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MEETING OF THE SUPREME COURT ADVISORY COMMITTEE

MARCH 25, 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 25th day of March, 2011, between the hours of 9:00 a.m. and 4:02 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

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

11-05 Memo from Judge Peeples, legal effect of letter rulings (3-23-11)

11-06 Memo from Richard Orsinger, TRCP 116 (3-24-11)

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MR. LOW: Chip can't be here, so you're going to have to bear with me, and I'll tell you like I tell the jury, I need your help. Really. First, welcome to everyone. The session, we should be able to finish our work today, and as you know, there's no meeting Friday.

MS. SENNEFF: Saturday.

MR. LOW: I mean Saturday. Boy, I started out good, not even knowing what day it is. Here comes Richard. I know he will keep us straight. Welcome, Richard. All right, first, Justice Hecht will give us a status report of what's going on and what's been going on since we last met.

HONORABLE NATHAN HECHT: Just a couple of things. The Court issued final amendments to Rule 281 and 284 and 226a of the Rules of Civil Procedure, and we -- it looks like a little bit of language was inadvertently omitted, some instructions, bracketed instructions to the trial court and lawyers, so we'll put those back in. Judge Christopher pointed that out this week, so that's a small change that will be coming out.

And then we adopted rules for the appellate courts to have electronic filing and also electronic copies by e-mail. Our court has been getting electronic copies for a long time, for a year or two, and then off

and on before that. So we're sort of moving, lurching, toward electronic filing, but the -- one of the problems is that the software that is going to handle the filings when they get to the court side of the interface has not been finished yet, so we're having to do that by hand, and there's still some work to be done on that. The Legislature seems to be receptive to the need for electronic filing and has agreed to have some funding for it if we can find the money, which we can only find it if a fee bill passes, and it might, but that's the status of that.

Then, of course, you know that we lost Chief Justice Greenhill several weeks ago, and if you think about it, you might want to drop Chief Justice Pope a note. He'll be 98 three weeks from Monday on April the 18th, or as he says "only 98," and that's all I have, but I'm happy to answer any questions.

MR. LOW: All right. The next thing is the legislative update.

HONORABLE NATHAN HECHT: I want to get your help on a couple of bills that are pending and tell you about one other. The one I want to tell you about is House Bill 906, and the section of the Family Code that deals with the rendition of judgment and the post-trial and the pre-appellate part of parental termination cases,

which I think is section 263.405, has caused the appellate courts and the trial courts quite a few problems because of counsel who is appointed to represent an indigent parent doesn't always want to take the case on appeal, and so frequently the baton is not seamlessly passed off between trial counsel and appellate counsel, and the Legislature has tried over the last few sessions to speed this process up to take the children out of limbo so that their situation gets settled as quickly as the legal system will reasonably allow, but a lot of times parents get caught in this swivet and forfeit their issues on appeal before they know it's even happened.

So we've written on it -- the Supreme Court has written on it a couple of times, and the courts of appeals have written on it several times, and there is a bill, House Bill 906, that will take those provisions out and require the Supreme Court to adopt rules to provide for accelerated procedures, and we're -- the Court is in favor of this, and we were actually going to appoint a task force to try to come up with something like House Bill 906, confident that this committee would then be able to adopt these accelerated procedures that would move things along without costing people their rights. But another group did this on their own, so thank goodness for that; and if the bill passes, and I hope it does, the

Court will be required to adopt rules no later than March 1st of 2012, so we'll have to get high behind it; and I think Professor Dorsaneo has worked on this some; and it's a difficult area, so it may take a little bit of time.

I just wanted to alert you to that, but then I want to get your counsel on two other bills so that we can respond to the sponsors, and one is House Bill 3393 by Representative Hughes. And they don't have copies, right?

MS. PETERSON: No.

HONORABLE NATHAN HECHT: It's very short, and I'll just read it to you. The substantive provision amends the Government Code to provide that, quote, "A court reporter may not be required to file an official transcript of a trial before the 60th day after the date a notice of appeal is filed. To the extent this subsection conflicts with the Texas Rules of Appellate Procedure or other rules of procedure, this subsection controls. Notwithstanding sections 22," some other statutes, "the Supreme Court or the Court of Criminal Appeals may not amend or adopt a rule in conflict with this section." So this would say that very simply in no situation may a court reporter be required to file an official transcript of a trial before the 60th day after the date a notice of appeal is filed, no matter what.

Now, Kennon has and I think Carl Reynolds at

the Office of Court Administration have pointed out to Representative Hughes' office on the civil side this would affect a number of proceedings that are required to be expedited by law, and it says "transcript of a trial," so I'm not sure if that includes like a hearing on a temporary injunction, but it would certainly include parental termination case, which we've just been talking about has to be expedited quicker than that; and the concern, I take it, is that lawyers sometimes wait till the last minute, not just in general, but to decide whether to appeal; and so then there's a lot of pressure on the court reporter to get the court reporter's record done in time for the appellate process to move on, but Representative Hughes has -- his office has indicated that he is amenable to exceptions, concerns, to hearing what input there might be on this, and so I would like to get the committee's take on that.

HONORABLE TOM GRAY: Is there any way we could get Representative Hughes to let this subcommittee know or this committee know what his primary concern is and draft a rule to address that and other concerns regarding reporters, because, frankly, my problem has not been at our court of getting it in the -- that 60-day period. It's getting it, you know, within a six-month period. It just -- I mean, when we run into problems

it can take a long time. And I know that David and Dee Dee had nothing to do with any of those situations.

HONORABLE NATHAN HECHT: I don't know the answer.

HONORABLE TOM GRAY: Okay.

MS. PETERSON: And if I may, I don't know all of the concerns, but one of the concerns expressed that gave rise to this bill is that under 35.1 of the Rules of Appellate Procedure the 60-day period begins to run after the date the judgment is signed, but then you have people waiting --

HONORABLE TOM GRAY: Until the 59th day.

MS. PETERSON: Right. Or even less. Maybe they're waiting until like the 29th day, and the reporter feels crunched for time, and so one of the potential solutions that was tossed around, if you will, is to make the 60-day period run not from the date the judgment is signed but from the date the notice of appeal is signed, but then there may be other implications that aren't intended, so that's one potential solution, perhaps too simple, but --

HONORABLE TOM GRAY: And I don't know if it's the reporters -- if they have a problem with this, but I know that we've run into it. There is no formal way in the rules for a court reporter to get an extension of

the period of time; and if there was a way that they could get an extension, that may alleviate the pressure on them, a formal extension, if you will. But as far as the text of the bill goes, I'm sure we could at least -- at the very least, come up with with a list of exceptions.

MR. LOW: Justice Bland.

HONORABLE JANE BLAND: It seems like the problem that the bill is intended to address is sort of a case-specific problem, when a lawyer has failed to make -- timely make arrangements to pay for the record, and I'm not aware of a problem with courts of appeals not being sympathetic to that concern so that if a reporter sends in a letter and says, "I haven't had adequate time to prepare the record because the lawyer just made arrangements to pay for it this week," our court grants those extensions routinely, and I know the 14th does, and I don't know that it's a formal process in the rules, but we treat those sort of like motions for extensions of time by the party, and we sign an order extending the deadline for a court reporter to comply, and my concern is on the flip side where the specifics of a case really require the court to act promptly, and we can't do a thing until we get the record, and I agree with Justice Gray that we have more problems with trying to get the record well, well outside the 60-day deadline than we do --

HONORABLE TOM GRAY: Giving an extension.

HONORABLE JANE BLAND: -- having some sort of demand that it's the 61st day and where's the record. So I also note that the courts of appeals, the intermediate courts of appeals, are subject to legislative performance measures, and the clock for us starts ticking when the notice of appeal is filed, and any delay in preparing the record to get to the court of appeals is subsumed within that performance measure so that the entire timetable for the time from the notice of appeal being filed to disposition is then skewed out further by any long delays, and it seems as though with prompt arrangement to pay for the record and all of the technology that we have now for realtime court reporting and scoping the record, and at least in the courts in Houston and I think shortly in all the other courts and probably the courts in Austin as well, our court reporters are now electronically filing the record. So, if anything, the time frame for preparing a record I think because of the advances in technology is shorter than it used to be, not longer. So those would be my comments.

MR. LOW: Judge Evans.

HONORABLE DAVID EVANS: I think Justice Bland hit a lot of issues, but this may be a problem that arose in a smaller -- in a rural court as opposed to an

urban court. At this point the courts at least in Tarrant County are wired to -- my reporter can send out her transcript electronically while the trial is going on, and it gets scoped by somebody in California, and then she has the material back that evening. So it may be that they're not having quite the support in that particular court that they need to get the records turned around, and then on a few times my reporter has come to me and said, "I've got to get this up for an expedited review," and I bring in an extra court reporter. My county allows me to bring in additional reporters if the record is behind, and I have a budget for that.

I can't see that -- and I would just be curious -- I think the comment over here of what the problem is trying to address, because I don't believe we would have that problem in Tarrant County with our reporting system.

MR. LOW: David.

HONORABLE DAVID PEEPLES: I like the suggestion made a few minutes ago that somebody ought to go to Representative Hughes and find out what this is aimed to fix, number one. Number two, I think any time there is language in a bill that says "and the Supreme Court doesn't have any authority to change this by rule," it seems to me that we, if we know people over there,

ought to talk to them about that, because I would hate for that to become commonplace. I mean, without even talking to the Court or anybody else to do that, it just seems to me is something that ought to be nipped in the bud.

MR. LOW: Well, we have some legislators that want to keep their territory, and they don't want anybody nudging in on their territory, and so they -- that's something I totally agree with you, and that's not I don't think the majority of the legislators feel that way, but some do.

Judge Gaultney, what do you think about your experience on this matter? Do you -- can you give us some comments?

HONORABLE DAVID GAULTNEY: Well, I agree with the comments that have been made, and that is that generally the court is very easy in granting extensions of time. I think the difficulty comes not early on, but getting the reporter record filed after the fourth or fifth extension; and I think what happens is court reporters are busy, and they're in court and getting the time to do it; and often, frankly, it's certain court reporters, you know, that you routinely see the request for extensions of time from. Frankly, that's the way it works. So I'm not exactly sure the problem that this is designed to address. The rules provide that both the

appellate court and the trial court are jointly responsible for making sure that the record gets filed timely and that I think is the way it works.

You know, if a -- I think when we grant an extension the trial court becomes aware that their record has not been timely filed, and I think that allows the trial court to work with the court reporter to ensure that the docket is being handled in a way that the records are being filed and you don't have five records that are -- have five extensions on them. So that's really the problem, I think, that the appellate courts are dealing with is actually getting records not filed within 60 days, but filed fairly quickly.

Now, there are all types of exceptions. This rule of 60 days with no exception strikes me as ignoring all types of accelerated appeals, all types of issues that we're presented with that require prompt attention and that do require an exception, and you know, I don't know if it would apply to election contest. I don't know if it would apply to, like Judge Hecht said, a termination proceeding or some type of other -- does it apply to mandamus proceedings? Does it -- you know, what exactly is it designed to do?

Now, if there has been a situation where some court reporter has been placed in a tight situation

in order to produce a record and that has produced a harsh result to the court reporter, it seems to me that that's something that can be worked out and is probably routinely worked out with the appellate clerks. I mean, you file a motion, a request. Maybe there's not a formal proceeding to do it, and maybe that could remedy some of the problem, but I think it's routinely done in the courts where they send a letter. They simply send a letter saying "I can't have it done," and you know, if the clerks and the courts are naturally trying to keep a gentle pressure on the process, so that -- not a harsh pressure, but a gentle pressure on the process to make sure that you're not a year down the road without a reporter's record, so it's a gradual process.

In my view the system works well, and when a court reporter gets out of balance in his or her docket, and they frankly have a backlog of records sometimes, as the trial judge said, what -- I'm sorry, Judge Evans.

HONORABLE DAVID EVANS: I've been called worse.

HONORABLE DAVID GAULTNEY: But the trial court once they become aware -- the trial court, once they become aware that there's that problem with their court, they make arrangements to bring in a substitute reporter until that reporter can get caught up.

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

MR. ORSINGER: I have an experience as a practitioner similar to what the appellate justices have said, that the difficulty is getting the record in after a long period of time with a number of extensions. That makes me think that maybe the problem is not so much the ordinary appeal, but it may be certain statutes that require quick filing, and it may be a better way to address that is to identify those statutes that are creating that enormous pressure to do something too quickly and change the timetable in the statute rather than adopting a statute that's an exception to all known rules and statutes, because there may be one or two statutes that are causing this problem, that if we could affect the timetable in those statutes we could avoid the unanticipated consequences of affecting all other practices.

MR. LOW: It looks like this only affects -- and it can't be sooner, but there's no limit, it doesn't affect how many extensions or anything like that. It's just can't be sooner, and don't most of you find that this is case-specific as well as type case-specific and need requires, so I think your idea is certainly an excellent one to look at the ones that are giving trouble.

HONORABLE SARAH DUNCAN: Buddy?

MR. LOW: Sarah. I'm sorry.

HONORABLE SARAH DUNCAN: That's okay. It's hard for you to see in two directions.

MR. LOW: Well, I don't see as well as I used to anyway.

HONORABLE SARAH DUNCAN: I think one of the really remarkable attributes of this committee is the breadth of the state that's represented, and the different types of trial court circumstances around the state are so varied, and the Court has worked very hard to work out very detailed timetables for a lot of different kinds of cases, and if we -- if this statute passes, it's going to mess up -- it's going to mess up everything, that whole detailed timetable, and I think if someone -- just a suggestion, if someone or a group of someones talked to -- was it Representative Hughes?

HONORABLE NATHAN HECHT: Uh-huh. Yes.

HONORABLE SARAH DUNCAN: -- and explained the makeup of the committee and the varied circumstances around the state, it might help him understand why the rules are as they are and how they have to work with the statutes and if there is a problem, the Court will be more than happy to address that problem, but a blanket "not before the 60th day after a notice of appeal is filed" is

going to affect too many types of cases that the Legislature itself has said are a priority.

MR. LOW: Justice Jennings.

HONORABLE TERRY JENNINGS: I just want to echo what Richard said a minute ago. Judge Cowen, who used to be on our court, used to always say the quickest way to slow down an appeal was to label it an accelerated appeal, and I think what he meant by that was there are so many accelerated appeals now that when the Legislature creates all these accelerated appeals it's almost like an unfunded mandate by analogy because you're creating more work and you're putting that additional work on a single person, the court reporter; and as Judge Gaultney said, that court reporter is working everyday in the courtroom and then in addition to that then they have to go back and make all these records on accelerated appeals; whereas, you know, many years ago you would wait until the final judgment, so it's problematic to begin with.

MR. LOW: David.

MR. JACKSON: Well, this is the first I'm hearing about this is this morning when Justice Hecht mentioned it to me, so I don't see this as being a groundswell of court reporter concern, because usually if that's the problem I hear about it a long time before now. So, I don't know, it would be interesting to find out

where this originated from and who is bringing it up, whether it's just one court reporter somewhere off in some district, but I really don't think it's an across the board court reporter concern at all.

MR. LOW: Does anyone here know the representative?

HONORABLE NATHAN HECHT: I know him.

MR. LOW: Pardon?

HONORABLE NATHAN HECHT: I know him. He's I think a well-regarded trial lawyer.

MR. LOW: No, I just meant that he might would listen to a group if we had a group going to talk to him.

HONORABLE NATHAN HECHT: Well, he's receptive to input. I mean --

MS. PETERSON: He called and asked for input.

MR. LOW: Okay. Judge, you need more input?

HONORABLE NATHAN HECHT: I think if that's -- I think that's helpful. But it sounds to me like that the considered view is that there's so many twists and turns to this that it would take -- if we knew exactly what the concern was it would still take pretty careful rules drafting to meet it, so that's what we'll tell him. So but, as I say, he's receptive to it.

MR. LOW: Oh, Pam, I'm sorry.

MS. BARON: I just want to echo something that was just said because I'm not unsympathetic to the court reporters because I do think our rules, when you parse through the three different sections for when the record is due, is a pretty short time frame because in an appeal where you file a motion for new trial your notice of appeal is due 90 days after judgment, but the record is due 120 days. So that's a 30-day time frame. If it's an accelerated appeal the record is due 10 days after the notice of appeal, and we are getting a lot more interlocutory appeals, all of which are considered accelerated, all of these sovereign immunity appeals, all of these doctor expert report appeals, and so I would think that the burden on the court reporters especially in that area is increasing, and in certain of those appeals I don't think it's that critical that the record get there that quickly. So we could try and identify particular appeals where there could be a little more time to get the record up. And then the third area is in restricted appeals the record is due 30 days after notice of appeal, and there the appellant has had six months to file their appeal, so I'm not sure why we have to have a 30-day time limit on the reporter in that situation, so I think there are some things we could think about in response to this

concern, if it is a general concern.

HONORABLE NATHAN HECHT: Great. The other one is House Bill 962 by Representative Hartnett, and it simply says that the Supreme Court shall adopt Rules of Civil Procedure requiring a person who serves process to complete a return of service. I don't think there's anything particularly controversial about that, but it raises a bigger question, which is why do returns of service -- why are they excepted from being electronically filed as they are in our electronic filing rules templates that we're using around the state. Why can't you use a scanned version or some sort of electronic format for a return of service, and we've talked about this before, is the notary important or can it just be signed under penalty of perjury or under oath, and then we have a representative here from the industry that makes electronic signature, digital signature equipment; is that right?

MR. RICE: Well, what we are is we are an electronic signature and electronic notarization technology. We're a software company that has the capability of applying secure signatures, e-signatures as well as the e-notarization of documents. For instance, mortgage documents. We've been working the mortgage industry for several years, and I brought by a signature

pad just for y'all to see. This is an electronic biometric signature pad. It's different than what you sign at Wal-Mart when you take a credit card and swipe it. In fact, this, what it does, the -- it captures the data of your signature just as a thumbprint. This also has a thumbprint capture on the front of it, but a thumbprint capture, what it does, it takes and digitizes that signature or a thumbprint and it pulls specific data. That data then renders the signature. It's not an image or a cut and paste. Like I could take -- I was telling this gentleman here while ago, I could take your signature, and I can cut and paste, and I can apply it to another document, you know. This you can't, because the data is what creates the signature, and it's forensically reproducible. So I could go into court five years from now and have that individual sign the pad just like this and compare the data, not the image of your signature. You're comparing the data that created that signature.

It also applies the notary seal, all of the requirements of electronic notarization. Texas allows for electronic notarization. Many people don't know about this technology. It's new stuff. I've been in it for seven years and had my head beat in a long time. Yes, sir?

HONORABLE TOM GRAY: She's going to need a

name.

MR. RICE: I'm sorry.

THE REPORTER: I've got it. I've got it.

HONORABLE TOM GRAY: Oh, you do. I'm sorry.

THE REPORTER: Thank you.

HONORABLE TOM GRAY: I would like a name.

MR. RICE: Bob Rice, R-i-c-e. I am the CEO of a company called Worldwide Notary, and we produce a product called Digasign, D-i-g-a-s-i-g-n. We're also working with several judges revolving around magistration documents where the magistrations are being done by videoconferencing, but the documents need to be signed at the jail and at the court, so the documents can be signed simultaneously as the magistration takes place. There's lots of -- lots of applications in the legal industry for the technology, and naturally my job is to take it there as rapidly as possible.

HONORABLE NATHAN HECHT: So my question with respect to Representative Hartnett's bill is about the committee's view of whether returns of citation can be electronically filed, can scanned copies be filed, how -- what is it -- what does the committee see as the importance of the how close to an original a return of service is?

MR. RICE: If I may just explain something

there, in the electronic industry when you sign a document in paper, I sign it in paper, and I scan that document, the original still resides somewhere, and typically in law -- in legal that has to follow the scanned or the faxed copy. With the electronic signature, the electronic copy or the electronic document that you see in your computer is the original. What you print out of it is a copy. Okay. If you take a document, and you've signed -- I signed electronically, he signs electronically, and he signs electronically, and then the fourth person down there signs it by paper it is no longer electronic. It is a paper document because that chain ended. Yes, sir.

MR. HAMILTON: Is the bill designed to prevent electronic filing? Is that the purpose of it?

HONORABLE NATHAN HECHT: No. It's -- the bill does not address electronic filing.

MS. PETERSON: It addresses it to an extent. It provides that the return may be electronically filed, and it has a provision in there that says if you have a certified private process server who is completing the return that it doesn't have to be verified. It can be signed under penalty of perjury, and the effect of that is you wouldn't have to have a notary involved, and so one of the questions is do we want to require the verification process to continue for the private process servers.

HONORABLE TOM GRAY: When you first mentioned it I was looking at this very myopically, I think, from the appellate perspective, and obviously the return is already part of the record and would be filed if we ever start receiving electronic records as part of the electronic record that comes to us, but what you're focused on, as I understand it now, is the actual delivery of the return from the process server to the trial court clerk.

MS. PETERSON: It's really two things, the delivery, if it can be delivered electronically, and also whether you have to have a notary involved to verify the return.

HONORABLE NATHAN HECHT: Because the current rule template, right, that we're working with excepts from documents that can be electronically filed returns of citation, and I'm just not sure where that came from. Some of these things have been around long enough that it escapes me why they were in the rule in the first place, but maybe there was a good reason, and so, of course, the courts I think generally that are moving toward electronic filing would like as many things to be electronically filed as possible, and why should we exclude returns of citation, but maybe there's a reason, and maybe another solution is that there's an electronic way of filing -- of

signing a return.

MR. LOW: Richard.

MR. ORSINGER: On the notarization requirement, I don't really see why we should perpetuate that. The U.S. government requires everyone to sign their tax returns, and they're under the penalties of perjury without a special memorial service to put it under, and that seems to work well. I've never heard of anyone that was acquitted of tax fraud because they didn't notarize their tax return. I also remember years ago when we adopted the Rules of Appellate Procedure, I think the process before that was that all motions had to be supported by verification or affidavit, if I vaguely recall this, and then we decided that matters that were known to the appellate lawyers didn't have to be sworn to on your motions for extension, for example, and I feel like that was very successful. I can remember in the old days having to do affidavits on all these motions, and if it's routine stuff why not just, you know, eliminate the requirement of an oath; and if someone lies, someone else will call it to the Court's attention and then you can have a fight over it. So it seems to me like the notarization is an unnecessary requirement that doesn't really add value.

On the issue of the electronic filing, I'm

trying to remember back what the debates were relating to the whole electronic filing process, and perhaps there was a concern at the time that there were some people that were serving process with the approval of a local judge with no training or no certification process that's statewide or otherwise, and these service issues usually arise only when there's a default judgment, because if they appear and file an answer then the service of citation isn't a debate, and I remember people having concerns that default judgments could be taken on questionable returns of citation where someone, you know, threw it at somebody or left it at the door or something, and it was not really clear, and I think there may have been a concern at the time that we want somebody to go under oath, and we want the original document. Sometimes it's signed by the recipient, sometimes it's not.

We've changed that whole process service now, and it's been upgraded. There are certain minimum requirements. I think there's more screening of the people that have the authority to do it, and so maybe that concern is not so great anymore. Maybe we've addressed that through the industry standards rather than having to perpetuate this requirement that the original piece of paper be filed.

MR. LOW: And on notarization, Justice

Jennings, didn't we have a proposal -- you know, there's a statute that allows a prisoner to sign subject to perjury without it being notarized.

HONORABLE TERRY JENNINGS: Right.

MR. LOW: And someone proposed -- the State Bar or someone proposed that it's unnotarized affidavit or something like that, and I think it was voted down. So we have had some discussion on that, and I don't remember the reasons, but most people kind of were against that, and maybe, Terry, you can tell us.

HONORABLE TERRY JENNINGS: I can't remember why, but, yeah, the extent of my recollection is what you just said.

MR. LOW: Okay.

HONORABLE TERRY JENNINGS: Sorry.

MR. LOW: All right. Okay.

MS. PETERSON: Just an additional note about the bill, my understanding is that the noncertified private process server would still have to go through the verification process, so the exception would be for the certified private process server because he or she has been vetted generally to a greater extent than the noncertified private process server.

MR. ORSINGER: That makes perfect sense to me, and it would also be an incentive for people to go

through the certification process, which would be good.

MR. LOW: Anybody have anything else --

MR. RICE: My only concern with that was that the notarization of like a peace officer, an officer of the court, does not have to be notarized. It was only the private process server that had to be notarized under the previous stuff.

HONORABLE SARAH DUNCAN: And I remember the same discussion you remember, Chairman Low, and there does seem to me to be some value, even though I'm -- when a lawyer files a motion --

MR. LOW: Yeah.

HONORABLE SARAH DUNCAN: -- they are an officer of the court.

MR. LOW: Right.

MR. RICE: Exactly.

HONORABLE SARAH DUNCAN: And that was the discussion that led up to doing away with the verification requirement for matters known to the lawyer, but with a private process server we're not talking about an officer of the court, and it gives me some pause to be in favor of a rule or statute that would do away with that requirement for a private process server, even if certified.

MR. LOW: I think one of the questions was some of the people had been district attorneys or worked

for the district attorneys thought there would be some problem prosecuting a person for perjury under those circumstances. I don't know.

MS. PETERSON: I've heard that sentiment as well.

MR. LOW: That was raised, and my knowledge was so little I couldn't agree or disagree.

HONORABLE TERRY JENNINGS: Well, it's a question of proving up the identity of who actually made up the document.

MR. LOW: Yeah, right, but that was that --

HONORABLE TERRY JENNINGS: But in this case it's --

MR. LOW: It's coming back to me now.

HONORABLE TERRY JENNINGS: -- the process server who was signing it.

MR. LOW: Anything else? Kennon.

HONORABLE NATHAN HECHT: I think that's fine.

MR. LOW: Okay. All right. Appreciate --

HONORABLE NATHAN HECHT: You know, there are a lot of other bills that would call upon the Court to make rules, and some of them on a pretty quick time frame, and we have encouraged that relationship with the Legislature, and I think it's very productive, but this is

even kind of another step that we can give back to legislators in the middle of a session with input from the committee that will hopefully give them some positive direction.

MS. PETERSON: And on that note, House Bill 962, for what it's worth, is going to a committee hearing on Monday starting at 2:00. The other bill has not been set for a hearing yet about court reporters.

MR. LOW: That's much better than Richard being over there until midnight being grilled by the Senate.

MR. ORSINGER: That was fun.

MR. LOW: Yes, Steve.

HONORABLE STEPHEN YELENOSKY: One bill I have a question about, I think it's perhaps in the same form as it was proposed last time, involves requiring the court to allow questions from jurors. I think it's Senator Wentworth's bill. I'm not sure of the number. I think 297 or something. Do you have anything to update us about on that?

MS. PETERSON: I do. We conferred with his staff, because the proposed rules were out there addressing the juror note-taking, which is also covered by the bill, which is 297, and his staff then conferred with him and the word we received is that he was fine with all

the note-taking provisions in the rule and was comfortable with the rule going forward, and so the rule, as Justice Hecht said, has been finalized in terms of the juror questions during trial as of the last time I spoke with his staff member he hadn't made a decision yet as to whether to proceed with that part of the bill or not. It's -- the bill still has note-taking provisions and juror questions provisions.

HONORABLE STEPHEN YELENOSKY: And the note-taking provisions are contrary to what was just promulgated because they require you to take the notes away before they deliberate. Is he conceding that point?

MS. PETERSON: Yes, and I pointed that out specifically when speaking with his staff members so that she would be sure to point it out to him. He's aware of the difference, and she said generally he's in favor of trial court discretion and in this case he was again.

HONORABLE STEPHEN YELENOSKY: But on juror questions he hasn't decided.

MS. PETERSON: He hadn't as of a couple of weeks ago. He may have a decision now that I don't know.

HONORABLE STEPHEN YELENOSKY: Do you know if there will be hearings, because if there are, you know, some of us may want to --

MS. PETERSON: What I can do, I'm going to

track that bill, and if it's set for a hearing I can notify Angie so she can inform the committee.

HONORABLE STEPHEN YELENOSKY: I can only speak for myself, but to say also some of the other Travis County district judges that have read the bill were concerned about the withdrawal of any discretion on the part of the judge, other than this sort of catchall good cause, which arguably isn't the kind of discretion that we would want; and, secondly, even -- even while taking away discretion as to whether and how, even if you took away discretion as to whether you allow questions, then there's the question of whether the trial judge has any discretion as to how they're asked. I certainly support using juror questions when appropriate, but I don't always do it the same way. I don't always stop after every witness and allow questions. Most trials I don't take questions at all. There are a lot of issues that I think ought to be considered, like how much that might lengthen the trial. We've talked about that.

One of the things in the bill is it would require the court to read the question verbatim, which if you think about it could cut either way. If you take a juror question verbatim and that's all can you do, a lot of them are going to be knocked out on objections because they're not asked in a proper way; and I'm sure Senator

Wentworth wouldn't like that; and on the other hand, there are questions if asked verbatim, because they're not lawyers asking them, could benefit from some rewording while maintaining the spirit of the question. So all of those things, I think, should be presented if, in fact, it's going to go forward.

MS. PETERSON: Two things. One, I sent over to his staff the Supreme Court Advisory Committee's proposal for the rule on general jurors questions so they would have that in hand. The other thing I wanted to note, I don't know that the bill has changed too much from the last session, and he did hear testimony during the last session to the effect that a lot of judges would like for there to be more discretion. If there's another hearing I think it would be good to repeat all of that, but he has heard it to an extent before.

HONORABLE STEPHEN YELENOSKY: Yeah, and I certainly respect the role of the Legislature in empowering jurors. I just think there are certain things that certainly need to be brought to their attention.

MR. LOW: All right. Item No. 4, first, Judge Peeples' memo I hope each of you have is March 23rd, because in my opinion he made a great analogy of what we're trying to do and what the problem is, so that's I think a good point. Judge.

HONORABLE DAVID PEEPLES: Yeah. I think you need to have in your hands the page and a half memo I did a couple of days ago, which Angie sent out. I would just make two points before we talk about it. Number one -- and Bill Dorsaneo and I went over this. I think he just wasn't able to get here today, but it's our understanding that we're going to talk about this and then the Court will decide whether they want something drafted, but it seemed to me it had been unwise to try to draft something before we even know what the committee wants to do.

And then second, take a look at page one right in the middle. It seems to me the real policy clash here is captured in paragraphs (1) and (2) in the middle of the first page, finality and appealability and effectiveness. To come up with one approach for those two situations, it seems to me, we need to think about that. It's a very serious thing when something triggers the timetables for plenary power and appealability, and if people don't know about it, rights can be lost, and that's a very serious thing, and that's talked about in paragraph (1).

Paragraph (2) is the converse of that. It can be that the timetables are already running and the letter might be interpreted to set that aside and stop them from running, and the inadvertent stopping of

timetables is not as bad an evil as the inadvertent starting of timetables, because for rights not to be lost, for the jurisdiction to remain in the court to do what the court thinks needs to be done, that's a better thing. So I -- it seems to me that the concerns expressed in paragraphs (1) and (2) are in tension with each other, and we need to keep that in mind as we talk about it. That's all I have to say.

MR. LOW: Okay.

HONORABLE DAVID PEEPLES: Right now.

MS. PETERSON: Reserve the right for rebuttal.

MR. LOW: The Federal courts never use -- we use the term rendition, render judgment. You won't find that in Federal court, enter judgment. Clerk enters in a civil jury trial, theoretically the clerk does. So then we have a problem -- I was looking at an opinion by Justice Guittard where a letter that was never filed, the record didn't show it was filed with the clerk, so you have to assume it wasn't at least for the record, and that started time running, just the letter, so there's a whole line. I mean, we have terminology and things the Feds don't have. The Feds define a final judgment any judgment that's appealable, any order that's appealable. We don't -- there's such a mixture of what we have as

different from the Fed, it would change many -- many terms and traditions. I think the Feds have a good system. I'm not disagreeing with their system, but we are where we are. Does anybody else have -- Richard.

MR. MUNZINGER: Well, you know, Buddy, I just think if there is a solution to the problem it may ought to be limited to those orders that affect an appellate right or an appellate timetable, because we all get a letter from the judge overruling your motion for continuance, overruling your motion for this or that, and for the concerns expressed by Justice Gray and others, final appeal rights and what have you are not generally affected by such a letter order. The comment of the Lehmann language being mandatorily incorporated into such an order that could have an effect on a timetable may be a partial solution to the problem. I don't know, but perhaps an appellate rule could say no order affecting appealability or a time frame shall do so unless it incorporates the intent of the judge that it be such an order. That is what I understand Lehmann to be or to say, and the requirement of the current rules, except there's criticism of looking at the subjective intent of the judge. I don't know, I'd hate to see a blanket rule applying to all letter orders. I don't think that's necessary.

MR. LOW: Yeah. But, I mean, first of all, you need to know when your timetables start running for anything, appeal, a motion for new trial, and everything; and before you know that you've got to know what it takes to do that, what is a judgment, what is ordered that does that, then where does it have to be filed or what has to be done so that each step -- we made each step to be definite so you don't have misunderstandings of what to do and when, and I -- I don't know, that's basically all I can say. Judge.

HONORABLE TOM GRAY: I guess since I raised the issue with Justice Hecht I'll kind of try to explain some of the problems that we were dealing with, and it's not a -- I won't say even a monthly recurring issue, but periodically it does come up, I would say two or three times a year; and we are obviously, you know, a very small court in the state; and so I presumed that it was happening with greater frequency on the larger courts; and they could certainly weigh in; but we would see the parties trying to raise the ruling that was embodied or potentially embodied or the comments potentially embodied in a letter ruling -- or let me just say a letter from the trial court.

One of the cases was a series of letters from the trial court that determined discrete issues in a

family law case, in particular the character of property, be it community or separate. When we got to the final judgment, the actual paper signed by the trial court, the judgment really bore no resemblance to the letters that had been issued, and it was a very large marital estate, and so they were taking on discrete items of property as they went through, and the argument was made that the letters constituted effectively, you know, findings with regard to the character of individual pieces of property and then when you looked at the division of the property at the end of the -- in the final judgment it was very different and very skewed with regard to one party or the other if these letters had any meaning.

The case that actually motivated me to go ahead and write Justice Hecht was that a ruling was made on an issue that was interlocutory appeal; and it's in what I provided to him; and I don't remember exactly even what the ruling was, but the winner of the ruling was instructed in the letter to draft the order; and the loser of the ruling that wanted to bring it up on interlocutory appeal was very concerned about whether or not his timetable had already commenced; and so they went through the considerable effort at that juncture to step out of the process, do their notice of appeal, begin their appellate process, and then comes back to the actual piece

of paper, the order, the written order when the trial court signed it, and did it all over again.

The -- in kind of the discussion that followed the Supreme Court's notice that this committee was going to at least discuss the issue, one of the trial judges and I were having lunch and he said, well, at the new judges school or, as they say, the baby judges school, he said, "We were told to put the following phrase in our letters and it says, 'This memorandum ruling shall not be considered as an order or finding of fact and conclusion of law, but shall have the same effect as if orally pronounced in open court'"; and apparently that got some traction and a number of the judges use it; and, in fact, I asked the new justice on our court who was a trial judge for 26 years what he thought about this, you know, letter rulings and he said, "I always thought they never had any more effect than if I had an announced the ruling from the bench," and I -- you know, okay, I'm still not sure that fully resolves all of my concerns or questions and how people may either lose their appellate rights or their ability to have something reviewed on appeal, or if you're the benefactor of that and it doesn't get appealed then obviously it works -- cuts both ways, so to speak.

What was interesting is the order that he sent me as an example is a classic as far as I'm concerned

in this whole appellate timetable issue because it says -- it references the date of the hearing and then in italics it says, "Plaintiff's application for temporary injunction is denied," which I believe it to be an appealable order, interlocutory appeal, accelerated, and then it instructs "the prevailing party will please prepare and present an order which has been approved as to the form by opposing counsel" and then has the tag line that this doesn't mean anything other than if I had announced it from the bench.

So all I'm looking for is if there is a way -- and the other area that it impacts a lot is in the preservation of rulings on issues like summary judgment evidence, because frequently the trial court letter order or letter -- I won't call it an order, but the trial court's letter saying that a summary judgment has been granted or denied -- most often it will be impacted if it's granted -- will also have some rulings on the summary judgment evidence, and not uncommon, but those rulings don't find their way into the final judgment or into a separate order and then it goes up on appeal.

Well, we know what the trial judge was thinking with regard to the objections, but if that letter can't be used as the order then we've got the problem of no ruling on the summary judgment objections, and so -- and I realize that that's both an argument for and against

the use of the letters, but I am inclined to think that with the excellent minds on this committee and an adequate looking at the problem that we could come up with a rule that would give greater certainty to what is going to happen with regard to what's in a letter from a trial court judge and give the parties greater certainty and, therefore, reduce the cost of overall litigation.

MR. LOW: Let me ask, I mean, is the sole issue a letter ruling by the court? Is that -- are we going -- does your committee go further than that, Judge Peeples? What's our real issue? Is it a letter ruling is what's caused the problem, or are we trying to change broader things than that?

HONORABLE DAVID PEEPLES: First of all, the committee was me and Bill Dorsaneo.

MR. LOW: The committee.

HONORABLE DAVID PEEPLES: The way I've got this stated it's limited to rulings because that's what Tom Gray asked about, but Bill and I flirted with the idea of broadening the discussion to Rule 11 agreements that are handwritten and signed by the judge and just decided to back off from that.

MR. LOW: Okay.

HONORABLE DAVID PEEPLES: So the answer is, yes, it's limited to letter rulings.

HONORABLE TOM GRAY: Well, I will say this, the concept that concerned me is broader than letter rulings. It was just letter rulings that brought it up, and it was the finality of judgments issue, because it -- and it wasn't to go back to that, but it's the whole concept of when is it final, what -- what is indicia of finality in light of Lehmann, but David is right that what I am focused on and what I was thinking about is as an appellate court what is the impact of a letter from a trial court judge to the parties and how can we consider it or treat it in the context of an appeal.

MR. LOW: But, see, finality, a couple of the court of appeals opinions, one by Justice Guittard, which says wasn't even filed and it's final. So are you saying that we should have a rule that it must be filed, and did you -- you know, it's final only when filed or should we deal with that, or should we just deal with strictly letter rulings and their effect?

HONORABLE TOM GRAY: Well, I'm not -- I'm not going to presume to set the scope of what we look at, but one of the things that does concern me about letters from the trial judge, they are not generally distributed with the level of attention to detail that a formal order is, and they're really not controlled by the rules as to who gets them. It -- while it may not be -- I mean, the

rules identify who is to receive formal copies of documents, lead counsel.

MR. LOW: Right.

HONORABLE TOM GRAY: Not true with regard to letters from the court. In some occasions I've seen letters from the court where the trial judge says you're to draft the order and it will be in effect a communication to the person that's going to draft the order for the judge to sign and may or may not copy all the parties in the litigation, and so it's -- and it's not formally -- usually it's not formally filed as part of the clerk's record but can be made so.

MR. LOW: Sarah.

HONORABLE SARAH DUNCAN: Two things I just want to say for the record, I don't think the letter you read would be appealable if in the same letter the judge says, "Temporary injunction is denied," but then also says, "Go draft an order, Joe," then to me under Lehmann, that's not appealable; and the second thing is I guess I am getting really old.

MR. LOW: Don't talk about that.

HONORABLE SARAH DUNCAN: Because I am getting sick of abbreviations, and I got a text message from my brother the other day. I don't know if I'm invited to go to dinner for his wife's birthday or not,

and the point that's made -- the point that's made on the reverse side of David's memo is more and more of this is going to be happening through e-mail instead of paper letters.

MR. LOW: Right.

HONORABLE SARAH DUNCAN: The thought that we are going to get reduced to e-mail orders that aren't -- you know, form being approved by counsel, whether you agree with the substance of it or not, is horrifying to me. I just -- to me, maybe it's just being old, maybe I am too fond of decorum -- exactly, I am very fond of clarity, but just that we're talking about this confirms my view that nothing in a letter to me should be an order.

MR. LOW: Elaine.

PROFESSOR CARLSON: I've got a question, Judge Peeples. As a practical matter when these kind of letter orders are signed, or perhaps the one that you described Justice Gray, and they're not filed, is there any corresponding notice given under Rule 306a to the litigants besides that letter, or is that considered to be notice from the clerk? Or does that back up the time frames because you didn't get the notice from the clerk?

HONORABLE TOM GRAY: That's actually another problem, because we -- you see these letters go out, and they're appealable orders -- or if they were treated as

appealable orders they do not have the backup protections, if you will, of the trial court -- trial court clerk notification that an appealable order has been rendered and entered in the record.

PROFESSOR CARLSON: Thank you.

HONORABLE STEPHEN YELENOSKY: Buddy?

MR. LOW: Yeah, Steve.

HONORABLE STEPHEN YELENOSKY: I agree with everything Sarah Duncan said except the part about it being because she or I are old.

HONORABLE SARAH DUNCAN: That's because you're old, too.

HONORABLE STEPHEN YELENOSKY: I'm old, too, right. And I sent an e-mail to Judge Peeples about this. I think the question that we may have to face is --

HONORABLE NATHAN HECHT: Not an order, though.

HONORABLE STEPHEN YELENOSKY: I'm sorry?

HONORABLE NATHAN HECHT: Not an order, just an e-mail.

MR. LOW: Just an e-mail.

HONORABLE STEPHEN YELENOSKY: Yeah, right, exactly. Is, yeah, if we draw some kind of bright line, I mean, you could put in a letter exactly the same content you put in an order, right? The difference then between

the letter and the order would be that it has letterhead at the top instead of the style of the case and that I think, as Justice Gray said or maybe that Peeples said, arguably it wouldn't be governed by the rule if you have to file it and all that stuff. So you would have the same Lehrmann problem -- is it Lehrmann?

HONORABLE DAVID PEEPLES: Lehmann.

HONORABLE STEPHEN YELENOSKY: Lehmann, you could have the same Lehmann problems with the content of it, but do you draw a bright line on the form and say that something with letterhead at the top that's not filed with the court can never constitute a -- an order, period, or can never constitute an order that starts or stops appellate timetables. I think a lot of us judges who feel like Justice Duncan treat letters that way, say in our letters things that confirm that they're not orders either to start or stop timetables, that they're not findings of fact, that they shall not be used to be considered incorporated into an order, do not limit the bases of support for an order. We say things like that. We file those letters, too, but we do everything possible to say to the lawyers that if it's got a letterhead at the top it ain't an order, and I think we might want to face the question of that difference in form because, of course, the content as I said could be exactly the same as an

order and simply say because of clarity if it doesn't have the style at the top it ain't that -- it at least ain't that kind of order and it ain't a judgment, excuse the slang, but -- and as far as e-mail, as I wrote to Judge Peeples, I think that's really bad form. Number one, it's typically not filed. That raises questions about whether it's publicly available.

We had a criminal case in which a judge was questioned -- a high profile criminal case, was questioned by the media about his use of e-mail with counsel because the media couldn't see it. Secondly, with e-mail, the problem that I see is that sometimes the court or the counsel forget to copy all the parties. That's easy to do. And then the other consideration that perhaps goes beyond these considerations, it invites substantive discussion from counsel, even if everybody is copied with the court that really ought to be done through a motion and response and hearing process.

So I'm all for pulling it back. I think we really ought to consider a bright line on form for purposes of delineating between an order and an expression of intent to sign an order for clarity of the parties, for transparency to the parties, and for openness to the public.

MR. LOW: Justice Peeples, when all the

Texas cases appear to -- the magic word is rendering judgment, rendition. Justice Guittard held that a letter was rendition. The Corpus court held the same thing, and it had to be -- had to be filed. So using that term and then without addressing just strictly letter rulings, could it -- would it be possible to define what is meant by rendition and how judgment is rendered or rendition when judgment is rendered when a formal order is filed and so forth? Would that be a possible answer, or what do you think?

HONORABLE DAVID PEEPLES: Yeah, I don't know, I'm not sure I want to try to define rendition and to solve this problem by defining rendition.

MR. LOW: Okay.

HONORABLE DAVID PEEPLES: But on the case law, it seems to me that we shouldn't be bound or hung up on what the cases have said. We ought to try to do something that makes sense and that we can defend as an original matter rather than trying to summarize or repeat the case law. I know you're not suggesting that, but --

MR. LOW: No, but the cases have, how they've interpreted it, I mean, it shows what a variation there is.

HONORABLE DAVID PEEPLES: Yeah. But I think that if it was written by Justice Guittard there is

probably some Supreme Court law on oral rendition and docket entries and things like that that come after that that may undermine the pennings of his -- of what he said in that older case. I don't know, but I do think that we should not be fixated on what the cases have said. We can look at the cases to see what kinds of problems have arisen --

MR. LOW: Right.

HONORABLE DAVID PEEPLES: -- but I say if we want to draft a rule, come up with something that we can defend as a matter of policy and workability, regardless of what the case law would be if you summarized it.

MR. LOW: But I was merely asking the question should you approach it as -- as a letter ruling, an e-mail ruling, or should you approach it something that encompassed that.

HONORABLE DAVID PEEPLES: Well, of course, e-mail, it doesn't have an ink signature on it. You can have digital signatures and so forth, but that's different. I want to repeat something I tried to say before. To me, I would be opposed to a blanket rule because to start timetables is a totally different thing from stopping timetables. If you start timetables with a letter ruling, somebody might not realize that that's happened and rights will be lost, but if you stop

timetables with a letter ruling that sets aside an appealable order on which the timetables are running, the only harm is it's still in the trial court --

MR. LOW: Right.

HONORABLE DAVID PEEPLES: -- and the trial court could do the same thing. So, I mean, starting and stopping timetables to me are just vastly different, and it would be hard to draft one rule that does justice in both of those situations, I think.

MR. LOW: When Richard speaks I'm going to then ask you if you want to make a motion or if you have some suggestions whether we do something or do nothing. Richard.

MR. ORSINGER: What David Peeples is talking about, starting timetables and stopping, to me I would phrase the issue is what constitutes an appealable judgment versus when is a motion for new trial granted. In my view they have to be discussed separately if they're going to be discussed at all, because the formalities associated with an appealable order I think are already thoroughly explored in the summary judgment area, and I'm not sure that we've found the ultimate solution there yet, and so we may go through a similar process in trying to exactly define an appealable judgment. I remember discussions in this committee about what happens when you

have several partial judgments in the record that collectively dispose of all relief, and do they constitute -- does the last one constitute finality for all of them, or do you have to restate them all as one judgment? Very complicated drafting process. I think we've done a lot of work on that. I don't think any of it has been adopted.

On the motion for new trial end, on the other hand, I don't think that parties or lawyers expect that if a judge signs a letter granting a new trial that there needs to be another formal step of submitting an order that's signed by the judge. I think most people think that's good enough if you get a letter from the judge, so I guess what I'm saying is, is that policy issue --

MR. LOW: And no timetable is keyed to that, if he grants.

MR. ORSINGER: To me that's the distinction that David Peeples was making. If it's a final judgment question it starts timetables, and if it's a motion for new trial it may -- but there is a procedural trap on motions for new trial if you're unclear, which is that you may think your motion for new trial got granted because you have a letter signed by a judge granting it, but if that doesn't constitute an order granting a new trial, you

will probably not take the necessary steps to preserve your appeal, and so it's possible the granting of a motion for new trial could be appeal preclusive as well, so I think these problems are important ones, but truly we've been drafting on these for a decade, and I don't know that we've ever found the perfect solution.

MR. LOW: Steve.

HONORABLE STEPHEN YELENOSKY: Well, why -- why -- that may be right now, but if you had a rule that said it's not an order unless it has the style at the top, everybody would know that, and when the judge sends a letter they would know it's not an order, and they would rush in with an order or the judge could attach an order. What's the hard thing that keeps us from requiring that there be an order with the style at the top? I mean, if you're writing a letter, write the same letter and put the style at the top. That makes it an order.

MR. ORSINGER: What if the style is in the re line? Does that constitute an order?

HONORABLE STEPHEN YELENOSKY: Well, we make that clear in the rule. We make that clear in the rule. I mean, I don't see what we're gaining by allowing things to be ordered by letter where there's a lack of clarity about whether they're orders or not. What are we gaining?

MR. LOW: Justice Bland, did you have your

hand --

HONORABLE JANE BLAND: No, but I don't think that a rule is necessary to address letter rulings. I think there are already so many different permutations of what constitutes a final judgment that it ought to be addressed on a case-specific basis, and we have the rule the Texas Supreme Court gave us in Lehmann that sort of gives us a test for finality, and I think you kind of have to look at the record as a whole and decide whether there was an intent for this to be some kind of binding ruling or not.

HONORABLE TERRY JENNINGS: That's what I was going to say. I mean, the bottom line is, is you're going to look at the intent of the trial court judge and can you determine from the document, and a lot of these things that we're talking about as far as being problems, well, it wasn't filed in the clerk's record and so forth, well, if it wasn't filed in the clerk's record, that would show an intent by the trial court that it's not an order or not meant to be a final appealable order.

MR. LOW: Judge Peeples, do you have a suggestion that --

HONORABLE TERRY JENNINGS: I mean, how pervasive is this problem?

MR. LOW: We're going to vote to see if we

do anything or leave it be for now. Do you have a suggestion as to what we do?

HONORABLE DAVID PEEPLES: If forced to give a suggestion right now I could do it.

MR. LOW: No, I mean, do nothing or do something?

HONORABLE DAVID PEEPLES: Not really. I was hoping to get the sense of the house, but could I -- the -- I respectfully disagree with the notion that we ought to look at the whole record or try to find the judge's intent because that is the opposite of clarity and predictability and knowing what your rights are. To me that would be a horrible outcome. That's the last thing we should do.

MR. LOW: Carl.

MR. HAMILTON: Where I practice, I think there's a general consensus by the judges and everyone that letters are only rulings, and unless there is an order with the style of the case on it in the file, there isn't an order.

MR. LOW: All right. Does --

HONORABLE DAVID GAULTNEY: I guess I agree that the problem is in stopping the appeal, not in starting it. I mean, we've got Lehmann in terms of language of unmistakable finality, and if you don't have

that then the trial court retains jurisdiction, and that's not a problem, you don't lose your appeal rights, but the problem I see is you do have language of unmistakable finality in the judgment. Okay. It has the Lehmann language, and then the trial court issues a letter ruling that clearly grants a -- well, clearly indicates he's granting a new trial. He sends it to everyone. It ends up in the file, goes up on appeal. We have a rule that says you don't consider letter rulings, and the party has lost its appellate rights. So there is something to be said that, you know, when you have that situation you can determine that that does not indicate that the judge intended finality despite the language in the actual judgment that says so, so I think there is a distinction between starting and stopping. I do think that Lehmann provides a little bit of flexibility in determining that, but I think the difficulty comes when the order itself on its face has unmistakable finality and yet everything else, all the parties understand that it was, in fact, set aside.

MR. LOW: All right. I get the sense of the committee that really we don't need to do anything further on this. Does anybody suggest that you want to vote? How many people think we should do something at this point, regardless of what it is, we would have to get to that --

HONORABLE STEPHEN YELENOSKY: As opposed to going to the subcommittee?

MR. LOW: -- or leave it as it is. Who wants to do something? One, two, three, four, five, six.

All right. Who wants to leave the status quo as it is? The vote. All right. That's 8 to 6, not many people voting. It sounds like an election in East Texas, so --

MR. ORSINGER: Except the votes are not in alphabetical order.

MR. LOW: For the ones who voted to do something, let's start out -- Mike, what should we do?

MR. HATCHELL: Well, we should do something. There's a problem between letters that are rulings on -- that you could consider orders, and I've had to file those letters before, but there's a serious problem of letters that are interpreted as being dispositive rulings. I'll give you two examples. I was consulted about three months ago by a man that got a letter from the judge in a case involving his son, which found that he was a coconspirator in breach of fiduciary duty and would be -- and judgment would be rendered against him for X amount of dollars. He was not even a party to the lawsuit. The judgment that came out six weeks later didn't even mention him.

Skip circulated a case yesterday that maybe

he could better describe in which a judge sent out a letter saying that a monetary judgment was going to be rendered against a party that didn't state an amount and yet that was found to be a judgment. Skip, maybe you want to pick up.

MR. WATSON: Well, we -- I was just talking to Judge Jennings. Apparently the appellate courts don't see a lot and don't see it as a problem, and I think that's just perhaps a different perspective, because we see it on the appellate practitioner end more than I would like to see it, and it's very, very disconcerting when you see it. The case that I was consulted on was one last October. It's *Green vs. State of Texas*, 324 Southwest 3rd 276, was one in which the letter that was sent out shortly before a trial judge retired said that "I render judgment for the state" but said no amount and further said, "The parties are to prepare the form of judgment and send it to me for signature," and everybody treated as -- even though it had the magic word "render judgment for the state" the parties treated it as, okay, we're going to send the real judgment to the judge with the numbers in it and the attorney's fees and everything else for signature.

Unfortunately, it didn't get signed until seven days after the judge's term expired, and so the question became, okay, did the judge even have

jurisdiction to sign this judgment, and the opinion that came down did something that I'm, you know, not sure how I feel about, except it gives me some heartburn. It was saying that the letter order rendering judgment was the judgment and that the act of signing the judgment that could be enforced was a mere ministerial act, kind of like signing findings of fact and conclusions of law, which the Civil Practice & Remedies Code says can be done after a judge leaves office. I'm just not sure I can quite get that down, the idea of what we ordinarily view and is intended to be viewed as the enforceable appealable order being signed -- being signed after a term expires, but that's what the opinion held, citing a 1957 Fort Worth no writ case.

I think it's -- I think it's a real problem, and I think the problem goes not just to appealability, but as Judge Peeples has identified, I think it's also a big problem of enforceability. You know, how do I get a supersedeas bond on that letter judgment, you know, that has no amount in it? How does the sheriff go out and execute on that judgment that was, quote, rendered? I'm not sure that the term "render," which I agree with the Chair, seems to be what most of these things turn on, is necessarily the magic bullet. Is it an enforceable and appealable judgment? And to answer Judge Jennings'

private question, yes, at least in our world it's a real problem, and when it comes up the results are catastrophic.

I mean, Judge Hecht wrote an opinion once on lawyer disqualification that had a line in it that I will never forget, and it was simply this, that the odds of being struck by lightning are incredibly remote, except when it happens. Then the results are catastrophic, and I think that's what we're dealing with here.

MR. LOW: But, Skip, in that case you had two problems, the language sufficient to constitute a judgment --

MR. WATSON: Correct.

MR. LOW: -- if that had been in an order. I mean, an official order, style of the case and everything filed, would that have constituted judgment when it had no amount? And then you have the fact that it was a letter is the second problem, it appears to me. I mean, you know, a judgment, would it be a judgment if they say I sue somebody for $10 million, and they say, "I award money damages to Buddy Low," filed, signed, is that -- I mean, you have what it takes to constitute a judgment, and then you have what form it's in, letter or order, and --

MR. WATSON: Buddy, my reaction to that would be -- at least the argument that I would make and

that I think that I would listen to even if I were on the other side of it would be that it's really not, because to my mind it didn't actually dispose of all issues.

MR. LOW: I --

MR. WATSON: Even if it had magic language at the bottom saying that "This disposes of all issues and all parties," I would be --

MR. LOW: Right.

MR. WATSON: -- begging to differ, and I would be in there not only with motion to clarify, et cetera, et cetera, or to alter or amend, but I would also be saying, "You're denying me the right to supersede this."

MR. LOW: Right. I agree. Richard.

MR. MUNZINGER: Small solace to the fellow who pays Skip a quarter of a million dollars to handle the appeal or 50,000. Or $20,000.

MR. LOW: Or a million.

MR. WATSON: I've got a card here, Richard, if you would like that.

MR. MUNZINGER: My only point is it's money out of a citizen's pocket --

MR. LOW: Right.

MR. MUNZINGER: -- to take an appeal like this. How can an appellate court say that a judgment is

appealable that doesn't set the amount of money in the judgment? It begs the imagination that there could be such a thing, and yet somebody has to appeal this and spend money --

MR. LOW: Right. That's right.

MR. MUNZINGER: I mean, that's a travesty.

MR. WATSON: To the court's credit, I mean, you know, it was a sales tax case, and the court said, you know, the amount is readily calculable and the attorney's fees were stipulated. Well, that's fine, but every single one of us have had situations in which the letter comes out and says, you know, whether it has the magic word "render" in it or not, it says, "This is what I'm going to do," you know, "prepare and submit the order," and yet the order comes out, and it is quite different than the letter, and I just -- the part of this that troubles me is the reasoning that the order, the thing that's actually enforceable and appealable, is a mere ministerial act. To me it is still a judicial act. It is the judicial act. It's the ultimate judicial act. It's the one that everything turns on, and I have real trouble separating them.

I understand oral orders from the bench of "Thou shalt not do this." I get it. You know, you're not going to violate that, and bad things happen if you do,

but I really am having trouble with the concept that a letter using the magic word "render" that is, in fact, still a letter and still incomplete and can't be readily enforced and I don't think can be appealed or certainly can't be superseded, that that is the act and that everything that we've written rules on on how to do it right that occurs later is purely ministerial and, P.S., can be done after the judge is out of office and has not been appointed back in the case.

MR. LOW: All right. We've had quite a discussion on what the problem is, and now we need to give some guidance to the committee of what we want the committee to go back and consider, and I'm all for -- I would like suggestions from some of the people that --

HONORABLE DAVID PEEPLES: I'll put it out. I think that what I want, I think, is to make a distinction between the two things I've got in paragraphs (1) and (2), and I would be in favor -- well, and maybe we need to get the sense of the house as to whether we ought to come up with a rule that has different rules for a letter being a final itself, the final and appealable order, and whether the letter is effective to set aside, you know, grant a new trial, set aside some earlier order. To me that's a meaningful distinction, and I would be interested in seeing whether the committee likes that.

MR. LOW: All right. Why don't you put it in a form that we can vote on? What do you move that we consider, just only letter, you know, whether a letter at all can be an order or a final judgment? Is that one of the things?

MR. ORSINGER: Buddy, let me make a suggestion.

MR. LOW: Sure.

MR. ORSINGER: I would like to vote on the distinction between a rule that applies to judgments and a rule that applies to orders other than appealable judgments, because I think that the policies relating to rulings on motions is different from the policies that are relating on appealable judgments, so I'd prefer that they be in different rules and that they maybe say different things, so I would vote that distinction.

MR. LOW: All right. We're going to have your proposal and we're going to vote yes or no. What is your proposal?

MR. ORSINGER: That any rule that's drafted for judgments should be a different rule in a different place than a rule that's drafted for orders on motions.

MR. LOW: All right.

MR. MUNZINGER: Buddy?

HONORABLE DAVID PEEPLES: How about an

appealable order on a motion?

MR. ORSINGER: Okay. Okay. I'll take that.

MR. MUNZINGER: Before you vote, Judge Peeples wants to have a rule that addresses orders that are appealable, but the right to appeal can be affected by an order that extends the time limits. For example, the letter saying, "I grant Mr. Low's motion for new trial" and it doesn't say "draw the order," that has the very same effect on one of the parties. Did that or didn't that extend the time of appeal? Did it affect the running of the time for appeal? And my point being an order granting a new trial stops everything and leaves the case in the trial court. There is no need for a notice of appeal. There is no need to do anything else to appeal the case. Was that letter that did that, was that intended to do that? It's the very same problem. In other words, I'm not sure you can distinguish between an order that is appealable and an order that affects my rights conversely, so to speak. And --

MR. LOW: Sarah.

HONORABLE SARAH DUNCAN: I was going to make a similar point and suggest that there's always a winner and a loser, no matter what an order or judgment is --

HONORABLE STEPHEN YELENOSKY: Are you quoting Charlie Sheen?

(Laughter)

HONORABLE SARAH DUNCAN: That isn't even a sentence. And even though -- I mean, I certainly don't want people to unnecessarily lose appellate rights, but an order that sets aside a previous judgment does hurt the party in whose favor that judgment was rendered, so there's always going to be a winner and a loser, and I don't think -- I know I can't distinguish between orders that start appellate timetables and orders that stop them, for that reason. Somebody is going to like the order, and somebody is going to not like the order. Somebody is going to be benefited by the order, and somebody is going to be harmed by the order. So to me, as Professor Carlson and I were just saying, we like Judge Yelenosky's approach.

MR. LOW: Okay. All right. David, do you -- oh, I'm sorry. Jane.

HONORABLE JANE BLAND: It seems as though there's two different paths. One is the content of the order or the communication from the trial judge, the contents of the communication, and the other is the type of communication. Are communications by letter more similar to written orders, are they similar to oral pronouncements, or are they similar to docket entries, which I think, in the main we don't consider to be -- have

any binding effect on anybody. So it seems like we ought to address the type of communication in this discussion and not the content of the communication, because the content of the communication, whether it constitutes a final judgment or not, has a whole set of rules and problems associated with it, and I don't think we should start drafting content-specific rules for letter rulings that are different than oral pronouncements and written orders.

MR. LOW: That was my point to Skip.

HONORABLE JANE BLAND: So the question is should we treat letter rulings more like docket entries and say they're of no moment, sort of as a blanket rule to get to Justice -- Judge Peeples' concern about clarity, basically define the communication and say how we're going to consider it. And I would propose that we say they're either more docket entries or they're more like oral pronouncements, and that's kind of the call that we would -- that's the choice. I wouldn't do anything, but that's the choice we have if we want to put it into a rule.

MR. LOW: That was my point to Skip, was would that have constituted a judgment, you know, the content, is that sufficient, and then it was a letter. Steve.

HONORABLE STEPHEN YELENOSKY: Did you want

to go?

HONORABLE DAVID EVANS: No, actually it's been said now.

MR. LOW: Jim, did you have your hand raised?

HONORABLE STEPHEN YELENOSKY: I know he was --

MR. LOW: Well, let Jim speak. We haven't heard from him. Jim.

HONORABLE DAVID EVANS: Go ahead.

HONORABLE STEPHEN YELENOSKY: Well, yeah, I mean, form versus content is the issue, right? I mean, content is going to be the same thing as it is Lehmann whether it's on the style or not, but, you know, at least I have some supporters on the issue that we should draw a bright line on the form; and, you know, if you had a rule that was clearer on the form, I mean, you wouldn't need -- 10 years from now after that rule has been in effect for 10 years, people would laugh at the idea that you thought you had gotten a new trial when you got a letter because everybody knows for 10 years now you didn't get a new trial unless you had it on the style in a filed order any more than anybody would think, well, you know, the judge said in court, "I think I'm going to issue a judgment in your favor" and nothing else happens. You would laugh at

the idea if somebody went up to the court of appeals and said that's an appealable order and judgment. Some day if you have a rule that's clear, you don't have a judgment unless it's the style of the case filed with the court, people will laugh at the idea that you thought you had a judgment when you had a letter, and it will be clear.

MR. LOW: Richard, I believe you were the next one to raise your hand, and then Gene.

MR. MUNZINGER: Well, the problem that I have, and I agree with everything that Judge Yelenosky said except it's a problem with definition. A letter comes to me from judge X on his letterhead, chambers of judge X, re, absolute complete caption, "In the 210th District Court of El Paso County, Texas," so-and-so versus so-and-so. Every party is named, et cetera. So there's the caption generally. I do whatever, signed by the judge. He automatically gives it to the clerk. I'm saying he automatically does. He does. He gives it to the clerk. It's filed. Arguably it has been served if he sent it to everybody, it's been served on the parties to the litigation, and it has the caption at the top, and it embodies a ruling of the court. It's in the form of a letter, but it has everything you want on it. Is that a judgment?

MR. LOW: Okay. I think Gene was next, I

believe, and then Judge Evans.

MR. STORIE: I also agree with a bright line rule on what a judgment is. It should have a caption. It should say "judgment," and I think that the problem of judicial capacity should be thought of as a different issue, which was the problem in Green and also in the case that Justice Gray notified us about earlier involving a judicial assignment.

HONORABLE DAVID EVANS: Mostly, it's letter -- in fact, I can't think of a letter I've sent out meant as an interim nonappealable order until you get an appealable order signed after all the parties have input, but it is designed to control the playing field until you get that order in. You know, they can have -- you can be setting some parameters on what's going on in the case, and so it's an interim step to getting a final appealable order, and I would think any rule that a trial judge in a letter ruling that states, "This is not intended as a final appealable order" has just made it clear that he's waiting on a draft or she is waiting on a draft of a final appealable order, but yesterday I got in a block, a mental block. I struck an opinion on a summary judgment, granted the no evidence summary judgment, asked for a draft of the order to come in, realized when I was looking at the order that it disposed of all the issues except tax and costs

and then started reading all the cases trying to figure out whether I was signing a final judgment or not and ended up writing another letter saying, "If this disposes of all of the issues then I want it captioned as a final judgment and want you to write it back -- send it back in in that form," and I'm going to -- and "I will upon review tax the costs," and that way this letter is not a judgment.

You know, we just -- we need some guidance at the trial court level as to what we're -- and, of course, the lawyers do, as to what we're signing whether it's a final appealable order. I've noticed they can do this in probate court a little bit better than we do it in civil litigation right now. They have a doctrine that tells them what's final and appealable.

HONORABLE SARAH DUNCAN: Oh, oh, we don't want to go there.

HONORABLE DAVID EVANS: Well, maybe not. I'm sorry. That was 10 years ago, Sarah, sorry.

MR. LOW: Sarah.

HONORABLE SARAH DUNCAN: You know, Lehmann, I believe, was intended to fix an existing problem, when is a summary judgment a final appealable judgment. I know the Supreme Court and Justice Hecht in particular struggled with that, and it is what it is, but what it is

not is easy. It is not easy for the courts of appeals judges and staffs to figure out what is and what isn't a final appealable judgment in any given case, and to broaden the application of that to me is about as misguided as we could get. And as Judge Evans says, we just want a rule.

I mean, I'm still in favor of a final judgment of trial courts having to say -- you know, review the file and put in a piece of paper that wraps everything up, but that failed, but at least if we're talking about just this discrete area of what everybody is calling letter rulings that I don't think are rulings, a re is not a caption. A re is a re, a regards. A caption is a caption, but I believe Judge Yelenosky's proposal actually makes that a moot point, because I believe what Judge Yelenosky is saying is if it's on letterhead it's a letter. If it's not on letterhead and has a caption at the top, it might be a judgment or order, and that's what I think we ought to do.

MR. LOW: All right, Richard. And then I'm going to ask the two of y'all to get together for some proposal because we need -- we've heard all kind of suggestions of all kind of problems, more problems than answers, and we need to come up with something that will help the committee go back and work on something, and we

need to tell them what. All right.

MR. ORSINGER: The debate has shifted, I think, to a discussion about the content of the rule that defines a judgment. We have spent years working on that, and if we're going to work on it again, which is fine with me, let's all go back and look and see what our ultimate proposals were on that. I don't know that it's necessary. Perhaps it is, but what I'd like to do is I'd like to make a practical point or a procedural point.

MR. LOW: Okay.

MR. ORSINGER: The way I see it there are three topics of concern, what constitutes an appealable judgment, when is a motion for new trial granted, and when is error preserved by securing a ruling on a motion or objection. Those are three different times where you might get letter rulings and probably all of us would agree that you should be able to preserve error on appeal by having a judge send a letter denying a motion, and maybe a lot of us would appeal -- would agree that you can grant a new trial by a letter without an order. I think all of us would probably agree you can't grant a final judgment by a letter. Those are all different things. They are covered by different rules. The rules we write ought to be in the rule relating to that kind of subject matter, not just one rule like the statute we said before,

no matter what -- no matter what all the other rules say, this is an exception to all of them. It must have a caption at the top. You go figure out how that affects all your appellate rules and all your other Rules of Civil Procedure, so what I'm urging is, is that let's recognize that we have different kinds of rulings that fit in the categories that require different solutions. Now then, Buddy, are you saying that we should come up with a good rule on what constitutes an appealable judgment?

MR. LOW: No. I'm saying that I'm looking for some help to the committee so that they don't go back and have to just, well, we want to change this, we want to change that. Let's focus on what we want the committee to do. You've said that what constitutes the judgment has been worked on for --

MR. ORSINGER: Over a decade.

MR. LOW: All right. And I don't disagree with that, so you're not suggesting they do that. I'm not either. Let's pinpoint what we want them to do, and if we need them to expand that, they can do that later, but let's pinpoint on a smaller problem and then vote and go from there. Would that be helpful to you, David?

HONORABLE DAVID PEEPLES: It would, and I like the idea of taking a short break so Richard and I can talk, and anybody else.

MR. LOW: Okay, all right, are you ready for -- oh, wait a minute. Nina, I'm sorry.

MS. CORTELL: That's all right. I'm kind of behind you. Judge Peeples -- I keep waiting for you to say -- has drafted a pretty recent rule on the form of a final judgment, and I think we have a really good proposed rule there. My thought would be just a very simple rule on orders. I don't think we have to go into all the particulars, just to put everybody on notice that to be an order it has to be in this form. I would look at the form and not address the content issue. That would be my vote.

MR. LOW: All right. I think that's what we should do, is that, and not the content at this point. All right. Let's take a break, and you and Richard get together.

(Recess from 10:46 a.m. to 11:02 a.m.)

MR. LOW: All right. Here's what -- Richard, do you have a proposal, or David, as to what the committee should consider? Obviously the committee, David's committee, can't consider everything. I mean, we've discussed many different things. I think it --

MR. JACKSON: Are we on the record?

HONORABLE DAVID PEEPLES: We're on the record. Buddy's talking.

MR. LOW: Gene, you ready? Okay. All

right. Obviously we've discussed a lot of different things. I think we need -- the committee can't go back -- they wouldn't come back for 10 years if they had to consider everything that's been discussed. We need to focus on letter rulings or letters from the court, whether they are on motions or whether there could be from that final judgment or what. Did y'all finally get together to see what it was the committee should go back and consider?

HONORABLE DAVID PEEPLES: I don't think that Richard and I and Mike Hatchell and Nina Cortell -- Carl was there. David Gaultney. I don't think we reached consensus.

MR. LOW: Okay.

MR. ORSINGER: I would have a proposal I think is a simple vote.

MR. LOW: All right.

MR. ORSINGER: Is how many people are in favor of us drafting rule language that deals with letter renditions of appealable orders and judgments?

MR. LOW: All right. Who's in favor of that, raise your hand?

HONORABLE SARAH DUNCAN: Only?

MR. ORSINGER: Only.

HONORABLE DAVID EVANS: What was that?

MR. ORSINGER: No, I mean, maybe not only,

but --

MR. LOW: State it again. It hadn't been heard around the --

MR. ORSINGER: Who is in favor of us drafting rule language regarding letter renditions or e-mail renditions on appealable orders and judgments?

HONORABLE DAVID PEEPLES: I'd want to know if Justice Hecht is still interested in this project.

MR. LOW: Yes, he is.

HONORABLE DAVID PEEPLES: Is he? Are you?

HONORABLE NATHAN HECHT: Yeah.

HONORABLE DAVID PEEPLES: Okay.

MR. ORSINGER: And by way of explanation, I'm trying to distinguish that from rulings that would just preserve error on appeal, a lot of pretrial rulings, evidentiary rulings. I'm talking now about letter rulings and e-mails that relate to appealable orders and judgments. Should we --

HONORABLE DAVID EVANS: Can we -- I guess you hooked me with e-mails. I realize a lot of judges are using e-mails right now, but I don't, except in extraordinary circumstances when we're in trial and we're trying to move some charges around and things like that, because of the problem that they don't get into the file. I'm unaware of how a judge sends out a written

communication that doesn't go to the district clerk's file. And if you look at the Rule 76a, and I -- and I can -- you can't seal -- you can seal everything except for a judge's order. I don't think you can seal a judge's communications.

MR. ORSINGER: I think you're talking about what the rule should say rather than whether we ought to write it or not.

HONORABLE DAVID EVANS: I don't disagree.

MR. ORSINGER: The first question is should we engage in the effort of trying to write rule language that governs letters and e-mails that purport to be appealable orders or judgments.

HONORABLE DAVID EVANS: I just wouldn't want to bless e-mails in the order. That's --

MR. LOW: Steve, and then Richard is going to make the proposal, and we're going to vote on it.

HONORABLE STEPHEN YELENOSKY: Yeah, my question is I think the same as Sarah's question, is which is to the exclusion of other orders because some of us obviously want to do that, but some of us want to do more than that.

MR. ORSINGER: Yeah. I think that I was trying to start out with a narrow ruling and then if you want to add more to it then you can propose let's expand

that out to exclude such and such kind of order.

MR. LOW: State your motion again, and we'll vote.

MR. ORSINGER: Whether the committee ought to consider rule language relating to letter and e-mail -- letters and e-mails that purport to be interlocutory -- pardon me, can I start over again?

MR. LOW: Start over.

HONORABLE STEPHEN YELENOSKY: No.

MR. ORSINGER: Sorry, Dee Dee. Whether the committee ought to draft rule language that would apply to letters and e-mails that purport to constitute appealable orders or judgments.

HONORABLE DAVID EVANS: Yes.

MR. LOW: Okay. All right.

MR. ORSINGER: Or that could be construed as constituting appealable orders or judgments.

MR. LOW: All right. All in favor of that, raise your hand. 15 in favor.

All opposed? Two opposed. All right. That -- that carries. All right. Now, do you --

MR. ORSINGER: Some people want to expand that out, and let them articulate that.

MR. LOW: Okay. But I'm not through with you yet. Do you propose something beyond that? Do you

also have a second thing you want to propose and consider?

MR. ORSINGER: No, I don't personally because I feel like the real problem area is these adjudications that are reviewable on appeal.

MR. LOW: No is a good answer.

MR. ORSINGER: Yes. No. No.

MR. LOW: Okay. Jane.

MR. ORSINGER: No, period.

HONORABLE JANE BLAND: I would just encourage the subcommittee to consider whether being overly technical about the requirements of an order could present the same sort of problems that we might have with requirements of an answer. In other words, we know what an answer is supposed to look like, but we also have plenty of cases where somebody has sent a letter, sent something, put something on a legal pad and filed it with the court in an attempt to answer a lawsuit, and we've looked at that and said that's an answer, so I urge that whether something is on a letterhead or not probably ought -- not ought to be the test of the effect of the ruling.

MR. LOW: Any further urging? Sarah.

HONORABLE SARAH DUNCAN: Well, we construe the filings of pro ses liberally so that they are found to have responded, answered the lawsuit, or filed a motion

for new trial if that's what the question is, but here we're talking about judges, and I don't have the same kind of sympathies for judges that I might for unrepresented parties.

I would answer the question, yes, obviously. I believe Judge Yelenosky would as well. I think it ought to -- the committee's work ought to go further than just appealable orders and judgments and encompass all orders, because you've got the same problem of what is the effect of a letter that could be construed as encompassing an order.

MR. LOW: Okay. Does anybody have -- I mean, that's one suggestion and other. Because when we do this it's not over once they come back. I mean, you know, it can be, you know, expanded, but we need to give them something to target and then can be expanded. Any other suggestions or motions that they consider? Sarah, you want to --

HONORABLE SARAH DUNCAN: Sure. I'll make a motion that the subcommittee consider that whatever the requirements are for appealable order or judgment be expanded to any order or judgment.

MR. LOW: All right.

HONORABLE SARAH DUNCAN: And all orders and judgments.

MR. LOW: Does everybody hear the motion? All right. All in favor of Sarah's motion raise your --

HONORABLE DAVID PEEPLES: Buddy, I'm not sure I understand it. I want to clarify what we just voted on that Richard moved.

MR. LOW: All right.

HONORABLE DAVID PEEPLES: As I understand what Richard was asking that was approved 15 to 2, address when can the letter or e-mail itself be the appealable order. No?

MR. WATSON: No, it was whether.

MR. ORSINGER: Well, when might be never. I don't think we should assume --

HONORABLE DAVID PEEPLES: When, if ever.

MR. ORSINGER: When, if ever, yeah.

HONORABLE DAVID PEEPLES: You're talking about the e-mail or the letter being the document that's appealed from.

MR. LOW: Whether that can constitute such.

MR. ORSINGER: That's what I -- that's what I meant, and that's where this discussion started originally with Justice Gray's concern.

HONORABLE DAVID PEEPLES: And with that understanding I would ask that Sarah repeat what she just moved.

MR. LOW: Right. All right. Sarah repeat, please.

HONORABLE SARAH DUNCAN: That the subcommittee consider that whatever its decision, conclusion is, on when a letter can be appealable order or judgment, that it also consider whether a letter can be an enforceable order or judgment.

HONORABLE DAVID PEEPLES: And that's item 3 in my letter, I think, my memo.

MR. LOW: All right. Now, all in favor of that, raise your hand, please. Eleven in favor.

All opposed? Three. All right. 11 to 3.

HONORABLE TERRY JENNINGS: May I ask a question?

MR. LOW: Sure, Terry.

HONORABLE TERRY JENNINGS: Of Richard. I'm wondering if we're going about this the right way, and again, I confess as I did to Skip, my perspective here is limited as an appellate judge. You know, I don't see these problems very much. I think Judge Gaultney has seen them, and as far as *Lehmann vs. Har-Con* goes, I mean, I've never really had a problem applying it, but just because I don't think I have a problem applying it doesn't mean other judges are going to agree with me as far as my interpretation of whether something is final or not, but

doesn't all of this ultimately kind of beg the question of do we need a separate document rule like in Federal court where, you know, for an order to be final and appealable it has to be appear in a separate document that has to be labeled as such, you know, appealable order or final judgment, doesn't this kind of beg the question? But by saying what isn't final and appealable by, you know, ruling out e-mails and letters and so forth, aren't we really kind of getting to the point where we're saying, well, you need a final -- I mean, you need some kind of a separate document that says this that's filed with the clerk?

MR. ORSINGER: I think that's implied for sure.

HONORABLE TERRY JENNINGS: I mean it's --

HONORABLE STEPHEN YELENOSKY: No, it's not.

MR. LOW: That's something they could conclude when they're considering this. That's something they very well could conclude, and then once they consider this if someone thinks we should go beyond that, and we can certainly do that. Steve.

HONORABLE STEPHEN YELENOSKY: Well, I mean, that may be the result, but that's not compelled by saying that if you were to decide that e-mails and letters aren't part of the body of documents that you look at to

determine if you have a final judgment, that doesn't mean you would necessarily still have to have one final document. You still -- all the documents you consider would have to have a caption at the top, but that doesn't compel a conclusion that there be one final document like we rejected sometime ago.

MR. LOW: David, do you think you need further input, go back and have your committee -- and do you need other people on the committee?

HONORABLE DAVID PEEPLES: I think the committee is fine the way it is, the subcommittee. I don't think I have input right now on letters and e-mails that purport to say motion denied, motion granted, new trial granted, my summary judgment is set aside.

MR. ORSINGER: See, my original motion that we voted on specifically did not answer that question, nor did it answer the question of whether a letter or an e-mail constitutes preservation of error for admission of evidence or ruling on pretrial motions. I was trying to deal with the original presenting question, what's appealable, and so the question was does somebody want to add to the scope?

MR. LOW: Right.

HONORABLE SARAH DUNCAN: I need to understand why Judge Peeples -- I thought my suggestion

would encompass --

MR. LOW: That.

HONORABLE SARAH DUNCAN: -- that.

HONORABLE DAVID PEEPLES: Well, I just asked you to rephrase it, Sarah, in light of the clarification that I sought about Richard's motion.

HONORABLE SARAH DUNCAN: Mine is all orders and judgments, whether appealable or not.

MR. ORSINGER: Should have the same standards as appealable? Well, then we ought to have a vote on that, because --

MR. LOW: On what?

MR. ORSINGER: Sarah is saying that she thinks whatever the standards are that we apply to e-mails and letters with regard to appealable orders and judgments, the same standard should be applied to motions for new trial and to rulings that preserve error for appeal.

HONORABLE SARAH DUNCAN: Did you say require that?

MR. ORSINGER: Yes. That's what I understood you to say.

HONORABLE SARAH DUNCAN: What I just said was that you should consider whether that should be true, come back to the committee with your conclusion, and then

we can all decide how each of us -- each of us can decide how he or she feels about it.

MR. LOW: Yeah, we're not voting on what it's going to be. We're trying to give input to the committee to go back, and I think we've given them about all the input --

MR. ORSINGER: The only mandate we have on that vote is dealing with appealable orders and judgments, so if somebody wants to tack motions for new trial onto that, it takes a separate vote in my opinion, and if they want to affect the ability to preserve error by letter or e-mail they need to add another vote on top of that.

MR. LOW: No, let's just tell them --

HONORABLE SARAH DUNCAN: That's why I used "any and all."

HONORABLE STEPHEN YELENOSKY: She said "any and all."

MR. LOW: Let's just tell them to do that, include whatever Richard --

HONORABLE SARAH DUNCAN: With unmistakable clarity.

MR. LOW: Yeah. All right.

HONORABLE SARAH DUNCAN: Buddy, if I could make one point.

HONORABLE DAVID PEEPLES: I think, Buddy,

we've got enough guidance, we're fine.

MR. LOW: Yeah, I think you do.

HONORABLE SARAH DUNCAN: In response to some comments that were made earlier, I would just like to say on the record --

HONORABLE DAVID PEEPLES: I'm ready to rule.

MR. LOW: Wait a minute. Sarah, I'm sorry.

HONORABLE SARAH DUNCAN: In response to some comments that were made earlier I would just like to say that it is not my view and I don't think it's the law that a docket entry is of no moment. It is what --

HONORABLE JANE BLAND: I said in the main.

HONORABLE SARAH DUNCAN: -- it is, and it can be considered if appropriate, but I just want it clear that I don't think they're irrelevant.

MR. LOW: Okay. All right. We're ready for Richard.

MR. ORSINGER: On the next subject matter?

MR. LOW: That's right.

MR. ORSINGER: Oh, we're moving onto the next agenda item and --

MR. LOW: That's it.

MR. ORSINGER: We might get it done -- are we striving to get it finished before lunch?

MR. LOW: No, we're just --

MR. HATCHELL: Yes.

MR. ORSINGER: We are? There's a memorandum. I characteristically like to have background for the discussion. I hope you got the memorandum by e-mail. I'm sorry it was so late in the week, and there's a copy of it over there. The proposition --

HONORABLE NATHAN HECHT: It's of publishable quality.

MR. ORSINGER: Well, unfortunately it's got some mistakes in it, but it's so hurried that I'm going to have to correct them as we go, but in a sense everything we submit in writing goes into some kind of permanent record somewhere, and so you're going to be judged by it I guess by anyone who ever reads these archives. Okay. So Justice Hecht had sent a letter out saying that I believe that it was a staff person, Michael Cruz, Deputy Clerk for the Supreme Court of Texas, had suggested that we consider electronic publication of citation of -- electronic publication of -- citation by publication for purposes of civil litigation. Or let me restate why.

Rule 116 as is currently written provides for citation by publication to be effected by publishing it in a newspaper, and the question is what do we do with electronic newspapers and what do we do with the possibility of publishing it on the internet outside the

context of even an electronic newspaper, and that's at the forefront of the national consideration of the issue, but it's certainly timely, and so what I attempted to do to find out what was going on in terms of official notices being published electronically or on the internet, both in Texas and around the country. You can see the text of Rule 116 here at the beginning, and at the end you'll see some proposals that have been worked up on how this might be tweaked, depending on what we want to do with electronic publishing notice instead of paper newspaper publishing notice, and to help trigger some thoughts for discussion purposes I listed issues that we might consider, and some of these deal with the current rule even without rewriting it.

For example, the current rule requires that the citation be published once a week for four consecutive weeks, the first publication to be at least 28 days before the return day of citation, and the publication has to be made in the county where the suit is pending if there's a newspaper in the county, but if there's not a newspaper in the county then a newspaper in an adjoining county where -- adjoining county where a newspaper is published. The rule doesn't tell us what happens if the county and all adjoining counties do not have a newspaper, so I don't know what people do out there in West Texas if they don't

have one. If it involves title to land then it must be published in a newspaper of the county where the land or a portion is located or if there is none then a newspaper in an adjoining county.

So the idea of published comes to us from the traditional concept of newspapers, which are defined, interestingly, I thought pretty well in -- on page eight in Nichols Cyclopedia of Legal Forms, and I'll just skip there for a second. They say there are several characteristics that newspapers have in common. They are published periodically, usually at short regular intervals not exceeding a week. They are meant to appeal to a wide spectrum of the general public. They usually contain advertisements, and their purpose is to convey news or advocate opinions. So that's more or less the traditional concept of a newspaper. Those of you who subscribe to local papers in big cities in Texas know that all of these papers now have electronic versions of the newspaper, which is not just a scan of the paper. It's actually an electronic configuration that's designed for ease of use and to emphasize their advertising and everything else, so it looks different even though it may have the same content.

HONORABLE SARAH DUNCAN: And it doesn't have the same content.

MR. ORSINGER: Maybe it doesn't have exactly the same content always, and then there are some newspapers that have gone to pure publication -- like the *Christian Science Monitor*. I don't know if any of you ever used to read that, but it was a lengthy newspaper with worldwide -- of worldwide -- issues of worldwide interest that was mailed by subscription to people. I subscribed to it myself for many years, and it's now gone completely electronic. They don't have a paper version anymore, but they do have subscribers, and now they just get it purely by e-mail, and then with the electronic readers we have like the Kindle and things like that you can get subscriptions now to newspapers that are sent to you by e-mail and you never get the paper copy. So the traditional concept of newspaper is in flux, and most of the people that have looked at it, including people that are in the industry, feel like ultimately the paper paradigm of hand-delivery to your doorstep or the guy at the stoplight selling them to you is eventually going to be replaced by electronic delivery. At some point there is a tipping point where they can no longer support the cost of printing for the small number of people that want print.

Okay. So then the issue of what does the term "publish" mean is something that we need to grapple

with either now or at some point in the future, and the definition of newspaper is something we need to grapple with either now or at some point in the future. The requirement of published once a week may impair the transition to electronic newspapers because they're not published once a week. They're put up on the internet, and they just remain there until they're replaced, so they don't have a cycle of publish, deliver, and then replace with something that's new that's published and delivered, and so we may have a problem with even internet versions of newspapers if we require them to be published once a week.

And then my proposal or issue No. 4 is let's consider the purpose of citation by publication. This is someone that's getting sued for something. It could be trivial, or it could be serious. I mean, it could be as serious as a money judgment that would wipe out all your assets, or you could lose your parental rights to your child, all the way down to just a suit for a hundred -- for a few thousand dollars. So behind all of these publication rules is a constitutional duty on the part of the government to give people notice that they're being brought into court, so we have to ask ourselves whether the idea of a periodic paper edition of local interest that's hand-delivered to people on a regular basis is the

best way to get notice out to someone that they're being sued or whether there is a better way to do it using the internet, such as prescribing notices being published on the internet and maybe even prescribing internet sites, whether they would be a county site or a statewide site where citations by publication could be published.

Issue No. 5 for us to talk about I think is whether we should do a rule change that allows you to add electronic publication to the requirement of paper publication in a periodic newspaper or whether we should go even further and require dual publication so that the subscribers that get the paper copy have exposure to it and the ones who get only the electronic copy have exposure, and that way we get all the subscribers included by requiring dual publication, or do we permit the plaintiff or the sheriff to decide whether to go paper or electronic or both, or do we require that a government agency create a web page where everyone knows they can go to to find out if someone has been sued, and that could be at the county level or it could be at the state level.

You could say in a rule, I think, although maybe that would be stepping on the wrong toes, that every county must maintain a website where it offers for viewers all of the citations by publication, or you could even maybe have the secretary of state do that for all of the

courts in Texas, and then anyone that wants to know if they've been sued or someone they know has been sued and cited by publication they can go to that one website and do a search. So that would be Issue 5.

No. 6, if you're going to have a government website, is it going to be local, or is it going to be centralized on a statewide basis? No. 7 is how does cost figure into this decision, because we have the cost to the litigant, we have the revenue to the newspaper, and we have the cost to the state if the state is going to provide an internet publication service at no fee, or we could have the fee go to the state to subsidize the cost of electronic publication. Steve, you want to say something?

HONORABLE STEPHEN YELENOSKY: Yeah. Can we add an issue, which is whether publication in the current world that we have can meaningfully provide due process to anyone? I mean, to me when you publish the publication is irrelevant. What matters is you have an ad litem who goes and looks for the person. I mean, which of us thinks, "Hmm, I wonder today if I've been sued. I'm going to go to a website and see."

MR. ORSINGER: Well, if that's true we can never admit it's true because the Supreme Court has said that this notice is a due process requirement, and so if

we did away with it because we know that it's really not working then we have constitutional problems that are encountered by just overturning a long term historical requirement of publication.

HONORABLE STEPHEN YELENOSKY: Well, but I said we do require an ad litem to look for the person.

MR. ORSINGER: I'm interpreting you to say why don't we just forget publication and let's go with a robust ad litem representation.

HONORABLE STEPHEN YELENOSKY: Yes.

MR. ORSINGER: And the good argument against that is there are a lot of Supreme Court decisions that talk about citation by publication, and I don't know that we should try to overturn them in a rule. Okay. So, anyway, I agree with you. I think in a lot of senses it's a legal fiction and that the real protection might be the appointment of the ad litem, but it's a legal fiction that the fiction readers on the Supreme Court like to read for some reason.

So, okay, so Item 8 is what does the -- what does the litigant do when there's no newspaper -- no paper newspaper in the county or the adjoining counties, because I think that may -- if it's not already true it's coming true, and our rule doesn't allow them to publish in a county that's not adjoining. Okay. So those are just

thoughts for us to consider.

HONORABLE DAVID EVANS: Richard?

MR. ORSINGER: Yes.

HONORABLE DAVID EVANS: I think what we're saying is it's been our experience that most ad litems locate the people and that publication might be the backdrop after the appointment of the ad litem. We don't have any authority right now to go get an ad litem until after publication has run, but once we appoint an ad litem with the type tools that they have and the motive that they have, they do a pretty good job of locating the defendants.

MR. ORSINGER: So what you're suggesting is not to do away with the publication requirement, but defer it until after there's been a --

HONORABLE DAVID EVANS: I'm just saying that my experience has been -- where I handle it is on foreclosure of real estate mostly right now and mineral interest cases, is that we will locate these heirs, and the ad litem comes back with a report that says they don't want to be in the lawsuit, but I know where they are now, but we don't have them actually served. Now we know exactly where they are.

MR. ORSINGER: Let me try to translate that into something concrete. Are you saying that we should do

away with notice, citation of publication by notice?

HONORABLE DAVID EVANS: I wouldn't do away with it unless it was the only way to fulfill this due process notice, but if the defendant comes in and says "We can't locate the person" and substitute service wouldn't be allowed, I'm not allowed to go to an ad litem first to appoint an attorney ad litem to do -- to check -- to go into the process. And it's been my experience that most of them do locate the -- a lot of the unknown heirs.

MR. ORSINGER: Okay, so I'm trying to put words into your mouth --

HONORABLE DAVID EVANS: That's fine.

MR. ORSINGER: -- and, you know, tell me if they don't work. Are you -- you're wanting us to write the rule so that citation by publication is not necessarily required until after an ad litem has been appointed? Is that what you're saying?

HONORABLE DAVID EVANS: That's a way to go about it, yes.

MR. ORSINGER: Okay. Well, let's add that onto the list. That wasn't the presenting question, but let's put that on here as to a factor as to the timing of it. Okay.

HONORABLE DAVID EVANS: Okay.

MR. ORSINGER: Now then, just a little more

background. I have a quotation here. I'm very sensitive to the fact that we're the guests of the publishing industry here in Texas frequently, and so they get the first say on this question, and the *Houston Chronicle* just a short time ago published an editorial I guess on this whole issue about whether the Legislature should provide for the publication of notices on the internet in lieu of in newspapers, and this is the *Houston Chronicle* holding in on this. It's there on page three and four, and this does not involve citation by publication of individuals. This involves bills that are in the current Texas Legislature that's now meeting that are moving public notices about the operation of government over to the internet, either on an elective basis or on a mandatory basis, and so they are pointing out the long and important history that newspapers have provided for our democracy in informing voters and taxpayers.

They also point out here in the middle of page four that governments would have to spend thousands of additional taxpayer dollars for secure servers, programming, posting and auditing, which is an important question when we're cutting back state benefits that are core, although it might be ameliorated by just providing that the filing fee or the service fee associated would be paid to the county or the state secretary of state to

underwrite the cost; and down toward the end of the *Chronicle* comment, second to last paragraph, they say, "A majority of Texans rely on their local newspaper as the primary source of information in their community"; and I'm not sure whether that's right. They may know and I may not know, but I certainly think that that will not be true in 10 years, and I'm not totally sure that it's true now. I don't have any data on it, and I might be able to find some, but that's what their feeling is, is the role of newspapers as the traditional vehicle for which public notice is to be given is historical and it's important and it's justifiable even under current policies.

The next section of the memo talks about pending legislation, and there are many, many bills that involve internet publishing. I just selected some. The first one mentioned is House Bill 1082, and it has to do with school districts giving public notices, and it says -- you'll see there on the top of page five, this is a very limited bill because it only allows internet publishing if there's no daily, weekly, or biweekly newspaper published in the school district and only if -- and only if the population in the school district is less than 10 percent of the population in the county. So that's a very restrictive provision of internet publishing in an area that doesn't have newspapers and in a district

that's a very small portion of the county, and in that situation then the publication may be posted on the district's internet website instead of in the newspaper, which seems peculiar to me because the condition is there is no newspaper. Steve.

HONORABLE STEPHEN YELENOSKY: Well, isn't that a totally different circumstance? That's notice of a meeting. That's notice to the whole haystack. That's not looking for a needle in the haystack.

MR. ORSINGER: Yeah, I think that -- and you'll see, each one of these is addressing slightly different concerns. What I wanted to do was to show what the Legislature is thinking in terms of electronic internet publishing versus paper publishing, kind of pick up a trend there. In this particular bill under (c) and (d) they actually attempt to address content of the electronic publication. They just adopt by reference whatever the content requirements are for the newspaper notice, but they require that there be a link on the home page of the website that's prominent that links to this information and then they say the newspaper requirements on page size and print size doesn't apply to the electronic page. So that's what that bill does. It's just limited to those areas where it's a very small school district, and there are no newspapers.

House Bill 1094 has to do with the publication of political expenditures and contributions for candidates for county and municipal offices, so that's not a statewide election, and they talk about making electronic reports available on the internet. The official report still must be filed with the clerk that's specified in the Election Code, but in addition to that they require -- they require that that information be made available to the public at the county's website within two days of when the official report is filed with the official state agency. So this is a mandatory requirement of internet publication of election information that is filed with the state, not very analogous to citation by publication, but I thought it was interesting that that bill appears to reflect that legislators believe that the word is going to get out better if you put it on the internet than if you just leave it with the clerk of the government agency in question.

House Bill 1153 on page six is much broader in scope. It would be a mandate to the state comptroller's office to establish an internet portal to the numbers on Texas government finances, so they are directing this department to create a web page. They even have details on how it will operate. They say it must include a search feature that retrieves information based

on the address, the user's entry of an address, and location. So if you put in your name and -- pardon me, if you put your address in there, it will feed back to you the financial information that's relevant to the area of the state that you live in. I believe that's what they are asking here, and they also have operational specifications about the content and how the website will work, which I thought was interesting, that the Legislature is prescribing certain minimum requirements about the way the information appears on the web page and how it can be accessed to a user that comes to the web page.

House Bill 2816 is another school district legislative proposal, and it says that all school district notices can be published on the internet instead of a newspaper, so if you were required to publish the school information in a newspaper you can -- your choice, put it on the internet and not in a newspaper. So this is not a requirement that they add it to the newspaper or an option that they add it to a newspaper. This is that the administrator can elect to go purely electronic without going to a newspaper, and when they go electronic notice, that it's at the district's internet website, not the electronic newspaper. There are some of these bills that say you can put it in the electronic version of the

newspaper. This says you can circumvent the newspaper, paper or electronic, and go directly to your website if you want to, and then they have some content requirements, which they incorporate by reference other than page size and font size; and they also require that it be placed prominently on the home page. It doesn't get into any greater detail about searching or what information should trigger the information.

House Bill 3364 is an amendment to the Property Code, and it says -- I wish that I had captured enough to tell you which provision this -- what subject matter is, I didn't, but that the -- if the county maintains a website, it doesn't mandate it, then the county must post a notice of sale filed with the county clerk on the website page that is available free of charge to the public. So what they're saying is that if you've got a website you must put this information on the website in addition to whatever legal requirements exist about notice.

Senate Bill 690 has to do with foreclosure on storage contents to fulfill a lien, and it says that "The notice required by this section may be given by publishing the notice once in a print or electronic version of a newspaper of general circulation in the county where the vehicle or motor is located," so they're

giving you the option of publishing one time in the print or the electronic version, it's your choice, so they've expanded it out from print to electronic. I suppose the newspapers charge the same whether the notice is in the electronic or the print, I don't know, but anyway, that's interesting because they gave you the option of the print or electronic version, but you're still required to put it in a newspaper of general circulation.

The next subsection is subsection (6) on the legal cyclopedia. I already told you about what I thought was very important, which is there's now a lot of vagueness about what constitutes a newspaper. There used to be real clarity on it because they always looked the same, but now some newspapers are transitioning to purely electronic, some are dual, and some are totally electronic without paper. At the bottom of page eight you'll see this practice note, "Due to the internet the very nature of what may be considered a newspaper is changing, requiring that practitioners review the effect of other laws. The online addition of a newspaper is, in fact, an addition of the newspaper has been accepted by many courts."

The next thing I want to call to your attention is over a couple of pages on page 10, category 7 and that is that a search of the case law on this subject

matter indicates to me that the case law is in its infancy. Some of the oldest cases are as long as seven or eight years old, but there's been very little litigation to tell us what a trend would be or even what the multiple choices are that we have. One of the earliest that I could find that was modern is a case out of the Virgin Islands there on page 10, *Hernandez vs. Alcorta*; and this was a local plaintiff was trying to get service on a bunch of nonresidents of the Virgin Islands that had interest in a condominium project; and they were attempting to justify citation by publication through a purely internet newspaper that had no paper delivery; but we -- they knew that the defendants didn't live in the Virgin Islands to get their paper copy of delivery anyway; and that particular court ruled factors one, two, three, and four that were offered to justify it that "internet newspapers reach a greater number of people because they're free and available 24 hours a day." I might parenthetically say not all of them are free. Number (2), "an internet newspaper's audience potentially extends beyond the confines of the original location." That's certainly true. (3), "the persons reading an internet newspaper can easily forward information to others, and (4), legal notices published in internet newspapers are not relegated to the section" -- "to a section in the back pages"; and

the court found that to be persuasive, so that was one of the earliest courts in America really to grapple with the idea of publication of absent defendants, citation by notice in a purely electronic newspaper might be preferable, in that case was preferable, to a print version.

And so Washington State has a Washington Supreme Court case decided 2006 called *Central Puget Sound Regional Transit Authority vs. Miller,* and that had to do with giving notice of a meeting of a company, I believe, that had condemnation authority, and the question was whether -- what constituted or would meet the definitions of the minimum requirement of notice in Washington statutes, and that court said there's very little case law on the subject of sufficiency of web posting for notice requirements, and they cited -- they say that several cases have rejected web posting as a method to apprise class members of a class action suit.

I think that the law is a little different now, but that was their context, but they go on to say in the second sentence of the second paragraph, just -- pardon me, "Miller's argument that posting on a website does not necessarily furnish notice to anyone is unfounded. Just as it is impossible to assure that anyone will look at a particular web page, it is equally

impossible to assure that anyone will purchase, much less read, a newspaper"; and in that particular situation there was a statute that permitted internet notice as an acceptable notice; and they ruled that that was constitutionally okay.

Subdivision (c) on page 11 is a Seventh Circuit class action case, and class action cases are different obviously than individual defendants, but they present some of the same challenges of getting notice out to real people about individual lawsuits, and in this particular case the question was there was a settlement where someone might have -- that was in the class might want to object to the settlement terms or the amount of fees or whatever, and the question is how do we get the notice out to the people in the class. And so this particular Seventh Circuit case in 2004, it says, "When individual notice is infeasible, notice by publication in a newspaper of national circulation is an acceptable substitute." They go on to say "something is better than nothing, but in this age of electronic communications newspaper notice alone is not always an adequate alternative to individual notice." I continue, "The worldwide web is an increasingly important method of communication, and," of particular pertinence here, "an increasingly important substitute for newspapers."

In this particular situation the defendant, or should I say the appellee, did not post a notice on its own website, but they hired somebody to maintain the website for the case, and the notice was posted on that website, and the court said that that was an acceptable substitute. So what's happening is, is that as time goes on we're transitioning away from a feeling that a web notice is not adequate for class action purposes to the fact that in some instances or maybe in all instances web notice is probably better than publishing in just the *New York Times* or the *Los Angeles Times* or whatever.

Subdivision D, I list other class action cases that have said that conventional newspaper publishing coupled with internet publishing is an acceptable way to give the notice requirement that the Federal -- Rules of Federal Procedure require. That's dual. That's not electronic to substitute for paper. That's electronic added to paper. Page 12, paragraph VIII, deals with the law reviews on the subject. Not surprisingly perhaps, most of the law reviews are written by student authors who are probably the ones that are on the internet all the time as compared to the law professors and the older practitioners like myself, and they were all very, I think, committed to the idea that the world is moving away from a paper-based paradigm to an

electronic paradigm and that we need to change our procedural rules that are all based on the paper paradigm so that we can accept and use the breadth and flexibility that's available in the internet world.

So I won't bother you with quotations from each. I will say that I do have one law professor article in here on page 15, and it's addressed to class actions as opposed to -- several of these are class actions. Some have to do with notice to individual defendants, but they all recognize that the internet is a game changer and that we need to reconsider our old paradigm. On page 15 is a list of other publications that address the issue of notice, electronic notice, e-mail notice, internet notice versus paper notice, and then Roman IX is where we have some proposals, which I might be able to cover briefly before lunch, and we can discuss after lunch.

The first proposal -- and I guess I should say at this point that my subcommittee, to the extent anyone had an opinion, was of the view that we should seriously consider offering internet publishing as an alternative but not requiring that it be the mandatory way to publish. In other words, allow internet publication as an alternative, but do not rule out paper publication and force internet publication, but that's a very tentative assessment. I wouldn't say that it was a vote or that it

was firm. It was just an inclination that if we're going to move to the electronic publication world we should go through a period of dual option where you could go the paper route and add to it the electronic or give you the choice of going either paper or electronic.

So this first proposal here just adds on -- takes all the language as-is, whatever a newspaper is and whatever publishing is in this day and time, the publication requirement may also be met by publishing citation at a newspaper's internet site for four continuous weeks beginning 28 days -- at least 28 days before the return day of citation, provided that the citation may be accessed by using a search capability built into the internet site. In other words, you can do continuous publication for the same period of time rather than periodic publication once a week, and it must be at the website of a newspaper, whatever we define that to be or whatever that's taken to be, and you must be able to find it from searches on the front page, not just have to click through to the legal notices. That's just one proposal for discussion.

An alternative is the same thing, only say that the publication -- a citation shall also be published in the newspaper's internet site, so that means you still have to publish by paper, but if there is an internet

newspaper, you are also required to publish in the internet version of that newspaper. The third alternative would take Rule 116 as-is and would just add "The publication requirement may also be met by publishing citation at an internet site maintained by the county" -- or substitute "State of Texas" if you want to go statewide on it -- for that same period of time. So basically that's moving away from the internet newspaper to a government internet.

So we've -- we've got the paper paradigm of the newspaper, we've got the electronic paradigm of the newspaper, and then we've got the government website, which could either be an add-on to the print or it could be mandatory. And if we do go the government route we have to decide whether it's the local government or whether it's the state government, so these options basically are putting this load at whatever speed you want to on whatever burden.

The next, version D, is the publication requirement shall also be met by publishing citation at an internet site maintained by the government. So that's newspaper publishing plus a mandatory publishing at the government site, and the last one is that eliminates newspaper publishing altogether by saying that "citation shall be published at an internet site maintained by the

county or the State of Texas for the purpose of publishing legal notices," and just as an add-on thought to the whole thing, one of the things that makes the state site attractive is that by aggregating them there may be revenue opportunities, if the state would ever consider revenue associated with legal notices. Newspapers certainly do, and also, it might give the state more clout with a search mechanism, search organization like Google, saying that we want you to agree to list the individuals that are at our government website as defendants cited by publication, we want some kind of arrangement with you that if someone does a Google search in the person's name it's going to find that notice at our government website. That may be unrealistic. Google may not be willing to do that, and they probably wouldn't do it for every single political subdivision in America, but if there's 52, 54 jurisdictions that they're concerned with, they might be willing to agree that if it conforms to their search format, that by putting in an individual's name and searching that the Google website will pull up this public notice, which would then greatly increase the chances that the defendant would actually find out about it or some friend or relative would find out about it.

So, anyway, those are -- that's kind of what the background suggests. Those are kind of the activities

going on in the area and some of the factors for us to consider. Steve.

HONORABLE STEPHEN YELENOSKY: Are there any studies in the modern era where individual defendants, not class action plaintiffs, not people looking for a notice about a meeting, have found out they were defendants by publication? Are there any studies?

MR. ORSINGER: I wouldn't -- I haven't found one, and I'll bet you that's because there isn't one.

HONORABLE STEPHEN YELENOSKY: Which leads me to believe at some point if we're relying on this notice somebody is going to have to analyze whether it's constitutionally sufficient in any way, any -- electronic, e-mail or whatever, because it's dependent on people looking for being sued as opposed to somebody looking for a notice or hearing about a notice of a meeting, so I question whether the game is worth the candle.

MR. ORSINGER: Well, in response to that, and I'm not defending the proposal, I'm just presenting it, but it does seem to me that it is more likely that someone would stumble on the fact they've been sued in some place where they are, you know, not very connected, more likely they'll stumble on that on the internet than they will stumble on that by reading a local newspaper.

HONORABLE TERRY JENNINGS: Why?

MR. ORSINGER: Why? Because if it's a place you don't live, you don't read that newspaper; and if it's a place you do live, according to the declining subscriptions, you don't read the newspaper either, even if you live there.

HONORABLE TERRY JENNINGS: Well, the -- it's problematic because, as has been pointed out, most people aren't going to get their notice this way anyway, and it occurs to me that there's a much larger problem here in regard to the internet because it's so vast. I mean, you're literally throwing up notice into the ether at some point in time; and, you know, not to attack every premise of what you just have kind of gone through, but, you know, when you talk about people accessing the internet, more people are accessing the internet, well, people are looking for specific targets. More people are looking at websites that they agree with and so forth and so on, and, you know, just because you throw something up on the internet doesn't mean it's going to be more likely seen there than it would be in a newspaper; and then you go back to the fact that even though there has been the decline in newspaper readership there has been kind of a recent up kick lately, and there's been some advertisement to that effect that more people are starting to go back, albeit a very small amount, to the print.

And it occurs to me as far as like a common forum that although more people are looking at the internet where you do have a newspaper, a wider variety of people are looking at a newspaper; and when you're flipping through a physical copy of a newspaper and you see that notice section, of course, I never really pay a lot of attention to it, but every now and then you'll see something that jumps out at you; but you're more likely to see something if you have a newspaper in front of you and you're flipping through it and you see, oh, there's the notice section you see all the time, you may see something that strikes your eye; but you're more likely because of -- although there may be a larger audience looking at the internet, it's -- what people are looking at is much more targeted versus the newspaper where you have a wider variety of people looking at a newspaper, maybe a smaller audience but a wider variety who may be able to flip through and see something. So I would go with your proposal that keep newspapers and make the internet an additional option.

MR. ORSINGER: You know, another interesting thing that you point out is while people browse the internet, there are statistics on a large number of what they call vanity searches where people stick their own name in the internet just to see what anyone is saying

about them.

HONORABLE TERRY JENNINGS: They Google themselves, yeah.

MR. ORSINGER: Yeah. So most people are not appearing on the internet. A few people are, but there are statistics that I've read on that, not for this purpose, and if the internet notices were somehow designed to plug into the ability if you search your own name you'll find out that somebody is suing you or did sue you, that might be a great enhancement to the kind of serendipitous discovery you're describing by reading through the newspaper.

MS. PETERSON: Maybe you could have a Facebook notice as well.

MR. ORSINGER: Well, see, I don't have a Facebook account, but apparently everyone else in America does --

MR. LOW: No, not everyone.

MR. ORSINGER: -- and so there's probably some way to involve Facebook in giving notice, but I don't have any friends on Facebook, and as far as I know my face isn't on Facebook.

MR. LOW: Richard, you're asking that we consider whether or not the internet should be a method, I mean, in addition to the newspaper. In other words,

you're not suggesting to substitute it, whether we should even consider that. Say you've got a place like Kountze where they read the local paper to see who the sheriff arrested and all of that, well, they'll see it, but in a place like that it might not be necessary. In Houston there's so many legal notices, who is going to read all the legal notices in the Houston paper, so you're just considering this as whether this should be an alternative, but if so, who decides, the clerk, the judge, or who decides whether it should be an alternative?

MR. ORSINGER: Well, we could write a rule that makes the decision, and we have a couple of choices to make. Is electronic publication mandatory or is it going to be optional or is it going to be exclusive?

MR. LOW: Uh-huh.

MR. ORSINGER: I bet if we took a vote that we wouldn't get anybody that supports that electronic is the exclusive method. I think that still --

MR. LOW: I think we need to vote on it.

MR. ORSINGER: Yeah. But that's an option, and we can put something like that in the rule, but on the other hand, if you say that electronic publication can be added, I don't know whether the plaintiff is ever going to want to add something more that would increase the chances that the defendant would be found. I mean, perhaps they

do have a motive to find the defendant, maybe they don't, but the option may or may not be used, and so it may be we ought to require it. I mean, if we're serious about having this information disseminated on the internet then perhaps we should require that it not just be published on page 23 of a section that no one ever reads, but is also put on the internet where there's a chance somebody might actually find it. And then the question becomes if we're going to mandate electronic publication are we going to limit that to privately-owned newspaper websites, or are we going to say that government websites are permitted, or are we going to require a government website.

MR. LOW: Well, we don't have government -- I mean, right now we don't have a state website --

MR. ORSINGER: Yeah, we do.

MR. LOW: We do?

PROFESSOR CARLSON: TexasOnline.

MR. ORSINGER: Yeah, we have a state website and then we also have departments that have websites, like the comptroller, the secretary of state, the Legislature, the Supreme Court, and yet I think --

MR. LOW: Okay.

MR. ORSINGER: Yeah. So, actually, you know, maybe the best thing to do -- and I think this is beyond a rule. I think this would require a statute, is

to just say that the secretary of state must maintain a permanent electronic repository of all citations by publication that can be searched from the front page with a name, and it costs them nothing. Disk space is the cheapest thing you can buy in the world, so, you know, you -- just the county clerks or the district clerks are required to e-mail these citations in or the plaintiff has to do it and then it gets posted at this State of Texas website, and you can search it for a name, and there's no reason to retire old cases. If someone got sued 10 years ago, they can find out about it whenever they do the search. If there's a cost associated with that, there will be some costs, but it won't be exorbitant. We can allocate part of the filing fee for that cost.

You know, ultimately, it's probably more effective to say there's one place in the state you can go to find out if you've been sued, but then, you know, as Justice Jennings has pointed out, that eliminates the serendipitous discovery. If you're searching to see if you've been sued, it's easy to do that if you only have to go one place to search, but if you're just kind of randomly reading and see, "Aha, my neighbor got sued," you won't do that probably unless you know their name and put it in, but you know, at least at this point we should probably open the door to it and then whoever is on this

committee in 20 years will probably be prepared to go away from print to electronic.

MR. LOW: Oh, no, we're going to finish with you. Carl.

MR. HAMILTON: Is this a problem now? Are there a lot of cases that come up where defendants that were served by publication file bills of review and say we didn't know about it?

MR. LOW: I see it as something to keep up with the present and the future.

MR. ORSINGER: The problem is not probably the guys that file bills of review. The problem with guys that could have had notice on the internet that didn't get it --

MR. LOW: Yeah.

MR. ORSINGER: -- and I don't think that there's going to be any statistics out there other than just statistics on internet usage and the way people use the internet. This is not a problem that the house is on fire and we need to call the fire department. This is a question of, you know, we're transitioning from a paper society --

MR. LOW: Right.

MR. ORSINGER: -- to an electronic society and do we want to continue to require that notices be

published in a newspaper of local distribution with diminishing subscription or do we want to allow or require that they go with the rest of the world that's progressively electronic. That's the way I see it.

MR. LOW: I see the *Houston Chronicle,* I'll read, and it says "For further details see website such-and-such." I mean, they're using it in the papers. So what guidance do you need from us?

MR. ORSINGER: There's other comments, I guess.

MR. LOW: All right. Sarah.

HONORABLE SARAH DUNCAN: I think there's a reason that the phrase needle in a haystack was invented.

HONORABLE LEVI BENTON: We can't hear, Sarah, down here.

HONORABLE SARAH DUNCAN: I think there was a reason the phrase needle in a haystack was invented, and I think it applies perfectly to the internet. There's no place easier to lose something than on the internet. You can find a site -- I had this happen the other day -- find exactly what you want on a particular site; and if you're not careful to bookmark it, you can go back two weeks later, three weeks later, and you can look for that site all day long; but if you're on a different computer and you don't have access to your history, you may not find

it. This -- I mean, default judgment by Facebook, this is -- you know, if you want to make it an option that people can post notice on the internet so that those few people who can't be found are served by regular service and don't read the newspaper or can't read the newspaper but just happen to have a computer and do what you call a vanity search on a daily basis for the entire world, that's fine with me, but I -- I think it's -- and I'm pretty -- you know, relative to a lot of people in this room, I'm pretty wed to my computer and digitally oriented, but I'm not in favor of it being sufficient for legal purposes in and of itself.

MR. LOW: Elaine.

PROFESSOR CARLSON: Well, I think I am in some circumstances, and I spend my life with principally 24 to 30-year-olds in law school, and I ask them in class, "How many of you receive a newspaper, written newspaper?" No hands go up. We get to citation by publication, "How many of you have ever read the legal notices in the paper?" Nothing. But I tell you what, I could Facebook and find any of them, probably, the next day. Now, it's how you fashion the service. Nothing in *Mullane vs. Central Hanover,* the U.S. Supreme Court 7-0 case, said you have to use the newspaper. It says you have to use a form of service reasonably effective to give the defendant

notice, and there are United States Supreme Court cases that say that doesn't mean you have to actually find the defendant either, but you've got to use a method that's at least calculated to attempt to give the defendant notice, and you're supposed to start with in-hand service or service via the mail. If you can't do that, you can go get substituted service. I think you could get substituted service by Facebook today. I do. I think you could get an order from a court saying, "I would like to Facebook this person and if they friend me I want to send them notice of this lawsuit." And I think that would be reasonably effective to give a lot of people notice. Now, not everybody, because some people like me still cling to their morning newspaper, but there are a lot of people who that is their primary method of getting informed.

HONORABLE SARAH DUNCAN: And I didn't mean my suggestion to preclude it.

PROFESSOR CARLSON: Right.

HONORABLE SARAH DUNCAN: I'm just saying I don't want that to be in and of itself sufficient for legal notice for all people.

PROFESSOR CARLSON: I understand, Sarah, but what I'm saying is citation by publication might be -- and our current method of serving via publishing in the newspaper may offend due process as to a defendant --

HONORABLE SARAH DUNCAN: Right. Right.

PROFESSOR CARLSON: -- who could be located by another method more readily. As far as citation by publication, Judge Yelenosky, as you know, it's very limited. I mean, you have to pretty much meet the situation where the defendant's whereabouts are unknown or you're dealing with an ad valorem tax, delinquent taxes, something along that lines. So it's very limited; and our rules are set up for a disdain for citation by publication because the defendant gets two years to move for a new trial instead of 30 days when they suffer a default judgment when citation is by publication; and as you point out, the court is required to appoint an ad litem for the absent defendant.

A state can always afford more due process than Federally required, so we could do away with citation by publication, or we could keep -- it's really not the only third method. It's constructive service. We have actual service, we have substitute service and constructive service, and we happen to choose newspapers. Why the newspapers passed the due process test, because at the time our rules were written that was the method by which most citizens would get their local information, right? And now that may or may not be true. I think the idea of transitioning at this time to afford both is a

very wise idea.

HONORABLE STEPHEN YELENOSKY: To what?

PROFESSOR CARLSON: To afford both.

MR. LOW: Steve. A wise idea. Steve.

HONORABLE SARAH DUNCAN: To afford or require?

PROFESSOR CARLSON: To -- well, I don't know, I'm not sure where I come out, to require versus may, versus shall, but I think incorporating both is a good idea to transition. Richard is absolutely right. The key is where do you find a spot where citizens would go, or do we not even not want to do that and say you've got to find this citizen by electronic means and then you can serve them through electronic means, which is then a targeted approach.

MR. LOW: Steve.

HONORABLE STEPHEN YELENOSKY: Well, as Judge Evans has been saying to me over here, of course, publication was constitutionally firm when you had a common of some sort where people -- you might not read it yourself, but other people in your community would read it and would tell you. We don't have that common place any more, so I question whether it can be constitutionally firm. Where I see the future with the electronics and the technology is, as we've been discussing in finding the

person, what I see is ad litems coming in saying, "I looked here, here, and here," and all of these electronic searches that don't really mean anything to me, some of them are -- they're paid searches. That's -- that's where I think the electronics go the other way around saying that we can use the electronics to notify people increasingly becomes infirm as the multiplicity of sources of information -- or the multiplication of sources of information continues. So while I understand maybe the fiction needs to be maintained, if I'm truly concerned about giving notice to people, you know, it's sort of like, well, they're going to post it at the courthouse, okay, check that box. That's meaningless from a constitutional perspective. Now, what else have you done?

MR. LOW: Terry.

HONORABLE TERRY JENNINGS: No, I was kind of just going to say what he just said. I mean, it really kind of exposes the idea that this really -- is this really a -- does this really fulfill due process requirements to begin with. The whole point about the newspaper was -- and this rule has been in effect for as long as anybody can remember and before that, because the newspaper was the common forum for the community; and because readership has declined it is no longer as effective as it used to be; but was it really even

effective to begin with, because, frankly, most people, the reason you're publishing it is because most people don't want to be found to be served anyway; and in regard to the internet, well, I have no objection at all to allowing that in addition to newspaper publication; but you're really just talking about a bigger haystack. And so, you know, at some point, you know, is this really worth the candle.

MR. LOW: Gene.

MR. STORIE: I have a couple of thoughts. One is that we've already had examples of people with tax consulting services who would offer to file your exemption for you. So I can see the possibility at least that some sort of niche business would try to arise and search for things like "tax sale" and then try to contact the people who may be involved in that; and the second thing is in terms of actual notice under the current rule, I had a thought, which is, living in Round Rock, I do happen to subscribe to the *Round Rock Leader,* but I think that the majority of people in Williamson County subscribe to the Austin paper. So if we're thinking of giving actual notice maybe we at least should consider some broadening of the rule to accomplish that.

MR. ORSINGER: Buddy, I think I could propose a vote that would -- it wouldn't be an either-or,

but we can find out which ones of these proposals are supported.

MR. LOW: Yeah, that's what I was going to -- I think nobody is for exclusive.

Mr. ORSINGER: Let's have a showing of hands, and let me set out the options this way and see if it's acceptable to everyone for a vote. One would be we add the option of electronic publication on top of the existing rule for newspaper.

HONORABLE SARAH DUNCAN: Option or in addition?

MR. ORSINGER: Yeah, in other words, we keep the current newspaper requirement and add the option, which is elective, I suppose, with the plaintiff.

HONORABLE SARAH DUNCAN: It would be in addition to.

MR. LOW: He doesn't mean exclusive option instead. He means that being another method.

MR. ORSINGER: Well, no --

HONORABLE SARAH DUNCAN: He needs to make that clear because if we're going to vote on this.

MR. ORSINGER: It's more than just another method. It will be clear if I can finish what my choices are.

MR. LOW: Go ahead.

HONORABLE STEPHEN YELENOSKY: We'll be the judge of that when you're done.

MR. ORSINGER: All right. Let me give you the options and then see if they require further clarity. Okay. Option one would be that we add on electronic publication on top of the existing newspaper, which would continue. The second option is that we mandate the electronic publication in addition to the existing newspaper, which would continue. The third option is we would go to exclusive electronic publication, no more paper publication. If we can do those three then I think we can write a good rule.

Now, there's going to be a follow-up question, and that is to the extent we do go to publication, whether it's optional or mandatory or whatever, is it only going to be for private newspaper websites, or is it going to be government websites, or is it going to be either?

MR. LOW: We need to get to that once we get the initial vote and break it down.

MR. ORSINGER: So the idea is newspaper plus optional electronic. The second one is newspaper and required additional electronic, and the third option is purely electronic, rule out newspaper.

MR. HAMILTON: Can I ask a question first?

MR. LOW: Carl.

MR. HAMILTON: On the second one when you say mandatory electronic, who does that?

MR. ORSINGER: Well, the newspapers. I mean, I think, according --

MR. HAMILTON: But who gets it to the newspaper?

MR. ORSINGER: The plaintiff, whoever has to get it to the newspaper --

MR. HAMILTON: Not the sheriff.

MR. ORSINGER: Now, wait a minute. And I think -- maybe there are some very small newspapers that don't have an internet presence, but all of the legislative enactments that talk about it assume that the newspaper, the traditional newspaper, has an electronic outlet in addition. So when you deliver to the newspaper the law will require that it be both put in the print version and in the electronic version of that newspaper. See what I'm saying?

MR. HAMILTON: The rule will require that.

HONORABLE TERRY JENNINGS: Don't newspapers do that already? Like the *Houston Chronicle*, do they already on their website have --

MR. ORSINGER: I don't have any idea. I don't read these legal notices on the websites of

newspapers. Perhaps I should have, and I will by the next meeting.

HONORABLE STEPHEN YELENOSKY: Every day.

MR. HAMILTON: That was getting to my question, if the newspaper already has --

HONORABLE DAVID PEEPLES: Are we trying to get this done before lunch?

MR. HAMILTON: -- an electronic version, doesn't --

MR. LOW: I'm just trying to get it done.

MR. ORSINGER: I think that it should be mandated. I mean, it shouldn't be optional with the newspaper, if we're going to say that it's mandatory. If it's elective and the newspaper doesn't have a website then we have to shift over to whether we're going to require them to stick with the newspaper or whether they can do it at the county website or state website, assuming that the government accepts that responsibility, but go ahead.

HONORABLE TERRY JENNINGS: How can you -- how can we require it if we don't know if it's going to be available? You're going to say "if available"?

MR. ORSINGER: Yes. If it's required as an add-on or even an exclusive.

MR. LOW: All right. We're going to vote on

option one, but before we do state it again so we know what we're voting on.

HONORABLE DAVID PEEPLES: Buddy, we haven't talked about this enough. There are lots of issues here. For one --

MR. ORSINGER: We can do it after lunch.

HONORABLE DAVID PEEPLES: I don't understand why -- you know, it's been my experience the person who wants to cite by publication wants a default judgment. They don't want to find the person and have them come in and fight it, and so why would they ever do an additional option? I don't understand that.

MR. ORSINGER: I don't think they would. I agree.

HONORABLE DAVID PEEPLES: This is surreal, and I think we ought to do something that we can defend with a straight face.

MR. LOW: Well, but do you have another alternative?

HONORABLE DAVID PEEPLES: Well, yeah. Judge Yelenosky hit the nail on the head and I think others. If you're -- well, number one, I mean, we look backward -- we look like a backward set of rules if we're talking about newspapers that no one reads, and so I think we need to do something that brings us into the 21st century, but Judge

Yelenosky said, you know, if you really want to find people you focus on the inquiry that is made at the trial court level, either by an ad litem or by asking questions.

Now, here's just an example: When I've had people come in in a damage lawsuit wanting to cite by publication, I say, "Hold on a minute, you want -- you're saying right now you can't find this person and you want to cite by pub. Once you get your judgment how are you going to find the defendant to collect it?" And they never have an answer for that. Never. Never. There's not a good answer for that. Taxation, property tax cases have been mentioned. There are cases where the probate court, you know, wants to extinguish claims against the estate, and so creditors are cited and so forth. That's a common thing. My most common experience has been in family law cases where a boy has gotten girl pregnant, happens a lot, okay, and he's gone. Okay. One case --

MR. ORSINGER: Do you have a study on that?

HONORABLE DAVID PEEPLES: Yeah. One situation, one situation where citation by publication is about the best we can do is where it was a one night stand and she doesn't even know his name, maybe his first name, and she doesn't know his family, where his hometown is, but she wants to terminate parental rights so that baby can be adopted by her present husband or boyfriend. Okay.

That happens. It happens pretty commonly. Another situation is where they had a relationship and, you know, months maybe, and she knows his family, but she wants to cite by pub because she wants him out of her life, and she hopes he never answers, but if you really want to find him you say, "Wait a minute, okay. Do you know his parents' name?"

"Yeah."

"Where do they live?"

"Well, they're a quarter mile down the street." Well, substituted service on the parents would be the way you go. I mean, this is a -- I mean, there are many situations, and, Buddy, you mentioned Kountze --

MR. LOW: Well, are you wanting to do away with citation by publication and all of that?

HONORABLE DAVID PEEPLES: What I'm wanting is for us if we're really interested in getting notice to people is focusing on the front end of it, the search that is made to try to find people. I would ask now that Facebook is so common, "Have you looked on Facebook?"

"Oh, I didn't think about that."

"Well, do it. Before I authorize citation by publication, tell me what you found out when you were trying to learn it." There's a statement in the Mullane case, the landmark Supreme Court case, that says basically

what we ought to be looking for is did you do what you would do if you really wanted to find the person, and I submit that that usually doesn't happen until the ad litem gets brought in. Now, I think to have newspaper only or electronic only, I thought about -- you mentioned Kountze, a small town in East Texas, if a guy gets a girl pregnant in Kountze --

MR. LOW: His daddy finds him -- her daddy finds him.

MR. ORSINGER: We can find him at the morgue.

HONORABLE DAVID PEEPLES: Citation on the internet would not be calculated to find that guy, but if it's in the local newspaper his family might see it or friends might see it and then tell him, "Hey, listen, I saw you mentioned in the newspaper the other day," but that wouldn't happen in the *Houston Chronicle*. So it's just a very different -- different kinds of cases and different real world situations if you really want to find people.

MR. LOW: I think Richard's task was not to weigh in on the merits of citation by publication. It was not that. His task was -- and you're talking about maybe rewriting and making it more rigid, maybe you have to do other things before you can do that and so forth, but

basically his task was to see if we should even acknowledge that there is a source of information in internet and make use of it was basically -- isn't that correct, Richard?

MR. ORSINGER: Yes, but I think it's entirely a question for Justice Hecht to tell us if he wants us to explore predicate requirements to searches before citation by publication is effected or whether we just want to address what citation by publication is when we get to it.

HONORABLE NATHAN HECHT: No, I think you should -- since this has brought it up, we should look at that, too.

MR. LOW: All right.

MR. ORSINGER: Okay. Well, then I would like to have some volunteers for my committee that have concerns about that aspect of it, because the issues y'all are presenting are daily occurrences for you, and they're not things that I deal with very often.

MR. LOW: I think David and Steve would be but --

HONORABLE DAVID EVANS: I mean, all of this is -- I think that's right, and the problem even relates back in some ways -- not to expand the scope, but depending on what we do on substitute service right now,

we are hanging -- you know, the way these current process servers approach it, you can hang a paper on the front of this gate out here the way they draft it, and I'm concerned the way we've got the rules drafted right now whether they're -- if they really are --

HONORABLE STEPHEN YELENOSKY: Yeah.

HONORABLE DAVID EVANS: -- calculated to give notice to the defendants. We're inundated with credit litigation right now. All they want is a default running against somebody, and we're inundated with property litigation where they just want to get a property interest, and they're not really interested in getting opposition, so I'm sure I'd be happy to help or --

MR. ORSINGER: So will Steve. I see Steve raising his hand.

HONORABLE STEPHEN YELENOSKY: No, no, no, not in lieu of you. No, absolutely not.

MR. ORSINGER: No, in addition.

HONORABLE DAVID EVANS: I would be happy to volunteer Steve.

MR. ORSINGER: I think that David makes an important point, which is option one, which is that you can just go internet if you want to, the plaintiffs will not go internet because they don't want to accidentally find the defendant. So the real vote to go electronic

here is probably option two, which is that if the newspaper has an electronic website it must be published there as well as on paper, or we have to make the other policy decision at the end, are we going to either require or encourage that there be government websites that contain this information in instances where there's no private ones or in addition to.

MR. LOW: But I think it goes beyond that. The Court wants us to go into a little deeper than that, as Justice Hecht expressed, and your committee to look into it, so we can vote on that, but until we know where we're going what good will that do?

MR. ORSINGER: I don't think that the predicate for citation by publication is required to know for us to decide whether we're going to go electronic.

MR. LOW: Okay.

MR. ORSINGER: But if you feel like it is --

MR. LOW: No, no. All right.

MR. ORSINGER: I would kind of like to know whether we're going to require parallel print and electronic, and if we are then that probably will affect what the run up is to citation by publication. Like we may want to require that a diligent search is made on the internet to locate the person or -- you know.

HONORABLE DAVID PEEPLES: How about --

MR. LOW: If that would help -- okay.

HONORABLE DAVID PEEPLES: How about telling the trial judge that when you are considering the request to issue citation by -- authorize citation by publication, think about in your community what is best calculated to reach the person in this kind of case, and I think in Kountze it would be the local newspaper. In Houston I doubt that it would be the *Houston Chronicle*.

MR. ORSINGER: Well, why not just say that it gets published electronically if electronic is available? That costs you nothing extra, and it might add to the exposure.

HONORABLE DAVID PEEPLES: I find myself thinking that the State of Texas website might be good. There's a paternity registry. You know anything about it?

MR. ORSINGER: I don't know about being on it.

(Laughter)

MR. ORSINGER: Everything I know is hearsay.

HONORABLE DAVID PEEPLES: Did that come out wrong. As a family law specialist, do you -- as I understand it, you know, a guy has gotten a girl pregnant but wants to stay in -- you know, find out if there's a lawsuit can log on and see if he has been sued for paternity. I don't know if they do it, but, okay, some

guys do want to be fathers. Not all of them want to abandon, but, I mean, the idea of having a website that is there for people that have been sued and it becomes commonly known if you think you might have been sued, you can check here and see if you've been cited by publication.

HONORABLE TERRY JENNINGS: I mean, you can do that on the Harris County website now. You can punch in your name as a party and see if it comes up.

MR. ORSINGER: That would really require more -- I mean, in a perfect world there will be some kind of search mechanism that will tell you whether there's any information in the universe that you want; and if you put your name in, you'll find it, whether it's an old judgment, a pending judgment, a claim, slanderous articles; but, you know, okay, if we just say that these plaintiffs have the option of publishing electronically, I don't think we've accomplished anything. I think that if we want to actually make the electronic world -- if you want to take advantage of the electronic world to disseminate we need to require it, but let's take a vote on that --

MR. LOW: All right.

MR. ORSINGER: -- and then once we do then we've got to decide whether --

MR. LOW: Justice Gray, and then we're going to vote on your proposal and then we're going to go to lunch.

HONORABLE TOM GRAY: It seems to me that what -- the difference sort of of what David Peeples is talking about and Richard Orsinger is that with regard to what Richard's original task was, is that do we want to do something to enhance the base of due process that we are willing to make as a rule as the ultimate fallback. What Judge Peeples is talking about is what do we want to do in the rules, possibly in Rule 108, in requiring something to do with substituted service before we rely upon the base ultimate fallback, and I think Richard is absolutely right that anything that strengthens that base that is left as a, quote-unquote, option for the plaintiff is simply not going to be followed.

MR. LOW: Because Richard only looked at Rule 116. All right, Richard, make your proposal.

MR. ORSINGER: Okay. So proposal one is whether we would introduce into the rule the option at the election to the plaintiff to go electronic in addition to newspaper; or, option two, put into the rule that if electronic newspapers are available, they must be used in addition to print; or option three is forget the print, let's go with electronic.

MR. LOW: All right. Make your -- restate one, and we'll vote them one at a time.

MR. ORSINGER: Okay. Do we add the election for the plaintiff to publish electronically in addition to the existing continuing requirement for print publication?

MR. LOW: All right. All in favor of that, raise your hand.

HONORABLE JANE BLAND: Is that option two?

MR. ORSINGER: Option two is --

MR. LOW: No, no, option one.

HONORABLE JANE BLAND: I was asking what you called the vote on. Sorry.

MR. LOW: No. Who votes "yes"?

MR. ORSINGER: Nobody.

MR. LOW: All right. It didn't look like it.

MR. ORSINGER: Yeah. Okay, so option two is that we're going to require that if an electronic dissemination is available, you must do it in addition to meeting the print requirements.

MR. LOW: All in favor of that, raise your hand.

MR. HAMILTON: You're not talking about the newspaper.

MR. ORSINGER: I am not talking about that.

That's a different vote, is whether it's available at the newspaper. What if it's available at a government site and not at a newspaper?

MR. LOW: All right, raise your hand.

PROFESSOR CARLSON: Mandatory where, Richard?

MR. ORSINGER: We'll vote later on where it's mandatory.

MR. LOW: 19 in favor, the Chair not voting. All opposed?

MR. ORSINGER: Okay. And the third vote is mandating electronic only and abandoning paper all together, and that's a no-brainer.

MR. LOW: Yeah, we don't need to vote on that.

MR. ORSINGER: The last thing we need to vote out, though, is that when we're doing this mandating of electronic do we mandate that it be with the print media that maintains an electronic site, i.e., an electronic newspaper, or do we allow it to be a government site in addition and let the plaintiff choose, or do we require that it be a government site? In other words, does it have to be the electronic newspaper? Does it have to be the government, or could it be either one?

HONORABLE TOM GRAY: Or both.

MR. ORSINGER: Or both.

MR. LOW: The first vote is allow it with the newspaper, you know, if they had it, it should be the newspaper. The second one would be -- what's the proposal?

MR. ORSINGER: To me it's either electronic newspapers only --

MR. LOW: All right.

MR. ORSINGER: -- or government website only, and pick state or county, or either or both. It would be the option as long as you go electronic you could either be the newspaper or the government, or we could require that it be on both the government and the newspaper's.

MR. LOW: Okay. Option one, who is in favor of option one?

MR. MUNZINGER: Buddy?

MR. ORSINGER: Newspaper only.

MR. MUNZINGER: How can the Supreme Court adopt a rule that says that the county must offer publication on its website? How can the Supreme Court promulgate a rule saying the school district has to do the same? I don't know that the Court has that kind of authority, and another point would be do we know whether the online addition of the *El Paso Times* is identical to

the print addition of the *El Paso Times* so that when we say you must do it electronically with the newspaper you're certain that the electronic version is publishing legal notices? I don't know if they do or not, and I understood Richard Orsinger to say that he didn't know if they did or not. He wasn't sure --

HONORABLE TERRY JENNINGS: We could find out.

MR. MUNZINGER: -- that the online addition was identical.

MR. WATSON: I would say that it's implicit that all three options are "if available," all three of those are "if available," and I would suggest starting with both and then working down in your vote.

MR. LOW: All right. Carl.

MR. HAMILTON: Without knowing more about the facts is this going to generate litigation over whether or not an electronic newspaper was available for that? I mean, let's take Starr County, for example. I know they don't have an electronic newspaper there, but there might be one in the adjoining county, or maybe there's two or three newspapers in the county and you select one that doesn't have electronic. Is that a bad service because you didn't select the newspaper that did have electronic?

MR. LOW: I have no -- Elaine.

PROFESSOR CARLSON: You know, in picking between your three choices, the inquiry would have to be almost individualistic about which one would more likely give a particular defendant notice. Maybe a compromise and not going as far, since we can't identify or we haven't identified one central place, although it could be TexasOnline --

MR. LOW: Right.

PROFESSOR CARLSON: -- I mean, that's kind of where we are going.

MS. PETERSON: No, texas.gov.

MR. WATSON: Or Justice Hecht's Twitter account.

PROFESSOR CARLSON: What we could do as an alternative is we could take Rule 244 that deals with the ad litem appointment and finesse your suggestions, our judge's suggestion, and then take Rule 106b, which deals with alternate service, and change the comment to make clear that you're not restricted to service by paper. In appropriate circumstances notice, the best notice practicable for substituted service, might be through Facebook, which would be the substituter where you would get onto the actual person. So you could just change those two rules without picking a place where ultimately

we think service by publication should be made when we go pure electronics, if we don't know what that should be.

MR. LOW: But all of those are good for them to consider when they go back, but remember, what they considered before they came was only Rule 116. All right. And so that is what -- we're not going to vote on something that wasn't considered by them. They will consider what we're talking about, but if -- Richard, if you will make the proposal again we're going to vote, and we'll have lunch.

MR. ORSINGER: Okay.

MR. LOW: On 116, Rule 116.

MR. ORSINGER: The first option by popular support is --

MR. LOW: State them one by one, and we vote.

MR. ORSINGER: Option one is that the publication requirement, we voted to make it a requirement, the electronic publication requirement is for both newspaper and government website, if available.

MR. LOW: All right. All in favor of that raise your hand.

Thirteen.

HONORABLE TERRY JENNINGS: I just did a search for the *Houston Chronicle*, and they do have a -- if

you go into the full *Houston Chronicle* site they have a legal and public notices section you can click on, but --

MR. LOW: Okay. All opposed?

HONORABLE TERRY JENNINGS: If you do it under Android.

MR. LOW: Okay. All opposed, raise your hand.

MR. WATSON: That's all we need.

MR. LOW: All right. Richard, you want to make the other --

MR. ORSINGER: Don't need to. I mean somebody that didn't vote --

MR. LOW: No. Well, if they didn't vote, they should have.

MR. ORSINGER: Well, no, I mean, it's possible that they don't -- let's just see if there's anyone that wants to limit it to newspaper websites alone. Nobody? And is there anybody that wants to limit it to government websites and rule out newspaper websites? Okay. So that's it.

MR. LOW: Let's go to lunch.

(Recess from 12:36 p.m. to 1:23 p.m.)

MR. LOW: Richard, do you need more time, or you think you know where to go and how to get there?

MR. ORSINGER: The only thing is, is that I

would like anyone -- I can fully do what we voted on relative to the publication component of it, but it does appear that there's some interest in talking about what the lead up is to citation by publication and how that's going to interface with substitute service and whatnot, and so I need some volunteers that will help me think some of those through because I don't generally take the judgments by citation, so I'm not too familiar, so someone like some law professor that is knowledgeable on the subject might volunteer to assist me.

PROFESSOR CARLSON: Can I do it, can I?

MR. LOW: Why don't you pick a couple or three volunteers?

MR. ORSINGER: Okay. We'll do that, and I think that that may take longer because that's going to get us into a deeper swamp.

MR. LOW: And any volunteers get a point.

MR. ORSINGER: Okay. So we'll report back on the electronic part of it and then later on maybe or at the same time we'll have some suggestions about when you progress from substitute service to citation by publication.

MR. LOW: All right. Elaine, you're up.

PROFESSOR CARLSON: Well, actually, Dulcie Wink is up. You might recall our last meeting we started

to look at the task force draft proposals on ancillary proceedings; and we started to look at injunctions; and Dulcie Wink is a very faithful member and hard-working, intelligent, wonderful person who worked on this; and she chaired the subcommittee on injunctions, so she is going to be presenting again.

MR. LOW: Okay.

MS. WINK: Thank you.

PROFESSOR CARLSON: And do you want to switch places so the court reporter can -- or are you good?

THE REPORTER: It's fine.

MS. WINK: Actually, I think this is probably best. A couple of things, throughout the discussion the last time I was here we almost got through the details of Rule 1, but there were a number of things that came up that got good consideration, and I have organized them into six issues, and I have been able to organize how they apply throughout the rest of the injunctive rules, and I think if I bring these up one at a time, remind you of the issues, then we can actually get voting on those changes to the proposed rules, and it will make the rest of the day go a bit quicker, if that's okay with you.

MR. LOW: I hope it works as well as it

sounds.

MS. WINK: It always sounds good and then practical application happens.

MR. LOW: Okay.

MS. WINK: Now, the first issue -- and, Mr. Orsinger, Richard, you brought this up. You had raised concerns because the Family Code does have many provisions that vary from the general rules of civil injunctions. Now, the good news is Chris Wrampelmeier was on our subcommittee, and he was also very concerned about that, and he is a family law specialist, so throughout the rules -- I knew we had covered it, but now I have very clear issues. There are some clarifications I think we could use today, but let me point out that in injunctive Rule 1(d) and 1(h) they pertain to TROs, and they explicitly refer to the Family Code exceptions, meaning Rule 1(h) says, "If there's a conflict between a provision of this rule and the Texas Family Code, the Texas Family Code shall prevail." So it's brought up twice and specifically has the exception to the Family Code. Injunctive Rule 2 has a parallel provision as to temporary injunctions, and that's 2(h). Injunctive Rule 3(c) addresses permanent injunctions and has a parallel provision. Injunctive Rule 4(b) expressly notes that the Family Code permits judges to issue TROs without a bond,

and it also mentions there are other statutes that do provide similar exceptions, so we do have that reference there already in the proposed rule. In injunctive Rule 5(f) it addresses the specific requirements for the contents of the writ of injunctions, and it does also refer to the exceptions from the Family Code.

Now, I would recommend based on a draft that we have a couple of clarifications, part of which was brought up at our last meeting. In injunctive Rule 1(d), as in David, (7), TROs, on page two of the draft where it currently says, "State the amount and terms of the applicant's bond," comma, "if a bond is required," I suggest that we make that a little bit more explicit and say, "State the amount in terms of the applicant's bond unless a statute eliminates the requirements of a bond." Okay. So I would propose that we make that revision to put people on notice of it. Do you want to address that real quick?

MR. LOW: Okay. Anybody have any comments on that? Any objections? No objections.

MR. MUNZINGER: Is a statute exempting a party from a bond the only way that you can avoid a bond?

MS. WINK: Yes. There are cases that are very clear. In fact, even if you have an agreed temporary restraining order, you must have a bond.

MR. MUNZINGER: Okay. Thank you.

MS. WINK: Or cash in lieu or other property in lieu of the bond.

MR. MUNZINGER: Thank you.

MR. ORSINGER: Follow-up.

MS. WINK: With the exception of Family Code.

MR. ORSINGER: The government doesn't have to post a bond, or does it, any government entity?

MS. WINK: It has separate statutes, and it is specifically exempt, yes.

MR. ORSINGER: Okay. So every exemption for every government entity that deserves one is a statute and not a regulation or a rule, always a statute.

MS. WINK: The only ones I've come up against have been statutory in nature.

MR. ORSINGER: Okay.

MR. LOW: Okay. Approval by silence.

MS. WINK: So be it. We will make that change. The other explicit change that we would recommend is in injunctive Rule 1(f), as in Frank, which is on page three. At the beginning of the sentence we recommend inserting "unless exempted by statute," and a comma, "no temporary restraining order may be issued," et cetera, et cetera, and that again refers to the bond. Does anybody

have any difference of opinion or exceptions to that?

MR. LOW: Silence is acception, so that is accepted, so really, seriously, if somebody has a comment I'm not trying to cut that off. If you have a comment or an objection, you know, raise it. Okay.

MS. WINK: Perfect, and we would need parallel changes in injunctive Rule 2(d), as in David, No. (8), and injunctive Rule 2(f), as in Frank, so and those relate to temporary injunctions, but have the same provisions.

MR. LOW: Okay.

MS. WINK: So I'll check that off. The second issue that came up and was discussed last time -- and, again, Richard Orsinger, this was one of yours. You asked for additional clarification in the proposed rules or the comments so that practitioners will understand that the application for the injunctive order may be in the party's pleading, and it's not necessarily required to be in a separate document. Before I make a recommendation, let me put one qualification out there. If a party's pleading does not contain the magic language, let me just say, does not have the general nature of the relief request, if you don't have the specific elements in your pleading, then you're not asking for injunctive relief and none can be awarded. However, the more specific

application where you might put far more details as to facts and affidavits, et cetera, can be separated and can be in a separate document.

So we would recommend that the current comment that we have to existing proposed Rule 1(a), injunctive Rule 1(a), we currently have a footnote there that says "Throughout the injunction rules the term 'application' refers to an application or a motion." We would recommend adding the following sentence: "The application may be included in the party's petition, counterclaim, third party petition, or other motion and is not required to be presented in a separate document." Would that provide enough clarity?

MR. ORSINGER: That's crystal clear.

MS. WINK: And I would also recommend that we add this to the footnote, that regardless, the rules require the, quote, "Plain and intelligible statement for the grounds of injunctive relief be stated in a sworn petition, counterclaim, or third party petition," end quote, because, again, that gets back to the language that must be put in the party's pleading.

MR. ORSINGER: And what you're envisioning is, is that the rules themselves will have footnotes at these locations?

MS. WINK: Yes, sir.

MR. ORSINGER: And the footnotes will be at the end of the rule.

MS. WINK: They're more like comments as opposed to -- they're written right now as footnotes, but they can be made as comments, whichever you prefer.

MR. ORSINGER: Well, will they be correlated to a particular phrase or sentence --

MS. WINK: Yes.

MR. ORSINGER: -- rather than just generally stated at the end?

MS. WINK: I would recommend that, for instance, this would be comments to injunction Rule 1(a), for example, and that's where the word "application" is used for the first time. We have a parallel set of footnotes in injunctive Rule 2(a) for the same reason.

MR. ORSINGER: Well, I'm going to defer to the professor, but my recollection of the footnotes in the rules now are primarily editorial comments by West or whoever clarifying that there's an erroneous cross-reference or something, but I'm not aware of us dropping comments in footnotes.

PROFESSOR CARLSON: We haven't.

MR. ORSINGER: I think that might be a great idea, but I'm worried that the suggestion might -- when it goes through the grinder all the footnotes may disappear

because there's no protocol.

PROFESSOR CARLSON: There might be some --

MR. MUNZINGER: We do so in discovery.

PROFESSOR CARLSON: -- in discovery, right. In discovery there was.

MR. MUNZINGER: And they were considered substantive. They were guidance to the bar that was considered substantive and binding on the courts.

PROFESSOR CARLSON: And, Richard, I'm not sure all -- and I can't speak because I'm not looking at all of them, but the general consensus we had on the task force was if you think something requires additional explanation to someone who doesn't do this everyday let's go ahead and put it in, and then we're going to have to make a judgment call at the end what the Court would -- what goes in as a comment and what doesn't, but I don't think we were trying to write the draft in a way that the rules couldn't stand alone. It was really for clarification, right?

MR. ORSINGER: Well, and I like these clarifications, but all I want to know or just wanted to mention is the possibility they may all get washed if the Supreme Court doesn't go along with the footnote concept, and that's just why I was inquiring. So there is precedent for keeping footnotes in.

PROFESSOR CARLSON: In the discovery rules there were, yeah.

MR. ORSINGER: I like the fact that footnotes are pinpointed, whereas general comments you may not remember -- you may not understand exactly what language you're referring to.

MS. WINK: And, Richard, those in the discovery rules are more explicit as to Rule 193.3 sub (a). They are more explicit most often, and they are binding.

MR. LOW: Richard.

MR. MUNZINGER: Well, I think we ought to have an operating understanding as we go through these rules. If we're going to add footnotes and/or comments, is it the sense of the committee to advise the Court that the comments ought to be adopted by the Court, because we may vote to approve a draft because we've just added something to a comment. My personal belief is that the comments in the discovery rules have been extremely helpful and that the process ought to be followed in something as technical as this area is. This is a very technical area. You don't get an injunction if you don't cross the T and dot the I. You shouldn't. And so my personal belief is we ought to at least begin with the understanding, if that's the sense of the committee, that

any time a comment is dropped in here or footnote it's intended to be a comment with the same recommendation for binding effect as is done with the discovery rules.

MR. ORSINGER: Well, I'm looking at the discovery rules here in the West desk copy, and the only footnotes are to cross-reference to a statute or something like effective date of a -- I mean, the footnotes are not used in the sense that they're used here as explanatory for text connected to the footnote.

MS. PETERSON: Is there some language before the rules? I think it's before.

MR. MUNZINGER: But there are comments in there, Richard, and --

MR. ORSINGER: Yeah, they are numbered comments. Well, I mean, this is the only thing I wanted for us all to be aware of, is that this is very readable and these footnotes really helped understand it, but when this comes out as a rule these are not going to be footnotes. These are going to be comments at the end of the rule, unless we go into new territory. That's what I thought, but I'm deferring to people that study these for a living, but -- and I'm looking at the discovery rules, and, yes, there are comments, but it seems to me like the only time there is a footnote is when there is a cross-reference to a rule, and I'm not sure whether that

was the Supreme Court that put that cross-reference or West Publishing Company that put that cross-reference.

MS. WINK: If I may add something here, throughout the drafts -- and I'm glad you brought it up. Throughout the drafts, sometimes depending on who was the original chairperson of the committee and what we thought was easiest to do, bottom line is the different subcommittees, some put suggested comments at the end. Some of them like me did certain comments that are just for you and for the Court perhaps and certain things that we think would be more likely to be effective if made a binding comment, much like these are in the discovery rules. So why don't I make that a little more clear through these rules, and I can make sure everyone else does when going through attachment, garnishment, sequestration, et cetera, so that we have a clear record of what we would be recommending to the Court to be part of the permanent comments and recommending that they be binding.

MR. ORSINGER: You know what, I'm the last one here to try to add to someone else's committee work --

MS. WINK: It's our job.

MR. ORSINGER: -- but you might ought to go ahead and make the decision for everyone as to what would be appropriate for an end comment and what is going to be

an informational footnote for the drafter and the Court analysis, because if what you're expecting Kennon or whoever to do is to figure out which ones of these are just kind of parenthetical asides for the committee process or explanation to the Court and which ones are intended to be published for the ultimate user, it would be helpful, I think, to everybody if you-all would tell us what you think the end comments should be, regardless of whether you repeat them or don't include them in the footnotes. You see what I'm saying?

MS. WINK: Absolutely.

MR. ORSINGER: I'm afraid that may be a lot of work, but without your recommendation we don't know the footnotes that we're getting comfortable with are going to end up as end notes and what they'll say when they do.

MS. WINK: I agree, and I'll be happy to do that. The good news is, having started with injunctions, it's going to be straightforward, and I can even do that on the fly as we go, so we won't have a problem there, and what I do at the end of these meetings and before the next one is I actually update so that I'm helping to keep track with Kennon and we can compare notes to make sure we do it.

For the record, the current footnote No. 1 is only just for information to the Court and to you guys

unless we also want to have -- well, here's -- let me back up. One of the things that we discussed in the subcommittees was the fact that a lot of the younger puppies up in the world of law are doing most of their research online, when all of the rest of us know that sometimes the digest is the fastest way. That's another story, but because of online researching and the effectiveness of it, when we change our rules we don't necessarily -- the electronic services, the Lexis and Westlaw, with all due gratitude for all they do for us, we don't necessarily get the past history from other rules tied to the new rule.

So, for instance, in footnote No. 1 I'm pointing out that this rule has been rewritten completely and has information that's from Rule 680 and 683. We can make that kind of information available as comments, whether you want it binding or not, and what that does is for the practitioners who are both electronically savvy and digest savvy, we will be able to always go back to the old volumes in the library to see what was specific as to those rules, and we don't lose any pre-existing research. Does this make sense? So I would recommend that we go ahead and use these kinds of comments and recommend that we keep them with the rules -- well, I would say this is specifically for research information only. This is not

one that I would say should be binding on the parties, but it's for research only. Would you agree?

MR. ORSINGER: Well --

PROFESSOR CARLSON: Richard, what I told the task force, and my understanding was, is that the Court from time to time uses comments, but we don't use comments extensively, that we -- you know, for whatever reason, and that we haven't really used footnotes, but because of the technical nature of the work -- and you'll see this in some of the subsequent drafts with other subcommittees -- there's both footnotes and comments. Here's what we think should be a comment, here's just for information internally for this group and the Supreme Court. We didn't do it that way in this subcommittee, but it could be done that way.

MS. WINK: Yes.

MR. LOW: Elaine, is there some suggestion that a comment, excuse me, has more weight than a footnote? I mean, Footnote 9 in Easterwood has been cited a hundred times. I mean, they site that more than they do the case, that's -- the body of the case, so is there some distinction that a footnote doesn't carry the weight that a comment does? Because that's not the way I understand it.

PROFESSOR CARLSON: That wasn't the

intention. It was really me being controlling.

MR. LOW: Okay.

PROFESSOR CARLSON: Because I said a lot of the folks on the advisory committee don't have a background, as I don't, in collections, so as you go through if you think it would be helpful from an explanatory point of view so everybody can follow the -- because a lot of people don't do sequestration, garnishment, distress warrants, things of that nature, so that was really sort of my marching suggestions to the committee.

MS. PETERSON: And one thing I think may be helpful with these rules, if they are numbered to the extent proposed, is to have a derivation table when it's all said and done. That was done when the Rules of Civil Procedure were moved into a separate body of the Rules of Appellate Procedure, and it's really helpful for research purposes.

PROFESSOR CARLSON: It's going to be essential.

MS. PETERSON: Yeah.

MS. WINK: That helps, Kennon, for the hard copy book purpose, but it's not all-consumingly helpful for electronic research.

MS. PETERSON: I think the electronic world

needs to be updated so that rules are treated like statutes and they're easier to research, but that's a different issue.

HONORABLE TOM GRAY: Well, I think that would be one advantage that we dinosaurs should be able to retain.

MS. WINK: Keeping the cutting edge over my opponents.

MR. LOW: Richard.

MR. ORSINGER: A couple of comments, maybe not directly germane, but I think the Court of Criminal Appeals has said that footnotes are not stare decisis as far as they're concerned, so I'm not sure that footnotes don't have an inferior status, although I agree some footnotes are famous and treated as precedent. Additionally, when we have adopted some uniform laws in our Legislature but varied from the norm, sometimes they have issued committee reports of the working lawyers and judges who adopted -- put the package together for the Legislature, and in the annotated statutes they include those after the uniform act, and they are extremely helpful, particularly we've been through so many transitions on the entity statutes and now we have a Combined Organizations Code, but before we had revised limited partnership acts, and so we had a lot of committee

explanations, in fact, all the way back to the Uniform Partnership Act we had committee explanation that following, and they're incredibly helpful to those of us who have had to litigate those issues.

So I think a committee report written down somehow, somewhere, might be something for you to consider, and then the question is how do we motivate the electronic publishers to connect it up with the rule, because they apparently already do that with the statute, but they don't do it so much with the rule, and the last thing I would say is that you should take your work product and put it in a law review article and get it published with a Texas law school in a law journal that says that it is the committee work and thoughts for these rules.

Now, you should wait until the Supreme Court is finished rewriting them and deleting and adding to, but that at least is a research for the capable researchers to go back, and it's not binding, it's not even as strong as a footnote, but it's a way for you to communicate with the future on what your thoughts were, and there will be researchers out there that will find that. Whether it's Texas Tech, St. Mary's, South Texas, I don't care, as long as it's a *Texas Law Review* they will find it and go to it, and you can help guide the courts and the briefing lawyers

on what you want, and it's your own words, and you don't have to have anyone else to approve it, so I would recommend that you-all do that.

MS. WINK: Just so that I could point out, Mr. Orsinger, I think that great and modest minds work alike in this covert because I had that idea, too, and it has been discussed among the whole task force, so a number of us do have that plan. Why don't I make this practical recommendation here? Footnote 1, I think would be that the current Footnote 1 in injunction Rule 1, I think is appropriate for a committee report as well as law review material, and if we ask the Court to -- in presenting the rules or in adopting the rules, to order that the committee reports be published with the rules then the committee reports will at least make it there. We can put more in the law review. Does that sound agreeable to everyone? By knowing I can make sure that the others help us get ready for the other parts of the rules.

PROFESSOR CARLSON: Could I add one thing? I think, Dulcie, correct me if I'm wrong, I think every author on the *Texas Collections Manual* that's published by the State Bar of Texas -- have you ever used that resource?

MR. ORSINGER: Yes.

PROFESSOR CARLSON: Is on the committee and

they, therefore, will also be the ones who go and rewrite that body of work, which is a very helpful body of work. So you'll see some of this carry forward in that direction.

MR. LOW: Jane, I'm sorry.

MS. WINK: In that regard I would say that currently proposed footnote No. 2 I think should be something that we comment and request that the Court use as part -- as a binding part of the rule just like the comments in the discovery rules.

MR. LOW: Jane.

HONORABLE JANE BLAND: I think the comments and the reports are great, but I don't think they should be published as part of the rule, and I think we should keep that kind of thing to a very minimum. The rules ought to be self-explanatory enough that somebody can read the rule and understand it, and if you add a bunch of comments or commentary to a rule people instantly become suspicious of the rule, that it's difficult, complicated, means more than what it says, that kind of thing, and although I think all the commentary would be very helpful during that transition phase from the old rules to the new rules, I don't think publishing it within the rules themselves is necessary or even very helpful, especially as you move further and further away from the re-entry

into the rules and as they become familiar.

MS. WINK: And I would especially agree with you with respect to the kinds of things we have in footnote 1 right now. I don't think it belongs with the rule. It doesn't have to be with the rule. The part that we just talked about that is really in footnote 2, making sure that people know that by application, it could be a motion, all these other things, would you agree that that needs to be with the rule so that people will know?

MR. LOW: But don't a lot of the rules have history, and it says originally was such-and-such? You know, they have a history, so this Rule 1 is kind of like a history where it came from.

MS. WINK: It is history, yes, sir.

PROFESSOR CARLSON: Well, look, Dulcie, over on page three. I think we've done this before. Look at the proposed comment. I think we pulled out what we thought needed to go in the comments in the comments.

MS. PETERSON: We did.

PROFESSOR CARLSON: So what you see in the footnotes is what we thought the committee needed to know.

MS. WINK: Right. I was just going in order, so there are things further along that I haven't gotten to yet that I would feel differently about.

PROFESSOR CARLSON: Okay.

MS. PETERSON: At least that was the intent.

PROFESSOR CARLSON: Yes.

MS. PETERSON: And I tried to reflect the drafter's intent in doing that but may not have always succeeded if the intent wasn't clear to me.

MS. WINK: Right. In fact, what is currently drafted as footnote 3 to injunction Rule 1, I believe that lives in the world of law review and not as comments to the rule. It's just for information for all of you. Okay?

All right. Let me make sure I'm following and staying on task. All right. The third issue that came up at the last meeting, Judge Christopher and others noted that the proposed Rule 1(b), as in boy, says that the verification -- that the facts supporting the application must be verified or supported by affidavits of one or more persons having, quote, "personal knowledge of the relevant facts that are admissible in evidence," and Judge Christopher raised the question of whether TROs can be based on affidavits that contain hearsay. Judge Yelenosky, I remember you had a lot of input on that, among other people, and Chip Babcock did ask whether this was existing in the current rules or in case law, so I have a report back on that.

If we begin -- we begin in this situation

with existing Rule 682, existing Rule 682 requires verified allegations, whether it's an affidavit or verified for all writs of injunctions, and TROs are writs of injunctions, so that doesn't answer the question, but that's where we begin. Then let's take what I believe is the closest analogy to be existing in the case law to answer this question. The reason the question doesn't come up very often is we're dealing with TROs that with only a few exceptions were just not appealable. So the closest analogy in the case law is the question of whether a TRO can be based on, quote, information and belief, and there is some existing published case law on that. A couple of cases have explained that a temporary restraining order cannot be issued on an affidavit stating the elements for an injunctive pleading based on information and belief. That comes from *Ex Parte Rodriguez*, 568 SW 2d 894 and 897. That's a Fort Worth court of civil appeals case in 1978. It is no writ. It also cites Durrett, D-u-r-r-e-t-t, versus I believe it's Boger, B-o-g-e-r, 234 SW 2d 898, that is a Texarkana Texas civil appeals case in 1950, no writ.

And the background here is that because the TRO proceedings are often going to be based on the argument of attorneys and the affidavits or sworn pleadings, it's very preliminary in nature, so the judges

would be more reticent about focusing on information and belief. We can take that to hearsay issues if you want to, but there are cases that also say that even a temporary injunction or permanent injunction cannot be issued based on information and belief. However, these cases go farther and say that can be waived because we end up in an evidentiary hearing and the issue is overcome by evidence presented and accepted into evidence, and that would come from the following cases: *Schwartz vs. Traveler's Insurance Company*, 1989 Texas App. Lexis case, 1891, that's a Houston 14th District court of appeals. That's no writ. It also comes from *Zanes vs. Mercantile Bank and Trust Company*, 49 SW 2d 922 and 927. That's a Dallas appellate court case, 1932, writ refused.

HONORABLE STEPHEN YELENOSKY: Did you say that that's essentially remedied by a later evidentiary hearing? And if so, obviously that would never excuse the granting of a TRO --

MS. WINK: True.

HONORABLE STEPHEN YELENOSKY: -- on information and belief because you don't have it.

MS. WINK: True, but I wanted to make sure you guys knew that both of these issues have actually come up on the TRO as well as the injunctive case, temporary or permanent, and have been addressed somewhat. Now, as a

task force and as our subcommittee on injunctions, we have recommended -- and you'll see this when we get to the Rule 2 on temporary injunctions and Rule 3 on permanent injunctions. We are recommending that parties be allowed to plead on information and belief as long as the grounds for the belief are stated, and specifically because it can be overcome at the hearing, but that's going to be up to you guys later.

Coming back to the TRO issue and the thing we need to decide, the issue before us is whether we want to revise the currently proposed language of 1(b) to say, "All facts supporting the application must be verified or supported by an affidavit of one or more persons with knowledge of relevant facts" and just leave off the rest. It doesn't --

MR. LOW: Now, you left out the word "personal knowledge."

MS. WINK: I did leave out the word "personal knowledge," because that's going to bring up the hearsay issue.

MR. LOW: Okay.

MS. WINK: That's going to bring up the hearsay issue.

MR. LOW: Okay. All right.

MR. MUNZINGER: Do you ever contemplate that

a temporary restraining order could be issued on sworn evidence without an affidavit?

MS. WINK: The rules require that all injunctive orders be -- that all injunctions be based on a verified petition, whether it's supported by affidavits or it's just a verified petition, so we're stuck with existing law on that in that respect.

MR. ORSINGER: Okay. I'd like to ask two questions. One is do you equate information and belief with hearsay, or are they different things? Because --

MS. WINK: They're different things.

MR. ORSINGER: -- I know that a lot of people plead and say, "On information and belief X, Y and Z," but when I'm pleading hearsay I say that "So-and-so said such-and-such" so you can identify the source and you can convict me for perjury if I lie, and to me there's a difference between globally saying something is based on information and belief and saying that I had a report from an employee of the company that they're about to do so-and-so, and state the name. Are you making a distinction between those two, and should we consider them separately, or are they equal to you?

MS. WINK: From a technical standpoint I think you can look at pleading on information and belief when you state the grounds for the belief to be exactly

what you brought up. It could be a hearsay issue, meaning I heard, I was told by, you know, Jim Jones, X, Y, and Z. It happens to be hearsay as well, but by identifying in the affidavit from whom I heard I'm satisfying the information -- the basis of my information and belief, right. So I think you can have both under the same words. The reason I left out the word "personal knowledge" is because it goes directly to the hearsay issue.

MR. ORSINGER: All right, so are you recommending we take "personal" out or leave it in?

MS. WINK: I think -- well, I'm more comfortable leaving it in because all of our affidavits are supposed to be based on personal knowledge true or correct.

MR. ORSINGER: Well, maybe that's true. I don't know. I mean, I wouldn't question that that's your assessment, but it seems to me that in a temporary restraining order where we're typically trying to fix emergencies for a very short period of time that if somebody is willing to swear under oath where the source of their information is from so they can be prosecuted or sued if they mislead the court, that perhaps we should allow the reliance on specifically identified hearsay sources for the limited purpose of getting a temporary restraining order for a short period of time until we can

get into court with witnesses, and if we go on the record with very language that's extremely inflexible and ungiving that you must produce someone with personal knowledge to support your TRO, no matter if 25 people that work for a company say that a company is about to do something or another person is about to do something, we are not going to give you a TRO unless they have personal knowledge of it, so I feel like we're stepping a little bit further.

You know, information and belief is a vague claim that I think something, but I'm not necessarily going to tell you why I think it. Whereas, somebody that offers you hearsay that's inadmissible but is sourced is more reliable in the sense that you can subpoena them or if they lie about it you can put them in jail. So are they the same thing, and are we really truly saying that you can't get a TRO unless every single fact or every necessary fact or all facts supporting it are based on personal knowledge? That concerns me, and I think that's a policy change.

MR. LOW: And you're saying that information and belief, identifying the source, okay, it shouldn't be generally, you should identify the source of your information.

MR. ORSINGER: I don't think you should give

TROs based on information and belief because that's an unsworn statement. That's somebody I just allege so-and-so based on information and belief. There is case law on it. It's -- you can't be prosecuted for perjury. It's not an oath. What I'm saying, though, is if someone swears that this individual witness told me the following things --

MR. LOW: That's your source of information and belief.

MR. ORSINGER: Yes, you're identifying the source of the inadmissible -- yes. That's why I would distinguish personal knowledge from information and belief.

MR. LOW: All right. Steve is going to have a stroke. Let's let him go.

HONORABLE STEPHEN YELENOSKY: Yeah, sure, but identifying the source, if the source is an employee of the company that's supposedly about to do the bad thing, you can at least argue that that would constitute an admission and would not be hearsay, but just to say, well, because I identified the source somehow that gets by everything, I mean, that would be saying, "Well, this guy named Tom Jones told me that company was about to do it." How does -- how does that provide personal knowledge simply because you identified the source?

MR. ORSINGER: It doesn't. The question is whether we're going to leave the word "personal" in or not. I admit it doesn't guarantee personal knowledge. All I'm saying is I'm not sure that personal knowledge is required. All of the case law I've read over the years -- and I have not done near as much work as the task force -- is an indication that affidavit on information and belief is not really an affidavit, and I agree, and I don't think we should be doing anything based on information and belief that requires swearing.

To me there's a distinction, though, an important one, between saying that "I allege this on information and belief" and that "I allege this because I have a witness here that tells me this, but I can't get him to sign an affidavit, but he told me that this is about to happen, and I need to stop it"; and it's a quick -- it's a short period of time until it gets fixed, and you can be sued if you get a wrongful issuance of a TRO, and you can be prosecuted if you lie under oath. So to me being sued for a wrongful TRO and being prosecuted for lying under oath is a good assurance of reliability if you don't require that the person have personal knowledge, but that you do require them to specify the exact source of their information so that we have some assurance.

Now, I think adding the word "personal" here

changes the law. That's my personal opinion. I didn't research it, and I certainly haven't served on a task force for six months or a year, so I'm just a little concerned about putting the word "personal" in there.

MR. LOW: All right.

HONORABLE R. H. WALLACE: To me if you've got a situation where the person who signs the affidavit says, "I received a telephone call from John Doe. He told me that my ex-employee was out recruiting people to come work for his new company," that's personal knowledge. I mean, he has personal knowledge that he received that phone call, and he could swear to that. If it's offered for the truth of it, it would be hearsay, but is there a requirement that you can only issue TROs on add -- on evidence that would be admissible at trial? I don't think so.

MR. MUNZINGER: But this rule says that.

HONORABLE R. H. WALLACE: No, I don't think personal knowledge -- it doesn't say --

MR. MUNZINGER: "Knowledge of relevant facts that are admissible in evidence."

HONORABLE R. H. WALLACE: Where? Oh, okay. I see. Okay.

MR. ORSINGER: But, wait, on your original point, the person --

HONORABLE R. H. WALLACE: Oh, yeah. It does.

MR. ORSINGER: The person that's on the phone has to be --

HONORABLE R. H. WALLACE: That's what needs to come out.

MR. ORSINGER: The person that's on the phone has to be the one to sign the affidavit. If your vice-president gets a phone call from a friend saying, "I think they're stealing your data and using it to start a new company," unless the person who knows that comes in and signs the affidavit, your vice-president putting in an affidavit isn't good enough because he doesn't have personal knowledge.

HONORABLE R. H. WALLACE: He had personal knowledge that he got a phone call.

MR. ORSINGER: Well, but this says the facts supporting --

HONORABLE R. H. WALLACE: You're right. Maybe it's the "admissible in evidence" that needs to come out.

MR. ORSINGER: Well, I'm arguing something that's different from that, because that raises a whole issue of waiver of objections to hearsay. If there's nobody else there to object to hearsay is it fair to say

it's waived? I think that's a different issue, and I don't want to make too much of this issue, but I just wanted to be clear that I'm not entirely sure that all the existing body of law that you can't issue a TRO on information and belief is the same thing as saying every fact supporting your TRO must be based on an affidavit from someone with personal knowledge. I think you're changing the law.

MR. LOW: Richard.

MR. MUNZINGER: I think Richard's hit it right on the head. There's a difference between what I offer in proof at the hearing 13 days after the temporary restraining order is issued and what I can say in the application for the temporary restraining order. I get a telephone call from my client. He has a secret formula. "Did you know that Joe Schmoe Hawkin is going to take your secret formula and publish it on the internet?" I didn't know that. "I'm telling you right now I work with him, and he hates you because you did A, B, C."

Well, now I can't get a temporary restraining order to stop that because the way this is written because I would have to say either "I've been informed," which is hearsay, or "Joe Schmoe told me about this," and Joe Schmoe is an employee of mine who works with this guy, et cetera, et cetera, but that's hearsay

and I couldn't get it, so I am deprived of my temporary restraining order. A rule that is set up to, as you point out, Richard, preserve the status quo for a brief period of time, you can't get the protection that you need for the brief period of time, even though at the hearing you might have to call Joe Schmoe and have Joe Schmoe so testify and you might have to subpoena the witness who you're threatening. You may have other evidence that you could prove it, but you could never get the temporary restraining order the way this is written. And this isn't just limited to collection cases.

MR. LOW: All right. What suggestions are you and Richard making as to changes we should make on what's been proposed? Let's have language.

MR. MUNZINGER: "An affidavit by one or more persons having personal knowledge of relevant facts," period, and the relevant fact would be "I, Richard Munzinger, manager of the ABC Office, have been told by my fellow employee."

MR. LOW: I understand, because a lot of times they've already done it before you can prove it. Then you can take bankruptcy. It's already done to you. You don't need an injunction. All right. That's the language you would add. What about you, Richard?

MR. ORSINGER: I would take the word

"personal" out because I think some people might construe the rule to mean that the only meaningful affidavit is someone that's swearing to a fact they have personal knowledge of.

MR. LOW: That was taken out the way read, and I asked the question whether it was taken out intentionally, and the answer was "yes."

MR. ORSINGER: Oh, I misunderstood that. I didn't realize you --

MR. LOW: Right when we started I said, "You deleted the word 'personal,' was that intentional?"

MS. WINK: That was my recommendation.

MR. LOW: Yeah. You could learn a lot listening.

HONORABLE DAVID PEEPLES: I think that the requirements in sub (b) are too strong, and I think TROs should -- the judge's authority to grant a TRO shouldn't be limited as much as this would do it.

Now, look back up to that list of five things. Before the judge can do this he's got to be convinced that there's an immediate and irreparable injury, no adequate remedy of law, and if it's done without notice to the other side, that there will be substantial damage before anything happens. That's a pretty tough showing, and I would point out that in the

recusal rule, 18a, this is to recuse a judge, we don't require personal knowledge. The very last sentence in sub (a) says you can ask for recusal on information and belief if the grounds of such belief are specifically stated, and you know, somebody is going to bulldoze a building, I mean, serious things can happen, and a TRO has a short, limited life span, and you can get it dissolved instanter.

MR. LOW: Yeah. Is there a limit in time when you have to hear the permanent injunction?

MS. WINK: Yes.

MR. LOW: Isn't it limited to --

MR. ORSINGER: Hear the temporary injunction.

HONORABLE DAVID PEEPLES: Temporary.

MR. ORSINGER: TRO is 14 days and can be extended once --

MR. LOW: Yeah.

MR. ORSINGER: -- and then after that I think you have to --

MS. WINK: Parties must agree thereafter.

MR. ORSINGER: -- get a new TRO or get a hearing.

MR. LOW: Okay.

HONORABLE DAVID PEEPLES: I think I would take the word "insufficient" out of that last sentence in

(b). I mean, frankly, I think an awful lot of trial judges would look at that and say, "You know what, I don't care what the rule says, I'm going to keep the building from being bulldozed without a permit until we can have a hearing on this."

MR. LOW: Right.

HONORABLE DAVID PEEPLES: And so if you make it too strong you're going to have judges basically saying, "I don't care what the law says, I'm going to do what has to be done even if this affidavit is not really sufficient," and I think we ought to try to correspond with what I think is the practice and with, you know, what needs to be done sometimes -- I think a good long-term movement in the law has been away from strict requirements for equitable relief and toward a little bit more easy to get equitable relief. I think that's a good thing, and I think we should not make it too hard to get a TRO, which just freezes the status quo for a short time.

MR. LOW: So the -- you would be more strenuous when you talk about a temporary injunction --

HONORABLE DAVID PEEPLES: Of course, yes.

MR. LOW: -- which lasts a long time. We are speaking in terms of a temporary injunction, and really that's temporary restraining order is the technical term.

HONORABLE DAVID PEEPLES: We're on page one, aren't we?

MR. ORSINGER: Yes.

HONORABLE DAVID PEEPLES: TRO.

MR. LOW: Yeah, temporary restraining order, that's what I say, instead of temporary --

MS. WINK: May I make -- before you go on, I think I can make one recommendation that will help something you said there, and then the rest of the comment can go on. In (a)(5), those points in (a)(5)(A) and (B), those are not current practice across the state as a whole. In order to take that out of the issues, really (a)(1) through (4) are what you have to plead. Okay. And you must. That's existing law. So I would recommend that what is now in (a)(5), that that becomes (B), and (B) becomes (C), et cetera.

The reason we put the language that you see in (a)(5)(A) and (B) in the rule is because many of the most populous counties say if you're going to go without notice I want some information about, you know, why, good reasons why, so that the judges know ahead of time what they're dealing with.

MR. LOW: So what you're talking about is deleting (5) and having (A), (B), (C)?

MS. WINK: No, sir. I'm suggesting that

what is currently (1)(a) --

MR. LOW: Right.

MS. WINK: -- sub numbers (1) through (4) stay where they are.

MR. LOW: I understand.

MS. WINK: That we turn what is currently (a)(5) into (B).

MR. LOW: Oh, okay, I see.

MS. WINK: And in the verification part, which would become (C) --

MR. LOW: (C), okay.

MS. WINK: Right, in the verification language, then all facts supporting the application, you've got it. Right? The facts supporting the application are there in (a)(1) through (4).

MR. LOW: So (1) through (4) would be the way it is now.

MS. WINK: Yes. Would that help?

HONORABLE DAVID PEEPLES: Well, I think (5)(A) and (B) is an excellent addition to this. I think a lot of counties and a lot judges have that practice. They'll just ask, "Have you talked to the other side?"

"Well, yeah, they won't talk to me."

"Well, let's get them on the phone," and they answer the phone for the judge. So that's a healthy

thing, and to put that in the rule is good. I just think that (b), verification, if judges follow that, it just seems to me out of the question somebody comes in and says they didn't even go to city council to get this building torn down or whatever they're going to do, and the judge says, "Oh, sorry, the law requires personal knowledge."

MS. WINK: Oh, I agree. We're still addressing the personal knowledge, information and belief issues separately. I agree with you there are issues to decide there, and this is the group to decide them and then the Court thereafter, but for purposes of saying, you know, what has to be supported by verification or an affidavit, period, it's going to have to be what is currently 1(a)(1) through (4). What you currently see as (5)(A) and (B) won't be there. We're going to revise that.

MR. LOW: But what about the last sentence, if you took out "personal knowledge," having knowledge, and then you relate what that knowledge is and then it says information and belief is insufficient?

MS. WINK: Actually, that's what I think we should go back to discussing. The -- more discussion on (C) itself, what is now (B) and will become (C), verification --

MR. LOW: Right.

MS. WINK: -- I'm hearing that it should say -- instead of what you see now it should say, "All facts supporting the application must be verified or supported by an affidavit by one or more persons having knowledge of relevant facts," period, end of story.

MR. LOW: All right.

PROFESSOR CARLSON: Strike the rest of the sentence.

MS. WINK: Strike the rest -- well, I actually think the last sentence should stay there, but can we just start with the first sentence?

MR. LOW: How is that different, information and belief? I've told you my information and what my belief. It's not personal knowledge, but it's the source, so how isn't that inconsistent?

MS. WINK: It's going to go -- I'm sorry, sticking with the issue on pleading in the information and belief, we just have existing case law that says we can't plead on information and belief. I think what's been discussed in this room where someone is saying, "I got a telephone call from my subcontractor, John Smith, who explained that he is seeing people on the ground lifting things off the property and setting dynamite so they can blow up my property," okay, I think that's sufficient, you know.

MR. LOW: But that's not sufficient to support the facts. You're trying to prove certain facts in order to get it, and there's personal knowledge of those facts, or there's some hearsay of those facts.

MS. WINK: Right, but I'm suggesting we take out the word "personal" so it's not personal.

MR. LOW: I understand.

MS. WINK: Yes, sir.

MR. LOW: I just see it as inconsistent. Richard.

HONORABLE TERRY JENNINGS: Buddy?

MR. ORSINGER: I wanted to say two things, but, Buddy, in my mind information and belief is different from stating hearsay with an attributed source, because information and belief is a catchall clause that liberates the pleader from any specific information at all, and I think that's really been the deficiency over the years. So I don't -- as long as we're real precise about what we're doing, I don't think -- I think we can get out of the conflict you're talking about.

MR. LOW: But let me ask you this. What if I got a phone call that so-and-so is about to destroy a bridge or something, okay, and there's talk about it, and I can't swear that I don't have personal knowledge, but the information I got says that, and I give the source of

my information. Isn't that still information and I have to believe it to get it?

MR. ORSINGER: Yes, but I don't think that's what the term "information and belief" means as used traditionally.

MR. LOW: Well, it might not mean it, but it says it.

MR. ORSINGER: Yeah, but I don't think it means that, and I think that you need to -- just because words are used in English for different purposes doesn't mean you can't use the words. You just have to use them in a way that's clear, but at any rate, I have a problem with making (b) a statewide practice; and the inquiry I did after this last meeting was just among family lawyers, but in this respect the Family Code doesn't alter the standards; but in Houston, for example, if you want to get a temporary restraining order from a family law judge as long as the restraining order is mutual, they will sign it, if it is not mutual, they will not sign it no matter how many affidavits are attached. In Dallas, you can't get a temporary restraining order with a divorce petition because they've adopted a standing rule that you're required to attach to the back of your petition informing the respondent that these are standing orders that they are now subject to because a suit was filed and their name

is the respondent.

So you get a reference to a standing set of injunctive -- temporary -- pardon me, temporary restraining orders that were passed down as a local rule without the permission of the Texas Supreme Court, and the only time that they'll give you a temporary restraining order is if you're asking for something more than is in their standing order, and then you go back to the San Antonio practice, which is what I think is more what I envisioned as normal around the state, is that you don't have to advise the other side that you're going to get a TRO. You just go down there, and if you can meet the requirements in the Rules of Procedure, one of which is not to get them on the phone talking to the judge, you can get your TRO.

So what I've decided is TRO practice varies from locale to locale because there's no appellate review to standardize it, and so what you guys would be doing or what we would be doing if we make this a requirement, this subdivision (5)(A) and (B), in my opinion is that you're going to change the way that TRO practice is practiced in a whole lot of the state, and I'm not sure that those people know that you're going to do that, and I'm not sure that they would want to do that. Judges and clients.

So I'm a little bit concerned about (5)(A)

and (B) as I think it comports with the Travis County practice that Judge Yelenosky described, but I've just named the three largest urban centers in Texas that don't follow this practice, at least in family law, which probably represents a huge part of their TRO practice. So I'm just wondering if that -- where are you guys -- did you go through that process and decide to standardize in that way notwithstanding?

MS. WINK: Well, here's what we did. That's an outstanding question. So setting (c) aside for a moment, verification --

MR. ORSINGER: Right.

MS. WINK: -- and let's go through this soon to be (b). First, this entire rule says when there's conflict with the Family Code --

MR. ORSINGER: It doesn't. The Family Code doesn't get this detailed.

MS. WINK: Right. And I think you're right in that county by county there are local rules out there that may or may not comply with the law in the world of injunctions, and nobody has fought that yet, and I don't want to take on that case personally, but it's out there. It's an issue. In Houston, where I live, I rarely can go to court -- of all the TROs I've ever done I've been required to talk to the other party ahead of time, with

one exception, and that was because there was the imminent danger that we couldn't prevent the harm otherwise. So the standard practice, the judges do require us in Harris County civil courts, other than family courts, the district courts anyway, that they want us to have talked to the opposing side.

MR. LOW: Terry.

HONORABLE TERRY JENNINGS: Is your concern basically, okay, the difference between information and belief and hearsay, based on information and belief alone without any supporting facts that's conclusory, right?

MR. ORSINGER: Right.

HONORABLE TERRY JENNINGS: That's no evidence.

MR. ORSINGER: That's what I think is really behind that rule.

HONORABLE TERRY JENNINGS: Right, and, of course, hearsay is evidence. It wouldn't be admissible at trial, but it is evidence; and by analogy, like in a criminal context, an arrest warrant, a search warrant, can by law be based on hearsay. They usually are based only on hearsay, so would it solve the problem to say something along the lines within (b), taking out "personal knowledge," adding a sentence something along the lines of "Hearsay evidence may be considered in determining whether

or not to grant the application" and then changing the next sentence to "Pleading on information and belief alone is insufficient to support the granting of the application." Would that satisfy your concerns?

MR. ORSINGER: Most of them. I guess what I'm left with after that point is if you have some other rule of evidence that would be objectionable, so we -- you know, could be authentication, could be -- so we definitely need to take out any reference to admissibility.

HONORABLE TERRY JENNINGS: Yeah, that's why I would say, "Hearsay evidence may be considered." You know, it's -- it wouldn't necessarily rise to the level where the application should be granted, but it can be considered and then pleading on information and belief alone.

MR. ORSINGER: I like that.

MS. WINK: Okay.

MR. LOW: Jane.

HONORABLE JANE BLAND: Maybe since the first sentence says you've got to have knowledge of relevant facts in your affidavit, that encompasses what's required by the rule. That sentence about information and belief is what doesn't meet the rule. I don't know that we need to include in the rule everything that doesn't meet the

rule. So, in other words, I don't think we need that second sentence. If we have -- if there are enough -- if there is enough facts alleged or verified to to warrant the issuance of the TRO then the rest of it's just -- so maybe the second sentence we don't even need to have. And I don't think there are many judges that grant TROs based on information and belief, because sometimes they're without notice and for all the reasons that we've talked about.

PROFESSOR CARLSON: So should we vote on that?

MS. WINK: I think we should -- if I may make a suggestion, I think we should vote on this issue, like whether we even want to discuss within these rules information and belief. It's going to come out not just here but throughout the other sets of rules, and in most of the other sets of rules it was really clear existing law required things. In the world of injunctions it's never been explicitly put in the rules. There's just case law that applies, and we've been trying to bring that forward.

MR. LOW: But I hear a number of the committee members thinking it should be easier to get a TRO, but on other things it might be more rigid, and so I don't know that you can address one sentence that hits

both of them because it depends on what you're doing, I think. Richard.

MR. MUNZINGER: Well, just an observation, pleading on information and belief is to some extent a response to Rule of Civil Procedure 13 and Rule 11 of the Federal rules where a lawyer has since the enactment of those rules the obligation not to plead things that the lawyer doesn't know or have good reason to believe, et cetera; and I know I've been in cases in state and Federal court where I've gone out of my way to plead certain things on information and belief for that very reason, because I've had adversaries who were very adept and prepared to seek contempt orders and what have you for the pleadings, the nature of the animal and the fight between the parties. That doesn't obviate the need, however, for situations where you have to plead something like that.

Now, pleading on information and belief is far different from a -- from winning the case in a temporary injunction, for example. The 14-day period of the temporary restraining order is a short period, admittedly, or the 28 days. The only other thing I would say is any time you give a right to one person you're taking away a right from another person, and so the concern that we're all focusing on is Richard is focusing on the family deal, husband is going to beat up the wife

or the wife is going to shoot the husband or whatever it might be. Maybe so.

If you don't let me do -- I had a case where I was a -- my partner, one of my client's partner did something and the partnership got into a dispute, and they're suing each other. Well, a great sum of money may be lost because of temporary restraining order, and so protecting the movant's or the applicant's right has an adverse effect, could have an adverse effect as well on the side. An observation only.

MR. LOW: Next, but -- Sarah.

HONORABLE SARAH DUNCAN: That's part of the point I wanted to make, is my understanding is that if you want a temporary restraining order or a temporary injunction that those facts do have to be sworn to, every one of them, and the personal knowledge of it to me is not the point. It's the swearing that's the point, and I would simply delete "personal" from this what is now (b) and make it "knowledge of relevant facts." But as Richard was saying, temporary restraining orders restrain what might be legal, proper, permissible conduct, and I don't think you ought to be restraining legal, proper, permissible conduct without somebody swearing that it's not legal, proper, or permissible, and this talk of issuing temporary restraining orders just because some --

"I heard" and "somebody said," that gives me great pause, concern.

MR. LOW: But it probably came about because they want to preserve the status quo and --

HONORABLE SARAH DUNCAN: Well, that's what they say, Buddy.

MR. LOW: Yeah, I understand.

HONORABLE SARAH DUNCAN: But they're just saying it, and people don't always know the truth, and even if they know the truth, they don't always tell it.

MR. LOW: I've heard that. Jane.

HONORABLE JANE BLAND: I agree with Sarah. I don't think temporary restraining orders ought to be easier to get. They ought to be extraordinary. My thinking of it is the two sentences are sort of repetitive. You've got to swear to personal -- you've got to swear to knowledge of facts. The second one is this isn't knowledge of facts. Well, we already know that something on information is -- but when people put that in front of you in front of the TRO, they haven't put in front of you enough to get a TRO granted. We don't need to incorporate it in the rule. There's lots of reasons why a TRO won't be granted. One of them is if you haven't sworn to enough facts to get one.

MR. LOW: All right. Steve.

HONORABLE STEPHEN YELENOSKY: Yeah. What Sarah said I think is certainly true. Some of the examples given -- oh, they're about to tear down the building -- well, I mean, those are rare, I think, number one. Usually it's about they're about to steal the secrets or not, and part of the thing is you're asked to -- you're asked to put in place a TRO which tells somebody not to commit a crime. Well, there's little downside to that when that's the question. "Tell him not to steal my secrets," but that's rarely the issue.

It's rarely the issue that somebody says, "I heard that the guy across the street is about to bulldoze my house." Okay. Well, if he says that and I order him not to bulldoze your house, there's little downside there, but that's rarely the question as well. There usually is some question as to whether or not what a person is about to do is legal, and if you're going to stop them from doing it simply because somebody states facts they don't know themselves that would make it illegal, that's problematic. I mean, with the kind of restraining orders we get is "Don't let them open their business because they're opening it with my confidential information." That's the kind of question. It's not wondering about whether or not they're going to commit an illegal act.

And so I agree with Judge Peeples there are

times when you are going to say the harm is so great that maybe I am stepping beyond the strict requirements of the rule, but I think those are sufficiently rare that if we put -- if we concretize that in the rule I think we support what I think used to be the practice somewhat, which was attorneys go to the courthouse to find a judge to sign their TRO, not to go to court to appear before a judge to establish the basis for a TRO. They just find a judge to get a judge to sign, as if there's never a downside to that, and I've seen plenty of downside that itself can't necessarily be remedied by law.

MR. LOW: Terry.

HONORABLE TERRY JENNINGS: Aren't the concerns y'all are expressing covered by (1) through (4)? I mean, you have to prove up (1) through (4), and the question really is, is what's sufficient, what type of evidence is sufficient to prove up (1) through (4); and if the law has been that hearsay evidence in this context is sufficient to prove up (1) through (4), yeah, I'm having a hard time understanding what the concern is.

MR. LOW: One more and then we're going to form a vote. We're fixing to vote. We've heard quite a bit. Okay.

HONORABLE R. H. WALLACE: Well, I was just going to say, I mean, I think if you take out the

"personal" -- everybody knows now that verification has to be based upon personal knowledge and true and correct, and if you take out "personal," when I read that rule I'm thinking "Hmm, the rule has changed. It doesn't have to be personal knowledge anymore. It has to be knowledge of relevant facts."

Well, the discovery rules allow us to designate witnesses with knowledge of relevant facts, and that could be anything. So I'm all -- I'm still for keeping "personal" in there because I think there's a difference between personal knowledge and hearsay.

MR. LOW: What vote would you propose that would be helpful?

MS. WINK: I would first say all in favor of taking out the word "personal" say so.

MR. LOW: All in favor of taking out the word "personal." All right. Ten for.

All against? Eleven, Chair not voting.

HONORABLE TOM GRAY: I'll vote now on the first one, and that way it will be eleven to eleven. I didn't vote for either of them.

MR. LOW: You're allowed to do that.

HONORABLE TOM GRAY: Okay. Now you're going to have to vote.

MR. LOW: I vote with you. I never go wrong

voting with you, would I?

HONORABLE TOM GRAY: I don't know. A lot of other people do.

MR. LOW: Okay.

MS. WINK: So if I understand correctly, "personal" is now stricken from the proposed rule. Okay. Then the second thing --

MR. LOW: By very slightly stricken.

HONORABLE R. H. WALLACE: By a scintilla.

MR. ORSINGER: By the Chair's deciding vote. It's all on your shoulders, Buddy.

MS. WINK: Then taking this in baby steps, because it just seems to work so much better that way, before I add the hearsay issue, which we can bring up in a moment I say we should vote on whether or not we strike the rest of what is in the currently drafted proposed rule.

MR. LOW: Strike the rest of what now?

PROFESSOR CARLSON: After (b).

MS. WINK: What is in current Rule 1(b), everything after the words "relevant facts" be stricken. Can we hear on that one?

MR. LOW: Okay.

MR. ORSINGER: This is what now?

MR. LOW: All right, let me --

MS. WINK: The question -- the question is, to be considered for vote, is whether the existing draft of Rule 1(b) after the words "relevant facts," if we can agree to strike the rest of that part of the rule.

MR. LOW: I mean, that "are admissible in evidence" and all of that.

MS. WINK: We take that out, and we take out the "pleading on information and belief."

MR. LOW: Okay. Who's in favor of stopping --

MR. HAMILTON: Can I say something, Buddy?

MR. LOW: Sure, Carl.

MR. HAMILTON: When you do that, isn't that contrary to having taken "personal" out? Because now if you take "personal" out that means you can have I guess hearsay evidence.

MS. WINK: We're going to have a -- we're going to have a separate question of whether or not to add an explicit comment on hearsay evidence.

MR. HAMILTON: Okay.

MR. LOW: All right. We're going to -- all right.

MS. WINK: But first go back to the proposal that in what is current draft of Rule 1(b) that we strike everything after the words "relevant facts."

MR. LOW: Put a period after "relevant facts," and that ends it. Who's in favor of that? 15. I don't even get to vote. 15 in favor.

Against? Five. Five against.

MS. WINK: And then finally, finally should we add a sentence to say that "Hearsay evidence may be considered in determining whether to grant a TRO"?

MR. LOW: Everybody understand? We add another sentence that "Hearsay may be considered in granting TRO" or in -- is that --

MS. WINK: "In considering whether or not to grant."

MR. LOW: All right. All in favor of that sentence raise your -- okay. Raise your hand. Six in favor.

All opposed? One. Okay, 14, 14 to 6. Okay.

MS. WINK: Okay. Great.

MR. LOW: Okay. Now, what's next?

MS. WINK: Next is back to issue -- this actually is resolving a lot of things. The fourth issue that was brought up last time is Judge Yelenosky brought up -- and he was correct -- what is in currently proposed Rule 1(d)(8), so everybody turn to (1), David, (8) on page two. Let me see if this is right. Sub (b), 1(d)(8) sub

(b), that language comes from the existing rules but says that you've got to set the hearing for the temporary injunction at the earliest possible date, taking precedence over all matters except older matters of the same character, and there was much discussion that that just doesn't happen and it's not manageable and it's not realistic on any court. Frankly, I don't know any court that's doing that, so can we all agree to take out at least the language that begins with "taking precedence over" through the end of that sentence?

MR. LOW: All right. Where would you put the period? You say it ends with "date"?

MS. WINK: Well, for right now I would say we strike everything after "date" and then I'm also going to make a recommendation for softening the language before that, but I think we could get agreement --

MR. LOW: Does everybody understand what she's proposing? On page two, (8), you would put a period after "possible date." Period.

MS. WINK: At least that, yes.

MR. LOW: All right. Richard, question.

MR. MUNZINGER: Is -- Rule (a)(5)(A) and (B), it remains in the rule. Richard Orsinger said that he didn't want it on, and I don't remember if we took a vote, but that may influence my vote on this question if

(5)(A) and (B) remain in the draft rule, we're now being asked to delete language from (8)(b), but my assumption is (5)(A) and (B) remain in the rule.

MS. WINK: We didn't get to -- we should come back -- can we address -- do you want to take that first?

MR. MUNZINGER: I don't care how we do that, but it will affect my vote.

MS. WINK: Okay. That's fair enough. Why don't I suggest that we back up and address the issue that Richard brought up earlier?

MR. LOW: Let me ask you one question before we do that. I have a note here you said something about seven unless such and such, that is something you're going to need to add.

MS. WINK: We already got that. We already got that.

MR. LOW: Okay. All right. Let's don't cover it again. Let's go back.

MS. WINK: Okay. What is in your current draft as Rule 1(a) No. (5) including sub (A) and (B).

MR. LOW: Okay.

MS. WINK: The first question is do we want to keep that in the rule as a new -- 1 sub (b), period, or do we want to toss it?

MR. ORSINGER: Where did that language come from?

MS. WINK: It comes from some of the local rules. It comes from Dallas or Tarrant County's local rules, and it comes from what we are being asked to do in the Harris County civil district courts other than family.

MR. ORSINGER: And the local rules that you're referring to in the other counties are civil courts and not family law courts?

MS. WINK: Yes, sir. Yes.

MR. ORSINGER: Okay. Did y'all check to see whether this was consistent with the local rules in the family law courts statewide?

MS. WINK: I can't -- I don't remember whether or not we did that.

MR. ORSINGER: Okay. Well, I'm afraid that you're going to change the practice in most of the state of Texas on TROs in family law matters, and I'm a little concerned because I don't know -- I don't know how bad the collection business is right now, but I know that the TROs in divorces are frequent, maybe more frequent than in collection matters or in foreclosures or whatever, and I'm really concerned about us taking a practice that may represent a minority of the TROs that are granted in Texas day in and day out, and that's to completely ignore the

sensitivity of the fact that in the family law matters sometimes you're trying to get a writ to keep someone from taking a kid out of state or from taking all the money out of a joint bank account or things that if you call them on the phone and say, "You've got 45 minutes to get down here for this TRO," you're going to find that they're already in Oklahoma or the money is already gone.

So the public policy that is involved in getting TROs in family law matters, which is not governed in my opinion by the Family Code, is not being adequately addressed by this, and I'm not sure that the task force has vetted this among the family law judges and the family lawyers in Texas.

MS. WINK: Okay. Let me respond to that in two ways. First of all, Chris Wrampelmeier was on our subcommittee to address the family law issues, and he did not have objection to that. I do remember that coming up, but more importantly, I think the things that you're concerned about are addressed in the rule and protected by the rule. For instance, if somebody is worried that -- if I'm representing the wife and she's in fear that she's going to be beaten up if the husband finds out that, you know, they're filing a lawsuit then clearly, you know, the applicant would sustain substantial damage before notice and a hearing could be heard, notice could be served and a

hearing could be heard. So that would be one of the exceptions when I'm not required to call the other side.

This also -- this provides for situations, if we can't get hold of the other side for all practical purposes or if somebody is going to be beaten up or somebody is being threatened with a gun, taking the children out of jurisdiction.

MR. ORSINGER: It's not the before notice. It's because of the notice. In other words, the woman is going to get beaten up because the husband found out that she filed the divorce, or the person is going to drain the bank account because they found out. So it's not a question of before, it's --

MS. WINK: Okay.

MR. ORSINGER: What I'm concerned about is the way it works now if you want to get a temporary restraining order to stop something that's irreparable, you do it secretly, meaning you don't give notice to the other side and then they get served, and then if they go do it, they go to jail; but what you're saying is, is that we've got to call them on the phone and tell them that we're down at the courthouse and want you to come down or I have to show somehow that I'm afraid the child will leave the state or the money will disappear before I can serve the TRO. I can't ever prove that, because it isn't

going to happen until they find out that the lawsuit is filed, so the danger of the policy problem here is the time period between knowing that the suit is filed and getting service of the TRO so that the law protects you. You've now handed the potential wrongdoer a window of opportunity to do the wrongful act before a TRO is signed, and in the family law arena that's disturbing to me, and I don't know why Chris wasn't concerned about it, and maybe I'm not representative of the family lawyers.

MR. LOW: Kennon.

MS. PETERSON: I just wanted to point out that existing Rule 680 of the Rules of Civil Procedure provides that "No TRO shall be granted without notice to the adverse party unless it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before notice can be served and a hearing had thereon." So in the existing rule it has that standard "before notice" in here as well, and my experience from looking at proposed local rules is that we have had some come through for approval that would be inconsistent with this in the sense that they would require more notice, and I've expressed concern because there's inconsistency with the statewide Rule of Civil Procedure about that, that there are some approved local

rules on the books that would require more notice and there are also some standing orders in place that would require more notice. And so there's an inconsistent procedure, I think, across the state for TROs issued without notice, and I think the question should really be what's the best way to proceed rather than what's happening now.

MR. LOW: All right, Gene.

MR. STORIE: Richard, can you just say that under (a)(5)(A) that the notice would not be practicable because giving notice would destroy the whole purpose of trying to get a TRO in that situation? I mean, you're never going to be able to state as a fact what the ultimate conclusion of the action is because you're trying to stop the action, so whenever you're getting a TRO you're laying the predicate for it and saying, you know, "We've got to stop them from taking that next step, and if I tell what he is going on they're going to take it before we can do anything about it."

MR. ORSINGER: To me the practicable means that giving notice is not easy or not readily achieved --

MR. STORIE: Could be.

MR. ORSINGER: -- so to me that wouldn't address that.

MR. LOW: Okay. What would you do, delete,

or what would you put something in there? What would you put?

MS. PETERSON: I mean, I think what you're saying, Richard, is that there may be harm or damage as a result of notice.

MR. LOW: Of the notice.

MS. PETERSON: So --

MR. ORSINGER: Before you have --

MS. PETERSON: Right.

MR. ORSINGER: We're -- this rule, I think -- you tell me it's already in there, but I have never practiced that way in 35 years, but I could have been wrong all these times.

MR. LOW: There's 36 coming up.

MR. ORSINGER: This creates a new time frame now, which is the difference -- the time that expires between notice that a TRO may be granted and the time the TRO becomes binding. To me in my practice the value of a TRO was the first time they find out the act is prohibited and might be motivated to do it, they are now prohibited from doing it, but if you call them and say, "We might prohibit you from leaving town with that kid" or "taking all that money out of the retirement and moving back to a foreign country, so why don't you come on down here in 45 minutes," and what's going to happen is for some people

during that 45-minute period the harmful act will occur, and it will not be illegal or improper or a violation of TRO, and so we're creating a new early warning to permit a wrongdoer to do wrong before it's prohibited, and that concerns me.

HONORABLE TOM GRAY: It seems to me that it's real easy to fix with the addition of a subsection (c) that says, "The applicant will likely sustain damage if notice is provided before the TRO is in effect."

MR. ORSINGER: I like that a lot.

MR. LOW: All right. You get that?

MS. WINK: I almost got it.

MR. LOW: All right. Be sure we get it.

MS. WINK: Could you repeat it one more time?

HONORABLE TOM GRAY: It will require the striking of "or" at the end of (A) and put it at the end of (B), add (C) that says, "The applicant will likely sustain damage if notice is provided before the TRO is in effect."

MS. WINK: Got it.

MS. PETERSON: Is it just "damage" or is it "substantial damage"?

MR. LOW: All right, Richard.

MR. MUNZINGER: Just a question about the

words "will likely." Is that intended to be near possibility? Would it be better to say "may sustain"? I don't know that there's a substantive difference in the words, but --

MR. LOW: Or "could likely" or --

MR. MUNZINGER: Richard's point is very valid.

MR. LOW: Yeah.

MR. MUNZINGER: At the same time, my clients have been hurt by people who take advantage and ignore the local rules that require notice. When you know that somebody is represented by a lawyer you're supposed to give notice; and our judges, or at least some, ignore that rule consistently; and I've had clients lose a substantial sum of money because that rule was ignored; and this pleading requirement, had it been in there and had been required to be satisfied by a judge, might have done some good in my circumstances. Richard's is far more important, some kid could be stolen or somebody could be hurt; but in any event, my question was "will likely," is it the equivalent of "may," which seems to me to be clearly a relaxed element of proving that it's possible only.

MR. LOW: If we're putting that in there, how would you put it, if we're putting that sentence?

MR. MUNZINGER: I'd say "may."

MR. LOW: "May likely." Okay.

MR. MUNZINGER: It just seems to me that's a lesser standard.

MR. LOW: How does that --

MS. WINK: I had actually -- I don't necessarily disagree, but I'd like to hear Judge Yelenosky's take on that, too.

MR. LOW: All right. Steve.

HONORABLE STEPHEN YELENOSKY: Well, I'm a little concerned. I think this may be an instance in which the existing rule has the same problem, but nonetheless you get those TROs, Richard, when we judges are convinced that somebody is going to abscond. Perhaps the reason the existing rule doesn't say what you want this one to say is because it's problematic on a due process grounds. You're saying, "I could give this party notice, but I'm not going to because on an ex parte basis I've decided that they're going to act badly if I give them notice." That's a little problematic to me to put in a rule.

I realize as a pragmatic there are times when we're convinced that somebody is going to abscond. I think usually what we'll try to do is, you know, talk to the other party, if the child is in a place where they

couldn't abscond at that moment, like the child is in school. You can even perhaps reset the TRO to a time when the child is somewhere where you know they couldn't abscond, but I think we should at least think about whether we want to put it in a rule that we are on an ex parte basis deciding that we're not giving you notice because we have determined on an ex parte basis that you're going to be bad if we give you notice.

MR. LOW: Carl.

MR. HAMILTON: I've always thought that the rule meant you could file an application for temporary injunction and give notice to the other side and the court sets it for a hearing, but if you go under Rule 680 and you have a situation where you can't give notice, there's no time for notice and a hearing, i.e., the temporary injunction type proceeding, then you can get a temporary restraining order. So it's not just the notice, but it's you don't have time for a hearing either, and I think that that rule says both. It says that if there's "immediate loss or damage will result before notice can be served and a hearing had," which to me means the temporary injunction notice and a hearing. On this rule you can have an immediate injunction if there's not time to do both of those things.

MR. LOW: All right. What are you

suggesting we should do on this particular sentence or suggestion of Judge Gray?

MR. HAMILTON: Well, it's according to how that's construed. If that's construed the way I think it is, I don't think we need to do anything.

MS. PETERSON: There's a separate Rule 681 for temporary injunctions specifically.

MR. HAMILTON: Correct.

MS. PETERSON: And so are you saying that the hearing referenced in the TRO rule is in regard to the TRO hearing or to the TI hearing?

MR. HAMILTON: I'm saying that 680 says if you don't have time to do a temporary injunction and give the notice and have a hearing, then you're entitled to get a TRO.

MS. WINK: May I address that? Actually, we were concerned about making sure we didn't step on the law. First of all, the language that you're seeing in (5)(B), in what is currently (a)(5)(B) is existing language in the existing rules. Okay. So not saying there isn't a problem we can't address, but that's existing language in existing rules. In the rules that we're providing to you further in for the temporary injunction and in permanent injunction they do specify evidentiary hearing, notice of an evidentiary hearing.

This one, this is not an evidentiary. The TRO is not an evidentiary hearing necessarily.

The court can, you know, put on -- can let people put on evidence, but it's not required to be a full evidentiary hearing, and it can be ex parte.

MR. ORSINGER: So you think "hearing" in Rule 680 means hearing on the TRO, not hearing on the temporary injunction?

MS. WINK: Yes, sir.

MR. LOW: Okay. All right. What would you like a vote on, Justice Gray's proposal, or what would you --

MS. WINK: Well, I think we need to decide whether or not we leave the existing (5)(B) and add what has been proposed, which is the applicant -- as a (C), "The applicant will likely sustain damage if notice is provided before the TRO is in effect." If we're going to do that I think we should keep the language parallel, "substantial damage."

MR. LOW: Okay. All right. Everybody understand the proposal? All right. All in favor, raise your hand.

MS. WINK: Of adding sub (C).

MR. LOW: Of adding.

HONORABLE DAVID PEEPLES: Tom Gray's

language.

MS. WINK: Yes, sir.

MR. ORSINGER: Did you get Mike's vote? Buddy, I'm not sure you got Mike's vote. He put up his hand up a little bit late.

MR. LOW: All right, I'm sorry. Let's go, so we can do it, give me one more chance.

MR. HAMILTON: Can you restate what we're voting on?

MS. WINK: Yes, sir.

MR. LOW: Well, I'm not sure I can count.

MS. WINK: Let me restate it so everybody is clear. Should we add a sub (C) that says, "The applicant will likely sustain substantial damage if notice is provided before the TRO is in effect."

MR. LOW: All right. All right. In favor? 17 in favor.

Against? Two. Okay. 17 to 2. All right.

HONORABLE SARAH DUNCAN: Maybe three.

MR. LOW: Maybe three. Okay. Still carries. All right, go on to the next.

MS. WINK: Okay. That brings us back -- let me get back. That brings us back to what is in existing proposed Rule 1(d), as in David, (8) sub (B). Should we take out the language after "possible date"? And we

might -- we might make the language a little better too before that, but let's just see if we should get rid of everything after "possible date."

MR. LOW: All right. Everybody understand? You're on page two. Are you voting or raising a question?

HONORABLE DAVID PEEPLES: I wanted to make a comment, I think.

MR. LOW: Oh, all right.

HONORABLE DAVID PEEPLES: Well, on (8)(A) and (B) you're talking about there's a no notice TRO and should there be a fast hearing. It seems to me on the next page "Motion to dissolve or modify" is really the important thing here. What I have seen just happen a bunch of times is, you know, the request comes in, you grant the TRO on some representations, and then within 24 hours the respondent has got a lawyer or maybe comes in and says, you know, "We need to talk about this, did you know so-and-so," and you dissolve the thing. Or you maybe get both sides in and have a little, you know, nonevidentiary hearing, a lawyer here and a lawyer there, and decide we're going to preserve the status quo or I'm not and I'll set you for a quick hearing, and in my experience that's what happens a lot rather than a quick contested hearing while the TRO stays in place. So I see this (8) as being unnecessary.

MR. LOW: Okay. Judge.

HONORABLE DAVID EVANS: I don't think the -- I worry about (B). You can't set them outside of 14 days. Setting anything within 14 days, you might get something set 11, 12, 13 days, but setting something 5 days away doesn't even get a process issued and served. I don't know how I would interpret this except to say, well, we have three hours available on Friday, which is four days away, and you can't get anybody served, and invariably the defendant will come in and say, "I want some more time to prepare for this," they'll have worked out something. I think on this short a hearing 14 days is pretty quick, and they could come in, as Judge Peeples noted, with a quick motion to dissolve, and you're there.

MS. WINK: Exactly why this existing language is troublesome. This is existing rule language, so --

HONORABLE DAVID EVANS: Yeah.

MS. WINK: So perhaps what we just want to leave in (B) is say "set a hearing of the application for temporary injunction," period, and let the rest of the rule -- which says it can only be for 14 days, right, and extended once by the court and thereafter only on agreement of the parties.

HONORABLE DAVID EVANS: You've sold me.

MR. LOW: All right. Richard.

MR. ORSINGER: I would echo I guess what David said. In San Antonio, perhaps uniquely around the state, you can get a hearing any day of the week, so the first earliest possible date in San Antonio is tomorrow. The problem, though, is that you take your TRO to the district clerk, and they're going to have to issue the process, and you're going to have to get it out and get it served. So the problem in getting a TRO is always how do I put the TRO -- how do I put the temporary hearing out long enough to assure that I have service, because if it's before then my TRO and my notice is no good because the date specified has already come and gone, so we can't squeeze these guys down too much or you're going to be constantly reaching a situation where the TRO expires before it's even served, and by the time it's served notice is for a day in the past.

So I didn't realize this was in the rule. I think what's happening is that on the TRO practice around the state we've all been doing what makes sense and not what the rules say. That's all I can figure, but at any rate, we definitely should not perpetuate it now that we're aware of it and we're all together and we're trying to get a uniform practice. So I agree totally that the 14 days is its own limit, and the judge -- although Judge

Yelenosky can make you call them on the phone if he wants to, I mean, the judge can -- but we're talking about what's mandatory, and it should be no quickness should be mandated short of 14 days.

MR. LOW: Gene.

MR. STORIE: I agree with Dulcie's latest suggestion because I think the earliest possible date in particular is horrific.

MR. LOW: Okay. Richard.

MR. MUNZINGER: I don't have any problem with deleting (8)(B), but I find (8)(A) to be salutary. Again, I hate to make the state victim to what I have been victimized by, but a lot of judges ignore rules that look to the benefit of the absent party who isn't represented. So you go down there, and you've got a local rule that says if you know there is a lawyer involved on the other side you're supposed to give him notice that you're coming here with this TRO, and they don't do it. So the judge now is faced with a rule that says you've got to say why if you know there's a lawyer on the other side you didn't give him notice or why I should grant this without notice. Now, if that is honored and Rule 13 is enforced, the other lawyer is going to have to plead, "I know that Richard Munzinger is involved in this case, but I didn't give him notice because he's old and stupid" or whatever it might

be, but he's got a reason for it.

So now here's a judge who is going to grant a temporary restraining order, which changes a citizen's rights dramatically, albeit for 14 days, but it still can be highly injurious to the person bound by the order, and the judge now has to say why he did that. It's similar to saying, "Why did you grant a new trial," because, again, there's two parties involved here, or more. Everybody has got equal rights. We're all equal, and they're not all divorce cases, and they're not all people who are going to steal a child and go to Oklahoma. Some of them have some money involved or what have you, and we're writing a rule for all cases. So I like (8)(A). I agree about (8)(B). I think (8)(B) is a pain in the neck and ought to be deleted, but (8)(A) I like.

MR. LOW: All right. From Richard to Richard.

MR. ORSINGER: From a practical standpoint I'm troubled by that process because normally you type the TRO up before you go down to the courthouse, and so if the TRO is going to have to say why the judge granted it without notice I'm either going to have to make that up in advance, or I'm going to have to leave in a blank in there and let the judge pen in what his thinking or her thinking was in granting the -- so are we now going to take TROs to

the courthouse that have blanks, or are we going to go take a TRO to the judge and say, "Would you consider this, and if you would, tell me why so I can go back to my office and type it up with your finding"?

MR. MUNZINGER: I agree with Richard's comments.

MR. ORSINGER: How are we going to --

MR. MUNZINGER: I agree with Richard's comments.

MS. WINK: May I address that? Actually, I do this all the time. I go with a temporary restraining order, and it has the various findings that I hope the judge will find, and often the judge says, "Well, Dulcie, I like this first part, I find that, but I'm going to strike this last part, and I'm going to modify it here." They red pen it. I leave blanks for the amount that they're going to find for purposes of the bond, so I think for purposes of most practice in the world of injunctions we're doing this ahead of time, and I'm certainly going to put in the proposed order why I think the judge is going to be granting it without notice.

PROFESSOR CARLSON: Richard, I hate to tell you, but it's in the rule now.

MR. ORSINGER: I know that. I've even served on the committee to help write the family law

practice manual. You know, this is not -- I think what happened, I realized this last time, is that we all do what we want around the state on this TRO stuff because it's not reviewable by an appellate court.

PROFESSOR CARLSON: You've gone rogue.

MS. PETERSON: Rogue Richard.

MR. ORSINGER: But I'm going to forward this part of the transcript to the family law form book committee so they can draft their A through Z's of why it was granted without notice to the other side, and you can strike out the ones you don't want.

MS. WINK: Well, you'll especially like the fact that we've put in here forms for what should be the content of the writ later on.

MR. ORSINGER: Okay. Fabulous.

MR. LOW: Richard predicated his statements by we're doing what's practical and what's right and not what's in the rule. Didn't you say that?

MR. ORSINGER: I'm afraid that's what we've been doing.

PROFESSOR CARLSON: We're trying to bring things together.

MR. LOW: All right. Carl.

MR. HAMILTON: Why are we taking out the "takes precedence over all other matters"?

MS. WINK: For all practical effect, it isn't being honored. The courts don't have any way practically to do it, and from all the comments we got last time the judges are saying it isn't happening, I wouldn't know how to apply it if I could docket my cases that way.

MR. LOW: Judge.

HONORABLE DAVID EVANS: The precedence, you know, there's Government Code sections on what cases take precedence, and there's statutory law that says cases take precedence. We've got enough preferences out there, but what I will tell you is if it's a problem I'm unaware of it. Everybody knows you have to try your temporary injunctions within 14 days, and you've got to set them, and you've got to bump something off the docket and get it done. The only -- I guess you can extend it for 14 more days if you have some other problem, but most of -- most of the judges I'm aware of, we're trying to try them within 14 days unless the parties agree they want a little extra time on it.

MR. LOW: We were about to vote, and would you make the proposal as to what we vote on?

MS. WINK: Yes. Yes, sir. For what is currently drafted as Rule 1(d), as in David, No. (8). I would recommend that it be stated this way: "If granted

without notice to the adverse party or its attorney," sub (A), "State why it was granted without notice," semicolon, and sub (B), "Set a hearing of the application for a temporary injunction," period.

MR. LOW: All right. Instead of "date," we would put the period --

MS. WINK: You're right, semicolon.

MR. LOW: -- after "injunction" right?

MS. WINK: Yes, sir.

MR. LOW: Okay. All right.

HONORABLE DAVID GAULTNEY: One question.

MR. LOW: All right. We've got some questions.

HONORABLE DAVID GAULTNEY: Doesn't (6) --

MR. LOW: Okay, question one.

HONORABLE DAVID GAULTNEY: Doesn't (6) already require the setting? Why couldn't it just read, "If granted without notice to the adverse party or attorney, state why it was granted without notice" because (6) already picks up the date and time.

MS. WINK: I think you're right.

HONORABLE SARAH DUNCAN: (6), uh-huh.

MR. LOW: All right, you want to change your vote, your statement as to what we vote on?

MS. WINK: Yes, sir.

MR. LOW: All right.

MS. WINK: Now it's proposed that Rule 1(d) sub (8) say, "If granted without notice to the adverse party or its attorney," comma, "state why it was granted without notice," semicolon, end of that rule.

MR. LOW: And that ends that -- that's the end of (8)?

MS. WINK: Yes, sir.

MR. LOW: Okay. All right, Gene.

MR. STORIE: All right. One more, you said, "its attorney," so how about "the party's attorney" because we could have real people involved.

MS. WINK: Okay.

MR. LOW: Yeah, that's --

HONORABLE STEPHEN YELENOSKY: Not anymore.

MR. LOW: You don't like to be called "it"?

MR. STORIE: Depends.

MR. LOW: All right. All in favor of that, raise your hand.

PROFESSOR CARLSON: Wait, wait, wait, wait.

HONORABLE SARAH DUNCAN: Wait.

PROFESSOR CARLSON: No, I didn't think, David did.

MR. LOW: All right, whoa. All right. 18 in favor.

All right. All opposed? And later it gets, the better we get. Oh, two opposed. Nina, I'm not going to be able to see that far.

MS. CORTELL: I'm sorry. I need to move down over there.

MR. LOW: I'm sorry.

MS. CORTELL: That's all right.

MR. HATCHELL: We're in the cheap seats.

MR. LOW: Okay. What next?

MS. WINK: Next is the fifth issue that came up in the last meeting, and Judge Christopher brought it up. She noted that proposed Rule 1(d), as in David, sub (10) should have the words "only upon" inserted on the first line between "binding" and "on." So sub (10) should start, "State that the order is binding only upon the parties to the action," and that would be in existing rule language. Do we have agreement on that?

MR. LOW: Does anybody disagree with that? I don't think --

MR. MUNZINGER: The remainder of subsection (10) is still there, so it would say "only upon the parties to the action, their officers," all the way to the end of the sentence.

MS. WINK: Yes, sir. It would.

MR. LOW: All right. I don't think that's

very controversial. All right. What next?

MS. WINK: And similarly there are other places in the rule that are parallel to that, and we'll make sure that's the same change. We would also suggest if we look at issue six, Chip Babcock suggested we need to consider a change in what is proposed Rule 1(e).

MR. LOW: 1 what?

MS. WINK: 1(e) sub (2), in light of some discussion about the -- the current existing rule says that the court may grant -- the court can issue a temporary -- the temporary restraining order can only be 14 days long and then the current rule says that the court can extend the duration of the TRO for a, quote, "like period"; and just in case the judge only set the first one for 10 days, from what I understood at our last meeting, we wanted to give the judges maximum flexibility and let them grant an extension for as much as 14 days, which, really, they should be able to do. So we would just propose in (e)(2), 1(e)(2), instead of saying "for a like period" it would say "for one period not to exceed 14 days."

MR. LOW: All right. For a period?

MS. PETERSON: A period?

MS. WINK: "For one period" is what I had suggested. It should be one. Everything after that must

be by agreement of the parties.

MR. ORSINGER: What if the first extension is only three days long and they come back for another three and you're still less than 14? Are you only entitled to one extension so you better get -- it better be 14 days and late?

MS. WINK: The court may only grant one extension. After that the parties must agree. Otherwise you have appellate review because it's no longer a TRO, it's become a temporary injunction.

MR. LOW: You just strike out "a like"

MS. WINK: Yes, sir, and insert "one."

MR. LOW: Insert "one" before "period," right?

MS. PETERSON: Just slight tweak, can we just say, "The court may extend the duration of a temporary restraining order for no more than 14 days," or "for a maximum of 14 days"? Do we need "period" in there?

HONORABLE STEPHEN YELENOSKY: Well, then that would allow successive extensions, which current law doesn't.

MS. WINK: I still think, Kennon, I think Judge Yelenosky is right. I really do think we have to say "for one period not to exceed 14 days" or we would be changing the law.

MR. LOW: All right. Let's vote on that.

MR. ORSINGER: Well, can I -- I have a comment.

MR. LOW: All right, short comment.

MR. ORSINGER: The current rule on 680 says, "No more than one extension may be granted unless subsequent extensions are unopposed." I think we've just dropped the concept of unopposed as an exception --

MR. LOW: Right.

MR. ORSINGER: -- and why?

MS. WINK: We haven't. It's just that we've said in (3), you know, the parties may agree.

MR. ORSINGER: Well, there's a difference between not opposing something and agreeing to something, and that's a really important difference. So I think you're changing it.

MS. WINK: Well, okay. Well, I hear that. Here's the problem, is we have existing cases that say -- we have existing case law that says the parties must agree, unopposed will not do it as a matter of law. We have too many cases that say it has to -- I'm just being honest with you.

MR. ORSINGER: So it's not just the trial lawyers that don't read this rule. It's also the appellate courts.

MS. WINK: Probably -- actually, I think that's one reason that we were trying to put so much detail in the rules, because a lot of people get caught up by folks like me that are real nitpicky and can really take you out on a technicality instead of facing the merits, which is what everybody should be focusing on. So were it not for existing case law that we would be obliterating I would say great, great.

MR. ORSINGER: Well, let me argue in favor of overruling the case law that misinterpreted the clear language in the existing rule, because there are a lot of times when you -- you're not willing to agree to something that's adverse to your client's interests, but you're willing to say that it's unopposed or tell the judge, "Judge, I can't agree to it, but I don't oppose it." If you do not allow that and require agreement, I think you're forcing some lawyers to say "no" when they would otherwise say nothing and allow it to happen, and the courts of appeals can adapt if we carry the language forward. Maybe we ought to drop a comment in there so it's a little clearer what we mean, but the fact that they've misinterpreted the existing rule is no reason why we need to eliminate clear language and replace it with language that we don't like.

MS. WINK: I have one more comment there.

That's beautifully said. Let me add one more comment. If we follow your suggestion, this will be -- if we followed your suggestion, this would be yet one more way in which Texas law of TROs differs from Federal. Don't even get me started. We could have a whole law review article on it, I've done that, but if we do that we really will have another area of distinction. Federal law --

HONORABLE TOM GRAY: You just convinced me of a good reason to do it.

MS. WINK: I'm just putting it all out. You guys get to decide. I'm just putting it all out there.

MR. LOW: Okay. Any other comments than Richard's suggestion? Judge.

HONORABLE TOM GRAY: I just had a question. I wanted to make sure that I understood that the reason that you don't want to make the change that Kennon suggested in making the No. 2 read "restraining order for no more than 14 days" is simply existing case law? And the way that the current rule is written.

MS. WINK: No -- well --

HONORABLE TOM GRAY: I mean, there's no statute that says a trial court judge can only give one extension on a TRO.

MS. WINK: No, there is existing rule.

HONORABLE TOM GRAY: Okay.

MS. WINK: Where a court cannot give more than an extension for one period, one extension. The rule says "one extension for a like period" and so --

HONORABLE TOM GRAY: But, see, the beauty of what we're doing is we can change that.

MS. WINK: Yes. Yes. Actually, and that's what we're trying to do, but I don't -- here's the danger. This is a TRO, and it is supposed to be extraordinary, but it's also supposed to be very temporary, and we have existing case law that says -- and I think it's right in urging principle that if we do something that's going to be beyond the maximum of what we've all known to be 28 days, absent agreement, it no longer becomes a temporary restraining order. It literally becomes an appealable temporary injunction, and we don't want -- I don't think we want it to be --

HONORABLE STEPHEN YELENOSKY: He's making a different point.

HONORABLE TOM GRAY: Yeah, there's no way you could do that, because you're going to grant no more than 14 days. It can all be granted at one time or in pieces, but --

MS. WINK: Okay.

HONORABLE TOM GRAY: -- you're still going to be limited to 28 days.

MR. LOW: All right. Save you're thoughts because we're fixing to take a break. The court reporter needs a break. I've gone too long, and I'm sure you'll have more thoughts during the break, and we'll be back.

(Recess from 3:13 p.m. to 3:26 p.m.)

MR. LOW: All right, while we convened, or recessed rather, before reconvening Richard did have more thoughts.

MR. ORSINGER: I wanted to make a motion.

MR. LOW: All right. That's what he wants to do. Okay.

MR. ORSINGER: And my motion would be that we reintroduce the concept of allowing an extension after the first one if it is unopposed, as opposed to agreed to, and where that would best be introduced I'm not trying to say, but I just think the concept of unopposed should be in there.

MR. LOW: Okay. All right. All in favor of that? As I understand his argument, like if you have a client who's violent and you say, "Judge, I agree, but I can't verbally agree to that, but I won't oppose it" because, you know, you just don't want to say "yes" to some things that you know -- that you know isn't right.

All right. All in favor of using the term being an -- and substituting "unopposed" for "agreed to."

Is that what you're talking about?

MR. ORSINGER: Yes, although they may think it's better to rewrite more words than just one. I'm not trying to tie their hands.

PROFESSOR CARLSON: Just one concept for the other.

MR. ORSINGER: Yes. Yes.

MR. LOW: Yeah, one concept, yeah. All right. All in favor of the unopposed concept as opposed to the agreed-to concept, raise your hand. 18, I believe. Is that correct? 18 in favor.

All opposed to that vote? One. Next time I want something I'm going to get you to make the motion.

HONORABLE TOM GRAY: Buddy, could I propose that the language would be "The court may extend the duration beyond the above-referenced time period if not opposed by the parties."

MS. WINK: Can we make it "only if unopposed"?

MR. LOW: Yes. "Only if unopposed." All in favor of that, raise your hand. All right, raise your hand.

MR. ORSINGER: Can I ask if "unopposed" includes agreed or not?

MR. MUNZINGER: Buddy, can I ask a question

about that?

MR. LOW: Sure.

MR. MUNZINGER: I think if you put language like that in here then you make people wonder why you have a subparagraph (3) that talks about the parties agreeing. I've never understood the distinction between me agreeing to it and me not opposing it. Richard has a reason for it. I don't know why. I'm not as smart as he is, and I mean that sincerely, but I don't know what the reason is to --

HONORABLE SARAH DUNCAN: It's doctors and dentists, Buddy.

MR. MUNZINGER: -- be able to say I don't oppose it, Judge, but I can't agree to it. You just agree to it.

MR. LOW: Yeah, but it doesn't work that way. I've had things I knew they were right, but I couldn't agree that my client was that bad on the record. I didn't want to do it on the record. I say I won't oppose that.

MR. MUNZINGER: Well, but what do you do to a rule if you say "unopposed" and then the next one you say "unless it's unopposed" and then the next one it says "the parties may agree"? It seems to me it's almost self-conflicting. Like I said, but why? This is a rule.

It's made for people like me that can barely read English that need help.

HONORABLE SARAH DUNCAN: I don't think we're going to have unopposed and agreed. It's that agreed is out, unopposed is in, and unopposed includes agreed.

MR. MUNZINGER: Well, I didn't hear --

HONORABLE SARAH DUNCAN: Agreed is a subset of unopposed.

MR. MUNZINGER: I didn't hear that as part of Richard's motion.

MR. ORSINGER: Could you rewrite (3) to say that "A temporary restraining order may not be extended beyond the duration" -- I hate "above-referenced" -- "beyond the above-referenced time periods except when unopposed or by agreement" or "by agreement or unopposed" or something?

MS. WINK: Yes. We can do that language if you guys agree to it. Something that gets that concept.

MR. LOW: Okay. All right. Anybody want to change their vote with this amendment or does it stick the same? Anybody opposed to that?

MR. MUNZINGER: Could you read the amendment for us?

MR. LOW: Read it again. Go ahead.

MS. WINK: Okay. Sub (3) would say, "The

court may not extend the duration beyond the above-referenced time periods unless unopposed or agreed by the parties."

MR. ORSINGER: Or you could say "unless the extension is agreed to or unopposed."

MS. WINK: That works.

MR. LOW: The concept, we voted "yes" on the concept, and that's not inconsistent with the concept we've approved. Okay. What else?

MS. WINK: That is the end of that one. The last --

MR. LOW: Wait just a minute.

HONORABLE DAVID EVANS: I had a new issue. It has to do with the mandatory contents of the temporary restraining order and the later effect of mandatory content of a temporary injunction. There are cases out there that hold that if that content is not present, these elements aren't present, the order is void. It cannot be waived. In other words, failure to object to the absence of it doesn't waive it, but there's also some couple of cases out there that say that it's even void even if the parties agreed to the form and the substance of the order, and it leaves you in the unusual circumstance of a contempt motion that was agreed to by the parties that can't be -- an injunction that can't be enforced even

though it was a negotiated injunction, and the reason that the parties don't -- that the defendants don't want to have all of the elements in there, they don't want the judge to state the immediate injury or loss or damage. They want to agree to it and let the status quo stay while they get the case ready, but it leaves you with this problem.

I pulled up a couple of cases on it, and so I wanted to just say that if -- I hate to get into the word "unopposed" or "agreed to." After that discussion I could think of a better time, but it seems to me that this mandatory language that says "must contain," it could also be modified to say, "must, unless agreed otherwise, contain these elements" and then you'll allow the parties a greater freedom to negotiate a temporary restraining order or temporary injunction that's enforceable and may not necessarily carry all these bad -- these harmful recitations as they see it in the record. So that was my suggestion

MR. LOW: All right. What about that?

MS. WINK: Those two things to consider, and I think you've pointed one of them out, which is there is much existing case law that says if we do not specify the elements, the immediate and irreparable injury, no adequate remedy at law, et cetera, if we do not specify

those, it is void ab initio. So you're absolutely right.

Now, I have been in situations, one darn recently, where, you know, you're sitting and talking to somebody who's not injunctive specialist and maybe you're trying to work out an agreement to solve a whole case, but they want an injunctive thing, just one issue to be mutual, and they don't have pleadings to support it. They don't have anything that would make it stand up at all. I can't make that happen necessarily under the existing rules. The best I can do is what you have done, or close to what you have suggested, say that specifically these issues would have to be -- the parties would have to agree that those specific elements are met. I think that's as close as we can get and give fair justice to existing law and standing law. Does that get close enough for you?

MR. ORSINGER: Well, why do we have to give fair justice to that? Can't we just make a policy recommendation?

MS. WINK: I think -- well, you have the right to do that. That's what this committee is here to do. I think it's dangerous when we're talking about extraordinary writs and injunctive writs in particular if we allow people to be willy-nilly. The reason we're making so much explicit language in the rules of what has to be in the orders under existing case law is so that

people won't be caught unaware of that.

HONORABLE DAVID EVANS: I had an injunction this morning -- yesterday before I left that sets where a loved one is going to be buried and then reburied after a certain period of time. Don't figure out how that happened. There are no reasons recited into that, but all the parties negotiated it and agreed to it, and it would be a shame if I couldn't enforce that five years from now when the eldest party passes away.

MS. WINK: If I may, I think what we can do to get around that is to have an agreed judgment as opposed to an agreed injunction. An agreed partial judgment. Parties can agree to those kinds of things and take it out of the world of injunctive.

HONORABLE DAVID EVANS: This is a terrible trap for --

MS. WINK: It is.

HONORABLE DAVID EVANS: It just leads to -- you know, you get down to contempt and somebody hasn't obeyed a court order, yeah, I agreed to it, but, you know, didn't hit the technical spots; and, you know, every other order I enforce the findings of facts and conclusions of law in a separate document. These are just findings and conclusions, and to say the order is void because of that really strikes me as putting the wrong emphasis on the --

that the case law, the policy, is wrong behind that, especially when it's agreed to.

MS. WINK: And, by the way, this doesn't just stop at our intermediate appellate courts. There are Texas Supreme Court authorities on this.

MS. CORTELL: That say if it's agreed?

MS. WINK: Yes.

MR. LOW: Judge, all right, what are you suggesting?

HONORABLE DAVID EVANS: Well, my suggestion was, is that there be --

MR. LOW: Okay. If we can get some language that we can --

HONORABLE DAVID EVANS: -- or agreement.

MR. LOW: If I can understand it everybody else can.

HONORABLE DAVID EVANS: Yeah, "Unless otherwise provided by the Texas Family Law Code," comma, "statute, or by agreement, every order must provide for" -- I think that would do it.

MR. LOW: Let's let her write it so we can see.

MR. MUNZINGER: May I ask a question of the Judge?

HONORABLE DAVID EVANS: Yes.

MR. MUNZINGER: How do you memorialize the agreement, and should the agreement be memorialized in some way? Rule 11 says, "No agreement of the parties" -- as I recall it, I don't have it in front of me, but "No agreement of the parties is enforceable unless made of record, signed by the parties, or otherwise reduced in the record," et cetera. So if we're going to say that this order can be entered and the parties have agreed to it and it's binding and it's overturning all of this case law and that's the reason for it, how are we going to have the formality of that agreement or should we have the formality of that agreement referenced in the rules? Even if only to say unless -- or agreed to as provided in Rule 11 of these rules.

MS. WINK: I believe what the judge is referring to --

HONORABLE DAVID EVANS: "Unless otherwise provided for in these rules." I guess, Richard, I just saw it as a pretty simple matter. You have parties in there getting ready to tee up a temporary injunction or they're on temporary restraining order, and they say, "We've reached an agreement, Judge. We've agreed to this restraining order language. I don't want all of this language in here about my guy being a bad guy." You say, "Oh, don't worry about that. I'm not going to let the

jury hear that."

"I know you aren't, but they're going to publicize it everywhere. I'll agree to the injunction, but I don't want this set of findings out here."

MR. LOW: Justice Gaultney, I believe, did you have your hand up?

HONORABLE DAVID GAULTNEY: Isn't the reason those cases are saying it's void is because the rule did provide for an agreement?

HONORABLE DAVID EVANS: Exactly.

HONORABLE DAVID GAULTNEY: And if the rule provides for an agreement then that would eliminate that concern.

MS. WINK: There are some cases, however -- and the one I'm most familiar with is when the parties enter into an agreed temporary restraining order, for instance, and let's assume that they complied otherwise with everything else. If they did not specify and agree to the bond, to bonds, if they didn't have bonds in there, they say, "Oh, I'll agree not to have a bond," void. Absolute void.

HONORABLE DAVID GAULTNEY: But isn't that because the rule doesn't provide that you can agree not to have --

MS. WINK: No. It's unwritten. You know,

the statutes tell -- or the rules and the statutes tell us that we have to post a bond or now we're expanding that to other security.

MR. LOW: Sarah.

HONORABLE DAVID GAULTNEY: The rules provide it.

MS. WINK: The rules provide that.

HONORABLE DAVID GAULTNEY: But if the rules provide that you can agree to be bound by an order then it seems to me that that fixes that problem.

MR. LOW: Sarah.

HONORABLE SARAH DUNCAN: Well, I was just going to say I think the reason the rules have been interpreted as they have, at least what the courts have written is that this is really a rather extraordinary thing to restrain someone from doing something or to make somebody do something, depending on whether it's a mandatory or obligatory injunction or TRO; and it's for that reason that the Supreme Court has said the rules have to be strictly construed and completely complied with; and we might want to fix your problem in some way, the parties' problem; but I don't know that we want to do it through this vehicle, which is a rather extraordinary thing.

HONORABLE DAVID EVANS: I just think you get

parties that enter into orders everyday now where they agree to them, and they want to enforce them, and they come to court and find out that they're unenforceable and then, you know, it then falls on some lawyer who didn't draft it properly to handle it to the judge. It won't come back on the judge's head. It comes on the party's head and attorney's head for not meeting the requirement, and that's just pretty harsh.

MR. LOW: Well, what language, what would you --

HONORABLE DAVID EVANS: I think Elaine has got some here.

MR. LOW: All right. Read some language so we can intelligently vote.

HONORABLE DAVID EVANS: All right. Well, looking at subparagraph (d) which starts off with "The court may grant the application." After the word "Texas Family Code," strike the word "or," strike the word "other," place a comma after "statute," and add the words "or by written agreement," and that's it.

HONORABLE STEPHEN YELENOSKY: By written agreement or by agreed order?

MR. LOW: All right. Everybody --

MR. MUNZINGER: Did you say "or by agreement"?

HONORABLE DAVID EVANS: She said "or by written agreement," and I could live with that.

MR. LOW: All right.

HONORABLE STEPHEN YELENOSKY: Not by written order or not by agreed order?

MR. MUNZINGER: Yeah, if I signed an order that said "approved and agreed to" --

HONORABLE STEPHEN YELENOSKY: Yeah, you would have to have a separate written agreement.

MR. MUNZINGER: That would be an agreed order I bound myself by it when I said --

HONORABLE DAVID EVANS: "Or by agreed order" would be fine. I was figuring we were going to get a draft back and have some fun debating at the next meeting anyway, so but maybe I was being realistic.

MR. LOW: Read what we're going to -- read what we're going to present to the committee to vote on.

PROFESSOR CARLSON: Well, I want to hear from you guys.

MR. LOW: All right. Steve.

HONORABLE STEPHEN YELENOSKY: Well, Sarah, I think people agree to things all the time that if granted over their objection would be extraordinary and obviously support all the protections in there for TROs and TIs when they're granted, either ex parte or without somebody

there, but it is hard for me to see the policy reason for undermining the enforcement of an order that somebody agreed to, and the only intent of that order could have been to bind them, and so I don't really see that any of the policy reasons for strict construction of the temporary injunction requirements makes sense in that context, and I don't see why we would have to have a separate written agreement and an agreement -- it should say "by agreed order" and not suggest that they need a separate Rule 11 agreement.

HONORABLE DAVID EVANS: Yeah. "By agreed order" would probably do it. I would just think that the motion would be should the parties be able to agree to an order and thus waive the --

MR. LOW: I understand.

HONORABLE DAVID EVANS: -- requirements.

MR. LOW: How else would they agree officially other than the order? If they agree, the judge is going to show by order they've agreed, wouldn't he?

HONORABLE DAVID EVANS: "An agreed order" would probably take care of it.

MR. LOW: Otherwise it would be a Rule 11, and we don't want to get into that.

HONORABLE DAVID EVANS: "An agreed order."

MR. LOW: "Agreed order." All right. Does

everybody understand the amendment? All right. All in favor of the suggested amendment -- Gene, you have a question?

MR. STORIE: I think I have one, which is why not just say "statute" rather than "Family Code or other statute"? I mean, is there a reason, Richard, or anyone, we need to single out the Family Code?

MS. WINK: The only reason I would say so is throughout the rest of the rules we have been explicit to the Family Code. That's going to be true with injunctions as opposed to all the others, simply because the most often you're going to have a tug and a pull is with the Family Code, so to be consistent with the rest of the injunctive rules I would say let's go ahead and say "unless exempted by the Family Code or statute." So I would recommend -- I agree with your analysis, but I think to be --

MR. LOW: All right. All right. Elaine, read so we know exactly how it reads, and we'll vote.

PROFESSOR CARLSON: Okay. Page two under (d), order, second sentence, "Unless provided otherwise by the Texas Family Code," comma, "statute," comma, "or by agreed order," comma, "every order granting an application for a temporary restraining order must" --

MR. LOW: All in favor of that raise your

hand. 18 in favor.

All opposed? Okay. One opposed. Okay. Now, where do you want to go for the next 15 minutes or so?

MS. WINK: Let me see if that gets all of our --

HONORABLE TOM GRAY: Buddy, just where it's on the record if somebody reads this later, one of the problems that I see with the agreement that I anticipate seeing as a result of a mandamus will be when they do not agree on a date, but the -- and the order does not specify a date for a temporary injunction hearing or even a final injunction hearing and one party then starts trying to avoid that hearing because they got what they want in the TRO and perpetually postpone it, and then you wind up not being able to get them there.

So there are some problems with some of the individual factors not being in a TRO that may not be immediately evident when everybody is down there facing it; and I'm very sympathetic to David's problem of, you know, here they've got an agreement. Well, yeah, they've got an agreement, but how far out are they thinking with regard to that agreement, and so that's why I didn't vote at all. I couldn't think of a way to fix it.

MR. LOW: All right, but my next question is

do you have a solution?

HONORABLE TOM GRAY: See, sometimes it helps to listen. Last words, I didn't know a way to fix it.

MR. LOW: Don't accuse me of listening.

HONORABLE DAVID EVANS: I think that -- well, I seriously doubt anybody would sign an agreed order without a trial date in it.

HONORABLE TOM GRAY: That's the number one reason I see TROs busted.

HONORABLE DAVID EVANS: But having said that, if there was an unlimited TRO signed or a temporary injunction signed, I would think that the party who's not getting to trial would be there and ask the court to dissolve it because their parties are dragging their feet and not going to --

HONORABLE SARAH DUNCAN: But there's no appeal.

HONORABLE DAVID EVANS: Well, it can be on interlocutory appeal. It doesn't keep you from going on permanent injunction, though.

MS. WINK: TROs don't go interlocutory appeal.

HONORABLE DAVID EVANS: I mean, sorry, not TROs, but temporary injunctions.

HONORABLE SARAH DUNCAN: That's part of the

reason I voted "no," is sometimes parties are represented not by the best lawyers at the beginning of the lawsuit and sometimes they get better, the lawyers, and sometimes they get worse; and because this is not appealable, none of these things, these requirements, may be met in any given situation; and yet someone could find themselves under a perpetual nonappealable TRO; and I don't think that's a good idea.

PROFESSOR CARLSON: Well, I think under the Quest case the Court interpreted them because it was ongoing as a temporary injunction and allowed the appeal.

HONORABLE SARAH DUNCAN: Yes, but it wasn't just -- the Court was explicit that just because it was open-ended at the end, in time, was not -- it was the nature of the relief. The time was part of it, but that was not all of it. That was not the sole consideration.

PROFESSOR CARLSON: No, it wasn't.

MR. LOW: Okay. What next do you -- I understand you have to leave at 4:00.

MS. WINK: Actually --

MR. LOW: What next would you like to briefly cover?

MS. WINK: Next we start picking up or actually moving forward to where we left off last time.

MR. LOW: Oh, my goodness.

MS. WINK: I know, it's frightening, isn't it?

PROFESSOR CARLSON: Where are we?

MS. WINK: We're on Rule 1(f).

PROFESSOR CARLSON: Wouldn't it be nice at the end if we moved to adopt them?

MR. LOW: 1(f). All right. I've got something written, "unless" --

MS. WINK: And we've already agreed that there will be a change to 1(f), so it will say "unless exempted by statute" --

MR. LOW: Right.

MS. WINK: -- "no temporary restraining order may be issued," so I think we're good with 1(f) unless someone has any other discussion about it.

Then I would say we move on to 1(g), and there's already been some discussion that came up about the motion to modify or dissolve with respect to a TRO that is granted without hearing. That language comes directly from Rule 680. All right. Where 1(g) does not -- does not require that it's only in a without notice TRO, so I think we need some guidance from you as to whether you want the motion to modify or dissolve to be addressed only if it's without notice. Before you go there, let me give you some thoughts that came from the

subcommittee, okay.

Sometimes that order got issued and had that a technical flaw in it, and in order to save it if it was brought to the -- brought to the court's attention quickly within a few days on a motion to modify the court could modify the TRO so that it would comply with law, right? So that was one of the reasons that we didn't want to limit it to only in cases when the TRO was issued without notice the way it is currently in Rule 680. It gives the court a quick opportunity to say, "Ah, we forgot to put a date in there," or "Ah, it's not agreed and we didn't say why there was irreparable injury or no adequate remedy at law"; and if the court is able to address that quickly and fix an order so that it doesn't go on as a void ab initio order we just thought that would be in the best interest of justice.

HONORABLE SARAH DUNCAN: But if it's void, it can't be fixed. It's just void.

MS. WINK: There are some cases that talk -- you're right, there are void from the beginning, but again, if we're catching it early and the court reissues the order, you can issue another injunction. Sometimes --

HONORABLE SARAH DUNCAN: You can issue a new TRO.

MS. WINK: Yes.

HONORABLE SARAH DUNCAN: But it doesn't make the first TRO not void.

MS. WINK: Correct, but there are some things where it's not void when voidable. For instance --

HONORABLE SARAH DUNCAN: Yeah.

MS. WINK: -- like if the court granted a bond and the other party thought, "Judge, really we didn't have enough evidence for you the other day, but that bond is not sufficient to protect the enjoined party," and if the court is willing to hear that, that could be fixed. So I agree with you. I agree with you. It's not perfect, and maybe we need to recraft it in some way.

HONORABLE SARAH DUNCAN: I think there's enough confusion already about void and voidable that if it's voided I think the rules should be correct, and if it's void, it's void, and it can't be fixed.

MR. LOW: This speaks only in terms of being voided by the party against whom the injunction is granted. What if the husband or wife got one, say, and then they kind of get together and he wants to come in and he's the one that got the injunction and say, "Okay, I agree, we'll dissolve it." I mean, he couldn't file a motion?

MS. WINK: Not under the current practice. Under the current rule, Rule 680, the motion to modify or

dissolve is only in situations where the party who is being enjoined did not get notice, and that's the party filing.

MR. LOW: Huh. So that party that got it couldn't say, "Well, I made a mistake, I'm sorry, dissolve it, please." He can't -- he created a mess, and I can't clean it up. Okay.

MR. ORSINGER: They might be able to do that by agreement. I don't know.

MR. LOW: Well, I guess. Then you could tell him, say, "Well, you know, you got it, you do it." I mean, you know, or you're the one against whom the injunction was granted. It just seemed like any party to it ought to be able to move to dissolve it.

MR. ORSINGER: I would be okay with that. Can the parties dissolve it by agreement, or do you think that even that is not allowed?

MS. WINK: Parties don't get to -- we don't get to overrule judges by agreement. We've still got to take it back to the judge and ask the judge to -- as I understand it. I'm not a judge, but that's my understanding.

HONORABLE DAVID EVANS: I'll sign anything with two other signatures on it.

MR. LOW: Only the person against whom the

injunction was granted, not the one who sought it, can seek to dissolve it. If that's the law then I guess we live with it.

HONORABLE SARAH DUNCAN: But --

MS. WINK: Well, we're recommending that either party, a party, either party, gets to move to modify or dissolve, so --

MR. LOW: It says on two days notice to a party, you've got to give notice to a party who obtained --

MS. WINK: Oh, fair enough. Okay. Good point. I misinterpreted that.

MR. LOW: So who is that? I mean, you're going to give notice to yourself? I mean, it says two days notice to the party who obtained it, means the other party is the one, and they speak of the other party. They don't speak in terms of the party who granted it --

MS. WINK: Fair enough.

MR. LOW: -- or who obtained it.

MS. WINK: Why don't we strike the language that says "to the party"? In other words, make it say "On two days notice, or shorter if the court directs" and leave the rest of it.

MR. LOW: The party may move, and either party could do it.

MS. WINK: Correct.

MR. LOW: Okay.

MR. ORSINGER: Well, and there may be third parties that are entitled to notice of any motion, and this doesn't really require that they get notice, so why don't we just say "on reasonable notice"?

MS. WINK: They are a party. If they are parties they can move. If they are not a party to the case they can't --

MR. LOW: Right, if they're not a party they can't move that.

MR. ORSINGER: No, but it's not required you give notice to anyone but the party who obtained the injunction, but in a three-party lawsuit, out of which one party obtained the injunction and the other one is relying on it, they're not entitled to notice because they didn't get it. That's not right. Every party is entitled to notice of every motion, so I don't think the notice should be limited just to the party who secured the injunction.

MS. WINK: Right. And that's why we're striking that language.

MR. LOW: We're not doing that. We'll say "a party."

MS. WINK: We're knocking out the language. It's now going to say "On two days notice, or shorter if

the court directs, a party can move."

MR. LOW: All right. Sarah.

HONORABLE SARAH DUNCAN: I think it assumes incorrectly that the only people who may want to dissolve or modify a TRO are people who are parties or entities who are parties to a lawsuit. The case I was mentioning at the break actually purported to enjoin, restrain a Mexican corporation that was not a party to a lawsuit, and so I think that might be a little limiting when it says "a party."

MR. ORSINGER: Let me follow that up with back on Rule 1 subdivision (d)(10) the TRO is actually effective on parties, officers, agents, servants, employees, and attorneys, so maybe the test ought to be if the TRO is effective on you, you have the right to move to dissolve it. So let's say I represent someone and this TRO reaches out and keeps me from doing something as a lawyer that I ought to be able to do. My client may not care to move to dissolve it, but I might. So is there a way for us to coordinate that so that anyone who is adversely or anyone who is impacted by the TRO can move to dissolve it?

MS. WINK: If you were going to go there perhaps the good language would be "a party or a person affected by" -- "a person enjoined by a TRO."

MR. LOW: Well, the person --

MR. ORSINGER: "Bound by." "Affected by" could be way downstream.

MS. WINK: You like "bound by"?

MR. ORSINGER: Could you say "bound by"?

MR. LOW: Yeah.

MS. WINK: Uh-huh. That's good.

HONORABLE SARAH DUNCAN: Well, except they may not be bound by it. They may just be purported to be bound by it.

MS. WINK: Under the language they're bound by it. The order is binding upon the parties to the action and all of these others, including persons in concert.

HONORABLE SARAH DUNCAN: Right. That's the way it's written, but I will guarantee you the judge in this case believed her order was binding on the Mexican corporation that was not a party to the lawsuit and would continue to under this rule. That would be her view, and I think you make a good point. All of the people affected adversely. Maybe it should be all the people and entities named in the order, any of those can, because if you start naming attorneys and agents and nonparties to the lawsuit, anybody who is restrained from -- I mean, I might know -- I mean, we did know in this case that a nonparty to the

lawsuit who wasn't served with the TRO or the temporary injunction wasn't bound by it, but when you try to convince prudent corporate officers and counsel that you're really not bound by this and you can completely disregard it, they're not going there. They are not going to violate a court order just on the say-so of a lawyer.

MR. LOW: What if you had an agreement that you're going to pay your -- you're buying -- you're in a business deal, and it has to be done in a few days and then they are restrained from withdrawing money from the bank, but they have to do that for that. Could a business partner who's affected by that say, "Look, we want the bank not to be bound by it"? You know, "It's going to affect us." I mean, it's a question of -- a lot of people are affected directly, indirectly, and remotely. How directly do they have to be affected when you say first? Richard.

MR. MUNZINGER: Well, the circumstance that Richard mentioned is obvious when it says "or participation." The rule says "or participation." It doesn't say I have to be a conspirator.

MR. LOW: Right.

MR. MUNZINGER: It doesn't say I have to do something evil.

MR. LOW: Right.

MR. MUNZINGER: I'm just participating.

MR. LOW: Right.

MR. MUNZINGER: And that can come up, for example, in an antitrust case. You can sue one party. The other may or may not be a necessary party. If it's a necessary party, obviously you've got a problem, but if I enjoin A, and A's price-fixing scheme involves B, B is working with him in participation. He's bound by the injunction. I've had that very fact circumstance, and I chose to sue the party who didn't have a lot of money, for obvious reasons, because he wasn't going to fight me as hard as the guy that had all the money. So that is a -- it's a bona fide situation.

HONORABLE SARAH DUNCAN: Same with breach of fiduciary duty.

MR. MUNZINGER: Yeah. And here's another problem. I'm the plaintiff, and I get this temporary injunction, and under this rule as it's now written it says "the party who obtained the temporary restraining order" -- on notice to that party you can change it, and now we're contemplating changing it on the motion of any party to include the plaintiff.

MR. LOW: Right.

MR. MUNZINGER: I get the order on Monday. On Thursday I want to change it, and I send notice to the

person who was enjoined, who may or may not have been served. May or not. I'm not so sure that's a good rule. I mean, suppose I do that because -- you know, there are people that can be pretty dadgum creative in this business. That's a real problem here. So which order am I defending, the first one I got, Judge, or the second one that I haven't been served with yet? And you've got a hearing coming up here, and this guy's changed it. There's some nuances here that we may not have thought through.

MR. LOW: All right. Be thinking about this because -- as you're in the bar tonight because you won't have forgotten it because in a couple of months we'll be convening again.

PROFESSOR CARLSON: Thank you, Dulcie.

MR. LOW: Next meeting is May 13th, and that is a Friday.

MS. SENNEFF: I hope so.

(Adjourned at 4:02 p.m.)

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REPORTER'S CERTIFICATION
MEETING OF THE
SUPREME COURT ADVISORY COMMITTEE

* *

I, D'LOIS L. JONES, Certified Shorthand Reporter, State of Texas, hereby certify that I reported the above meeting of the Supreme Court Advisory Committee on the 25th day of March, 2011, and the same was thereafter reduced to computer transcription by me.

I further certify that the costs for my services in the matter are $1,905.00.

Charged to: The Supreme Court of Texas.

Given under my hand and seal of office on this the 16th day of April, 2011.

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