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MEETING OF THE SUPREME COURT ADVISORY COMMITTEE

October 16, 2015

(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 16th day of October, 2015, between the hours of 9:00 a.m. and 4:24 p.m., at the State Bar of Texas, 1414 Colorado, 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

15-01 Proposed Amendments to Parental Notification Rules

15-02 Redline Parental Notification Rules Draft 10-9-15

15-03 Clean Parental Notification Rules Draft 10-9-15

15-04 Alliance for Life Suggestions, Parental Notification

15-05 Current Version of Canon 3.B(8), Code of Judicial Conduct

15-06 Clean Proposed Revisions to Canon 3.B

15-07 Redline of Proposed Revisions to Canon 3.B

15-08 Example of Emails to Justices

15-09 Memo on Ex Parte Communications by Martha Newton

15-10 Survey of Court Clerks on Ex Parte Communications

15-11 Judicial Ethics Commission Opinion #154

15-12 SB No. 455 Enrolled Version

15-13 Proposed TRJA 14 - Special 3 Judge Panel, Final 10-12-15

15-14 Redistricting Litigation - FJC

15-15 Bill Analysis SB455 - Senate Committee Report version

15-16 Rule 13 Texas Rules of Judicial Administration - MDL

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CHAIRMAN BABCOCK: Welcome, everybody, to the first meeting, first session, for our new three-year term for this committee. It's been a little late coming, but here we are after all. As most of you know from past experience in this committee, I think everybody shares my view that this is one of the best things that certainly that I do in my professional life, and it's a great honor to be with probably 50 of the greatest minds in the state in the legal community, so thanks for being here and thanks for serving on this committee.

For the new members and as a way of reiterating this for the old members, we have a very few rules, but here are some of them. We only consider what the Court wants us to consider. Before I was chair, the practice of the committee was to take anything in the state, any citizen, lawyer, anybody wanted to raise, and we would study it and then pass along things to the Court, and more often than not the Court was not interested in those things and wouldn't do anything, and it wasted -- not wasted, but it took a lot of our time in an unproductive way. So now we only consider something if the Court wants us to. If you or somebody you know wants a rule to be amended or changed or looked at, send that to me and Justice Hecht, and Chief Justice Hecht will canvass

the Court to see if that's something the Court wants us to look at, and if so then we'll go and look at it.

The second thing that I think we need to all keep in mind is that we are the Supreme Court Advisory Committee; that is, we give advice to the Supreme Court. Like most of our clients, they don't have to take our advice. Sometimes they do, mostly they do, but often they don't, and that's fine. There was a time, long time ago, when this committee thought maybe we were the Supreme Court, but we're not. We're just advisors to the Court. The Court obviously has the -- has the final say.

So with that, I want to talk about and recognize the new members of our committee, if they are here. Justice Bill Boyce of the Fourteenth Court of Appeals. There's Justice Boyce, nice to have you with us, and Justice Brett Busby also of the Fourteenth Court. Hello, your Honor, and then we have Cristina Espinosa Rodriguez.

MS. RODRIGUEZ: Good morning.

CHAIRMAN BABCOCK: Is it the new people sit together?

MS. RODRIGUEZ: Safety in numbers.

CHAIRMAN BABCOCK: Is that the thing? Nice to have you with us. And Evan Young from Baker Botts. All three of you sitting together. We also have Judge

Alcala from the Texas Court of Criminal Appeals. Is she here? She is an appointee -- well, she's the Lieutenant Governor's -- no, she's from the Court of Criminal Appeals. Wade Shelton I think is here. Hi, Wade.

MR. SHELTON: Hi.

CHAIRMAN BABCOCK: And Carlos Soltero. Carlos is here. Great, nice to have you with us.

MR. SOLTERO: Thank you.

CHAIRMAN BABCOCK: We welcome you, and I think you'll say when it's all said and done this is a fun ride. We've had to change and adjust the schedule slightly, and I apologize for that, but it was unavoidable. Today we are going to go until 1:00 o'clock, so I hope everybody had breakfast, and we will break at 1:00 for lunch, but we're only going to take a 30-minute break for lunch. Customarily we take an hour, but today we're only going to take 30 minutes, and then we're going to go and recess at 4:30. There won't be any Saturday meeting, and we're going to have to have another meeting this year, and it is going to be December 11th, and we'll send notices out on that, but you might mark that on your calendar. And is it going to be here or at the -- it's at the Texas Association of Broadcasters building, the second floor.

Most of you know my right hand, who things

wouldn't get done without her, but this is Marti Walker to my right, and she handles all the administrative aspects of this committee and posts things to the website; and the man to my left needs no introduction, Chief Justice Hecht, who will report from the Court. We started doing this a number of years ago so that the Court would have an opportunity to tell us what's happened to our work product. Since we had no work product from this committee or from the hold over committee, he won't have anything to say about that, but he also often has nice tidbits to share with us so we can go back to our communities and say we're insiders and we found all of this great stuff out. So there we go. Chief Justice Hecht.

HONORABLE NATHAN HECHT: Thanks, Chip, and first of all, thanks to all of you for your service on the advisory committee. The committee has been in existence since the Rules of Civil Procedure were created, since the Rules Enabling Act back in 1939, and has served the Court in various iterations over the years, so very pleased that you have agreed to serve on the committee, and the Court does review the transcripts of the meetings and looks very carefully at the arguments that are made as well as your bottom line recommendations. So we're interested in the debate as well as the -- as well as your conclusions.

The Court's deputy liaison to the committee

is Justice Jeff Boyd. He was unable to be here today, and we would ordinarily try to find another day, but we need to get the work done on the bypass rules as soon as we can because those rules take -- the changes in the statute take effect January 1st, so we've had to move ahead. Justice Boyd is sorry that he can't be here today, but he is thoroughly engaged in the rules work and the work of this committee.

Martha Newton is the Court's rules attorney. She's seated on my left. Most of you veterans know Martha, but she is available on rules issues whenever, and so you're welcome to call her with questions that you have at any time. Shanna Dawson is our paralegal that works on rules, and she's here, too, and will be helping us as well.

Well, on rules issues, let me just say that the electronic filing project begun by the Court in December of 2012 -- 13, 2013, is complete. In the middle of September all 254 counties in Texas were able to accept electronic filings. It's mandatory in 62 of the counties, and it will be mandatory in all 254 on July -- on July the 1st of next year, but it -- it's mandatory now in all of the counties with more than 50,000 in population. So there are 192 counties that have less than 50,000 in population, which gives you some indication of the

challenge that this has been. For many of the clerks in counties there was simply no technological availability wherewithal to accept electronic filings or manage them once they got there, so this has been an effort by Tyler Technologies, the Court's contractor on this project.

It's the largest electronic filing project in the United States and has become a model for the other states who are trying to get there as well. This is -- it will be mandatory in all civil cases in all counties in Texas with the exceptions that are in the rule by July 1st of next year. It will be available in criminal -- for criminal cases in clerk's offices, and with courts who want to accept electronic filings, it will be up to the trial courts in each jurisdiction to decide whether they want to or not. That's starting November the 1st. Some jurisdictions are very anxious to begin this, some are not so sure. So in criminal cases they'll have some time to look at this, and the Court of Criminal Appeals expects to have a hearing next spring to decide whether electronic filing should be mandatory in criminal cases. So that's coming along.

In August, we issued a couple of orders that we felt were necessary as interim procedure pending further consideration by the committee. One is to exempt truancy cases from electronic filing. Because they are

now no longer criminal and are more like juvenile cases, and juvenile cases are exempt from electronic filing, we exempted those as well. Nobody knows exactly how many there are going to be. Nobody knows exactly how this is going to play out, so as time passes it may be that they shouldn't be exempt, but this was an effort to try to maintain the status quo. The identities of juveniles are sensitive, of course, and so we wanted to be careful about that, but going forward it may be that these should be electronically filed like all other cases. We'll just have to see and then look forward to your advice on that subject.

Another change made by the Legislature was in Senate Bill 888. Before now the decision by a juvenile court to certify a juvenile for trial on criminal charges as an adult was not appealable until the final judgment of the criminal court. And that's been the law for maybe 20 or 25 years. Now they have -- the Legislature has changed that and made that order of certification appealable immediately, as soon as it is issued. We were concerned that this would catch lawyers off guard. They might not have been following the changes. They might not know to appeal. They might think they were still under the old law. A court might rule that because you didn't appeal when you could, you can't appeal from the final judgment,

so to try to forestall some of these problems we issued an order that requires trial judges in these cases to tell the juvenile on the record in Court that the juvenile can appeal the certification order immediately and to put that in writing in the certification order to minimize the chances that somebody is not going to pay attention to that.

Also, the law provides that the appeal from the certification order will not stall, continue, postpone the criminal proceedings, so we also put in the order that appellate courts should try to decide these issues within 180 days. We're always putting mandates on the courts of appeals to decide this issue or that issue in a hurry, but there are not very many of these orders, and obviously it would make a big difference if the case were not going to be tried in the adult court. So, again, this is just an interim order, and we welcome the advisory committee's counsel on what we should do permanently going forward.

Then just two other things, we changed the MCLE rules to revoke the so-called emeritus exemption, which exempted lawyers who were 70 or more from the requirements of MCLE, so they will now be required to have MCLE as well, and we're thinking about for lawyers that are over 80 doubling the number of hours. I don't know -- I don't know who that affects, but --

MR. LOW: You got my attention.

HONORABLE NATHAN HECHT: Yeah. So this came from Buck Files, who is over 70 himself, and was enthusiastically supported by Justice Johnson, who will be 71 a week from tomorrow.

The other thing is that the restyled Rules of Evidence were finalized by the Supreme Court and the the Court of Criminal Appeals in -- effective April 1, and so this really reflects the best work of this group. The subcommittee that worked on this really did extraordinary work. The rules are much better for the effort. As always in these projects we identified a number of issues, substantive issues, that need to be revisited; and some of those are before the committee at some point already, so this is really a great thing; and we're very proud of the new Rules of Evidence. That's all I have. I'd be happy to respond to any questions.

CHAIRMAN BABCOCK: Any questions? Okay. Well, we'll move on to the next agenda item, which is comments from other Texas Supreme Court Justices. Since there are none here, probably can dispatch with that quickly, although Justice Hecht said we could expand it that anybody who wants to be a Texas Supreme Court justice could speak very briefly. Okay. Nobody on that.

Our next -- the next item is the October 9th

referral letter from Chief Justice Hecht on additional matters to consider, and that is posted on the website, but for purposes of study the first two items deal with Texas Rules of Evidence, which is Buddy Low's subcommittee. That's Rule 203 and Rule 503, and the evidence subcommittee consists of Buddy Low, chair; Justice Brown, vice-chair; and then Levi Benton, Professor Carlson, Professor Hoffman, Roger Hughes, Mr. Kelly, and Judge Alcala. Peter Kelly and Judge Alcala. So that's who is going to consider that.

Then the next item is new TRAP rule on filing documents under seal, and that will be assigned to the appellate subcommittee chaired by Professor Dorsaneo. The vice-chair is Pam Baron, and the members of that committee are Justice Boyce, Justice Busby, Professor Carlson, Frank Gilstrap, Skip Watson, Evan Young, and Scott Stolley; and Scott wanted me to point out that he has changed firms and is now with Cherry Petersen Landry Albert, 8315 North Central Expressway. He's got business cards to hand out to everybody if you're interested.

The next item is rules for juvenile certification appeals that came out of the 84th Legislature, and that will go to our legislative mandates subcommittee chaired by Jim Perdue; vice-chair, Justice Bland; consisting of Justice Pemberton, Professor Carlson,

Pete Schenkkan, Judge Evans, Levi Benton, and Justice Busby.

The next item is the time standards for the disposition of criminal cases in district and statutory courts, and that will go, because there's not really a natural subcommittee for this one, to Judge Peeples, his 166/166a subcommittee. Judge Peeples, the chair; Richard Munzinger, the vice-chair; Justice Boyd, Professor Carlson -- Elaine, you're getting everything.

PROFESSOR CARLSON: I know. Living the dream.

CHAIRMAN BABCOCK: Nina Cortell, Rusty Hardin, and C. Rodriguez. We have two, so, Cristina, this one is the one you're on. The next to last item is the rule for administration of a deceased lawyer's trust account; and, Jim, this goes to your subcommittee, so you drew double duty this time, along with Buddy; and then finally, the constitutional adequacy of Texas garnishment procedure. Carl, you drew the bean on this one. That's the garnishment subcommittee, Rules 523, 734. Hayes Fuller is the vice-chair. Eduardo Rodriguez is on that committee. If you guys need any help, let me know. That's kind of a skinny subcommittee because I thought we were done with garnishment forever, but anyway, you've now got a new assignment, and this will all be posted on the

website.

So we got through with that, and now the judicial bypass rules, parental notification, Professor Alex Albright and Richard Orsinger were co-chairs. Richard couldn't be here today. But Justice Pemberton, Judge Peeples, Lisa Hobbs, Judge Estevez, Justice McClure, and Susan Hays are members of that specially constituted subcommittee. They've been working very, very hard on short time -- a short time period, and we've got to get this rule done today or if not done today, very near completion, because there's a January 1 deadline for the Court on this. So, Alex, take us through this one.

PROFESSOR ALBRIGHT: Okay. Thank you. Sherry Woodfin, who is the clerk of Tom Green County, was also on our committee, and she was not listed, so I want to include her for thank you. We had a great committee. We had to work really quickly, and we powered through.

What I thought I would do is give a little bit of background on parental bypass, judicial bypass, go through and summarize the amendments to the statute, and then a little summary about how these work and then we'll go through the issues that are presented. I think this is a procedure that not many of us have a lot of experience with. Some of you judges do, but most of the lawyers here do not. Susan Hays is here, who is on our committee,

sitting next to me. She is the legal director of Jane's Due Process, which provides representation to minors throughout the state when they file these procedures, and so she can help us a lot with some of your practical questions about how it works.

So under Texas law a minor typically can obtain an abortion only with the consent of a parent or legal guardian. Originally it was notification, then it was changed to consent, but the statute has always had, consistent with the 1979 United States Supreme Court opinion of *Bellotti vs. Baird*, an alternative procedure whereby the minor can obtain authorization for the procedure without parental consent, if she can show that she is mature enough and well-informed enough to make her own decision or that the abortion is in her best interest. The opinion requires that a state that has a notification or consent law have such a procedure, and the procedure, quote, "must assure that a resolution of the issue and any appeals that may follow will be completed with anonymity and sufficient expedition to provide an effective opportunity for an abortion to be obtained."

The Texas parental consent statute includes a judicial bypass to comply with Bellotti, and this is what we have before us today. The Legislature has provided the framework for this procedure in the statute,

and it was amended this session, as you all know, to go into effect in January 2016. The Supreme Court is involved because the Legislature asked the Court to issue rules as may be necessary in order that the process may be conducted in a manner that will ensure confidentiality and sufficient precedence of all other pending matters to ensure promptness of disposition. So, in other words, the rules need to comply with the constitutional requirements of anonymity and expedition. The original rules were adopted in 1999. Bob Pemberton was the rules attorney, were amended in 2006 in response to statutory amendments, which -- was Lisa the rules attorney then?

MS. HOBBS: Probably.

PROFESSOR ALBRIGHT: We have lots of rules attorneys. Today we address the amendments to the rules with Martha Newton as rules attorney in response to the statutory amendment. In revising these rules the subcommittee was aware of two important constraints. First and foremost, to follow the amendments enacted by the Legislature. So most of the time you will see as you go through these rules that we just changed things because the Legislature said those things needed to be changed instead of -- was it three days, two days or three days?

MS. HAYS: Two days.

PROFESSOR ALBRIGHT: Two days, now it's five

days, we just changed that. Second, we were aware that we need to provide a process that passes constitutional muster to the extent that we could do so in compliance with the statute. We also had the benefit of rule revisions suggested by Alliance For Life and other organizations that were involved in the legislative process. You have that draft with your materials. It is the one -- the way I tell which one it is, it says, "Effective January 1, 2015," instead of "'16." That is a mistake I made as well, but somebody caught it for me. So to tell the difference between the two drafts, theirs has a January 1, 2015, date on the top. We also had the advice of lawyers like Susan, judges who are on our committee like Judge Estevez, and clerks like Sherry Woodfin, also on our committee, who have practical experience with these types of proceedings.

So next I want to give you all a summary of the amendments, which actually began -- the part that affects us began on page six of the bill that you have in your materials. The first part of the bill really concerns doctors and when doctors can do an abortion for a medical emergency. First of all, the statute has much more limited venue than the previous version. This is on page seven, 33.003(b). Previously the minor could file in any probate, district, or family court in the state. Now

it's limited to the minor's county of residence, with a few exceptions. If the minor's parent or guardian is the presiding judge in the county of residence then they can go to another county or if the county has a population of less than 10,000 then they go to the -- either of those situations they can go to a contiguous county or the county where the minor intends to have the abortion. That was -- we just put that into the rules. There was no -- no fudging that, so there was no decision to be made by us with the venue rules.

The attorney's sworn statement, which we'll talk about later, is on page eight, 33.003(c)(3) and then it also goes over to section (r), and I forgot to put down the page number, but it's a couple of pages later. This requires the attorney -- or requires the application to include a sworn statement of the minor's retained attorney concerning the minor's prior application history and proper venue and also to the truth of her address and the venue. There is also relating to this, which is of concern to lawyers that we have talked to, page 18, 33.012 provides that there is a civil penalty for a violation of the statute enforced by the attorney general with a 2,500-dollar to 10,000-dollar fine. So lawyers are concerned about this statement, and we will talk about it in a bit.

The amendments make it so that the guardian ad litem cannot be the same person as the attorney, so there has to be two people who are helping the minor in these proceedings, an attorney and a guardian ad litem. A guardian ad litem does not need to be an attorney. There is a list of the kinds of people who can be guardian ad litems. The minor has to appear in person. That's page nine, 33.003(g)(1). She used to be able to appear by video conference or telephone. Witnesses can still appear by video or by telephone.

The court's ruling, the most significant change is -- but again, easy to deal with from our perspective, is that it changed the deadline for the Court's ruling from two to five days. This is on page nine, 33.003(h), and that same provision also removed the deemed grant. It used to be that if a judge did not decide the application -- on the application within two days it was deemed granted and the minor could have an abortion. It is no longer deemed granted. It just leaves it -- it just says the decision has to be made in five days and leaves it at that, so we had to deal with that, and we'll talk about that in a minute.

It changed the standard of decision from a preponderance of the evidence to clear and convincing evidence, and it includes various permissible. It uses

the word "may." "The court may consider" and "the court may make" certain inquiries in making the decision. And that's on page 10 and 11, 33.003(i-1) and (i-2).

Court proceedings are to be confidential. This is page 12, 33.003(a). It removes the -- this is the only place where the statute before used the word "anonymity" instead of "confidential," and it removed the anonymity of the minor, and now it only says "confidential." It also removes a sentence that says that the minor may file using a pseudonym or only initials. It just removes it. It does not include a prohibition. It also includes a provision that allows the court to disclose confidential records to the minor.

The new statute has a provision that requires a -- the clerk to report to the Office of Court Administration and then the Court Administration to issue a report. This is page 13, 33.003(l)(L)(1). The clerk has to report the case number, style, county of residence, court of appeals district, date of filing, date of disposition, and the disposition. The OCA publishes a written report with only the court of appeals district and the disposition, and it's specifically to protect the confidentiality of the identity of the minor and judges and the case number and the style.

There is a res judicata provision on page

13, 14. 33.003(o), (p), and (q). The minor can't withdraw or nonsuit without the Court's permission. If the minor has obtained a determination of the application, the minor may not initiate a new proceeding, and it is that determination is res judicata as to the issues unless there is a material change in circumstances when the minor can file a new proceeding in the same court.

Appeals, 33.004, on page 15, again, the ruling is in five days instead of two. There is no more deemed grant, and the court of appeals may publish an opinion, but again, must preserve the confidentiality of the identity of the minor. And then there's another provision on page 17, 33.085, that clarifies the judge's duty to report abuse.

So those are kind of the highlights of the changes to the proceeding in the statute. Now I thought we would talk for a second about how this actually works in practice, because for I think all of us it took us a while to kind of get our heads around that. The minor files under these rules an application that is Rule 2.1(c), which contains a cover page and a verification page. So there are two different pages. The cover page contains the information that would entitle the minor to relief. She's a minor, she's pregnant, she seeks an abortion without parental consent, and the grounds on

which she relies, whether she retained an attorney, who she would like as a guardian. We have added a provision that says venue is proper and that she hasn't previously filed an application elsewhere.

The verification page is the second page, and it contains all the information that has to be confidential. It verifies that all the information in the application is correct. It has her address and how to get in touch with her, and so this is the second page, and all of this is put under seal. If the minor comes into the courthouse without an attorney, the clerk helps the minor fill out the form, and the rules require the clerk to do so, and she signs it under oath. We have also included -- now there's a statute that says you can make a statement under penalty of perjury, a declaration, you don't have to have a notary in there. We've said you can do it either way.

If she has an attorney then the attorney fills it out for her, and the attorney also has to file the verification page. That's where we have put this attorney's sworn statement, is in the verification page. The assigned court, the clerk then assigns a judge. The assigned court has to appoint the minor an attorney if she doesn't have one and a guardian ad litem. The judge also has to set a hearing so that the ruling can be issued

within five days. There has to be testimony. There is a record, and then the judge issues a ruling. If the judge doesn't issue a ruling we have a procedure for that, which we will talk about. Is there anything else about the practicalities of this?

MS. HAYS: That was a good summary.

MS. HOBBS: I think the one thing that I think in our discussions I found important was that usually the lawyer, if the minor is represented, goes down to the courthouse and files this in person and pretty much seeks the hearing set on that day. There is a -- the process is, is at the courthouse, in person, trying to get all of it set on that first day that you file, and I think that becomes important as we discuss other issues.

PROFESSOR ALBRIGHT: Right. Yeah. And another thing you have to realize with prior practice has been that these have usually been filed in the county where the abortion is going to -- is being sought, is to be performed. Now it's going to have to go to her residence, so there's going to be some traveling involved. Think about a girl in a school in one county, and she resides in another county. The abortion -- there are only, what, five places in the state where an abortion can be performed, so there is going to be a lot of traveling with this.

MS. HAYS: And a lot of courthouses that aren't used to these proceedings --

PROFESSOR ALBRIGHT: Right.

MS. HAYS: -- are going to have to start handling them.

PROFESSOR ALBRIGHT: Right. Because they have been centered in the five places that have abortion facilities. So, okay, so we -- I'd like to go through this issue by issue instead of line by line, and in the committee's report we identified some issues for discussion. The first one, which has gotten lots of traction on the e-mail, is the confidentiality versus anonymity. As I noted, the statute no longer uses the word "anonymity." It was used in one place before, and it was scratched out, but it is very careful to protect the confidentiality of the identity of the minor. So when you look at our draft, you look at Rule 1.3 on page three of the redlined draft, we deleted any reference to anonymity. We left the rest of the rule as before, keeping the reference to the minor's identity to the verification page and requiring the minor to be referred to as Jane Doe.

Our -- throughout our deliberations we decided to keep the rules as much the same as possible, consistent with the statute, so that was another thing that we went forward with. We left it as Jane Doe because

that's the way it's always been, and we also wanted to comply with other rules that provide that minors should be referred to in court proceedings by initials or pseudonyms, and we felt like this definitely protected the confidentiality of the identity of the minor.

On Rule 2.1(c)(2) on page 14, 2.1(c)(2), we deleted the requirement that the minor's full name be included on the verification page. It's not required by the statute. It never has been, and if the minor verifies it herself, if she makes the application without a lawyer, her name will be on that verification page. If she has a lawyer who verifies, her name will not be included, and we understand this to be current practice. So --

CHAIRMAN BABCOCK: All right. Do you want to solicit comments about that?

PROFESSOR ALBRIGHT: I'm ready to solicit comments about it.

CHAIRMAN BABCOCK: All right. Justice Pemberton.

HONORABLE BOB PEMBERTON: Well, this is one area in which the subcommittee did differ, and let me just kind of explain the issue. I'm one of the members that had some reservations. Essentially what the committee is doing with the amendment to the verification page to eliminate the reference to the minor's name is to sanitize

the court record largely of any reference to the minor's actual identity and to -- to heighten the level of anonymity that the rules would require relative to the statute. As Alex mentioned, I was the rules attorney who was here when the -- the original notification bypass rules came through and --

CHAIRMAN BABCOCK: Judge, could you speak up just a little bit? We're having trouble down here.

HONORABLE BOB PEMBERTON: I was just saying I was the rules attorney when the notification/bypass rules came through. The committee and the Court strained to be very faithful to the intent of the Legislature. At the time, that statute, as Alex mentioned, had explicit requirements that the anonymity of the minor be preserved. That's why the rule had multiple references to preserving anonymity and the Jane Doe requirement. The approach that the subcommittee majority took here gave some of us pause in light of the statutory language in the amendments, and I want to refer you to -- to that. As was mentioned, this is in -- it would be on -- if you have the amendments, page 12. The key operative language here is the Legislature took out both a former explicit requirement of anonymity of the minor, authorization to use pseudonyms and changed a phrase. "The proceeding shall be conducted in a manner that protects the anonymity of the minor with

confidentiality of the minor." Now, if we're construing statutes and giving effect to ordinary meaning, confidentiality and anonymity are related but distinct concepts. Anonymity is essentially the absence of a name. Confidentiality is keeping something secret. Essentially it's the difference between the Hollywood star who avoids the paparazzi in a restaurant by wearing a ball cap, wig, sunglasses, and signing the ticket "Mr. Smith" versus sneaking in the back door to avoid notice.

The Legislature changed this language, and also we should note that the word "confidentiality" is modified by a phrase, "of the identity of the minor." Now, confidentiality, keeping something secret, identity, I think that implies that within the court record the identity of a minor is not entirely unknown, rather it is known, yet kept secret. Now, this view of the statute is -- further seems to dovetail with some additional new language. As Alex mentioned, there is now a res judicata provision; that is, which you necessarily look to some prior proceeding to determine whether this is the same minor and what the issues are, and you have to compare the two. That's page 14.

There is also the provision relating to nonsuiting that would necessarily require some sort of cognizance of this same minor being in some prior

proceeding. Perhaps the attorney verification contemplates some ability to consult court file, the court records, to determine a prior application history. All of this is to say that I think the Court -- there seems to be a big picture intent here to -- certainly not to make the minor's identity even less known than it is now under the current rules, but to make it more known, probably with an eye to enforcing these forum shopping, res judicata type provisions, and so that's where the concerns within the subcommittee are coming from.

CHAIRMAN BABCOCK: Thanks, Judge. Some other people along here had their hands up. Frank.

MR. GILSTRAP: If the Legislature had intended for the minor's name to be inserted into the proceeding, it would simply have amended section 33.003(c) to put in the minor's name. It did not do that. There's nothing in that section that requires that the minor's name be on the application, for example. It strikes me that removing the provision guaranteeing anonymity is kind of an odd way of requiring that the minor's name be put into the proceeding, when in fact, they could have done it straight up.

What's the purpose of anonymity versus confidentiality? Well, anonymity doesn't necessarily mean exactly knowing the person's name. When I get a call, I

may know who is on the other end of it without knowing their name. The purpose of the removal of the anonymity provision is to require the judges to actually decide the case. Before we had this deemed granted provision, and there was a provision apparently where the minor could appear through videoconferencing or something, and that kind of made it a faceless proceeding. You really didn't know who it was. Well, it didn't make any difference. It's going to be deemed granted if you don't rule anyway.

The Legislature says you can't do that anymore. You actually have to decide the case, and in 33.003(i-1) they -- first of all, they have taken out the provision where you can videoconference, and an amendment adding 33.003(i-1), they have a whole list of things, questions that should -- that the judge can ask the minor. This is to get to know the minor and really know what her situation is. That's -- and if there's a provision out there saying it's got to be anonymous, I think the judge is going to be restrained. So there is a reason for removing anonymity, but certainly it doesn't mean that you insert the name, and, in fact, we all know that if it's a celebrity's daughter and the name is on there, you can kiss confidentiality goodbye. That's the real world, and what Judge Pemberton is suggesting is, well, we need to do that so we can see if they've had a prior bypass

application. Well, those things are confidential. Are we now going to allow attorneys to go in and electronically check whether there's been a prior bypass application? If you do that, we're not going to have confidentiality.

CHAIRMAN BABCOCK: Okay. Carl.

MR. HAMILTON: The statute requires that the physician be given a copy of the court's order if there's an order that it's going to allow the abortion, and how does the physician know that the girl presenting the order is the one that went to the proceeding?

MR. GILSTRAP: Good question.

MR. HAMILTON: If her name is not anywhere, how does the physician identify this person who is going to be entitled to the abortion?

PROFESSOR ALBRIGHT: I think Susan can answer that question if you want an answer now.

MS. HAYS: By private affidavit. It's a fairly common practice to keep the minor's name out of the courthouse, particularly when there was courthouses where there were issues with maintaining confidentiality.

MR. HAMILTON: Private affidavit from whom?

MS. HAYS: From the counsel of record. So I, representing a Jane, execute an affidavit of my name, the date, the cause number, and the true identity of the minor with her date of birth, since doctor's offices like

to have dates of birth with their patients.

PROFESSOR ALBRIGHT: I think that the date of birth is on --

MS. HAYS: I think we decided it wasn't.

MR. HAMILTON: And where does that affidavit go?

PROFESSOR ALBRIGHT: The date of birth is on the -- if she signs it without a notary her date of birth would be on there.

MS. HAYS: The affidavit, along with the order from the court or a certificate that there's been a grant -- and a lot of the courthouses have a practice of embossing that order so it can't be copied. It's a single document along with the affidavit taken directly to the clinic or the minor takes it to the clinic so that the doctor has in the file that that particular individual had a case and had an order granted. And I will add I think this practice makes some of the clerk's offices feel better, too, that they don't have to worry about inadvertent disclosures later with the files being in the courthouse.

CHAIRMAN BABCOCK: Okay. Any other comments? Yeah, Richard Munzinger.

MR. MUNZINGER: I have a question. I don't work in this area, and I don't know the law.

CHAIRMAN BABCOCK: Speak up, Richard.

MR. MUNZINGER: I don't work in this area, and I don't know the law.

MR. MEADOWS: Chip wanted that on the record.

CHAIRMAN BABCOCK: And you don't have to say that, Richard, because that would apply to anything, right?

MR. MUNZINGER: I have the understanding in my mind that there are a number of persons who have obligations to report child abuse, and there may be circumstances -- I'm going to make a hypothetical case up. A 12-year-old girl comes in, and she's pregnant. There's only been one situation where pregnancy occurred without sexual intercourse. I don't know who the girl had sexual intercourse with. I'm a court personnel. Do I have a duty to report this obvious proven abuse of a minor child to law enforcement? If I do, do the rules that you have drafted contemplate or provide any vehicle to allow me to honor my legal obligation, if I have one? I don't know if I have one. I understand the Family Code says something to the effect that anybody who knows of child abuse is required to report it. I don't know that to be a fact. But my question is, has -- is there a duty to report? If so, do the rules provide any semblance of protection for

court personnel who look at this tragic situation and decide that someone needs to do something about the guy who is doing something to this 12-year-old child?

PROFESSOR ALBRIGHT: There is -- there are provisions throughout the statutes and the rules that require report of abuse, and I have that to talk about later, but yeah.

MR. MUNZINGER: It concerns itself with anonymity and confidentiality, and that's why I raised it now. I didn't know whether you had it later to talk about it. I do think it's an issue at least from my point of view. I would like to have the issue addressed and the committee consider it, because I think it is a problem. It poses a problem to people who have a conscience regarding this situation, a 12-year-old -- I've seen it myself, little girls that are pregnant for God's sake, and they don't have anything to say about it, they're being abused.

MS. HAYS: I'll give a short answer now since it's on your mind. Yes, there are obligations for reporting abuse that apply both to persons, i.e., anyone, and professionals in Chapter 261 of the Family Code. Now, as a practical matter, and I was a guardian ad litem for a 12-year-old earlier this year who was a rape victim. That particular case came to us after law enforcement was

involved, so the case was ongoing, but how serious situations of abuse are handled through these cases, you know, is obviously these cases can be a nice safety net, a way of catching things in a manner where there's a deliberative, careful process to take care of the safety of that individual. I think if I were that court clerk I would be going -- involving the judge quickly in the matter to protect the clerk, and the ad litems, the attorney -- the ad litems and the judge work together on handling the expeditiousness of the bypass procedure and simultaneously handling the reporting issues regarding law enforcement if they're not already involved.

CHAIRMAN BABCOCK: Judge Estevez.

HONORABLE ANA ESTEVEZ: And I will also let you know just from personal experience that I've had police officers that have come with a search warrant when there is a bypass that they've been made aware of to go get the DNA.

MS. HAYS: Uh-huh. Absolutely.

HONORABLE ANA ESTEVEZ: So just so they have a way to continue to prosecute it, and so they get involved very early in the process and then they pursue.

MR. MUNZINGER: My concern is not with what law enforcement does or what doctors do. My concern is what the rule does or the proposed rules do regarding

court personnel --

HONORABLE ANA ESTEVEZ: They have a special statute.

MR. MUNZINGER: -- and their reports, if any, whether they may or may not, whether if they do make a report, is there any presumption or anything else that protects them from having made such a report in the circumstance that I described where the abuse is clear cut and is res ipsa loquitur?

HONORABLE ANA ESTEVEZ: It's required by the same statute that we're talking about today. There's a specific --

MR. MUNZINGER: I understand that it may be by the statute, but does the rule address it?

PROFESSOR ALBRIGHT: Yes.

HONORABLE ANA ESTEVEZ: The rule addresses it.

MR. MUNZINGER: We'll get to that provision then. Thank you very much.

CHAIRMAN BABCOCK: Frank.

MR. GILSTRAP: Well, I still don't understand, how do we dovetail the requirement that the court personnel do not know the name of the minor with their obligation to report abuse? Because you can't report abuse without saying who is being abused.

HONORABLE ANA ESTEVEZ: It's confidential. It's not anonymous.

MR. GILSTRAP: It's confidential, but they've got to keep it confidential, but you're telling me that, in other words, if I'm a clerk and I see that there is abuse, am I required to report it?

HONORABLE ANA ESTEVEZ: Yes.

MR. GILSTRAP: And if so, how can I report it without knowing the name? I think that's the question.

MS. HAYS: In that circumstance, when there are serious cases of abuse, the name is revealed, and part of --

MR. GILSTRAP: It's not in the application.

MS. HAYS: It's not in the application. It's in a sit down discussion with the ad litems, who are there to look after the best interest of the child, and the judge --

MR. GILSTRAP: Okay.

MS. HAYS: -- and handle the process in a way, and I'll also add in serious cases of abuse when that information is revealed to the abuser and where that girl is, when it is revealed is critical to her safety, so that is when the court and the ad litems work together to make sure she's kept safe throughout that reporting process.

PROFESSOR ALBRIGHT: Another thing, what the

rules require is it's Jane Doe in the papers, but when she talks to people and talks to the judge, she uses her name. Her name may be in the record somewhere. It may actually be on the verification page, but the "In Re: Jane Doe," you know, it's -- so when you're looking at the docket of the court it does not have her name on there.

CHAIRMAN BABCOCK: Justice Busby.

HONORABLE BRETT BUSBY: I think there's a part of Rule 1.3(b) that's inconsistent with the last statement because it says on there that no reference may be made to the name of the minor on the record. So I took that to foreclose the proposal that Richard Orsinger had made by e-mail that the judge could ask the minor's name during the hearing if he or she thought that that was important to do so. It seems like the current draft of the rule forecloses that, and so I also -- given that it does, I'm not sure, going back to the question that Richard and Frank were asking, how a judge would discharge his or her duty to report abuse because it's not just a duty on the guardian but also a duty on the judge to report abuse without knowing the minor's name.

PROFESSOR ALBRIGHT: Yeah, that has been in the rule since the beginning, and nobody had ever suggested that it be changed. I think we may need to look at the abuse reporting provisions may -- may have

exceptions, you know, so if you -- if there was abuse, I think we just have to look at that and see how it works.

HONORABLE BRETT BUSBY: But do you agree that the way that 1.3(b) is written now prohibits the judge from asking the minor's name on the record?

PROFESSOR ALBRIGHT: It appears to do that.

MS. HOBBS: On the record.

PROFESSOR ALBRIGHT: Yeah, on the record.

MR. GILSTRAP: What part of 1.3(b)?

HONORABLE BRETT BUSBY: It says 1.3(b), "no reference to the minor's identity in the proceeding, with the exception of the verification page," which has actually been taken out now, "and the communications required, no reference may be made in any order, decision, finding, or notice or on the record to the name of the minor."

MR. GILSTRAP: Okay. Thank you.

MR. MUNZINGER: Could you give me a reference to the section of the rule that concerns abuse reporting?

MR. JACKSON: 33.0085.

MR. MUNZINGER: Is that the statute or the rule?

MS. HAYS: That's the statute.

MR. MUNZINGER: I understand. That's why

I'm asking. Is there a section in the rule regarding that?

PROFESSOR ALBRIGHT: 1.3(d) on page five of the redlined copy.

MR. MUNZINGER: Thank you.

MR. GILSTRAP: 1.4(d).

CHAIRMAN BABCOCK: Justice Brown.

HONORABLE HARVEY BROWN: Alex, at the beginning you said that you didn't go through all the rule and kind of, you know, look to improve it across the board, you looked for things that were only necessary because of the legislative changes.

PROFESSOR ALBRIGHT: We did a little. We did not take on a complete rewrite.

HONORABLE HARVEY BROWN: Is this one of those little that you decide to change? In other words, what in the legislative process made you think that we need to take out the verification reference to the full name?

PROFESSOR ALBRIGHT: I think the committee just looked at it and said there's no requirement that it have the name, never has been, and Lisa.

MS. HOBBS: And then the other thing I would add is since these rules were written we now have had more global rules that apply to minors' names in filings, so

that has been something that has happened in the interim. Now the rules state -- they actually -- the Rules of Civil Procedure prohibit you using the minor's name in a court document unless it is required by a statute.

PROFESSOR ALBRIGHT: That's right.

MS. HOBBS: And because there was no requirement in the statute that the name be used, our rule is -- this draft rule is consistent with how we treat minors in any other proceeding. This is how it works, and so we just implemented those rule changes that have happened since the bypass rules were originally drafted into the current rules.

HONORABLE HARVEY BROWN: And I had one other follow-up question, and that is Frank mentioned the possibility of these names being disclosed because of the verification page. Has that actually happened where in the last 16 years that we've had disclosure of people's names as a result of the verification page? In other words, is this speculative, or is this something that's actually happened?

MS. HAYS: We've so far been successful, and it's not happening. I have had phone calls from reporters asking me about a particular case in a rural county that they knew had been filed. Okay. These are currently and have been supposed to be anonymous and confidential, yet

people find out and start digging and start asking. We've also had clerk staff when a minor called into a courthouse wanting -- inquiring about filing -- and mind you, and Justice Pemberton can certainly correct me. As I understood the original promulgation of the rules, the idea and the concept was that any minor could walk in without counsel and successfully file one of these cases, get help, and it happen, but have had a clerk ask the minor, "Could I meet you outside the courthouse later and talk you out of this," and seek to engage the minor in an inappropriate conversation about what she was trying to do and divert her from the legal process and one would presume know her name and identify her, so, yes, there is a real danger if that's your question.

CHAIRMAN BABCOCK: Frank.

MR. GILSTRAP: In regard to the duty to report, I'm satisfied that 1.4(d)(1) says that the judge has got to make the report, and I think you could argue that that relieves the other court personnel from the requirement to make the report of abuse. Insofar as putting the name in, I am very uneasy about that because I don't think there is any uniformity as to how these applications are handled. In Tarrant County, for example, I know that they don't make a paper copy, and they throw the application away -- the file away after a while, but

that's just how they do it; and there's no guarantee as to how the confidentiality requirements should be handled statewide; and, you know, maybe small towns are different, I don't know; but, I mean, if the name goes in there, you're really raising the possibility that it's going to be disclosed; and I think -- I think the Court is charged with passing rules to protect the confidentiality; and I think we need to try every way we can to keep the name out of the record. The judge can ask it, and it's going to be in the court reporter's record, but that's going to be kind of difficult to access, and the judge doesn't actually have to ask the name.

PROFESSOR ALBRIGHT: Question, is there like a conversation with the judge and then they go on the record and the judge is careful not to ask the name on the record, or does the judge often not know the name?

MS. HAYS: There are often conversations with the judge before and after we go on the record. And I'll give you another example from the case where I was guardian on it with the 12-year-old recently, I made a point of letting the court staff and the judge know the situation of the case because it's a little shocking to see a child walk in and --

MR. MUNZINGER: Could I remind you that you are speaking to all of the room?

MS. HAYS: I was saying, yes, there are often conversations before and after going on the record with the judge to let them know what witnesses we might have, to -- and, for example, in the case where I was a guardian with the 12-year-old, I went in and let the court staff know to let the judge know the circumstance, because I knew anyone would be taken aback upon seeing this girl because she was a child, not a teenager.

CHAIRMAN BABCOCK: Roger, and then Judge Estevez.

MR. HUGHES: I favor the rule for the reasons outlined by Ms. Hobbs, but also because I practice in primarily rural areas. You know, there's a lot of ways to -- it gets out. One thing I found is that even if the county has more than 10,000 people living in it, everybody who works at the courthouse is probably related to each other within three degrees of consanguinity; and they're also related to half the county within three degrees of consanguinity; or they're real friendly with somebody, or they went to school, the same high school, as that young lady who is applying; and the point I'm trying to make is part of the confidentiality provisions of these people, talking about this rule, no e-filing, fax filing, hand delivery.

Well, that now means there's a lot more

hands through which that piece of paper that has the young lady's name in it is going through. It goes through the hands of the person who goes to the fax machine, the person whose in basket it sits in for a while, and so on and so forth. We now have a lot more people who are finding out the young lady's name, and the more people -- and I think Orsinger is right, the more people who find out that name, the more chances there are for either inadvertent comments or outright leaks. So I think the rule as written bears some wisdom.

CHAIRMAN BABCOCK: Judge Estevez.

HONORABLE ANA ESTEVEZ: Regarding the conversations before the proceeding, those are usually with -- they would have been with the attorney, because the old rule allowed us to appoint one person that could serve both functions, so now we're going to have two people no matter what. There's going to always be an ad litem, and then there's always going to be an attorney that's been represented, and those people always know the name of their client, especially the ad litem, because they would have had a greater duty to at least know their name. I don't know that it's important for the judge to know the name, because when we have those conversations we do not talk to the client, we always talk to the attorneys or the ad litem; and we ask the ad litem, you know, what

-- what do we have, in front of them; or I guess if we have a true ad litem we can actually have the ability to talk to those ad litems outside the presence of the child. I guess we have that ability now since we -- we have a different relationship with them.

MS. HAYS: Yes.

HONORABLE ANA ESTEVEZ: So I don't -- I don't know that this is a problem because the ad litem would always know the name. We don't need to have them on the record because the ad litem would tell us that there was abuse, and at that point we would be able to elicit the name from the ad litem or -- and/or the attorney and still get there without ever putting anything on the record. So I don't know that it's really an issue. There are two people that will be obligated by an attorney -- at least an attorney-client relationship and an ad litem relationship to know who they are representing. I don't know that they can go through the proceeding without knowing it.

PROFESSOR ALBRIGHT: And they also have the duty to report abuse, and that's explicitly in the rules and in the statute.

HONORABLE ANA ESTEVEZ: And so they can let us know if they feel like they don't want to -- you know, they'll --

MS. HAYS: And in practice you don't need 10 people who all are in the process to report the abuse. We work together, make sure the abuse has been reported, and have one person do it. If it hasn't been reported, probably would do it very -- from the judge's chambers. In the case that I worked on recently, part of the conversation I had with the judge off the record before we went on the record was the status of law enforcement investigation, so the judge knew there was one ongoing. There was no need to pick up the phone and report it, and then discussed it again during the hearing outside the presence of the 12-year-old so not to upset her more.

HONORABLE ANA ESTEVEZ: What I'm trying to say is I'm not sure that we need to spend as much time on how to report the abuse and whether we use the name, but rather I think all of us, if we could have drafted this, we would have kept it the way it was, and it was very interesting. I looked at the -- I tried to look at the legislative history because the original bill actually allowed and had it in there to continue with "In Re: Jane Doe" or with using the initials. The Right to Life draft kept that language in there as well, even though the Legislature hadn't passed it, so they didn't have a problem with it. I could not find why they struck that, because we -- I think we all agreed as a committee if we

were drafting it, we would have allowed that, and we could still have everything they were trying to achieve and still allow her another level of confidentiality or keeping her anonymous, but the reality is that's not what they did. They struck it, and so now what do we do? Do we ignore the Legislature and decide they did something that they didn't intend to do or that we find just should be unconstitutional or do we follow what they did, and that's where we all struggled. That's where the division in our subcommittee was, and I think the people that have had -- have been on the bench, we understand that we will get reversed if we do it wrong, and I think the -- you know, the practitioners want to do the right thing, and we didn't always get to do the right thing, so it doesn't bother us when we have to do what the law requires us to do.

MR. GILSTRAP: What are you saying the Legislature did, precisely?

HONORABLE ANA ESTEVEZ: They actually struck the language -- let me start right at the beginning. The original bill that they presented that had all of these other changes kept the words, and you might have them right there in front of you. I don't know specifically, but it says, "The petitioner may file her petition with 'In Re: Doe' or using her initials," period. Somehow,

somewhere in between all of the levels of the reading, all of the sudden, and at the end, here we are, where there's a line right through it; and those words no longer exist; and even the Texas Right to Life group and all the other groups that had contributed to writing a draft kept that provision, so it doesn't bother them. So I don't know that they ever intended to take that out, but someone did, and that's where we are.

CHAIRMAN BABCOCK: Lisa, then Frank.

MS. HOBBS: Well, the Legislature is presumed to know what the law is, and so arguably the Legislature struck those words because both the United States Constitution, as articulated by the U.S. Supreme Court, and the current Texas rules already would require essentially the minor's name to be included in the record in an anonymous way. So it could have been stricken simply because under existing law she could file as a minor using only her initials.

CHAIRMAN BABCOCK: Okay. Frank.

MR. GILSTRAP: Well, insofar as striking the words "anonymous," I think I addressed that earlier. Insofar as striking the reference to I think it's pseudonyms or initials, I don't think that precludes using Jane Doe. I don't think that's really a pseudonym. I think these can be filed pro se, and the people are going

to -- if it says you can use a pseudonym or initials, they might be imprudent and use a pseudonym like their user name on Facebook or something from which you can figure out who it is, or they may -- it may be just too cute. So the removal of pseudonyms or initials I think does say that we mean that the minor's name should be inserted in the proceeding. There's another reason for that, just like there's another reason for removing the word "anonymous."

CHAIRMAN BABCOCK: Justice Pemberton.

HONORABLE BOB PEMBERTON: Oh, I'm fine.

CHAIRMAN BABCOCK: Pemberton first, then Brown.

HONORABLE BOB PEMBERTON: I said go ahead and go to the next one.

CHAIRMAN BABCOCK: Oh, you yield to Justice Brown?

HONORABLE BOB PEMBERTON: I yield my time to Justice Brown.

HONORABLE HARVEY BROWN: So the duty of the court to report seems like to me is going to be very rare, but when it occurs it's going to be because the ad litem or the attorney or both don't think there's already -- they don't believe there was abuse, because if they think there was abuse they've already reported it. Right? I

mean, when you interview the woman, I would assume if you think there is abuse, you report it because you're required to report it.

PROFESSOR ALBRIGHT: It may all be at the same time.

MS. HAYS: Yeah.

HONORABLE HARVEY BROWN: Well, you have to talk to your client before you walk in the courthouse, right?

MS. HAYS: Not always. If the minor walks in the courthouse and filed on her own, then the ad litem is appointed by the judge and hasn't met the minor before she filed the case.

HONORABLE HARVEY BROWN: You talk in the hallway for 5 or 10 minutes or whatever and decide what you're going to do. I guess I'm thinking, the judge, this isn't going to come up very often. It's only going to come up if there's a disagreement between the judge and the lawyer and the ad litem, because otherwise the judge is going to say, "You're doing it, I don't need to do it, great, as long as I can verify that."

MS. HAYS: Not necessarily, and I'll just emphasize you can't underestimate the wide variety of situations that teenagers in the state find themselves in, so it's difficult to write a rule or make assumptions

about -- about how you do abuse reporting and not end up harming someone, if that makes sense, that the attorney may have known before they walked in the courthouse but wishes to discuss with the judge how to handle this with law enforcement in a way that will protect her safety, if it's a very volatile situation. Like I'm not even for sure -- for example, we're not even sure this girl should ever go home again. Let's talk to the district judge and work together with law enforcement or with CPS to make sure she's safe first and foremost, or there may be a situation where it's not so dire that that take place. Do you follow me in what I'm saying of the care that has to be taken to keep her safe?

HONORABLE HARVEY BROWN: But even up to that point --

MS. HAYS: And they may agree that abuse is going to be reported.

HONORABLE HARVEY BROWN: And if they agree, who normally does it? Is it the judge or the lawyer?

MS. HAYS: Both together if they're sitting in chambers.

HONORABLE HARVEY BROWN: They call together?

MS. HAYS: Yeah. You may call together.

CHAIRMAN BABCOCK: Okay. Yeah. Evan.

MR. YOUNG: The constitutionality issue has

been raised, and I take it that that's mostly from the Bellotti case that was circulated.

MS. HAYS: And its progeny.

MR. YOUNG: When you talk about progeny, I don't know if it's been considered, but the *Ohio vs. Akron Center for Reproductive Health* case, 497 U.S. 502.

MS. HAYS: Yes.

CHAIRMAN BABCOCK: Evan, could you speak up a little bit?

MR. YOUNG: *Ohio vs. Akron Center for Reproductive Health*, 497 U.S. 502 at page 513 seems to take Bellotti and limit the idea that anonymity is a constitutional requirement in the sense that it's being discussed here. Bellotti was a plurality opinion. It was a fractured opinion. There were five justices speaking with any part of it, and the Akron case, let me just read this one paragraph just so we have it on the record.

MS. HAYS: I have it as well.

MR. YOUNG: "Confidentiality differs from anonymity. We did not believe that the distinction has a constitutional significance in the present context. The distinction has not played a part in our previous decisions, and even if the Bellotti principal opinion is taken as setting the standard, we do not find complete anonymity critical. HB 319, the Ohio statute here, like

the statutes in Bellotti and Ashcroft takes reasonable steps to prevent the public from learning of the minor's identity. We refuse to base a decision on the facial validity of a statute on the mere possibility of unauthorized illegal disclosure by state employees. HB 319, like many sophisticated judicial procedures, requires participants to provide identifying information for administrative purposes, not for public disclosure."

And so I guess the question is does that matter if the analysis of the subcommittee has been through the lens of the Federal constitutional requirements, I guess I would like some further thought on whether or not this really is a Federal constitutional requirement --

MS. HAYS: Yeah. I'll be happy to address that.

MR. YOUNG: -- for the purposes that Justice Pemberton --

MS. HAYS: And you mentioned that Bellotti was a plurality, but the four requirements Bellotti lays out that ensure teenagers can set their own health care, if not, look to the best interest, and in the being confidentiality --

CHAIRMAN BABCOCK: Susan, talk to the room.

MS. HAYS: I said the four requirements that

Bellotti laid out in a plurality opinion, which is mature minors may consent on their own, if not mature then look to best interest, anonymity and confidentiality, were subsequently endorsed by a full court in *Lambert v. Wicklund* in 1997, which was a per curiam opinion, and again in Casey; and as for the particular statute that was at issue in Akron, it was very different than what we have here in that there were criminal penalties for disclosure of confidentiality information, which I was checking our Penal Code this morning. We don't have that. So real enforcement to breaches of confidentiality.

In addition, the statute in Akron still contained the word "anonymous." It required that each hearing shall be conducted in a manner that will preserve the anonymity of the complainant. So when Justice Kennedy was writing about "not at issue here" or "the distinction doesn't matter here," I believe he was discussing that statute as a whole. Our statute as a whole, as 3994 has amended it, no longer has the anonymity protections written into statute, and unlike the Ohio statute and some other statutes in certain courts located around the country on anonymity, do not have the criminal penalties for the breaches of confidentiality. So anonymity is absolutely still a requirement in its sub law.

CHAIRMAN BABCOCK: Justice Pemberton.

HONORABLE BOB PEMBERTON: Well, this might be a good time to point out, obviously there are some difficult, hotly contested myriad constitutional issues in this area. Back when the original bypass rules were drafted, a decision was made of this committee and of the Court to recognize that, but not to weigh into it. Recognizing first the procedural -- procedurally this committee is not -- and this rule making is not really the place to play some of these out. You need folks filing briefs and having contested cases before a court. So as reflected in the explanatory statement, the historical approach has been to acknowledge there are many issues out there of constitutionality.

One could argue that a bypass proceeding, there might be a question about whether you actually have a case of controversy, a judicial controversy, but instead simply to focus on the task of determining what the Legislature said, whatever you might think of it, and writing rules faithfully to implement that intent; and part of, I think, the underlying disagreement within the subcommittee is coming from that perspective. Obviously there's a view of the constitutional law that may be informing the view you have reflected in the draft rules before you, and there are others on the committee that suggest that perhaps we should focus more on what the

Legislature actually said.

CHAIRMAN BABCOCK: Judge, I'm going to admit, like my good friend Mr. Munzinger, that I don't know anything about this, but in terms of statutory construction, if there are two constructions of the statute, of an ambiguous statute, and one would lead to an unconstitutional result whereas the other would not, is there any canon that says you've got to pick the constitutional road?

HONORABLE BOB PEMBERTON: I think that's generally correct, and I think, though, I would say that you don't have any ambiguity here.

CHAIRMAN BABCOCK: Yeah.

HONORABLE BOB PEMBERTON: If you read the prepositional phrase "of the identity" modifying "confidentiality" and the other parts of the statute, how in the world do you police a res judicata provision if you sanitize the court record of any reference to the identity of the minor?

CHAIRMAN BABCOCK: Yeah. Well --

HONORABLE BOB PEMBERTON: Among other provisions.

CHAIRMAN BABCOCK: I, for one, certainly think that our threshold issue is to take what the Legislature has done and try to -- try to put it into

rules, and if there's constitutional problems with that, that will be -- that will be figured out in the adversary process --

HONORABLE BOB PEMBERTON: Right.

CHAIRMAN BABCOCK: -- not in the rule making process, but, yeah, Lisa.

MS. HOBBS: And I would 100 percent agree with Justice Pemberton if the rule had said you have to file the minor's name in the application that the Supreme Court would be obligated to implement that rule, even if the Supreme Court were concerned with its constitutional -- the constitutionality of that provision, but I wasn't driven by the anonymity requirement in the Constitution so much as the statutory language, which nowhere in the statute requires the woman's name -- the minor's name in the -- in the application. So I actually think the statute pretty unambiguously doesn't require the name, and it has what has to be required, and her name is not required to be in the -- anywhere in there.

CHAIRMAN BABCOCK: Okay. We're going to take a vote in a minute between the majority view and the minority view. But Roger.

MR. HUGHES: I'm just following up. I want to make sure I understand. If some court personnel gets their hands on the name of the minor and puts it in the

local paper, there is no criminal sanction that could be levied?

MS. HAYS: Not that I can find. And I would hope my clients were --

MR. HUGHES: I mean, if anyone else knows of one I would like to hear about it, because, I mean, we had a case in my county a couple of years ago where a public official used their office to get their hands on the list of men who had been charged with sex abuse crimes and had been no billed by the grand jury and published it in the local paper as a means of influencing a subsequent race for the DA office, and that -- I mean, there were criminal sanctions attached to that. So the possibility that someone could say there's no criminal penalty, why not? That's troublesome to me.

CHAIRMAN BABCOCK: Yeah. Okay. We're going to vote, but does anybody want to have the last word? Justice Pemberton, you want to -- you got anything else to say about it?

HONORABLE BOB PEMBERTON: My sense of the committee is we've all said enough.

CHAIRMAN BABCOCK: You have to speak up. What?

HONORABLE BOB PEMBERTON: But go ahead. You frame the issue how you want to, but --

CHAIRMAN BABCOCK: Yeah, the way we typically do it is the majority of the subcommittee has got a proposal that's before us, and so the way I would frame it, Judge, is that everybody who is in favor of the majority view is going to -- will raise their hands and then I'll ask everybody in favor of the minority view raise your hands so then we'll have a record of that.

PROFESSOR ALBRIGHT: I think it's important to say what is the view. A lot of times we have votes and it's "Who's with the majority," and it's like, wait a minute, what are we voting on?

HONORABLE KENT SULLIVAN: You need to articulate the minority view.

PROFESSOR ALBRIGHT: I would say that the majority view is that the minor's name should not be on the application and that it be styled "In Re: Jane Doe." We can separate those two out if you'd like.

CHAIRMAN BABCOCK: Okay. Justice Busby.

HONORABLE BRETT BUSBY: And also that it not be asked about on the record.

PROFESSOR ALBRIGHT: I think that, yes.

MS. HAYS: So you're changing it.

HONORABLE BRETT BUSBY: No, that's what's in here now. That's what --

PROFESSOR ALBRIGHT: It's in the rule, yeah.

HONORABLE BRETT BUSBY: -- I want to make that be --

PROFESSOR ALBRIGHT: To leave that, leave it the same that it's not -- her name is not in the record.

CHAIRMAN BABCOCK: But --

HONORABLE BOB PEMBERTON: To clarify, Alex, y'all are proposing, to be clear, to take the reference of the minor's name even out of the verification page as it now is in the current rule.

PROFESSOR ALBRIGHT: Correct.

HONORABLE BOB PEMBERTON: Okay. So it is more anonymous than the current rules.

CHAIRMAN BABCOCK: Okay. Carl, then Buddy.

PROFESSOR ALBRIGHT: It's still in the verification --

MR. HAMILTON: The majority --

THE REPORTER: Wait, wait.

CHAIRMAN BABCOCK: Whoa, whoa. Hold on. One at a time.

MR. HAMILTON: The majority view is there is no name anywhere, but what's the minority view?

CHAIRMAN BABCOCK: Well, Justice Pemberton has laid out and it's in the papers, too, if you'll look at Alex's summary, she -- she I think fairly summarizes what the minority view is on this in her overview, but

Justice Pemberton has articulated what his thoughts are about it.

HONORABLE BOB PEMBERTON: Essentially you can't take out all reference to the minor's name anywhere in the record including the verification page because, A, the statute by referring to confidentiality of the identity of the minor contemplates some knowledge in the proceeding of the minor's identity. Reading that with --

PROFESSOR ALBRIGHT: But Bob --

HONORABLE BOB PEMBERTON: Reading that with the forum shopping res judicata provision, the statutory scheme couldn't work any other way.

PROFESSOR ALBRIGHT: But, Bob, I have a question. What exactly is your proposal?

HONORABLE BOB PEMBERTON: My proposal would be was -- is not to eliminate all reference to the minor's name anywhere in the court record. What the majority proposal is to essentially sanitize the record of any reference to the minor's name.

PROFESSOR ALBRIGHT: No, it's not, but --

HONORABLE BOB PEMBERTON: That's what the change --

PROFESSOR ALBRIGHT: No, because it would be -- her name will be on the verification if she signs the verification.

HONORABLE BOB PEMBERTON: If she signs the verification.

PROFESSOR ALBRIGHT: But so do you want -- I'm taking it that your proposal is to leave her name on the verification page.

HONORABLE BOB PEMBERTON: That would be something.

PROFESSOR ALBRIGHT: To take it out that -- that the judge can put her name on the record at the hearing and then I've heard you talk about putting her name in the style of the case, and I'm not sure whether you want to propose that or not.

HONORABLE BOB PEMBERTON: My propose -- my concerns were raised in response to the subcommittee's proposal to eliminate all reference to the minor's name within the proceeding. I simply don't think that's supportable under what the Legislature has done here, whether --

PROFESSOR ALBRIGHT: And, I know, but we can argue about --

CHAIRMAN BABCOCK: Whoa, whoa, whoa.

HONORABLE BOB PEMBERTON: I'm not --

CHAIRMAN BABCOCK: Alex, Alex. Let him finish, then you can talk.

HONORABLE BOB PEMBERTON: I would say at a

minimum you have to leave the reference to the minor's name in the verification page. Some way for the judicial system to track who these minors are filing these prior applications to make the statutory provisions about res judicata, et cetera, work. Otherwise you've rendered ineffective what the Legislature has done.

CHAIRMAN BABCOCK: All right. Alex, have at him.

PROFESSOR ALBRIGHT: Yeah, I just want it to be a clear vote. I mean, if we're voting, we can vote on -- the vote could be what's the intent of the Legislature, or the vote can be accept these amendments or have some other type of amendments.

CHAIRMAN BABCOCK: Yeah, but let me try to clarify that and then we can have more comments. Justice Busby, sorry.

HONORABLE BRETT BUSBY: Go ahead, Chip.

CHAIRMAN BABCOCK: I'll get to you in a minute. My thought was you have or the committee has done a very thoughtful memo where they've laid out the issue, the idea of the majority and the idea of the minority as the subcommittee, and those two competing views are reflected in the rule that you have proposed in various places on that issue. So what I'm trying to get a sense of the committee on for the benefit of the Court is does

the committee as a whole favor the majority's view, or does it favor the minority's view in terms of these many places where the majority's taken a particular approach. So that's what I propose the vote to be. Now, Justice Busby, what did you have to say?

HONORABLE BRETT BUSBY: I just want it to be clear where Richard Orsinger's proposal falls within what we're voting on right now, because his proposal was that it could be asked about on the record, but the current rule says that it can't be. So I'm just trying to figure out if people agree with Richard's proposal, where should that fall into this.

CHAIRMAN BABCOCK: Okay. Judge.

HONORABLE ANA ESTEVEZ: I was just going to suggest that if we need clarification what the actual vote can be, it could just be under looking under 1.6 -- I'm sorry, 2.1(c)(1), page 11. The actual words that we're discussing, it's "The cover page must be itself 'In Re: Doe' and must not disclose the name of the minor or any information by which the name of the minor can be derived," and it's also on section (2) on page 12 where it has it in there.

PROFESSOR ALBRIGHT: It's (2)(A).

HONORABLE ANA ESTEVEZ: (2)(A). The part where it's stated that we're not going to put that in.

MR. GILSTRAP: (2)(A).

HONORABLE ANA ESTEVEZ: And our proposal, the minority proposal, would be to delete "the cover page must be styled 'In Re: Doe.'" I don't know that we ever talked about that we're going to require them to put their name in. We were going to give some sort of acknowledgement that they have struck that language, so it may be that we don't have to tell them how to do it, and we just don't say, "You can do what they told us not to do."

CHAIRMAN BABCOCK: Skip.

MR. WATSON: I just wanted to ask Bob, just so that I can understand.

HONORABLE BOB PEMBERTON: Yeah.

MR. WATSON: Did I understand your last to be that that your minority view would be satisfied if the verification page that is signed by the applicant containing the name of the applicant also contained the name of the applicant in print? Would that satisfy your concerns?

HONORABLE BOB PEMBERTON: That -- well, some -- the point is some --

MR. WATSON: No, I just -- I need to understand that. It needs to be elementary school simple for me to vote.

HONORABLE BOB PEMBERTON: Yes.

MR. WATSON: Thanks.

HONORABLE BOB PEMBERTON: That would be one way to get there. The Court obviously in the rule making process has other things they can say.

CHAIRMAN BABCOCK: Rusty.

MR. HARDIN: Just a question to the minority people.

HONORABLE BOB PEMBERTON: Yeah.

MR. HARDIN: Does the summary that has been provided as to the respective positions of each side, does it accurately reflect the minority's position? And the reason I ask, if it does then the vote potentially could just be whether to adopt the majority or minority view; and if it is accurately in the summary that was provided here, when it gets to what the minority's position was, does that accurately state what the minority's disagreement was within the committee?

HONORABLE BOB PEMBERTON: That is a summary of -- that is a summary I drafted.

MR. HARDIN: I thought it was.

HONORABLE BOB PEMBERTON: And Alex was kind enough to include it. So, Chip, one way to approach it is do you like the upper part of the page or the down part of the page?

CHAIRMAN BABCOCK: That's the truck I was trying to drive.

HONORABLE BOB PEMBERTON: Okay. Gotcha.

CHAIRMAN BABCOCK: Nina.

MS. CORTELL: I probably am in the minority on --

THE REPORTER: Speak up.

MS. CORTELL: -- how to do the vote, but I may not be on this specific provision, because there may be people who feel differently on different provisions. In other words, maybe it should be "In Re: Jane Doe" but also have the name on the verification page. I don't know how you do a generic split majority/minority view of the subcommittee that captures the views of this larger committee.

CHAIRMAN BABCOCK: Yeah, that --

PROFESSOR ALBRIGHT: I agree.

CHAIRMAN BABCOCK: That's a good point. I think it might be helpful to the Court, though, to get a sense of the full committee as to whether they like the approach of the majority versus the minority; although it may also, as you say, make a difference if we're talking about specific provisions. So we'll take that under advisement whether we're going to go back and go through specific provisions, but anyway. Justice Brown.

HONORABLE HARVEY BROWN: I wonder, Bob, if there's a compromise, and that is you've heard the concerns about the verification page and that that might be inadvertently known by more people and disclosed; but a record is unlikely, much less likely for something to be known. The court reporter doesn't type it up, just a lot -- it seems like that gives an extra level of confidentiality on the record, so I wondered if you would be satisfied if it just said "The judge should ask on the record the name." So that takes care of your res judicata issue. There is a record, court reporter's notes somewhere, but on the other hand, it seems like it takes care of their concerns because nobody is going to get those court reporter notes, so it's only available in that extreme case where somebody really thinks there may be an issue.

HONORABLE BOB PEMBERTON: Well, I mean, again, the concept that I'm operating from is following what the Legislature did, that may be -- some approach like that may seem to be a means of being able to make effective those res judicata provisions, forum shopping, et cetera, but there are a lot of ways you could skin that cat.

CHAIRMAN BABCOCK: Lisa, but I just thought of a new -- a great new game show, Battle of the Former

Briefing Clerks. Rules attorneys, I should say.

HONORABLE BOB PEMBERTON: It's --

MS. HOBBS: I love Justice Pemberton so much that we have -- let the record reflect that we are still smiling at each other.

HONORABLE BOB PEMBERTON: We are all good and we feel tremendous empathy for Marisa. Obviously post-traumatic stress disorder can be managed.

MS. HOBBS: I think it is interesting to hear the minority position articulated here today about what their position means, because the basis for their position is that the Legislature's removal of a provision that states "a case may be styled by a pseudonym or with initials," I don't know how you extrapolate from that omission to say, "My position is the name at least needs to be in the verification."

HONORABLE BOB PEMBERTON: And to be clear, it's not just that.

MS. HOBBS: Okay.

HONORABLE BOB PEMBERTON: It is the substitution of the -- for this former expressed anonymity to "with confidentiality of the identity." Identity. What are you keeping secret? Identity. You know the identity, and these other provisions of the statute, the reach statutes as a whole. Anyway, we've been around the

block on this.

MS. HOBBS: I just want to point out --

HONORABLE BOB PEMBERTON: It's not simply the removal of former expressed mandate.

MS. HOBBS: But if the minority's position is taken to its extreme then what the position seems to be is that the removal of that line would require Jane Doe cases to be styled with the identity of the minor in the style, and that to me is the real danger of the minority's position.

HONORABLE BOB PEMBERTON: I'm not sure you have to go that far.

CHAIRMAN BABCOCK: Judge Evans.

HONORABLE DAVID EVANS: How does the woman who is the subject of one of these proceedings go about obtaining a copy of her court file several years later? What does she do now? Is it possible to obtain it?

MS. HAYS: Go to her attorney.

HONORABLE DAVID EVANS: Her attorney quits practicing and leaves the state.

MS. HAYS: I don't know that we've ever had a --

HONORABLE DAVID EVANS: It's a problem we run into with minor prove-ups with confidential settlements. How does the person who was the subject of

the proceeding go back to the granting court to find out what occurred while she was a minor and being represented by an ad litem? And I'm not weighing in on Judge Pemberton's side, but I've -- this has always concerned me about these type of things that the people who will later in life bear the consequence of the decision in the proceeding can't get back to the record, and I don't understand how a verification page would help you get there.

CHAIRMAN BABCOCK: Yeah, Professor Albright.

PROFESSOR ALBRIGHT: Well, there is a provision in the statute that requires the clerk now to keep the sealed record for the same amount of time that they would keep any other court records, so they can't destroy it immediately, if that helps you. I guess if she had the cause number or the date --

HONORABLE DAVID EVANS: She wouldn't. I mean --

PROFESSOR ALBRIGHT: She would know the date, she would know county, right?

HONORABLE DAVID EVANS: I agree with you she might know the general time of the court proceeding, and I don't disagree with that, and I'm just pointing out that the person who is -- who was gone to all the trouble to protect has a right to be able to access her court file,

and if it's -- if it's -- and I'm not saying that it should be easily accessible, and I have Mr. Hughes' concerns in mind, but that's the person who is the subject of this and who will live with either the judicial action or inaction for the rest of her life.

CHAIRMAN BABCOCK: Got it. Okay. Everybody in favor of the majority approach to this issue of confidentiality versus anonymity, raise your hand, please.

All right, everybody that favors the minority approach to it, raise your hand.

All right. This will be very helpful to the Court. The vote is 16 in favor of the majority, 15 in favor of the minority. So we for sure have consensus. Justice Gray.

HONORABLE TOM GRAY: I'd like to ask one question of the people that may know the answer and then have a kind of out of the box potential solution. Do we know how many or roughly how many of these proceedings there are in the state of Texas in a year?

MS. HAYS: We have an awfully good idea. The only data that is available on -- are on cases for which fees are paid, which doesn't always happen but mostly happens, and Jane's Due Process keeps track of cases we refer out, but we don't --

HONORABLE TOM GRAY: Just a number. I just need a number.

MS. HAYS: My gut is four years ago there were close to 500. Now that number is down to 200 statewide per year.

HONORABLE TOM GRAY: We have that many certified vexatious litigants in the state of Texas for which we maintain a registry, and it would seem to me that if we're talking 500 or less of these type proceedings a year, it would be a -- and I hate to harken back to our sensitive data form, but a method by which the person seeking the abortion would fill out a sheet, give it to a registry of a person who is maintained at the -- maybe in Ms. Newton's office, and that person would be either assigned a Jane Doe number or could even be given a name that is tracked through all the way through the proceeding. Any time that one of these is filed the person in charge of the registry could check back the identifying information to see if there was a previous filing, which would facilitate the res judicata test; and it would be a fairly easy registry to maintain; and you would preserve confidentially, anonymity, whatever you want to do it; but it would be fairly easy, it would seem, to maintain; and I know that that is an entirely out of the box idea of how to address this problem; but one of

the problems that I see downstream from this is confusion because of the use of the same name, Jane Doe, because you've got to take this two levels of appeals later, and who is it we're -- who is the party?

CHAIRMAN BABCOCK: Right.

HONORABLE TOM GRAY: And so just a concept.

CHAIRMAN BABCOCK: Yeah, Nina.

MS. CORTELL: In light of the closeness of the vote, I do think it's appropriate to revisit some of the sub issues because my suspicion from the discussion is there's probably more concern about what goes on that verification page rather than, for example, how to style the proceeding. It seems to me that anonymity speaks to it is unknowable, whereas confidentiality means we're going to do everything we can to maintain confidentiality, and so whereas maybe a name should be on a verification or not, it doesn't mean that other steps taken to ensure greater confidentiality shouldn't be taken and that the 15 that voted for the minority view wouldn't agree with that. I believe Justice Pemberton, if I heard correctly, for example, you wouldn't take the position that the style needs to give the name, right?

HONORABLE BOB PEMBERTON: No. I mean, it certainly -- you know, going back again to the legislative intent, it says "confidentiality of the minor." That's

got to be preserved. The concern here is how to do that without rendering entire sections of the statute unavailable.

MS. CORTELL: For that reason, I'm a little concerned that the closeness of the vote does not accurately portray how this committee in toto will feel about some of the sub issues, such as styling the proceeding.

CHAIRMAN BABCOCK: Yeah, that's a great point. Nina, I've consulted with Chief Justice Hecht, and here's our thinking about that. We want to try to get through these categories in broad terms and see how we can get -- hopefully we can get through all of them today and then if we have time we can go back to the specifics, either later today or possibly at the December meeting, so I think we'll approach it that way, but, yeah, Kent.

HONORABLE KENT SULLIVAN: I just thought it was worth noting how many comments have been made articulating concerns about our courts' ability to handle issues of confidentiality with real efficacy and practicality, and I just think that's worth bookmarking, and I do wonder to what extent that may have affected some people's views regarding this issue, and of course, the issue I think of anonymity versus confidentiality is a different one, but I think that some of the practical

issues begin to potentially border that way.

CHAIRMAN BABCOCK: Thank you. Okay, Alex, let's go to the next issue. In your memo it was consequence for failure to rule. Is that what you would propose?

PROFESSOR ALBRIGHT: Yeah, I was going to do e-filing really quickly because it relates to confidentiality.

CHAIRMAN BABCOCK: Okay. Let's do e-filing.

PROFESSOR ALBRIGHT: The committee recommends that the application not be e-filed to preserve confidentiality and to comply with the current statewide e-filing rules but to allow for situations where the minor's attorney may be far away from the courthouse. Particularly in appeals we have allowed for filing by e-mail and fax, and that's' Rule 1.5, and if anybody has questions about all of those rules on e-filing I'm letting Lisa handle those.

CHAIRMAN BABCOCK: Okay. Justice Christopher.

HONORABLE TRACY CHRISTOPHER: Well, excuse me, I think you're going to have the same problems with fax filing as you have with e-filing. You know, that will not go to the designated clerk who is supposed to keep things confidential. Okay. I mean, in the big counties

that's how we handle it. There's one clerk that handles these files, and you know, the lawyers know or a minor comes in, they're, you know, referred to one particular clerk. In a big county or probably in the smaller counties fax filing goes over here, goes through here, goes through here, goes through here. It is often, you know, days before a judge sees a fax filing, and so it would be very difficult to ensure that you've got your work done in five days.

CHAIRMAN BABCOCK: Okay. Yeah, Susan.

MS. HAYS: To address these issues with e-filing and fax filing, I believe there is language in the existing draft that the person transmitting it must call ahead to make sure the right person is there to receive it. Oh, there's not. We need to double check that. With -- Mr. Hughes, you had a concern about e-filing and confidentiality versus walking into the courthouse and confidentiality. In my experience handling the cases at the trial level, we hand walk the case through anyway because you've got to get a hearing set, and there's no way you're going to get a hearing setting quickly unless you're standing there talking face-to-face with a court coordinator.

At the appellate level, because of the distances, then we're brushing up against the

expeditiousness requirement of these cases. E-filing has already happened via e-mail. I filed one through a portal this spring. I didn't do it until I had the clerk on the other line saying she's there to receive it and to make sure that it's sealed. So in these rare instances where faxes are even being used anymore -- and I think your concern would be handled with the language making it clear to the practitioner that they are to call ahead and make sure the clerk is there and arrange for the fax filing if e-mail isn't available.

CHAIRMAN BABCOCK: Frank.

MR. GILSTRAP: While I understand the need for fax filing, but I'm really concerned about the e-mail. It can be misdirected. It can be flipped. I mean, once you put it in the electronic record, I think your chances of maintaining confidentiality go down, and if we're going to be able to file by fax, why do you need e-mail?

CHAIRMAN BABCOCK: Okay. What else? Anything else on this topic? As I understand it -- yeah, Roger.

MR. HUGHES: Maybe if we're going to allow e-filing on this, and I am now persuaded we should, some allowance is going to have to be made so that it doesn't get kicked back for technical insufficiency, because I've had instances where the clerk's office farms out screening

stuff for compliance with the JI -- whatever those rules are, and there is no uniformity across even within a county about applying those standards. So you file something Monday and then Tuesday you find out it's been kicked out, but you don't find out until Tuesday at 5:00 o'clock. I think something has got to be made if we're going to allow e-filing so that if it's going to be kicked back you find out in a few minutes rather than two days later.

CHAIRMAN BABCOCK: Okay. As I understand it, Alex, there was no dissent on this issue in the subcommittee; is that correct?

PROFESSOR ALBRIGHT: No, and the alliance for --

CHAIRMAN BABCOCK: That is correct or it's not correct?

PROFESSOR ALBRIGHT: That is correct. There was no dissent, and the Alliance for Life version also said no e-filing. I think when you look at the e-filing rules it says, "Documents to which access is otherwise restricted by law or court order must not be filed electronically."

CHAIRMAN BABCOCK: Okay. Any other comments about e-filing? Yes, Judge Estevez.

HONORABLE ANA ESTEVEZ: I just did want to

mention, I have two counties, and one of them is very efficient in the e-filing, and the other one is very inefficient.

CHAIRMAN BABCOCK: Which is which?

HONORABLE ANA ESTEVEZ: Randall is very -- I don't mind. We talk about it all the time. We're trying to get there, but I just -- I know all the concerns. The problem also occurs that it doesn't go into the system right away in one county, and so there's just -- we're not technically there, and maybe in the future it won't be an issue, but right now there's a lot of people that are going to be touching these files that don't need to be touching it --

CHAIRMAN BABCOCK: Yeah.

HONORABLE ANA ESTEVEZ: -- and it just makes it a lot easier.

CHAIRMAN BABCOCK: Thank you. Great. All right. Alex, let's go on to the next topic with that, and that would be the consequences for failure to rule. Would that be next?

PROFESSOR ALBRIGHT: Yes. That's it.

CHAIRMAN BABCOCK: Okay. Let's talk about that.

PROFESSOR ALBRIGHT: Okay. So the amended statute no longer has a deemed denial as a consequence of

the judge -- no longer has a deemed grant, sorry, as a consequence of the judge's failure to rule within the allotted time period, thus the minor is left without an expeditious ruling if the judge holds a hearing but refuses to rule or refuses to hold a hearing within the allotted time of five days. So we talked about lots of different options here. We rejected a deemed denial procedure. This one was -- that was apparently proposed in the Legislature and taken out. A procedure where the court of appeals would make a decision made by an offer of proof of the minor, we rejected that.

So we opted for an expedited motion procedure to the Supreme Court. We talked about something to the presiding judge. Eventually this morphed into the Supreme Court clerk as being more expeditious, so that the Supreme Court could quickly determine what the problem was and expedite how to solve the problem either by a writ or by a call to the presiding judge. So Rule 2.6 is a motion for expedited relief for the trial court, and Rule 3.3(e) is a motion for expedited relief in the appellate court.

CHAIRMAN BABCOCK: All right. Comment? Frank.

MR. GILSTRAP: The deemed granted provision served three purposes. First of all, it gave the judge political cover. In fact, these things are confidential,

but when the judge goes out to a party meeting and they ask him, "Are you granting bypasses?" he can say "No. No, I'm -- they're deemed granted."

It also on a larger, more important level it gave the judge some ethical coverage. If the judge has ethical or moral reservations about the abortion procedure he could remove himself from the process by just letting the deemed granted provision be granted, and he didn't have to sign a bypass order that would almost as certainly lead to an abortion; but the primary reason, the primary purpose of it, is time and Bellotti -- and that gets into a constitutional issue.

In the Bellotti case the court said the abortion decision is one that simply cannot be postponed or it will be made by default with far-reaching consequences, and let's think about how much time we're talking about. We're not -- we're talking -- what are we talking, does Texas prohibit abortion after 20 weeks now or is it 24 weeks? There is some point at which the state can prohibit abortion, and so it's one thing to tell a couple of 15-year-olds that you've got to wait a year before you can get married. It's another thing to tell a minor that you've got to wait a year to have an abortion. It just doesn't work. So the time is of the essence, and that's -- I think that's what the committee proposal

speaks to, and if we've extended it to five days now instead of two days and everything that can be done to expedite the process in case the judge simply doesn't rule has to be done, and so I think that what the committee has done is a good proposal.

CHAIRMAN BABCOCK: Okay. Judge Estevez.

HONORABLE ANA ESTEVEZ: I just want to put something on the record in case the Supreme Court wants to look at it. On page 5,382 of the 84th Legislature, regular session, this is just a little bit of legislative history, and one of them, Minjarez says, "If the judge fails to rule does that mean that it's deemed denied," and Morrison says, "It is automatically denied, yes, if the court has not ruled after five business days." I'm not suggesting that is what the rule is, but I just want them to be aware that it's there. I agree that a deemed denial makes absolutely no sense because what happens then? We went through the whole scenario, and we couldn't have deemed findings of nothingness, and so there wouldn't be any evidence for the court of appeals to go up to.

Now, I do want to say that in that statutory history or legislative history that they also ask, "Well, if Jane Doe does not agree with the judge's ruling of a denial for the bypass, what's her next step if she wants to do an appeal," and someone stated "They can go to

another judge then and look for a ruling or get a mandamus," and I don't believe that's where we were either, but I just wanted to point that out just so they're aware of it.

PROFESSOR ALBRIGHT: Yeah, and --

CHAIRMAN BABCOCK: Alex.

PROFESSOR ALBRIGHT: And there was a draft, I believe, that did have a deemed denial, so I don't know which draft that was discussed.

HONORABLE ANA ESTEVEZ: I think this is after that.

PROFESSOR ALBRIGHT: Okay.

HONORABLE ANA ESTEVEZ: So this is --

CHAIRMAN BABCOCK: Justice Christopher.

HONORABLE TRACY CHRISTOPHER: I sent out by e-mail my comment on this rule and a suggestion that we change it. I hope everyone got it. I didn't see it in the actual materials that were attached here. I do not think going to the Supreme Court is an efficient way to move the case along. I think the way to move the case along is by the appointment of another judge. That happens through the regional presiding judge. Even if the Supreme Court ultimately decided to appoint another judge, they would say, "Regional presiding judge, please appoint a new judge to handle this matter." So I see no reason to

include the Supreme Court in the timing of problem here.

I know people -- I've talked to Alex about it. She said some people on the committee were worried that judges would duck their responsibilities. Well, a judge can duck their responsibility now by recusing. All right. And then the regional presiding judge would appoint a new judge. If people are worried or want to know what judges are ducking their responsibility, then the regional presiding judge can make a report to the Supreme Court about what judges are not ruling, but to include the clerk of the Supreme Court, somebody at the Supreme Court, look at it, think about it, wonder about it. You know, "Oh, well, let's order him to do something that he should have already done." You know, if he's ducking his responsibility, another order from the Court is not really going to do it; and then there would be a show cause, contempt. At the end of the day it's going to be a new judge appointed. So let's short-circuit that and appoint a new judge after the five-day period, or even less than that, because the ad litem needs to be appointed right away, the attorney needs to be appointed right away, and a hearing needs to be set right away.

CHAIRMAN BABCOCK: Okay. Lisa.

MS. HOBBS: We definitely discussed a lot the regional presiding judges being involved, and we think

most of the time that's going to be how it happens. The clerk has an obligation to find a judge to hear the case expeditiously. Presumably she will either do it through some local administrative process or she could go through the regional presiding judges. Our thought as a committee is that hopefully this is not going to be a huge problem of people refusing to rule, that we believe judges take their duty to rule in cases to be -- responsibly and seriously, and the Chief Justice actually can appoint a judge, so it doesn't have to be a regional presiding judge, it could just be the Chief Justice that appoints one to hear it. It doesn't have to be going up and then back down anyway. The Chief Justice has that authority.

Our thought was, you know, if they're going to listen to anybody, hopefully they will listen to the Supreme Court, or maybe the Supreme Court can get a judge quickly to look at it, but I don't think anybody on the committee would oppose it going to the regional presiding judges to the extent they would be willing to take on that role. It wasn't a rejection from our standpoint of that being a possibility. This was just the thing that we were more familiar with. We're familiar with the Supreme Court issuing writs and judges realizing that a writ is a serious thing from the Supreme Court, and so that's the -- that's the route that we went, but I mean, I think I -- I

appreciate your comments, Justice Christopher, and I think that's a valid choice as well.

CHAIRMAN BABCOCK: Judge Estevez.

HONORABLE ANA ESTEVEZ: I just -- Ms. Hobbs already stated this, but the reality is I don't know that this will ever -- we're hoping that they never need that provision, period, because I don't know any judges that just ignore their -- the statute that said you had to have a ruling within the period of time, and the clerk would come and find you and tell you, "You have to do this," and we always would -- we would do it within that day unless for some reason we had to do it the next day. We would get on the phone, get the attorney appointed, and we would within a few hours because of all the time restraints before, and so I -- Judge Peeples isn't here today, but okay, because we talked about it, and he didn't know of anyone either that had just refused to set a hearing; and obviously, I think Frank stated before he -- you thought that the judges would not want to rule so they would have a deemed grant so that they wouldn't have the ethical responsibility of some sort of abortion; and I would totally disagree with that. I would think that if you didn't rule and you think that it's an ethical issue then you just granted an abortion, not that you didn't grant an abortion after you heard it, so I think that the judges

that -- in all of the state of Texas really do take their statutory duties seriously. The ones that cannot -- cannot in any sort of way consider the judicial bypass rules, I know are -- in our jurisdiction, they were excluded from listening to the cases, and so it wasn't ever an issue.

CHAIRMAN BABCOCK: Justice Pemberton.

HONORABLE BOB PEMBERTON: I was just going to add, I think the gist of the committee's discussions was there needs to be some mechanism in case you have a situation where there is a problem getting a ruling. The form it takes, whether it's PJ versus Supreme Court is less -- it just needs something in there to address those hopefully rarity situations, but the Lege did -- the scheme does anticipate there's an actual ruling. There's no deemed action mechanism, so we thought that there needs to be some means to ensure there are rulings, and that's where this is all coming from.

CHAIRMAN BABCOCK: Okay. Nina.

MS. CORTELL: I think any number of persons could handle it, but I think there is something to be said for a single conduit just because to make sure that somebody is ready and able and willing to react quickly. The only thing I'm concerned about in this first saying the responsibility is if you go to a court of appeals that

hasn't got a mechanism or isn't ready to deal with this quickly. I don't know if that's a problem, but there's some benefit to a single conduit.

CHAIRMAN BABCOCK: Lisa.

MS. HOBBS: That's why we had discussed going to the court of appeals with the motion, and we just decided that that is too many people who may not understand how the system works, and that's why we kind of bypassed the court of appeals and went straight to the Supreme Court.

CHAIRMAN BABCOCK: Okay. Anybody else on this? Yeah. Justice Brown.

HONORABLE HARVEY BROWN: This is related to 2.3, but the issue I have was the word "instanter." You know, you just heard one judge say, "It's a priority, we try to do it within an hour or two, occasionally they may have to go over to the next day." That's my experience from many years ago, too, is that it's done really, really quickly; but sometimes there's extraordinary other things going on at the same time; and you're in the middle of something; and you can't just literally stop within a minute; and "instanter" to me suggests everything else, no matter how pressing, no matter what it is, stops immediately; and so I just I had a little issue with that, so maybe you can explain to me why "promptly" wasn't

strong enough. Because that's part of this rule, too, and 2.3.

CHAIRMAN BABCOCK: Professor Albright.

PROFESSOR ALBRIGHT: "Instanter" is used throughout these rules, and it's a defined term in 1.2(c).

HONORABLE HARVEY BROWN: Thank you.

PROFESSOR ALBRIGHT: "Instanter means immediately without delay. An action required by these rules to be required to be taken instanter should be done at the first possible time and with the most expeditious means available." So I think it does mean you can finish what you're doing as long as it's not a day-long project.

HONORABLE HARVEY BROWN: Right.

PROFESSOR ALBRIGHT: And but then you need to handle it. And the reason we changed "promptly" to "instanter" in 2.3 is because since there was no deemed grant. You know, it was if they didn't do it quickly it would be deemed granted and then everybody, you know, would be done, but now there is no deemed grant so we did need these appointments promptly. We need the hearing promptly. We need all of this as soon as can be done.

CHAIRMAN BABCOCK: Okay. Great. Anybody else? Okay. What's the next category?

MR. GILSTRAP: Chip?

CHAIRMAN BABCOCK: Yeah, Frank.

MR. GILSTRAP: One question. In 2.5(d) it says, "The court must rule on an application as soon as possible after it is filed subject to any postponement requested by the minor," but then it also says, "The court must rule on an application by 5:00 p.m. on the fifth business day." That seems like there's a conflict there.

PROFESSOR ALBRIGHT: I think that was just a matter of leaving it like the rules were and changing it as the statute required us to.

MR. GILSTRAP: But the statute gives -- the statute lets the judge wait five days, right?

PROFESSOR ALBRIGHT: Wait. But I think -- you know, it said before "rule on it as soon as possible" and you have to do it before -- you have to do it by 5:00 p.m. on the fifth day.

MR. GILSTRAP: It actually said second day before. Now it says fifth.

PROFESSOR ALBRIGHT: Right, so there was the immediately after -- I just -- I don't really remember exactly, but I know that this change was brought about by the statute.

MS. HOBBS: I think the statute used to require it -- the ruling to come immediately after the hearing, and I think that was removed from the statute.

PROFESSOR ALBRIGHT: Yeah.

MS. HOBBS: So then we removed it from the rule. I get your point that it seems a little -- I don't think inconsistent. I think we -- you know, we want these rulings as expeditiously as possible in the first sentence and then the second sentence says in no event can the ruling come more than five days after it's filed, is the way I read the rule.

CHAIRMAN BABCOCK: Okay. Frank, anything more?

MR. GILSTRAP: (Shakes head.)

CHAIRMAN BABCOCK: Okay. All right.

HONORABLE DAVID EVANS: Could you frame this in a way that a failure to act promptly is grounds for recusal so that the presiding judge, who -- it would supplement 18b? Have you thought about or did Judge Peeples discuss that?

MS. HAYS: I -- to answer your question, Judge Peeples and I -- or I asked him to review the recusal rule and the parental bypass rules.

HONORABLE DAVID EVANS: If it were phrased that the failure to act within a certain amount of time as the judge assigned to the case was a ground for recusal and would supplement -- and I'm going to have to think back. 18b would be a ground of recusal. Then everything triggers in for the regional presiding judge or any other

authority, and so that's a little bit easier for the presiding judge to step in. Plus you put in there that "can rule without a hearing," you might want to say that if that were alleged the judge could summarily determine it from the papers in the cause. There is a summary provision in 18b that allows -- you have to have an oral hearing on recusal under 18b.

MS. HOBBS: I see. It was the oral hearing on recusal.

HONORABLE DAVID EVANS: Oral hearing on recusal under 18b unless there are certain qualifications met and then you can summarily rule as the presiding judge. I'm a presiding judge.

PROFESSOR ALBRIGHT: So what that does is it automatically gets you a new judge instead of having the assigned judge make --

HONORABLE DAVID EVANS: Well, if the judge has failed to act and that's recusal and it's submitted to the presiding judge and you don't have to have an order of referral, there's a few tricks that are going to have to be played in it. Then it gets to the presiding judge. Presiding judge says "didn't meet the time limits." If it didn't, presiding judge can then sign an order for another active district judge to hear the case, which will avoid an objection to a visiting judge and get you a judge to

hear the case.

PROFESSOR ALBRIGHT: That's worth looking at.

HONORABLE DAVID EVANS: I think that's where I would go with it.

MS. HOBBS: Yeah.

PROFESSOR ALBRIGHT: I think we're all just in agreement that we need to do something quickly to get a ruling.

CHAIRMAN BABCOCK: Judge Estevez.

HONORABLE ANA ESTEVEZ: I'm just going to tell you how brilliant Judge Evans is right now.

HONORABLE DAVID EVANS: Say again.

HONORABLE ANA ESTEVEZ: You're brilliant. What I was going to just bring up and I have confirmed that the legislative --

HONORABLE DAVID EVANS: I'm leaving.

HONORABLE ANA ESTEVEZ: The legislative history, again, in that same testimony, and I'm just -- for the record, I'm going to put that on page 5,383, they state -- well, that if the judge doesn't rule then they can go to another judge and look for a ruling or get -- that they can go get another judge, and what's important is on page 14 of our -- of the actual statute states, "Except as otherwise provided by subsection (g), a minor

who filed an application and has obtained a determination by the court as described by subsection (i) may not initiate a new application proceeding, and the prior proceeding is res judicata," and so why that fits so beautifully with Judge Evans' is because if they did this automatic recusal --

HONORABLE DAVID EVANS: It wasn't quite automatic. I said it was a ground which would have to be verified under 18a that says judge has had the case, failed to rule timely or conduct a hearing under the time, and that the judge -- and the presiding judge could determine from the papers in the cause summarily, and probably in order to avoid some delay you might want to consider whether you would require -- and I am not speaking on behalf of PJs, but you would have to investigate whether you would require the judge, the judge who has the case, the district or county judge, whether or not an order of referral to the district -- to the presiding judge is required.

Jurisdiction of the presiding judge is not invoked until the judge who presented with the motion has either refused -- has either refused or granted the motion to recuse. So you have to have an order of referral as a presiding judge either saying, "I've got to go hear this or not," so there is another delay in a critical time

period that you would have to consider whether an order of referral is required.

CHAIRMAN BABCOCK: Justice Christopher.

HONORABLE TRACY CHRISTOPHER: Well, that's why I didn't include any sort of recusal mechanism in there --

HONORABLE DAVID EVANS: I see.

HONORABLE TRACY CHRISTOPHER: -- because it does -- it just does create more delay. First you have to have a verified motion to recuse. You have to find the judge who is not ruling to refuse to -- you know, to either recuse or say, "I'm referring it to the," you know, "presiding judge." So that's why, you know, unless there is some constitutional thing that I'm unaware of, my proposal was just a verified letter by the lawyer saying "Hadn't been ruled on, please give me another judge." That's it.

HONORABLE DAVID EVANS: You could accomplish that, Tracy, under the current by just transferring to another court. Now, I didn't really think that referral would be that slow, but --

HONORABLE TRACY CHRISTOPHER: But I mean --

HONORABLE DAVID EVANS: But I understand what you're saying.

HONORABLE TRACY CHRISTOPHER: If the judge

is not ruling, a motion to recuse has to go to the judge who is not ruling to begin with, so, you know, and if he's not ruling and is, you know, hiding out, you know, for whatever reason, then you just built in more delay.

HONORABLE DAVID EVANS: Could be. And I don't disagree with that.

CHAIRMAN BABCOCK: Okay. Anything else on this? Because here is the incentive for not having anything more on this, we'll take our morning break, but Judge Evans.

HONORABLE DAVID EVANS: If it's going to go to the regional presiding judges, perhaps you should just put something in there that whatever they do as an administrative judge is confidential and not subject to Rule 12 and not open to inspection.

CHAIRMAN BABCOCK: Good point.

HONORABLE DAVID EVANS: Those assignment orders can be pulled at any time.

CHAIRMAN BABCOCK: Okay. Everybody ready for a break? All right. We'll take a 15-minute break. Thank you.

(Recess from 11:13 a.m. to 11:30 a.m.)

CHAIRMAN BABCOCK: All right. Let's go to the next topic, which I think is attorney's sworn statement; is that right?

PROFESSOR ALBRIGHT: That's right.

CHAIRMAN BABCOCK: Okay. Let's talk about that.

PROFESSOR ALBRIGHT: Okay. So the statute requires attorneys who assisted the minor in filing the application to sign a verification, and you can look at the statute as to the requirement, but I guess maybe that's the way to do it. Let's look at the statute, which is -- sorry, here it is. It's on page 14, (r) on line 13. "An attorney retained by the minor to assist her in filing the application under this section shall fully inform himself or herself of the minor's prior application history, including representations made by the minor in the application regarding her address, proper venue in the county in which the application is filed, and whether a prior application has been filed and initiated. If an attorney assists the minor in the application process in any way, with or without payment, the attorney representing the minor must attest to the truth of the minor's claims regarding the venue and prior applications with a sworn statement."

So, what we did is look at Rule 2.1(c)(3). On the application form, we -- the verification page, "Declaration of an attorney. If any attorney assists the minor in filing the application, the attorney who

represents the minor shall sign the verification page, and the declaration shall be made to the best of the attorney's knowledge, information, and belief performed after reasonable inquiry." This is the obligation of attorneys under Rule 13. So they are attesting to the truth that the minor is pregnant, she's not emancipated, she wishes to have an abortion.

(d) is the res judicata provision that concerning her pregnancy the minor has not previously filed an application that was denied, or if so, that the current application is filed with the court who previously denied the application and that there has been a material change in circumstances since the time the previous application was denied, and then (e) is the venue is proper in the county, and on the verification page there's the current residence including the physical and mailing address, and so that includes all of the things that are part of this that have to be verified as part of the statute.

The statute does seem to require the lawyer to do -- it says "fully informed." We talked a lot about this, and the problem is, is that the lawyer really can't do an independent investigation. The lawyer can talk to his or her client, but you can't go knock on the door of the minor's residence and say, "Hey, Mom, does Jane Doe

live here? I'm just wondering." You can't -- as we talked about before, because all prior -- any applications, prior applications, would be sealed, you would have no access to prior applications. So we decided that realistically that all we could require the lawyer to do was to talk to the client and verify, you know, do whatever they could reasonably as required under Rule 13 and verify that to the best information and belief that they have. So that is how we handled all of this.

CHAIRMAN BABCOCK: Okay. Comments? Roger.

MR. HUGHES: When I looked at the way that Rule 2.1 was drafted about the attorney's declaration, it seems to me that the exact language of what the -- what the rule says the attorney must sign goes further than what the statute does. The way I read the statute was the only thing the attorney has to verify for the client is the allegation concerning prior applications and venue, but according to the rule the client -- or pardon me, the minor has to verify the substance of the application, and therefore, when you drop down to paragraph (3) that says the attorney who assists has to sign the verification page, that would appear to require the attorney to verify more than the statute requires the attorney to verify. That is, the attorney would be verifying that the eligibility and the requirements to obtain a bypass, which

I don't -- and so I think the -- what is it, 2.1, subsection (c)(3), needs to be revised to track the language of the statute.

PROFESSOR ALBRIGHT: What if we just -- I mean, that's a good point. If we just say, you know, "has to verify 1(d), 1(e)." I think you have -- do you have residence in that one? I can't remember, but we could just pick out the ones that are required to be verified. The reason it's done this way is just so we don't have to have another document, so but we could have the lawyer just verifying the particular things that are listed in the statute.

MR. HUGHES: Well, that essentially is what I am advocating, but I thought the language of the statute was actually -- yeah, the revision, which is 33.002(r), "If the attorney assists the minor in the application of the process in any way, with or without payment, the attorney representing the minor must attest to the truth of the minor's claims regarding venue and prior applications in the sworn statement."

PROFESSOR ALBRIGHT: Yeah, earlier up there it talks about her address as well.

MR. HUGHES: Well, like I said --

PROFESSOR ALBRIGHT: I think it's a drafting issue.

MR. HUGHES: The reason being is as an insurance defense lawyer, you know, I get real sensitive to conflicts of interest and requiring an attorney who -- making them sign something, I mean, you're forcing the attorney to become an attorney of record; whereas before otherwise it would be voluntary; and then you're requiring the attorney to verify information that might otherwise be treated as confidential, so I don't think you ought to push it any further than that.

PROFESSOR ALBRIGHT: Okay, yeah, that's a good point.

CHAIRMAN BABCOCK: Nina.

MS. CORTELL: To follow up on Roger's point, what it says up above is "shall fully inform himself" on this, or herself, as to those points, right? And then the verification is more limited.

PROFESSOR ALBRIGHT: And the verification what?

MS. CORTELL: More limited. Down here. The last sentence is more limited than the first sentence.

PROFESSOR ALBRIGHT: So you're saying you --

MS. CORTELL: That you could narrow the scope of the verification.

PROFESSOR ALBRIGHT: Okay. I'm lost. I'm sorry.

MS. CORTELL: Maybe I misunderstood. I think Roger was saying to limit the verification to the points raised in the last sentence.

MR. HUGHES: Yeah.

MS. CORTELL: And you had come back and said there were other categories in the first sentence, but that's not included in the verification requirement.

PROFESSOR ALBRIGHT: No, if -- well, okay, so if you look at on page eight, (c)(3), at line 18, it's to be accompanied by the sworn statement of the attorney under subsection (r), so I guess what you're saying is the -- is that the address, all you have to do is inform yourself, but you don't have to attest to it. Okay.

CHAIRMAN BABCOCK: Got that squared away?

MS. HOBBS: Uh-huh.

PROFESSOR ALBRIGHT: Yeah.

CHAIRMAN BABCOCK: Okay. Any other comments? Justice Gray.

HONORABLE TOM GRAY: Just a general observation that the statute talks about a prior application, and you make it limited to prior application with regard to this pregnancy, the current pregnancy, and it just seems to be a narrowing of the statutory requirement.

PROFESSOR ALBRIGHT: I guess I thought that

that's what it meant.

HONORABLE TOM GRAY: It may or may not be. I don't know, but it's a narrowing.

PROFESSOR ALBRIGHT: It didn't make any sense to me that you would say it was in her best interest when she was 12, and so it's in her best interest for every -- you know, she gets pregnant every year after that, it's in her best interest and so automatically grant the bypass.

HONORABLE TOM GRAY: Or not. It's information gathering, and that's -- so I just make that observation. I think it narrows the statute.

CHAIRMAN BABCOCK: Richard.

MR. MUNZINGER: I was looking at Rule 1.8, duties of attorney, "An attorney must represent the minor." Do the rules contemplate any kind of moral objection of an attorney to refuse to participate in a proceeding in which the attorney believes the proceeding is immoral per se? I'm a Roman Catholic. A Roman Catholic may not in any way participate in an abortion, facilitate it or otherwise, so if a judge calls me and says, "Munzinger, you're going to represent this 15-year-old girl," and I say, "I'm not going to do that, Judge." May I be held in -- the rule is silent on my moral objection. I just was curious if the committee gave

that any thought or if it has done anything that would allow someone in my shoes to make such an objection.

CHAIRMAN BABCOCK: Judge Estevez.

HONORABLE ANA ESTEVEZ: I wanted to respond to that before and now, because we have a new issue now. Before the way we would do it, because it was just like the clerk came to the judges and they had to find a judge that was going to be here. I mean, if I was out in South America, and there's no way I can rule in five days or anything like that, so we would actually call the attorneys and ask the attorney, let them know what it is, and if they said they would not take it, we called a different attorney. We can't do that anymore. We don't believe. We don't really know, but the Legislature has just passed a new law that now says that we have to use this wheel for attorneys and ad litems and everything else, and we are very unsure whether that includes the bypass or not, and so that's going to be something I think we were going to address at some point, but if that happens then I guess we'll end up the same way, but we would still call the attorney, and we just -- we skip them.

If they will not -- you know they can say, I'm not -- "I'm anti-abortion, but I will still serve if that's what you want us to do," then we do that. If they

say, "There is absolutely no way morally we will do this," we have never appointed someone that has said that, and I believe that the statute and everything, that's consistent with the law. I don't think there is any problem with that. It's just like anything -- some other things that come across, but that is how we do it.

MR. MUNZINGER: May I respond just briefly?

CHAIRMAN BABCOCK: Yes.

MR. MUNZINGER: I'm speaking to the record. I appreciate your practice. This is a rule promulgated by the Texas Supreme Court. It affects Roman Catholic attorneys. Roman Catholic attorneys who obey their church may not participate in an abortion. If they do, they -- let me finish, please. If they do, they have a very serious moral problem. I am urging the Texas Supreme Court to do something to protect Roman Catholic attorneys. We've got a problem. We can't represent a person like this. I can't be a guardian ad litem like this, and if a judge appoints me, I can't do it. And if the judge -- he may be my political enemy. "Oh, Munzinger, I got you now, son. You're in contempt. I want your law license. You have disobeyed a court order."

We've got to have something that protects people, and it may not be a Catholic next time. It may be somebody with a different viewpoint, but we have not

forfeited our rights as citizens by our beliefs in this procedure. This rule needs to take into account. I don't want to get into a debate with anybody. I'm just urging the Court to be sensitive to that issue.

CHAIRMAN BABCOCK: Do you think that a lawyer has the ability to decline an ad litem appointment?

HONORABLE DAVID EVANS: He does on the basis of a conflict of interest.

MR. MUNZINGER: You know, I used to do that in criminal cases. I wouldn't do drug cases so they gave me capital murder cases and rape. I took rape and capital murder. I wouldn't take drug cases, and I got away with it. I don't know whether we can or can't. I don't what our rights are to refuse a court order to represent an indigent defendant or somebody else.

CHAIRMAN BABCOCK: Somebody up there, I don't know who it was, just said that --

HONORABLE DAVID EVANS: You can decline under the Rules of Professional Conduct on a conflict of interest.

MR. MUNZINGER: I'm sorry, I can't hear you.

HONORABLE DAVID EVANS: You can decline representation as an ad litem on the basis of a conflict of interest under the Rules of Professional Conduct, and you must do so or you are subject to discipline. And so

if you have the belief that you cannot serve as effective counsel, you have to state that, and I don't think a judge can override it or second guess it. He may think it's a subterfuge, but I think the lawyer just goes to the bottom of the list on the ad litem.

MR. MUNZINGER: Well, if that is the rule I urge the Supreme Court to say something in the rules that will protect people who find themselves in the position that I find myself in in connection with this rule were I to be appointed by a judge.

CHAIRMAN BABCOCK: Frank.

MR. GILSTRAP: Can't we solve the problem by simply amending the last clause in 1.8, which says, "When an attorney is not required to represent the minor in any other court or in any other proceeding" by simply saying "When an attorney is not required to represent the minor"? That way the attorney doesn't have to serve, and that's the gist of Richard's concern.

MR. MUNZINGER: That's my concern in a nutshell.

CHAIRMAN BABCOCK: You know, to my way of thinking, it's, you know, no judge can compel somebody to take an ad litem appointment, but belt and suspenders I guess.

MR. GILSTRAP: But it says "must."

CHAIRMAN BABCOCK: Huh?

MR. GILSTRAP: It says "must."

CHAIRMAN BABCOCK: Okay.

PROFESSOR ALBRIGHT: I think that's once you've taken on the representation, because if you've agreed to represent her because she's retained you or you've agreed to take on the appointment, but I hear what you have to say.

CHAIRMAN BABCOCK: Yeah.

MR. SHELTON: Do I recall that several courts have training requirements in order to be qualified as a potential appointee? I mean, in other words, you --

MS. HAYS: It's in Chapter 107 of the Family Code.

MR. SHELTON: And so if an attorney never qualifies him or herself for that task, then doesn't it render it sort of moot?

HONORABLE ANA ESTEVEZ: Not necessarily. It all depends whether we're going through the wheel or we're not going through the wheel, because now we have two people, and they allow clergy. It allows you to appoint clergy and other people. It's a very broad ad litem. It doesn't have to be an attorney ad litem, so there is -- I don't believe that that statute is going to apply to the ad litem that's appointed here because they give us a

different structure of who can be appointed as an ad litem by statute, and it does not -- it includes way more people than -- I apologize for my English, but a group of people that it's more extensive than attorneys, and so they wouldn't be subject to the statutory requirements of any type of training, which we have wondered whether those ad litems still have to be in our wheel, though.

CHAIRMAN BABCOCK: Yeah.

HONORABLE ANA ESTEVEZ: I mean, this is what the judges have been talking about. Are we supposed to add clergy people? We would like to know if interpreters need to be -- I mean, we have so many questions about the legislation.

CHAIRMAN BABCOCK: Okay. Any other comments? Frank. I could tell you were winding up for one.

MR. GILSTRAP: Well, you know, I think we're ignoring the elephant in the room, and while I think this is a good provision and I think it's a provision that should be adopted, our first duty is to brief the Supreme Court of Texas, and the problem is the Legislature said the attorney should attest to the truth of the minor's claim regarding venue and prior application in a sworn statement, and this ain't a sworn statement. I mean, it's just not, and if it were any other provision I would be

saying that's a problem, but the problem we've got here is this, that the attorney cannot attest to the truth in a sworn statement because he or she cannot know whether the minor has had a prior application and probably almost certainly cannot know where the minor lives, like, for example, she doesn't have a driver's license.

CHAIRMAN BABCOCK: Yeah.

MR. GILSTRAP: So but if you really require a sworn statement, you're going to run flat into a constitutional problem. You know, the test is whether it's an undue burden, and no one knows what an undue burden is, but requiring attorneys to swear to the truth of things that they cannot know is an undue burden.

CHAIRMAN BABCOCK: Got it.

MR. GILSTRAP: And so, therefore, this -- this strikes me as a way to preserve the constitutionality of the provision.

CHAIRMAN BABCOCK: Frank, when you have a corporation sign answers to interrogatories, isn't this language kind of what you use? Because the guy signing it doesn't have personal knowledge of everything they're answering. That's the whole purpose of the corporate interrogatory, is because, you know, you can't -- you can't take a deposition, because not everybody knows all of this stuff.

MR. GILSTRAP: Maybe so. Maybe so. That might be the answer.

CHAIRMAN BABCOCK: The interrogatories have to be verified.

MR. GILSTRAP: You know, I think if you actually require the attorney to sign an affidavit you're going to have -- you're going to have attorneys who say, "I can't sign this."

CHAIRMAN BABCOCK: What about this language?

MR. GILSTRAP: Because they don't know.

CHAIRMAN BABCOCK: What about this language here?

MR. GILSTRAP: The language the attorney can sign, the language.

CHAIRMAN BABCOCK: Yeah.

MR. GILSTRAP: And that's why it's there, but, you know, we -- it's really hard to reconcile that language with the language of the statute.

CHAIRMAN BABCOCK: Well, except that the language in the statute is the same language or essentially the same as we have for verifying interrogatories. So there is some precedent for treating it this way.

MR. GILSTRAP: Well, maybe so.

CHAIRMAN BABCOCK: Okay. Anybody else? All

right. Nice job, Alex. Let's go on to the next thing.

PROFESSOR ALBRIGHT: Okay. We're cracking through this. The next one is the report to the Office of Court Administration. We did not include this in the rule, although there is -- there is quite a bit of the statute about it, but we decided that this is between the clerks and the Office of Court Administration. There needs to be a significant amount of education of clerks all over the state and then the OCA and the clerks have to figure out how they're going to get this information back and forth in a confidential manner.

CHAIRMAN BABCOCK: Okay. Comments on this? Going once. Well, it sounds to me like you've got a unanimous approval for your approach on this, which does make sense, by the way. How about abuse reporting?

PROFESSOR ALBRIGHT: Abuse reporting, we've already talked about that. It was -- there is an addition to the statute that makes clear that the judge has an obligation to report abuse, so it changed the rule to tip that. We've already talked about not only the judge but the lawyers and ad litems have that duty as well, and we just included it in the statute. Susan, is there anything else we need to talk about?

MS. HAYS: Huh-uh. I think we covered it earlier unless there are any questions.

CHAIRMAN BABCOCK: Comments about abuse reporting? Justice Gray.

HONORABLE TOM GRAY: Well, to follow up on Richard's comment earlier, I don't think the rule as written covers or protects -- I don't know how you want to put it -- the court personnel along the way that learn of this, was my understanding of their duty to report abuse that they become aware of, and are they protected if they do report it, and is it clear that they have an obligation to report it? And I'm talking about like in the clerk's office.

PROFESSOR ALBRIGHT: So, I mean, based on what I've heard today I would say court personnel should probably go talk to judge.

HONORABLE TOM GRAY: Should probably go talk to the judge is different than that person having an independent obligation to go and report it, but I'm not even talking about court personnel. I'm talking about as much clerk's office personnel who handle this file and become aware of abuse.

MS. HAYS: I -- what -- where I'm not totally following your concern, Justice Gray, is that the clerk personnel don't have access to the facts of the case or should not, so --

HONORABLE TOM GRAY: An application for an

abortion has been filed by a 14-year-old.

MS. HAYS: In that case, yes, but her age isn't on the application.

HONORABLE TOM GRAY: And you want me to not report that because I don't necessarily know that this person is anything younger than 18 is all I know about it? I mean, when you get indicted for failure to report --

MS. HAYS: No, I understand. I'm trying to ferret out the circumstances of what information the clerk has access to and would that ever -- would it ever occur that a clerk has access to information that the judge does not.

HONORABLE TOM GRAY: Independent duties to report.

CHAIRMAN BABCOCK: Yeah, Justice Gray's point is that any of these it's going to be an underage person.

MS. HAYS: Well, 17-year-olds can consent to sex in Texas.

HONORABLE ANA ESTEVEZ: But can't have --

MS. HAYS: Right, but can't consent to their own healthcare, which is what the bypass order gives the right to do.

MR. MUNZINGER: Well, I go back to the example that I gave of the 12 or the 13-year-old. These

are not unusual events.

MS. HAYS: No.

MR. MUNZINGER: They are not unusual events that 12 and 13 and 14-year-old girls become pregnant, most often by relatives, stepfathers, uncles, cousins, you name it; and so they're a 12 or 13-year-old; and there's a court reporter sitting there; and she takes the record as required by the statute and learns that this is a 12 or 13-year-old girl. That's abuse, res ipsa loquitur. That's done. She's been abused. Now, she, if I understand the Family Code correctly, has a duty to report the abuse. The point of the judge and mine is may she, should she, what rules does the Supreme Court give to protect, encourage, or discourage that conduct, because it is a duty that exists by law, a law passed by the Legislature and signed by the Governor. It's law. So what do we do about it?

MS. HAYS: Does it address the concern if the rules include some language that clerk staff -- and this may be too substantive for this process. Clerk staff have no duty to report if the judge informs them that the issue has been handled?

MR. MUNZINGER: I don't know if that --

MS. HAYS: And, for example, a case where I had recently where there is an ongoing criminal

investigation.

MR. MUNZINGER: No, I understand, and my only point, again, it's like when I said I'm Catholic and I want the Court to say something to protect me. It's one thing that we've all had these experiences. It's another thing that we have these practices. This is a rule, and the Court should in my respectful opinion recognize that state law requires every human being to report abuse of a minor, male or female, and so a court reporter has now got information that a female of 13 or 14 years old has been abused. Is the Court going to do anything about it? Is the Court going to blink its eyes because it's dealing with abortion, or is the Court going to do something about it? I say, Judges, do something about it. This draft rule doesn't. You should.

CHAIRMAN BABCOCK: The question I would have, Richard, is can the Court do anything about it? Justice Gray, do you think that under the current law that a clerk or a court reporter or some staff person, not in the judge's office, but learns that there's a 13-year-old in there who is wanting to have an abortion, that they're -- and maybe they learn some other things, that it's the father that's been involved in this. Do they have a -- do they have a duty under existing law to report that?

HONORABLE TOM GRAY: I think they do.

CHAIRMAN BABCOCK: Okay.

HONORABLE TOM GRAY: And that runs headlong into the problems of confidentiality and --

CHAIRMAN BABCOCK: Right.

HONORABLE TOM GRAY: -- that we talked about earlier.

CHAIRMAN BABCOCK: Yeah. Richard.

MR. MUNZINGER: The judge a moment ago said what do we do about the person who comes 15 years later and asks for her record? How do we find that? So we have a 12-year-old girl who is being abused by her stepfather, and she's abused until she turns 17. Nobody reported it. Nobody did anything for her. She is an emotional, psychological, physical wreck because of the failures of the judge to report the abuse, of the attorney ad litem to report the abuse, of the court-appointed attorney to report the abuse. All three have violated a legal duty owed to a minor who has been harmed by their breaches of duty, and she wants relief from a plaintiff's lawyer to get her money damages that she's entitled to, and she can't find the record to prove her case. That's a problem.

I think that's part of one of the things the judge may or may not have had in mind, but he raised the

question, how do we identify people who come later and want their records, and we all mince around this question because it's abortion. Whether it's abortion or scrambled eggs, it's the law, and we need to deal with it, and the Court needs to deal with it, but I won't say anymore.

CHAIRMAN BABCOCK: But the issue that Justice Gray identified, we would by rule be absolving people of responsibilities that the Legislature has said have responsibilities to report abuse, and that was my response to Richard's earlier comment. Can the Supreme Court do that?

HONORABLE TOM GRAY: I'm not asking that they be absolved. I find it odd that we state in the rule that the court has a duty to report and we don't say that the court reporter does.

CHAIRMAN BABCOCK: Okay. So you think that the statute -- the rule is ambiguous by omission?

HONORABLE TOM GRAY: That would be one way to characterize it.

CHAIRMAN BABCOCK: There's a problem. There's a problem with the rule.

HONORABLE TOM GRAY: You know, I've got a problem writing the rules as I've stated in here before.

CHAIRMAN BABCOCK: Yeah.

HONORABLE TOM GRAY: I think this is a good

example of why the Legislature should do the drafting and the judiciary do the interpreting, and we're trying to do the legislative process here.

CHAIRMAN BABCOCK: Well, okay, I hope we're not, but we're trying to figure out what they want. Lisa, even though he wasn't a former rules attorney, do you want to respond to him?

MS. HOBBS: I like to battle current sitting judges as well.

CHAIRMAN BABCOCK: All right. Good.

MS. HOBBS: We were just looking at 261. Should I say it?

PROFESSOR ALBRIGHT: Yeah.

MS. HOBBS: So Chapter 261.101 would place an obligation on a person or a professional to report suspected abuse. A professional is defined as anyone with a license, so I think that would include a court reporter, but it applies to persons, too, so that would apply to a clerk. The statute says that a professional may not delegate to or rely on another person to make the report, so it's in here, and your point is well-taken that perhaps our rule should alert all court personnel that they may have reporting obligations under the statute and just refer them to it without making --

CHAIRMAN BABCOCK: Yeah.

MS. HOBBS: -- a judgment on it.

CHAIRMAN BABCOCK: Makes a little bit of sense. Frank.

MR. GILSTRAP: Well, let's make sure we understand what we're talking about here. As I understand, every 16-year-old who applies for an abortion or younger, that's -- you know, we're talking about all of these worst case scenario, about a 13-year-old pregnant by her father. We're talking about every 16-year-old, that's a case of abuse because it's what they used to call statutory rape? I don't know that they use that term anymore.

MS. HOBBS: Not if you were 17.

MS. HAYS: If it's a three-year age difference. 15 and 16-year-olds can legally have sex with age-appropriate partners.

MR. GILSTRAP: Okay. Okay. Okay.

CHAIRMAN BABCOCK: Somebody else had a hand up down here. Wade? David.

MR. JACKSON: I did.

CHAIRMAN BABCOCK: As one of the staff people.

MR. JACKSON: As a reporter for 49 years I've heard a lot of things that I wasn't supposed to hear, but I feel a lot of times the court reporter is hearing it

at the same time the judge and all the lawyers are hearing it. Everyone in the room is hearing it, so I would be very uncomfortable running off every time I heard something like that causing a lot of problems and blowing up every hearing that we have like this. I mean, that disclosure to bring in all of these authorities is going to alert whoever you're trying to hide this from and blow it all up anyway.

CHAIRMAN BABCOCK: Good point. Yeah, Justice Busby.

HONORABLE BRETT BUSBY: Is this an appropriate time, Chip, to take a vote or have any further discussion on Richard Orsinger's proposal about allowing the court or suggesting that the court ask the name on the record that was tied into our earlier discussion of reporting abuse? We didn't take a vote on it earlier with the main vote, so I figured I would mention it here if we want to address it now or we can save it as one of the subsidiary issues that Nina talked about for discussion later.

CHAIRMAN BABCOCK: Well, I think we can talk about it now. I think my plan was if we have time and I think we -- maybe we will. It looks like we will. We'll go back and address those item by item, but no reason not to talk about it now if you want to talk about it now.

HONORABLE BRETT BUSBY: I think we've covered it pretty well during the previous discussion, so I don't have anything to add to that except that, you know, I think the current rule takes the position that the judge cannot ask about it on the record, and Richard's proposal was that the judge should be allowed to ask about it on the record.

CHAIRMAN BABCOCK: Right. Frank.

MR. GILSTRAP: Well, we're assuming that intercourse with an underage minor is sexual abuse. I don't know that that's true. That's what the -- well --

MR. MUNZINGER: At a certain age it is.

MR. GILSTRAP: Okay. Well, it seems to me you can read section 33.085 which says -- places the duty on the judge to report as absolving other court personnel, and that way we don't have to worry about all of these other statutes that require reporting of, quote, sexual abuse, whatever that may be.

CHAIRMAN BABCOCK: Well, yeah, that's David's point. You know, you've got a judge sitting right here. I'm just typing down words. Why would I have a duty if the judge doesn't want to do it, and that's -- Justice Gray says, well, wait a minute, you know, you're a person, you're a professional, you're covered by a statute requiring reporting, and you're hearing it, so, you know,

you're not absolved. And I'm not sure if by rule you can solve that problem.

MR. GILSTRAP: Maybe the Legislature solved it by the statute.

CHAIRMAN BABCOCK: Maybe they did. Rusty.

MR. HARDIN: I think we're just asking for a bunch of practical problems by referring to it at all because you already have a statute under the Family Code that makes it mandatory for every person to report. There's no reason to put something special in this particular bill or these particular rules different than any other time, and what you end up doing is by calling attention to it then some prosecutor is going to sit there and look and say, "Well, wait, maybe -- I hadn't thought of that. Maybe there are five people in the room that heard this and only one of them reported." I've actually had a case where the prosecutor contended even though it was reported by the superintendent above the principal that told him about it, and the principal counted on the superintendent to report it. Superintendent did. I had two prosecutors I had to talk out of that believed that's okay, that meant he had to do it, too. They both had to report even though the second person knew the other one had, and I think when you put language in here like this you just invite problems, and you're not going to build

anything in that protects anybody or harms anyone. Leave it out of the thing. There are already statutes sufficient to deal with it, and you're just going to create chaos.

CHAIRMAN BABCOCK: Good point. Judge Estevez.

HONORABLE ANA ESTEVEZ: A way to perhaps do that that wouldn't -- that would call attention to the fact that we do need to report it as sexual abuse may just be a -- the same heading and we just refer to the statute and say that we're under the same obligations, so that way we don't ignore the fact that they did, in fact, put it in the statute. I mean, the Legislature felt strongly enough to make sure that we all know that we're under those reporting statutes, so it would probably be good just to keep it all together and say that everyone has the duty to report as they did before.

CHAIRMAN BABCOCK: Yeah, but I --

HONORABLE ANA ESTEVEZ: Because when we were doing our subcommittee meeting I was concerned that someone left out would think they're not under that obligation.

CHAIRMAN BABCOCK: But Rusty's point is --

HONORABLE ANA ESTEVEZ: Not to refer to it at all.

CHAIRMAN BABCOCK: -- do you need a rule? It's not controversial. People who are covered are covered, and if you put a rule in there then that's going to get somebody thinking about here's some mischief I could make.

HONORABLE ANA ESTEVEZ: It could be that some people feel that because this is so confidential that somehow they don't have to report something. I don't know. I don't know how people feel about it.

CHAIRMAN BABCOCK: Okay. Anybody -- anybody else? Okay. Pretty interesting issue. You want to go to ad litem?

PROFESSOR ALBRIGHT: So ad litems, we -- I think we -- hold on. We talked about their duties to report. There was -- we cleaned up the rules -- excuse me. The rules always talked about attorney ad litems, assuming that all attorneys were appointed by the court, but actually some -- some Janes come in -- some of the minors come in with -- with lawyers from the beginning. So we tried to change all of them to -- whenever they were talking about duties of the attorneys, there wasn't just attorney ad litems. It was whatever attorney is representing the minor, whether they were appointed or not. We -- we changed it to show that the guardian ad litem has to be different from the lawyer, and we dealt

with the reporting. I mean the abuse reporting, same thing we've been talking about with the judge applies to lawyers. We also talked about the wheel issue, and you talked to Sherry about it?

MS. HAYS: Well, we were just sitting here looking at it as well, and we may need to go back and do some other things on that.

PROFESSOR ALBRIGHT: Yeah, these things, the ad litems and the abuse reporting got complicated because there are additional statutes that impact all of this, and everybody is trying to unpack these new amendments in these other statutes, and honestly we ran out of time before we could get through it all, and so I think it deserves further study in view of these other statutes.

CHAIRMAN BABCOCK: And when you say "deserves further study," by whom and when?

PROFESSOR ALBRIGHT: By Martha Newton in the next two months.

CHAIRMAN BABCOCK: Thank you, I'm sure Martha has perked her ears up.

PROFESSOR ALBRIGHT: And we will be glad to work with Martha.

CHAIRMAN BABCOCK: Judge Evans.

HONORABLE DAVID EVANS: On the issue of ad litems versus attorneys on Title IV-D, the Title IV child

support cases, we've researched, we have made those courts under the regional judges, and we appoint attorneys to represent respondents in child support cases, and we specifically call them attorneys as opposed to attorney ad litem, and we believe that that keeps us from outside of the legislation on the wheels for attorney ad litems. Now, there are other considerations that have come into play on the appointment of an attorney, and it may depend on the type of case, but -- and there are issues to avoid like cronyism and things like that, but appointment of attorney versus attorney ad litem is at least perceived by the people that have been working on the Title IV-D cases and criminal cases to be a different matter.

CHAIRMAN BABCOCK: Okay. Yes, Judge Estevez.

HONORABLE ANA ESTEVEZ: Even if that would take care of one issue we have to appoint either an attorney ad litem or a guardian ad litem. Under Chapter 37, the new legislation, they do have exemptions under 37.002, and they do not include the bypass statute. So I don't know what that means. I just -- we would like it to.

CHAIRMAN BABCOCK: Okay.

HONORABLE ANA ESTEVEZ: But it doesn't appear to.

CHAIRMAN BABCOCK: Judge Wallace.

HONORABLE R. H. WALLACE: Well, I mean, I think it means it's not exempt is what I think it means, and I'm assuming that goes beyond our rule-making authority to put a provision in the rules because I can see where that could be a source of delay. You've got a name come up on the wheel, and that lawyer is out today. I mean, I don't know, but I'm assuming that the Legislature didn't exempt it. Can we exempt it by the rule?

CHAIRMAN BABCOCK: Okay. Judge -- Justice Christopher.

HONORABLE TRACY CHRISTOPHER: Just something for you-all to think about, the district court judges, in connection with that list, you get to pick who you want to put on that list, and there is some thought that you can make a list for a certain type of case and a list for another type of case. So you could have a list for the parental bypass cases that's separate from your regular list, and the people that are on your bypass list are all people that have no religious objections to taking the cases. And you just go down the list.

CHAIRMAN BABCOCK: Okay. Any other comments?

HONORABLE DAVID EVANS: That doesn't require

a local either. There's a local rule provision that those specific lists have that --

HONORABLE TRACY CHRISTOPHER: It's a list in your case.

HONORABLE DAVID EVANS: -- can be done on that case.

HONORABLE TRACY CHRISTOPHER: Yeah.

CHAIRMAN BABCOCK: Okay. Anything else? All right. Let's go back to the confidential versus anonymous debate. Justice Busby, you raised the issue about something on the record, and I'm trying to find what the provision of the proposed rules that affects, and I was --

HONORABLE BRETT BUSBY: Sure, it's in 1.3(b) where it says, "No reference may be made in any order, decision, finding, or notice or on the record to the name of the minor." And -- for several of the reasons discussed earlier and as well as the reasons in Richard Orsinger's e-mail, I think it would be wise to allow the judge to ask about the name of the minor, in part to allow him or her to fulfill the reporting obligation, which it sounds like from our previous discussion is independent of the obligation of the attorneys who are -- and the guardian who are involved to report it.

CHAIRMAN BABCOCK: Okay. This seems to be

what was in the rule -- the existing rule; is that right?

HONORABLE BRETT BUSBY: Yes, but because if the name ends up being taken off the verification page then there -- it won't be anywhere, and Richard's proposal, Richard Orsinger's proposal, was to allow it to be asked about at the hearing on the record. He suggested that would provide greater confidentiality, but in any event, this is another way -- if it doesn't end up on the -- and we've already taken a vote on whether it should be on the verification page or not, but if it doesn't end up on the verification page this would be another way for the judge to learn the name and discharge his or her duty to report the abuse.

CHAIRMAN BABCOCK: Okay. Yeah, Professor Albright.

PROFESSOR ALBRIGHT: Richard's not here, but I talked to Richard several times about his e-mail, and I am not sure that he contemplated that it was going to be on the record. I think he contemplated that there would be a conversation between the judge and the minor and he would know her name, but I'm not sure that he contemplated that it would be on the record. I think it was so that he -- so that there would be a -- yeah, and but that's the way I understood it, but we really -- I don't remember us really focusing too much on the record or not. But I

don't -- I do not believe that -- I mean, when I read it again, I don't see that he was saying on the record.

CHAIRMAN BABCOCK: All right. And the proposal would be to change that -- to delete that language "or on the record" from the existing rule?

HONORABLE BRETT BUSBY: Either that or to put something -- I think it would actually be better to put something affirmative in the rule to say that the judge can ask about it or should. I mean, we can debate whether it should be "should" or "can" or "may" ask about it, but because as was pointed out earlier, there are going to be judges in counties who don't normally handle these things handling these type of applications now because of the change to where these can be held, and so some judge who has never handled one of these before may not know that the ordinary -- the people who do these all the time, the way they do it is to do it off the record. Some judge who has never gotten one of these before is not going to know from reading this rule that that's the way you're supposed to do it.

MS. HOBBS: And are you just concerned about the reporting abuse? Is that the --

HONORABLE BRETT BUSBY: Well, I think that's one concern. You know, others have been raised about why you might need to know the name because of the provisions

about not filing multiple applications and that kind of thing, but I think one of -- one of the concerns is for the reporting. And looking back at Richard's e-mail, he does talk about the applicant being required to reveal her identity only upon request by judge in the hearing on the application. Then only the judge, the court reporter, and the attorney and the guardian ad litem would know her identity and then he goes on to explain why he believes that's a good proposal.

CHAIRMAN BABCOCK: All right. Nina.

MS. CORTELL: It seems to me we have a delicate balance. I understood the committee's tension over anonymity versus confidentiality, the fact that it would not be knowable at all. I understand Brett raises a legitimate concern, but then we also have the duty per the Legislature to maintain confidentiality to the maximum extent possible, so it seems to me -- and I don't know, I defer to those who know more about how this actually works, but if it's on the verification page and if people need to then access that to determine for reporting purposes, it seems to me that's best way to accomplish both goals.

In other words, not to allow the names in an open courtroom where you have additional people having that information, and I would assume the judge would have

access to the verification page, so the reason I had wanted to see us break it down is it just seems to me that it's all -- this is one truly where the devil is in the details, and, yes, maybe the name should be somewhere, but it ought to be limited, not in the style of the case, not open in the courtroom, but somewhere where if someone has to access it for other reasons they could do so.

CHAIRMAN BABCOCK: Okay. Judge Evans.

HONORABLE DAVID EVANS: I would just point out that for decades if not a century or more we've protected the identity of parents who give up children for adoption, and we've done so successfully for the most part, and I don't know if that's any guideline, but I'm still opening -- my court ceased to have family law jurisdiction probably in 1970, and I'm still receiving applications to look through sealed files and reveal parents who were given up, you know, by people who are my age, but we don't do that without going through a procedure. So those parents have been -- those women who -- and men who gave up children, they have been protected all of those years by the court system I think pretty well. I'm sure there have been failures, but it is trackable and retrievable for those people who are affected by that litigation.

CHAIRMAN BABCOCK: Okay. Yeah, Frank.

MR. GILSTRAP: Well, you know, I am a bit uncomfortable with telling the judge that he cannot ask the applicant her name on the record. I mean, we're putting a whole lot of stock in off the record conversation. I don't know that that's how we should be doing it.

CHAIRMAN BABCOCK: Well, you know, we're talking about an existing rule that's been in effect for 16 years, so we've been doing it for 16 years. The question is whether the amendments to the legislation suggest to us that we should advise the Court to change that.

MR. GILSTRAP: Okay.

CHAIRMAN BABCOCK: Yeah, Judge Estevez.

HONORABLE ANA ESTEVEZ: I just want to make the point that when they go and they have their abortion their medical records are confidential. They're not anonymous, and so what we're fighting for is not something that the child --

PROFESSOR ALBRIGHT: They're not public.

HONORABLE ANA ESTEVEZ: Well, no, I understand they're not public documents, but it's kind of the same as the adoption issue. It's once they're confidential they have a way of keeping those confidential. The problem with -- I think the problem

that people are concerned with has nothing to do with after the procedure has occurred. It's special problems in special jurisdictions in which everybody is talking, and they're going to talk the minute the child walks into the courthouse because it's very unusual for a child that age to walk in without a parent, and if they know everybody then they're going to know there's something else going on instead of -- because they already know who is getting divorced and who is fighting over custody.

So I don't know that we can necessarily fix this problem that has to do with small jurisdictions in which everyone knows their business anyway, and I think that's what everyone is talking about. It's not -- in these larger jurisdictions I don't think there's ever been a problem with confidentiality versus being anonymous because we deal with those all the time in adoptions, and so I just want the committee and the Supreme Court to maybe realize that it's not an issue that we can really take care of if there's such a huge difference because it's both sides are protected, both of those types of cases. The anonymous case and the confidential case are -- they're both protected now. The public is not able to see an adoption record.

I had a request within this last week to open an adoption record, and I've had quite a few, and

they don't go without a huge amount of scrutiny, and no one else knows about them, and no one else can hear about them unless I sign that order, and I think that's the reality of where we are in these type of cases, and so I don't know that that child is going to lose any confidentiality by being confidential as opposed to being anonymous. I don't know that that happens. I think the problem is going to happen either way. Because it's not a how you file problem. It's a how you walked in and who is talking to who problem.

MS. HOBBS: I agree, there's risks with the venue provisions that have been set by the Legislature. It's a real problem. I think it is not fair to analogize medical records and court records because medical records are presumptively closed and private, and court records are presumptively open, and so there's a big difference. I also unfortunately wish I could rely on the fact that adoption records are for the most part kept confidential, but our experience with this difficult issue is that targets of people who grant abortions, people who get abortions, they're targeted in a different way than someone who has given up a child for adoption, and that is the reality of life in America right now, and so I think that's what's driving the hypersensitive concern about where the identity of the minor's name is included in the

records by the subcommittee members.

CHAIRMAN BABCOCK: Okay. The way we often do this when we have a suggestion that we -- especially when we have a suggestion that we change an existing rule for whatever reasons, sorry, is we make it by motion that is seconded. So if anybody wants to make a motion along the lines that Justice Busby suggested, that we delete the phrase "or on the record" and add a sentence or a clause that says "the judge may ask on the record the identity of the minor" then I'm willing to entertain it. Yeah, Justice Busby.

HONORABLE BRETT BUSBY: So I'll make that motion, and just to be clear, this is only if the -- only if the name is taken off the verification page that I would suggest that this change be made.

CHAIRMAN BABCOCK: Okay.

HONORABLE BRETT BUSBY: So that's why I'm suggesting a change to an existing rule, because it's being changed in a different place that I think requires this change.

CHAIRMAN BABCOCK: Yeah, I understand that. Carl.

MR. HAMILTON: I'm confused about -- I'm confused about something. It says "with the exception of the verification page 2.1(c)(2)." 2.1(c)(2) strikes out

the name on the verification page.

CHAIRMAN BABCOCK: Right.

MR. HAMILTON: So there is no name in the verification page.

CHAIRMAN BABCOCK: Right. That's why Justice Busby is saying you should be able to say it on the record.

HONORABLE BRETT BUSBY: But you're right. I think even if -- I think a change would need to be made to that part of the rule under the majority the subcommittee's proposing.

CHAIRMAN BABCOCK: Yeah, that's a good point, but let's stick to this thing for now. For now, the motion is to strike the phrase "or on the record" and to add a phrase that says, "The judge may ask the name of the minor on the record." Judge Estevez.

HONORABLE ANA ESTEVEZ: Just a point of order or question.

CHAIRMAN BABCOCK: There's no points of order here.

HONORABLE ANA ESTEVEZ: Do we -- well, to --

CHAIRMAN BABCOCK: No, no, say whatever you want, but just say it.

HONORABLE ANA ESTEVEZ: Can you just strike "or on the record" and not add the next sentence?

CHAIRMAN BABCOCK: Well, he gets to decide what the motion is. Point of order.

HONORABLE BRETT BUSBY: And just for clarification, the only reason that I'm suggesting that something additional be added to explain that that may be done is for the judges who don't handle these all the time, so that there is some clarity for them about what can and can't be done.

CHAIRMAN BABCOCK: Okay. So that's the motion. Does anybody want to second it?

HONORABLE HARVEY BROWN: I'll second it.

MR. HAMILTON: Second it.

CHAIRMAN BABCOCK: All right. So it's seconded. So everybody in favor of Judge Busby's motion raise your hand.

All right. Everybody opposed raise your hand. All right. It carries by 17 to 11, so we'll give the Court that sense of the committee on that issue.

What other specifics? Nina, you are the one that suggested that we maybe go back point by point because the vote might not be as close, and you've just been proven right. The vote was not as close.

MS. CORTELL: Well, my sense of the committee was that the primary concern was the omission of the name from the verification page, and indeed that kind

of played out just now because that vote assumed that the name was deleted, but if the name were included I have the feeling that the committee would feel differently about the name appearing anywhere else; for example, in the style of the proceeding or coming out in open court. So I don't -- I don't know how best to tee that up, but I thought that was the concern of the committee in the 16/17 vote or whatever the prior vote so that if you -- in other words, I don't think it's the sense of the committee that we put the name in the style or perhaps that we even allow questioning on the record if the name is included on the verification page.

CHAIRMAN BABCOCK: Okay. But let's -- you know, if you can or let's look at specific language that we want to talk about.

MS. CORTELL: Well, I don't think we -- I mean, Alex, you can correct me. I don't think we said to change the style or anything, correct?

PROFESSOR ALBRIGHT: There has been no motion to change the style from "In Re: Jane Doe."

MS. CORTELL: Right. So my only concern was that I didn't want this -- the Court, the full Court, to take from the very close vote earlier that there was a majority or even close to majority view that there should be these other changes that are not suggested here but

that were implicated by the minority view that was voted on earlier, and to wit the vote we just took I think kind of confirmed that, right? That was a different split. I don't know how to best --

CHAIRMAN BABCOCK: Right. Yeah, Justice Christopher.

HONORABLE TRACY CHRISTOPHER: I think the committee recommended that we change current Rule 2.1(c)(2), the verification page, and you can see that in 2(a), it's on page 14, where they scratched out "full name." So the committee recommended changing that, and I think that's the vote Nina wants. Keeping in "full name."

MS. CORTELL: What I would like clarified if we can is that if the full name were included in the verification page, that otherwise the sense of this group I think may be for a greater confidentiality in other provisions and that we not make other changes that might otherwise have been suggested by the minority view. In other words, if we accepted the name on the verification page, would -- what would the vote be on the minority versus majority view on confidentiality?

CHAIRMAN BABCOCK: Okay. So do you propose we talk about 2.1(b)(2)(A)? Is that --

PROFESSOR ALBRIGHT: (c)(2)(A).

CHAIRMAN BABCOCK: Say it again now.

PROFESSOR ALBRIGHT: It's 2.1(c)(2)(A), where the committee has recommended to delete "full name."

CHAIRMAN BABCOCK: Right.

PROFESSOR ALBRIGHT: From the verification page.

CHAIRMAN BABCOCK: Yeah, that's what we want to talk about, right? Nina, is that what you're saying?

MS. CORTELL: Well, what I'm suggesting would only be to give the Court a sense of the committee, but if others don't want to do this, that's fine. If you accept that -- if one allows the full name in the verification page, what would the vote of the committee be otherwise on the majority versus minority view of the subcommittee on confidentiality.

CHAIRMAN BABCOCK: Okay. So in order to follow through on that concern, we need to decide what people think about this change on 2. -- 2.1(b)(2)(A).

PROFESSOR ALBRIGHT: (c).

CHAIRMAN BABCOCK: (c)(2)(A). Sorry. 2.1(c)(2)(A). So we can talk about that. Wade.

MR. SHELTON: Just to backtrack, for the committee the majority basically, as I recall, reported that you-all made this adjustment contra to what's in the statute in order to fulfill the broader purpose of the statute for securing the name against the child -- I mean,

securing the name against publication.

PROFESSOR ALBRIGHT: Well, the statute nowhere and never has required full name on the application.

MR. SHELTON: Okay. All right.

PROFESSOR ALBRIGHT: And it does require confidentiality.

MR. SHELTON: Right.

PROFESSOR ALBRIGHT: And so we -- and elsewhere in statutes and rules it says that you should not include minors' names in filed document unless it's required by law, which it's not, and so we took it out.

MR. SHELTON: Does the statute require a verification on the minor's part when she's not represented by an attorney? On the application? Is that --

PROFESSOR ALBRIGHT: Yes.

MR. SHELTON: So it has -- and then when one verifies under those circumstances, one verifies using their whole name, right? I mean, in other words, if the minor is to verify --

PROFESSOR ALBRIGHT: Right.

MR. SHELTON: -- the application, then her whole name would appear under that provision.

PROFESSOR ALBRIGHT: Right.

MR. SHELTON: In the statute, right?
PROFESSOR ALBRIGHT: Exactly.
MR. SHELTON: Okay.
PROFESSOR ALBRIGHT: Could a minor get -- take an oath?
HONORABLE ANA ESTEVEZ: Yes. Yes.
MR. SHELTON: Okay. So the statute as it currently is before you-all in your study and before us, it had a provision in which certain facts were to be verified by the minor, and then to be clear, if the -- if she's represented by an attorney and the attorney is to verify instead of her or in addition?
PROFESSOR ALBRIGHT: No, I don't think that's addressed in the statute. I think it's the -- it's the rules, the existing rules, have this verification page.
MR. SHELTON: Right.
PROFESSOR ALBRIGHT: The new statute requires a verification by a lawyer to certain things.
MR. SHELTON: Is that in addition or in lieu of the minor?
PROFESSOR ALBRIGHT: I don't know that there is a requirement that the minor swear to anything, and I can't remember.
MS. HAYS: I think it was --

MR. SHELTON: The reason why I wonder is it seemed like they were asking more of the minor and less of the attorney in terms of information, and so I was trying to grasp whether or not when an attorney comes on board if the attorney is affirming -- well, they are affirming lesser or fewer items than what was asked of the minor.

PROFESSOR ALBRIGHT: Yeah. Okay. I do see now that the statute says the application must be made under oath, but it did not say who needed to make the oath.

MR. SHELTON: Right.

PROFESSOR ALBRIGHT: Now there is a requirement that an attorney swear to certain things, so I think the original rule was written with this verification page to take care of the oath, and it's either going to be the attorney or the minor who signs it, depending on whether she is represented by a lawyer early on.

MR. SHELTON: Well, I'm just wondering if her name appears and then will be protected under seal no matter what it is we've discussed so far, because of the application and the possibility that she has to make it an independent verification, and if the possibility that the lawyer has to make an additional verification as opposed to in lieu of her verification. So it seems to me it's all under seal. There's a name in there somewhere, right?

I mean, possibly.

PROFESSOR ALBRIGHT: There's possibly -- if she goes in there by herself and makes the oath, her name is on the verification page, yes.

MR. GILSTRAP: Where does it say that?

CHAIRMAN BABCOCK: Justice Christopher, and then Roger, then Frank.

HONORABLE TRACY CHRISTOPHER: The statute says, "The application must be made under oath." Then it says, the new addition is, "It must be accompanied by the sworn statement of the minor's attorney." That's two oaths, not one oath.

CHAIRMAN BABCOCK: Roger.

MR. HUGHES: Well, the other thing about whether or not the name of the minor has to appear in the verification page, it seems one of the themes today has been do we track the language of the statute and be done with it or try to go further in a different direction; and the statute, when it lists what the application must have, it doesn't say the person is supposed to state under oath or put in the application somewhere what their name is. So I'm not sure we really need to have the verification page state the minor's name.

CHAIRMAN BABCOCK: Frank.

MR. GILSTRAP: I agree with Roger under

either circumstance. Whether the minor is represented by an attorney or not there is no requirement other than in the old rule that the minor's name appear on the verification page.

PROFESSOR ALBRIGHT: That's right.

CHAIRMAN BABCOCK: Okay. Yeah, somebody has got their hand up. Justice Bland.

HONORABLE JANE BLAND: Doesn't the minor have to sign it?

MR. SHELTON: Yeah.

HONORABLE TRACY CHRISTOPHER: Well, so but if you read the statute it says, "The application must be made under oath." You have just implied that the lawyer can make it under oath for the minor, but the statute says the application must be made under oath and be accompanied by the sworn statement of the attorney. It sounds like two oaths to me. Not one oath.

MR. SHELTON: And in an earlier -- forgive me, I'm sorry.

CHAIRMAN BABCOCK: No, go ahead, Wade.

MR. SHELTON: In an earlier conversation, I think in response to the minority report someone from the majority asked, "Are you asking for the verification to appear in print," or someone posed that, print and signature, right? Do you remember that? And so what that

just leads me to wonder in practice, Susan, if the applicants, if you will, the minors have been signing off on the applications and/or verifications.

MS. HAYS: Yes, and I believe -- and I'm pulling up my verification page to read from it. The current verification page includes blanks to allow that, if it's filled out by someone other than the minor.

CHAIRMAN BABCOCK: But when the minor fills it out, does she put in, you know, "I verify this is all true and correct and you can throw me in jail forever if it's not, signed, Jane Doe" or is it signed by the real name?

MS. HAYS: I've got the verification page in front of me. The current verification page --

PROFESSOR ALBRIGHT: Just for the record, she's looking at the existing form.

MS. HAYS: It's Form 2B in the current set, and these, of course, will have to be tweaked once the rules are decided upon. Current verification has a blank for the minor's name and then it also has a blank for the signature at the bottom. "I swear or affirm that in my application is true and correct. Signature of minor or other person completing this form." So current forms allow the attorney to sign for the minor and often do when they're filing the case like they would for any other

client.

CHAIRMAN BABCOCK: Okay. Justice Brown.

HONORABLE HARVEY BROWN: Well, I guess I don't understand why in subpart (2) we have the attorney can do it, but then when we were talking about subpart (3), the declaration of the attorney, we say, well, attorneys don't want to say that the statements are true and correct. They don't know they're true and correct, but the very verification in subpart (D) says it's true, so how can the attorney say it's true for subpart (2)(D), but not be able to say it's true for subpart (3)? Subpart (3) we specifically said they don't have to say it's true. They just have to say they believe it's true and they've made the inquiry. That's not what (D) does.

CHAIRMAN BABCOCK: Well, one is because it's a lawyer.

MR. GILSTRAP: Chip?

CHAIRMAN BABCOCK: Frank.

HONORABLE HARVEY BROWN: That supports Jane's comments.

MR. GILSTRAP: The difference is that the minor knows. The minor knows if she's had a prior application, and she knows where she lives. The attorney can't know.

HONORABLE HARVEY BROWN: Well, that's why

I'm saying it shouldn't say an attorney can make the verification, and that's why Justice Christopher was saying there should be two things, one from the applicant and one from the attorney.

MR. GILSTRAP: Well, but that's what's required now. If the attorney -- the statute requires the attorney to make a sworn statement to attest to the truth.

CHAIRMAN BABCOCK: What about that point, Alex? What Justice Christopher just read sure sounds like it ought to be two --

PROFESSOR ALBRIGHT: I think where we came from is that we had the statute -- I mean, we had this rule, and lawyers had been signing it for 16 years, and we were trying to comply with the statute, so we put it on this declaration of the lawyer, and we saw that the full name was not required in the statute anywhere, so we took it off. I think that's the only answer. We --

MS. HOBBS: And the forms.

PROFESSOR ALBRIGHT: The forms, we had the forms, which also said it can be completed, you know, by someone on behalf of the minor or the minor.

CHAIRMAN BABCOCK: Susan.

MS. HAYS: And I would add to address just the point Justice Christopher raised, the statute as amended under (c)(1) has "under oath" and the basic facts

supporting an application and then the separate attestation of the attorney, but the statute doesn't specify who makes the oath under (c)(1), and I think that's why the original form, verification form, allowed another person to fill out the application for the minor.

CHAIRMAN BABCOCK: Justice Christopher.

HONORABLE TRACY CHRISTOPHER: Well, and I do understand that and maybe in practice the lawyers have been filling it out. I would think that the other person would -- and we certainly saw this. We would find grandmother coming in who doesn't have legal custody, who wants -- but, you know, has been taking care of the minor and agrees to the abortion and wants her to have the abortion, but because she doesn't have legal custody, you know, they have to go through this process. So that's the kind of other person that I would think would swear, "I know this girl, she's pregnant," you know, "She's never filed another application before," not her lawyer. I mean, the lawyers are writing in saying, "We can't be swearing to stuff that we don't know," and you're telling me they're swearing to stuff they don't know.

MS. HAYS: The same -- and part of the language that's in the rule as suggested with the declaration of attorney comes out of the civil procedure rules, with the same obligation attorneys have when we

file any pleadings.

HONORABLE TRACY CHRISTOPHER: No, I understand the declaration, and I agree with the declaration, but the question is whether the original oath that people are -- that lawyers are allegedly signing, you know, is -- was correct; and, you know, to me the idea of the original form, that either the applicant or someone else signed it, it would be someone with personal knowledge; and if the lawyer doesn't have personal knowledge, the lawyer shouldn't be signing it.

MR. SHELTON: Right.

CHAIRMAN BABCOCK: Okay. Carl.

MR. HAMILTON: The statute says under section 5 --

CHAIRMAN BABCOCK: Speak up. I can hear you, but they can't.

MR. HAMILTON: "A pregnant minor may file an application." It doesn't say somebody else files it, and then it says, "The application must be made under oath." To me that means the minor has to make it under oath.

CHAIRMAN BABCOCK: What about the form? What if the forms let someone else do it?

MR. HAMILTON: The forms?

CHAIRMAN BABCOCK: Yeah. That's what Susan was just saying.

MR. HAMILTON: I haven't seen any forms. I don't know what they say.

CHAIRMAN BABCOCK: They're Supreme Court approved forms, aren't they?

MS. HAYS: Yes, they are.

MR. HAMILTON: They allow somebody else to do it?

CHAIRMAN BABCOCK: Yeah. I mean, that's what Susan just said.

MR. HAMILTON: Well, the forms came before the statute I guess.

MS. HAYS: No.

MR. HAMILTON: This statute.

CHAIRMAN BABCOCK: Don't get the family law bar involved. Yeah, Wade.

MR. SHELTON: Well, I'm just -- you know, we have the -- I don't have a good enough analogy going, but what's popped into my head is something like a sworn account where the client has to make particular representations as to the accuracy of the amount owed and whatnot, and the attorney really can't do that. I mean, so there's certain -- there are certain areas of law in which the attorney can just by her signature is attesting to the good faith of the pleading, but there is something more specific that has to be sworn to, and in this

instance I'm guessing that the -- the reasoning for having this young lady attest to anything is "I'm not forum shopping" and whatever else is of the mind to control the process. I mean, so I guess I'm struggling with how we avoid having her name in the record, albeit sealed record, and control at least on one occasion, and that's in the form of the application that's under oath, and that would therefore answer the question over here about the judge's use on the record.

CHAIRMAN BABCOCK: Lisa.

MS. HOBBS: Well, you know, to defend the committee a little bit, I mean, I think we just didn't identify this issue because of the form, but the conversation we're having, which is a good one, assumes that the minor may only swear to the application by signing her full name, and I don't think that's true because I sign my name "LH" all the time, and I do it on my checks even, and I do it when I initial my daughter's -- anything she -- with the AISD that she has to sign. That's how I sign my name. Maybe I shouldn't say this on an open record, but --

MR. SHELTON: Yeah, what's you're Social Security number?

MS. HOBBS: Yeah, exactly, and you know, the other people might do some kind of mark as their

signature, so I just point out that the requirement of something being sworn does not require the full name of the minor in the verification.

CHAIRMAN BABCOCK: Okay. All right. I think it's time that we vote on this, and so everybody in favor of the majority report, which deletes the "full name" in section 2(c)(2)(A), raise your hand.

And all those opposed, raise your hand. Kent, do you have your hand up? Hang on. Keep them up because I couldn't see Kent's.

All right. There are 13 in favor and 16 opposed. And this is a good time to have lunch. Harvey.

HONORABLE HARVEY BROWN: Well, after lunch can we talk about whether we should delete the phrase "which may be by the minor's attorney" in that discussion we just had as to whether the attorney can swear to something under oath, so that they don't have to --

CHAIRMAN BABCOCK: Yes, but only on a full stomach, please.

(Recess from 12:53 to 1:29.)

CHAIRMAN BABCOCK: Justice Harvey Brown is the last person to speak, but if he doesn't get in here quickly he will not be the first person to speak after the break.

MR. MEADOWS: There he is.

CHAIRMAN BABCOCK: There he is. And you had a suggestion, Justice Brown, on another issue on the confidentiality versus anonymity --

HONORABLE HARVEY BROWN: Yes.

CHAIRMAN BABCOCK: -- that we should take up.

HONORABLE HARVEY BROWN: Yes, we've already talked about it, and that is the phrase "which may be signed by an attorney," which I'm looking for.

HONORABLE TRACY CHRISTOPHER: Page 14.

HONORABLE HARVEY BROWN: Thank you. The last provision in that says that the person signing that is --

CHAIRMAN BABCOCK: What rule are you talking about?

HONORABLE HARVEY BROWN: Okay, I'm on page 14, on the verification page, about the fifth or sixth line down the phrase has been added, quote, "which may be the minor's attorney." I'm suggesting we should delete that.

CHAIRMAN BABCOCK: All right.

HONORABLE HARVEY BROWN: And I think we've already discussed the reasons for it, that subpart (D) requires that person to state the verification page is true, an attorney can't state that on his or her personal

knowledge if that information is true; in fact, that's the very reason we changed subpart (3), the declaration of attorney to make it that the attorney is not declaring those things are true. The attorney is only declaring to the best of their knowledge, information, and belief after reasonable inquiry it's true, so that's different.

I think Justice Christopher pointed out the language in the statute suggests there should be two things, one, the statement by the applicant, and the second, the statement by the attorney, so that's my suggestion.

CHAIRMAN BABCOCK: So if you deleted that, that would not prevent the grandmother from --

HONORABLE HARVEY BROWN: Exactly.

CHAIRMAN BABCOCK: -- signing, but it would because of the change of the statute that Justice Christopher pointed out, that would remove that.

HONORABLE HARVEY BROWN: That was my understanding, frankly, that it was the grandmother rule, too.

CHAIRMAN BABCOCK: Right. Okay. Comment about this? Yeah, Roger.

MR. HUGHES: Well, as long as the attorney is willing to put their law license on the line, I don't see why they can't sign it. According to the statute, the

statute does not expressly state who is to sign the application. It just says it's supposed to be under oath.

Second, I -- you know, I would caution an attorney against verifying it because you're verifying not merely the residency, the venue, and the prior applications; you're verifying the basis for the application to begin with. That is the substantive requirements to meet, not just the technical ones for venue, et cetera, and that might be a bit daunting. That said, if grandma can do that, I don't know why a uniquely informed attorney couldn't.

Second, while I know I consider it a questionable practice or one where you're sticking your neck out, under the Rules of Procedure to verify the things that have to be done and that you have to verify sometimes, I have seen attorneys verify, you know, no consideration, usury, and the like. So while I -- let's put it this way. I am not sure I would encourage attorneys to swear to it. I'm not sure I would outright prohibit it.

The second thing is the reason why we changed section (3), the declaration of the attorney, that's an involuntary thing for this attorney. The attorney doesn't get a choice. The attorney has to verify that, and my -- the argument I made there was when the

attorney must sign, has no option to sign, the statute only requires them to verify two things. So I would say if you're going to be shanghaied against your will to sign this, you shouldn't have to be made to sign more than the statute requires you to sign.

On the other hand, if the attorney thinks that they can in good conscience and consistent with the oath, verify the entire application, you know, I don't see why they should be prohibited. I would ask under the preceding rule, did attorneys routinely verify all of this for their clients?

CHAIRMAN BABCOCK: I don't know. Susan, do you know if attorneys typically verify for their clients?

MS. HAYS: Depends on the circumstances, and you'll recall current law is open venue, and most of the cases are filed in urban areas, so when we were dealing with the minor coming from a small rural county where she had confidentiality concerns of filing in that county and time is always of the essence --

CHAIRMAN BABCOCK: Right.

MS. HAYS: -- and it's particularly more of the essence now than it was a few years ago because there's so many fewer clinic doors to go through, the attorney would fill out the whole application and go to the courthouse, get the hearing, and file it before the

clients come to the county. So there's a geographic issue --

CHAIRMAN BABCOCK: Yeah.

MS. HAYS: -- that is less likely going forward, but will happen when we have kids from small counties who are not Texas residents or the third exception under venue, if the minor's parent is the actual judge.

CHAIRMAN BABCOCK: Justice Christopher, are you there?

HONORABLE TRACY CHRISTOPHER: Yes.

CHAIRMAN BABCOCK: Oh, there you are. You pointed out that under the amendment it looks like there has to be two things, an attorney has to swear in addition to something else. Could the attorney do the something else, though, under the statute?

HONORABLE TRACY CHRISTOPHER: Well, I think if the attorney had personal knowledge and was able to swear that something was true. I mean, my concern was the way it's currently written with having that language in there, and I would be in favor of having that language out, is that someone could read this and think the only verification --

CHAIRMAN BABCOCK: Right.

HONORABLE TRACY CHRISTOPHER: -- that they

needed was the declaration of the attorney, and I don't think that's accurate under the statute.

CHAIRMAN BABCOCK: But if in a rural county or wherever, the attorney said, "Hey, I know I've got to do a limited verification and I'll put my -- the language here in (3) on that, but I know there's got to be additional things verified, but I feel comfortable that I know all the facts, and I'll verify it," then he could do that under the amendment, even under the amendment.

HONORABLE TRACY CHRISTOPHER: I think so.

CHAIRMAN BABCOCK: Yeah.

HONORABLE TRACY CHRISTOPHER: I mean, and it would be -- you know, it would comply with the way our form is now.

CHAIRMAN BABCOCK: Yeah. Yeah.

HONORABLE TRACY CHRISTOPHER: In terms of the verification.

CHAIRMAN BABCOCK: Got it. Professor Carlson.

PROFESSOR CARLSON: Rule 14 of the Texas Rules of Civil Procedure expressly provides that whenever a client needs to execute an affidavit, an attorney can do it in their stead. I'm not suggesting the attorney should lie, but that's kind of the general authority, and I notice the statute says, "The application must be made

under oath." Is there somewhere else in the statute that says "based on personal knowledge," or we're just assuming that?

MS. HAYS: We're just assuming.

CHAIRMAN BABCOCK: That wasn't rhetorical. You were looking at them, right?

PROFESSOR CARLSON: I was just looking at that them, and they said "no."

MS. HAYS: The original statute is application made under oath.

CHAIRMAN BABCOCK: Alex.

PROFESSOR ALBRIGHT: And I think you need to realize that when -- under the old statute there wasn't that much to swear to, she's pregnant, she's a minor, she wishes a bypass, here's her name and date of birth, here's her -- how do you get in touch with her. I mean, you didn't have all of this venue stuff and residence that you were -- you were swearing to so -- so the -- I think the way we were writing this was trying to conform it with current practice. I think lawyers could sign that on behalf of their client.

MS. HAYS: Uh-huh.

CHAIRMAN BABCOCK: Okay. Anybody else? Yeah. Justice Brown.

HONORABLE HARVEY BROWN: So, in other words,

this isn't a change we're making because of the Legislature. This is a change because some lawyers have done that. If lawyers are comfortable doing that now, some, we don't need to expressly state it if they're already doing it and get back to the point that the language might suggest this is okay when some of us at least think that there's a problem with the lawyer doing that. To get to Roger's point, maybe a lawyer wants to do it, but if you just look at that clause by itself, it sounds like we've already given permission to the lawyer to do it, and I think that's at least an open question as to whether lawyers should do that.

CHAIRMAN BABCOCK: Okay. Any other comments about that? All right. Let's vote. We will vote about whether or not people think the majority proposal, which says -- which may be the minor's attorney in 2.1(c)(2) is a good idea and should stay in. So everybody that thinks that, raise your hand.

And everybody that thinks it's a bad idea and should be deleted, raise your hand.

The vote is 7 think it should stay in and 14 think it should go out. So you've got your answer on that.

What else should we look at, Professor Albright?

PROFESSOR ALBRIGHT: One thing that I'm concerned about is that we have talked about several different places where the minor's name could be, the verification page and the record, and I'm -- my sense is that people don't necessarily think it should be in all of these places, but perhaps only one, and it sounds like nobody really thinks it should be in the name of the case because that -- we have not really talked about that except in kind of conceptual terms.

CHAIRMAN BABCOCK: Right.

PROFESSOR ALBRIGHT: So, you know, if it's going to be somewhere, maybe people have a preference as to where it should be.

CHAIRMAN BABCOCK: Wade.

PROFESSOR ALBRIGHT: And I don't want the record to reflect that the sense of the committee is that it should be in multiple places.

MR. SHELTON: I took Justice Busby's motion to say in the event that there is no name in the verification, then in that case it perhaps can appear in the record, and I've heard no one -- I don't think anybody has expressed a desire to have the name appear in the style of the case whatsoever at all. So it kind of seems to me sitting down here it sounds like the only thing we've really said with any clarity affirmatively is that

perhaps the name should appear in the verification. I think. That's the way I take the temperature so far.

CHAIRMAN BABCOCK: Justice Pemberton.

HONORABLE BOB PEMBERTON: And just to clarify, my concerns expressed earlier in the morning were simply that the name should be somewhere in the court record, the verification page or somewhere else, and to the extent it is, whether -- I'm not advocating it be in the caption necessarily.

CHAIRMAN BABCOCK: Right. Okay. Good. Justice Busby.

HONORABLE BRETT BUSBY: And just to be clear, that was my motion, that if it did not appear in the verification then the change should be made to allow the judge to ask about it on the record.

CHAIRMAN BABCOCK: Yeah, and that motion passed 17 to 11, but with that understanding, I assume. Anybody else? David.

MR. JACKSON: Could I maybe say something that might help make up our minds about whether it's the verification page or the record? The court reporter's machine has all sorts of back ups, so if you do say their name on the record, you can job define that to anything you want it to be, to John Doe or whatever, but the strokes that you hit are still backed up about three

different ways; and five years from now if somebody gets hold of that machine or gets hold of those notes they'll be able to figure that out. So I think it's safer in a specific place like the verification page.

CHAIRMAN BABCOCK: Great point. Thank you. Yeah, Lisa.

MS. HOBBS: In a similar vein I, too, am worried about it being in a court reporter's record, which seems to be the least protected record that we have in the court system because court reporters will often take these home and work on them at home or contract out with third parties to transcribe the record, and while I think the rules require everybody who comes in contact with these records to do all that they can to ensure the confidentiality, it's just there's -- it seems like the court reporter's record passes through maybe not more hands, but less secure locations.

CHAIRMAN BABCOCK: Nina.

MS. CORTELL: If you think it's appropriate I would suggest that we have one more vote, and that is if the name is to appear somewhere in the record it should be only on the verification page.

CHAIRMAN BABCOCK: Nina, could you speak up a little bit?

MS. CORTELL: Really? First time. I am

saying would it be helpful to have one more vote, and that is that if the name of the applicant is to appear anywhere in the record it should only appear on the verification page.

CHAIRMAN BABCOCK: Okay. That's a motion?

MS. CORTELL: Motion.

PROFESSOR ALBRIGHT: Second.

CHAIRMAN BABCOCK: Seconded. All right. Everybody that thinks that what Nina just said is a good idea, that is --

MR. HAMILTON: Can you repeat what she said?

CHAIRMAN BABCOCK: Yeah. That is that if the name is going to appear anywhere, it should be limited to the verification page and not appear anywhere else. Everybody in favor of that motion, raise your hand.

Everybody that thinks that's a bad idea, raise your hand. Well, that would be our first clear direction I think. 22 in favor and zero against. Who made that motion?

MR. HATCHELL: Nina.

CHAIRMAN BABCOCK: Yes. Touchdown. All right. Good. Anything else that we need to talk about on the issue of confidentiality versus anonymity? I'm getting so I can say that now without stumbling.

Well, if there's nothing more on that then

somebody said something to me on the break, which is really true and I think it bears repeating. There probably is no more difficult issue in our society than the one we've just dealt with, and everybody in this room has different views about it, some strongly divergent, and the fact that we've been able to have this discussion in the way that we've had it, is fabulous. It makes doing this just absolutely worthwhile, and maybe some other institutions in our country could follow our lead on things like this. So props to you guys.

All right. We'll go to the next item on our agenda, which is ex parte communications.

HONORABLE TOM GRAY: Excuse me, Chip.

CHAIRMAN BABCOCK: Another societal issue, by the way.

HONORABLE TOM GRAY: Are we not going to talk about the other changes?

CHAIRMAN BABCOCK: No.

HONORABLE TOM GRAY: That we made in the --

CHAIRMAN BABCOCK: No. But if you've got anything you want to say, send it to the rules attorney. Current rules attorney, not the past one.

The judicial -- excuse me, ex parte communications, and Nina, who just ended on a high note on the last discussion, is our chair on this, and so take us

through it, Nina, and tell us what the issue is.

MS. CORTELL: Okay. First of all, I'll be speaking on behalf of the subcommittee, but we have several members here, and we expect a robust discussion by all, including by members of the subcommittee consisting of Justice Tom Gray, Judge David Peeples, Justice Bill Boyce, Professor Lonny Hoffman, and his eminence, Mike Hatchell, so we had a great committee. The issue raised in the August 4 letter from Justice Hecht was basically what is a judge to do when a judge receives an improper ex parte communication. The current canons of judicial conduct do not say, and the specific context we were asked to consider was that of communications by e-mail or other forms of social media. I will footnote that the members of the subcommittee are not very conversive with social media, so we invite those of you who are on Facebook and others to please educate us. And part of what led to this was in connection with the gay marriage cases that were heard by the Texas Supreme Court, the justices received a number of mass e-mail communications expressing views about the case and about the subject matter and found that there was not a particularly clear guidance in the Canons of Judicial Conduct as to how to react to these.

In your materials -- and I'm afraid they weren't posted exactly under this topic but were posted

earlier in August, right, Marti, I think the preliminary materials, and that included several things that I want to reference you to in case you haven't looked at them. One is some of these e-mails were posted so you can see what those look like. Martha Newton prepared a very good memorandum for Chip about the issues that were raised that we'll talk about. There is a prior ethics opinion, No. 154, that was posted and also a survey of court clerks on ex parte communications and how -- what common practices there might now be, notwithstanding the fact that we don't have specific guidance in the canons.

So what the committee focused on was Canon 3 of the Code of Judicial Conduct and specifically Canon 3.B(8), and so what I would recommend people look to that was posted were our proposed revisions. We have a redline and a clean copy, and let me say that we consider this the beginning of discussion where I don't think you'll be able to sign off on anything today, and we really do welcome the input of the full committee to help us in our further deliberations.

The first problem we encountered was in the definitional section, so the current Canon 3.B(8), the description of ex parte communications does not seem to include communications by persons not affiliated with the proceeding. So that would be exactly the type of people

who would be sending these e-mails or maybe communicating with judges on Facebook. So we -- the first thing we did was to try to expand the category of communications to which the prohibition will apply. So you have the redline. You'll see that we deleted "ex parte communications" and then just talk about "communications made to the judge outside the presence of all parties concerning the merits of a pending or impending judicial proceeding," and we deleted -- you can see this language that tries to cabin in categories of communications, so between a judge and a party or a guardian ad litem or ADR or whatever, we took out all of those and just opened it up to a broader base, and that will be very concerning to many because we -- I just want to flag, if you haven't already looked at it. We have proposed in (8)(a) which now provides for a possible set of actions that need to be taken when there is a communication made that's prohibited by Canon 3.B(8), so casual consequences if we are to do something as our list of things that need to be done once you open up the category.

Also, Justice Gray, why don't you maybe tell a little bit about your examination of the term "ex parte communications" because I think that will also inform the discussion?

HONORABLE TOM GRAY: I didn't know I was

going to get called upon.

MS. CORTELL: I know, I didn't give you warning.

HONORABLE TOM GRAY: I did some -- I don't think that's the one we need. I did some research on case law that had attempted to define "ex parte communications," and it was actually a very narrow definition that had been used in the cases. Most of them went back to one definition, and I'm trying to find a reference to the person's law review article, but it was generally ex parte communications were those made to a judge outside the presence of less than all of the parties to the case, and that was used in several Texas cases, and it was a -- it was just very narrow, I mean, if you look at it; and then Black's Law Dictionary was cited in two of the cases, one, the fifth edition, the other was the eighth edition; and they were actually slightly different. In the fifth edition it was ex parte communication -- I'm sorry, eighth edition, "A generally prohibited communication between counsel and the court when opposing counsel is not present."

The fifth edition said, "An ex parte communication is one in which the court or tribunal hears only one side of the controversy." So we were working with a very -- if you use the term "ex parte

communication" almost by definition it rules out the subject that we were asked to look at, which was the social media comments. So is that what you wanted me to elaborate on since you didn't give me a heads up?

MS. CORTELL: Yes. Thank you. So we took out the term "ex parte communication" because the definition is actually so narrow that it would not capture the broader category. I'm going to go ahead and talk a little bit about the additional language that we added and then I would suggest opening up -- I'll tell you what, we'll talk about the whole thing and then we'll come back to this. So then we wanted to make clear that it would be limited in some way because of the problem on social media where you could get any communications and how do you know which ones will trigger the to do list in (8)(a), so we put in a subjective limitation. So it applies to any communication perceived by the judge to be an attempt to influence the judge in a pending or impending judicial proceeding, and then in the footnote we noted that the standard could be subjective or objective, and then based on a later communication from Lonny Hoffman, who met with other judges -- I think Justice Busby was there, and he can speak to that, but there was great concern about opening up this can of worms, so they even wanted it to be narrower, so subjectively this is only triggered if the

judge thinks there is any possible way he or she could be influenced by the communication.

So at any rate, so the first issue really is how do we define the body of communications that will be deemed improper. That's in (8). We did not otherwise do anything with the exceptions other than in (8)(e) to delete "ex parte." And then if you look at (8)(a) this was our attempt to come up with a list of things that the court would need to do once these communications are received. Those that are prohibited by 3.B(8). So we are saying that the judge or the clerk should reduce the communication to writing, and there is a comment that kind of elaborates on that, "preserve the writing among the documents in the case, send a copy of the writing to all parties, notify the sender that the communication as made is prohibited by the canon, that the communication will be sent to all parties, and that other communications by the sender may be considered by the court if the sender complies with the rules."

So there was a strong feeling by the subcommittee that this should be a teaching moment and that if someone wants to submit an amicus filing or some other type of filing that is appropriate within the rules, that the sender should be made aware of that, and then sort of an open-ended "Court can take other action as it

deems appropriate." And you'll see in our footnote there some examples of that was you could request the parties to respond, address the communication by court order, or inform the sender that the court is prohibited by rule of law from considering the communications. So those are some examples, but we didn't want to be too specific as to kind of over -- the committee didn't want to tie the hands of the court too much.

So, Chip, I'm at your pleasure, but my suggestion would be to first open up for discussion the definition of what communications should be prohibited.

CHAIRMAN BABCOCK: Sounds good to me. What do you -- what do people think about that? Yeah. Justice Pemberton.

PROBATION OFFICER: Question, communications, I'm driving to work and there are folks protesting on the sidewalk or there's an editorial in the paper. Is that a communication made to a judge?

MS. CORTELL: I would rule "no."

HONORABLE BOB PEMBERTON: Okay. I just want it out there. There needs to be some concern about the breadth and narrowness of that term, directly or indirectly.

CHAIRMAN BABCOCK: Judge Wallace.

HONORABLE R. H. WALLACE: Given this factual

scenario, do you think this would apply? Let's say the judge has ruled on a matter of some notoriety, and then after the ruling and before the case is final or anything of that then gets hate mail and love letters from various people about the case.

MS. CORTELL: I would say "yes."

HONORABLE R. H. WALLACE: Well, that's --

MS. CORTELL: Well, again, and what I think -- and this --

HONORABLE R. H. WALLACE: I'm not talking about party. I'm just talking about people in general.

MS. CORTELL: Well, this goes to the standard, right? So if the standard is going to be that the judge -- the judge's perception of whether that communication will influence him or her, and you've made the determination that there's no way this can influence you, then the answer would be "no."

MR. MEADOWS: But that's not really what the rule says. It says if the judge perceives it to be an attempt, as opposed to whether it was effective.

MS. CORTELL: Well, that goes to the footnote 3 where there is an alternative. So you could make it more restrictive, but that's what -- I mean, really we're asking you-all, and you're in a better position than I am to evaluate this, but we could tighten

that up. One question should be, should it be subjective or objective, right, but you could tighten that up, but it was intended to I think not apply to those types of communications that the judge felt that it really was not influential.

CHAIRMAN BABCOCK: Carl.

MR. HAMILTON: Is this rule intended to say that unless the communication that the judge perceives to be an attempt to influence him, unless it meets that qualification other communications are okay? It starts out by saying you can't have any communication with the judge, and then it says, "This prohibition applies to any communication." Does that mean that whatever communication there is has to be one that is trying to influence the judge before he knew?

CHAIRMAN BABCOCK: Well, the current canon says, "The judge shall not initiate, permit, or consider ex parte communications," right?

MR. HAMILTON: Of any kind.

CHAIRMAN BABCOCK: Yeah, "of any kind, made outside the presence."

MR. HAMILTON: Yeah. The way this is worded it sounds like a communication with the judge, an ex parte communication is okay so long as it's not perceived that it's trying to influence the judge.

MS. CORTELL: It's not intended that way.

CHAIRMAN BABCOCK: Yeah. Justice Boyce.

HONORABLE BILL BOYCE: To follow up on the last question, part of the discussion we had in the subcommittee is that for a long time there was a self-limiting principle here in the rule because it dealt with parties and people specifically connected with the lawsuit. The charge to the advisory committee as a whole and the subcommittee changes the definition of that because it assumes that you're talking about communications that are related to a case but not coming from parties, and they may be coming from an e-mail campaign, letter campaign, things that appear on Facebook, any number of avenues.

So I don't presume to speak for anybody else on the committee, but the conception was if you're not going to have a limiting principle anymore based on who is making the communications, you've got to have a limiting principle somewhere to know when any kind of formal response is going to be required, and that addresses the point that Justice Pemberton raised. I suspect nobody in the room thinks that because the *Houston Chronicle* writes an editorial that says, "This is an important legal issue that the court should do this with," that you need to disclose that. But it's a spectrum from very broad

communications to a letter directed to you specifically urging you to do something, so when you come out somewhere in the middle there like a concentrated e-mail campaign or something that appears on Facebook, you need a limiting principle; and so the notion of the judge's perception of when it is general and doesn't need follow-up versus more specific and does need follow-up, that's the concept. It's not to bless anything in particular. It is to try to provide a limiting principle for when some more -- when it is a -- a communication that is sufficiently targeted that it warrants some kind of formal response from the judge.

CHAIRMAN BABCOCK: And if I could follow up on that, Justice Boyce, it seems to me that when you get into perceived by the judge in an attempt to influence the judge, you're quite right to raise the objective versus subjective. If you make it subjective, that's almost like a get out of jail free card. That's almost like, "No, it didn't influence me, and I didn't think it was going to influence me," but if you make it objective and you put it in the canons, now have you got an administrative body who is going to second guess you about whether it influenced you or not? You say, "No, it didn't," and they say, "Yeah, objectively it should have and so we're going to sanction you for that." So that's a problem.

HONORABLE BILL BOYCE: That's a balancing

issue.

CHAIRMAN BABCOCK: And I know our charge was to consider the canons, but I think we also ought to at least for the record mention to the Court that perhaps there are other places in the rules where this issue could be dealt with that would have less severe consequences for the judge who guesses wrong on something like that, and I'll have something to say about the scope of this in a minute, but that was something that occurred to me as a limiting principle or limiting problem in any event. Richard.

MR. MUNZINGER: I've practiced in several areas of the state and have found in a number of the areas of the state in which I have practiced ex parte communications with a judge by a party to a pending case are routine. They're commonplace. I've never done it in my life. I've always believed that it was totally unethical and impermissible. Other people may not share that belief, obviously do not. The rule as proposed leaves it to the judge to -- as you say, it's a blank check. What do I care? I mean, as long as I can listen to anything and say it didn't influence me and I didn't think it was going to influence me. The vice is not to protect judges from communications from citizens by e-mail or letters. Most of us would think that a judge wouldn't

be influenced by that, although it might be a case, a criminal case, maybe they are, but we're dealing with -- I think we're dealing principally with civil situations here.

There is no reason in the world that a party to a lawsuit should be communicating with a judge to resolve that party's case, unless it's to say "Is the case set for Monday or Tuesday," et cetera. To erase all of this language that's in the rule and then to add this that this prohibition applies to any communication perceived by the judge, et cetera, is a blank check to let judges do whatever they want and parties do whatever they want regarding communications with the judge. This rule has a number of vices. The old one did, too.

What are "the merits" of a proceeding? Can the setting of a case for trial and the continuance of a trial be addressed to the merits of a proceeding? I suspect not in a literal reading of the word "merits," and yet seeking a continuance of a case has effect on the parties to the litigation. Motions for continuance are required to be sworn. You're supposed to set out your grounds in a sworn motion and promise that you're not doing it for delay only but that justice may be done. Is that within this communication?

I have driven hundreds of miles to cases and

been told, "Oh, that case was continued."

"When, Judge?"

"Friday." No order entered. It was continued by telephone because my adversary called the judge Friday at noon and said, "Judge, don't put me to trial. I mean, you know, we're trying to settle this," whatever they said. I don't know what they said. I wasn't there.

CHAIRMAN BABCOCK: Because it was ex parte.

MR. MUNZINGER: Exactly so, and the truth of the matter is I see heads nodding around the room. We've all -- I won't say we all have, but many of us have been victimized by ex parte communications with judges, and there ought to be an absolute prohibition, and anything that allows a judge to escape responsibility for having an improper communication with a party to a lawsuit needs to be avoided. Cases ought to be decided on their merits, not on politics or who is a donor, not who belongs to which political party decide the cases on the merits and that includes motions for continuance.

I don't like this thing, "Parties concerning the merits of a pending or impending matter." That may well -- "It didn't apply to the merits, Mr. Munzinger. It only applied to a continuance," by way of an example. Maybe it ought to read "concerning a matter relating to a

pending or impending judicial proceeding." I don't like the word "merits." I don't like this idea that the judge gets to determine whether it would influence him or not. I think it's a terrible mistake and a blank check for abuse.

CHAIRMAN BABCOCK: Well, just to follow up on that, Richard, you're identifying two different problems. One, when there's ex parte communications by a party or the party's lawyer with the judge. The plaintiff's lawyer calls up at Friday at noon and say, "Yeah, Judge, take this off the docket. I need a continuance because I'm not ready," and you're not a party to that conversation because you might say, "It's been on the docket for 10 years. Why isn't he ready? I can't understand it." So that's an evil that is in one place.

What the Court -- what spawned this debate was the Court receiving unsolicited communications about a case, not from a party, not from a party's attorney, but via the internet that got into their inbox some way that dealt with the merits of the case. What do you do with it? Those are two separate problems it seems to me.

MR. MUNZINGER: Well, I agree with that, and certainly requiring the judge to report any ex parte communication that he got, whether it was verbal, e-mail, or correspondence from a nonparty is one thing, but to

draft a rule here that gives somebody a blank check is another thing.

CHAIRMAN BABCOCK: No, no, no. I take your point. I'm just trying to point out there are a couple of different evils we're trying to remedy here.

MR. MUNZINGER: Well, I'm a citizen, and I could write a judge a letter saying -- I might have an interest in some case. Some cases are political, some aren't. You can't stop a citizen from writing a judge and giving his opinion that Richard Munzinger is a liar and, by God, anybody that believes him and his client ought to be boiled in oil.

CHAIRMAN BABCOCK: That would be false.

MR. MUNZINGER: They're citizens. They can say that, and I don't -- the judge ought to say, "I got this letter, I'm not paying any attention" or say, "They've got your name, Munzinger." He might say that. I don't know what he would say, but I think you need to be careful about a rule that sanctions communications with a judge that shouldn't be sanctioned.

CHAIRMAN BABCOCK: Justice Gray.

HONORABLE TOM GRAY: Richard's points are well-taken. The -- I will say that the phrase "merits of a pending or impending judicial proceeding" are in the existing canon, so we didn't feel at liberty to tinker

with that. The next sentence was primarily to get to the address -- get to and address what the Supreme Court asked us to look at, which was the e-mail blast and the social media responses of you could -- and it is too broad in its scope probably as drafted because it really was not intended to, I guess you'd say, be so much -- and by the way, Nina, if I speak out of school here on what we were thinking, rein me in, but it was more -- that sentence addresses more the social media or what I will characterize as third party communications.

CHAIRMAN BABCOCK: Right.

HONORABLE TOM GRAY: And it could easily be modified to say something about "This prohibition includes communications from persons who are not parties which are perceived by the judge to be an attempt to influence the judge," and then that way the "influence the judge" part applies to those nonparty communications, whereas any communication made outside the presence of all the parties about the merit of the suit is prohibited, and so it would be fairly easy to tinker with that second sentence and limit that to the communications by persons who are not parties, specifically trying to get to those social media type things, because basically, as I understand the survey that was done, most of the social media e-mail, Facebook, letter writing campaigns, where there is large blocks of

the public motivated to contact the judges regarding a specific pending case, they are third parties, and they are not -- they're about a specific issue type thing, about a specific case. And those are not typically across the nation included in any canon that prohibits ex parte communication because it's not included within the definition of an ex parte communication. So, I mean, we're addressing something that hadn't been addressed nationwide or hasn't been addressed very much.

CHAIRMAN BABCOCK: Well, here's the problem I see with the current language and with the proposed language. When you say, "The judge shall not permit," well, you know, I've goat a Facebook page or I've got a Twitter account. That gives permission to anybody in the world to post on my Facebook page or to tweet me, in the vernacular, and one of our judges as we know, we have a position -- we have a tweeter laureate.

HONORABLE TOM GRAY: His name did come up in the subcommittee specifically.

CHAIRMAN BABCOCK: But this canon says, you know, you can't permit that. So does that mean I can't have a Facebook, because if I have one I know that I might be permitting this kind of communication? Wade.

MR. SHELTON: Is -- on Facebook, using that as an example, can you restrict posting? Because for a

judge to have a Facebook page, which is probably totally necessary because we elect our judges, but not only do we have the problem of if they allow postings of we can't leave it to the judge's perception alone because it would give an appearance of impropriety to the whole rest of the world if all of this editorializing on a particular case is appearing on that judge's Facebook and even though the judge says, "I'm ignoring it. I never look at Facebook." Well, everybody else might, right, so that kind of leaves us a problem on the subjective piece.

CHAIRMAN BABCOCK: Yeah. Somebody else, Justice Christopher, was that you?

HONORABLE TRACY CHRISTOPHER: Yes. I think it's a mistake to eliminate that first -- or the second sentence, because I think that's very important to keep that in there, that that's ex parte communications and it's not subject to whether I think they're trying to influence me or not. It should just be "ex parte communications." I mean, I can think of examples where what if a lawyer is -- I'm at a cocktail party, and a lawyer is telling me, "Oh, you know, I was in this great trial. You know, I was super, and you know, here's how I managed to, you know, trick the defendant," or you know, "get a great result" and then six months later it shows up in my court.

Well, he wasn't at the time trying to influence me and I didn't think he was trying to influence me. He was just telling me about his case, but you know, I would recuse off of that case because he told me something about his case, and if you leave it the way it's written now, you know, I wouldn't feel the need to recuse off the case. So I think you have to leave the "ex parte communication" in there about parties and attorneys and then have a separate sentence about the third party people that write you, and I do think imposing a burden -- I know we're not to 8A, but imposing a burden on the judge to, you know, reply to them all and say, you know, "Please don't do this anymore," and "I'm not going to consider this," and "If you want to file an amicus brief, you can" is just way too much.

CHAIRMAN BABCOCK: Well, and the other thing is, you know, I don't check my Facebook page hardly ever, so if I received it when it hits my Facebook page, even though I haven't looked at it in the last six months --

PROFESSOR ALBRIGHT: Chip, that's what everybody says, "I never check my Facebook page."

CHAIRMAN BABCOCK: Right. Well, and there's a huge loophole, too. I guess you can know when somebody looks at a page if you want to dig that deeply, but anyway, Justice Busby.

HONORABLE BRETT BUSBY: I agree with Justice Christopher's suggestion to leave the second sentence as it is and then add a separate sentence that deals specifically with this problem of the mass electronic communications in a pending case; but I would also suggest that the section that deals with those sort of communications be limited to pending cases rather than impending cases because once you get outside the context of a judge talking to party or guardian ad litem, et cetera, it's very difficult to know what could be an impending case; and you know, if somebody said something to a judge at a community meeting, well, I hope -- or sends them an e-mail, says, "The next time you get one of these cases, you do this," is that something that needs to go in the file? I think that's probably not really what we're aiming at, so I would urge that the subcommittee in defining the communication part of it to think about whether we want to just limit it to pending cases.

CHAIRMAN BABCOCK: Judge Evans.

HONORABLE DAVID EVANS: I would keep the existing ex parte as Justice Christopher and Justice Busby suggested and create a separate category, and the only response I think appropriate from a trial judge -- I won't speak to appellate judges -- to such a communication that comes to the court is that the court does not consider

these communications, they do not comply with the law, and make whatever adequate disclosure the court feels that it needs to make.

To send the kind of notification that might be required by this rule invites the parties -- the parties will not be able to resist responding to the allegations from nonparties and putting it in the record, which forces the judge to violate the canon and consider the merits of what was said by the nonparty; and so when you say you can't consider it, you shouldn't even be looking at it to determine if -- we just don't consider this. We cut off -- we cut off e-mails and send orders out locally, just you don't communicate with us by e-mail on -- to the pro ses and nonparties, at least I do in 48th and I think other judges do. So I would offer that, and I don't know how to handle the social media and the restaurant encounters.

CHAIRMAN BABCOCK: Nina.

MS. CORTELL: Well, two things. One, I don't think the subcommittee would have a problem breaking it out one rule for parties, one rule for third parties. I don't know if that resolves the issue, Chip, that you're raising about permission vis-a-vis Facebook, and I think we need to consider that. In terms of advising the sender of the communication that the court does not consider it,

we had it in one of our drafts, and I just have to say that there was push back from members on the committee who felt like, well, you looked at it, so I considered it, and so maybe that doesn't make sense to say that. I was -- I was not one of those people, so I hope y'all speak up.

HONORABLE DAVID EVANS: We speak -- if we get it by e-mail we said we don't consider it or file it, and it comes from the staff. It never comes from me, but I don't know that -- but other people do otherwise.

CHAIRMAN BABCOCK: Yeah. Cristina.

MS. RODRIGUEZ: Has the subcommittee considered addressing the distinction of the social media and the mass communications? I know that we don't want to make these rules sort of of the moment, but it seems a distinctly different issue, and there's a passivity of receipt of the information that you don't get in, say, the cocktail party chat.

CHAIRMAN BABCOCK: That's a great distinction. Yeah, Alex.

PROFESSOR ALBRIGHT: Yeah, I was wanting to make the same point, because there's one thing if you're sent an e-mail, even if it is a mass e-mail. It's definitely directed to the judge, so that was the distinction I was making, it's directed to the judge, where if something ends up on my Facebook page that is

posted by somebody else, that's shared by somebody else, that's not really -- it ends up on my Facebook page, but it's not "Alex, you should know about this." I mean, if I "like" it that might be a problem, right, but I think Justice Pemberton's issue about the protesters outside the courthouse, that is "any communication," but -- and it may be directed at the court more generally, but I think it is encompassed by this.

HONORABLE BOB PEMBERTON: That's why I raised the question.

PROFESSOR ALBRIGHT: It's one thing if they're up and down Congress Avenue, but if they're in front of the courthouse about an impending case, but, you know, the United States Supreme Court deals with that everyday.

MS. CORTELL: Well, the "made to the judge" in the prior sentence was meant to be sort of a cabining.

PROFESSOR ALBRIGHT: So it is directed to the judge?

MS. CORTELL: Right. Right.

CHAIRMAN BABCOCK: Judge Estevez.

HONORABLE ANA ESTEVEZ: Well, I wanted to defend leaving the "shall not permit" because I think that always dealt with someone who started the conversation, and we could shut it down. If somebody else brings up a

case, that's where the permit is, so it needs to stay because it has nothing do with the Facebook issue or the mass media or anything like that. So what we really need to do is we need to add something in parentheses, not as simple as "when possible," but an asterisk with a comment that says, "We recognize that some communications are received without us having any control over them because of the e-mail and the Facebook, and -- but we are in no way saying you are no longer allowed to have an e-mail or Facebook or media account."

As far as what Alex is bringing up, when you're on -- I've been on a, you know, death penalty writ case, you walk in, you walk out, you walk anywhere, and the family is out there trying to scream at you, "You need to make sure she dies," you know, that's an ex parte communication intended to influence the judge.

CHAIRMAN BABCOCK: Right.

HONORABLE ANA ESTEVEZ: And I'm not going to write -- I don't feel compelled ever, I've never felt compelled, and under this rule I would have to write that in and send it to all the parties. I don't feel compelled to do that without reading this rule. Now I would feel like I would have to do that, and I don't think that's what you're referring to, but yet it would be a targeted --

HONORABLE TOM GRAY: That actually is exactly.

HONORABLE ANA ESTEVEZ: Yeah, that's exactly what happens to anyone who is addressing this type of cases, and that is what you want us to do?

HONORABLE TOM GRAY: One of --

HONORABLE ANA ESTEVEZ: For writings, I've had the writings from the family members, and we do, we send them out to everybody and do it like a normal ex parte, but on the day of the hearing and I am walking in or walking out and they're screaming at the open court, I've never felt like the rules required me to do anything. I shut it down.

CHAIRMAN BABCOCK: Skip.

MR. WATSON: I don't know if anybody else is concerned about this, but -- and it may be nothing, but to me there is just an inherent contradiction between sentence two and sentence three. Sentence two is deliberately limited to concerning the merits of the pending or impending proceeding, but sentence three is any communication; and whether it's perceived or objectively, I don't care, to influence the judge, not on the merits, but to influence the judge; and I am -- my mind is racing to the kind of practical things that come up of, you know, you run into the judge in the coffee shop; and, you know,

it pops into your head that the other side's motion for summary judgment has been pending for two years; and you've been postponing discovery to see if you need it; and you say, "You know, it would really help to move it along if you could rule one way or the other on that motion for summary judgment." Just bring it up. That's one example.

Another example, and I can see where this should be done formally, but it's one that I wrestled with when I was much younger was a judge who was appointed, you know, an attorney who was appointed a judge and called a case to trial in which he had been listed as an expert witness for the other side on attorney's fees. Do you file on that? Or do you say, "Joe, do you recall that you were listed as an expert witness in this case? Do you think this is one where you might want to pass it off or call the administrative judge?" Do you put that on the record with the filing, or do you just quietly say, "Do you realize what's happened here?"

I could see arguments on both sides of that, and finally, the one where you always have to kind of zip your lip is, you know, is this thing going to be decided within my lifetime, plus 21 years, you know. We've got a perpetuities problem here. You know, I just -- I wonder which way this should go, but to me, there needs to be

a -- it needs to be consistent. It needs to be either about the merits or it needs to be about any communication, and as it is I don't know which way it is, as it's written.

CHAIRMAN BABCOCK: Justice Boyce.

HONORABLE BILL BOYCE: I'll make one observation, which I don't think I'll be contradicted on, which is the subcommittee was unified in the thought of not wanting to define what social media means or otherwise try to cabin this in terms of particular types of social media of which are going to be endlessly evolving and we need our children to explain to us in any event. So I'm sensitive to, for example, Alex's observations to take Facebook for an example. You can be a passive recipient. You can also be a direct recipient through a message. You can have something post. There is gradations on all of this, so the "any communication" in broad language, obviously appropriately is the subject of attention, but it's also trying to address the fact that it's got to be a rule of sufficient flexibility to address whatever things come along and whatever formats of a communication come in and out of style.

So that's a consideration for some of the broadness. I don't believe there could be any objection to trying to deal with that particular problem in a

separate sentence that is distinct from the more traditional understanding of ex parte communications in terms of, for example, Mr. Munzinger was describing of communications with the Judge by a party or lawyer outside of the presence of all of the parties.

CHAIRMAN BABCOCK: Peter.

MR. KELLY: Precisely what Justice Boyce just said, "outside the presence of the parties." The Black's Law Dictionary, ninth edition, says, describes ex parte as "done or made at the instance and for the benefit of one party only and without notice to or argument by any person adversely interested"; and I prefer that language "without notice to" as opposed to this more archaic sense of "outside the presence of the parties," because for instance, we're swapping drafts of the jury charge during trial by e-mail. That's not in the presence of any party, but it still has to be done with notice to all the other parties, so even though that wasn't the subject of the revision of the rule, I would change "outside the presence of all parties" to "without notice to all parties."

HONORABLE TOM GRAY: You just have a too archaic definition of "presence."

MR. KELLY: Virtual presence.

HONORABLE TOM GRAY: An electronic presence.

CHAIRMAN BABCOCK: Justice Christopher.

HONORABLE TRACY CHRISTOPHER: Well, I mean, there are some judges that consider a letter sent to a judge that's copied to the other side to be an ex parte communication because, you know, it's not part of a formal, you know, pleading. I never thought it was, but a lot of judges when I first got on the bench, they said that's an ex parte communication, and certainly when people start copying me on their e-mail strings about the discovery disputes that they were having, I wanted to stop those as ex parte communications as far as I was concerned, but "in the presence of" is kind of an interesting issue.

CHAIRMAN BABCOCK: Justice Bland.

HONORABLE JANE BLAND: Well, just two things about the Code of Judicial Conduct. One is it's largely aspirational. In other words, it has high-vaulted ideas throughout without a lot of particulars. There are a couple of little things that there are particulars like you can't own even one share of stock in -- you know, for a party to the case, but other than that it's sort of the judge shall act fair and impartially, you know, in general; and the second thing about it is it's focused on the judge's conduct and not someone else's conduct.

So canon 8 currently is, you know, that "the judge shall not initiate," "the judge shall not permit,"

which, you know, entertains some idea that the judge is aware, whether by Facebook or other means that somebody is attempting to influence him, and "the judge shall not consider." When you add 8(a) and this, you know, broad definition of communication what you're doing is sort of incorporating a remedy to a violation by a third party and, you know, putting the responsibility on the judge to handle it, but typically the canons don't do that.

The canons really only focus on the judge's conduct and then, you know, either by custom, practice, or other rule, the judge is -- takes care of remedying the problem whether it's by recusal, by disqualification, by notice, by conducting a hearing. There's about, you know, 50 different remedies a judge can use to fix an error in judgment by someone else or even by herself. You know, even if you're the one that's made the error and inadvertently engaged in some kind of ex parte communication, there's lots of things you can do to remedy it; but when you put into the canon, you know, specific things that the judge must do, that's something different than what's been in the canons before at this point. Those are usually subject to other rules, and so when you have this second sentence that talks about any communication and then it tells the judge, if you -- you know, if you receive this communication in some way then

you need to do these five things, you're kind of getting away from the aspirational aspect that I think the canons are intended to be. They're only about 16 pages. They're not intended to cover everything. They're intended to be a moral code of conduct.

CHAIRMAN BABCOCK: Okay. Nina.

MS. CORTELL: A few things. One, I should have said this at the outset. We were trying to give the committee something to look at and consider. There was a variance of ideas on whether any action should be taken, but we wanted to provide the committee with a menu, which we've done, but I also want to clarify that the third sentence is meant to be a subset of the second sentence. Obviously we didn't do that too well, so I apologize, but the limiting concepts "of made to the judge concerning the merits," so on and so forth were intended to also be a part of the third sentence, but I understand and take -- I agree with a lot of the comments that, you know, maybe we need to break out one rule for one situation and another for another; but maybe at some point, Chip, to Justice Bland's comments just made, we should consider your point of whether if we're going to do anything, whether that fits better with a rule versus being in the canons, but we were asked to look at the canons, so --

CHAIRMAN BABCOCK: No, I know. I said that

for the record. Roger.

MR. HUGHES: Well, I agree with Nina and Judge Bland. It might be wiser to break this out into a canon and then separate procedural rule. Let me explain why I have some separate reasons. When I first looked at this I kind of looked at it from an advocate's point of view rather than the judge's point of view, and as an advocate I see two things. First, using of this new rule as a basis to recuse a judge. That is, by saying, "Well, judge so-and-so tolerated or permitted these kind of communications and did nothing"; and that should be a basis for recusal; and I think it would -- and that's why I think we want to break this rule away so that that's treated as a separate issue from what -- from that.

Now, the other one is as an advocate how do I respond to this? That is, how do I respond to something that isn't even in the record? How do I -- if they file an amicus brief as counsel we know what to do. That's an amicus brief. You respond or you don't respond. You've got something to shoot at, but here you don't.

So here is my thinking, is that, essentially what Judge Bland suggested, the canon ought to be an aspirational thing, and therefore saying it is -- it ought to be enough for the canon just to say, "The judge ought not to initiate, consider, or permit these kinds of

contacts from a third party," which would allow the judge to satisfy that when they're hit up with these statements and the judge could go "Oh, no. No, no, you can't talk about this. I'm not going to permit you to talk about this in my presence about that case."

And the same thing goes for Facebook. Facebook seems to me is kind of like you put your address in the phone book, are you permitting people to send you, you know, ex parte letters? I think not. It's when you start encouraging people on Facebook to do this.

But then the second thing of it is I think that a separate rule of procedure to say when the judge has received this sort of thing what is -- what should the judge do about it, and from there you can -- you could take a look at whether that ought -- you know, the failure to follow that rule of procedure might be grounds for recusal. But I think the -- how the judge remedies the situation, which is what I see the proposal for a (b) as, I think that ought to be a rule of procedure rather than in a canon, and then that way you could deal with these issues about what -- how does the other side get to respond, and you also deal with these issues about when would it be a basis for recusal, which ought to be different from whether they violated a canon.

CHAIRMAN BABCOCK: Yeah. I agree with what

you say, Roger, about recusal -- about a procedural rule rather than a canon, but these things can get manipulated very easily. For example, you've got a judge and you don't like -- like you don't like the way it's going, you don't like the judge how she's ruling against you all the time, so you organize some campaign to just bombard her Facebook page and then trigger her duty to disclose that and then use that as a basis for recusal. I mean, that's a mischief that is not so farfetched.

MR. HUGHES: Well, and if I may use an example, that is perhaps something that has to do with the decisions we've made in Texas. I can remember when I found out how the U.S. Supreme Court deals with it. It's up to each individual justice to decide whether to get the recusal motions filed against that justice, and some people think, well, that's just totally unfair. You're leaving it up to their conscience, and it's like, well, yeah, but if there's a -- if you have a divided court and you really want to use the recusal method to create the kind of division where basically people file recusal motions precisely to get the other judges to kick you off the case.

Well, we've gone the other way in Texas. That's exactly what we do. It may -- we may have to think about it. That's what I'm saying, I think that somehow we

have to think about when we -- if we implement a rule about what's a poor judge to do in exactly the situation you describe.

CHAIRMAN BABCOCK: Yeah. I don't think this -- excuse me, I don't think this is much of a secret, but I defended a judge from Galveston County against a public admonition by the Commission on Judicial Conduct involving her Facebook account, and one of the charges was somebody had posted to her Facebook about a criminal trial, you know, "My favorite movie is Clint Eastwood's *Hang 'Em High*, you know, just saying, Judge." That was the post, by somebody she didn't know, had never heard of; and she took it down; but nevertheless, that became a basis of a charge of misconduct and a public admonition; and we've got to be very careful a rule that doesn't subject our judges to a complaint and then the next thing they know they're in front of the Judicial Conduct Commission and they've got a blot on their record.

HONORABLE TOM GRAY: Would you like for me to introduce it as an exhibit in the record?

CHAIRMAN BABCOCK: Only if it's got my picture on it.

HONORABLE TOM GRAY: It doesn't have your picture.

CHAIRMAN BABCOCK: Then your request is

denied then. Yeah, Tom.

MR. RINEY: Roger pointed out we can take a look at this from a lot of different perspectives, and I think one of them is from a layperson's point of view because we view this type of conduct, attempt to influence the judge, as improper; but most laypeople don't see it that way; and judges in the state of Texas are elected officials who go out and run for office; and, I mean, I've been at judicial fundraisers where a sitting judge is running for re-election and a layperson will make a comment that just makes a lawyer cringe; but they don't see they're doing anything wrong. This person is running for office, they're asking for my money, but if the language is as broad as "any pending or impending litigation in an attempt to influence" I really don't think we want that judge to have to come back from a campaign trip and comply with new section 8A. I mean, I think that's a real problem when we're dealing with the breadth of the language. I mean, those judges that have had a contested race could probably address that a lot better than I can, but I think we have to be real careful about it.

CHAIRMAN BABCOCK: Yeah, the citizens have a right to petition their government, and that's surely implicated when they communicate with the judge, even

though we all would cringe, as you say. Lisa.

MS. HOBBS: I agree. I feel like we can talk about, as Justice Bland noted, what the judge's conduct is and we can talk about lawyer's conduct, and maybe we need to think about whether our disciplinary rules cover enough of a lawyer directing these types of things, which probably is not who is directing them, but we can probably have a prohibition in our lawyer rules, but I just think it's really hard to do much that's going to stop the public from talking to -- or wanting to talk to the people they're electing; and on the other hand, though, I wouldn't be opposed to some lofty statement that gives judges cover that -- not necessarily subject them to punishment, but that says, "Look, the Code of Judicial Conduct says this isn't proper." Because sometimes I think that's what the code needs to do is just to let the -- offer the judge somewhere to point to tell somebody who doesn't understand the system why this is a problem, so maybe that might be the only way I would see how we could really do this.

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

MR. FULLER: I just think 8A invites mischief, and I can see a situation where a judge complies with 8 and then gets in trouble because they didn't do 8A,

and that's just not right. It invites mischief, and we don't need to go down that road.

CHAIRMAN BABCOCK: Any other comments? Yeah, Kent.

HONORABLE KENT SULLIVAN: To the point I think Lisa was making, I do wonder about looking at this in isolation and wonder if we're looking at this comprehensively if it shouldn't be revisited in the context not only of the canon, but the DRs and even the Rules of Civil Procedure in terms of creating a comprehensive environment that provides a little clarity to all the participants. I also agree with the notion that you probably need to break these out. The thing that is I think most offensive to people is when this involves a party or a lawyer for a party and there is clear, unequivocal direct ex parte contact. We all know it. I suspect everybody in this room has seen that somewhere in the state, and that's something that we should have real clarity about and that there should be real remedies for.

Lastly, as to third parties, I mean, I'm out on a very tenuous limb here, but I thought with respect to social media that you could arrange your accounts, whether it be Facebook, LinkedIn, and the like so that people could not post from the ether so to speak so that the posts could be limited to people that you had specifically

given access to --

CHAIRMAN BABCOCK: Oh, sure.

HONORABLE KENT SULLIVAN: -- like friends or contacts or whatever. I thought that you could arrange your account in such a fashion, and I do wonder if people who -- you know, if judges shouldn't take more prophylactic measures.

CHAIRMAN BABCOCK: Well, you certainly can do that. You can restrict your Facebook account to just friends, for example, but I learned you can have a public Facebook account; and if the aspiration of the judge is to increase information back and forth between the Court and the public, not in an improper way, but just in an informational way, you know, "We've got eight cases on our docket Monday, and here's a list of them," and you know, things like that, then you can't restrict it. I don't think there is software available that says, "By the way, if it mentions any of my cases don't let it through."

HONORABLE KENT SULLIVAN: Sure.

CHAIRMAN BABCOCK: I mean, it's a little bit of an all or nothing thing. Yeah, Justice Gray.

HONORABLE TOM GRAY: We made a conscious effort in the committee to not characterize the third party communications as improper for the very right of to address the court, petition their government.

CHAIRMAN BABCOCK: Right.

HONORABLE TOM GRAY: If all we're going to deal with is the participants in the litigation, which is what virtually every rule about ex parte communications addresses, then you could stop the entire rule right after the middle -- well, in the middle of the second sentence as it currently exists where it says, "A judge shall not initiate, permit, or consider ex parte communications," period.

CHAIRMAN BABCOCK: Right.

HONORABLE TOM GRAY: And stop there. We were asked and tasked with developing a response, not to address the propriety of, but to what should the judge do when they get these bombardments of e-mails or a communication to the judge that is not a party or from someone who is not a party to the suit.

CHAIRMAN BABCOCK: Right. Right. Martha, what did the Court do when it got bombarded with these issue messages about a pending case?

MS. NEWTON: They decided that they would forward the e-mails to the clerk, Blake Hawthorne, and he combined them into a PDF and attached them in the case management system. So if you go to the Court's website and go to "case search" and type in the case number for those cases, they're available to the public.

CHAIRMAN BABCOCK: Available to the public, what about the parties? Did they give notice to the parties?

MS. NEWTON: I don't know that.

MR. GILSTRAP: Chip?

CHAIRMAN BABCOCK: Yeah, Frank.

MR. GILSTRAP: Well, maybe I'm reading the wrong provision, but the proposal of proposed 8A says that the judges have got to, you know, save the thousand e-mails, flip them to all the parties, and then respond.

CHAIRMAN BABCOCK: Yeah. Right.

MR. GILSTRAP: You know, and I mean, and this response is supposedly going to, you know, dissuade them from sending further because it has some statement that you shouldn't do it and but if you do it right we will consider it, and it just seems like you might egg on the procedure by requiring this response to a thousand e-mails.

CHAIRMAN BABCOCK: Yeah.

MR. GILSTRAP: From some people who probably don't need to say anything else.

CHAIRMAN BABCOCK: Justice Christopher.

HONORABLE TRACY CHRISTOPHER: I think what the Court did was fine. I don't think it's required, and I don't think the rule needs to be changed.

HONORABLE TOM GRAY: Amen.

CHAIRMAN BABCOCK: Was that a smattering of applause?

HONORABLE TOM GRAY: Or a slap down?

CHAIRMAN BABCOCK: That was the crowd at the TCU game the last week.

HONORABLE TRACY CHRISTOPHER: Oh, no, I bet I could good get a vote. I bet I could. Maybe not applause, but a vote.

CHAIRMAN BABCOCK: All right. Elaine.

PROFESSOR CARLSON: Nina, did your committee have the time to see what other states are doing in this, with this problem?

MS. CORTELL: We just went from the survey that we had that's been posted.

PROFESSOR CARLSON: Oh, okay. I haven't seen that. Thank you.

CHAIRMAN BABCOCK: Judge Estevez, then Jim.

HONORABLE ANA ESTEVEZ: I'm just curious because my court coordinator has a huge amount of ex parte when someone calls and says, "Can we move a hearing" or "I have to submit something, please don't have the judge read" or who knows. I don't know everything she hears, but is this intended to go to all of our staff as well, and if so, then I'm going to just -- I'm going to agree,

no matter what at the end of the day because of the amount of work and onerous burden this puts on everyone in our office.

CHAIRMAN BABCOCK: Right.

HONORABLE ANA ESTEVEZ: It's too much and then if we don't do it, do they get a new trial? I mean, what happens? Is it a point on appeal, and I'm now a witness as to the communication that I received I thought I stopped or I just deleted or I didn't think anything about, and so now they can, you know, recuse me or disqualify me or sanction me. What happens from -- what happens from here?

CHAIRMAN BABCOCK: In most counties we don't have the funds to fund a briefing attorney for the district judges. Now we're going to have to have somebody spending half their time responding to e-mails and to Facebook posts. We've got to be careful about that. Jim.

MR. PERDUE: I don't know if Judge Christopher is taking credit for winning this game 40 to nothing, but I want it on the record, Phil Maxwell was here earlier. We discussed the issue. He wanted to -- as an extra point on the score -- say you shouldn't be changing the definition of ex parte communication to handle this particular issue, and I agree with that, and that seems to be the sensibility in the room.

CHAIRMAN BABCOCK: So it sounds like he was running for two points, not kicking for one.

MR. PERDUE: Well, he ran it in from two yards out to make it 42 to nothing, Judge Christopher.

CHAIRMAN BABCOCK: Sounds good to me. Nina.

MS. CORTELL: I was just going to ask and I do think it's a good point to refer to in Martha's memo that the model code has just a -- is broader than our code, and it says -- there's a comma and then says "or consider," so "A judge shall not initiate, permit, or consider ex parte communications," which are the communications we've been talking about, and then, comma, "or consider other communications made to the judge outside the presence of the parties or their lawyers concerning a pending or impending matter."

So it is a broader -- ours has that cabining of all those categories right now after the word "communications." If you take that out then you broaden it, and you have an aspirational statement as to -- and it only says consider -- the prohibitions against considering. So I don't know if that's an alternative that the group wants to consider, but I do think generally what we need to be thinking about is a couple of things. Do we want to try and provide clarity in this area? We've heard at least one vote in favor of that, or do we just

want to walk it, and on the vote for clarity I heard not only are we looking at canons but the disciplinary rules and the procedural rules. So I think at some point if there's some central issues that the committee ought to address.

CHAIRMAN BABCOCK: Yeah, I think that's a good point, but I think the vote gets to be done by the Court, not by us, and Martha and I will talk to the chief about this and see if he wants us to keep going on this issue or whether or not this discussion as described by the two of us will be sufficient. So stay tuned on that, and we'll see if we need to do further work on this proposal. Did somebody else have a hand up? Yeah, Carl. Sorry.

MR. HAMILTON: I have a question about footnote 5 on page two, pertains to the (e) paragraph, "considering communication expressly authorized by law."

"Issue raised was whether to add the exception" --

MR. JACKSON: Carl, we can't hear you.

MR. HAMILTON: I'm just reading footnote 5.

CHAIRMAN BABCOCK: But not loud enough.

MR. HAMILTON: "Whether to add an exception for a hearing to the party after notice and an opportunity to be heard does not appear at the hearing." What is that

about?

MS. CORTELL: There's a list of the current exceptions (a) through (e) under the current canon, 3.B(8), and this was raised by a member of our committee whether an additional exception should be made for that.

CHAIRMAN BABCOCK: Justice Gray, and then Judge Evans.

HONORABLE TOM GRAY: Yeah, the -- as the rule is currently drafted there is no authorization to proceed with a hearing in the absence of one of the parties, even though they got notice of the hearing, because the hearing then is being held is the judge and less than all the parties, and it would be a technical violation of the canon, and to -- that was just something that came to our attention as we were working on this rule looking at the exceptions and thought that the court should probably address, is that it was okay to go forward with a hearing as long as everybody had the notice and opportunity be heard, and if they chose not to be there then that was their own problem.

CHAIRMAN BABCOCK: Judge Evans, and then Peter.

HONORABLE DAVID EVANS: The only thing I'd like to ask is that if we're going to modify a rule or require filing in the Court file, that give some thought

to the fact that some of the communications that you might receive are going to be requesting relief, and I don't want to inadvertently make somebody an intervenor in a suit, and so I'd like some -- I'd just like the Court to consider something about that. If it's going to be required to be kept by a judge as part of his judicial records then maybe doing what the Court did, putting it on the website or putting it in a separate file, is the issue, but making it clear that not becoming a party because filings to become a party or be a participant in the litigation are required to go through the clerk and there are very narrow exceptions for the court to hand file matters at this time.

CHAIRMAN BABCOCK: Okay. Peter.

MR. SCHENKKAN: Not clear to me listening to all of this where we're actually headed with this, but if we're going to wind up working with the words of this canon again and against this background of it possibly being used in recusal motion, but the matter raised by footnote 3 what the standard should be, and the footnote has subjective, objective, and restrictively subjective.

CHAIRMAN BABCOCK: Right.

MR. SCHENKKAN: I want to offer a variant on the objective one, borrowing from the disciplinary rules affecting lawyers; that is, you don't have to go all the

way to "appears to be intended to influence the judge." You can limit it to "that reasonably appears to be intended to influence the judge," and you could then add "and that reasonably appears likely to have an effect on the judge," and then especially if you need to -- and I'm in full agreement with Richard, having been the victim of this myself, to go a little bit beyond the merits and include anything that would have a material effect on an opposed or opposable motion. That would be a way to do it and is the kind of thing that I would like to see examined if we're going to go down this road. It's not clear to me we are, but --

CHAIRMAN BABCOCK: Okay. Great. Thank you. Anybody else? Yeah, Peter Kelly.

MR. KELLY: Just to return to the earlier point about changing from "presence" to "without notice." That resolves the issue of footnote 5. Also if you define ex parte communication as "any communication made without notice," then you can get away from the subject at issue, whether it was made with the intent to influence, but it also covers the issue that Skip raised about you run into the judge in the coffee shop, "Hey, did you rule on the summary judgment." As long as notice is given to the other side then that's not a violation of the canon, and then you don't necessarily need to have 8A after that.

You don't have to respond to the e-mail, the judges don't have to respond to e-mails they're getting as long as the parties have notice that the e-mails have been received.

CHAIRMAN BABCOCK: Does anybody remember Southwest Airlines used to have those seats that were facing each other, like kind of compartments? The worst ex parte I ever saw, I walked on the plane, sat in one of those seats. The other five were empty. Pretty soon -- this was 25 years ago. The judge is not on the bench anymore, and the lawyer is not practicing, but appellate judge comes and sits in the window seat, so he and I are facing, you know, this way. Pretty soon a fairly prominent trial lawyer comes along, sits right across from the appellate judge. We all strap ourselves into our seat belts. Some more people come along, plane takes off, and this lawyer starts talking to the appellate judge about a case in his court; and the judge says, "Hey, I can't talk about this"; and the guy is undaunted and keeps going on talking about his case; and the judge says it two or three more times; and I wasn't involved in the case; and finally I said, "Hey, he can't talk about this. Do you understand that?" And so -- and not only that, he can't escape. So if you're going to ex parte a judge, I guess that's the way you want to do it.

All right. Nina, we'll get back to you

about whether we're going to talk about this more. Our next and last topic for the day is three judge district court and ADR in constitutional county court judges, which Jim Perdue's subcommittee has addressed, and so, Jim, take it away.

MR. PERDUE: Okay. We saved the controversial issues for the end of the day.

CHAIRMAN BABCOCK: When we're all tired.

MR. PERDUE: I also need to thank the subcommittee. My subcommittee consists of Justice Jane Bland, Justice Bob Pemberton, Pete Schenkkan, Judge David Evans, Robert Levy, Justice Brett Busby, and Professor Elaine Carlson, who all participated in this, and we actually have a rather unanimous draft of a rule that we can present to the committee based on the legislative mandate that you'll find in the enrolled version of Senate Bill 455. You should have a basically a report on the minutes of the first subcommittee telephone conference that we had. We had two telephone conferences that were by far a majority of the committee. Then you've got the -- essentially the bill analysis, which does give you a statement of intent regarding behind the bill. The final version of the bill, which you will see when a roll passed basically on party line votes from the Senate and the House. The concept of the bill is well-stated I think in

the author or sponsor's statement of intent in the bill analysis document.

Justice Brown was asking, "The committee does not bring you a statement regarding this as a policy decision of the state or its propriety or functionality. Rather it is a bill that has passed. This is a bill that is now codified. This is a bill that is the law of the state of Texas," and the question then is, is a rule appropriate in somewhere to help the implementation of the codification of this new section in the Government Code. As chair, that was the first question asked, and I was rather agnostic on whether you needed it. Judge -- Professor Carlson and Pete Schenkkan felt strongly you needed it, and everybody else came around to the view that a rule serves the purpose of the statute and that somehow putting something out there would assist the implementation in the courts that would be called upon.

From there the question become simply where. There was quick agreement that the Texas Rules of Judicial Administration made sense for the place for a rule. Conveniently Texas Rule of Judicial Administration 14 got repealed, and so we shuffled the deck and slid it in right after 13, 13 being the state MDL rule which is also in the materials, which offers not a quite perfect corollary, but something which did become a means for which the

subcommittee worked off of when it comes to some of the language. Globally, the bill passed establishes the applicability of what any rule would be, and so this is a bill -- you can make jokes, but this is a bill that on its face, full intent, full disclosure was intended to address the concept of redistricting cases and school finance cases and their venue given that the State of Texas or an officer of the State of Texas or a department of the State of the Texas is a party, which obviously brings that litigation to Travis County, and a means to address what the author identified as a disproportionate role by district judges in that type of litigation where the considerations of the entire electorate of the state of Texas ought to be considered in that type of litigation.

So the definition on applicability of the rule that we've brought to you, proposed Texas Rule of Judicial Administration 14, is identical to the final enrolled version of Senate Bill 455. That language you can in concept I guess discuss core principal of the committee, again to be strict obedience to the statute and will have full disclosure as we move through the rule what's in the statute and what may not be in the statute, but we felt like if you're going to take a statute, which clearly contemplates something very specific, defines it, that the applicability of the rule would track that

identical language, so if you go to -- if you just have the final bill and then the rule that you have in front of you, 14.1 on applicability is essentially the enacting provision of 22A.001, the very first section of the bill. That is the concept of what this is to apply to.

And I can -- I'll detail this on school finance a little bit. There wasn't much -- there wasn't much consideration by the subcommittee that the idea of apportionment of districts for the House of Representatives that is redistricting was confusing, but I do have some specifics that I can give to the committee and the Court on finances and what conceivably can be a finance case, what conceivably might not be a finance case; and that concept then of applicability seems to be left for judicial determination because basically you've got a bill that enacted pretty much mandatory standards throughout it.

The -- there is -- there are not a lot of "mays" in this, and so we tracked that. I saw something on the bypass rule about the idea of modern language being "must" rather than "shall." We went with the biblical "shall," and so that's what you'll see in the rule. The first kind of effort by the committee to put a little more rules-oriented decision into the process that is not straight from the bill appears in 14.2(b). And that is

the idea that there is a time provision for the attorney general to invoke what we are calling a petition to convene a special three-judge district court. We set that time at 60 days. That time is not in the bill; but the concept was that all the parties to this litigation, especially the attorney general, are highly incentivized to have this issue teed up, teed up fast, teed up early, and teed up completely; and the experience that I was able to glean from other cases, especially the tortured history of West Orange Cove, was the idea of transfer or venue and especially in the -- cases like this are -- have numerous numbers -- I mean, just innumerable parties. That issue historically does get addressed by the parties very quickly.

So the time deadline here is in the rule. The parties, especially the attorney general's office, seems naturally incentivized anyway. The second consideration for the deadline was the idea of not just getting it teed up quick but to prevent the idea of you come out of session in 17, and you have a different variation on school finance from where we sit today. Is it possible -- and I will say that the subcommittee could not come up with a scenario and the practitioners I have talked to couldn't find it, that you have a true challenge to the state's financing of the school system that doesn't

get set in Travis County.

And if that's true, can there be some coordination of the challenge so that a more friendly county gets a piece of the litigation from which the attorney general in -- it's a venue shopping question essentially, but in some friendly exercise they get another district court to get a case. They then take that case and that judge to become a participant in a three judge panel, even though that is occurring, you know, some period down the road. We thought that just based on every survey we could get, that's highly, highly unlikely; but in kind of the core principle of avoiding venue shopping and really address the core idea of the bill in the first place, which is to diversify the panel that hears these, you take what it is and you tee the first one up under the rule.

The stay provision you see in (c) is in the bill. The next then is the progression to the form of what we are calling the petition to convene, and we then -- this language is an effort to provide some direction to the parties and as well to the Court of what we thought were the relevant considerations under what is albeit a very direct standard of applicability and not one that is subject to discretion. So basically you have the contents of a petition to convene, which you'll find are rather

simplistic, but the reality is that this is a very binary question. If it is this type of case, it gets a three-judge panel pursuant to the enrolled bill and the current Government Code.

So basically the issues are included in the petition through the attachment of the underlying complaint. The attorney general would ask to be summarized what that complaint is and why because essentially you've got the State of Texas, a Texas state officer or agency in the original case, which is then subject to your applicability provisions of 14.1(a) or (b) and then an argument of why that applies. The exhibits then are relatively simple, although we did -- we did initially have I think in my always effort to minimize paper I think I said the controlling petition at the time of filing the petition to convene. We changed that to "all pleadings on file in the original case along with the docket sheet," the idea being that you might as well just take the entire file to the court because it shouldn't be very big anyway it's so early in the litigation, and they could just look at that.

You do need provide service to the district court given that there's an automatic stay anyway and all the parties in the case. That's rather just formalistic and we didn't find much controversy there. We did provide

for a response. The bill itself does not provide for a response. Having looked at some further litigation, I can see why now a party might be entitled to a response, and I can address that with some specifics, but again, the idea that in fairness, if there is a response and given that the standard is so minimal under the statute, in other words, it is a unicorn or it's not a unicorn, and that's the argument you're making, that needs to be put in and we put a 10-day time line on that. That's not in the bill. That again, that deadline was chosen from the date of service of the petition to convene, with the idea that this is a matter which needs immediate attention. The bill obviously intended that, the new codification intended that, the rule then embodies that policy.

14.5 is a verbatim recap -- well, it rewords it, but it's the identical provision; that is, the Chief Justice of the Supreme Court is the -- is the one person considering this, unlike Rule 13 where you have a panel, 22(a) of the Government Code now basically puts this in the sole hands of the Chief Justice of the Supreme Court. So you're not going to have a panel to decide whether there's a panel. The order then is the means by which the Chief Justice will appoint the members of this panel. Those are, again, set by the statute, which you have, and these are defined in 22(a).002. Again, agnostic on the

question. All we did is change the language, quite frankly, to make it I think clear as to what you're talking about, which is you've got the district judge of the district -- where the original case is, a district judge not in that county, and then a court of appeals judge on neither.

One question from the subcommittee just for this committee, the language again, which is out of the statute in 14.5(b)(2)(a) states "The district judge of the judicial district to which the original case was assigned." There was some question about the practicalities of Travis County practice and the assignment of a district judge to a particular matter. The local rules as I read them and my experience, albeit it limited somewhat, is there's a concept of the central docket, but you do have a court, and the idea was is that the assignment by the district clerk occurs when you land in that court, and that's then the judge.

So we did not try to address the conceptual vagary of Travis County practice or a local rule of what this district court assignment means specifically in concept, Bexar County or Travis County, but we do flag it as a potential question, although in pragmatics it seemed like as we discussed this and I further discussed this and it's not like every one of these goes to a specific judge,

that you do have a random assignment in district clerk's office to a court that is the court, even though the system provides for other judges to hear hearings on that case. But even then, by the way, the local rules do have a specification for a special case and that judge and that judge alone gets it.

So we did not differ from the language of the bill, thinking that the practicalities of it, although Judge Bland may -- there was a question about the idea of could you play games a little bit in a particular county to gain the assigned judge as opposed to the assigned court. We felt that would be rather untoward, and other than flagging it didn't think that it needed to necessarily be addressed. The provision in 14.5(c) again is straight from the bill. Interestingly it is limited to (2)(b) and (c). In other words, it's limited to the appointees by the Chief Justice, so the idea of the assigned judge being an appointed judge that is somewhere beyond an election, that is contemplated by the bill itself. The only restriction on the idea that the judge is an elected serving judge is to the second two members appointed by the Chief Justice. We thought whether there needed to be some reference to the Government Code regarding visiting judges or, you know, not elected, and it seems very clear that this language is higher than

that, easy to understand, and no need to go there.

14.6 is then the rules governing the proceeding. This, again, is straight from the statute, although we shuffled a little bit. This is at the end of the statute. We moved it up here right after the order creating it so that they're -- so that they're clear. The idea is that the Rules of Civil Procedure apply. As to a conversation that Judge Evans and I had, you know, there is a fiscal note. I don't know what the fiscal note on Senate Bill 455 was and whether they are going to meet that or not, but OCA is required for the budget on this thing. That's in the bill, and so the idea is this panel does take over for purposes of this particular proceeding, they get that courthouse, they get that courtroom, they've got that judge, unlike something else, but at least in concept that's going to be OCA's responsibility. That's again straight out of the statute.

You then get to 14.7, and this is again straight out of the statute essentially, but it does merit a little bit of just putting out there. We discussed how detailed the mechanics of the three judge panel, that is between the three judges, may need to be put in the rule. In the materials you've got a resource material on the Federal experience with the Federal corollary to this bill, which is the creation of three-judge panels in

Federal redistricting or Federal redistricting, whatever. That experience is that the rule is silent. The Federal rule is silent on the specifics of the mechanics and that experience, which is now over 20 years, and just trust is that it works without the rule specifying to the three-judge panel how to do the specifics of their job, rule on an objection, rule if -- how does the presiding judge get chosen.

The Federal materials that you've got, which Judge Bland was able to get from Judge Rosenthall support the idea that they need to be able to make it work amongst them just as the court of appeals is able to make it work or a commission and judicial ethics is able to make it work, and so the committee goes to the sand, but not into the waterfront on the idea of specifying how the thing works by giving essentially credit to the bill. There is a provision, as you can imagine, especially behind the purpose of the bill that one judge doesn't get to go lone ranger. You have to have unanimous consent on the action, and if one judge does get off the reservation then that action could be reconsidered. That's specifically straight out of the bill and the code.

The thing we did add is the idea in 14.7(d), which is you need to know who your presiding judge is in a hearing or in a court. That concept came out of the

Federal idea in that it set the playing field for the parties, and that is the presiding judge -- the panel needs to tell you who that is before you wander into a hearing, before you wander in trial. Whether the other two members are going to talk to the presiding judge or defer to the presiding judge on specific rulings, that's between them, but at least you know as the party litigant who the presiding judge is, and they won't change that course on you while you're in.

CHAIRMAN BABCOCK: Can I just interrupt for one second?

MR. PERDUE: Sure.

CHAIRMAN BABCOCK: Because I'm going to forget about this. Does the statute permit the Chief Justice of the Court to appoint the presiding judge, or is that silent?

MR. PERDUE: Silent on that.

CHAIRMAN BABCOCK: Okay. Because the custom with the limited experience we have with three-judge courts, the chief appoints the presiding judge.

MR. PERDUE: So this which is now Government Code 22A does not say that.

CHAIRMAN BABCOCK: So the court could if it wanted to make the chief the arbiter of who's going to be presiding.

MR. PERDUE: In concept it could. That would just be rule-making authority, and again, like we said, core guiding principle was go to the bill, but if the Court wanted to under the concept of rule-making authority beyond what's in the Government Code to implement Government Code, that seems to be something that is possible. I mean, to me it does. I don't speak for everybody else.

CHAIRMAN BABCOCK: Yeah.

MR. PERDUE: But that seems -- for example, the idea was that did they mean that the court of appeals judge gets to be the presiding judge. Well, why? Does the judge that originally got the case get some deference as the presiding judge because it landed in his or her court? Why? So we just stayed silent on that, and whether the Chief Justice gets to say who that is, the bill doesn't say it, the Government Code doesn't say it, this rule as written doesn't say it.

CHAIRMAN BABCOCK: Okay.

MR. PERDUE: The next thing is transfer and consolidation of related cases. This is the area that gave the subcommittee the biggest challenge. There are semantics, there are language choices, and there's practicalities in it and that I only further became kind of understanding of the distinction of transfer and

consolidation. This is a concept slightly different than MDL, so -- and so you don't get to really track 13, although we did track Judicial Administration Rule 13 on the form and the steps for transfer and consolidation; that is, the petition or the response; but the standard of transfer or consolidation, which I'll address, is different and the logistics or practicalities of the parties are very different than the idea of asbestos MDL, fen-phen MDL, right. You're just -- you're talking about a different beast.

So first thing to highlight for the committee on the whole, the definition that is related to transfer and consolidation begins in 14.8(a), and it is the bill's definition of related case. This comes straight from the statute and so now 22A of the Government Code. Going back to the applicability starting point, that is, State of Texas or Texas state officer, in a district court arising from the same nucleus of operative facts as the claim. That language is not the same language as you would see in some other things. That language is in some other precedent, but let me give you just a concrete example.

There was an issue regarding consolidation of a school finance piece of litigation that was out of Dallas and taken up by the court of appeals on a concept

of consolidating with a different one. This would be back pre-West Orange, but there is an opinion which is cited in a district court opinion on the issue, but not surprisingly it's an asbestos case, *Owens Corning v. Martin*, 942 S.W.2d 712. The idea of consolidation when you say "discretion of the court" is looking at whether the causes of action relate to substantially the same transaction, occurrence, subject matter, or occurrence and is appropriate when the evidence presented will be material, relevant, and admissible in each case, so that's the historical judicial standard for consolidation.

The practicalities here is you've got this definition of the same nucleus of operative facts, the judicial determination of that question of transfer and/or consolidation, is one that will be asked of the panel, so if a related case is identified by the AG or any party to the related case, they can move to have that action defined as a related case and transferred to the three-judge panel. This is then when the committee especially struggled, not just with the definition of related case, but the distinction between transfer and consolidation.

The bill, quite frankly, I -- this is not speaking for the committee. This is speaking for me personally. I've come to a belief that the bill gets the

words right in two places and then flips them the last two places, which is a challenge for the rule that is tracking the bill and complete discretion of the Court in its rule-making authority on what this means.

Here's the concrete example of the challenge: There is a case in Dallas county called *Hopson vs. Dallas ISD*, but which included Shirley Neeley, Texas Commissioner of Education. This is a district court case. This was brought by Dallas taxpayers, including the Highland Park Shopping Village as a party, and they moved to consolidate this case with West Orange Cove into Judge Dietz's court in Travis County. The school districts in West Orange Cove opposed the motion to consolidate, and Dietz then denied the motion to transfer the Dallas plaintiffs so that -- well, wait, no, wait.

Here's the distinction, the transfer motion to Dietz to decide whether to consolidate the Dallas taxpayers was granted. They take the Dallas court, the Dallas district court case, they send it to Judge Dietz in Travis County. They then move to consolidate their claims as taxpayers, related to the system, which are obviously very different in consideration to that of the ISD plaintiffs in West Orange Cove. They moved to consolidate with them as consolidated parties. Dietz then -- Judge Dietz denies the motion to consolidate. So he's taken the

case on transfer to Travis County, but he won't add it into the ISD litigation pending in the court. He's now got the case. He's got West Orange Cove. He denies the motion to consolidate them, and the taxpayers of Highland Park then drop the case.

MR. HARDIN: Everybody got that?

MR. PERDUE: That -- that is the distinction that -- the concrete distinction that finally let me figure out the difference between transfer and consolidation and the reason why you'll see there is a question that needs to be answered regarding 14.8(g) and (h), which again is language straight out of 22A.003(b) and (c). (b) is your 14(a). (g) -- (c) is your 14(a)(h).

On the related case definition and what may or may not qualify, I will refer the Supreme Court to a case that is pending before it now, which is -- has the brief of the merits completed. It's submitted as of September 2015, Cause number 14-0986, *Williams vs. Sterling City ISD* from the 11th Court of Appeals. This is a case involving specific school districts that sued the Secretary of Education, not over the entire financing system of school finance for the state, but for actions that were taken in the legislative session of '08, which affected then the budget, and there were call back provisions permitted of the Secretary of Education from --

and so the Secretary of Education essentially had the ability under the budget to take money back, and they didn't like that, so they sued for having money taken away from them in '08, '09, specifically that money.

The remedy then that was given those districts was a future credit. So you can see how you're getting close to both related case and applicability, but is it or isn't it, and if that is so, would it be subject to being transferred and/or consolidated under this bill, but it's a concrete example of one because you do have the state as a party, the Secretary of Education as a party. It involves in some regards financing, but it's specific to the districts who then are seeking, and their damages are retrospective damage of future funding credits, that is, they are getting -- on the pay back to the state balance, they're getting credits for that going forward, and that opinion, that particular dispute is now at the Texas Supreme Court, separate and apart from the Travis County litigation regarding school finance, but they've never seek to consolidate or join. But that then also gives you the idea of the challenges of taking a, quote-unquote, "related case," transferring it to the three-judge panel, but do you automatically consolidate cases, or do you have discretion over the consolidation given the fact that you don't meet the standards of

aligned parties that make sense, efficiencies, the things that generally led to the idea of consolidation, especially the idea of consolidation for purposes of all proceedings including trial.

These cases are notoriously unwieldy. Other people can talk about it, but in talking to practitioners you're talking about an army of lawyers on both sides, an army of interested plaintiffs on both sides. By way of example, West Orange Cove One is 50 pages, West Orange Cove Two is a hundred pages. Judge Dietz's first findings of opinions on the current litigation was 120. Apparently what is going up now is 320 pages of findings of fact. That does talk to the idea of this number of cooks in the kitchen as a policy decision, and Judge Evans and I talked about this a little bit and having a three-judge panel submitted the idea of navigating 300 pages of finding of fact versus one judge navigating 300 pages of finding of fact, but that is the law. We trust smart judges to figure that out.

So the biggest challenge specifically on 14.8 is the idea that from the bill in 14.8(g) you'll see if the court grants the motion to transfer, the bill states "It shall consolidate the related case with the case before the court." That's straight out of 22A.003(b). This is why I think the words are inverted.

The subcommittee felt the words were inverted. We wanted to bring the issue to the committee on the whole and to the attention of the Court. The question of words are intended to mean exactly what they mean or something that me personally as a nonjudge, I think Professor Carlson stays out of this a little bit, but the judges can weigh in as they see fit, but it's ultimately the Court.

Then you get to (h), "A case consolidated," not transferred but consolidated, "under the rule must be transferred to the panel if the court finds that transfer is necessary." That's -- that's an issue. For example, when we -- the first draft of the rule that Justice Busby fixed for me throughout this process was a -- was typed a motion -- was called "a motion to consolidate related case." In our discussions as we came to the end of the first meeting and then clarified and unanimous by the end of the second meeting, we retitled that "motion to transfer related case," because the idea related case on this particular topic seems to be contemplated very clearly that it needs to be taken to this three-judge panel when it's invoked. Whether that case needs to be consolidated for proceedings, as I have now learned the pragmatics of it, is a different question that does seem to be slightly confused on the language choice in the latter part of 003 of the Government Code.

So you have a rule proposal in front of you that tracks the bill and tracks the Government Code, but does pose in concept at least a pragmatic question if you accept the idea that transfer as a predicate makes sense, but consolidation may or may not be discretionary. Under the bill it says -- it goes to the thing -- it goes to the first step last, and it goes to the mandatory concept second, and so you've got the idea that there is a discretionary concept of transfer and a mandatory concept of consolidation of which the subcommittee feels I'm -- we don't think -- I think I speak for the subcommittee. We're not sure that's exactly the intent. The rule tracks the language. We changed the motion to be a motion to transfer as opposed to entitled a "motion to consolidate" because it seemed to be the idea that the related case needs to go to the panel, but if you think it's related case does it really become an ISD case if it's not truly an ISD case.

Lastly then you have appeals. Importantly on appeals, Justice Busby did work beyond the bill. We bring to the Court a change to TRAP 57. Professor Carlson and everybody agreed this is a very simple fix. On the jurisdiction of direct appeals the bill contemplates that an appeal from this panel will go directly to the Supreme Court. Again, the idea of let's get it teed up quick.

This is the kind of litigation that merits that. So we've amended 57.2 as a proposal of a corollary rule that merits amendment separate and apart from the Government Code change to add special three-judge district court in the concept of original jurisdiction for direct appeals under TRAP 57.2.

Justice Busby then talked to Blake Hawthorne, the current Supreme Court clerk, about the idea of the purpose of and the methodology of direct appeal in the concept of setting jurisdiction and what needs to be decided and decided early and quick when you've got a direct appeal, and so the comment and the changes you see in 57.1 and 57.3 from the chair's perspective aren't necessarily mandated by the bill. I think to make 57.2 consistent with the bill you need to change 57.2, but it is logical and Justice Busby's conversation with Blake Hawthorne support and, therefore, the committee brings you the changes to 57.1 and 57.3 on something that is a two-step way corollary to this specific issue, which is if you're trying to set jurisdiction in the Texas Supreme Court on a direct appeal the whole record is not necessary. It should be the docketing statement, you get a ruling, and you're good to go. So that's what is in front of the committee as a whole. I defer to my colleagues on the subcommittee to weigh in because I've

talked too much already.

CHAIRMAN BABCOCK: No, you haven't talked too much. Great piece of work, Jim. Thank you. We're going to take our afternoon break. When we come back we'll get as far through this proposed rule as we can before we recess at 4:30. So let's keep it to 10 minutes if we can.

(Recess from 3:45 p.m. to 3:58 p.m.)

CHAIRMAN BABCOCK: All right. Let's go back up to the top of the rule. I wouldn't think there would be much controversy about 14.1, but unless anybody has comments about 14.1, excuse me, how about 14.2? Any comments? Yeah.

MR. YOUNG: On 14.2(b), I have two questions really. First is with respect to the 60 days, and I talked through it with Justice Bland about just this passage. You know, I get the sense that simultaneously we think that it's very unlikely that the state would ever go beyond that because it's not in its interest to do so. In some cases it would be very detrimental to do so, but on the other hand we're putting in a date because we feel like there needs to be some sense of expedition even though the statute seems to give the state an absolute right and a nondiscretionary duty to convene this three-judge court if the condition is met, which doesn't

have anything to do with the date.

So I'm not certain. I would just be curious to know further thought on the 60 days, and the second thing about this subsection is it seems like maybe again because of that 60-day requirement that there will be certain cases conceivably that are in the system already that just need to be addressed. For example, hypothetically, the school finance case that's pending now. If that were to be remanded to the district court, I would assume that the statute's application would be to allow the attorney general to ask for a three-judge district court at that point, but I don't know that under the rule that would seem to follow. So I was just curious to know if there had been any thought about that particular topic as well.

HONORABLE BRETT BUSBY: Jim, you want to take that or I'm happy to take that. Recently, I think, no, there has not been any conversation among the subcommittee members about the issue of pending cases, but I reasonably recognize that after our last meeting as well, and I was just mentioning it to Martha, and so perhaps in order to -- so we had no intent to say anything one way or another about how this would affect pending cases. I think the general rule is if the statute doesn't specify that it applies to cases filed only after the

effective date of the act, that if it's procedural, it applies to pending cases, so I don't think the subcommittee intended to take a position on whether this would apply or not. One possible way to work around that would be to add some language at the beginning of (b) that said something like "for cases filed after the effective date of this rule," comma, and then go on with "petition needs to be filed within 60 days," and that way we're not taking a position one way or the other about what happens with pending cases.

MR. YOUNG: Would it not seem to then exclude pending cases altogether if you could expressly talk about cases that are final actors of --

HONORABLE BRETT BUSBY: I don't think so, because (b) is just the timing requirement.

MR. YOUNG: Yeah.

HONORABLE BRETT BUSBY: (a) is what allows the attorney general to file the petition. So if you had that prefatory language in (b) I don't think it would foreclose it, and in answer to your question about why 60 days at all, the thinking was that it would be -- Jim mentioned some of the reasons. Another one that occurred to us is do you really want to allow the attorney general in the middle of trial to file one of these motions and say, "We don't like the way this is going, let's get us a

whole new court and start this whole thing over again," and I think -- I don't want to speak for the whole subcommittee, but I don't think any of us felt like that was something that should be allowed.

CHAIRMAN BABCOCK: Carl.

MR. HAMILTON: Do we assume then that if the attorney general doesn't file within 60 days, that's some kind of a waiver and can't do it after that?

CHAIRMAN BABCOCK: I'm sure that's the intent, isn't it?

MR. HAMILTON: Yeah.

CHAIRMAN BABCOCK: Yeah. Justice Bland.

HONORABLE JANE BLAND: For rules that are -- come into effect and there are already pending cases to which they may be applicable, Texas Supreme Court often has an enabling paragraph ahead of the rule to talk about what to do with pending cases, so I know last summer or a couple of summers ago the justice court cases, I think they had three different rules for cases that were pending in county court, cases that were pending in justice court, and the rule would be available to the extent practicable, and you can do the same thing here, have a trigger date for pending cases that would be different than the rules so that you don't gum up the rule with something specific to only a small percentage of cases.

CHAIRMAN BABCOCK: Okay. Peter, then Justice Pemberton.

MR. KELLY: I had a general question about mandamuses. The appeals are addressed by altering Rule TRAP 57. There's nothing addressing whether mandamuses go straight to the Texas Supreme Court; and a separate issue, and thank you to Nina for doing the cite on TRAP 7, substitution of parties, "If an officer leaves the office, especially in a mandamus proceeding, the trial judge makes its ruling." If the trial judge leaves the office while the mandamus is pending in the court of appeals, it gets sent back down, the mandamus is abated, sent back down to the trial court, determination by the new judge.

Rule TRAP 7 applied in this context, if, for instance, one of the three-judge panels, one of the three judges on the panel leaves office or is otherwise incapacitated and then the related issue is there's nothing in here about replacing judges who leave the bench. There's initial appointment but not filling vacancies.

CHAIRMAN BABCOCK: Justice Pemberton. You want to respond to that?

MR. PERDUE: No, Bob should go.

HONORABLE BOB PEMBERTON: Okay. I'll go quickly just on transition language for Martha. Discovery

rules, the order issuing the rules had a lot of transition language that may be some good template. As far as the 60-day deadline, I'll admit the subcommittee -- I'm not sure anybody really had experience with school finance cases. Those are very complicated cases, many moving parts. You know, we overlooked the -- you know, the possible implications or implementation issues that may arise for pending cases. You know, I'm not -- admittedly, I'm not sure we've appreciated all the scenarios that could arise in cases like this where maybe the 60-day deadline may not necessarily be workable, so that's some kind of a red flag for the Court is y'all may know more about -- y'all see more of those than say courts of appeals and others do, so --

CHAIRMAN BABCOCK: Jim, did you want to say something?

MR. PERDUE: So the 60 days is in the rule, but realize, this has been passed. This is in the Government Code. So while the committee and the Court is called upon to issue a rule consistent with it, but in concept, you've got this statute on the books. It is effective September 1. If -- if West Orange Cove -- if the current case comes back and is remanded, would somehow the enactment of a rule prevent the implication of the Government Code? I don't know. So for an enacting

provision for the rule, which by the way, the fix could be more on remand as opposed to the serving of the petition, but, I mean, if that's a specific consideration, but you do have to deal with the fact that, I mean, the statute that's underlying the rule is already on the books.

CHAIRMAN BABCOCK: Okay. Lisa.

MS. HOBBS: I have a comment that kind of hits on a couple of provisions in this proposed rule and start -- it kind of starts with the vague language in the statute about which cases this applies to, and it applies to any case that the state is a defendant and challenges the finances or operations of the state's public school system, and then when you petition to convene you make an argument that says why this is a case that challenges the finances or operations of the public school system, and then the Chief Justice considers your filings, and something that's a significant power of the Chief Justice is he gets to decide I guess in the first instance whether this is a case that challenges the finances and operations of the state's public school system. That is an unusual grant of power to the Chief Justice.

And then going to the appellate rules, the statement of jurisdiction that's been drafted here says the Supreme Court decides whether it has jurisdiction, and I guess I just stopped and thought when would it not have

jurisdiction, because it seems to me that maybe that's trying to get at this vague standard of whether this case was initially appropriate for the three panel court -- judge panel, three-justice panel, sorry, but it seems to me that how in practice this might work is the Chief Justice makes the call, and then I guess if you disagree with him maybe you would mandamus him to the full Supreme Court and say, "No, this isn't -- this isn't an appropriate case." And I wonder instead of doing that if maybe the Court might consider just saying that it's the Court that decides whether it is an appropriate case for the three-judge panel and not the Chief Justice, because that's an unusual grant of power. It seems like that would stop sort of what would happen if he gets it wrong. I think the worst case scenario is that it's decided as a statement of jurisdiction in a direct appeal following a final judgment. That seems like the worst of all things in my opinion, so that's just a general comment about a little tricky issue going through all of these rules.

CHAIRMAN BABCOCK: Okay. Carlos.

MR. SOLTERO: Yeah, I have a question because I obviously haven't studied this all like many have, but can there be more than one three-judge panel? In other words, I understand the consolidation and the transfer, so if all the cases get consolidated and

transferred and they all go to the three-judge panel that the Chief Justice has appointed, that's fine, but what happens if there are multiple cases that keep popping up and they either don't get transferred, is the statute and/or rule going to have multiple three-judge panels or would it be just the same? Is it there one basically new court that is established for this that carries on in perpetuity or an extended period of time? Does anybody know?

HONORABLE BOB PEMBERTON: I think the concept is just to glom everything together that's kind of sort of related.

MR. PERDUE: It's a fair question in that West Orange Cove was litigated for a decade, so but it seems to contemplate that especially with the concept of related case and transfers and consolidation, that if you've got a piece of litigation that comes out on the other side of the session and a three-judge panel is created, they are going to get that. Now, if you had another case filed of which the panel decided not to take it as a defined related case, could the AG invoke the rule, create a three-judge panel for that case? That does not seem to be inconsistent with the statute or the rule. There is experience -- not in school finance, but in redistricting litigation on the Federal side where you can

have a three-judge panel on, you know, on your house district, one challenge and you could have a three-judge, so you could have South Texas plaintiffs in one three-judge panel where you conceivably have something else in a different three-judge panel on the Federal experience, but school district finance is a little different, but that's just -- that's where it is. So the concept of perpetuity is one that I can't answer I don't think as clear. Judge Evans has his hand up, which means there's an answer.

HONORABLE DAVID EVANS: No, you don't have that authority. Chip?

CHAIRMAN BABCOCK: Judge Evans.

HONORABLE DAVID EVANS: Lisa, I viewed this in the grant to the chief in his administrative capacity and not to the Court as jurisdiction. I just read it in the context as a regional presiding judge might be, when I read the law, the legislation, that it was a grant to him in his administrative or her in their administrative authority to appoint judges on the three-judge panel, so that's -- there would be no further review after that.

MS. HOBBS: But who would decide whether it was a case that challenges the finances or operations of the state's -- the AG?

HONORABLE BRETT BUSBY: The chief.

HONORABLE DAVID EVANS: The chief.

MS. HOBBS: The chief does.

HONORABLE DAVID EVANS: Because the way the law is drafted, but it's a regional judge that decides whether or not under the certain laws that he might do or she might do certain things, so that's how I viewed it when I saw it, but I'm not -- it's an unusual grant.

MS. HOBBS: It is an unusual grant of power is really my main observation.

CHAIRMAN BABCOCK: Yeah. Richard.

MR. MUNZINGER: Does the statute give the Chief Justice the discretion to say "yea" or "nay" to a petition filed by the attorney general? Subsection (c), "Within a reasonable time after receipt of a petition from the attorney general under subsection (a) the Chief Justice of the Supreme Court shall grant the petition." I don't know that the chief has any discretion on that issue, and I want to back up and ask another question that I had one to raise if it's all right with you.

CHAIRMAN BABCOCK: Yeah, sure.

MR. MUNZINGER: Is 60 days enough time -- is 60 days from the service of a petition on a state agency or a state officer, does that allow the attorney general enough time to consider and weigh the political, legal, financial, et cetera, considerations that are triggered by

such a lawsuit, and do you want to give him more time, perhaps by requiring that any petition that triggers Chapter 22A be served on the attorney general at the time of filing whether it's an original or an amended petition? That way the attorney general doesn't have any delay between the time that a state agency's officer receives the petition and gets around to deciding whether it is or isn't within 22A, et cetera. It just seems to me that there may be a way that would give the attorney general more time to consider the issue, and that is especially true when you look at the thing about related cases, and it's 45 days, which shortens that time period. In any event, you may want to give some thought to having contemporaneous service on the attorney general, and I'm not sure that the Chief Justice has any discretion at all given the language of the statute.

CHAIRMAN BABCOCK: Okay. Professor Hoffman, then Pete.

PROFESSOR HOFFMAN: So I think Lisa raises a very good point, and I want to suggest maybe one somewhat creative way to read the statute to address her concern, but before I do, a question. If a plaintiff files a lawsuit against the state that's a tort case, somebody slips and falls in a school or maybe it's an intentional tort case where the state -- so we don't deal with

sovereign immunity issues, the state is the defendant and it involves the operation of the public school system, and maybe "system" is what changes that, but imagine it's a tort case and the AG tries to invoke this, am I guessing first correctly that that -- that no one -- am I right that that wasn't what the legislation was directed at?

MR. PERDUE: You certainly can read the statement of the author's intent, the legislative history that is in the record of the discussion on this bill in the Senate, and I think, quite frankly, the applicability section in the bill itself, now in the Government Code and the rule, that would suggest it is not.

PROFESSOR HOFFMAN: Okay. So that makes sense to me, but I don't know the details, so but let's assume this happens. Okay. So tort case gets filed. AG files this motion that looks mandatory, so away it get goes and assume the chief judge does exactly what the Chief Justice is supposed to do under the statute and sends it to the three-justice district court. Okay. Could we write a rule that says the district court can consider a motion to remand it back just to the district judge because this is, in fact, not consistent with the applicability and read it similar I think to the idea that was just articulated that the function of the Chief Justice is entirely administrative? It's not to make any

substantive decisions as to whether the statute does or doesn't apply here. Would that -- so the question I'm throwing out is would that be consistent with the statute?

CHAIRMAN BABCOCK: Justice Gray, you had your hand up.

HONORABLE TOM GRAY: Yeah. Interesting concept, Lonny. I was going to follow up on Richard's deal about the 60 days because that seems to me to be, one, unnecessary under the statute. It seems to be a terribly short period of time given that the consensus seemed to be of the committee that if they were going to do this, it would be something that the AG wanted to do very quickly, but I could see some real efficiencies to remain in place to develop the case under a single judge and then 60 days out from trial then apply for the three-judge panel to try the case, and so I don't see -- one, I don't see the need for the 60 days if the AG is going to go forward and do this quickly anyway, and I could see some real savings and benefits to letting it go as long as necessary, and you know, it seems counterintuitive to the statute to put such a short period of time in it.

CHAIRMAN BABCOCK: Justice Busby, and then Elaine.

HONORABLE BRETT BUSBY: Well, I guess the

opposite perspective on that would be what if you have 20 of these cases going at the same time? Is it more efficient to have all 20 of those do discovery and all of that rather than getting them together into one case, which seemed to be what the statute was aiming at.

I guess we could consider -- back to Professor Hoffman's comment, I guess we could consider a motion to remand and having the three-judge panel do that rather than the Chief Justice. There's nothing in the rules for that. I think what we interpreted on the subcommittee, and others can speak to this if they disagree, but the way I was reading the bill is that the Chief Justice shall grant the petition if it's a petition under this rule, which means that it's a petition that does, in fact, challenge the operations or finances of the public school system and so if it's not such a petition then he doesn't have to grant it.

CHAIRMAN BABCOCK: Okay. Professor Carlson, then Lisa.

PROFESSOR CARLSON: I think the Legislature envisioned an earlier assignment of the three-judge panel, because it speaks to pretrial rulings being made. Also, even though it wouldn't be true in every case, a lot of times in the school cases the constitutionality of a Texas statute is attacked, and the attorney general I believe

still, unless it was repealed in the last session, is required to receive notice from the trial judge immediately. So they'll have the heads up for sure.

CHAIRMAN BABCOCK: Lisa. And then Pete. Pete, you've had your hand up for a while. Lisa, I'm going to give Pete a chance.

MS. HOBBS: I will defer to Pete Schenkkan any time.

CHAIRMAN BABCOCK: Pete, sorry.

MR. SCHENKKAN: Oh, I'm going to hold onto that, Chip. No, I want to address the discretion issue in the key that I think Brett just said, and that is the only duty of the Chief Justice to appoint this kind of a three-judge court is to a case to which it applies. He can't do that unless he decides whether or not it applies, thus the statute intrinsically gives him that discretion.

Second layer of argument, although this is judicial administration rather than the adjudication of the merits is the school finance system constitutional or unconstitutional, even as a judicial administration matter the question of whether this is a case to which this statute applies is most emphatically a question of law, which is most emphatically the province and duty of the judicial branch; thus, if there is an issue here at all, it only has to do with can the Legislature properly give

it to the Chief Justice alone as opposed to the Court as a whole. I frankly don't care.

I mean, I don't see how that's a problem in the real world, and given that as a judicial administration matter as a pigeonhole category instead of the Rules of Evidence or the Rules of Procedure to say nothing of the constitutionality of the school finance system, seems like a pretty reasonable choice that the judicial branch wouldn't want to fight with, given especially that the appeals from interlocutory orders or final judgments of this three-judge court go to the Court, not to the chief. So, again, I don't see that we have a problem. I think the discretion is built into the statute, undergirded by the separation of powers and protected as a practical matter from having any bad consequences.

CHAIRMAN BABCOCK: Lisa, you going to disagree that?

MS. HOBBS: No, certainly not with our current Chief Justice, whom I have the utmost respect and admiration for.

CHAIRMAN BABCOCK: He's not here, you can talk about him.

MS. HOBBS: But under a different Chief Justice I might worry a little bit, and but my point

really is that it's unprecedented, and as someone who has assisted the Chief Justice in his administrative docket, it really is a bigger burden than you realize, and that's a lot to put on a single person when these issues can get tricky. The issues of whether to transfer a court of appeals case from one court of appeals to another is actually -- can get quite tricky, so I can imagine this issue being trickier than we realize.

I appreciate Lonny Hoffman's suggestion. I would make that ruling by the three-judge panel immediately appealable, immediately reviewable somehow.

CHAIRMAN BABCOCK: Yeah.

MS. HOBBS: Because to me it just needs to be resolved early. It's going to come up. There's going to be questions, and I feel like if I were the Supreme Court I would want to write a rule that addressed it in the first instance rather than trying to figure out later.

CHAIRMAN BABCOCK: All right. Let me get this right, Lisa. You don't mind talking behind the Chief Justice Hecht's back because there's a record, but you don't want to talk -- you don't mind talking behind Wallace's back. All right. We're going to break now and take this back up at our next meeting.

MS. BARON: Can I say one thing? One thing.

CHAIRMAN BABCOCK: Pam.

MS. BARON: Can I ask that the Rule 57 changes be referred to the appellate rules subcommittee? Because I think they are going to apply to all direct appeals, and I think there are a few problems with the language that's in here.

CHAIRMAN BABCOCK: Yeah, why don't you and Jim interact on that issue?

MS. BARON: Okay.

MR. PERDUE: It's an intercourt transfer.

CHAIRMAN BABCOCK: We have a transfer but not a consolidation. Hang on. We're going to be back here on -- not here, but at the TAB on the 11th. I will let you know whether the next meeting is one day or two days. That's going to depend on how quickly our other subcommittees are going to be able to work on the assignments that they got today. So I'll let you know just as soon as we know.

Okay. Great piece of work today. Welcome all the new members. You guys were great, and thank you very much. We're in recess.

(Adjourned at 4:24 p.m.)

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REPORTER'S CERTIFICATION
MEETING OF THE
SUPREME COURT ADVISORY COMMITTEE

* *

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

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Given under my hand and seal of office on this the 2nd day of November, 2015.

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