows the meaning of all these words --

HONORABLE DAVID EVANS: Could you speak up?

MR. MUNZINGER: We can't hear you.

HONORABLE SARAH DUNCAN: -- but you would be surprised how many lawyers in the state don't know what "irreparable" means, and for them that's -- you know, it means "damages."

CHAIRMAN BABCOCK: Yeah, Justice Bland.

HONORABLE JANE BLAND: Well, it's just like a motion -- an agreed motion for continuance. If the judge doesn't agree, then the judge doesn't have to sign it, but if the judge, taking a look at the pleadings, is in agreement that there's the potential for irreparable harm the judge can sign it, and all we're really doing is obviating the need for an evidentiary hearing, because -- and trying to get an agreement that can get these parties to a trial. That's all a temporary injunction is supposed to be, and the more difficult we make that, the more expensive it is for the litigants, and it just seems like it makes sense that if the parties don't want these recitals, they're just not necessary to anything related to enforcing the court's order.

CHAIRMAN BABCOCK: Jan.

HONORABLE JAN PATTERSON: Well, except if you have to show them these elements, this goes back to the points that maybe you don't want these extraordinary remedies too easy to accomplish even by agreement. One of the reasons we took out or we allowed the omissions in the

first -- in the TRO was to expedite to make it more efficient, but you recall there was also this element of bullying and making it too easy to agree and coercing someone who might resist if they had to have a hearing or showing, and here that goes with extra force that we're putting the imprimatur of the court on an extraordinary remedy, and maybe this is the point where there has to be transparency and explicit showings and not a buy-in to some agreement that makes it too easy to obtain extraordinary relief.

CHAIRMAN BABCOCK: Justice Christopher, I think, had -- no, Judge Evans had his hand up first.

HONORABLE DAVID EVANS: I just don't think that if parties agree to a cease and desist -- and I think most judges are very careful about pro ses. I think most judges are very careful about outclassed lawyers. They can recognize when somebody is not at the same skill level as somebody else, and when they see that type of advantage being taken care of I think my colleagues don't sign those orders, and they don't sign them on pro ses, and although I'm sure that there are judges who bully people into agreements, I think that's the exception and not the rule and that we have parties, major parties, agree to cease and desist orders all the time, in all types of environments, and this is just a useful tool for resolving disputes and

furthering discovery. I just think the -- I just think the decisions came out unfortunately. I view it as the agreement is the reason why the court has signed it, because knowledgeable parties have come to the court and said, "This is in our best interest, and this is what we want you to sign, and we believe it's fair," and it meets our requirements. That's an additional reason for granting one, because the parties agreed to it.

CHAIRMAN BABCOCK: Judge Christopher.

HONORABLE TRACY CHRISTOPHER: Well, I mean, think about a family law case where the husband and wife are saying really ugly things about each other in front of the children; and you don't want to have to put all of those facts in an order before you sign an order that says, "Y'all are not going to say ugly things about each other in front of the children"; and people are going to want to, you know, come down to the court and they're going to agree to that; but the idea that you're going to have to put in, "Well, you know, so-and-so called so-and-so, you know, blah, blah, blah, blah," and "So-and-so called so-and-so you know, in front of the children, and we know that this is going to cause psychological damage to the children," to put that in an order when you can get somebody to just agree to it going forward and waive those requirements is just not a good idea.

CHAIRMAN BABCOCK: Roger.

MR. HUGHES: Well, this gets back to the comment I made earlier. When we say they're agreeing to the order, are they essentially agreeing that the injunction issue without proof of irreparable harm, et cetera, et cetera, or are they simply saying I don't -- "I don't agree these grounds exist, but the judge found them, but I don't want them stated in order to" -- you know, for the interests. You know, as long I guess as, I suppose, the judge has the safety valve of being able to back off of an improvident agreed injunction and is not bound to enforce it, a la Merchant in Venice, that this might be acceptable that the parties could agree to an injunction, but the judge is always free on the last day to say, you know, "Y'all agreed to it, but for public policy reasons we just can't enforce it."

CHAIRMAN BABCOCK: Okay. All right. The vote is going to be -- oh, Gene, I'm sorry.

MR. STORIE: Just a short one. I mean, a system of justice exists to resolve disputes for people who can't resolve them for themselves, so I really do think any time they can agree, whether it's in a discovery matter or ultimate settlement or just to call a truce while there's a temporary injunction, that's a good thing, so I would want it to be in sentence one.

CHAIRMAN BABCOCK: Okay. The vote is going to be people who are in favor of (d) as written here, which doesn't have the agreement feature to it, and if you're in favor of the agreement feature you should vote against (d) as written here. Does that make sense? All right. So everybody in favor of (d) as written, raise your hand.

And all opposed? 5 in favor, 18 against. So we will -- we will draft it, excuse me, to have the agreement feature in it.

MS. WINK: Will do.

CHAIRMAN BABCOCK: And I think there was another comment about changing the word "petition" in (5) to "application."

MS. WINK: Made note of that. We'll get that.

CHAIRMAN BABCOCK: Okay.

MR. ORSINGER: And also the trial on the merits, we didn't really discuss it. Should it say "until further order of the court" or "until rendition of judgment"?

CHAIRMAN BABCOCK: We did discuss it, and I think that that language was --

MR. ORSINGER: Well, are we going to go with "further order of the court" then?

MS. WINK: I think we should go with

rendition, actually.

MR. ORSINGER: Well, the court can, of course, substitute a new injunction for an old one.

CHAIRMAN BABCOCK: "Further order of the court or rendition" --

MR. ORSINGER: Okay.

CHAIRMAN BABCOCK: -- is what I had written.

MR. ORSINGER: Okay.

CHAIRMAN BABCOCK: Okay. Any issues on (e), effect of appeal?

MR. ORSINGER: I have a concern.

CHAIRMAN BABCOCK: Why does that not surprise me?

MR. ORSINGER: Sorry.

CHAIRMAN BABCOCK: No, no, no. Your concerns are always well-taken.

MR. ORSINGER: I believe that there are some statutes that say that the appeal of an order suspend the effect of it during the appeal, but that may only -- that may just be limited to special appearances and not to injunctions.

MS. WINK: This is language from existing Rule 683.

CHAIRMAN BABCOCK: Yeah.

MR. ORSINGER: And there's no exceptions in

the statutes anywhere?

MS. WINK: No, not that I know of.

MR. ORSINGER: There are?

PROFESSOR CARLSON: 51.014 does carve out some things, but not injunctions.

MR. ORSINGER: Good, okay.

MR. BOYD: Yeah, it does.

MR. STORIE: Yeah.

MR. BOYD: Let me pull it up. I think it does, but what I can't remember is 51.014, does it say whether the court --

PROFESSOR CARLSON: It says "except for (d)."

MR. BOYD: -- has to stay the trial proceeding, but isn't it from the grant or denial of the temporary injunction? Let me pull it up. It's coming.

CHAIRMAN BABCOCK: Jeff, what's your question?

MR. BOYD: Does Civ. Prac. and Rem. Code 51.014 provide for an interlocutory appeal from the grant or denial of a temporary injunction.

HONORABLE JANE BLAND: Yes.

MR. BOYD: And if so, does it say whether the trial court must stay all proceedings?

HONORABLE JANE BLAND: It does and the trial court does not.

MR. BOYD: Does not have to stay. Okay. Can -- does the statute say whether the court can?

CHAIRMAN BABCOCK: Does the trial court have authority to stay?

HONORABLE JANE BLAND: Oh, I'm sure if the trial court wants to, but it's not required to stay like a lot of the interlocutory appeals require a stay, and the reason for that is because in many places and in many kinds of cases the trial court can get to a trial on the merits sooner than the trial, and when Harvey Brown was a trial judge still and you and me, when we were all still trial judges, a number of trial judges got together and said, "We don't want to have a stay of a temporary injunction because we can get the case tried sooner than the appellate court can review the order."

CHAIRMAN BABCOCK: Yeah. Elaine.

PROFESSOR CARLSON: Yeah, I'm looking at the language, and (4) is the provision for being able to take an interlocutory appeal of the granting or denying of an injunction and then the statute says, "An interlocutory appeal under subsection (a) other than appeal under subsection (a)(4) stays the commencement," blah, blah, blah. So --

MR. MUNZINGER: Stays what?

PROFESSOR CARLSON: Stays the commencement of

a trial.

MR. ORSINGER: And (a)(4) is the injunction appeal?

CHAIRMAN BABCOCK: (a)(4) is the injunction appeal. Justice Hecht.

HONORABLE NATHAN HECHT: And we held about 15 years ago that the trial court should go ahead, and if they beat the appellate court to it, well, so be it, and if the appellate court is worried about that they can always stay the trial.

CHAIRMAN BABCOCK: The appellate court can.

HONORABLE NATHAN HECHT: Yeah.

CHAIRMAN BABCOCK: Do you have to go to the trial court first?

HONORABLE NATHAN HECHT: For a stay? I don't know.

CHAIRMAN BABCOCK: Roger.

MR. HUGHES: I think the Rule of Civil Procedure is you have to ask the trial court to set a supersedeas bond, but it has discretion to say, "No, I'm not going to allow any kind of supersedeas relief." Then you go to the court of appeals, but once again, by the time you crank those wheels you may be on the doorstep of trial.

MR. ORSINGER: You're invoking the accelerated appeal provisions of the Rules of Appellate

Procedure.

MR. HUGHES: Yeah. Yeah.

MR. ORSINGER: Is what he's doing.

CHAIRMAN BABCOCK: Okay. How about applicant's bond? Any issues on that?

MS. WINK: And note that we have already added as preliminary language "unless exempted by statute."

CHAIRMAN BABCOCK: Okay. Any other issues on (f), applicant's bond? Yes, Justice Christopher.

HONORABLE TRACY CHRISTOPHER: Well, the point I brought up. Somebody gets a copy of the injunction in the courtroom, but the bond doesn't get posted for a day or two, and they don't get served for -- you know, with the injunction. Is what the judge has done of no course and effect?

CHAIRMAN BABCOCK: Jim, what's the answer?

MR. PERDUE: This is my day of learning as one of the attorneys -- as one of the class of attorneys that is taken advantage of regularly, I'm here just taking it all in.

MR. GILSTRAP: That's covered by (f). That's covered by (f).

MR. PERDUE: I appreciate Judge Evans' leniency for --

HONORABLE TRACY CHRISTOPHER: I mean, I think

it's kind of interesting --

HONORABLE JUDGE EVANS: Well, you're one of those outclassed --

HONORABLE TRACY CHRISTOPHER: -- question, but I don't know if we need to discuss it now.

CHAIRMAN BABCOCK: Okay. Anybody -- Roger, you know the answer?

MR. HUGHES: Well, it depends on whether you're raising the bond from the TRO or not. I mean, I believe it's -- I don't know if it's a rule, but I thought there was case law that said that the TI could provide that the bond filed or security given for the TRO would now apply to the temporary injunction, but of course, then you need to make sure that's what the bond says, too.

CHAIRMAN BABCOCK: Yeah.

MR. HUGHES: Of course, then there is the question of what happens if you have to raise the bond, but I think the answer is if you don't have a bond in place or you don't have one in the right amount you better -- you better hustle.

MS. WINK: Yes. That is the answer.

CHAIRMAN BABCOCK: But until you hustle up and get it then there's no injunction.

MS. WINK: Correct.

MR. HUGHES: Yeah.

MR. GILSTRAP: That's what section (f) on the rule on the next page says.

CHAIRMAN BABCOCK: Right. Yeah. Okay. (g), motion to dissolve or modify. Let's not rehash the discussion. Yeah, Judge.

HONORABLE R. H. WALLACE: Well, why do you need that for a temporary injunction? After you've had a full evidentiary hearing, you've ruled, if they think you need to rehear it, file a motion and set it for hearing in normal course. I mean, I can see where the TRO, we hashed that out, but once you've had your hearing and everybody has put on their evidence, you've ruled.

CHAIRMAN BABCOCK: Justice Christopher.

HONORABLE TRACY CHRISTOPHER: Yeah, I agree. I mean, why are we wanting to rehear something as expeditiously as possible after we've just spent a long time on the injunction?

CHAIRMAN BABCOCK: Well, can't you envision a situation where case is set for trial in 12 months or something, but at nine months circumstances have changed, events have overtaken the injunction, and now maybe the grounds that were present before are no longer present? Lightning struck Frank's house and destroyed it.

HONORABLE TRACY CHRISTOPHER: That might be a reason why you would want to have one soon, but vast --

this provision doesn't tell us that's what has to happen before you move to dissolve or modify, so basically anybody who's unhappy with it is going to move to modify or dissolve, and we have to have an immediate hearing again on it.

CHAIRMAN BABCOCK: So you're against that.

HONORABLE TRACY CHRISTOPHER: Yes.

CHAIRMAN BABCOCK: Okay. Judge Evans.

HONORABLE DAVID EVANS: Same point, we have -- we have FELA cases we have to specially set, we have other matters that we're told that we have to handle expeditiously, and this area is another mandate. This -- you know, I think we can make that decision based upon an application for an expedited hearing as to whether or not it needs to be heard quickly or not.

CHAIRMAN BABCOCK: Okay. Richard.

MR. ORSINGER: I would question the last sentence as well. I don't see why there should be a requirement that a motion to modify a temporary injunction has to be supported by affidavit or verified pleading. If at that point there's a mature lawsuit pending, everybody has got a lawyer, people have taken depositions, you should be able to just file a motion and say, "The circumstances are different and you ought to modify your temporary injunction." The requirement of having the backup of

affidavits for a TRO is a completely different policy I think --

CHAIRMAN BABCOCK: Yeah.

MR. ORSINGER: -- from just a change of circumstances in an ongoing lawsuit that's being litigated in a full sense.

CHAIRMAN BABCOCK: Judge Evans, if we delete (g) here and there's a temporary injunction and things do change where as the defendant, I say, "Boy, I want to get back in of front of the judge and basically get him to reconsider either the scope or fact of the injunction," you say that that's -- you could do that anyway, right?

HONORABLE DAVID EVANS: Sure. I mean, of course, I recognize that all courts are different, but -- and that we have different systems in different metropolitan counties; but, you know, in my county the way it would be handled in R. H.'s court and my court, they would contact our coordinators, they have good access to; and they say, "We've got an emergency here, and we've outlined it in the motion, and we need to get it heard as soon as possible"; and our coordinators would contact us and say, "They say they need it." They would hand us the paperwork, we would look at it and probably get on the phone with the other side and start setting the hearing up.

CHAIRMAN BABCOCK: Yeah. Okay. All right.

It seems to me the vote on this is whether to have (g) or not.

MS. WINK: Or alternatively, whether or not to take the second -- the last two sentences out and take out in the first sentence "which may be less than three days." Just say -- it would say, under my proposal, "On reasonable notice to the party who obtained the temporary injunction, a party may move for dissolution or modification of the temporary injunction."

MR. ORSINGER: I don't think you should limit notice to the ones who obtained the temporary injunction because in a multiparty lawsuit everybody should get notice of the hearing --

MS. WINK: Right.

MR. ORSINGER: -- and I think Rule 21 or something would require notice to all of them anyway.

MS. WINK: Okay.

CHAIRMAN BABCOCK: Okay. Well, yeah, Judge Christopher.

HONORABLE TRACY CHRISTOPHER: I mean, isn't it sort of understood that you can move to rehear, dissolve, modify, any order that the judge signs? Why do we need it in the rule? What does that sentence add?

MR. MUNZINGER: That was my point, too. Why do you need that?

MS. WINK: I'm not saying we do. This is one thing that deciding this here will make a difference in the rest of the rules as well. One of the things that we did as a task force was err on the side of answering the question that's not going to be known for the young practitioner. They might look at it and say, "I can move to modify a temporary injunction, that's clear in the rules, but there's no parallel provision." I agree with you that most of us that have practiced for a number of years know that there may not be a precise rule of procedure to file a motion, but we just do and argue our case, but we've erred on the side of letting practitioners that are new, especially to the areas of extraordinary writs that are very technical, that they have the right.

CHAIRMAN BABCOCK: Richard, one last comment.

MR. ORSINGER: To me the one sentence in here that really probably is really valuable is the one that says, "The court must hear and determine the motion as expeditiously as practicable." If, in fact, we want the court to prioritize efforts to amend temporary injunctions, if we take that sentence out it's just going to be handled in the ordinary course of business. If we want these to have priority, the modification of a temporary injunction to have a priority, we better say it here. The rest of this I think probably goes without saying.

CHAIRMAN BABCOCK: Richard.

MR. MUNZINGER: Number one, I think that the rule ought to be stricken, and I would hope -- this section of the rule ought to be stricken, and I would hope you would ask for a vote on that question.

Number two, why is it the purview of the Supreme Court rules committee or the Supreme Court to tell trial courts what's important in managing their dockets? These trial judges know whether they need to advance or not advance a motion to modify a temporary injunction. Any party is always free to file -- as long as the case isn't on appeal, temporary injunction is not on appeal, I'm always free to ask a judge to modify it, change it, or otherwise. I think this is surplus, and we ought not to be putting things in here for people that are young in practice.

CHAIRMAN BABCOCK: Justice Gray.

HONORABLE TOM GRAY: Actually, Richard's comment just brought up the perfect reason to leave part of the sentence, and that was the temporary injunction can be up on appeal and you can file a motion to modify it, and do we want to do that or not, prevent it or not?

CHAIRMAN BABCOCK: Okay. The vote is going to be everybody in favor of deleting subsection (g), and then if you are against that proposal then you want to keep

it. Yeah, Jeff.

MR. BOYD: Just for clarification, did we leave this provision in the TRO rule?

CHAIRMAN BABCOCK: Yes, we did. All right. Everybody in favor of deleting (g), raise your hand.

Everybody in favor of keeping it, raise your hand. By a vote of 15 to 6, we delete it. Let's go to (h).

MR. ORSINGER: Chip, can I say the reason I voted against that was because I think some of (g) should be in there, but I don't agree that it should be in there the way it was originally written.

CHAIRMAN BABCOCK: Did you get that?

THE REPORTER: Yes.

CHAIRMAN BABCOCK: It's is in the record. Okay, (h).

MR. MUNZINGER: I have a question.

CHAIRMAN BABCOCK: Yes, sir.

MR. MUNZINGER: Are there other statutes or other codes that address the issuance of temporary injunctions? If there are, what is the effect of singling out the Family Code as governing the Rules of Procedure but not singling out the other codes, and have you created a problem, and it would seem to me that anything that's enacted by the Legislature is substantive law and not

procedural law, and so that I think there's a risk in -- if there are other such statutes, there is a risk to the Court and to us in singling out the Family Code both here and in connection with the temporary restraining order.

CHAIRMAN BABCOCK: Orsinger has insisted as a matter of longstanding practice that we exempt the family law bar from any requirement that we come up with.

MR. ORSINGER: Long ago it was decided to humor the family lawyers so they didn't go to the Legislature and rewrite the Rules of Procedure piecemeal, but that's exactly what happened in this situation. The Family Code provides that certain of these requirements we've been debating do not apply in family law cases, and even though those who understand the way the statute works, unless the Supreme Court gives notice of repeal or if they adopt this rule, it's not going to override the Family Code, there's going to be a lot of confusion if new rules come down that appear to be contrary to what the provisions of the Family Code suggest, and I would guess -- I don't have for all of you who want statistics, I don't have it, but I would guess that 80 or 90 percent of the injunctions that are signed in the state are in family law cases.

MR. MUNZINGER: What would be an example of a provision of the Family Code that could conflict, Richard?

MR. ORSINGER: You don't have to post a bond,

you don't have to have verification of the kinds of relief that are described in a certain section of the Family Code. You don't have to show a probable right of recovery for certain types of relief that are in the Family Code, and you can imagine in a divorce case --

MR. MUNZINGER: Sure.

MR. ORSINGER: -- you know, what you want to do is you want to stabilize the situation. You shouldn't have to be able to prove that you're going to get that car before you can prohibit the husband from taking the car from the wife or something like that. So the purposes of injunctions in family law matters are so different that it's very difficult to apply these rules, so some years ago we just went in and just negated a bunch of them, and I'm sorry to -- I mean, but that was the only way to make it work because these rules make good sense between a lender and a borrower and between landlord and a tenant and between somebody with a bulldozer and somebody with a historic building, but these rules don't work very well for most of the issues that we need help on in families.

CHAIRMAN BABCOCK: Yeah, Elaine.

PROFESSOR CARLSON: Chapter 65 of the Civil Practice and Remedies Code has some provisions to injunctions in general and in specific situations. It's on pages 14 through 18 of the materials, and for each of the

ancillary proceedings we're going to go through we tried to include in the packet -- well, we did include the packet, the corresponding statutory basis, and I will tell you it was very constraining sometimes in working on the rules to make sure we weren't violating or in conflict with the statute. As you can see on page 18, for example, 65.045 prohibits the Supreme Court from enacting rules inconsistent with a subchapter.

MR. GILSTRAP: Should we expressly exempt out Chapter 65, or are we just going to leave the Family Code in there because that's just a -- the way we do it?

MR. ORSINGER: Well, that's certainly where the most prevalent exceptions are, because, I mean, the Family Code actually goes in and specifically overrides some of these provisions, but I have no -- I have no problem at all with adding to that sentence, but I would be reticent to take it out simply because I think it would mislead too many people if we take it out.

MR. MUNZINGER: You could do it in an official comment, couldn't you, too?

MR. ORSINGER: Yes, as long as it's on paper that you can show it to a judge it should be okay.

MR. GILSTRAP: And there are several provisions that have -- statutorily provide for an injunction. I think the rule is that you don't have to

prove irreparable harm, for example, in those cases, and there are a number of them outside of 65.

HONORABLE TRACY CHRISTOPHER: Right.

MS. WINK: And, in fact, we've addressed those in the parts where we've discussed the application and the order in the preliminary language of both Rule 1 and 2 by pointing out "unless exempted by statute." The task force as a whole and especially the entire family bar members of the task force were very clear that we just have to be very explicit about the Family Code, and they have many, many things that are different from this.

CHAIRMAN BABCOCK: Okay. Any other comments about that? All right. The comments, comments about the comments.

MS. WINK: Actually, I can help you with that, but instead of going into comments of the comments I suggest you take a look at the redline I send tomorrow. What was asked at the last meeting was that you guys -- that we provide to you at the end of the rules here's what we recommend that we provide as additional information for the Supreme Court only and provide what you propose to be historical comment that might -- that is not binding but is helpful to the practitioners who are trying to see where these parts of the rules came from for purposes of research, and finally, what we would propose to be

supportive commentary for each of the rules that, like the discovery rules, we would recommend to be binding in support of -- on the applicants and the parties. So you'll be able to look at that much more clearly if we bring you a redline of that tomorrow, but I have done that for you throughout the rules.

CHAIRMAN BABCOCK: Okay. Well, then Rule 3. Yeah, Richard.

MR. ORSINGER: Okay. On (a)(2) I'm going to take another run at immediate. Is there anybody that would agree that you don't have to show immediate harm to get a permanent injunction? It seems to me like at that point we're way past immediate. A permanent injunction is good forever, and I think immediate really has no relevance to a temporary injunction, but it seems to me, I mean, it escapes me why you would have to show that the harm must be immediate to get a permanent injunction. If you get harmed and you can meet the equitable requirements for it and the harm may occur now or may occur 20 years from now, you get your injunction, it seems to me.

CHAIRMAN BABCOCK: Because your liberty is being restrained, and this is America.

MR. ORSINGER: I know, but you've had a jury trial, and you've lost, and that's America, too.

CHAIRMAN BABCOCK: I was just trying to help

Munzinger. He was on his Blackberry. I wanted to get his attention.

MR. MUNZINGER: I was listening carefully.

MR. GILSTRAP: Well, you know, I never regarded the 680, Rule 680, as, you know, dealing with permanent injunctions, but I guess maybe it does, but, you know, permanent injunction is not an ancillary remedy, so it seems to me that, you know, maybe we're really breaking new ground here. I agree with Richard that it doesn't need to be immediate harm, and I don't see any reason -- there is no need for a verification. I mean, here, you know, we're having a trial on the merits after discovery, so why on earth do you need a verified petition. Maybe you'll have one because you've already had a temporary injunction, but you can see a situation where you're simply seeking a permanent injunction with no temporary relief, you don't need a verified petition there.

MS. WINK: There are rules saying, "No writ of injunction will be issued without sworn pleadings." So --

MR. GILSTRAP: And we're changing the rule. That's the point.

MS. WINK: I hear you. That's the proposal. I just want to make sure.

CHAIRMAN BABCOCK: Okay. Any other comments

about this?

MR. ORSINGER: The whole Rule 3.

CHAIRMAN BABCOCK: We're onto Rule 3.

MR. ORSINGER: Yes, okay. I've got comments on some of the parts of Rule 3.

CHAIRMAN BABCOCK: Let's do it.

MR. ORSINGER: I don't know whether this is a specific editing issue or not, but I think that there's case law out there that even permanent injunctions can be modified for changed circumstances. Does anyone who is an injunction specialist have an opinion on that? An injunction judgment that's gone final is no longer appealable I believe is still subject to modification at a later time.

MS. WINK: I have not looked at that, frankly. I would go back -- I would have to go back to it.

MR. ORSINGER: Okay. Well, I don't know -- I believe that's the law. I haven't researched it recently, but I have researched it before, and if it is then I think perhaps we should be very careful that we don't say anything on these permanent injunctive orders that would be interpreted as overturning law that if the circumstances that warranted the injunction have changed that the injunction can be altered or removed.

CHAIRMAN BABCOCK: Roger.

MR. HUGHES: I'm sorry, what Mr. Orsinger was --

MR. ORSINGER: Yeah, on (b), verification may be coming out, but "all facts supporting the plea for a permanent injunction must be verified," that seems preposterous to me. In other words, are you saying that all of my witnesses' testimony and all of the exhibits that I'm going to offer to support my permanent injunction have to be attached to or included in my pleading?

MS. WINK: No.

MR. ORSINGER: No?

MS. WINK: We're just saying you have to have the -- like current averments. If you've satisfied it at either temporary restraining order or temporary injunction, those verified pleadings saying immediate harm, irreparable injury, no adequate remedy at law, likelihood of success.

MR. ORSINGER: Okay. Well, then I'm misinterpreting that. So this is -- you're just saying that if there is a requirement to verify that all facts you offer to comply with that verification requirement must be verified. In other words -- well, I'm talking around in circles. All right. So I misunderstood that.

CHAIRMAN BABCOCK: But we ought to conform this (b) with the (b) on --

MS. WINK: I've done that. I have done it.

CHAIRMAN BABCOCK: Okay, you've done that.

MS. WINK: I have done that.

CHAIRMAN BABCOCK: Okay. Any other questions, comments? We're not going to have any more discussion about the Family Code.

MR. ORSINGER: Well, I might say one other thing. This plea for permanent injunction --

CHAIRMAN BABCOCK: Silly me.

MR. ORSINGER: -- you know, we're almost out of the plea era of Texas procedure. I'm sorry Bill's not here because he was here when we invented the plea era, but we now --

CHAIRMAN BABCOCK: It was in the Eighties, wasn't it?

MR. ORSINGER: We don't -- this may not matter to anybody else, but we've just about eliminated pleas from Texas procedure and replaced them with pleadings and motions and stuff, and I'm not sure that this isn't an excellent opportunity, if not our last, to get rid of this vestige of the plea era of Texas procedure. So just consider it.

MS. WINK: Do you consider a pleading to be a plea? Because here's the thing I want everybody to consider, in order to be granted any relief at trial you have to plead for it, so if you go to the trouble of

wanting injunctive relief, you've got to plead for it. It's got to be your --

MR. ORSINGER: Well, way back in the old days -- I'm sorry Bill isn't here. Elaine is here to get me if I'm wrong, but in the old days --

PROFESSOR CARLSON: I think Lonny is much older than I am.

MR. ORSINGER: -- all of these things we used to do was by plea. We had a plea and abatement instead of a motion to transfer venue, or we had a plea of privilege, I mean, instead of -- and we had all of these pleas that were all in the defendant's pleadings, and we've slowly been moving away from pleas in the defendant's pleadings to motions of all kinds, and this has been a long process I didn't invent, but it's been going on, and here I see the last opportunity for us to take this little vestige of that era out, and I think we should.

CHAIRMAN BABCOCK: Well, without making too grand a point of it, I notice that on the temporary injunction the verification says, "All facts supporting the application."

MR. ORSINGER: Yeah.

CHAIRMAN BABCOCK: And it probably would be better to have the --

MR. ORSINGER: And I like "application" if

you define it to include a pleading, a motion, or whatever you --

CHAIRMAN BABCOCK: Well, let's not make a historical event out of it.

MR. ORSINGER: Well, I was putting it in historical context.

CHAIRMAN BABCOCK: Just make it consistent to the language.

MR. GILSTRAP: Why don't we get rid of (b)?

CHAIRMAN BABCOCK: What?

MR. GILSTRAP: Why don't we get rid of (b)? I haven't heard of any good reason to have (b) in here why we need a verified pleading for --

CHAIRMAN BABCOCK: Well, Dulcie says there's a statute that says you can't have an injunction without a verified pleading.

MR. GILSTRAP: A statute?

MR. ORSINGER: A statute or a rule?

MS. WINK: No, it's rule.

MR. GILSTRAP: It's the existing rule.

MR. ORSINGER: But you can't change the rule because that's the rule.

MR. GILSTRAP: No. I mean, we're changing the rules now. Let's get rid of it. I mean, is there any reason for it other than the fact that we've been doing it

that way for 70 years?

CHAIRMAN BABCOCK: And there -- well, that's a reason, but your argument would be that you don't -- it doesn't have to be verified because you're going to have a trial.

MR. GILSTRAP: You've had trial. You've had discovery.

CHAIRMAN BABCOCK: Right.

MR. GILSTRAP: You've had everything. So why are we going to kick it out because there's no affidavit supporting it when there's been evidence and findings and the jury said --

CHAIRMAN BABCOCK: Well, because -- I mean, I can make an argument, because the foundation of the trial is the pleadings, and I can see a reason when you're asking for an extraordinary remedy like a permanent injunction that you ought to do so based on a verified pleading. I mean, that makes sense to me. And what you're -- what you're saying is, well, but wait a minute, why do we need that since ultimately we're going to have to put on evidence anyway.

MR. GILSTRAP: The earlier -- the earlier arguments were, well, you haven't had time to do discovery and you're going to court and you at least need to have a verified pleading to kind of meet the threshold to get

temporary relief, but, my god, it's been two years, you know.

CHAIRMAN BABCOCK: Well, since we started this today?

MR. GILSTRAP: No. Since you filed the lawsuit. Since you filed the lawsuit.

CHAIRMAN BABCOCK: I'm with you. Yeah, Pat.

MR. DYER: Usually when you file your application for TRO you've got your request for temporary injunction and permanent injunction all in the same paper --

MR. GILSTRAP: Right.

MR. DYER: -- and you don't have to get the TRO --

MR. GILSTRAP: That's right.

MR. DYER: -- so you can file for the temporary injunction, but if you do that you also ask for the permanent injunction. I prefer somebody swear if they're going to get this relief, so I think it ought to be verified for the temporary injunction and permanent injunction.

MR. GILSTRAP: In this case I didn't ask for permanent injunction. There's nothing --

MR. ORSINGER: You didn't ask for temporary injunction.

MR. GILSTRAP: I simply want -- when the trial is over I want a permanent injunction. That's all I'm asking for, not a TRO, not a temporary injunction.

MR. DYER: It seems to me if somebody is going to ask for extraordinary relief somebody ought to swear to the facts.

MR. GILSTRAP: Why?

PROFESSOR HOFFMAN: The problem with your argument, Frank, is that was the same argument for not having a verified at the temporary injunction state, a position which I fully support and think that verified pleadings generally are --

CHAIRMAN BABCOCK: But it got slaughtered in the vote.

PROFESSOR HOFFMAN: But we were slaughtered in that vote.

(Multiple simultaneous speakers)

THE REPORTER: Okay, wait. Everybody's talking at once. Please stop.

MR. GILSTRAP: There were some arguments made. There were some arguments made, you know, that you haven't had time to do discovery. I think Roger made that, and, you know, if people still feel that we need to have a temporary verified pleading, let's do it, but there's -- there's no basis for it that I can see.

CHAIRMAN BABCOCK: But why don't we have a vote?

MR. GILSTRAP: Okay.

CHAIRMAN BABCOCK: So why don't we vote on whether or not we should have a verified pleading to support a permanent injunction. All in favor of that raise your hand.

HONORABLE R. H. WALLACE: That we have to have a verified pleading?

CHAIRMAN BABCOCK: And all those opposed? Jeff, you got your hand up?

MR. BOYD: No, sir.

CHAIRMAN BABCOCK: By a vote of 8 in favor, 10 against, no -- unless there is a recount.

HONORABLE TRACY CHRISTOPHER: No, I was just going to say why don't we put it in Rule 93, certain pleas to be verified?

CHAIRMAN BABCOCK: Okay. And the pleas would include injunctions, I would think.

HONORABLE TRACY CHRISTOPHER: Right. Plea for an injunction.

MR. GARCIA: Well, but what was the vote now? We just voted to verify or not verify?

CHAIRMAN BABCOCK: It was 8 in favor of verification, 10 against. The Chair not voting.

MR. GARCIA: So the same rationale would apply to a temporary injunction as --

MR. GILSTRAP: No, there was an argument for temporary injunctions that wasn't present here, and that was you haven't had time to do discovery, so you need to at least have some threshold credibility requirement before you go to the courthouse.

CHAIRMAN BABCOCK: Okay. So that vote is in the record, and the conflict with the Family Code is not going to be revisited, so we're onto Rule 4.

PROFESSOR HOFFMAN: And just before we do, just to clarify that, should we take that 8 to 10 vote as some reason for the Court to consider us revisiting the question of dropping Rule 93 entirely at some point in the future?

MR. HUGHES: Amen.

CHAIRMAN BABCOCK: I don't -- I wouldn't be willing to go that far, but I'm sure Justice Hecht will scour this record and see that comment there. Richard.

MR. ORSINGER: On Rule 4(a)(3) --

CHAIRMAN BABCOCK: All right.

MR. ORSINGER: -- I'm concerned about the way that is written because it says that the bond has to promise to pay all sums of money and costs that may be adjudged, but the bond is only -- the obligor on the bond

is only obligated to the amount of the bond. It's not an open-ended thing. There's a dollar figure that's a cap, so you have to be liable all the way up to your bond amount but not beyond, and this eliminates any ceiling. It says if you're a security for an injunction you have to be liable for all the monies and costs, even if it's a 500-dollar bond. So that needs to be rewritten or else it defeats all of the stuff that we're trying to do.

CHAIRMAN BABCOCK: Dulcie, what do you say to that?

MS. WINK: Existing law.

MR. ORSINGER: Well, gosh, then we better just perpetuate it.

MS. WINK: Well, I'm not trying to tussle with you, but the reality is the sureties are dealing with this all the time, and, you know, the reality is they're dealing with it.

MR. ORSINGER: Well, you know, the bonds that I draft, they say that they cap out, and there's no obligation above that amount, but the bonds that I draft are not in compliance with this rule --

MS. WINK: Shame on you.

MR. ORSINGER: -- and, therefore, we ought to do something. We all know that bonds are set in an amount. I mean, there are very few bonds that are infinite in

liability, and so we shouldn't have a rule that requires that the obligor will pay whatever may be assessed even if it's in excess of the bond that was set by the trial court. It makes no sense. Okay, so that's my point. Reject it if you want to.

Okay. 4(b), there's a cross-reference there to 14(c), which I think will not be 14(c) after you're finished, or is it still going to be 14(c)?

MS. WINK: Actually, Rule 14(c) is the existing rule number. 14(c), not an injunctive --

MR. ORSINGER: And it will still be 14(c) after we're finished?

MS. WINK: Yes.

MR. ORSINGER: Okay. And then on (c) I'm a little concerned about the necessity of a bond in connection with an ancillary injunction. I'm not familiar with the term "ancillary injunction" as opposed to "temporary injunction" or "injunction," and I'm a little worried that your throwing that into this might create some uncertainty.

MS. WINK: And I have never had to deal with that particular language. It is just the existing language in Rule 693(a), so if anyone is more familiar with it let me know.

CHAIRMAN BABCOCK: Justice Christopher.

Sorry.

MR. ORSINGER: I think you should --

HONORABLE TRACY CHRISTOPHER: Well, I understand Justice Hecht's exhortation not to revisit current law, I do think that the bond area should be looked at, and it's confusing, and the rule as written is confusing, and what's in this new rule is confusing. I mean, you ought to state, you know, what amount a bond needs to be set, and it ought to be a dollar amount, and there shouldn't be this odd language in (a)(3) that causes problems. I mean, if we're going to go through the process of, you know, rewriting these rules, let's not just rewrite them as poorly as they were written to begin with.

HONORABLE NATHAN HECHT: And I'm not saying that. I was only making the point earlier that I think it's unlikely that the Court will change the substantive law for getting an injunctive relief, but for stuff -- for other procedural things I think we should take another look at it.

CHAIRMAN BABCOCK: Frank.

MR. GILSTRAP: Well, I mean, you know, bond -- the bond ought to apply to a permanent injunction, and this says in the opening line it says a "writ of injunction." We need to probably say "a temporary restraining order or temporary injunction."

CHAIRMAN BABCOCK: Okay. Elaine.

PROFESSOR CARLSON: I was just going to agree with what Richard said insofar as the cases that I've read dealing with bonds, is ultimately the language of the bond controls. We have looked at other provisions -- and I'm sorry I can't put my finger on it right now -- where the provisions end with "up to the amount of the bond" or "up to the penal amount of the bond."

MR. ORSINGER: What does the TRAP say? There's a TRAP rule about bonds.

PROFESSOR CARLSON: Yeah, 24.

MR. DYER: The attachment and sequestration bonds, they have a dollar amount plus value of fruits, hire, rent, or revenue, so it is open-ended, but it's subject to proof at a later stage.

MR. ORSINGER: So the district judge is not required to figure out the amount of the bond at the time that --

MR. DYER: He would not know it at the time.

MR. ORSINGER: Really?

MR. DYER: Yeah.

MR. ORSINGER: So it's kind of like interest accruing for a two-year period or something.

MR. DYER: Yes, and there are bonds also where you can accrue interest, but in attachment frequently

it's a thousand dollars, but the actual bond itself says "and plus the value of the fruits, hire, rent, and revenue," and that's determined at a later stage. So just looking at it, the surety and the obligor cannot know what their ultimate liability will be down the road.

PROFESSOR HOFFMAN: So how is that bond priced?

MS. WINK: Well, actually, even in --

MR. DYER: I think it's still done the standard one, like probably about 10 bucks per thousand.

MS. WINK: Even in the injunctions here, at the hearing the court has to make a determination. Hopefully people remember to put on evidence of it. It's pretty embarrassing when one fouls that up, but put on evidence of what the damage will be if the bond was -- if the injunction was issued in error, if it was a bad decision, and so the parties have to put on evidence of, you know, how much the other side is going to be damaged as best they can. So in reality, Richard, there's an amount that the court finds, but it also -- but the bond says not only that, it may be a 10,000-dollar bond, but it also includes "and costs that may be adjudged by the applicant." So we can tweak the language in that way, but the way the language is here is there because it has the parties make proof of how much the bond should be.

MR. ORSINGER: Well, the "paying all sums of money that may be adjudged" is damages. It's not court costs, which I know court costs are unknown, but this basically says that the bond has to be a bond for whatever the damages may be, and I don't believe that. I believe the bond has to be for the amount that the judge sets when they issue the temporary restraining order or the temporary injunction.

MS. WINK: I agree with you to a heavy extent. I agree with you that the judge makes a finding on what he or she believes may be the damage if somebody finds out later that this injunction was issued improperly.

MR. ORSINGER: And so they'll give a dollar figure and --

MS. WINK: They'll give a dollar figure.

MR. ORSINGER: -- and the bond should be that dollar figure.

MS. WINK: That dollar figure will actually go in the bond. It will be conditioned to pay that dollar figure. Your language here is just to guide the court on what they've got to find. Now, the bond will also say "and costs." It may be "$10,000 and costs," right, and the costs they won't know. That will be somewhat open-ended, but I think you're focusing on being concerned that the language of the bond itself tracks these particular words

when, in fact, the language is intended to give you guidance as to what the court has to find in order to tell us how much the bond is going to be, and it's got to be for the -- your actual bond language is going to be for the dollar figure and costs.

MR. ORSINGER: Well, the -- I see what you're saying, but I think that because this is applying before there's a final trial I think it says it's an open-ended obligation to pay all sums of money that may be adjudged, not what the judge presently expects or --

MS. WINK: We'll work on that language. We'll work on it.

MR. ORSINGER: Yeah. To me every bond that I've ever seen has been for a dollar amount plus something that accrues like interest. I haven't done an attachment bond, but the focus of the bond is an amount, and the amount is set by the judge, and if your bond is for less than that amount you don't have a temporary restraining order or temporary injunction, and if you post a bond for exactly that amount, you do.

MS. WINK: Uh-huh.

MR. ORSINGER: And so it worries me that this says that the bond -- I think this is a statement of what the bond must say. The bond must say that the obligor on the bond, which includes the sureties, will pay whatever is

adjudged at the end of the case, and that's an open-ended bond. To me that's a very different kind of bond.

MS. WINK: I hear you. I'm already saying I'm willing to work on the language.

MR. ORSINGER: Okay. Okay. I'm with you.

MR. GILSTRAP: You're just copying language from the existing rule on this, aren't you?

MR. DYER: Yes, that came from existing rule.

CHAIRMAN BABCOCK: Richard.

MR. MUNZINGER: I just want to agree with Richard. It's clear this is a condition of the bond, and so if you have a corporate surety, the corporate surety is promising to pay the amount that will be adjudged, which in this language would be the damages as distinct from the amount that I might suffer if an improvidently granted temporary injunction were granted, and that seems to be the purpose of the bond. The case law on when you try and review the amount of a bond set by a trial court pretty well says that it's up to their discretion, and there are almost no guiding limits of what the bond might be.

CHAIRMAN BABCOCK: Yeah.

MR. FRITSCHE: Just two points. Just understand that this tracks exactly what is in 684, and it is only -- what's in currently 684, and it's only if the TRO or the TI is dissolved in whole or in part, so there's

a limitation on when the bond amount -- the obligation accrues. It's upon dissolution.

MR. ORSINGER: But if the bond is -- if the TRO is dissolved, there is still the other shoe to fall, which is the countersuit for the improvident issuance of the TRO, and it's the damages that you pay at the end of the jury trial is what the bond is supposed to stand good for.

MR. FRITSCHE: Which again is probably why the court has to take that into consideration in considering this extraordinary remedy, and obviously the bond may need to be increased or of such significant amount that it will protect the person against whom --

CHAIRMAN BABCOCK: But Richard's problem, I think, is that the bond may be 25,000, and it may be dissolved at some point, and you come and you say, "My goodness, my business has been hurt by half a million." Well, is the bond conditioned on half a million or on 25,000? If it has this open-ended language then the surety company might be on the hook for a half a million.

MR. ORSINGER: It seems to me we can eliminate this problem by breaking it into two. Let's give the trial court a standard for setting the bond --

MS. WINK: Right.

MR. ORSINGER: -- and then let's let the

sureties have a bond that meets the dollar figure set by the judge, and let's do those in separate provisions so that they don't confuse each other.

CHAIRMAN BABCOCK: We're giving more than a wink and a nod to this.

MR. ORSINGER: Okay. Good deal.

CHAIRMAN BABCOCK: Gene.

MR. STORIE: I don't know if this is the only exception, but in tax cases you have a requirement for a bond to secure an injunction of double the amount due or to become due during the pendency of the injunction. So for number one that's very open-ended, and number two, it wouldn't really be set by the trial court. It's set by statute, and it's not so that you can eliminate the bond. It's just specific as to the kind of bond.

CHAIRMAN BABCOCK: Okay. Richard, did you not have any comments to (d) or (e)?

MR. ORSINGER: I did.

CHAIRMAN BABCOCK: Well, let's --

MR. ORSINGER: Not an editing comment, but at the very end of (d) --

CHAIRMAN BABCOCK: Well, save them.

MR. ORSINGER: Oh, okay. I'll save them.

MR. GILSTRAP: Where did (d) and (e) come from? They seem new.

MS. WINK: No. They're existing.
MR. GILSTRAP: What's that?
MS. WINK: They're existing.
MR. ORSINGER: They are?
MS. WINK: They are existing. In fact, let me be specific.
MR. GILSTRAP: They're what?
MR. MUNZINGER: We can't hear y'all down there.
MS. WINK: 684 and, well, actually, the review of applicant's bond is a new provision, but the restraining for governmental entities is existing.
PROFESSOR CARLSON: 684.
HONORABLE TOM LAWRENCE: You know, this whole thing started when the private process servers wanted to be able to serve garnishment and then we had a discussion about that and then we realized that there were all these inconsistencies in these ancillary sections, and so all we were supposed to do is go back and make this prettier. We weren't supposed to change all of the existing rules to have any substantive effect. So while I appreciate all the comments, the task force really wasn't trying to change anything. In fact, we were trying to leave it like it was, only change the order and make it flow a little bit better. So, I mean, that was the whole focus of the task force.

MS. WINK: Well, and in the form of practice as it exists.

CHAIRMAN BABCOCK: As you probably heard from Professor Dorsaneo, he's not bound by that.

HONORABLE TOM LAWRENCE: Well, it's his fault because he did this back in 1940.

MS. WINK: And for the record, while he's not here to protect himself, he was on this injunctive rules subcommittee.

CHAIRMAN BABCOCK: There we go.

MR. GILSTRAP: Chip, in all fairness, I mean --

MR. ORSINGER: So he's estopped from any criticism.

MR. GILSTRAP: -- I don't know that these rules have ever -- the injunction rules have ever been worked through. I mean, I haven't met anybody here that was on the committee when any of these injunction rules were adopted, you know, so it's probably high time.

CHAIRMAN BABCOCK: We will be in recess until 9:00 o'clock tomorrow morning, Saturday morning, right back here. Thanks, everybody, for a really good discussion today.

(Adjourned at 4:58 p.m.)

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REPORTER'S CERTIFICATION
MEETING OF THE
SUPREME COURT ADVISORY COMMITTEE

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I, D'LOIS L. JONES, Certified Shorthand Reporter, State of Texas, hereby certify that I reported the above meeting of the Supreme Court Advisory Committee on the 13th day of May, 2011, and the same was thereafter reduced to computer transcription by me.

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