

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

* * * * *

MEETING OF THE SUPREME COURT ADVISORY COMMITTEE

JULY 13, 2018

(FRIDAY SESSION)

* * * * *

 Taken before *D'Lois L. Jones*, Certified
Shorthand Reporter in and for the State of Texas, reported
by machine shorthand method, on the 13th day of July,
2018, between the hours of 9:00 a.m. and 4:00 p.m., at the
State Bar of Texas, 1414 Colorado Street, Austin, Texas
78701.

1 **INDEX OF VOTES**

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

4

<u>Vote on</u>	<u>Page</u>
5 Procedural Rules in SAPCR cases	29,198
6 Procedural Rules in SAPCR cases	29,200

7

8

9

10

11

12 **Documents referenced in this session**

13 18-01 Local Rules Report (8-9-18)

14 18-02 E-mail from Judge Tracy Christopher to SCAC regarding
15 Local Rules

16 18-03 Examples of Local Rules

17 18-04 Examples of Standing Orders

18 18-05 Rules In SAPCR Filed By A Government Entity

19 18-06 Limited Scope Representation Rules (6-28-18)

20

21

22

23

24

25

1 *-*-*-*

2 CHAIRMAN BABCOCK: Welcome, everybody. We
3 have some new victims for our committee. Kim Phillips,
4 who is to my right up at the end there from Shell is
5 joining us for the next three years, and welcome, Kim.

6 MS. PHILLIPS: Thank you for having me.

7 CHAIRMAN BABCOCK: Great to have you with
8 us. And as everybody knows at the beginning of the new
9 term we take a picture, but since so many people were
10 absent today I thought today would not be a good time to
11 take our picture, so let's try to do it in September, our
12 September meeting, and try to do it as we have in the past
13 at Jackson Walker after the Friday session. The next one
14 will be a two-day session, so we'll be staying over, and
15 we'll try to arrange the pictures, which Marti is hearing,
16 I'm sure, about getting the picture next time, Marti.

17 MS. WALKER: Sir?

18 CHAIRMAN BABCOCK: After the September,
19 Friday of September. We also have another new person with
20 us, Jackie Daumerie, an alias she just picked up recently.
21 Jackie was at V&E, and she was at an agency here for a
22 while, and she clerked for Justice Lehrmann, and she is
23 the new rules attorney. And I don't know who is going to
24 boss whom around, Jackie or Martha, but we'll find out as
25 time goes on. The only other thing is we will be ending

1 today at 4:00 o'clock, in case that affects anybody's
2 travel schedules, and with that I'll turn it over to
3 Justice Hecht.

4 CHIEF JUSTICE HECHT: Well, I've got quite a
5 bit to report. I won't go into too much detail, but
6 just -- I'm happy to answer questions. Martha has taken
7 the position as staff attorney in my chambers, but she's
8 going to continue to work on some rules matters. And as
9 Chip says, Jackie is the new rules attorney at the Court,
10 and besides clerking for Justice Lehrmann and being --
11 having a stint at Vinson & Elkins in Houston, she
12 graduated from the University of Texas undergraduate and
13 from the law school as well, so we're glad to have Jackie
14 with us.

15 We have done some work on the State Bar
16 rules. The Legislature passed a bill last session
17 amending the State Bar Act to allow inactive lawyers to
18 engage in, quote, "volunteer practice" under rules
19 promulgated by the Court. In other words, they can do
20 Legal Aid, and so our rules adopted in December create the
21 New Opportunities Volunteer Attorney, NOVA, program, that
22 will allow inactive lawyers to continue to practice in a
23 pro bono capacity as well as also lawyers who are licensed
24 in other jurisdictions. In February of 2016, a lawyer in
25 San Antonio, Tom Keyser, e-mailed me and asked whether it

1 would be possible to waive the rule prohibiting lawyers
2 who have ever been suspended from running for a position
3 on the board of directors, and I immediately asked the
4 bar, and when I didn't get a response for six months I
5 asked you what you thought, and you said the rules should
6 be changed, but you'd like to hear what specific
7 parameters the bar thought would be appropriate.

8 So we asked again what they thought, and
9 when I didn't hear back from them for six months, I told
10 them we were going to do it ourselves, and then a few
11 months later I heard back from them, and they proposed
12 changes to the rules, which would provide that an
13 administrative suspension no longer bars service as a
14 director or officer. So administrative is like when you
15 pay your dues late, don't go to CLE, that kind of thing.
16 A disciplinary suspension does not bar serving as a
17 director if the reinstatement was at least 10 years ago,
18 and a disciplinary suspension still bars serving as an
19 officer.

20 Now, Tom was -- he had a rough patch many
21 years ago and came very close to the end, and he since
22 rehabilitated and reinstated in the bar and has had a
23 spotless record all of that time, so he qualifies under
24 these rule changes. He ran unopposed for the board of
25 directors from place -- the District 10, Place 1, in San

1 Antonio last spring and was elected May 1st and took
2 office about three weeks ago, and so -- and we're glad
3 that Tom has gotten to realize his dream of providing
4 service to the bar, and I want to thank the committee for
5 its help in considering those changes that prompted the
6 bar to make some I think good amendments to the rules.
7 Richard Orsinger was very instrumental in helping move
8 things along and maybe some others were, too, and it had a
9 good end.

10 The rules have also been changed regarding
11 the petition procedure to run for president-elect, so in
12 the past very few candidates have ever petitioned to run
13 for officer of the State Bar or director, but now that's
14 kind of the in thing, and so the bar wants to have a more
15 thoughtful procedure as to how to do that, so petition
16 candidates will have to file their petitions September
17 1st, right before the September bar board meeting.
18 They'll have 180 days before that to gather signatures,
19 and then the bar board can -- may or may not put people on
20 the ballot at the September meeting, and all of this is
21 moving the date up from when they've been doing it, which
22 has been in January. So these are changes that the bar
23 talked long and hard about and the Court did as well, and
24 we'll see how they work.

25 We also made some changes in the

1 disciplinary rules. You may know that in the State Bar
2 Sunset proceedings Senate Bill 302 came out of that. They
3 changed the disciplinary rules procedure to create a
4 permanent committee on those rules. About half the
5 members are appointed by the Court, about half by the bar.
6 The chairman goes back and forth. They take up rules
7 changes, and there is a very specific process for how
8 they're considered and how they're ultimately issued, and
9 so we'll see how that process works. The statute also
10 calls for an ombudsman, or in this case an ombudsperson,
11 who ends up being Stephanie Lange, a UT law graduate. She
12 spent four or five years at Akin Gump and was at the Texas
13 Banking Agency just before coming to us, so this is kind
14 of an unusual process because Stephanie will be over here
15 housed in the State Bar, but she reports to the Court.
16 She is paid by the bar, but the Court is responsible for
17 her. So it will be an interesting way to see how those
18 rules progress, but she's already involved in trying to
19 determine what rules changes might be appropriate.

20 We also issued an order in June establishing
21 ADR programs for grievance cases. The initial screening
22 of minor grievances can be referred to a mediation program
23 called the client-attorney assistance program and then
24 also the grievance referral program is available later to
25 rehabilitate or remediate lawyers accused of minor

1 misconduct, lawyers with issues like poor law office
2 management skills, poor communication skills, those sorts
3 of things. The rules changes also restore the Chief
4 Disciplinary Counsel's power to issue subpoenas and to
5 hold investigatory hearings at the -- in the initial
6 phases of the grievance. The Chief Disciplinary Counsel
7 had that power up until 2003, and it was omitted
8 inadvertently in some Rules of Evidence made at the time,
9 and so that's been returned. And also sanctions can be
10 imposed for failing to -- lawyers failing to comply with
11 those initial investigatory proceedings. The rules
12 changes also require attorneys to self-report criminal
13 conviction or disciplinary action in other jurisdictions.
14 Those were the changes to the disciplinary rules made in
15 June. We got quite a few comments on the subpoena rule
16 and the hearings rule, and we went through those very
17 carefully in issuing the final rules that, as I say, were
18 effective in June.

19 On other projects, House Bill 45 directed
20 changes in the enforcement of foreign judgments in family
21 law cases, and we immediately appointed a task force to
22 look into that. Amendments were proposed to the Texas
23 Rule of Evidence 203 and to the Rule of Civil Procedure
24 308b, and we made those changes, and they were effective
25 January 1st as required by the statute. House Bill 2776

1 directed that the state's right to supersede a judgment
2 for something other than money or real property is not
3 subject to counter supersedeas, Rule 24.2(b)(3), unless
4 the underlying case was a contested case administrative
5 enforcement action. That change in the statute favoring
6 the state rejects the reasoning of our decision in *In Re:*
7 *State Board for Educators Certification* back in 2014.
8 It's a minor change, but important to the state. The --
9 this committee considered those changes and made
10 recommendations, which we approved with minor style
11 changes.

12 And then the Judicial Branch Certification
13 Commission rules have been changed. Senate Bill 43
14 directed changes in licensing and disciplinary processes.
15 Senate Bill 1096 directs the Supreme Court to adopt rules
16 governing registration, training, and background check
17 processes for individuals seeking appointment as
18 guardians; and Senate Bill 36 requires registration of
19 guardianship programs and directs the Court to adopt rules
20 for issuing, renewing, suspending, or revoking a
21 guardianship program's registration certification. Our
22 April order made changes, most of which are already
23 effective. Those regarding guardianship proceedings are
24 not effective until September 1st.

25 As you may know, the Legislature and the

1 Office of Court Administration and the Court have given
2 more attention to the guardianship proceedings in the
3 state. We have 53,000 pending guardianships scattered
4 around the counties. They are administered by district
5 courts, county courts, constitutional county courts.
6 There are a lot of different ways of treating these
7 proceedings, and the Legislature has expressed some
8 interest in looking at those processes and making sure
9 they're protective of the wards in those cases.

10 Our April order also strikes a rule limiting
11 the amount freelance court reporters could charge for
12 transcript copies, referred to as the one-third rule. We
13 got about a thousand comments on that -- no, I'm sorry,
14 about a hundred comments on that rule and finally made the
15 change recommended by the commission and adopted the code
16 of ethics for the court reporters.

17 On other administrative stuff, just briefly,
18 the Supreme Court's Bar Exam Task Force has reported in.
19 The deans of all 10 law schools asked us to appoint a task
20 force to look at the bar exam and whether it's effective,
21 what is it supposed to do, is it doing that, should it be
22 changed. This is a national issue. It was a signature
23 issue of the outgoing ABA president this last year, and it
24 continues to be of concern to the American Bar
25 Association, so our task force has reported back and

1 recommends that Texas adopt the uniform bar exam, which
2 about 30 states and territories have done already, and --
3 but keep a Texas law component to that.

4 So this -- not to speak too broadly about
5 it, but basically it assists lawyers taking the bar in
6 moving to other jurisdictions for licensure. So a New
7 York student could come here, go to the University of
8 Texas, take the Texas bar, and then -- New York is a bad
9 example because -- oh, no, New York has adopted it, so
10 then you can go back to New York, and if your pass score
11 was high enough you can instantly waive into the New York
12 bar. So it helps law students be more -- have a broader
13 pick of law schools to go to and then jurisdictions to
14 serve when they pass the bar. So we just got it. It's on
15 the Court's website. I advise you to look at it.

16 The task force also recommended that the
17 Court look at pilot projects to perhaps alter the way that
18 some lawyers are licensed, particularly those who are
19 promised to do government service for a period of time or
20 Legal Aid work for a period of time, and they don't
21 have -- they're short on details on those, but they do
22 think that we -- like the national interest in this issue,
23 we should look at different ways of licensing lawyers. So
24 the Court is going to take that up in August at our
25 administrative conference; and of course, before anything

1 is done it will be published and there will be an
2 opportunity to comment; but while you're on the beach this
3 summer or wherever, pull out the report off the website
4 and give us your thoughts.

5 Historically the Court and the Court of
6 Criminal Appeals created the Judicial Mental Health
7 Commission. The two courts met in joint session in
8 January, first time we think in history, and then the two
9 courts jointly created this commission, and its charge is
10 to examine the issues relating to mental health as they
11 affect the third branch, so it has a very broad charge.
12 It has an astonishingly well-qualified group of members,
13 commissioners who are recognized in their fields from
14 across the state. The commission is intended to operate
15 much as the children's commission has, as a sort of
16 multidisciplinary group, collaborative group to aid the
17 courts in handling cases and parties with these issues.
18 Our Justice Jeff Brown is co-chair. Judge Barbara Hervey
19 from the Court of Criminal Appeals is the other co-chair,
20 and Justice Bill Boyce, a member of this committee. I
21 think -- yeah, and also the Judicial Council has done an
22 enormous amount of work on these issues, and he is the
23 vice-chair. They're having a big summit in Houston,
24 outside Houston, in October, and we hope to have by the
25 start of the session a -- some concrete ideas about how to

1 address some of these issues in the courts. In all my
2 years on the Court I have never gotten so many e-mails
3 from people wanting to be on a commission or a committee,
4 even this committee.

5 CHAIRMAN BABCOCK: Surprisingly.

6 CHIEF JUSTICE HECHT: I get quite a few
7 e-mails about this committee, but there's just a huge
8 interest in these issues, and it is increasing. The Court
9 has also been supportive of the Texas Lawyers Assistance
10 Programs initiative called the Lawyer Well-Being
11 Roundtable. It convened in early June. Bree Buchanan,
12 who is the director of the TLAP is heading it, trying to
13 get it going, and maybe you saw in the press this week
14 it's a whole story actually, first surfaced in March or
15 April that more than 50 percent of physicians report
16 "doctor burnout," quote-unquote, an inability to perform
17 at their own self-set high levels because of basically
18 stress. And so there's three people that I don't want to
19 get burnout, my physician, the pilot on my plane, and my
20 lawyer, and they need to be focusing at top performance
21 all the time, but as we get reports that lawyers are
22 increasingly struck by stress-related conditions the --
23 several of the law schools are already -- they already
24 have programs in effect throughout the law school
25 experience to try to identify people who are susceptible

1 to these problems and get them help so that it will end up
2 in a good place to try to remove the stigma from it, to
3 try to think in a more positive approach, and Bree is
4 going to be doing that with the Lawyer Well-Being
5 Roundtable.

6 The Judicial Committee on Information
7 Technology has sent us their report a couple of days ago.
8 It is all expected. They recommend that the access -- Re:
9 Texas Access be expanded to allow all lawyers access to
10 all cases in the state and public access under
11 registration procedure so that you can sign up and get
12 access to court records. There will be protocols in place
13 by Tyler Technologies that runs Re: Texas Access to redact
14 automatically certain information in court records and to
15 ensure that data miners can't have broad access to the
16 information that truly is available to subscribers. There
17 will a fee for it. It will be 10 cents a page up to \$6.
18 The PACER service for the federal courts is 10 cents a
19 page up to \$3, so this is a little bit more than that.
20 The money will go to maintenance of the program in the
21 clerks' offices, and if there's any left over it will go
22 to access to justice.

23 So we're moving -- we should have it in
24 place fully for lawyers by the end of the year, so you'll
25 be able to see any case that's been filed electronically

1 in a court in Texas by the end of the year, and that
2 should be every civil case there is for the last six
3 years. It doesn't apply to criminal cases yet. We're
4 still working on that, but we're moving in that direction.
5 So it looks to me as if we'll have -- we're not
6 reinventing the wheel here. We have PACER to look to, and
7 we'll have a model that we'll be able to provide people
8 information about documents filed in the courts.

9 As an aside, because of the church school --
10 church shooting in Sutherland Springs and the school
11 shooting in Santa Fe, you have seen in the press a call
12 for more information being reported by the courts to the
13 national database, which is checked when someone wants to
14 buy a firearm. Senator Cornyn immediately called for
15 that. Governor Abbott echoed that call. It's part of
16 Governor Abbott's response to the school shooting, and the
17 side effect of that is that we have advised the Governor's
18 office that we cannot provide the information he wants
19 unless we have a statewide case management system, and so
20 now he wants a statewide case management system, and if we
21 have that then not only can we do what he wants, which is
22 a good thing, but also it would provide us information
23 that we've never had at all about our dockets and how
24 they're running. For example, we didn't see
25 self-represented litigants coming. We were three years

1 into it before we realized there are always
2 self-represented litigants that were causing special
3 issues with the way we do business.

4 Back 15 years before that we didn't know
5 that jury trials had stopped for three or four years until
6 a professor does a paper on it and says, "Oh, by the way,
7 there's no jury trials anymore." This would help us with
8 that kind of information. We could use it in guardianship
9 cases we've been working on, child cases, mental health
10 cases, business cases, all kinds of things to try to make
11 the justice system more efficient.

12 So that's what we've been doing, and for the
13 fourth consecutive year we've cleared our docket of argued
14 cases. Questions, questions?

15 HONORABLE STEPHEN YELENOSKY: Yeah, on your
16 first agenda item, Justice Hecht, you mentioned attorneys
17 who are inactive working in Legal Aid. Will they be
18 covered by any liability insurance?

19 CHIEF JUSTICE HECHT: I think they're
20 covered by the Legal Aid providers.

21 HONORABLE STEPHEN YELENOSKY: Okay. Even
22 though they're inactive status, that's not a problem?

23 MS. NEWTON: Right.

24 HONORABLE STEPHEN YELENOSKY: And my
25 question about the last item you mentioned is what kind of

1 information is the Governor wanting that would be helpful?

2 CHIEF JUSTICE HECHT: The kind of
3 information that is supposed to be reported to NICS.
4 There's a federal -- the federal program requires that the
5 states report background information, convictions. I
6 don't know if it's mental health, but issues that have
7 been determined to impact on whether somebody should be
8 sold a firearm; and you may remember that in Sutherland
9 Springs the shooter had been -- had had a conviction that
10 had not been reported; and had it been reported by the
11 military, actually, he couldn't have bought the weapon.

12 HONORABLE STEPHEN YELENOSKY: So it's mostly
13 criminal convictions and mental health commitments?

14 CHIEF JUSTICE HECHT: Yeah.

15 CHAIRMAN BABCOCK: Any other questions? All
16 right. I should note for the record that one of our
17 members -- in fact, I think the longest serving member on
18 this committee -- Professor Bill Dorsaneo is here. You
19 may not see him, but he is on the phone. Can you hear us,
20 Bill?

21 PROFESSOR DORSANEO: Yes, I can. Good
22 morning, Chip.

23 CHAIRMAN BABCOCK: Good morning. Great that
24 you're with us, and just pipe up whenever you want, and
25 we'll try to be alert for the phone. So with that we'll

1 go to our item on local rules; and, Judge Peeples, you are
2 the vice-chair, but I think Kennon maybe is going to get
3 the football at some point.

4 HONORABLE DAVID PEEPLES: We're going to
5 count on Kennon. Nina Cortell chairs this committee, and
6 she's in North Carolina and couldn't be here. Some of you
7 came in late. You'll need -- there's a four-page memo,
8 and Judge Yelenosky has got extra copies. If you need
9 something raise your hand, and there's an e-mail from
10 Judge Christopher that I think everybody ought to have.
11 So raise your hand and we'll get those to you if you don't
12 have it. Take a look at that memo, and the paragraph at
13 the bottom of the page summarizes the high points that we
14 need to talk about. Just, by the way, this is the first
15 reading. This is not final. It is understood, at least
16 by me, that we'll go back to the drawing board after the
17 discussion. I think that's true, Chip.

18 CHAIRMAN BABCOCK: Sure.

19 HONORABLE DAVID PEEPLES: And but look at
20 the bottom page of the paragraph that starts with "among
21 subcommittee members." There are five things to look for
22 here, and the committee wants us to think about are there
23 some things that should and should not be in local rules.
24 In other words, can you come up with a list, a consensus
25 list of things that should be and those that should not be

1 in local rules and, second, content that could be okay to
2 have in a local rule and you wouldn't have to get approval
3 to do it because it's so basic and uncontroversial.

4 And then third, there's the overriding issue
5 or I guess it's in the background of here we are civil
6 lawyers and a civil Supreme Court making rules that might
7 apply in criminal cases. Judge Newell from the Court of
8 Criminal Appeals is here, and Holly Taylor maybe will be.
9 She's been in on our discussions, but lurking in the
10 background is the issue of how we ought to interact with
11 the Court of Criminal Appeals. Just speaking for myself,
12 it's just inconceivable that I or the civil lawyers or
13 civil judges would tell the Court of Criminal Appeals how
14 it ought to -- what ought to be in a criminal court rules,
15 but they don't have rule-making authority and the Supreme
16 Court does, and so that's an issue that is present here
17 also.

18 Fourth, and if you had a chance to read
19 Martha Newton's memo -- by the way, a very good memo -- it
20 lays out the details of how the Supreme Court is not
21 equipped to give really good and thorough consideration to
22 local rules and to decide to approve them or not or to
23 tweak a detail or two, and so one thing that also is on
24 the table is what can we do to relieve the Supreme Court
25 of that burden without taking the responsibility totally

1 away from the Court, but to make it easier for the Court
2 to, you know, have the final word, but not to have to do
3 all of the nitty-gritty detail work.

4 And then finally there's the issue of making
5 local rules accessible to the public. You know, we all
6 walked into the clerk's office, and there's a stack of
7 things right there, but nowadays we have websites and so
8 forth, and so we need to think about that, and local rules
9 ought to be accessible to everybody who goes to a court
10 because they're telling you how things are done and how
11 things won't be done, and it's probably going to be
12 different from what you're used to, and so accessibility
13 is an issue also. We included as tabs B and C that Marti
14 sent out just some sample local rules for cases around the
15 state, starts with Bell County and goes through Willacy
16 and maybe beyond, and I think the point there on civil
17 rules is how much -- there's a lot in common, but there's
18 a lot of variety from county to county and district to
19 district about what judges there think ought to be in the
20 local rules and how they do things, how you set a case,
21 you know, when they have nonjury weeks if they do and jury
22 weeks and just things like that, that if you're not there
23 practicing in that county it will be very foreign to you
24 and you'll be in trouble if you don't know how things are
25 done. And so the point of tab B was to show the wide

1 variety of things that are in local rules, and we need to
2 think about that, and then C was a set of standing orders.
3 Most of them dealt with family law cases and are very,
4 very similar. Somebody originally did it, and it was
5 copied by other counties around the state, but also a
6 standing order concerning some pretrial matters in -- from
7 a criminal district judge in Houston, just, you know,
8 basically the family law rules -- and Richard may know
9 this better than I, but basically it's just a TRO that
10 goes out with the petition, and except in a small category
11 of cases there's a standard TRO in family law cases, and
12 that's something also to have in mind.

13 And Kennon has to leave to give a CLE
14 presentation at 11:00 or so, and, Kennon, let me turn it
15 over to you, and I think we just need to have a good rich
16 discussion, but I'm sure Kennon has some things. By the
17 way, Kennon Wooten is a good person to have on a
18 committee.

19 CHAIRMAN BABCOCK: Yeah, before Kennon
20 starts, I don't think Justice Christopher's e-mail is in
21 the record, is it, Marti?

22 HONORABLE ANA ESTEVEZ: That's what we just
23 passed out.

24 CHAIRMAN BABCOCK: Okay. Well, then I won't
25 take time to read it, but let's be sure that it's on the

1 website and part of the materials.

2 HONORABLE DAVID PEEPLES: Yeah. She has
3 concern about a proposal that a local rule cannot
4 contradict a rule of civil procedure, and Houston she says
5 for 30 years has had something -- a local rule that says
6 to get an oral hearing you've got to wait a little bit
7 longer and sometimes things will be done by submission.
8 That happens in a lot of places. She says this would make
9 that unlawful, they couldn't do it; and she says it's a
10 very, very healthy rule that they've followed for a long,
11 long time; and it would be very hurtful if they can't keep
12 doing that. I think that's a fair summary of what she
13 said.

14 HONORABLE STEPHEN YELENOSKY: Well, she
15 wasn't concerned about the contradict because that's in
16 the current rule. She's concerned about "shall not
17 modify"; and she says that their local rule, while not
18 contradicting, would modify and, therefore, not be
19 permissible; and we have the e-mail, but I don't think it
20 is on the website. Is that right, Marti?

21 CHAIRMAN BABCOCK: Yeah, let's make sure it
22 gets on the website. Great. Okay. Sorry, Kennon. All
23 yours.

24 MS. WOOTEN: No apologies needed. On that
25 about Justice Christopher's e-mail that it does raise an

1 interesting issue because the current standard, as Judge
2 Yelenosky noted, is that the local rule shouldn't be
3 inconsistent with the statewide rule; and when you're at
4 the Court assessing whether a rule is -- a local rule,
5 excuse me, is inconsistent with the statewide rule
6 sometimes you're looking at does it modify the statewide
7 rule; and so modification, at least when I was at the
8 Court as the rules attorney, came into play in assessing
9 whether what had been presented to the Court for approval
10 was acceptable or not; and then that kind of opened a can
11 of worms because you would look at the body of local rules
12 as they -- as it existed and realize that there were
13 several local rules that had already been approved that
14 modified the statewide rules to a degree. And here you
15 are as the rules attorney interfacing with the clerk and
16 telling them, "Well, you can't modify the statewide
17 rules"; and they say, "Well, we've already done that, you
18 know, look at all this stuff in the rules as they stand."
19 And so you get into this tough situation where you're
20 trying to be true to Rule 3a of the Texas Rules of Civil
21 Procedure while acknowledging the reality of the state of
22 local rules in the state today.

23 I think another thing worth noting is that
24 there are very divergent opinions about what should be
25 done with local rules, including among the subcommittee

1 members. Chief Justice Gray doesn't think that there
2 should be local rules at all; and he will say more, I'm
3 sure, but that was one thing, just because --

4 CHAIRMAN BABCOCK: His opinion has evolved
5 on that I think.

6 MS. WOOTEN: Yes. Well, so that's how it
7 started that there shouldn't be local rules and then
8 there's recognition that they are out there and they do
9 some good for us; however, they are not always made
10 available to the public; and the litigants in the case
11 don't always know about some of these local rules, in part
12 because they're not posted online, and in part because in
13 addition to the approved local rules we have standing
14 orders; and the standing orders may be in place at the
15 court, but never actually made part of the court record.
16 And so the litigants who are in the actual case trying to
17 follow the rules don't necessarily know about the rules,
18 and so Chief Justice Gray has made a very good point that
19 if we're going to have these standing orders perhaps they
20 should be part of the court record, the case file for the
21 case at hand, so that the litigants know about them and
22 are less likely to run afoul of them.

23 And so we have an interesting system in
24 place in terms of the criminal procedures. That is
25 something that's been a problem for a long time. Even

1 though we have Rule of Civil Procedure 3a, it doesn't on
2 its face say that the local rules at issue can only impact
3 civil cases; and so you get at the Texas Supreme Court all
4 of these submissions that impact not only civil cases but
5 criminal cases, and you get over your skis pretty quickly
6 sometimes as the rules attorney and -- who is reporting to
7 the Texas Supreme Court all in this context of civil
8 proceedings; and so over the course of time I think
9 there's been an informal approach that's worked fairly
10 well where the rules attorney will reach out to the Court
11 of Criminal Appeals, sometimes the rules attorney and
12 sometimes before that it was just the judges who had
13 authority and kind of took the lead with rule-related
14 matters, and you'll have an informal discussion about
15 these submissions that affect criminal procedures, make
16 sure you're not doing something that you shouldn't be
17 doing, make sure you have some input from people with
18 expertise in regard to criminal matters, and move forward.
19 And I think it's worked fairly well over the course of
20 time, but there is no formal procedure for that particular
21 part of the process, and there is I think a little bit of
22 tension in doing that by virtue of the Texas Rule of Civil
23 Procedure 3a.

24 So there are a lot of issues, and I think
25 it's important to reiterate that the subcommittee hasn't

1 yet come down in presenting any kind of formal
2 recommendation for this full committee to consider, but
3 thought it would be helpful for the full committee to have
4 a proposal to look at to at least ground the discussion so
5 that it's not so theoretical in nature and so that we can
6 look at proposed rule text and use that as a point of
7 discussion. I wanted to make it clear that it's not a
8 formal proposal because there have been no votes on the
9 proposed amendments that are in this memo, and it would
10 not be accurate to say that every member of the
11 subcommittee is behind what's being proposed informally in
12 this memo; but I think, Judge Peeples, if you agree, it
13 might be helpful to just go to the part of the memo on
14 page two from the subcommittee that has some redline
15 proposed amendments, with footnoted discussion points. We
16 kind of used that to work through some of the main issues
17 that we confronted as a subcommittee. Does that make
18 sense, Judge Peeples?

19 HONORABLE DAVID PEEPLES: Well, that's one
20 way. Another way is just to let people talk about issues
21 that they want to do. What do you think, Chip?

22 CHAIRMAN BABCOCK: Why don't we talk issues
23 first and then we'll go to specifics?

24 HONORABLE DAVID PEEPLES: Yeah. I'd rather
25 think more generally than deal with language, frankly,

1 right now myself.

2 CHAIRMAN BABCOCK: Yeah.

3 HONORABLE DAVID PEEPLES: Is that okay?

4 CHAIRMAN BABCOCK: Judge Yelenosky.

5 HONORABLE STEPHEN YELENOSKY: Following
6 that, I think whatever -- whatever we do is meaningless
7 unless there is a way for attorneys affected by a local
8 rule to request a review about a concern and that they're
9 able to identify that concern and have someone else, like
10 their State Bar representative for the area or whatever,
11 submit that for review, be some kind of filter, so that it
12 affects their -- it can cut down on the volume. Perhaps
13 things can be taken care of if there's a misunderstanding,
14 but without that, whatever we do is nice on paper but in
15 my opinion meaningless, because when I started as a
16 judge -- I don't know if it's true now or not, but there
17 were lots of local rules that were never submitted to the
18 Supreme Court for approval, and counsel were subjected to
19 them because the judges said they were, and they couldn't
20 very well stand up in court and say "no," and I don't know
21 that there was any way of enforcing that then.

22 I also know here in Travis County that we
23 had approved local rules, but there were also standing
24 orders that were never submitted for approval by the
25 Court; and they were just a circumvention, frankly,

1 because they existed as a rule of general applicability
2 rather than an order like a family law order saying in
3 every case you're subject to a TRO that says you can't
4 spend your money. There were local rules in effect, so
5 nobody had a means of saying, "Well, you didn't get that
6 approved by the Supreme Court," other than exposing
7 himself or herself as an attorney to be in opposition to
8 the majority or the individual judge who wrote those
9 rules. So I'm not particularly interested in the details
10 if we don't have that.

11 I see in (g) that there is an effort, a
12 specific effort for this to be possible, a written
13 request, and I'm just suggesting that that is sine qua
14 non of anything we do and that we have some kind of way
15 for attorneys, even if it's just a suggestion in the
16 comment, that perhaps they can go through their State Bar
17 rep or someone else so that they're not outed as the
18 attorney who didn't like the judge's local rule or
19 standing order or local rule masquerading as a standing
20 order. If we have that then it might also address the
21 concern that there's too much work required to approve
22 these at the Supreme Court level, and I certainly
23 understand that. I went through that with our rule.

24 We submitted it I think in 2012, and it was
25 approved in 2014, and I understand why it took so long

1 because there were so many, but the time spent on our
2 local rule yielded a tweak, frankly, if I remember right.
3 It was the first proposed limited scope representation,
4 but in order to get limited scope representation in effect
5 with one tweak to 20 some-odd pages of local rules, a lot
6 of work was spent by the staff attorney and a lot of time
7 was delayed; whereas if we didn't have that, yet we had a
8 very effective means for an attorney to anonymously say
9 "They've implemented local rules that do this and here's
10 my concern," that would be much more effective and
11 efficient. So that's my overall comment.

12 CHAIRMAN BABCOCK: Well, when you say
13 review, are you talking about review before the rule goes
14 into effect, or somebody is mad about it after it's in
15 effect?

16 HONORABLE STEPHEN YELENOSKY: After it's in
17 effect, because that cuts down on the delay and because it
18 allows attorneys to identify a particular concern as
19 opposed to giving 20 pages of local rules to the rules
20 attorney for the Supreme Court and saying "review the
21 whole thing" with nobody complaining about 19 of the
22 pages, but everybody complaining -- would complain about
23 one.

24 CHAIRMAN BABCOCK: Was there ever a review
25 and comment procedure for the rules you're talking about

1 in Travis County ahead of time where you said, "Here's
2 what we're thinking about doing"?

3 HONORABLE STEPHEN YELENOSKY: Not officially
4 because we didn't invite -- we didn't want to invite a
5 process that was going to make it impossible. We would be
6 writing rules by committee, but we did reach out on
7 certain things and work with attorneys. For example, on
8 limited scope representation I worked closely with Phil
9 Friday and some other family law attorneys because it was
10 most -- of most interest to them, but it was done
11 informally because if we started a process there, that
12 would be another two years, and frankly, we didn't want to
13 relinquish to the attorneys the ability to complain about
14 things that they just didn't like when, in fact, they were
15 totally consistent with -- nobody could argue they were
16 inconsistent with local rules, or I mean, the Rules of
17 Civil Procedure where you need to modify. But so the
18 preapproval either by the Supreme Court or by attorneys to
19 me is -- is inefficient for the reasons that I said, and
20 the ability to point out problems anonymously is much more
21 efficient and just as effective.

22 CHAIRMAN BABCOCK: Okay. Justice Bland,
23 then Buddy.

24 HONORABLE JANE BLAND: I have a few
25 questions. How many counties and which counties are not

1 publishing the -- their local rules? And understanding
2 that the rules attorneys are incredibly pressed and have
3 to prioritize their work, who is better resourced than the
4 Texas Supreme Court and rules attorneys to interface with
5 the Court of Criminal Appeals and evaluate these rules?
6 Judge David Evans, who I think is now at our regional
7 presiding judge meeting, asked me to report this morning
8 that the regional presiding judges do not want this work.

9 CHAIRMAN BABCOCK: Too bad, Martha.

10 HONORABLE JANE BLAND: And then finally --
11 and so I think we could cure the notice issue by
12 requiring, you know, everybody put it on the Texas
13 center -- or the Texas Supreme Court portal. The resource
14 issue is much more difficult and so wondering whether
15 maybe a subcommittee of this committee, you know, of
16 volunteers because basically, you know, we're talking
17 about work that is going to have to be done by someone,
18 could vet local rules and then work with the rules
19 attorney to alleviate some of this work. Could that work?
20 And so those were -- those were some thoughts I had.

21 I think that Harris County -- the Harris
22 County trial courts worked very hard to -- and are
23 thoughtful about amendments to their local rules. I think
24 the last one was in 2014. They work well, and they -- I
25 think they also bring to the Court's attention, the Texas

1 Supreme Court's attention, you know, issues that are
2 percolating out there; and if -- if a local rule goes by
3 inaction because in the meantime the Texas Rules of Civil
4 Procedure are amended to address the issue, that means to
5 me the system is working. You know, sometimes it's better
6 to do nothing. So I don't see that this prioritization
7 naturally has to take place because the rules attorneys
8 are under-resourced is necessarily a bad thing, and my
9 fear is that if we punt this work somewhere else, it's not
10 going to be as well done as it is now. So that's my
11 comment on the process.

12 As far as, you know, not allowing the local
13 rules to modify the existing Rules of Civil Procedure,
14 well, that's why you have to get Texas Supreme Court
15 approval; and, you know, if the Texas Supreme Court
16 approves it, that, you know, is an indication that it can
17 be in harmony with what's out there. It may not be the
18 same, but it can be in harmony or harmonized.

19 And finally, with respect to the Court of
20 Criminal Appeals, you know, the criminal cases are
21 governed by statute, the Code of Criminal Procedure, so
22 it's really unlikely that we're going to run into some
23 giant conflict between a local rule and something in a
24 criminal case, because criminal statutes trump; and so to
25 the extent that the civil rules, you know, you know,

1 somebody tries to import those, that doesn't necessarily
2 work; and, you know, I think the idea that the -- that the
3 rules are not passed without consultation with the Court
4 of Criminal Appeals is absolutely essential. I'm not sure
5 who better -- who is in a better position to do that than
6 the Texas Supreme Court, its coequal court, and the Texas
7 Supreme Court's legal staff.

8 MS. NEWTON: Chip?

9 CHAIRMAN BABCOCK: Yeah, Martha.

10 MS. NEWTON: I just thought I would follow
11 up just to make a comment to kind of give you an example
12 of -- a concrete example of dealing with criminal rules.
13 So we had Lubbock, kind of a big county, and their rules
14 have been pending for a while, and it had a ton of
15 criminal rules in it. So I sent them to Holly and asked
16 for, you know, her -- thinking that she would, you know,
17 hopefully look it over and say, "This all looks fine," but
18 then it turns out that the Court of Criminal Appeals saw a
19 ton of problems with them; and so a while later, they
20 looked at them in conference, sent me back a very
21 comprehensive memo explaining lots of kind of
22 constitutional implications with the rules and how they,
23 you know, violated certain other laws, which I am -- was
24 grateful for because none of that I knew. I don't have
25 the expertise.

1 So then I sent that back to Lubbock and then
2 like three months goes by and then they send me back
3 another draft that they've changed a lot of things and
4 then I send that back over to Holly and then they talk
5 about that again and then Holly sends back another
6 completely separate thorough, very thorough, memo pointing
7 out problems, legal problems, with these -- this new
8 draft, and then I sent that back to Lubbock and then,
9 what, three or four more months go by and then we get
10 another draft from them, and I think we finally got their
11 rules approved, but you know, that took like six, seven
12 months and, you know, we can't do that with all of the
13 rules. It's just not -- it's not feasible I don't think.

14 CHAIRMAN BABCOCK: Buddy, did you have
15 something to say and then --

16 MR. LOW: Yeah, when we use the term local
17 rules, that's a broad term. We're really addressing local
18 rules of procedure, not decorum or conduct that each judge
19 sets, "I'll do this or that" or conduct. So we are really
20 dealing and the thing that -- when I helped the -- we used
21 to call it divorce courts, if their local rules, the thing
22 that Justice Phillips was concerned with was the time
23 element, not altering or amending any time element that
24 the rules called for. So, I mean, just say local rules,
25 judge can have unwritten local rules of decorum, but we're

1 really addressing procedural rules.

2 CHAIRMAN BABCOCK: Well, yeah, except that I
3 just looked at this tab B, Bell County District Court
4 Local Rules, and the Rule 1.1 is conduct and courtroom
5 decorum.

6 MR. LOW: I understand. That's what I'm
7 saying, is that's a rule of decorum, and I think we should
8 address really local rules of procedure.

9 CHAIRMAN BABCOCK: Yeah. I get -- that's
10 right. Justice Bland.

11 HONORABLE JANE BLAND: So the process that
12 Martha described to me is magnificent. It's working well.

13 CHAIRMAN BABCOCK: Yeah, easy for you to
14 say.

15 HONORABLE DAVID NEWELL: Holly thanks you.

16 HONORABLE JANE BLAND: Yes, because that is
17 exactly the kind of care and attention that changes to
18 rules should have, and obviously any amendment to the
19 rules in this committee gets kicked back and forth
20 multiple times before all of us stakeholders say, yes, we
21 have a rule we can all adopt or at least live with; and in
22 particular with the Court of Criminal Appeals, you know,
23 that's absolutely essential; and I'm not sure that there
24 is another body that's capable of putting that thought and
25 that collaboration together with the Court of Criminal

1 Appeals and the local authority; and so although I know
2 it's time consuming and complicated, it is a good thing
3 that it took a while to come up with a rule for Lubbock
4 County that everybody thought worked.

5 CHAIRMAN BABCOCK: Okay. Richard Orsinger.

6 MR. ORSINGER: Okay. On the process issue,
7 the subcommittee of this committee would work well. We
8 sometimes have special created task forces that operate as
9 tantamount subcommittees to this rules subcommittee, but
10 the State Bar of Texas also has a rules committee, and the
11 State Bar of Texas could create a brand new local rules
12 committee, and it will have volunteers from all over the
13 state I promise you.

14 MR. LOW: Yeah.

15 MR. ORSINGER: And the incoming president
16 will appoint them, and you can vet original changes with
17 them and we just -- as we have with the task force process
18 or the subcommittee process they can refine the
19 alternatives, discuss them, and then if the Supreme Court
20 wishes we can bring them here to the Supreme Court
21 Advisory Committee to have them vetted publicly and then
22 it could go to the rules attorney where the rules attorney
23 can do the finishing touches. As far as justice -- Judge
24 Yelenosky's suggestion, perhaps we ought to acknowledge
25 formally in the process that there should be the ability

1 to make an anonymous complaint or anonymous suggestion to
2 whatever committee is empowered to do this analysis and
3 announce that you can do it anonymously and that if you
4 send it by e-mail we promise that we'll take your e-mail
5 address off of it or something. We want to encourage
6 people to come forward without feeling like they're being
7 targeted, so I think there's plenty of volunteers, so I
8 don't think Martha has to do all of this on the weekend.

9 MS. NEWTON: Now it's Jackie.

10 MR. ORSINGER: Jackie. So I think that's a
11 great idea, and let's bring in the volunteers. Now then,
12 I don't -- I practice in a lot of different courts, and I
13 don't like a lot of rules that are inconsistent and you
14 get surprised on what they are, and it would be even worse
15 if you're pro se. But just a couple of the diversities
16 that occur to me is that in most of the states, in the
17 family law practice anyway, you have individual courts;
18 and the case is assigned on the day that it's filed and
19 then it stays in that court all the way along the way and
20 then you have one judge to deal with and all of their
21 idiosyncrasies, and you know what they are, and you meet
22 them. But in Austin and San Antonio we have a central
23 assignment, and so you don't know what judge you're going
24 to get on any day of any hearing or any day of the trial,
25 and so that introduces some differences there. You're

1 going to have to have some inherent differences between a
2 central docket.

3 I know in Houston, for example, they
4 frequently have the problem that judges have to be -- I
5 mean, lawyers have to be in different courts at the same
6 moment at 9:00 a.m. in the morning. We don't have that
7 problem in San Antonio. You're all in the same place.
8 You can never be in two different courts in two different
9 hearings at the same time because they're all assigned out
10 by one judge. So that's the difference, and then you have
11 the judges -- you have a district like the big ones that
12 have multiple judges in one area, or you have rural judges
13 that have one judge for four counties, but three of those
14 counties overlap with another judge that has five
15 different counties; and so you're going to have to
16 interface that; and then you have the problem that some
17 courts, particularly the rural courts, have criminal
18 dockets as well as civil dockets; and I think by law as
19 well as by practice they always prioritize the criminal
20 cases first; and yet they have combined dockets everyday,
21 and so they have special problems because they've got to
22 do the guilty pleas and they've got to, you know,
23 prioritize the criminal; and so they have to have special
24 rules to help sort through how they're going to handle
25 their civil and their criminal.

1 So even though I like consistency, there's
2 such diversity. And then one judge who hands down one set
3 of rules, in my experience they can be very arbitrary
4 rules, but if you have 13 judges in a county that have to
5 agree on the same set of rules they tend to be a consensus
6 set, and so they're more mainstream. So, you know, once
7 again, the individual judges that say, "This is what I
8 want in my court" have more freedom to be irregular, if
9 you will, than someone who has to have the compromise of
10 all the other judges.

11 Now then, as far as standing orders versus
12 no standing orders, I've watched this over the years. I
13 don't think there is any question that the judges that
14 started adopting standing orders in the family law arena
15 to get around the requirement of approval of local orders;
16 and initially in Dallas it was controversial, so that I
17 can remember going down to the courthouse in Dallas
18 County, and there would be a set of standing orders
19 Scotch-taped on the door to the courtroom, and there would
20 be another judge that would have Scotch-taped on the front
21 of his courtroom that the standing orders do not apply in
22 this court. So, you know, they didn't even have a
23 consensus among each other.

24 Now then, what does it all boil down to?
25 We've had standing orders for 10 years. As the comment

1 was made, the standing orders are basically just a
2 substitute TRO, and most of the TROs are right out of the
3 family law practice manual, and so the standing orders
4 have kind of supplanted the practice of getting TROs, and
5 I think that that's -- you know, I think that that's been
6 good. Interestingly, though, Harris County has never
7 adopted standing orders. Dallas County has standing
8 orders. Bexar County has standing orders. There's no
9 difference that I can discern between filing a divorce in
10 Harris County and Dallas or San Antonio. They have no
11 standing orders there. They have just kind of a routine
12 TRO that the judge will sign without much investigation.
13 So even though I was really upset that all of these local
14 judges were adopting standing orders without any
15 consistency and without any Supreme Court approval, I
16 think over the last 10 years it's kind of proved that the
17 standing orders are really not that different from the
18 prototype TRO, and so it really hasn't amounted to much
19 difference, so I would agree with Buddy.

20 The most dangerous thing that we can do is
21 have judges who are changing deadlines. If a standing
22 order says you have to make your Daubert objection to the
23 experts six months before trial, that's a problem. I
24 mean, and I've seen local rules where the timing on
25 deadlines is prescribed in advance. Our rules say that

1 you can have a special deviation from our discovery rules
2 by going to level three in a specific case based on a
3 hearing, with notice to everybody and an opportunity to be
4 heard. A standing order that changes the discovery
5 deadlines for every case in that court is a violation of
6 the rules and I don't think should be allowed, so I agree
7 with Buddy. I really strongly would oppose the idea that
8 we can just have a variety of different deadlines around.
9 If a judge wants to change a deadline in a case after a
10 hearing, that's one thing, but saying "All cases in my
11 court have the following deadlines," to me that is really
12 a pernicious practice.

13 CHAIRMAN BABCOCK: So to summarize, it's a
14 mess.

15 MR. ORSINGER: You know, it works pretty
16 well, you know, considering that it's a democracy.

17 CHAIRMAN BABCOCK: Buddy, and then Professor
18 Hoffman.

19 MR. LOW: Richard's suggestion to use the
20 State Bar is really a good one. Any evidence question the
21 evidence committee gets, we send it first to the State Bar
22 committee, and they have people that do research to see
23 what's happening in this state and that state and come
24 back, and we get a consensus, and we ought to use them
25 with a guard instead of Martha having to get up on Sunday

1 morning at 3:00 o'clock. We ought to use them now.

2 MR. ORSINGER: She's running on Sunday
3 morning at 3:00 o'clock.

4 CHAIRMAN BABCOCK: Yeah, Martha never
5 sleeps, so I don't know that 3:00 o'clock is a problem.

6 MR. LOW: But that's an excellent idea that
7 we use the State Bar committee for these local rules.

8 CHAIRMAN BABCOCK: Professor Hoffman.

9 PROFESSOR HOFFMAN: So as I think about
10 these some more -- and a lot of what Richard said I would
11 agree with -- I would just sort of make the observation
12 that the reason that we have local rules presumably, like
13 why do they exist, is that we're a big and diverse state
14 and exactly as Richard describes, Houston doesn't look
15 like Hidalgo County and indeed, for that matter, Houston
16 doesn't look like Austin and the central docket doesn't
17 exist, et cetera; but the number of sort of major
18 variances, central docket versus not, urban versus rural,
19 criminal and civil together, is probably a relatively
20 finite number. At least I think, you know, we could at
21 least try to kind come up with that list, and so the point
22 I'm sort of -- seems like I'm getting to is why not come
23 up with two or three or maybe land up being five, but I
24 wouldn't think it would be more than that, of sort of
25 basic templates, right, so you have the urban noncentral

1 docket template that a State Bar committee or our
2 committee or someone comes up with and says, "This is the
3 basic model," and we have the benefit of years and years.
4 Harris County came up with some good ideas and Travis
5 County, and we end up with a template for the urban model
6 for the noncentral docket. We come up with the urban
7 model for the central docket, come up with the rural that
8 doesn't have criminal, the rural that does have criminal,
9 and those -- that then becomes what counties can choose
10 from. You know, a cafeteria style of things.

11 Now, that doesn't mean that we've come up
12 with everything or anticipated all of the issues in the
13 world, and so a county would be free to then propose some
14 variance from that for some new issue we haven't thought
15 of, but to me, if you can do that, you do this work on the
16 front end, and it would significantly I think minimize
17 over the long haul. So anyway, I would have more to say,
18 but those are some kind of broad thoughts.

19 CHAIRMAN BABCOCK: Okay, thanks. Kennon,
20 you had your hand up, and then Peter.

21 MS. WOOTEN: Just a few points. One, in
22 regard to the presiding judges, they are already involved
23 in the mix. There is a Rule of Judicial Administration,
24 -- I think it's 10 that -- or five, excuse me, requires
25 the presiding judges to ensure adoption of uniform local

1 rules, so what happens in practice or at least what
2 happened in practice when I was the rules attorney is that
3 local rules would go to the presiding judges first, then
4 would come to the rules attorney with a stamp of approval
5 by the presiding judge, and then there would be a more
6 in-depth analysis by the rules attorney of what had been
7 proposed. So that's one point to make in regard to the
8 involvement of presiding judges.

9 In regard to templates I will say that when
10 there was a template for e-filing local rules it made the
11 job so much easier as rules attorney because you simply
12 assessed the differences and focused on those as opposed
13 to the more comprehensive exercise of trying to figure out
14 if a local rule pertains to a statewide rule and, if so,
15 is it modifying it to what degree, is it consistent or
16 not, et cetera. The template simplified the process
17 dramatically; however, if I recall correctly, there may
18 have been a time when this committee tried to come up with
19 templates for local rules, and it ended up being very
20 controversial and at the end of the day simply unworkable
21 because of the reality that people to a degree don't want
22 to give up their ability to make decisions specific to
23 their court and are very hesitant to agree to some kind of
24 template for fear that it's going to impact their autonomy
25 and tie their hands in ways that are undesirable.

1 So I think that's the reality in regard to
2 templates. Yes, they're easier. Is it possible to have
3 templates, even four or five that people can get behind on
4 the whole? That's questionable. I don't know if it's
5 necessary because of the Court's rule-making authority to
6 have support behind those templates, but I think before
7 this committee goes down that path it might be worthwhile
8 to think about where the committee has been in the past
9 and whether we can learn from what happened in the past.

10 And the final point I think that's worth
11 making is that the process may be simplified to a degree
12 if you remove from the assessment certain aspects of local
13 rules that really don't need input from the Supreme Court
14 of Texas. There are some things, for example, like what's
15 our vacation policy going to be. I don't think the Texas
16 Supreme Court necessarily needs to weigh in on the lower
17 courts decisions about vacation policies, and there are
18 other categories of that sort that --

19 HONORABLE DAVID NEWELL: Decorum.

20 MS. WOOTEN: Yes, Judge Newell mentioned
21 decorum. That's another thing that perhaps the Texas
22 Supreme Court doesn't need to assess.

23 MS. HOBBS: We're giving each other looks.

24 MS. WOOTEN: Yeah. Lisa and I are giving
25 each other looks because some of these local rules talked

1 about what I as a woman can wear in a courtroom and talked
2 about what a man can wear in a courtroom, and there are
3 aspects of that that are a little personally offensive to
4 me, and so I don't know if we want to take the Court out
5 of the mix altogether in assessing even the most simple
6 things, but that is an option to consider in terms of
7 simplifying the workload for the Court.

8 CHAIRMAN BABCOCK: Chief Justice Hecht had a
9 comment, and then Peter.

10 CHIEF JUSTICE HECHT: Well, I do think it's
11 important to remember the history, and here's how I
12 remember it. In the Sixties before I went to law school
13 courts in Texas didn't have but a handful of local rules,
14 and I know when I started practice even in Dallas there
15 were just a very few local rules for what were then nine
16 civil district courts, and then in the early Seventies
17 then Senate Judiciary Committee Chairman Biden thought it
18 would be a good idea to let federal courts experiment with
19 best practices because there's only 94 districts or
20 however many. I think 94, and maybe they would come up
21 with better ideas and then that would help everybody.

22 And it was a disaster, and the 94 districts
23 went 94 directions; and it quickly looked as if this was
24 not going to happen, so they went completely the other way
25 and tried to rein all of that in, with the exception of

1 the Federal Rules of Appellate Procedure; and now you
2 probably know that the various circuits can change and can
3 add their gloss or even change the rule, but it's not in a
4 self-standing set of rules. It's a -- you look under the
5 federal rules, and you look down below to your circuit
6 that you're in, and it's got the little twist that that
7 circuit puts on the rule if there is one. So much like a
8 template.

9 And when I came to the Court, one of this
10 committee's pending projects was to do what you say, to
11 have a -- some sort of reorganization of the local rules,
12 but back then all of the local rules were on paper, but we
13 didn't have any electronic way of gathering them up, and
14 so it was an -- you know, 254 counties, and some of them
15 sometimes the district courts in the same district would
16 have different local rules. So it was essentially
17 impossible, and Luke Soules tried to do it, God bless him,
18 but it was just too much. What we thought -- I don't know
19 that -- I don't recall that the template was as
20 controversial an idea as it was just overwhelmingly
21 impossible. We just -- we used the decorum rules as an
22 easy example, if we could just have general decorum rules,
23 pretty much everybody agrees about this, then we can add
24 little exceptions down below and the counties could sign
25 off, and that would be easy; and then docket call, maybe

1 we could do the same thing and differentiate between
2 different kinds of courts, maybe we could do that. Then
3 when you get into the more complex stuff about --
4 vacations you could probably do, but some of the transfer
5 thing, the scheduling orders and stuff that the courts
6 have, then it gets very different from court to court. So
7 it just never happened, and then the Court was hopeful
8 that when the bar undertook to gather up all of the local
9 rules in the state and put them in a central database on
10 their website that that would -- that would help. I think
11 that's the -- it was -- they were on their way to doing it
12 at one point, and you know, but monitoring it and trying
13 to go back to it --

14 MS. NEWTON: Yeah.

15 CHIEF JUSTICE HECHT: -- is just very
16 difficult, but, I mean, ideally, I do think that would be
17 the way to do it. But I -- just echoing what Martha said
18 earlier, it's just not physically possible for our Court
19 and I wouldn't think the Court of Criminal Appeals to
20 spend as much time as it's going to take on these local
21 rules because sometimes they propose local rules that are
22 very unique and different, and if we were talking about
23 them here they would be very controversial, and when you
24 get sent a 40-page set of rules and the problem rule is
25 over on page 23 and you've got to go through it to find

1 it, but, you know, the authors don't say, "Oh, by the way,
2 look over on page 23 because that's going to be a
3 problem." They put it on page 23 for a reason.

4 I do think there needs to be some high court
5 review of the rules, and I think following the experience
6 of the federal courts, this committee and our courts
7 should look at procedures like the one Justice Christopher
8 mentions in Harris County and see if this is -- if this is
9 really a good idea then we should have it somewhere other
10 than in a Harris County local rule, and then if some
11 counties want to opt in, that's fine; and if some counties
12 don't, that's fine, too; but if more of a consensus were
13 that more submissions and fewer oral hearings was a very
14 bad idea, then we would have to think about that, it seems
15 to me; and it doesn't seem to be, it seems to be the
16 opposite, which that's fine, but the process of trying to
17 get a workable set has proven very difficult historically.

18 And the other side of that is if you don't
19 do it, if you just say, "Well, pox on all of this, let's
20 just don't have any local rules," then the judges have
21 them anyway; and they just don't tell you; and they say,
22 "Okay, well, in my court this is the way we're going to do
23 it"; and you show up and you don't know and you say,
24 "Well, I didn't know it."

25 "Well, that's why you shouldn't be here."

1 MS. WOOTEN: Hire local counsel.

2 HONORABLE STEPHEN YELENOSKY: That's why you
3 shouldn't be from out of town.

4 CHIEF JUSTICE HECHT: Yeah. So we need some
5 process to identify these things, but we're not physically
6 able to do it. And maybe Martha and Jackie are if we
7 crack the whip harder, but the Court itself is not.

8 CHAIRMAN BABCOCK: Martha has already taken
9 quite a whipping here. Peter, then Munzinger, and then
10 Justice Bland.

11 MR. KELLY: I generally don't care what the
12 local rules are as long as I know what the rules are; and
13 when I was a young lawyer in Houston I was sent down to
14 some rural county in South Texas; and I brought three
15 copies of each exhibit, one for the judge, one for
16 opposing counsel, one for me; and the judge looks at me
17 and says, "Well, where's the fourth copy?"

18 "What do you mean?" Local rules, like
19 Richard pointed out, taped to the back of the door on some
20 yellow piece of paper, there's to be four copies of each
21 exhibit. Had I known that before I left Houston I would
22 have had four copies. Now that we have everything on the
23 internet, they can have four copies or six copies or
24 whatever the requirement is, or have three days notice or
25 10 days notice as long as the litigant -- as long as the

1 attorney can figure out what it is.

2 And Justice Hecht referred to the courts of
3 appeals, circuit courts local rules. Those are very well
4 organized. It will have the Federal Rule of Appellate
5 Procedure, and then the local variation on it. So I'd be
6 more concerned with having some rules and restrictions on
7 how the local rules are published and so non-local lawyers
8 can figure out what they are rather than be so concerned
9 about what the actual rules are. And a perfect model is
10 the federal rules, the local rules, Federal Rules of
11 Appellate Procedure that states the rule and then what the
12 local variations are.

13 CHAIRMAN BABCOCK: Richard Munzinger.

14 MR. MUNZINGER: I just -- I know Justice
15 Hecht said that he thinks that it's necessary that there
16 be some centralized review of local rules. The reason
17 that we're having the discussion is because we don't have
18 the logistical ability -- the Supreme Court does not have
19 the logistical ability to approve statewide local rules
20 from every jurisdiction in the state. Why isn't it
21 feasible to solve the problem by adopting a rule, for
22 example, rule three, that says you may not do 1 through 10
23 in your local rules. The rules attorneys at the Supreme
24 Court have spent a number of years reviewing local rules,
25 and I suspect if you ask them to make a list of the rules

1 which they have found to be unacceptable they could be
2 categorized in one way or another that would specify a
3 vice in a local rule that would not survive. I think that
4 may be better -- that may be a better way of proceeding
5 statewide.

6 I would oppose delegating any authority of
7 the Supreme Court to the State Bar of Texas. Not for any
8 reason that the State Bar of Texas isn't a wonderful
9 organization, but how do you delegate governmental
10 authority to a nongovernmental entity and make it legal?
11 I don't know that, and I don't like the idea of diluting
12 responsibility and authority. They generally go hand in
13 hand and should, but if the rules attorneys were to
14 make -- they've seen all of these things that the judges
15 do and don't do. They can make -- it seems to me they
16 could make a list that would say, "Don't do this, don't do
17 that."

18 My personal experience is similar to yours.
19 Lots of times local rules say you have to -- on any
20 contested motion make sure you've called the other lawyer
21 and ask him to agree to it before you come here. All
22 right. We don't have that in the rules except in
23 discovery fights as I recall the rules, but those kinds of
24 things are -- they may catch you by surprise or they may
25 not, but in any event, I respectfully believe, Justice

1 Hecht, that the problem may be because we have said we
2 want to approve these local rules. Why do we have to
3 approve local rules, other than to ensure that justice is
4 done and that the Texas Rules of Civil Procedure are
5 honored by every court in the state? That's the task.
6 That's the goal. "Don't do this, Judge."

7 Last point, don't -- whatever we do, we need
8 to distinguish between rules and orders, because judge X,
9 who is a member of the administrative district of 15
10 district courts, says "Okay, well, this is not a local
11 rule. It's my standing order in my court, and I have the
12 authority to do what I want in my court"; and I think
13 whatever we do statewide should recognize that standing
14 orders are, as others have said, frequently an effort to
15 avoid local rules as well as the Rules of Civil Procedure.
16 Thank you.

17 CHAIRMAN BABCOCK: Justice Bland.

18 HONORABLE JANE BLAND: So as Kennon pointed
19 out, the process has always been that these go through the
20 regional presiding judges; and at least my experience is
21 the regional presiding judge says, "Looks good to me" and
22 so and rubber stamps it, and Martha is nodding her head.
23 I mean, you send it to Olen, Olen looks at it and says,
24 "Oh, it looks all right," and why? Because Olen doesn't
25 have a rules attorney -- I'm speaking of Judge Underwood.

1 The regional presiding judges don't have rules attorneys.
2 It's only when it gets to somebody who is, you know,
3 incredibly experienced and has a higher view of the entire
4 judiciary about what's going on rules-wise that somebody
5 notices that page 23 of the proposed rule is going to be a
6 challenge and may be in contravention of existing rules or
7 statutes; and so the reality is trying to say someone else
8 needs to do it, you know, sort of assumes that there is
9 someone else who can do it; and so, you know, my
10 recommendation is that if the local rules are -- the
11 proposed amendments are voluminous, difficult to
12 understand, potentially raise problems after consultation
13 with the Court of Criminal Appeals, that the Texas Supreme
14 Court say "no." I realize that it's not easy to say "no"
15 to a group of 13 judges from Lubbock or 26 civil district
16 judges in Harris County, but, you know, you have an option
17 of just denying it.

18 If you think that the reality is it's too
19 much for one person, and it sounds like it is, you know,
20 create a committee of this committee to at least give a
21 recommendation and perhaps some process that would make
22 local judges know that their concern and the reason that
23 they are forwarding this rule was thoroughly considered
24 and vetted, but, sorry, we're going to stick with the
25 rules that we have. But the reality is that saying that

1 the Court can't do it, you know, I'm not really sure there
2 is any other court that is capable.

3 CHAIRMAN BABCOCK: Okay. Lisa, and then
4 Judge Yelenosky. Oh, sorry, then Evan, and then Judge
5 Yelenosky.

6 MS. HOBBS: So I'm so old, how long has it
7 been since I was rules attorney?

8 CHAIRMAN BABCOCK: 25 years.

9 MS. HOBBS: Yeah, something like that.

10 CHIEF JUSTICE HECHT: It seems like just
11 yesterday.

12 MS. HOBBS: So I don't remember it being a
13 big burden to do local rules, and I think that's probably
14 a testament to the Legislature's trust of the Court now in
15 taking on bigger projects so that the rules attorneys have
16 legitimate projects from the Legislature with set
17 deadlines to where reviewing local rules was intimidating,
18 but it wasn't -- I don't remember it taking a huge part of
19 my job, but I also didn't have as much work as Martha has
20 from the Legislature when, you know --

21 HONORABLE STEPHEN YELENOSKY: Did you get as
22 many submitted?

23 MS. HOBBS: I don't know, I mean, but y'all
24 wouldn't believe what's in them. I mean, what I will say,
25 could we write -- could you get -- how many rules

1 attorneys? What number are you now, nine?

2 MS. NEWTON: I was eight. Jackie is nine.

3 MS. HOBBS: Nine, get the nine rules
4 attorneys in a room and could we write -- no, I mean, you
5 wouldn't believe what's in these rules, right? I mean, I
6 was like a fourth-year lawyer. I had tried one big case,
7 and so are we smart and are we -- you know, we're the best
8 and the brightest, no doubt, but our experience level --

9 CHAIRMAN BABCOCK: Speaking just for
10 yourself.

11 MS. HOBBS: No, speaking for all of them in
12 this room. But like --

13 HONORABLE STEPHEN YELENOSKY: And we know
14 what happened in the book.

15 MS. HOBBS: I had tried one case in my life,
16 right, and so as smart as I was, I didn't have the
17 experience to look at a rule and say, oh, this could be
18 problematic for these reasons, so I love Justice Bland's
19 idea of a committee, because, you know, someone says,
20 "This makes me uncomfortable," and we're smart enough to
21 like research it, but we just don't have that like gut
22 instinct that a group of lawyers with a ton of experience
23 could identify for us what the problems are with the rule.

24 I would never ban local rules. I think the
25 whole idea of -- especially in complex cases where we need

1 judges to tinker with procedure. Judge Evans is a great
2 example of it, of just -- I would not want someone -- a
3 judge who is innovative to be hamstrung in any way from
4 trying something that moves a docket along, because the
5 rules are slow to change. You know, it just -- that's
6 what it should be about is like local experimentation of
7 will this work, will we get our docket cleared.

8 Lubbock is a great example of it. Lubbock
9 just was flying through cases, like every case within 12
10 months or 18 months getting tried because of what they did
11 with their local rules to get them done, and I don't want
12 to take that away from them. We've all learned from
13 Lubbock's example. So I guess those are my points. I'm
14 sorry it's becoming more -- a bigger deal than it was. I
15 like the idea of an experienced group of people looking at
16 them and advising the rules attorneys and kind of helping
17 identify. I would never prohibit local rules. I think
18 they're super important, and, yeah, you guys wouldn't
19 believe what some -- sometimes we see. It was fun.

20 MS. WOOTEN: Uh-huh.

21 CHAIRMAN BABCOCK: Evan.

22 MR. YOUNG: To me there are sort of three
23 things in the conversation and it's all touching on -- or
24 maybe could. One is how to narrow the problem so that
25 there's less of a burden and we really are focusing on

1 what matters. The second is who is going to actually do
2 the review of what emerges from the process of creating or
3 drafting these local rules that maybe we can circumscribe
4 and then the last is where are they? How are they found?
5 Was there integrity ensured such that ordinary people,
6 lawyers can find them?

7 On the first part, how to narrow it, it
8 seems like there could be some focus not only on the
9 substantive carve outs that have been alluded to, things
10 that are just purely matters of administering a particular
11 courtroom in ways that are appropriate for an individual
12 judge to insist upon, just because life is short and we
13 need to have some basic preferences that will be adhered
14 to by people, but maybe other things could be thought
15 about throughout the rules. For example, maybe there are
16 parts of the Rules of Civil Procedure in which we could
17 say more expressly that here is a default, subject to
18 modification by order of the court or by local rule,
19 thereby signaling that variation is appropriate and
20 signaling to someone who is reading the Rules of Procedure
21 I ought to find out what my local court thinks about this
22 because the Supreme Court has specifically articulated
23 that this is an area in which some amount of variation
24 should be permissible.

25 That's something that would be a more

1 significant look, right, all of the committees,
2 subcommittees of this committee perhaps could think about
3 what rules within their particular area might be
4 appropriate for revision to accommodate that if that
5 seemed appropriate; but it would, I think, advance the
6 competing goals that Martha's very excellent memo laid
7 out, having some insistence on basic uniformity while
8 acknowledging that some local variation should be
9 permissible in specific areas. The second part I think
10 that I'm in agreement on the idea on who reviews it. You
11 know, look, when you have Justice Bland, I think now three
12 times having volunteered to run a committee --

13 CHAIRMAN BABCOCK: That's what I heard.

14 MR. YOUNG: -- I think the answer has to be
15 "yes," right, by acclamation. So I would refer to that as
16 the Bland committee from now on. I do think -- and I like
17 the spirit of, you know, volunteerism across the state,
18 but I'm concerned that having too broad a group of people
19 doing it will eliminate the goals of uniformity because it
20 will be difficult to have too many disparate groups aware
21 of the same common principles that the Court has
22 historically articulated, and one could suppose that each
23 of the courts that is proposing local rules, "Well, I'm
24 the volunteer. Here, I think this is good," you know.

25 CHAIRMAN BABCOCK: Yeah.

1 MR. YOUNG: And that same thing could
2 happen, if it's something that's too disparate. So I do
3 something like this would be appropriate, but it also
4 seems from Martha's memo and the conversation a part of it
5 just is a bandwidth problem, and that's really an awful
6 reason to have a situation like we're talking about for
7 something that's so desperately important to the litigants
8 and the courts of our state as the integrity of the rules
9 that actually govern how proceedings unfold, and so it
10 strikes me as entirely appropriate for the courts to ask
11 the Legislature -- I know that we're sometimes squeezing
12 juice out of a stone, but another rules attorney, more
13 staff under the rules attorney to be able to focus on
14 particular things, maybe in conjunction with the Bland
15 committee. I don't know, but that strikes me as a very
16 helpful thing.

17 With respect to the Court itself, I
18 recognize that the nine justices, you know, sit en banc
19 and everything that they do and that there's only so much
20 energy they can expend on looking at the local rules of
21 Rockwall County and the local rules of Loving County or
22 whatever you might say it is, but could it possibly be the
23 case that the Court could divide into three-judge panels
24 and that only if one member of the three-judge panel,
25 three-justice panel, flags as problematic some local

1 proposal that the full nine would have to devote
2 conference time to considering it. At least you would
3 have, you know, a sense that this has gotten attention
4 from the Supreme Court; and if it's unanimous among a
5 panel that it's noncontroversial or nonsubstantive,
6 whatever, good, we're ready to go; and that might
7 accelerate the process of being able to implement these
8 local rules.

9 Some things in Martha's memo were really
10 appalling. Now, the idea that she would call judges who
11 are proposing local rules that are getting the attention
12 of nine Supreme Court justices that then have questions
13 about what's going on and she says then there are times in
14 which the judge that's proposed local rules won't even
15 call her back.

16 HONORABLE STEPHEN YELENOSKY: Justice Hecht
17 can't get the bar to call him back.

18 MR. YOUNG: But we're talking about Martha
19 here, you know.

20 CHAIRMAN BABCOCK: Yeah, today.

21 MR. YOUNG: It seems to me that that in
22 conjunction with just, you know, the part of the memo I
23 thought was, you know, very subtle and respectful, it's
24 appropriate. I think you said that it's not that easy to
25 find out what the direct contact for judges is. This is

1 something the judicial council has thought about and what
2 Chief Justice Hecht was describing earlier today is
3 relevant to this notion of being able to more readily
4 contact the judges of our state. I think it's entirely
5 appropriate for judicial security and other reasons that
6 the public not have direct contact with judges, but I
7 don't think it's appropriate whatsoever that the rules
8 attorney or the Supreme Court or the Office of Court
9 Administration not be able to instantly be in touch with
10 any judge in our state, especially if they're submitting
11 local rules. And so to the extent that the problems
12 rely -- are in part just wasted time in trying to get hold
13 of people, that's something that we should be able to
14 facilitate, and maybe some of the proposals the judicial
15 council is working on will do that.

16 And then lastly, where it is, how to manage
17 these local rules so that they have integrity. Your point
18 was spot on, all of the horror stories that one might have
19 about not even knowing what they are related also to the
20 point that you made, Chief, about the new state case
21 management system that will facilitate things like the
22 Governor has asked strikes me that perhaps what the Court
23 should do is require that any effective local rule be
24 uploaded to the state-managed web pages and that no local
25 rule be regarded as effective or even opposed unless it's

1 uploaded there with an indication of whether or not it's
2 yet been approved by the Supreme Court; and any amendment,
3 any change, would be uploaded to a single centralized
4 place so that every single person would know I go to the
5 Supreme Court's local rules page, I click on the court or
6 the county, whatever, I see what's there; and if it's not
7 there, it's not a local rule. Every judge knows that,
8 every court knows that this is how we do it, and then we
9 don't have this problem of tracking things down and have
10 to worry about where it is.

11 We also have the ability of the rules
12 attorneys, the Bland committee, and others being able to
13 instantly see what has been proposed so it can be much
14 more readily accepted, marked in an official way as in
15 effect or not, thereby I think eliminating a whole lot of
16 the waste of time and confusion really that a state with
17 254 counties with everybody doing their own thing and
18 supposedly having the local rule, Martha's memo says that
19 if the Supreme Court says, "No, we don't approve it" and
20 they keep doing it anyway, there's no recourse. Well,
21 that's insane, right? So if we have a page where the
22 local rule is valid only if it's on this page, the Supreme
23 Court disapproves it, it's off the page, it's void, it's
24 not a local rule. You can't order it to take effect.
25 It's not something that can be enforced. The integrity of

1 the rules I think requires a little more than what we have
2 right now, and this conversation strikes me as a very
3 helpful way of the Supreme Court articulating some
4 principles that will help achieve a much greater
5 uniformity alongside an appropriate and balanced level of
6 local experimentation variation, so I apologize for the
7 filibuster, but those are my thoughts.

8 CHAIRMAN BABCOCK: Okay. Judge Newell, do
9 you remember what you wanted to say?

10 HONORABLE DAVID NEWELL: I'm so much older
11 than I was. So I just wanted to say -- actually, not to
12 take away from those observations, I just wanted to offer
13 this observation. I'm listening to this, not to bring it
14 back to the criminal law aspect, but I can say, you know,
15 we're a busy court, and this is certainly a lot of hard
16 work, but we do enjoy or we do appreciate -- maybe "enjoy"
17 is too strong a word, but we do appreciate having some
18 input beforehand before these things become a conflict
19 because we can guarantee that if there's going to be a
20 conflict in a rule with a statute it's something that's
21 going to get litigated, and we would rather be on the
22 front end of that. So we do like having that process, and
23 so we would want to be -- have someone on Justice Bland's
24 committee if we could.

25 But that said, I also do empathize greatly

1 with the Supreme Court, because, you know, it's terribly
2 inefficient for Martha to have to go back and forth to
3 different local groups because we found something else,
4 you know, and so we're very cognizant of that every time
5 we have to go, "Well, you kind of missed this rule." You
6 know, it's not efficient, you know, so there's got to be
7 some way that we could streamline it. Maybe another
8 committee or subcommittee from this committee would be the
9 way to do it, but we're happy to -- if you need us to work
10 harder we're happy to chip in. We just want to be --
11 whatever you decide, we understand if you want to get out
12 of that biz then, you know, we understand, too, but we do
13 want to be part of the process.

14 CHAIRMAN BABCOCK: Okay. Kim, you had your
15 hand up a minute ago.

16 HONORABLE STEPHEN YELENOSKY: I thought I
17 was next, but go ahead.

18 CHAIRMAN BABCOCK: You were, but she's new.

19 HONORABLE STEPHEN YELENOSKY: Oh. The
20 privilege of being new.

21 MS. PHILLIPS: Yes. Just a couple of
22 observations. I'm thinking of myself as a customer of the
23 court, the courts are there to serve the people, the
24 consistency, a template, some baseline for what local
25 rules can and cannot be would be very helpful, because it

1 injects predictability for businesses. We know what to
2 expect. We know we don't have to hire local counsel, you
3 know, in every single county for every single case. Like
4 how do you simplify the process, make it predictable, well
5 known, and manageable for your -- I'm calling them
6 customers, right, because you think about people who can
7 then opt for arbitration, right.

8 The other thing I was thinking in terms of
9 bandwidth, I don't -- if the courts are allowed to propose
10 local rules just all year long or is there some way, some
11 time line, where we can set an expectation? If you have a
12 local rule, it must be submitted by this date and you can
13 submit local rules every other year. The courts shouldn't
14 be submitting local rules every other month or every six
15 months. They should have an understanding of what is
16 happening in their county and should be able to get
17 focused and submit a group of local rules, you know, every
18 other year, every three years, or just in some timeliness
19 with some manageability so the Supreme Court is not
20 overloaded, because I agree with Justice Bland that the
21 Supreme Court is probably the best place to have the
22 highest level perspective on what's happening across the
23 state locally, so we create parity and consistency across
24 the state.

25 CHAIRMAN BABCOCK: Okay. Great. Judge

1 Yelenosky, you were right. I jumped a couple of people
2 over you. Sorry.

3 HONORABLE STEPHEN YELENOSKY: No, you
4 didn't. No, you didn't. Pulling back for a minute, we
5 started with the suggested change to Texas Rule of Civil
6 Procedure 3a, and I don't think this conversation has
7 anything to do with that rule, and I don't think there
8 should be any change to the rule, and I hope you'll
9 welcome that because the rule as it states -- as it is
10 right now allows all of these great ideas to be
11 implemented by the Supreme Court should it wish to, and
12 any change to the rule would only limit the Supreme
13 Court's authority.

14 Now, whether the Supreme Court can delegate
15 authority to the State Bar or not is not the issue because
16 the Supreme Court can ask anybody they want for input; and
17 if they determine that that input, with some cursory
18 review is something they want to approve, the current rule
19 allows them to do that; and there are so many good ideas
20 here I don't think there's any way we could decide which
21 should be incorporated into a rule; and instead we ought
22 to suggest respectfully to the Supreme Court that it
23 consider these things and ask us to create committees or
24 whatever, but rather than focusing on the language of the
25 rule, which I think is adequate now, there obviously are

1 going to be -- whatever else is done, there's still going
2 to need to be some form of review, whether you say "modify
3 or contradict," we're all lawyers, we can all make an
4 argument that a local rule modifies or it contradicts. Is
5 a time period in the Rules of Civil Procedure -- can that
6 be shortened or lengthened? Well, it depends on whether
7 the point of the time period in the rule is to shorten or
8 lengthen. Is three days for the benefit of the party
9 receiving the notice so that four days is fine?

10 All of these things could be argued, so
11 certainly there's going to have to be some way of
12 reviewing this, but my point is that obviously the Supreme
13 Court -- I think these are great ideas. The Supreme Court
14 may want to hear them, but I'd suggest that it not result
15 in any real discussion of the language of the rule.

16 CHAIRMAN BABCOCK: Okay. Scott, and then
17 Judge Peeples, and then Kennon.

18 MR. STOLLEY: So hearing this discussion,
19 one of my concerns is that the Bland committee would end
20 up being a committee of one.

21 HONORABLE DAVID NEWELL: Two. Two. I'll be
22 on that.

23 HONORABLE STEPHEN YELENOSKY: And who would
24 that be?

25 MR. STOLLEY: No, but I believe that under

1 the State Bar Act the State Bar is considered an
2 administrative arm of the Court, and so I think the Court
3 could delegate a first level review to a State Bar
4 committee, and I think there's good precedent for doing
5 something like that because we've got some very good
6 pattern jury charge committees. I've been on some of
7 those committees, and I know some members here who have
8 been on those committees, and those committees work very
9 hard and very diligently to come up with great ideas. I
10 have every expectation that a similar committee at the
11 State Bar level for local rule first review would be just
12 as diligent, so that might be a good idea. One other
13 suggestion I would have about that, though, is to consider
14 how appointments to that committee would be made. You
15 might not want it to be solely in the hands of the State
16 Bar president.

17 CHAIRMAN BABCOCK: Justice Peeples, and then
18 Kennon, and then Judge Evans.

19 HONORABLE DAVID PEEPLES: I know we're going
20 to run out of time pretty soon. I want to be sure we've
21 got some take-aways where we can go back and talk about
22 all of this. I think we've got some good guidance on the
23 idea that there ought to be -- the Supreme Court ought to
24 be relieved in part of its review burden but still have
25 some control. I think there's consensus on that. How you

1 do it, of course, is in the details.

2 I think second there's consensus that there
3 ought to be access, transparency, that kind of thing. I
4 haven't heard anybody disagree that the Court of Criminal
5 Appeals on criminal rules ought to be in the -- in the
6 loop big time. The details of that I think we don't talk
7 about, but I haven't heard any disagreement; and if
8 anybody does disagree, I think you need to say it because
9 I think the Court needs to know that. And then fourth,
10 there's been talk of a template and guidelines. I think
11 baseline was mentioned, but I think I hear support for the
12 idea that it might be helpful for reviewers and for local
13 courts to know A, B, C, D, and E, those are good to have
14 in local rules and if you have that that's a good thing or
15 it's certainly okay. X, Y, and Z are forbidden, and you
16 need to know that, and I think that would advance the ball
17 both, as I said, for whoever reviews it and for the courts
18 that are doing this.

19 I tell you, I'm attracted to the idea of
20 bringing the lawyers outside this group in on the process,
21 the State Bar, for several reasons. Number one, they
22 would have expertise. You know, they wouldn't, you know,
23 have one trial and a few years out of law school. I
24 assume it would be people who really litigate, and I think
25 the -- I've served on a few committees and to serve and

1 then you come up with a report, and it gathers dust and
2 nothing ever happens, that chills your enthusiasm for ever
3 doing that again, but this would not gather dust. I mean,
4 I think to be big time on the initial decision, I think
5 people, as Richard said, would jump at the opportunity to
6 do it; and I think, you know, I'm glad Scott mentioned the
7 PJC.

8 I mean, the Supreme Court has not delegated
9 to this group anything. We do nothing unless the --
10 without the Supreme Court's approval, so I think that it
11 is not a problem with bringing the State Bar in. I think
12 it's a good point -- it's a good point to make that just
13 to turn it completely over to the president of the bar
14 might not be a good idea.

15 CHAIRMAN BABCOCK: Yeah, can I offer a
16 friendly amendment to what you just said? I think the
17 objection to the State Bar was not that they couldn't have
18 a role, but that they would have decision-making ability.

19 HONORABLE DAVID PEEPLES: Yeah.

20 CHAIRMAN BABCOCK: And I agree with whoever
21 said, you know, they're not --

22 HONORABLE DAVID PEEPLES: Yeah.

23 CHAIRMAN BABCOCK: -- elected officials.

24 HONORABLE DAVID PEEPLES: I'm not for them
25 having veto power or, yeah, "We approve and therefore it's

1 approved."

2 CHAIRMAN BABCOCK: Yeah.

3 HONORABLE DAVID PEEPLES: But to have that
4 vetting process I think would mean a lot to whoever is at
5 the next level.

6 CHAIRMAN BABCOCK: Sure.

7 HONORABLE DAVID PEEPLES: And just one final
8 point and then I'll stop. The Rules of Procedure don't
9 cover everything. There's a lot left to courts'
10 discretion and when a court is in effect saying, "I've got
11 this discretion but I'm willing to put in some local rules
12 how I'm going to exercise it," trial settings, a bunch of
13 things. You know, can you bring a child witness at 9:00
14 o'clock in the morning. I might not even want to hear
15 from that witness and you've taken them out of school.
16 Don't do that. Things like that. It's a good thing to
17 know the thinking of judges in writing posted rather than
18 it's all in the judge's head. So local rules are a good
19 thing if it's done right.

20 CHAIRMAN BABCOCK: Kennon.

21 MS. WOOTEN: Just a couple of quick points.
22 In regard to the template concept, I like it if it's
23 something that can be done. I would hesitate to try to do
24 everything in these templates because I think that could
25 really slow down the process, but I think having a

1 starting point of what shouldn't be in local rules or what
2 cannot be in local rules and what can be in local rules is
3 a good idea. I think, though, that the devil is in the
4 details there because there are a lot of local rules
5 already in place, so are you going to grandfather what's
6 in the rules now, or are you going to mandate that every
7 submission that comes to the Court be reviewed
8 comprehensively, not just with an emphasis on proposed
9 amendments. So that could get complicated, and just
10 something I think to think about is where we are now and
11 what we have to deal with in terms of what's already on
12 the books.

13 In regard to posting the rules online, just
14 so that it's in the record, the State Bar of Texas court
15 rules committee went through a very extensive process of
16 going to all of the courts throughout the state of Texas
17 to get their local rules with the goal being that this
18 package would be submitted to the Court and in conjunction
19 with the Office of Court Administration all of those local
20 rules would be online because the courts throughout the
21 state have different practices in regard to providing
22 local rules. At the time some were charging for local
23 rules. At the time some would mail them in snail mail so
24 somebody who needed to know what's on page two of the
25 local rules wouldn't know until several days later,

1 perhaps too late to be helpful.

2 So that effort was undertaken, and long
3 story short, it took a long time, and courts were not
4 always responsive to the requests to provide local rules.
5 Ultimately the State Bar court rules committee gave all of
6 these local rules over, and there were concerted efforts
7 by both the Court and the Office of Court Administration
8 to put them online and then there was time, and time
9 resulted in amendments to the local rules that we had
10 collected, and there isn't a desire to put online outdated
11 local rules. So it gets thorny quickly, and at the end of
12 the day, I think what was done is on the Texas Supreme
13 Court's website there are links to the counties or courts'
14 websites so that people can more readily access those
15 websites. However, not all of those websites contain
16 local rules. And even if all of those websites contain
17 the local rules, we have to contend with the reality that
18 not all people have access to the internet still, even
19 though we think it's the answer, there are several pro se
20 individuals, who just -- and not just pro se individuals.
21 There are just many people who don't have that access, so
22 we would need I believe to have not only online posting,
23 which is essential, but perhaps another requirement for
24 making these rules available upon request that is more
25 uniform and efficient. So that's all I'll say about that

1 for now.

2 CHAIRMAN BABCOCK: Martha.

3 MS. NEWTON: Well, I just wanted to add
4 since I worked with Kennon and Shanna on that project kind
5 of two complications that we ran into that -- just so it's
6 on the record and the committee knows. So one is that
7 it's very difficult to get a complete set of the current
8 local rules of any particular court or county because
9 sometimes -- or frequently they don't send us an entire
10 new set. They say, "Here's our amendment to," you know,
11 "Rule 7, local Rule 7, 14 and 28," and so then we issue an
12 order that approves local Rule 7, 14, and 28, kind of
13 without regard to the whole set. So getting a complete
14 set was difficult, and so then we thought, well, we can
15 link to the websites, but we also found that some lower
16 courts didn't have websites. I think eventually that will
17 be remedied. Or you had to, you know, go through a bunch
18 of links to find them and then they might be moved, and so
19 we did work on that diligently but ran into some
20 complications.

21 CHAIRMAN BABCOCK: Judge Evans.

22 HONORABLE DAVID EVANS: I just went through
23 the process of having local rules approved by -- and
24 reviewed by Jackie. I want to tell you that it was a
25 great experience. I went through the drafts last night.

1 I think we had over seven redlined versions back and
2 forth. I was most impressed with the discipline that was
3 shown. The review was not whether it was good policy or
4 not, but whether or not the rules conflicted with the
5 Rules of Civil Procedure, administrative orders, or the
6 law of the state of Texas. Local rules, when adopted,
7 generally they have a life of over two decades. They are
8 generally the product, a consensus of a group of judges
9 sitting down and hammering out docket issues and case
10 loads and how to handle them in their area, with the
11 exception of a single district general jurisdiction court
12 and extremely rural area.

13 This one that we just did was Wichita Falls.
14 Jackie, maybe with the same experience level you might
15 have had, had never heard of a docket call. Wichita Falls
16 still has a monthly docket call where the lawyers come and
17 all of the judges are present and the case orders for the
18 next two to three weeks are set up and decided. She was
19 great. I mean, we went through it. We needed courtesy
20 copies. She pointed out we had e-mail rules. All of that
21 language worked out. I hope I haven't tainted the vote
22 that's going to go before the Court at this point, Jackie,
23 but I am lobbying hard as much as we worked on it with
24 Wichita County. I would expect those rules to be in place
25 for 20 years. I don't think they're going to change. I

1 think they'll be published.

2 What I would be concerned about a State Bar
3 committee doing is not having the discipline that the
4 rules attorneys have had and that that is not a
5 policy-making issue of whether this is a good local rule
6 or a bad local rule. Now, to give comfort to -- and I did
7 practice law, and I do vaguely remember it, hidden in the
8 memory of 20 years in front of the mast, but local rules
9 are the product of consensus of the judges who then go to
10 the local bar and say, "Here's our local rules. What's
11 your input here?" It may not handle Shell's problem, but
12 I think you're probably going to need a guide dog wherever
13 you go as Shell, and I wouldn't want to ruin anybody local
14 counsel being hired, but you certainly need to know how to
15 interpret the local judge. But that's my point, is that
16 if you're going to have a review committee, that's a
17 limited review. You're not making policy. I don't think
18 the -- I think the presiding judges have the same staff
19 issues that you do.

20 Scott, you are so right. The State Bar has
21 done great work, and there's no doubt about it, but I
22 don't think this is a State Bar function. I think this is
23 one where it needs practitioners who are used to writing
24 Rules of Civil Procedure familiar with the structure of
25 the Rules of Civil Procedure and members of the judiciary

1 that can pick through.

2 Now, decorum and attire, I am personally a
3 great fan of the local rules is less is better.
4 Unfortunately, I will say I didn't -- the local rules I've
5 approved as presiding judge have been more and more and
6 more, but they don't conflict with the Rules of Civil
7 Procedure, and that's how those judges want to do it. I
8 think the template would point out that you could probably
9 reduce many of these things to very simple statements and
10 that these would be model rules. I mean, how many times
11 do you need to describe attire for a court? And if you
12 want to compare all of those, you can't make any sense out
13 of my district. I think you have to change clothes
14 somewhere outside of Wichita Falls when you go into
15 Montague. I mean, it's just that way.

16 So those are my comments, and as you know I
17 wasn't here for part of the discussion, but that's never
18 bothered me not to be present when it was discussed. All
19 right.

20 CHAIRMAN BABCOCK: Thank you, Judge. Skip,
21 and then Tom, and then we'll take our break.

22 MR. WATSON: Well, just I think it's obvious
23 that the rules attorneys need help. I think the question
24 is what kind. I don't care if it's a State Bar committee
25 or if it's an -- I think this Court could appoint a

1 committee to designate people to -- for them to call or
2 even -- because I tend to think less is more, and it's
3 usually one or two people on the committee that do the
4 work. I think they ought to have the authority to call
5 designated attorneys around who just know what's going on,
6 whether they're criminal or civil or whatever and say in
7 confidence what -- how does this work, you know, in your
8 area, and I would encourage you to do that, but one of
9 those three grades I think is what we need, if it's not
10 going to be more and more rules attorney, which may or may
11 not happen with the Legislature.

12 The other problem that we really haven't hit
13 on much but that bothers me is that the idea of still
14 being blindsided and how do you enforce it. I mean, you
15 know what happens when you go to judge X in, you know,
16 Lazbuddie and say, "I'm sorry, but that's unenforceable."
17 It's going to be a bad day for the rest of the trial and
18 for your client, and you're not going to get anybody's
19 attention with a mandamus, and plus that's really going to
20 be a bad day for the client back in that court. I just --
21 I just wonder if there might be a way or maybe it already
22 is to just say blanket these -- no local rules are
23 enforceable unless published on a central website that
24 contains all the rules, that if they're not there, if the
25 amendments aren't there, they don't exist. You know, and,

1 sure, that's not going to solve all of the problems, but
2 it would help. There would be one place to go to.

3 CHAIRMAN BABCOCK: And Tom -- Tom, you had
4 your hand up, correct?

5 MR. RINEY: Yes. Whichever direction we
6 decide to go I think it would simplify the job if we did
7 break it down along the lines of what Buddy suggested. A
8 lot of these rules of decorum, I mean, I understand there
9 can occasionally be a problem, but it's usually not that
10 serious; and, I mean, the Supreme Court really doesn't
11 need to be delving into that. If we take a look at the
12 federal courts, for example, the Northern District of
13 Texas has its local rules but then it has what it calls
14 "judge-specific requirements," and that's a lot more about
15 decorum and how many copies you need to bring and so it's
16 pretty easy to figure out, okay, here's what the local
17 rules are for the entire district, here's some
18 judge-specific requirements. So I think that's something
19 to make -- might help simplify the process.

20 Also, I think you have to deal with standing
21 orders. I mean, the idea of a standing order being
22 published or being pasted on a courthouse -- a courtroom
23 door, that's just crazy. I mean, how many cases -- we
24 many times have cases we never walk into the courthouse on
25 that case until trial, because judges don't want to have

1 hearings. They want to do it by submission, do everything
2 by e-mail, by conference calls and so forth, and that is
3 not notice to have something posted on a courtroom door,
4 and it's archaic.

5 Finally, you've got to figure out a way to
6 deal with the enforcement of secret rules, and there are.
7 Those are the rules you find out from the court
8 coordinator when you're getting ready to do something,
9 "Well, you can't do that because that's not the way he
10 does it" or "she does it." And it's not published. The
11 Supreme Court can't disapprove it because it's never been
12 submitted to anybody. So there needs to be -- that needs
13 to be addressed, too, and the number one goal has got to
14 be what Peter said, and that is notice. The lawyer has to
15 be able to figure out a way to know what the rules are,
16 and it has to be easily accessible. I understand some of
17 the logistical requirements, websites, but that's got to
18 be a goal and particularly if it deals with time limits.
19 Because, you know, we've got Rules of Civil Procedure. I
20 understand there may be good reasons to modify them in
21 certain circumstances, but any type of standing deviation
22 of time limits from the Texas Rules of Civil Procedure is
23 just an invitation for disaster for the lawyer.

24 CHAIRMAN BABCOCK: Thanks, Tom. Okay.
25 Well, thanks for all the hard work that the subcommittee

1 did, and keep working because we'll bring it back on our
2 September agenda and finish this off, and now we'll be in
3 recess for 15 minutes. Bill, that means we'll be back
4 around 11:15.

5 (Recess from 10:54 a.m. to 11:12 a.m.)

6 CHAIRMAN BABCOCK: All right. We're back on
7 the record, and we're now talking about procedural rules
8 in suits affecting the parent-child relationship, and Pam
9 is going to lead us through that, and, Bill, are you on
10 the phone?

11 PROFESSOR DORSANEO: I certainly am.

12 CHAIRMAN BABCOCK: All right, great.

13 MS. BARON: Excellent.

14 CHAIRMAN BABCOCK: We can hear you. Thank
15 you. Okay. Pam, take it away.

16 MS. BARON: All right. Well, House Bill 7
17 passed a bunch of stuff, and included in that was a
18 direction to the Supreme Court to consider certain rules
19 in certain areas and pertinent to the appellate rules.
20 One was whether there was a conflict between a filing of a
21 motion for new trial and the filing of the appeal itself,
22 and also the period including the extension of at least 20
23 days for a court reporter to submit the reporter's record.
24 The Supreme Court referred that to a task force on House
25 Bill 7. The task force made its recommendations and then

1 the Court asked us to review and make a recommendation as
2 to those recommendations, and just to kind of give you a
3 little bit of background, let me explain what the current
4 rules are.

5 Right now in a parental termination case,
6 what happens is the trial court enters final judgment, a
7 notice of appeal is filed. The filing of the notice of
8 appeal triggers a lot of deadlines in the court of
9 appeals. From that date the court reporter has 10 days to
10 file the reporter's record, and the clerk has 10 days to
11 file the clerk's record, which we're not addressing today.
12 Then from the filing of the record there's 20 days for
13 appellant to file his brief, 20 days for appellee to file
14 his brief, but the really critical number is that by
15 Judicial Rule of Administration the court of appeals has
16 180 days to reach a final decision in the case. What
17 we've seen is that court reporters are complaining that 10
18 days is problematic as a time to get the records done. We
19 are -- that doesn't apply just in parental termination
20 cases. It applies in all accelerated appeals.

21 We are seeing a general increase. Every
22 time the Legislature meets there's going to be another
23 accelerated appeal of some sort created. Some of those
24 are done on the pleadings. They don't necessarily involve
25 reporter's record, but there has been a big burden on the

1 reporters who have trouble convincing the court to relieve
2 them of their daily duties so that they can get these
3 records accomplished. In some counties they're required
4 to pay out of their own pocket for a substitute so that
5 they can meet the deadlines. The way the deadline works
6 right now, though, is the court of appeals can grant up to
7 three 10-day extensions, and it can grant further time in
8 extraordinary circumstances.

9 One of the things that the court reporters
10 are complaining about is they didn't know that the
11 timing -- time deadline had been triggered because they
12 weren't getting notice of the filing of the notice of
13 appeal, so by the time you find out that an appeal has
14 been filed, it's already -- the record is already due, and
15 the burden is on the court reporters in these cases to
16 request and obtain extensions from the court of appeals.

17 The task force made a couple of
18 recommendations. First on the issue that we're not
19 addressing today, which Richard was on that task force, so
20 he can correct me if I'm wrong, on the conflict between
21 motions for new trial and taking an appeal, the task force
22 concluded there was no direct conflict, but they asked the
23 Court if they could have leeway to look at maybe tweaking
24 that a bit to make them at least a little bit -- sync a
25 little bit better. Is that right, Richard?

1 MR. ORSINGER: Just briefly on that, the
2 task force focused on the question of whether we should
3 shorten the deadline for motion for new trial in these
4 termination appeals and concluded that that would be
5 counter-productive. What we want to do is encourage the
6 district judge to consider the motion for new trial in a
7 timely way, but often the appellate lawyer is coming in
8 with no knowledge of what happened in the trial, motion
9 for new trial is not due for 30 days, but the briefs may
10 be due in some situations before there's familiarity with
11 the case. So we decided to abandon any idea of shortening
12 the deadline, so that's kind of what happened with that
13 motion for new trial issue.

14 MS. BARON: Okay. All right. But that's
15 not on the table today --

16 MR. ORSINGER: No.

17 MS. BARON: -- is my understanding. Okay.
18 So the task force made two recommendations of changes to
19 the appellate rules to address the problems that the court
20 reporters are facing. The first was to require the party
21 taking the appeal to serve the notice of appeal on the
22 court reporter and also to require the clerk of the court
23 to promptly inform the trial judge that an appeal has been
24 filed, which would also help get notice more promptly to
25 the court reporter, and the task force unanimously

1 approved those changes. They also then turned to whether
2 or not to expand the time for filing the record in
3 parental termination cases from 10 days to 15 days, and
4 they did approve that.

5 My recollection is the vote was something
6 like 11 to 2, with one abstaining, and then I think this
7 was Kennon or Lisa. Lisa. There was a concern raised
8 about why are we taking the most important appeals and
9 making them longer while letting these other accelerated
10 appeals remain on a shortened deadline, and so the
11 committee took another vote, and they did vote -- the task
12 force took another vote, and they voted to expand the time
13 for filing the record not just in parental termination
14 cases, but in all accelerated appeals from 10 days to 15
15 days. The advantage of this is that it does relieve some
16 pressure on the court reporter to request an extension,
17 and it gives the court reporter two weekend periods to get
18 the records done.

19 Our committee -- our subcommittee met by
20 phone. Everybody participated 100 percent, which was
21 nice. Richard Orsinger was on the call as a resource. We
22 had a great discussion, and our results on our vote was
23 our subcommittee unanimously approved the suggested
24 changes that would require serving of the notice of appeal
25 on the court reporter and requiring the clerk to promptly

1 inform the trial court of the filing of the notice of
2 appeal. One subcommittee member near and dear to my
3 heart, me, was a little concerned that there was nothing
4 specified in the rule about what are the consequences if
5 you fail to serve the notice on the court reporter. Some
6 courts of appeals are known to be a little overzealous on
7 some of these requirements, so at my suggestion -- and
8 Frank Gilstrap provided the language I think -- was to add
9 a comment that basically said the purpose of this change
10 is really administrative. It's not affecting the
11 jurisdiction of the court of appeals, so the court of
12 appeals wouldn't dismiss an appeal if you failed to
13 provide adequate service in that case.

14 We then turned to whether or not to expand
15 the time for filing the record from 10 days to 15 days,
16 and there we were less unanimous. We have two appellate
17 court justices on our subcommittee who were concerned
18 about giving up any of the 180 days to decide the case
19 because now given that parties do tend to ask for
20 extensions on briefs, the court reporters do ask for
21 extensions on the record, that the time from submission to
22 decision is very short, and you do have to read the
23 record, write the opinion, get it out with the approval of
24 your panel. So we're facing two different groups, one
25 wants more time, one is under a constraint of time, and

1 how to balance that is a difficult decision; and so our
2 subcommittee didn't completely agree on how that should be
3 resolved; and the vote initially was 6 to 3 not to expand
4 the time from 10 to 15 days. Many members of the
5 committee believe that by changing the requirement that
6 the notice of appeal also be served on the court reporter,
7 court reporters will be getting earlier notice of the need
8 to prepare the record so they were de facto getting some
9 kind of extension already.

10 And then that vote ended up being 6 to 3,
11 and it was later changed -- one vote changed, so we split
12 7 to 2, disapproving the expansion of the time from 10 to
13 15 days. We did take an alternative vote in the event
14 that the Court wanted to -- disagreed with that, so that,
15 if, in fact, the time were expanded for parental
16 termination cases, the Lisa question of whether it should
17 be expanded to all interlocutory appeals or accelerated
18 appeals, and there, again, we voted 6 to 3, but this time
19 in favor of uniform treatment of interlocutory appeals
20 when it comes to the record. After we met Justice Busby
21 asked the clerk of his court to prepare some statistics,
22 which we've attached to the report that gives a sense of
23 how long it's taking to file records in parental
24 termination record cases, at least in that one court of
25 appeals. The average time was I think 25 days from the

1 filing of the notice of appeal, and I think his belief was
2 the -- at least in his court extensions were granted when
3 requested. There hasn't been a problem, the records are
4 getting filed.

5 I would just note I was one of the
6 dissenters on the 7 to 2 vote, is that 25 days as an
7 average puts the burden on the court reporter to come in
8 and ask for two extensions to get to 25 days, because they
9 have 10. The court can grant them 10 at a time, so
10 they're going to have to get two extensions, and that
11 burden is on them. They don't get the second weekend
12 automatically to prepare the record, so that was my
13 thinking on that. So I guess what we need to do today is
14 examine whether we're happy with the changes to how notice
15 of appeal is given both by the party and through the clerk
16 and then, second, to determine whether the time should be
17 expanded in parental termination cases and alternatively
18 whether the time should be expanded in all interlocutory
19 appeals.

20 CHAIRMAN BABCOCK: Okay, great.

21 MS. BARON: Bill, do you have anything you
22 want to add to that?

23 PROFESSOR DORSANEO: Well, on the 180-day
24 requirement, that's not just for parental termination
25 cases, right? That's a general administrative rule?

1 MS. HOBBS: No. It's a -- this is Lisa
2 Hobbs. It's a Family Code provision that's specific to
3 termination cases.

4 MS. BARON: Is it statutory?

5 MS. HOBBS: It's statutory.

6 MS. BARON: I thought it was in the Rule of
7 Judicial Administration. I thought it was 4.2 of -- or
8 6.2 of the Rules of Judicial Administration. Is it also
9 statutory?

10 MS. HOBBS: I think it's -- I'll look it up
11 while y'all continue talking about it.

12 MR. ORSINGER: We checked into this very
13 question, and I talked to Dean Rucker, Judge Dean Rucker,
14 who is the head of the task force, and he said that it's
15 just the administrative order requirement, because I had a
16 vague recollection that there may have been a legislative
17 deadline set, too, but he said the deadline that we're
18 operating with now was imposed by administrative rule.

19 CHAIRMAN BABCOCK: Chief Justice Hecht.

20 CHIEF JUSTICE HECHT: Just two other things
21 for background. One, there are a lot of these cases, and
22 so we have changed our procedure internally at the Supreme
23 Court for handling them, and we made the change October
24 1st, and through the end of June we had 140 petitions in
25 parental rights termination cases. They weren't -- some

1 of them are multiple petitions in the same case, so there
2 weren't 140 cases, but a lot of times it was only one
3 petition. So there are a lot of cases, and they are not
4 spread around the state evenly. A lot of them come out of
5 the Fourth Court. I don't know why.

6 MR. ORSINGER: We've been trying to figure
7 that out for six months and can't figure it out.

8 CHIEF JUSTICE HECHT: Yeah.

9 MR. ORSINGER: It may not relate to
10 demographics.

11 CHIEF JUSTICE HECHT: Yeah.

12 MR. ORSINGER: We examined that, and I don't
13 think there's any correlation, but it may relate to local
14 policies about settlement postures, about mediation, about
15 who the mediators are, so I don't know how we're going to
16 explore that, but I'm -- Justice Hecht, I'm more inclined
17 to think that it has to do with the practices that vary
18 from district to district than it does to do with the
19 population or the closeness to the border.

20 CHIEF JUSTICE HECHT: The second thing is
21 that these cases are usually not well-lawyered. Sometimes
22 that's just a problem between the appointed trial counsel
23 handing off the case to the appointed appellate counsel,
24 and there are lots of missteps when that happens, but even
25 so a lot of times counsel are appointed in these --

1 counsel for the parents are appointed in these cases, and
2 so there's a real problem with meeting deadlines because
3 they're not attended to as carefully as they might be in
4 other cases.

5 CHAIRMAN BABCOCK: Okay. Other comments?
6 Richard.

7 MR. ORSINGER: Okay, so one of the things I
8 think to remember about this deadline for the record is
9 that there's no movement to extend the deadline for the
10 clerk, so that's fine. If you do, fine. No one is
11 advocating that, but the court reporters have a unique
12 position that so far as I can tell they're the only public
13 official that has to absorb governmental costs out of
14 their own personal pocket, and the reason I say that, if
15 these appeals are all at no charge to the appealing party,
16 and the court reporters are required to prepare the
17 record, and David Jackson did a survey, which I hope he'll
18 speak to in a minute. It's fairly comprehensive, not
19 completely uniform, but it was obvious to me that there
20 are many counties in this state that do not reimburse the
21 court reporter for the time spent or costs associated with
22 preparing a free record, and there are two costs that have
23 been identified to me. One is to pay the scopist to help
24 to prepare the record itself, and the other one is if the
25 district judge or the trial court insists on conducting

1 business with the court reporter while the court
2 reporter's record is due, the court reporter has to pay
3 for a substitute court reporter to come in to record daily
4 business while they do the free work on the record, and
5 some of the counties reimburse that cost of the
6 personal -- the official court reporter paying another
7 court reporter, some counties don't. I don't think that's
8 fair to make a government employee have to fund a state
9 cost like that, so I'm very sympathetic.

10 Now, what difference does five days make?
11 Well, according to what I understand it makes a huge
12 difference because if you add -- if you move the deadline
13 from 10 days to 15 days the court reporters have two
14 weekends in there that they can work where they don't have
15 to be in the courtroom for the daily business, and that
16 reduces the necessity that they have to hire somebody to
17 substitute. Now, Justice Busby's view is, well, they
18 don't need the extra five days because we give them 10
19 days plus 10 days, and that may be true. I don't know.
20 He's gathered some statistics for his appellate district,
21 and they do appear to be that they liberally grant those
22 extensions; however, it seems to me the court reporters
23 are very concerned about the fact that they don't have an
24 entitlement to that extra time, and so it's a factor that
25 I think we should consider.

1 Secondly, this record and the quick
2 preparation of the reporter's record is important because
3 it appears more often than you might think that one of the
4 appellate points should be ineffective assistance of
5 counsel, and sometimes you can't tell -- or most of the
6 time if your appellate lawyer is coming in you won't have
7 any idea that there was ineffective assistance until you
8 see the reporter's record, but even worse than that,
9 sometimes the ineffective assistance is the failure to
10 interview witnesses or the failure to call witnesses,
11 which isn't even going to be apparent from the reporter's
12 record, which is going to get us eventually into a
13 discussion about the new trial deadline.

14 So at any rate, the task force perspective
15 on it was that this short amount of time isn't going to
16 add much to the appeal. It isn't going to take much away
17 from the court of appeal's ultimate deadline, and it would
18 make an important relief to the court reporter. Now, a
19 counter-argument, which I heard in Pam's subcommittee is,
20 well, we're making some changes. We're -- now we're
21 requiring that the court reporters get immediate notice of
22 the appeal. Before there was not even a requirement, and
23 sometimes they didn't know for two or three days unless
24 somebody bothered to tell them that there was a duty on
25 them to prepare the record. So that -- that may make a

1 difference that we're going to give them directly --
2 direct notice, and that may cure the problem, so I think
3 some of the discussion on Pam's subcommittee was we're
4 making some other changes here, let's see if they solve
5 the problem and then we don't have to add the extra five
6 days. I think the extra five days is important to the
7 court reporters and is worth paying attention to.

8 CHAIRMAN BABCOCK: Thank you. Anybody else?
9 David Jackson.

10 MR. JACKSON: Well, I didn't think we were
11 going to talk about 145 today, so I didn't get all of that
12 stuff out, but the notice directly to the court reporter
13 is a really big issue because there have been many
14 instances where the clerk dropped the ball, the court
15 reporter found out after their time was up that they were
16 supposed to have been preparing the record. So the direct
17 notice issued to the court reporter who actually took the
18 hearing is very important. If we could set up a procedure
19 where that actually happens, that can get the reporter to
20 work very fast.

21 The other issue is the length of the
22 hearing. You know, if you're talking about a one-day
23 hearing, which is about 200 pages, 250 pages, that can be
24 done in 10 days. That's not a problem, but if you have a
25 five-day hearing, that's a thousand pages, and you're

1 asking one court reporter to turn out a thousand pages for
2 a five-day hearing in 10 days and the other court reporter
3 to turn out 250 pages in 10 days. We need to work out
4 some resolution to the length of the trial. If a trial
5 goes beyond a certain number of days the court reporter
6 obviously needs more time.

7 CHAIRMAN BABCOCK: Who had their hand up
8 here? Yeah, Richard, and then Judge Bland.

9 MR. MUNZINGER: How do you serve a court
10 reporter?

11 CHAIRMAN BABCOCK: Say that again.

12 MR. MUNZINGER: How do you serve the court
13 reporter? His comment, the court reporter who actually
14 took the record. The court reporter could be assigned to
15 the court, could be sick, so you get a pool reporter from
16 the county or borrowed reporter from another court, or the
17 person is a privately employed court reporter working by a
18 contract with the county. How do you serve the court
19 reporter? I don't know how you serve a court reporter.

20 CHAIRMAN BABCOCK: Justice Bland.

21 HONORABLE JANE BLAND: Two comments. One,
22 the idea of serving the court reporter is an excellent
23 idea because it's just one more check on making sure that
24 the wheels get in motion for preparing the appeal. We had
25 a court reporter in Harris County -- not a court reporter,

1 a clerk in Harris County that, you know, through some
2 filing glitch didn't get four notices of appeal in
3 parental termination cases to surface, and a couple in our
4 court, a couple in the Fourteenth Court; and so it took a
5 while for that error to be detected and then, you know, a
6 month or more had gone by. So if the court reporter is
7 also served that's just one more person educated in the
8 fact that there's an appeal pending, so it's a great idea.

9 As far as the extension of time to file the
10 record in accelerated appeals, the reality is that the
11 deadlines for filing the reporter's record are ideals. We
12 ask the court reporters to comply with these records -- I
13 mean, with these deadlines, but our enforcement
14 capabilities are very limited, and because we have to
15 expend a lot of resources in enforcing those -- those
16 deadlines or potentially abate the case to the trial judge
17 to have the court reporter show cause why the record
18 hasn't been filed, thus, you know, making the appeal
19 further delayed. You know, it's kind of a tool that's
20 just rarely used. So the idea behind the 10 days is to
21 get the court reporter to put this at the top of the pile
22 of his or her work, and it's just like the 180-day time
23 frame for deciding these cases.

24 These cases, we need to signal that they are
25 a priority and that you've got to get on them, and so I am

1 not in favor of extending the deadline, even a five-day
2 deadline, because I cannot tell you the number of cases
3 that we are getting full briefing and the record 10 days,
4 5 days before the 180-day deadline. So we are writing the
5 opinion in five days, so -- which is not ideal, and for us
6 the 180-day deadline is also an ideal. We work hard to
7 comply with it. If we have to modify the opinion on
8 rehearing in any way, we almost -- we kill it, and so, you
9 know, so we're always balancing that. Change the opinion,
10 kill the 180-day deadline, and so it's just a mindfulness
11 technique more than it is something with real teeth in it,
12 but if we -- if we drag it out further it's just going to
13 mean that those extensions are going to bump out further,
14 that the briefing is going to bump out further, the
15 submission date is going to bump out further, but the
16 180-day deadline will still be there. So I'm not in favor
17 of extending that time for the reporter's record, and I
18 don't know if Judge Brown --

19 HONORABLE HARVEY BROWN: Yeah, agreed.

20 CHAIRMAN BABCOCK: Okay. Judge Estevez.

21 HONORABLE ANA ESTEVEZ: Okay, so that's the
22 appellate side. The district court side, which sees the
23 court reporter and sees the stress and sees how impossible
24 it is for them to make every single deadline, especially
25 when you're a working court; and if you do have general

1 jurisdiction, you're working in a capital murder, you've
2 already asked for two or three extensions, you've just
3 finished another trial that somebody got a huge sentence
4 for, and every criminal case gets an appeal. So every
5 time I try a criminal case my court reporter has more
6 stress and more stress and more stress, so when I have a
7 termination case, well, then all of the sudden it's
8 explosion time emotionally for the court reporter, and it
9 is. I mean, court reporters really have true meltdowns
10 quite a bit when they're in a working court that has the
11 right to appeal at all times. A family law court on
12 termination issues, I mean, mostly it's going to be
13 criminal -- if you have criminal jurisdiction and family
14 law jurisdiction at the same time then the court reporters
15 are working maybe five times more than a civil court, and
16 so this is extremely important for them to, number one,
17 get the service. I think that would be great. It happens
18 in criminal cases, too. They don't even know that they
19 have been served, and they've missed their deadline, and
20 they're starting off with they just asked for an extension
21 in three other cases and now they have to ask for an
22 extension of a case they didn't even know appealed.

23 So service, I just emphasize that that's
24 going to -- that will at least help them decide which
25 stress level they're going to go -- or what they have to

1 do first, and obviously the termination is going to take
2 precedence over everything. And I would just say I think
3 if you give them an extension I don't know that it's
4 extremely meaningful because the difference between 10
5 days and 15 days, they're going to probably need another
6 extension if they needed the first one, but I think that
7 it's showing them that you care enough to try to, you
8 know, manage your stress and manage their ability to get
9 these cases out, and the sooner you serve them -- that's
10 where you're really giving them time, because if they
11 didn't find out about it until five days have already
12 passed then they really only had five days to file that
13 record.

14 So in essence if you can get them service --
15 and I think you can do it. I think that, you know, I got
16 served with a mandamus electronically that's already come
17 back down, you know, so if it's -- all of them are
18 e-filing, right? They have to. So they're in the system,
19 so that notice can be an e-file notice to them the same
20 way that everything else happens, so I don't think -- I
21 mean, they shouldn't be doing a record unless they can
22 file it with a court of appeals, and they can't file it
23 with the court of appeals unless they're e-filing, so
24 notice is not an issue. The biggest issue is which court
25 reporter did it, which should be on a docket entry.

1 CHAIRMAN BABCOCK: Yeah. Yeah. Munzinger
2 doesn't have a computer, so that's why he's --

3 HONORABLE ANA ESTEVEZ: But now with all of
4 the other requirements you have for the court reporters,
5 that notice isn't going to be an issue because there's no
6 way they could even file a record if they weren't on.

7 CHAIRMAN BABCOCK: Yep, got it. Thank you.
8 Other comments? Yeah. Justice Gray.

9 HONORABLE TOM GRAY: As far as the draft of
10 28.4 -- and I'll start with the service requirement. I
11 don't know that "served" is the right term. I just think
12 they need to be provided a copy at the same time. I would
13 like one, too, at the court of appeals because we have --
14 well, first of all, we have the worst record in the state
15 on getting these done by 180 days, and we've attempted to
16 address that, and one of the first things that we're now
17 doing is sending a letter back to the trial court, the
18 court reporter, and the court clerk, and the attorneys of
19 how serious this matter is and how quickly they need to
20 get on it. So we need that notice.

21 Yes, the rules currently require the clerk
22 to immediately send us notice when the notice of appeal
23 has been filed, but frequently that is -- can easily be a
24 week or two, 10 days later. We recently had one where the
25 district clerk did exactly what the appellate lawyer said

1 to do, and that was to send the notice of appeal -- they
2 wanted to appeal it to one of the Houston courts, and so
3 the notice of appeal was sent to the Houston court. Well,
4 you know, it's two weeks now into the appeal before we
5 even know it's going on, and the reporter didn't know who
6 to ask an extension for, the Houston court or us. We
7 didn't know about it yet, and so if they would send us a
8 copy as part of the notice of appeal process under 28.4,
9 that would be great, too.

10 CHAIRMAN BABCOCK: Just curious, but how did
11 it get to the Houston court when it should have gone to
12 yours?

13 HONORABLE TOM GRAY: They specify in the
14 notice of appeal which court the appeal will go to, and
15 they said the Houston court of appeals.

16 MR. ORSINGER: Brazos County has their
17 option.

18 HONORABLE TOM GRAY: Used to. Used to.
19 They don't anymore. They can't go south anymore.

20 MR. ORSINGER: They actually have the right
21 to choose where they want to appeal, but that's unique in
22 Texas.

23 HONORABLE TOM GRAY: There are some counties
24 that still have that over in East Texas where they're
25 overlapping, but I think that's only in criminal cases,

1 but --

2 CHAIRMAN BABCOCK: We're speculating about
3 whether there are any other counties like that left.

4 HONORABLE TOM GRAY: There -- there is one I
5 know with regard to -- there's three or four in Texarkana
6 or Tyler, like Gregg County, and there's about three
7 counties right there along the Longview, north of Smith
8 County, that can go either way and then there's one county
9 that can go to six or five, to Texarkana or Dallas, and
10 so, yes, there's some overlapping counties out there
11 besides the Houston courts, but it just got sent, and we
12 didn't know that it was pending, and so we would like a
13 copy of it.

14 I would like to see a formalized procedure
15 for the -- both the clerks and the reporters to request
16 the extension. I don't care if it's by letter or by
17 motion. I would prefer it be by motion, but there -- the
18 rules do not currently contemplate them requesting an
19 extension except in this context now.

20 I understand very much Judge Estevez'
21 perspective from the reporter's perspective as well as
22 Justice Bland's from the appellate courts. I don't think
23 it matters because we don't have a whole lot of teeth to
24 require that record to be done that's not going to
25 ultimately be a delay, whether we abate it, have a show

1 cause hearing, or whatever. All of that's going to cause
2 delay, and ours is mostly encouragement to get it done as
3 soon as possible.

4 With regard to the specific language in the
5 rule on 28.4(b)(2), the title is "Clerk's duties." That
6 does need to say "Trial court clerk's duties" because
7 we're in the appellate procedures, and that will clarify
8 that it's not the appellate court clerk's duties.

9 The only other thing, I will address Richard
10 Orsinger's potential of where all of these cases may come
11 from and why they come from different parts of the state.
12 My observation from the Waco court of appeals when the
13 Legislature turned to that probably a decade ago now and
14 increased the funding in those areas, if they send more
15 money to a region of the state for the state to process
16 these kinds of cases, you get more cases. So if you want
17 a spike from another area of the state, just fund it more;
18 and I think the prospect is the agencies that are doing
19 it, they're always working on the margin. They're trying
20 to address the worst cases with the funding they have
21 available. That's what they should be doing, and if they
22 have more money, they can go down and take another tier of
23 cases that they would like to address but would not
24 otherwise have the resources. More cases lead to more
25 appeals, and there you go. So --

1 CHAIRMAN BABCOCK: Okay.

2 MR. ORSINGER: That's a variation of
3 Parkinson's law that we should now call Gray's law.

4 CHAIRMAN BABCOCK: Gray's law. The Bland
5 committee and the Gray's law.

6 MR. ORSINGER: There we go. The more you
7 appropriate, the more problems you have.

8 HONORABLE TOM GRAY: I wouldn't exactly say
9 that's what I said, but --

10 CHAIRMAN BABCOCK: Let's call it Gray's
11 anatomy. How about that?

12 HONORABLE TOM GRAY: Oh, let's not.

13 CHAIRMAN BABCOCK: All right. Any more
14 comments about 28.4? Yeah, Richard.

15 MR. ORSINGER: As far as how you describe
16 the words to give notice, Rule 296 is a model we can use
17 having to do with findings of fact, and it says that "The
18 clerk of the court, who shall immediately call such
19 request to the attention of the judge." That's the way we
20 do it when a notice comes in for request for findings, so
21 you could say the clerk of the court is required to call
22 it to the attention of the court reporter. You should
23 also make the appealing lawyer give notice, but probably
24 both of those. Probably the clerk when they get the
25 appeal notice needs to contact the court reporter and the

1 lawyer who is appealing has the duty to contact.

2 HONORABLE TOM GRAY: I mean, the real reason
3 that we're having the problem is the clerks aren't
4 providing the rule-required notice to the reporter now,
5 and we're really asking the attorneys to do that
6 simultaneously with filing the notice of appeals, and I
7 think that's an excellent change, and I would just like as
8 the court of appeals to be included in that change as well
9 so that we know that we've got the appeal. Used to there
10 was actually a requirement that the person giving the
11 notice of appeal had to provide a copy to the court of
12 appeals. That was viewed as redundant because the clerk
13 was required to immediately notify us. Well, it was
14 redundant, but it's a redundancy with a purpose that we
15 have lost. So --

16 CHAIRMAN BABCOCK: Okay. It sounds like
17 there is no dissent from the proposal on 28.4 subject to
18 certain modifications that have been suggested to which
19 there doesn't seem to be any opposition. Do we need to
20 take a vote on 28.4? It doesn't seem to me like we do.
21 Pam, you satisfied with that? It looks like everybody is
22 in agreement on 28.4.

23 MS. BARON: Yeah, I think it's pretty
24 noncontroversial.

25 CHAIRMAN BABCOCK: Okay. What about on --

1 on 35.1? Do we need a vote, or do we need more
2 discussion, or what's your pleasure?

3 MS. BARON: Well, let's do it in two pieces
4 as we did on the subcommittee. So the first thing we
5 considered if you look on page three -- is that three? I
6 don't know.

7 CHAIRMAN BABCOCK: Should be five.

8 MS. BARON: Five of our -- I don't know
9 where we have our rejected rule changes. Our first
10 proposal was one that Frank Gilstrap authored, which is to
11 take the existing time period rule, but to add a section
12 that addresses only parental termination cases, and so
13 that's what a rule would look like if that's what the
14 committee wants to do, and I think it helps to break this
15 into two steps, and that would be the first step. Do we
16 want to expand the time in parental termination cases from
17 10 to 15 days?

18 If -- the second question would be if we
19 were to do that do we want to include other appeals, but I
20 would start with just parental termination cases.

21 CHAIRMAN BABCOCK: Okay. Comment about
22 that? Yeah, Lisa.

23 MS. HOBBS: So I am the dissenting voice in
24 the task force, underlying task force, for doing this
25 because parental termination cases are our highest

1 priority cases, and if you remember -- when I was the
2 general counsel at the Court we started the Children's
3 Commission, and one of the things we really looked at at
4 the commission was when a child is -- who is going to be
5 their primary caregiver, and they're getting out of first
6 grade, and the court system is such a slow process, and
7 the next thing you know they're in third grade before they
8 find out like who is their primary caregiver. And that,
9 you know, if you think back when you were a kid in the
10 summer like how long the summer seemed to you, and so I
11 just -- I felt strongly, especially coming from a
12 recommendation from the Children's Commission, which was
13 essentially what this task force is, it's an offshoot of
14 the Children's Commission, I personally felt like as a
15 committee member extending the time frame for our most
16 sensitive appeals did not make any sense to me. So I was
17 ultimately convinced to change all accelerated appeals to
18 15 days instead of 10 days, but the notion that you would
19 have my interlocutory appeal on a special appearance from
20 my company in Delaware that doesn't want to be sued in
21 Texas, like that they would -- we would have a quicker
22 time frame for getting that record up there than for a
23 parental termination case. This proposal illogically
24 makes no sense for how we prioritize our cases, and so
25 that's why I ultimately came down on voting I would vote

1 for 15 days for all accelerated appeals, but if you break
2 it down by parental termination and you give longer on a
3 parental termination case, it just logically doesn't make
4 any sense to me. So that was just my plea for voting this
5 first vote down.

6 MS. BARON: Can I ask a quick question? So
7 would it be your view that if you were voting just up or
8 down on whether any time should be expanded you would say
9 no?

10 MS. HOBBS: My first vote would be no based
11 on -- because they get extensions anyway, and now we're
12 giving them notice, now we're giving their trial court
13 judge notice, so to the extent their excuse is they're
14 having a hard time balancing, the judge now gets a copy of
15 notice of appeal and realize that this is a priority, too.

16 MS. BARON: Right.

17 MS. HOBBS: So I would vote originally no
18 extensions. I mean no extension of the rule-based
19 deadline.

20 MS. BARON: Yeah. It helps to use the word
21 "expansion" for that so that we're not confusing it with
22 extensions. So expand from 10 to 15. Reporters can ask
23 for extensions.

24 CHAIRMAN BABCOCK: David had his hand up
25 first and then --

1 MR. JACKSON: That was kind of my question.
2 I mean, you get into, you know, you want to do these as
3 fast as you can because, you know, the child issues; but
4 the reality is you just can't turn certain cases in 10
5 days. I mean, it just can't be done if you've got a
6 thousand pages and you're in court everyday for a case
7 after the case that you're trying to get the record out
8 on. You just can't get it done.

9 CHAIRMAN BABCOCK: Judge Estevez.

10 MS. BARON: Can I ask him a question real
11 quick?

12 CHAIRMAN BABCOCK: Will you yield for a
13 question from Pam to --

14 HONORABLE ANA ESTEVEZ: Mine is not a
15 question. I was just going to inform you guys that these
16 extensions that you think are so easy to get are not that
17 easy to get, and they get extremely ugly letters, and then
18 there's a remand and then we have hearings and then they
19 threaten our court reporters, and they get under a huge
20 amount of pressure. So assuming that -- I don't think you
21 guys see that. I mean, I get cc'ed on every letter from
22 the court of appeals, so it is not -- the busier court
23 reporters are not just, "Hey, I'm getting an extension."
24 They actually fret over getting an extension. My court
25 reporter had a knee replacement and spent all of her time

1 working even though she wasn't supposed to be working
2 trying to get records out because they said they weren't
3 going to give her another extension, and so it was due
4 before she was going to even come back from work.

5 So I don't think that when we say, hey, it's
6 so easy to get an extension, and maybe the first one is
7 easy, but after that there's nothing easy about it and
8 there's nothing not stressful about it. It's the same --
9 I mean, you guys know. You ask for a continuance the
10 first time, the judge is nice to you. What happens the
11 second time? Well, that's what happens to the court
12 reporters.

13 CHAIRMAN BABCOCK: Pam, did you want to say
14 something?

15 MS. BARON: Well, I just wanted to ask the
16 question is, you know, across the state how hard is it to
17 get extensions, and how much of a burden is it to ask for
18 one?

19 MR. JACKSON: It's sort of like the paying
20 the reporter thing. It's different all over the state.

21 MS. BARON: Okay.

22 MR. JACKSON: Different jurisdictions have
23 an easier time of getting things done.

24 CHAIRMAN BABCOCK: Professor Albright.

25 PROFESSOR ALBRIGHT: Well, it sounds to me

1 like -- well, maybe the first thing to do is ask a
2 question. How many of these cases are the one-day cases
3 and how many are the five-day cases?

4 MR. JACKSON: I asked our president of TCRA
5 that question to try to get ready for this, and most cases
6 fall within the three-day, one- to three-day, they say.

7 PROFESSOR ALBRIGHT: So where does that
8 fall?

9 MR. JACKSON: Yeah, well, if it's a one- to
10 three-day case you're talking a 200-page record or a
11 600-page record roughly, and you can do that in 15 days,
12 if the judge will help you.

13 MS. BARON: Can you do it in 10? No.

14 MR. JACKSON: 600 is tight. It's tight.

15 CHAIRMAN BABCOCK: Richard and then Levi.

16 PROFESSOR ALBRIGHT: I hadn't finished. I
17 hadn't finished.

18 CHAIRMAN BABCOCK: I'm sorry, go ahead.

19 PROFESSOR ALBRIGHT: I asked a question then
20 I have a comment.

21 CHAIRMAN BABCOCK: Okay.

22 PROFESSOR ALBRIGHT: It seems to me that the
23 way to deal with these is more on the extension side than
24 extending the time for everybody. If you are getting a
25 lot of them done in 10 days as we've all acknowledged that

1 these are important to get them out as quickly as you can,
2 so why -- why extend the time for those you don't have to,
3 but you have to have an extension process that you can
4 rely on, and now that I've been an appellate lawyer for a
5 year, I understand that it is -- some courts, like the
6 Supreme Court, have one -- have an extension process that
7 you can rely on and you find out quickly. Other courts do
8 not, and you're on pins and needles trying to figure out
9 if your extension is going to be granted or not. So I
10 don't know what the answer to that is, because we have
11 different courts all over the state doing it. But I agree
12 with Lisa that it does not seem right to extend only
13 parental termination cases.

14 CHAIRMAN BABCOCK: Orsinger.

15 MR. ORSINGER: So for a little context, in
16 the old days the only interlocutory appeals were temporary
17 injunctions, and then the Legislature started adding this
18 and that and the other, and now the Legislature is adding
19 full blown week-long, two week-long jury trials to the
20 definition of accelerated appeals. Well, when you're
21 doing a half a day or a day-long temporary injunction
22 hearing, which we did a lot of in the 1980's with all of
23 the foreclosures and when the banks were collapsing and
24 all of that, we had temporary injunction hearings all the
25 time. It's one thing to appeal a one half-day temporary

1 injunction hearing where you've got a banker and then two
2 developers that testify. It's another thing when you have
3 10 or 15 witnesses, and it's even another thing if you
4 have a jury.

5 The only thing that's accelerated about this
6 appeal is our desire to get it disposed of, but the one
7 category we had which was originating from a half a day to
8 a day-long temporary injunction hearing, that's when the
9 timetables of accelerated appeals were conceived of, and
10 now all of the sudden these trials on the merits are
11 dumped into that category. I think it's time for us to
12 ask the policy question of what is the appropriate amount
13 of time to give the court reporter and not fight over
14 whether we ought to increase the deadline for accelerated
15 appeals, which really originally were just supposed to be
16 nonjury hearings with no findings of fact and no jury
17 verdict or anything. So to me the question ought not to
18 be should we give these guys five more days. The question
19 is what's reasonable? Nobody is getting their records
20 done in 10 days. They're begging the court for the first
21 extension and then they're double begging the court for
22 the second extension. And is that reasonable? Should we
23 -- is that the way we ought to design the system because
24 it wasn't designed this way on purpose? It was designed
25 to handle temporary injunction appeals, and the

1 Legislature has now dumped complicated trials into the
2 middle of that procedure.

3 So I think it's very little to offer these
4 people five days. From what I understand it's going to
5 make a difference to them between whether they have to
6 hire a court reporter, some of them out of their own
7 wallet, to cover the daily work while they work on the
8 record. If they get that second weekend, they don't have
9 to hire the court reporter because they could be on the
10 job during the day and got two weekends to do the record.
11 Now, maybe that's not representative, but I have good
12 information, I believe, that in fact that's a reality for
13 these court reporters, and I don't think we're paying
14 enough attention to that.

15 CHAIRMAN BABCOCK: Okay. We've got Levi,
16 and then we've got Justice Brown, and then we've got Judge
17 Estevez.

18 HONORABLE LEVI BENTON: I kind of want to
19 ask some questions also. In the counties where the
20 multidistrict courts are court reporters required -- if
21 they're busy and under pressure required to ask another
22 court reporter for assistance?

23 MR. JACKSON: I don't know.

24 HONORABLE LEVI BENTON: See, because I think
25 in the big counties -- and there are six words that David

1 said, "if the judge will help you." In the big counties
2 if the court reporter goes to the administrative judge or
3 to his or her judge and says, "Hey, I need help," the
4 judge ought to be obliged to find a court reporter in a
5 sister court who is not as busy. And, I mean, that might
6 not solve all of the problem, but it would help some of
7 the problem. I think, you know, Richard's point about
8 asking policy questions, we've already asked the policy
9 questions, and it's 10 days, and I don't think we ought to
10 expand the parental termination cases. We just ought to
11 make court reporters do what judges do when they're busy,
12 ask a colleague for help, and we ought to do it in the
13 rules pertaining to court reporters. Just affirmatively
14 make them ask for help.

15 CHAIRMAN BABCOCK: Okay. Justice Brown.

16 HONORABLE HARVEY BROWN: Well, five days can
17 be very important in some of these cases because we really
18 do hit the deadlines and issue these with little time for
19 reflection, so those five days can be important. The fact
20 is if we say it's 15 days, the reporter records that could
21 be done in 10 days will not be done in 10 days anymore.
22 Everyone will take the 15 days. It's just like lawyers
23 always -- almost always file the day it's due, not early.
24 A lot of these are a hundred pages or less. It is a rare
25 case that is 600 pages. I don't remember one. But I'm

1 not saying there hasn't been one, but I don't remember
2 one. And we can't do it by the number of days because
3 sometimes there's some methods that the attorneys use so
4 that they'll meet other deadlines, so a trial has to be
5 started by a certain date. So I just had a case where the
6 trial was started on the last statutory day. They asked
7 three questions. That was day one. Day two was five
8 questions, three weeks later. The real trial lasted then
9 a day another month after that. It was three days
10 officially, but two of the days only had a total of
11 probably 8 or 10 questions, so we can't do it on the
12 number of days, so I think that -- so many of these can be
13 done readily. As David said, you know, a trial that's 250
14 pages in a day, I mean 250 pages you can get done in 10
15 days. I think that's the -- probably the rule more than
16 the exception, and we do grant these all the time.
17 Somebody comes in and says, "I need more time," I don't
18 remember anybody denying one that I've seen, certainly a
19 first extension.

20 CHAIRMAN BABCOCK: Judge Estevez.

21 HONORABLE ANA ESTEVEZ: To kind of answer --
22 and I'm sure it's different in every jurisdiction, but we
23 have a shortage of court reporters, and so we don't have
24 someone that we can just -- we don't have a shortage of
25 visiting judges, so if for some reason I have to be in

1 Randall County and all of the sudden something came up
2 that they can hear, I can get a visiting judge, you know,
3 in my other courtroom and do something, and so I can do
4 that, but I had trouble finding a court reporter to cover
5 my court when she was just sick. Somebody came from South
6 Texas. My old court reporter came from Dallas to fill in
7 for six weeks while she was doing her knee replacement and
8 doing all of that other work when she was officially off,
9 but, so, no, we can't just do that and just pretend that
10 there's court reporters. There's no court reporter out
11 there in those -- an extra court reporter in those scant
12 population areas. It's not feasible.

13 Do other court reporters help you? Yes.
14 They do help you. They are under no obligation to help
15 you, and sometimes they can't help you. We had a problem
16 when we started our CPS court, she didn't have a court
17 reporter, so court reporters were kind of -- you know, we
18 were all sharing, and I was doing other judge's work
19 because his court reporter had gone somewhere else. Well,
20 there's no reason for him to even do the work, so I did
21 his work because the court reporter is already set up in
22 my office -- or, you know, in my courtroom, so we would
23 find a way to make it work for that short period of time,
24 but it is not feasible.

25 Now, I don't know if the extension is

1 necessarily -- because I will agree with you. I will say
2 that if they have 15 days they're not going to have some
3 incentive to have 10 days if they think they're going to
4 have more time in 14 days or 13 days. I like the idea --
5 I don't remember who said it -- about putting in a rule
6 that requires some sort of extensions without them having
7 to fret over it. I don't know if that's the answer, but I
8 think that that's a nice compromise.

9 CHAIRMAN BABCOCK: Okay. Professor
10 Albright.

11 PROFESSOR ALBRIGHT: I just want to put out
12 there, it sounds like court reporters are paid a very
13 strange way. You know, if you are a state employee, you
14 work 40 hours a week, and any time you work over that you
15 get comp time or overtime, but that is not the way court
16 reporters are paid, and so if the state ends up having to
17 pay a lot of comp time or overtime, the state finally
18 figures out that they need to hire more people. That
19 apparently is not the way it works with court reporters,
20 so I just want to put that out there.

21 CHAIRMAN BABCOCK: Pam.

22 MS. BARON: In terms of back to the
23 disparate treatment of the time for filing the reporter's
24 record and parental termination cases, I think that's what
25 the legislative mandate is asking us to consider, because

1 the Legislature in House Bill 7 specifically told the
2 Court to address the time for filing the reporter's record
3 in parental termination cases, so that's a reason to
4 consider it separately. Once we make that decision then
5 we can consider whether or not other appeals should be
6 included in that umbrella, but I think that's the issue
7 that we've been asked to consider.

8 CHAIRMAN BABCOCK: Okay. Pete.

9 MR. SCHENKKAN: Reading that directive that
10 the Supreme Court is tasked with and that we're trying to
11 provide input on, I'm persuaded that we ought to for now
12 just go with the fact that we're going to try to do a
13 better job of giving court reporters immediate notice, and
14 we're still going to have to wrestle with the tensions
15 over making people request extensions and hoping that the
16 people processing those request for extensions will pay
17 careful attention to them and behave reasonably, but the
18 underlying problem is a problem that has to do with the
19 resources in the system and whether they're adequately
20 allocated. That's not for the Texas Supreme Court to
21 address, but it would as a decision-making, as a rule, but
22 it is something we ought to respond to the Legislature
23 about if there's something sensible we can say about that.
24 It sounds to me like relatively modest amounts of money
25 appropriately directed to the handful of cases in which

1 there are 600 pages and the court reporter is in the
2 middle of another case and even rarer cases of a thousand
3 pages might solve the problem -- or not solve it, but
4 might go a long way towards solving it. If we could get
5 our arms around the facts on that, which I doubt anybody
6 in the room here right now is able to do, but surely
7 somebody can figure that out. We could tell the
8 Legislature back, well, actually why don't y'all
9 appropriate \$2 million for a fund for parental termination
10 transcript preparation when it isn't otherwise readily
11 available. Let's take this seriously on behalf of the
12 children and the people fighting over the parental role
13 and fix this tiny little thing that is preventing some
14 kind of reasonable justice from being done in a timely
15 fashion.

16 CHAIRMAN BABCOCK: Okay. Yeah, Commissioner
17 Sullivan.

18 HONORABLE KENT SULLIVAN: It occurred to me
19 just in listening to this that if a layperson were
20 listening they would find our discussion very remarkable.
21 I agree with what Pete had to say. I mean, it does sort
22 of sound like we spend a lot of time talking about court
23 reporters, and it's been a dominant portion of this
24 discussion, and I think that -- and I'm a fan of court
25 reporters, but I think a layperson would say that we have

1 the proverbial sort of tail wagging the dog with respect
2 to the solution of this overarching issue for the legal
3 system, and it's an important issue. My view is this
4 scenario that could use some best practices review. It's
5 all about resource allocation. If you're looking at the
6 court reporters, you might revisit just, for example, how
7 do you pay them, what you pay them. There's an allocation
8 issue. I know different courts, some federal courts, pool
9 court reporters. State courts often individually assign
10 court reporters. One might revisit the other sorts of
11 allocations methods, and candidly, if you still can't
12 solve the problem then it seems to me that there ought to
13 be a systemic reassessment. Do you need to look at other
14 technologies or other alternatives to supplement the
15 system that you've got, but we are talking in circles now.

16 CHAIRMAN BABCOCK: Professor Albright.

17 PROFESSOR ALBRIGHT: Pam, did you-all
18 consider having a rule that would say that 10 days for all
19 of these cases except if there's more than X hours of
20 testimony you get the 10 days?

21 MS. BARON: No, we did not have any
22 discussion. Nobody raised that. We didn't have a court
23 reporter on our subcommittee. I think that's kind of a
24 tough --

25 PROFESSOR ALBRIGHT: Yeah.

1 MS. BARON: -- rule to draft and enforce.

2 PROFESSOR ALBRIGHT: Yeah.

3 CHAIRMAN BABCOCK: Okay. Any other comments
4 before I try to formulate a vote? Yeah, Peter.

5 MR. KELLY: Just a comment on that last
6 comment. If we file a petition you have to state, you
7 know, expected days of trial, discovery, stuff like that.
8 Perhaps if you file a notice of appeal for one of these
9 hearings the party appealing will specify whether this is
10 a 10-day or 15-day based on the length of testimony, put
11 that burden on the party rather than on the court
12 reporter. Or the rule.

13 CHAIRMAN BABCOCK: Okay. Yeah, Justice
14 Gray.

15 HONORABLE TOM GRAY: I don't know how this
16 fits into what you're about to try to formulate, but one
17 of the problems that maybe fits into the discussion is we
18 have -- I think they're called associate judges that do a
19 lot of this in our area. They typically do not have
20 official court reporters. They pick them up --

21 CHAIRMAN BABCOCK: Uh-huh.

22 HONORABLE TOM GRAY: -- for the individual
23 hearings and cases, so that who they are and contacting
24 them and what their schedules are and how they get paid, I
25 have no clue, but I know that when we go to find them, it

1 is sometimes difficult.

2 MR. MUNZINGER: That was my point.

3 HONORABLE TOM GRAY: The other part of this
4 is -- and one of the reasons that we got in such kind of
5 dutch with the rule behind the eight ball on meeting our
6 180-day deadline is we had several Anders cases come
7 through where the attorney that was appointed to represent
8 the parent didn't see an issue, and then the parent comes
9 in, and the parent suddenly wants a -- the record from not
10 just the trial, but from every hearing that was held, and
11 we thought they were entitled to it. So then we go out
12 where we've got these associate judges, and we're trying
13 to track down six different court reporters and get
14 individual hearings transcribed. So there are a lot of
15 moving parts to this problem, and I think some of it's
16 resources, but when you're -- where Judge Estevez is, you
17 may not have -- even if there's more money, you may not
18 have more court reporters that you can spend that money
19 with.

20 I, too, have -- and this is going to sound a
21 little odd, suffered the same conflict with a court of
22 appeals granting extensions with the same court of appeals
23 that she has, because the -- on our transfer cases, we
24 wind up sending criminal cases, and termination cases are
25 not transferred, and there's a whole batch of cases that

1 aren't, but we've had the problem of that court being very
2 severe in its granting extensions. As a result, suddenly
3 we get motions for extension of time that identify a more
4 recently filed but transferred case as having an earlier
5 deadline on getting a brief done. Now, this is in the
6 briefing, but I know it affects the records as well, than
7 what we are willing -- I mean, we're willing to give more
8 time, but it's yet a later filed case that is getting
9 pressure on either the reporter for a record or an
10 attorney for a brief, and we've seen it both.

11 So there is a -- and I say that only to say
12 that there is a marked disparity among the courts of
13 appeals of how liberal you should be in granting an
14 extension request. We basically take the philosophy of if
15 we can't get to it, it's okay to extend it, so if we can't
16 be working on it. As Judge Bland was talking about the
17 five days, we have found ourselves trying to write the
18 opinion with only the appellant's brief. We don't have to
19 have an appellee's brief to even issue the opinion, but to
20 meet the 180-day deadline we have actually started working
21 on the cases when we have only the appellant's brief, and,
22 you know, you do little things. They are not as
23 efficient, because you don't have both sides, but we do
24 what we do within the confines of the rule to try to meet
25 those deadlines, and I'm very sympathetic to the

1 reporter's problem. Same problem addresses the attorneys,
2 except for the resources issue. So, anyway, however that
3 may work into the formulation of the vote.

4 CHAIRMAN BABCOCK: Thank you. Pam. That's
5 not helpful.

6 MS. BARON: Lisa, did you just determine
7 whether it's statutory or rule-based?

8 MS. HOBBS: It is rule-based, and it's the
9 Rules of Judicial Administration. I was thinking of the
10 trial court 180-day deadline to try the case.

11 MS. BARON: Okay. And, Richard, is the task
12 force considering whether that --

13 MR. ORSINGER: Yes.

14 MS. BARON: -- whether that 180-day deadline
15 could be altered?

16 MR. ORSINGER: Yes. Our task force has
17 several subcommittees, and the membership is a little bit
18 fluid, but one of the subcommittees is going to make
19 recommendation to the task force fairly soon that if we
20 increase the period of time that it takes to get the
21 record to the appellate court that that adds to the 180
22 days, and I'm going to go ahead and give you the preview
23 of the principal reason why, is that we're concerned that
24 the current deadline for filing a motion for new trial is
25 too quick for these appeals, 30 days, because frequently

1 the appellate lawyer doesn't know what points to raise, if
2 any, that are needed in a motion for new trial, which
3 would be needed if there was a jury trial or if there was
4 any evidence that's not on the face of the record, any
5 complaint. And the ineffective assistance of counsel is
6 not going be evident until you can see what judgments were
7 made, what witnesses were called, and what the
8 cross-examination was; and even worse than that, if you
9 have an inadequate number of witnesses called in defense
10 of the parent, you have to go interview the parent and
11 other people to find out the potential witnesses that
12 could have been brought in to explain the behavior
13 complained of.

14 So because we're struggling with the issue
15 that you can't in some instances get an ineffective
16 assistance of counsel appeal, which I thought was rare,
17 but based on the task force experience, it's not rare. We
18 are probably -- I mean, we may -- the task force may come
19 in here and say we want to extend the deadline for filing
20 a motion for new trial until so many days after the
21 reporter's record is filed so that the appellate lawyer
22 has something to read before they know, before their
23 preservation deadline is gone; and if we do that, we've
24 got to help the courts of appeals because they're going to
25 run out of their 180 days. So at least at the

1 subcommittee level the recommendation is surfacing that
2 we're going to maybe need to expand a little bit of some
3 of these internal deadlines; and if they are lengthened,
4 then we need to add some time to the court of appeals
5 total, period.

6 CHAIRMAN BABCOCK: Okay. Richard.

7 MR. MUNZINGER: Why can't the 180-day be
8 extended commensurate with extensions of time to the court
9 reporter and others to allay some of the problems that the
10 appellate court justices have? It's very disconcerting to
11 hear that an appellate justice is considering the case
12 without -- and I know you're not deciding, you're
13 considering, but you're considering a case without the
14 benefit of the other party's brief. Good gracious. I
15 mean, this is due process. I'm supposed to be heard, and
16 I've got a fellow who's sitting here as honest and decent
17 and good a human being as there is in the world trying
18 to --

19 CHAIRMAN BABCOCK: You're talking about
20 Gilstrap?

21 MR. MUNZINGER: No, I've got a case in front
22 of Justice Gray, so I was talking about him. But you see
23 my point. My goodness gracious alive, somebody is
24 deciding a case and they haven't heard from the other side
25 yet? That's not good law. It's not good rules.

1 CHAIRMAN BABCOCK: Pam.

2 MS. BARON: Just one last comment and then I
3 hope we can proceed to a vote, but, you know, court
4 reporters have no resources or very few resources they can
5 draw on. Courts of appeals are overburdened, but they do
6 have more resources, and so that's why I would strike the
7 balance to expand the time by five days.

8 CHAIRMAN BABCOCK: Okay. All right, let me
9 give this a shot. We're talking about page five of Pam's
10 memo, and it says that "By a vote of 7 to 2 the
11 subcommittee rejected the following amendment to TRAP
12 35.1," and then it's got some proposed amendment, which
13 was rejected. So, Kim, for your benefit -- when I framed
14 the vote I try to frame it in the way that the
15 subcommittee voted. So I would say on this one, how many
16 people think that this -- this proposed 31 -- 35.1 that
17 adds a subsection (d), "If Rule 28.4 applies," comma,
18 "within 15 days after the notice of appeal is filed,"
19 thinks this is a bad idea? In other words, agrees with
20 the subcommittee. So everybody who thinks that's a bad
21 idea would raise their hand, but before --

22 MS. HOBBS: I was ready to vote. That is a
23 bad idea.

24 CHAIRMAN BABCOCK: So you're ready to vote.

25 MR. ORSINGER: She doesn't need to vote. We

1 know what her answer is.

2 HONORABLE DAVID PEEPLES: Are you for the
3 five days or not? Isn't that the question?

4 CHAIRMAN BABCOCK: Yeah.

5 MS. BARON: Yes, in parental termination
6 cases.

7 MR. SCHENKKAN: But as posed it's are you
8 against it or not.

9 MR. ORSINGER: So we're voting against the
10 negative, right?

11 CHAIRMAN BABCOCK: Yeah. That's why it's so
12 hard to frame it because the next vote is going to be the
13 subcommittee said okay to --

14 MR. WATSON: Well, just do it straight up.
15 Don't do it the way the subcommittee --

16 MR. ORSINGER: How many are in favor of
17 adding five days to the deadline and how many --

18 CHAIRMAN BABCOCK: Yeah, why don't we do
19 that?

20 MS. BARON: Thank you.

21 CHAIRMAN BABCOCK: Forget about everything I
22 said, Kim.

23 MS. PHILLIPS: Okay. I can do that.

24 HONORABLE TOM GRAY: No problem.

25 CHAIRMAN BABCOCK: How many people are in

1 favor of adding five days?

2 MR. GILSTRAP: To termination.

3 CHAIRMAN BABCOCK: Raise your hand.

4 MR. GILSTRAP: In termination cases. Right?

5 MR. ORSINGER: Yeah. First vote.

6 CHAIRMAN BABCOCK: How many are against?

7 Well, 13 in favor, 14 against, the Chair not
8 voting, so there you have the vote. And Richard.

9 MR. MUNZINGER: Can you take a vote or do
10 you think it's wise to take a vote to see if the vote
11 would change if the time for consideration is extended
12 from 180 days to move with the time for the extension of
13 the filing of the record? That's why I voted "no."

14 CHAIRMAN BABCOCK: Lisa.

15 MS. HOBBS: If I could suggest possibly a
16 vote on what the task force recommendation was and what I
17 believe was the subcommittee's recommendation of extending
18 everything, all accelerated appeals, to 15, so that you're
19 not creating an irrational rule, but you recognize there's
20 a problem with getting -- so you've now taken a vote on
21 something that was not actually recommended by either the
22 underlying task force or the subcommittee, and I think
23 it's worth voting on what the subcommittee actually
24 recommended to the committee.

25 CHAIRMAN BABCOCK: Okay. Pam, what do you

1 think about that?

2 MS. BARON: Well, I'm not sure that we
3 necessarily recommended that.

4 MS. HOBBS: Oh.

5 MS. BARON: Okay. Because the first vote
6 was do we extend parental termination cases, and the
7 second question was, if we did, if we had voted the other
8 way, do we think everything falls in that bucket, and the
9 answer was "yes."

10 MR. ORSINGER: But the Supreme Court ought
11 to know if a majority of this committee is in favor of
12 moving from 10 to 15 on all interlocutory appeals. If one
13 vote changes the outcome of the vote, the majority count
14 changes. If I remember what you said, it's 15-14 the
15 other way.

16 CHAIRMAN BABCOCK: Right.

17 MR. ORSINGER: We ought to know the answer
18 to that.

19 CHAIRMAN BABCOCK: Okay. So frame the
20 question, Richard.

21 MR. ORSINGER: Should the deadline for
22 filing the appellate record in accelerated appeals of all
23 kinds be extended from 10 to 15 days?

24 CHAIRMAN BABCOCK: Pam, you okay with that?

25 MS. BARON: I'm perfect with that.

1 CHAIRMAN BABCOCK: Okay. Everybody in favor
2 of what Richard just said, raise your hand.

3 Everybody opposed? So by a vote of 21 to 4,
4 we're in favor of that.

5 MR. ORSINGER: That's an important piece of
6 information I think.

7 HONORABLE STEPHEN YELENOSKY: I just have a
8 standing vote in favor of whatever Richard says in family
9 cases.

10 CHAIRMAN BABCOCK: If I were voting, but the
11 Chair didn't vote on that last one, that's how I would go.
12 Whatever Richard says. Well, all of this voting has made
13 me hungry. Let's recess for an hour until 1:30.

14 (Recess from 12:24 p.m. to 1:26 p.m.)

15 CHAIRMAN BABCOCK: Okay. We're on the
16 record, because I want to say that we have discussed and
17 voted on procedural rules in suits affecting the
18 parent-child relationship, so that is finished and sent to
19 the Court with our recommendation, so that will not be on
20 any further agenda unless the Court asks us.

21 So now we'll turn to the procedural rules on
22 limited scope representation. Justice Bland is the chair
23 of that subcommittee that's discussing that, and I believe
24 maybe she's asked some people or some people have been
25 invited to be resources for us, which is great, and you

1 can introduce them if appropriate and start out the
2 discussion.

3 HONORABLE JANE BLAND: Hi, okay, this
4 afternoon we have with us Chris Nickelson, who was a part
5 of our subcommittee group and gave us invaluable comments,
6 feedback, and support, and was really essential in
7 surveying the family law bar, which was part of the task
8 that the Texas Supreme Court allocated to our committee.
9 And we also have from the Access to Justice Commission
10 Trish McAllister and Kristen Levins -- Kristen, nice to
11 meet you -- who have done a lot of work on limited scope
12 representation in connection with providing more access to
13 the courthouse for people of low income and modest means;
14 and so they are very knowledgeable about limited scope
15 representation and have done, you know, a lot of the work.

16 I also want to recognize Kennon Wooten, who
17 is a member of our committee but also chaired the
18 subcommittee that worked on limited scope representation
19 for the commission to -- well, it was the Justice Gap
20 Commission to expand -- Commission to Expand Civil Legal
21 Services, and I commend that report to you to the extent
22 you want to learn more about limited scope representation.

23 Part of the recommendations of the
24 commission in connection with limited scope was to look to
25 see if there could be rules that would make limited scope

1 more approachable and a skate towards -- and the rules
2 governing limited scope more clearly defined, particularly
3 when it comes to appearing in court, and that's what our
4 subcommittee looked at. Texas Disciplinary Rule 102(b)
5 allows for limited scope representation; and, you know, it
6 allows a lawyer and a client to agree to limit a scope,
7 the objectives, and the methods of representation, so long
8 as the client consents to that scope after being told, you
9 know, sort of the drawbacks to having a lawyer on a
10 limited basis.

11 So the disciplinary rules provide for it,
12 but the question always becomes what happens when a
13 limited scope representation encompasses a court
14 appearance and how do our rules work with that, and we
15 have two rules regarding attorney appearances in state
16 court. One is Rule 8, which defines the attorney in
17 charge for a case, and that rule basically says a lawyer
18 who appears -- who appears on behalf of a client is
19 responsible for the case. In other words, it's a general
20 appearance, and the lawyer is charged with anything that
21 might come out of that case in representing that client,
22 and so that's our current Rule 8. And then we have
23 current Rule 10, which provides for withdrawal of
24 representation and how that is accomplished, and of
25 course, that also -- because we only have general

1 appearances that relate, that's sort of a more general
2 withdrawal.

3 And so what our subcommittee was tasked with
4 doing was, first of all, surveying the bar to find out
5 about, you know, what is the level of familiarity of
6 limited scope representation. If there is familiarity,
7 what sorts of problems have you encountered in connection
8 with it, whether you're a practitioner who engages in
9 limited scope representation, a judge with a limited scope
10 lawyer in front of you, or opposing counsel, because
11 obviously one of the concerns of limited scope
12 representation is does that present an insurmountable
13 burden to the court and to the opposing counsel in
14 determining sort of who is representing the client for
15 which task and how are we going to accomplish things like
16 service and notice.

17 And so Chris was instrumental in
18 accomplishing a survey that he and Pam Baron really put
19 together with our committee sort of taking a look at, and
20 I'm going to turn it over to Chris to talk about the
21 results of the survey, and then we'll talk about sort of
22 the issues that limited scope presents when a limited
23 scope lawyer is representing a client in court and what
24 our recommendations are with respect to amendments to the
25 Rules of Civil Procedure to sort of address some of those

1 concerns.

2 MR. NICKELSON: Some of you may know me.
3 I'm Chris Nickelson. I am currently the chair-elect I
4 guess of the family law section. I'm here on behalf of
5 the executive committee for the family law section. I
6 served also on the Texas Commission to Expand Civil Legal
7 Services, have been the liaison or the go-between between
8 the Court's organizations and family law section. My job
9 was to do my best to try to poll the membership of the
10 family law section. At least that's how we decided that
11 by sending out a survey through the State Bar of Texas,
12 that that would be the most expeditious manner to try to
13 communicate with our members. We put together a survey.
14 It's attached at the back of your materials.

15 The issue of limited scope representation
16 was one of a lot of friction a number of years back when
17 there was a fight over the Supreme Court reforms, and so
18 the section came out sort of -- at least there was a lot
19 of verbiage that it was opposed to the limited scope idea.
20 Since that time, you know, it's been my job to try to
21 ascertain if we're going to have a rule in this state,
22 what's it going to look like and what would be the best
23 rule. So sending out the survey, it went out to 5,830
24 section members, went out to section membership. That's
25 almost all of it. It's around 6,000 members, and then

1 another 6,000 nonsection members were polled. It was a
2 little bit -- if you read the materials at the back, it
3 will tell you that the survey went out to 13,000 lawyers.
4 That's been revised downward. It will also tell you that
5 apparently there were 5,000 lawyers practicing in Travis
6 County and only 8,000 practicing in the rest of the state
7 family law.

8 We determined in discussing with Tracy
9 Nuckols that most likely that's an overlap. The lawyers
10 from Travis County being overwhelmingly represented
11 because people on the My Bar page when they are asked or
12 they have the ability to list where they practice, they
13 said they practice in Travis as well as other parts of the
14 state, so that's a little bit about the numbers and the
15 methodology. The response rate was I won't say abysmally
16 low. It's very low. It's not what we would have wanted.
17 It's about 3.6 percent overall, which is I don't think
18 surprising to many people of the State Bar surveys. The
19 people excluded from the survey were people who did not
20 designate a place of practice in the state of Texas or
21 people who had previously opted out of surveys.

22 The survey results, I would just point out
23 that I don't know that I would put a lot of stock in the
24 answers given by people identifying as Travis County being
25 accurate. I think that the best answers that you can rely

1 on or get closer to it are the ones that are for people
2 outside of Travis County. So --

3 HONORABLE STEPHEN YELENOSKY: Well --

4 MR. NICKELSON: The things that are perhaps
5 remarkable about the survey is that a majority said that
6 problems had arisen in limited scope representation
7 because there were no procedural rules governing limited
8 scope representation, and then the highest result of the
9 survey, an 84 percent of respondents saying that they
10 believe that it would be helpful to have procedural rules
11 addressing limited scope representation. I think if you
12 go through and -- and I thank Pam Baron for doing this.
13 She had a lot more fortitude than the rest of us. I read
14 the comments to the survey. Me being a family lawyer and
15 having lived through the forms fight, I understood all of
16 the comments, and they were all unsurprising to me.

17 Thanks to Pam, she could group them into
18 categories, and so there was one distinct group of
19 comments that was concerned about limited scope
20 representation from the perspective that -- which is
21 clients never seem to understand, and then another whole
22 group of comments to it focused on the sort of burden
23 imposed by the client hiring the full service lawyer by
24 those doing limited scope, with all of its ambiguities,
25 and that being their source of concern about limited

1 scope. And then the third group all focused on withdrawal
2 and the ambiguities or problems related to withdrawal,
3 when it would be permitted.

4 So in a nutshell, I do invite everybody to
5 take the time to look at the survey. It is interesting.
6 It's a small sample. Hopefully if we had a larger sample
7 maybe the results would remain true, but we just don't
8 know. So that's my report on our survey.

9 HONORABLE JANE BLAND: Thank you, Chris, and
10 I took over this committee more than halfway through this
11 project, so Pam Baron was the one that really shepherded
12 this project up through the survey and then she prepared
13 the memo that we all worked on, and I wondered, Pam, if
14 you wanted to make any comments about the memo before we
15 go into a discussion about the rules?

16 MS. BARON: I came in a minute late, but I
17 guess our committee has just been blessed with a lot of
18 resources, and I'd like to thank all of those people who
19 helped us. You know, we had the task force report. The
20 family law section has been incredibly supportive. Chris
21 has given so much of his time. The people at Texas Access
22 to Justice, Trish McAllister and Kristin Nickells --

23 HONORABLE JANE BLAND: Levins.

24 MS. BARON: -- have been very supportive and
25 helpful providing information. Kennon shared the

1 committee on limited scope representation for the task
2 force, and they did yeoman's work in gathering materials
3 from all over across the United States, so we just had a
4 wealth of resources so we have been very fortunate for
5 that. So I would comment on that. The survey was an
6 interesting process. The State Bar, Tracy Nuckols was
7 super helpful, and Chris was great about working with her
8 and getting it out. We were a little disappointed in the
9 response. I will add that in terms of a survey, it was
10 not an open-ended survey like is limited scope
11 representation a good idea or a bad idea because that
12 decision has already been made in the disciplinary rules.
13 Disciplinary rules expressly permit it if it's agreed to
14 between the attorney and client, so we did not ask survey
15 participants to weigh in on that, which we're sure we
16 would have gotten a lot more comments if we had, but we
17 were more focused on how can we make it work better within
18 the system, and pleased as punch to have Justice Bland as
19 the new chair.

20 HONORABLE JANE BLAND: I know you are.

21 MS. BARON: Not a committee of one, though.

22 HONORABLE JANE BLAND: Never, never. So we
23 definitely recognize those people, so that was good, but
24 we also should recognize Justice Bob Pemberton and Evan
25 Young --

1 MS. BARON: Yes.

2 HONORABLE JANE BLAND: -- who also made big
3 contributions to this.

4 MS. BARON: Let me add one thing. I
5 apologize to Justice Pemberton because I thought I was
6 still vice-chair, but I'm not. He is. So there you go.

7 HONORABLE JANE BLAND: And so what happened
8 after we did the survey is we went ahead and had a
9 discussion about the rules that we thought touched most on
10 limited scope representation, and as I mentioned earlier
11 that's Rule 8 and Rule 10, and at the -- at the end of our
12 report you'll see our effort to have a discussion about
13 these rules, and I'll just note that I know Chris has
14 presented this draft to the executive council of the
15 family -- State Bar family law section and will have some
16 feedback, and I know that we also sent this to Trish and
17 Kristin, and I think they -- you know, they're hopeful to
18 have a more robust limited scope representation practice,
19 but I think recognize that this is the start for getting
20 some rules for limited scope representation in court, and
21 I encourage you all as well to offer any comments that you
22 might have as our discussion goes forward.

23 We also had the benefit of the Travis County
24 -- and I hate to say it because it brings up this
25 morning's discussion, the Travis County local rule.

1 Travis County has had a pilot project with limited scope
2 representation and had a local rule that I think Judge
3 Yelenosky was involved in drafting and approved by the
4 Texas Supreme Court, and so that was very useful in
5 looking to see how these rules ought to be drafted.

6 Anyway, so looking at two rules that we are
7 recommending changes to, the first is Rule 8, attorney in
8 charge, and we recommend dividing Rule 8 into two
9 sections, Rule 8.1, which is the current text of the rule,
10 and then Rule 8.2, which would be the new text that we are
11 recommending. The current text of Rule 8 may need some
12 tweaking, but we didn't want to go into doing that until
13 we thought -- until anyone on this committee suggested
14 that we needed to, and it seemed to -- it seems to work
15 all right in practice, but we're open to changing it to
16 look more in line with sort of what our modern rules look
17 like; but for now, if you look at Rule 8.1 in the draft,
18 that is exactly the text of the current rule. And that's
19 why it's not underlined, just so everybody knows this is
20 not new stuff.

21 Rule 8.2 is the new stuff, and it's
22 really -- tries to tackle two or three things. One, how
23 do we notify the Court and parties that a lawyer is only
24 practicing -- or only representing his or her client for
25 some very discrete legal tasks and is not undertaking a

1 general representation in a lawsuit. Second, when a
2 lawyer has notified the court and opposing parties about
3 the nature of the limited representation, how does that
4 lawyer communicate when the representation has ended and
5 how does it end, because it may not -- it may not have the
6 same concluding date as the lawsuit itself. And then
7 third, how are -- how is the court supposed to notify that
8 side of the case and how are opposing parties supposed to
9 serve that side of the case when a lawyer is engaged in
10 limited scope representation.

11 So that's what Rule 8.2 -- those are what
12 the changes locally are intended to look like in Rule 8.2,
13 and then Rule 10.2 is its companion rule, which will be
14 new rules related to withdrawing from a limited scope
15 representation. So before we begin with going through the
16 rules themselves, I guess I would direct you first to the
17 comment that we proposed for the 2018 -- very optimistic,
18 2018 rule change and then maybe I'll open up the floor for
19 some discussion about questions, concerns, just generally
20 about this approach, and you may have other ideas about a
21 better approach.

22 So the 2018 comment basically says that
23 consistent with the disciplinary rules an attorney may
24 limit the scope, objectives, and general methods of
25 representation if the client consents after consultation.

1 "This rule is intended to address the attorney's
2 responsibilities to the court and opposing counsel when an
3 attorney represents a client in court for a limited
4 purpose." And it just adds the caveat that the -- caveat
5 that the rule does not otherwise define the scope or
6 method of representation by a lawyer and leaves it to the
7 lawyer and client to address, within their engagement
8 agreement. In other words, if you are engaging in a
9 limited scope representation that doesn't deal with a
10 court appearance, that's not -- that's not going to be
11 handled by the Texas Rules of Civil Procedure. That's the
12 intent of the comment. And sort of with that
13 introduction, I open the floor for comments, questions.

14 CHAIRMAN BABCOCK: Okay. Frank.

15 MR. GILSTRAP: This has all been in abstract
16 terms. For those who are not familiar with this, give us
17 some concrete examples of limited scope representation,
18 please.

19 HONORABLE JANE BLAND: Yes. So, for
20 example, you would want to potentially engage a lawyer to
21 help you secure a temporary protective order in a family
22 law case but can't necessarily afford to engage a lawyer
23 for an entire family law proceeding, and so the lawyer
24 says, "I'll represent you for this hearing and to secure
25 this protective order and that's it." That's one example.

1 There's another kind of example called ghost
2 writing. Ghost writing is a lawyer prepares a pleading
3 but doesn't sign it and some states require a lawyer to
4 disclose when a lawyer has written a document. Other
5 states do not require it. We did not take a position on
6 ghost writing in this rule, but we would be obviously open
7 to consideration of rules about ghost writing if this
8 committee would like us to consider them. Yes.

9 MR. LEVY: So the one question that comes to
10 mind is clarifying or confirming that the client
11 understands the limited scope, and I know in your rule
12 draft you've got reference to "service on the party,"
13 which I assume is the client. Is that the purpose for
14 that? And that's 21a service, but do you need a proof of
15 service? Do you need some validation that they've seen
16 it, that they've accepted it, so that there's not a
17 dispute later as to whether the client understood that
18 issue?

19 HONORABLE JANE BLAND: The rules about
20 service are -- are not changed by this -- by these amended
21 rules, so the service is performed in the same manner as
22 it is in any case, but it's who it is directed to and how
23 should it be directed, and there are a couple of different
24 ways to do it. You can serve the lawyer only on those
25 matters that the lawyer is engaged for, those discrete

1 tasks. You can serve the lawyer and the client for those
2 tasks. You can serve the lawyer and the client for
3 everything.

4 MR. LEVY: So that --

5 HONORABLE JANE BLAND: You would never not
6 serve the lawyer with anything, so -- so those are sort of
7 the questions, and I think when we get to the discussion
8 of service we can get more in --

9 MR. LEVY: Let me step back then not about
10 that, but just the question of how does the -- how do we
11 validate that the client understands this issue, and is
12 there something that the client should acknowledge or
13 accept or -- because you say you have to consult with the
14 client, but that could be a later point of --

15 HONORABLE JANE BLAND: Well, the
16 disciplinary rules require lawyers to consult with clients
17 and tell them, you know, the bad things and the good
18 things about any limited scope representation, and what
19 the client is missing out on if the client doesn't have a
20 lawyer engaged for the entire matter. Our rule is really
21 not intended to enforce that disciplinary rule. It is
22 really more intended to facilitate a lawyer's appearance
23 in court when a lawyer has a contract with a client.

24 MR. LEVY: Okay.

25 CHAIRMAN BABCOCK: Richard, and then Peter,

1 and then Harvey.

2 MR. ORSINGER: I don't know whether you want
3 to get into the substance now or later, but let me just go
4 ahead and pose my concern. I have never had a problem
5 with figuring out how limited scope representation is
6 going to work on transactions, like reviewing contracts or
7 even advising a client about their risks and liabilities
8 and all that. The courthouse is where I have a problem.
9 And so -- and to just put it in my terms as a family
10 lawyer, let's say that I'm representing a woman who's been
11 injured physically by her husband and I say, "Okay, I'm
12 going to represent you in your divorce. I'll get your
13 protective order. If we have to fight over limited
14 visitation and child support I'll do that, but I will not
15 file a damage suit against your husband and try to get
16 tort damages for assault and battery." I'm not that kind
17 of lawyer. I haven't done one of those in 30 years.

18 So we got the limited scope engagement. I
19 file it under Rule 8. I'm only here for the family law
20 matter. I'm not here for the tort. Okay. So then let's
21 say that my client goes out and hires a tort lawyer to
22 handle the tort. So now we're getting ready to go to
23 trial and the judge says, "I'm not going to have two
24 trials. I'm going to have one -- there's just going to be
25 one trial. We're going to try everything at one time,"

1 which is what they typically say in my experience. So
2 does that mean when I go to examine the husband that I
3 just question him on divorce stuff and then I pass the
4 witness to my co-counsel, who is the tort lawyer, who
5 questions him on tort stuff and then they go to the
6 husband's lawyer, and he may have limited representation,
7 too, so we may have an insurance company lawyer. Is that
8 what we do, or how do we break up a trial where you have
9 limited representation, but you have multiple issues, some
10 of which are being represented, some are not?

11 CHAIRMAN BABCOCK: Is that rhetorical?

12 MR. ORSINGER: Well, it's been troubling me
13 for decades, and I don't have any answer to it. Maybe
14 there isn't an answer to it.

15 HONORABLE DAVID EVANS: It is not
16 rhetorical. It happens.

17 CHAIRMAN BABCOCK: Justice.

18 HONORABLE DAVID EVANS: It is not rhetorical
19 because you have insurance counsel appear to defend car
20 wrecks. Then you have a counterclaim alleging that the
21 plaintiff was negligent and a plaintiff's lawyer, and then
22 you'll have both lawyers look at you and say, "They have
23 to send discovery to us separately, and we both get to
24 speak, and we're both lead counsel on these issues." It's
25 a big seller in the 48th, by the way, meaning it doesn't

1 go very far with me. But having said that, I think
2 limited representation is necessary. I think there are
3 examples of it already, especially in child support. In
4 Title IV-D work, the state, although it nominally
5 represents the AG, is collecting child support from the
6 obligor, but there may be other issues that are being
7 tried changing conservatorship, so on and so forth, that
8 the AG's office is not allowed to represent on, and there
9 will be other counsel or pro se appearances on those
10 issues.

11 So in that environment they have somehow
12 worked a practical solution for how to handle that, but I
13 would be very -- I would be very concerned about this
14 being gamed in the trial court in civil litigation where
15 somebody says, "Well, I've got this issue, but I'm the
16 lead counsel on the next issue." And I say gamed. It
17 will be taken advantage of, and that's just -- it would
18 worry me that the trial judge wouldn't have the authority
19 to say, "No, you are the lead counsel -- one of you is
20 going to be designated as lead counsel for the overall
21 case," much the way we do in an MDL process. We need to
22 have an MDL plaintiff lawyer. So that's out there. And
23 then I can just see a number of disputes between "I sent
24 the discovery."

25 "Yes, but you sent it to the wrong lead

1 lawyer."

2 HONORABLE JANE BLAND: And Richard and Judge
3 Evans, I think Chris received similar feedback from the
4 family law bar, and so when we were drafting the rule we
5 were really contemplating the situation where a client has
6 no lawyer at all, engages a lawyer on a limited basis for
7 a couple of tasks, but is swimming alone otherwise, and so
8 the rule was really drafted with more that in mind. So
9 what we need to do is go back and consider how to handle
10 the situation of two lawyers; and there already is, you
11 know, a rule that says, I think you can only have two
12 lawyers argue or something like that; and obviously in the
13 48th or many other trial courts they will say "One riot,
14 one ranger," but we'll consider the idea that this might
15 be used for -- in cases with multiple lawyers, which would
16 be an abundance of riches for most of these clients that
17 are really not -- not able to afford lawyer one, much less
18 lawyer two, three, four.

19 CHAIRMAN BABCOCK: Judge Estevez.

20 HONORABLE ANA ESTEVEZ: We just see it all
21 the time when somebody hired a lawyer and they're trying
22 to have us hold them in contempt. They come in the first
23 time, so we appoint them a lawyer and there's always a
24 modification in there, but the statute lets us appoint for
25 contempt issues because -- but not for modification, but,

1 you know, a lot of -- in our jurisdiction a lot of the
2 times even though they tell their lawyer -- their clients
3 "We're not going to represent you on this," a lot of the
4 times they go and they talk and they get it all resolved
5 and they go ahead and do that just for free, even though
6 they don't have to. But that is a -- that is a huge
7 problem. I mean, I have it all the time where the lawyer
8 says, "I want to leave now, Judge, because I don't want
9 him thinking I'm representing him. I need this
10 bifurcated."

11 You know, we've set it all, so all of the
12 sudden when I'm done with contempt the lawyer gets up and
13 leaves. I mean, that's how they deal with it, you know,
14 and ask me, "Can I do that to make sure he doesn't think
15 I'm representing him on this issue?" Because, I mean,
16 obviously, just like Richard said, I mean, we're going to
17 hear it all at the same time. We didn't come here so we
18 can come back tomorrow. So --

19 CHAIRMAN BABCOCK: Yeah, Lamont, and then
20 Trish.

21 MR. JEFFERSON: Well, I think Justice Bland
22 may have addressed my question, which is it does seem to
23 me like this whole idea is to assist those who wouldn't
24 have a lawyer otherwise, and so limited scope
25 representation would say so client comes to me, you know,

1 "Will you help me out on this hearing that I've got coming
2 up" and most likely what I would do -- and I'm not sure if
3 this rule addresses it and probably if it does, if it's
4 intended to, maybe it should not. What I would most
5 likely do is counsel the person through the hearing and
6 not become attorney of record so that I'm not then subject
7 to the court's whim about whether I can get out or not;
8 and I think you answered the question by saying, well,
9 this proposal doesn't address the situation where a lawyer
10 is not already an attorney of record. And so if I'm not
11 going to be attorney of record, I don't have to worry
12 about a rule, but now there is a rule that suggests that
13 there is a procedure to follow if I just want to have a
14 limited representation of a client without becoming an
15 attorney of record of the case, and I think the creation
16 of that rule suggests that I need to be, that maybe
17 there's not -- that the present rules don't allow me to
18 just counsel the client through the procedure, that now
19 I've got to go ahead and become attorney of record, be
20 subject to the whims of the trial judge, and worry about
21 my scope being expanded involuntarily.

22 Because the ethics rules already address
23 that situation and because I think the intent of this rule
24 is to just allow me to do what I'm already doing, I mean,
25 it's supposed to facilitate that, I guess I have a

1 question about whether that's -- whether this rule is
2 accomplishing that objective or not of freeing up lawyers
3 to believe that even though the rule already says it, now
4 I know because of the language of this rule that I'm not
5 going to get in trouble by counseling a client through
6 some court appearance without becoming attorney of record,
7 and I would rather just have that option without a rule
8 out there saying, "Okay, if you're going to have a limited
9 representation, this is what you need to do."

10 CHAIRMAN BABCOCK: Okay. Trish.

11 MS. McALLISTER: I think the one thing to
12 remember is that for a limited scope representation, I
13 mean, the whole premise of limited scope representation is
14 that the -- that the lawyer does some part and that the
15 litigant -- and then the client does some parts. So in
16 the situation where the client is being covered by all
17 lawyers, that's not really limited scope representation,
18 because the client themselves is not doing any action pro
19 se. The fundamental premise of limited scope
20 representation is the assumption that the client is going
21 to take some action and do something in the case pro se.

22 And to address Lamont's situation or
23 question, I think the real -- the real thing that we have
24 heard over the years is that the real reason why limited
25 scope representation hasn't expanded very much in this

1 state -- it has in other states -- is because of the fear
2 of being able to get off cases; and the reality is is that
3 the clients that we see at Legal Aid or how I saw when I
4 was litigating at Legal Aid, there are some people that
5 could -- you know, as we all want everybody to have a
6 lawyer, and there are some people who you could coach and,
7 you know, hope that they will do a good job representing
8 themselves in a low contested situation, but when you have
9 a highly contested situation -- and some of these
10 situations that we dealt with were involving domestic
11 violence or harm to another person, you really want them
12 to have a lawyer; and if they can -- you know, if lawyers
13 feel more comfortable saying, "Okay, you know, here, I'll
14 do these pieces for you, and I will litigate this part,"
15 especially, you know, going to court because that's where
16 somebody is not necessarily going to feel so safe, but
17 then have the -- they can get off. I think that's what
18 these rules are trying to accomplish, because you can
19 still do what you want to do without these rules, because
20 that's the professional responsibility rule where you're
21 just saying to the client I'm not going to -- "I'll coach
22 you, but I'm not going to become a attorney of record."

23 MR. JEFFERSON: Maybe that could be
24 addressed in a comment. Because, I mean, my concern is by
25 adding this rule it creates the impression that you need

1 to be attorney of record, and I think lawyers already are
2 skeptical of their ability to enter into a limited
3 representation with a client. We try to guard around that
4 in a lot of different ways, but I think -- I think if
5 we're going to have a rule that says you can be attorney
6 of record in a limited scope representation manner, that
7 doesn't preclude you from not being an attorney of record
8 and still providing counseling to the client. Because
9 that seems to me like that would be the more -- more
10 common type of limited scope representation.

11 MS. McALLISTER: I see what you're saying.
12 Okay.

13 CHAIRMAN BABCOCK: Kennon.

14 MS. WOOTEN: I agree with Lamont's comments
15 because when I first read it, this proposal, I wasn't sure
16 whether and to what extent it addressed things like ghost
17 writing; and when I was working on the issues related to
18 limited scope representation, I spoke with attorneys who
19 provide limited scope representation and heard from some
20 of them a concern about a rule --

21 MS. McALLISTER: Right.

22 MS. WOOTEN: -- because of what's already
23 been stated, this reality that some judges once they have
24 a lawyer in the case are hesitant to let the lawyer go for
25 fear that it might result in a less efficient process

1 moving forward, and so what lawyers engaged in limited
2 scope representation will often do is simply stay in the
3 background. They're ghost writing documents. They're
4 never appearing at court. And then there are some lawyers
5 who will appear at court but also stay in the background.
6 With this rule, in looking at the notice required, I can
7 envision a situation where you have a lawyer who maybe
8 wants to go to one hearing but also wants to be in the
9 background ghost writing, and in my notice I have to say
10 the issues for which I'm representing the client. Well,
11 now I'm in the court, so I need to -- do I need to say all
12 the issues for which I'm representing the client?

13 And another thing that strikes me as
14 potentially problematic about having to set forth the
15 issues for representing a client is that it might reveal
16 to some people or suggest to some people that the client
17 feels vulnerable on those particular issues for which he
18 or she has representation and when there's not
19 representation otherwise, and so I wonder if that level of
20 detail is needed. I know in the local rule for Travis
21 County it's more "I'm going to be here for this hearing on
22 these issues" --

23 HONORABLE JANE BLAND: They use the word
24 "tasks" in the local rule and originally this draft had
25 "tasks" and then it went through our subcommittee and it

1 was changed to "issue" because for fear that it was too --
2 it was too specific. So it was sort of the opposite of
3 what you were saying, so it changed "issues" and then I
4 think Chris got similar feedback from the family law bar
5 that they liked "tasks," so but we can get into that when
6 we get into the rule; and I agree that if this is a rule
7 that by not addressing sort of ghost writing implies that
8 somehow it is or is not allowed then maybe we do need to
9 go ahead and take a position on it. I think it was the
10 consensus feeling of the committee that we ought to not
11 require disclosure for ghost writing, but we understand
12 that others may not agree with that, and certainly there
13 is a -- across the country states have taken different
14 positions. Some require if you do any work you must
15 disclose it, and some require no disclosure, and then some
16 have kind of a hybrid.

17 CHAIRMAN BABCOCK: Levi, and then Judge
18 Yelenosky, then Buddy, then Kennon.

19 HONORABLE LEVI BENTON: I don't like the
20 part of the rule that requires disclosure of what the
21 limited scope is. I have in the last several years
22 regularly appeared as local counsel, and my engagement
23 agreements say that I have limited duties and my notice of
24 appearance filed with the court says I'm not lead counsel,
25 that lead counsel, Lamont Jefferson, is still lead counsel

1 herein. So I wouldn't want to be required to list tasks
2 or issues. It's just I'm local counsel, and I'd be
3 curious, those of you who regularly have local counsel
4 activities, how they feel about that issue, and whether
5 they're filing a notice of appearance that puts the court
6 on notice and opposing counsel on notice that you're not
7 lead counsel. You're with a different firm, you're in the
8 case, you're just additional counsel for party X.

9 CHAIRMAN BABCOCK: Judge Yelenosky.

10 HONORABLE STEPHEN YELENOSKY: Well, I think
11 we have to get back to why this is even an issue and what
12 the problem was. Ghost writing, if it's a problem has
13 been a problem irrespective of this, and so maybe you want
14 to address that, but this comes about because of a
15 problem, and that problem is people not -- particularly in
16 family cases, people not being able to afford a lawyer to
17 do the whole case. That's the problem we're addressing,
18 and the resistance, including myself as a judge, was,
19 well, we want an attorney to be in there on everything.
20 We don't want things cut out, but we do have to deal with
21 it in another context already because when we appoint for
22 defense in contempt cases, that's all we can appoint for.
23 So it's already done there.

24 But I have been persuaded over the years
25 that limited scope representation was really a bad idea

1 for all the reasons people are saying here, except that it
2 was worse when people couldn't get at least some attorney
3 help on their case; and so, yes, there are all of these
4 problems; but the demand came from the family lawyers,
5 they wanted to be able to do this; and the response wasn't
6 to limit anything they were already doing, whether it's
7 ghost writing or what you were describing, Lamont; and if
8 it needs to be clear that it's not a limitation of other
9 things concerning which are silent, then that could be
10 there; but the point of it was to respond to the family
11 attorneys' concern that I'm going to be in trouble with
12 the court if I try to come into court and say, "Well,
13 Judge, I'm just doing the child support, I'm not here on
14 the custody issue."

15 And so the whole point of the rule was to
16 give lawyers comfort to come into court and do that, even
17 if they had a judge who didn't like that, because it would
18 be in the rule; and most importantly, the reason why you
19 have to state your task or issues or whatever is, because
20 the attorneys wanted to be sure they could get out of the
21 case, and the only way you can get out of the case is if
22 the judge knows what it is you are doing and you
23 demonstrate that you've done those things, and there could
24 be a dispute about that. There are always going to be
25 problems with the client, and those are ethical problems

1 for the lawyer. A lot of lawyers won't want to do this
2 because of that. Don't do it. There are lawyers asking
3 us to be able to do it, and they're going to have to deal
4 with the ethical issues. The court doesn't get involved
5 between the client and the limited scope attorney
6 regarding ethical issues or malpractice. The whole point
7 of the rule is to allow attorneys to come into court, know
8 what they're responsible for, vis-a-vis the judge and
9 vis-a-vis the opposing party. What happens otherwise is
10 not the concern, as I understand it, of this rule.

11 CHAIRMAN BABCOCK: Buddy.

12 MR. LOW: Steve raises a real issue, the
13 ethical issue. I mean, if I represent somebody limited,
14 for a limited purpose, I'm going to learn certain other
15 information. There's no question the attorney-client
16 privilege would apply, but I haven't looked at all the
17 ethical rules about the interest of the client for this or
18 that and limited. So are there ethical problems involved
19 in doing that that we have to address?

20 HONORABLE STEPHEN YELENOSKY: Well, if I can
21 respond, yes, there are ethical problems. Do we have to
22 address them? No. Because the question is not how
23 limited scope should be conducted in an ethical manner, at
24 least as I understand it. The question is how can limited
25 scope be conducted such that it's accepted in at least

1 every court to which the rule applies, and lawyers who
2 want to do it, who are willing to wrestle with these
3 ethical issues, have some comfort that they can go into
4 court and be allowed to do it. I don't -- I mean, there
5 are difficult ethical issues here, but whether there's
6 going to be limited scope or not I don't think is on the
7 table. There already is limited scope. It's permitted
8 under the ethical rules. It's been the Travis County
9 local rule for four years now. So we've got limited
10 scope, and I didn't think this was to address the ethical
11 issues.

12 MR. LOW: But, but --

13 CHAIRMAN BABCOCK: Kennon.

14 MR. LOW: -- do we need to put in a comment
15 something about warning about the ethical issues and so
16 forth? Do we need to warn the lawyers? We put some
17 comments when we do things like that. Do we need to do
18 that?

19 CHAIRMAN BABCOCK: We just put a warning,
20 "There's ethical issues."

21 MR. ORSINGER: "Do not do this. Here's how
22 to do it, but don't do it."

23 MR. LOW: You must look at the
24 representation within the guidelines of the code of ethics
25 and be sure that, you know --

1 CHAIRMAN BABCOCK: We could have a little
2 triangle with an E in it.

3 MR. ORSINGER: No, you need to do the little
4 circle with the slash through it. "Do not do this."

5 CHAIRMAN BABCOCK: Kennon.

6 MS. WOOTEN: Just two points. One, in
7 response to Buddy's comment just now, the draft comment in
8 the memo does refer explicitly to Texas Disciplinary Rule
9 of Professional Conduct 1.02 thereby signaling the lawyer
10 if it gets passed as proposed that there is an ethical
11 rule that comes into play.

12 The other thing that I wanted to mention is
13 in regards to the proposed rule and I'm struggling to
14 understand why the other parties had a say in whether the
15 attorney providing limited scope representation can get
16 out of the case. Because normally, you know, that's a
17 matter between the lawyer and the client; and here the way
18 it's structured, if I'm reading it correctly, you can get
19 out if several of these requirements are met, one of which
20 is statement that the other parties do not oppose the
21 motion; and then the order provision, subpart (c),
22 addresses what happens if another party is opposed to the
23 withdrawal; and I don't understand why that's a component
24 of it.

25 HONORABLE JANE BLAND: And we can talk about

1 that more in connection with the withdrawal rule when we
2 get to it, but one of the issues with limited scope
3 representation is the burden that it places on opposing
4 parties and the trial court, and one of the remedies for
5 that is to have clarity about the scope of the
6 representation at the outset and also clarity about when
7 the scope of representation is concluded, and so if
8 everyone is in agreement that the limited scope lawyer has
9 fulfilled the task the limited scope lawyer notified
10 everybody that the lawyer was handling, then the judge
11 must sign an order allowing that lawyer to withdraw.

12 But what if there's disagreement about that?
13 Then the judge can still sign an order allowing that
14 lawyer to withdraw, but has to have a hearing and hear
15 what the disagreement is; and part of that is -- I think
16 Chris had a really good example of when that might come
17 into play. Orders, particularly involving children and
18 possession and health insurance and all these other
19 things, are really complicated orders in family law cases;
20 and if the lawyer says, "I'm going to represent, you know,
21 my client in connection with this case, you know, and here
22 are the tasks" and represents the client at the hearing
23 but then refuses to draft the order and, you know, perhaps
24 prevailed at the hearing and then, you know, is asking the
25 losing party to draft the order for them. In other words,

1 kind of shifting the burden of that legal work onto the
2 other party, and so having some parameters around
3 withdrawal seemed to be prudent.

4 The Travis County local rule has similar
5 parameters. The only -- the only difference is in Travis
6 County you have to get this kind of agreement even for
7 substitution. We decided that if the lawyer is
8 substituting, an opposing counsel shouldn't have a say in
9 that, so we took that out.

10 CHAIRMAN BABCOCK: Okay. Justice Brown.
11 Then Richard.

12 HONORABLE HARVEY BROWN: Following up on
13 Justice Bland's comment about clarity, it seems to me that
14 one part of the ethical rule should be part of this rule,
15 and that is that we should require the client to consent
16 in writing to the limited representation. The DR's don't
17 require it in writing. They just require consent, but if
18 you don't have it in writing, it seems to me like you're
19 going to have inevitable conflicts between the client and
20 the lawyer, and then the judge is going to have to be a
21 fact finder between two fact witnesses stating what
22 happened. So I think we should require and have notice
23 something that the client has consented in writing before
24 you allow that.

25 (Conference Phone interrupts with automated

1 message: "Hello, you have been conducting a
2 meeting for a long period of time.")

3 HONORABLE STEPHEN YELENOSKY: Why is that
4 any of your business?

5 HONORABLE JANE BLAND: We know we have long
6 meetings.

7 HONORABLE TOM GRAY: Dee Dee, did you get
8 that?

9 MS. BARON: Make sure that's in the record.

10 HONORABLE JANE BLAND: I think Judge Brown's
11 idea is a good one, and I'm not sure that we want the --
12 one thing we can do is have the client sign the notice.

13 CHAIRMAN BABCOCK: Yeah.

14 HONORABLE HARVEY BROWN: That would work.

15 CHAIRMAN BABCOCK: Go ahead, Richard.

16 MR. ORSINGER: So I'm going to take another
17 run at it. I see that this is how you get in and how you
18 get out, and I'm really worried about what happens in
19 between, and it may be that there's some people here that
20 have the practical experience of how you handle a case
21 where part of the issues are being handled by a lawyer and
22 part of the issues are handled by a pro se, and the lawyer
23 is going to ask one witness some questions and then the
24 other -- then the client is going to ask some other
25 questions, and the client is going to call for hearsay and

1 the client isn't going to know how to authenticate a
2 document, and I'm having a real hard time getting my brain
3 around this, and I'm wondering the people who have
4 actually tried this, how do you do it?

5 HONORABLE DAVID EVANS: It forces a separate
6 trial.

7 HONORABLE STEPHEN YELENOSKY: Yeah.

8 HONORABLE DAVID EVANS: It forces a separate
9 trial. That's what it does.

10 MR. ORSINGER: It forces two trials even if
11 you're --

12 HONORABLE DAVID EVANS: Sure.

13 MR. ORSINGER: -- like one legal --

14 HONORABLE DAVID EVANS: Yeah.

15 MR. ORSINGER: -- legal issue and one --

16 HONORABLE DAVID EVANS: Right. It forces --
17 from a practical management standpoint of trying to --
18 who's going to speak at what point, who's going to answer
19 on behalf of the client as to an issue, you could have --
20 you could have two different viewpoints almost come out in
21 the situation.

22 Now, the one I gave you about the defense
23 lawyer on the car wreck and the plaintiff's lawyer, that
24 definitely happens, but even in family law you're going to
25 have that. So the only practical solution is to say if

1 you can you try the issue separately, and that is a
2 problem.

3 CHAIRMAN BABCOCK: Does that happen, Judge?

4 HONORABLE DAVID EVANS: Yeah. We do it in
5 the -- in the Title IV-D work we end up with that kind of
6 situation --

7 HONORABLE ANA ESTEVEZ: Yeah.

8 HONORABLE DAVID EVANS: -- at times, and
9 that's where I'm most familiar with it, because we'll end
10 up with conservatorship issues and other issues come up in
11 response to a child support enforcement action, and I am
12 told that when they get into that separate representation
13 sometimes the most efficient way is, well, we reduce the
14 child support arrearage, we'll get that number fixed, and
15 then we'll go try the second part of it.

16 CHAIRMAN BABCOCK: Judge Yelenosky.

17 HONORABLE STEPHEN YELENOSKY: I think what's
18 more common is somebody says, "Okay, I'll help you get
19 your temporary orders," and so that's all they do, and
20 when they get to trial it's just the pro se. But what you
21 say -- what you're pointing to is a problem, but not a
22 significant -- I mean, it's a problem, but you're
23 typically not dealing with a jury. You're dealing with
24 the judge, and it can be worked out, but I wouldn't
25 want -- there are all kinds of problems with this

1 obviously, but I wouldn't want that tail to wag the dog
2 where the dog is really, you know, people coming in doing
3 temporary orders or coming in, "Okay, I'll work on the
4 child support," and it either can be cabined off without a
5 separate trial somehow or in worst cases --

6 HONORABLE DAVID EVANS: In worst cases.

7 HONORABLE STEPHEN YELENOSKY: In worst cases
8 you have to do it, but I don't think that is the common.

9 HONORABLE DAVID EVANS: I mean, it has
10 benefits. There should be some rule, but it depends on
11 what environment you're really reaching for. If you're
12 trying to assist people who can't afford counsel and are
13 without representation versus people who have -- in
14 another situation may have claims, and so that's -- I
15 think it's a difficult management problem, and it can be a
16 real trial management problem.

17 HONORABLE ANA ESTEVEZ: I just disagree that
18 it's unusual. I mean, it's extremely common in our pro se
19 enforcement cases. I mean, because I don't know if the
20 family law lawyers all got together and decided that's
21 what they're going to do, so that's what they do is they
22 ask, "Can we do the enforcement first, Judge? You
23 appointed me on this, but I can't do the other issues."
24 And so, you know, we're elected. It's a small county. Of
25 course, you can. So -- so we do the enforcement, they

1 leave, we go on to the other. Unless, you know, they go
2 talk a little while during, you know, to deal with the
3 enforcement issue and then in the middle of that they
4 decide the other issues, too, which happens maybe 50
5 percent of the time. So that still leaves 50 percent of
6 the time in a very, very common situation we have this
7 situation. So it's common.

8 CHAIRMAN BABCOCK: Okay.

9 HONORABLE STEPHEN YELENOSKY: But that's
10 where you're appointing.

11 HONORABLE ANA ESTEVEZ: Yeah, well, we
12 appointed them because it's, you know, quasi-criminal.

13 HONORABLE STEPHEN YELENOSKY: But my point
14 is this --

15 HONORABLE ANA ESTEVEZ: No, it happens also
16 -- I have people that were hired only for contempt,
17 because somebody came in that goes, "No, I'm going to hire
18 my own attorney" and then they come in and they say, "I
19 was only hired on contempt," and they won't do the
20 modification, so it's not that --

21 HONORABLE STEPHEN YELENOSKY: Oh, I'm just
22 saying --

23 HONORABLE ANA ESTEVEZ: They still give them
24 two different prices. They're not -- you know, they're
25 not --

1 HONORABLE STEPHEN YELENOSKY: Right.

2 HONORABLE DAVID EVANS: You try the
3 arrearage and then you're left with conservatorship and
4 future support, and modification and support, and that's
5 where you end up. Usually the arrearage gets reduced as
6 one judgment, and then you try to figure out if you've got
7 separate representation and modification and
8 conservatorship, and that's where you -- and the change is
9 supported. At least that's how I've seen it.

10 HONORABLE ANA ESTEVEZ: I mean, sometimes
11 it's visitation, so it's just a contempt issue.

12 HONORABLE DAVID EVANS: Yeah.

13 HONORABLE ANA ESTEVEZ: It doesn't matter
14 what it is, but --

15 CHAIRMAN BABCOCK: Okay. Any other comments
16 at this point? Jane, what do we want to do from here?

17 HONORABLE JANE BLAND: Okay. So I think
18 we'll go ahead and start going through the text of the
19 recommended changes.

20 CHAIRMAN BABCOCK: Okay.

21 HONORABLE JANE BLAND: Under Rule 8.2
22 paragraph (a), that's the paragraph that notifies the
23 court and opposing counsel that a lawyer is making a
24 limited appearance, requires a notice that identifies the
25 attorney that's making the appearance and the issues or

1 tasks, and happy to hear feedback from you on correct
2 language. Issues or tasks for which the attorney will
3 represent the client, identifies the party that the
4 attorney represents and the service information for both
5 the attorney and the party that becomes important in
6 connection with service later on in the rule. And then I
7 think we had the suggestion from Justice Brown that we add
8 that the notice be signed by the client. I think that's a
9 great idea, so we'll include that as well. Any comments
10 about the notice?

11 CHAIRMAN BABCOCK: Yeah, Justice Gray.

12 HONORABLE TOM GRAY: I'll comment on the --
13 the selection of the term "issues," to me that's a real
14 problem. If I was trying to do this it would concern me a
15 lot as the attorney of what happens when that same issue
16 pops up later in the trial court or even later in a motion
17 for new trial or even later in an appeal. Am I obligated
18 to keep coming back, because even -- regardless of what my
19 engagement letter says, I signed a notice that said I'm
20 going to represent them on these issues. Apparently
21 Travis County has the word "task" there, and I would like
22 Stephen to at least relate if that has worked well in the
23 context of Travis County, or if it has presented its own
24 set of problems.

25 HONORABLE STEPHEN YELENOSKY: I think it's

1 worked well because I don't hear any problems with it, but
2 that's just silence, and that's the only way I can judge
3 it.

4 HONORABLE TOM GRAY: I mean, what I had done
5 as an idea was to replace 2 with something along "clearly
6 describe the scope of services the attorney will be
7 responsible for and any limitation thereof," but I also
8 heard the complaints over here of Levi and others that
9 that may be too descriptive and provide too much
10 information about what my role is and what my really
11 confidential relationship is with my client, so, you know,
12 I like "tasks" better than "issues" but --

13 HONORABLE STEPHEN YELENOSKY: I don't know
14 that it matters. It's sort of self-policing because you
15 have to put enough in there that at the back end you can
16 get out of the case.

17 HONORABLE TOM GRAY: Right.

18 HONORABLE STEPHEN YELENOSKY: And you have
19 to put -- and don't want to put in there anything that
20 would be revealing a privilege. So the attorney has got
21 to figure it out. I don't know that it matters that much
22 what words you use.

23 CHAIRMAN BABCOCK: Yeah, you know, Levi's
24 point, which I thought about a minute ago was about a
25 local counsel, and I've never thought of local counsel as

1 having -- of making a limited appearance.

2 HONORABLE STEPHEN YELENOSKY: No.

3 CHAIRMAN BABCOCK: Levi.

4 HONORABLE LEVI BENTON: So as someone who
5 has unsuccessfully tried to hire Buddy Low as local
6 counsel in certain counties, I wouldn't want his notice of
7 appearance to say anything other than he's additional
8 counsel. Period.

9 CHAIRMAN BABCOCK: Yeah. But --

10 HONORABLE LEVI BENTON: And I do think that
11 the proposal might be -- and it might work in Travis
12 County in family law cases, but in complex commercial
13 cases, it's just -- it causes more problems than it
14 solves. The notice that's filed puts the world on notice
15 that I'm not lead counsel, or the local counsel is not
16 lead counsel. It doesn't further burden the court or
17 opposing parties in my view. Harvey and I were having a
18 side bar about getting out of the case. You know, my
19 local counsel engagement letter says if the lead lawyer,
20 Chip Babcock, withdraws I have a right to withdraw,
21 period, without any further discussion. I have had
22 opposing counsel give me problems on withdrawal, and I've
23 said to the trial judge in Harris County, "You might have
24 all power, but you don't have the power or authority to
25 expand the scope of my engagement agreement," and that has

1 been a winning argument. So --

2 CHAIRMAN BABCOCK: Okay. Justice Gray, and
3 then Frank, and then there were some other people over
4 here, too.

5 HONORABLE TOM GRAY: Well, as I understand
6 that part of Levi's concern, they're not making a limited
7 appearance under this rule --

8 HONORABLE STEPHEN YELENOSKY: Right.

9 HONORABLE TOM GRAY: -- when they appear as
10 local counsel.

11 CHAIRMAN BABCOCK: Right.

12 HONORABLE TOM GRAY: And that's -- so I
13 don't think it's a problem, but, for example, if the trial
14 judge called you on a Friday afternoon and says, "The
15 other side is down here on a TRO," and your lead counsel
16 has already gone to Colorado for the weekend, are you
17 going to go over there and argue the motion?

18 HONORABLE LEVI BENTON: That's a good
19 question, and I would say the answer is I have a right to
20 say I am not lead counsel, and, "Your Honor, you ought to
21 wait until lead counsel is available." The other flip
22 side is it's Friday afternoon and trial starts Monday, and
23 the client hasn't paid me the additional fee. Should I be
24 able to withdraw on the eve of trial if I'm not lead
25 counsel? So that's why I say I think it is limited, and

1 the answer is, yes, I should be able to withdraw on the
2 eve of trial because I'm not lead counsel and the client's
3 not going to be abandoned and the court is not going to be
4 burdened by my withdrawal.

5 HONORABLE JANE BLAND: Could we remedy this
6 by limiting this Rule 8.2 with a prefatory "when no lead
7 counsel has been designated"?

8 MR. ORSINGER: Automatically you're
9 designated, the first lawyer who signs.

10 HONORABLE STEPHEN YELENOSKY: Why not say
11 "when the party will be proceeding pro se in part"?

12 MS. McALLISTER: Part, yeah.

13 HONORABLE STEPHEN YELENOSKY: Because all
14 your cases are never going to involve those.

15 HONORABLE LEVI BENTON: Right. That's
16 right.

17 MS. McALLISTER: And that's what limited
18 scope is about.

19 HONORABLE STEPHEN YELENOSKY: I mean, I'm
20 just trying to --

21 HONORABLE JANE BLAND: We'll take a look at
22 figuring that out.

23 CHAIRMAN BABCOCK: Okay. Frank had his hand
24 up, I think, and then so did Robert. Peter did.

25 MR. GILSTRAP: The problem is the term

1 "limited appearance." I mean, you're either there or
2 you're not, and when you're there, the issue is what are
3 you there for. It's the scope of your representation. I
4 would say (2) should say "the scope of the limited
5 representation," and then over in (d), line three, it says
6 "outside the scope of the limited representation."

7 HONORABLE LEVI BENTON: Chip, how about
8 this? How about changing the caption and naming it
9 "Appearance by counsel other than lead counsel"?

10 MR. JEFFERSON: I don't like that.

11 CHAIRMAN BABCOCK: I don't know, Levi, if I
12 buy the distinction between lead and local counsel as
13 being a limiting factor.

14 MR. LEVY: Yeah.

15 CHAIRMAN BABCOCK: I mean, you've got local
16 counsel in Tyler in federal court, and those rules say
17 you're local counsel if -- you know, they've got to stay
18 up to speed on the pleadings, they've got to be ready to
19 argue at a moment's notice. You know, they're just as --
20 and there may be some protectionism going on there, but
21 still, they're still every bit as much as a lawyer in the
22 case for all purposes as the lead lawyer, so I don't know
23 if I think that concept works, but --

24 HONORABLE STEPHEN YELENOSKY: Regardless,
25 does it have to do with this rule?

1 CHAIRMAN BABCOCK: What?

2 HONORABLE STEPHEN YELENOSKY: That predates
3 this rule. It doesn't have to do with this rule, what
4 he's concerned about. Why does this rule have anything to
5 do with that?

6 CHAIRMAN BABCOCK: Well, because rule -- the
7 existing rule says the first -- the first lawyer that
8 signs is the attorney in charge, unless another attorney
9 and the attorney in charge is the lead lawyer, but that
10 doesn't mean, you know, I'm not going to have an associate
11 or a junior partner.

12 HONORABLE STEPHEN YELENOSKY: Oh, my point
13 is just that in considering a limited scope rule we're
14 addressing a particular problem and maybe we need to be
15 more clear about that, but his contention about what he is
16 responsible for or not responsible for as local counsel
17 long predates this issue.

18 CHAIRMAN BABCOCK: Well, I don't know if I
19 agree with that. Levi is saying that just by the mere
20 fact that he's local counsel -- I guess maybe lead counsel
21 is from New York let's say. That's the classic out of
22 state counsel.

23 HONORABLE STEPHEN YELENOSKY: Chicago.

24 CHAIRMAN BABCOCK: The mere fact that he's
25 local counsel for out of state lead counsel limits his

1 representation of the client.

2 HONORABLE STEPHEN YELENOSKY: Because it --

3 CHAIRMAN BABCOCK: That's what I'm saying.

4 HONORABLE STEPHEN YELENOSKY: Because this
5 new rule would suddenly capture that or would refer to
6 that?

7 CHAIRMAN BABCOCK: Well, I think --

8 HONORABLE STEPHEN YELENOSKY: I mean, I'm
9 just saying we can make the rule not do that.

10 CHAIRMAN BABCOCK: Okay.

11 HONORABLE STEPHEN YELENOSKY: And I think
12 Justice Bland --

13 CHAIRMAN BABCOCK: But Levi is saying that's
14 the status now. So --

15 HONORABLE LEVI BENTON: Yeah, because the
16 court doesn't have the authority, Chip, to expand my
17 contractual duties and obligations.

18 MR. GILSTRAP: Oh, I'm sure he does.

19 MR. STOLLEY: The court does.

20 CHAIRMAN BABCOCK: There may be some judges
21 that disagree with that, but not in Harris County maybe.
22 I've lost track of everything. Frank, and Robert had his
23 hand up next I think.

24 MR. LEVY: Well, I was really echoing what
25 you had mentioned, that I think the lead counsel issue is

1 a separate matter, and it doesn't formally act as a
2 limited representation.

3 CHAIRMAN BABCOCK: Peter, you had your hand
4 up I know.

5 MR. KELLY: Yes, I did.

6 CHAIRMAN BABCOCK: For a long time.

7 MR. KELLY: No, just it was briefly, but a
8 couple of points. 8.2(a) requires filing of the notice
9 but not service of the notice, and you probably want to
10 require service on opposing counsel. I had the note of
11 doing a time limit. That might be one way to do it, if
12 the paradigm is a pro se party going through divorce and
13 want to hire a lawyer just to do the custody hearing. So
14 he's filed notice of appearance, and the issue is custody,
15 of, say, of an 8-year-old. Well, is that limited
16 appearance attorney on the hook for another 10 years until
17 that minor becomes -- reaches majority? So that nine
18 years later if the custody issues arise again or just
19 three years later, is that attorney still on the hook to
20 come down and represent that party in that, and can the --
21 can you also build in a time limit to limit the
22 representation? I think that might address some of these
23 issues about having ongoing involvement with a particular
24 issue.

25 My third note is there was some discussion

1 about not wanting to disclose what issues you're on. You
2 have to do that, especially when you get to the service
3 requirements, which are further down in (c) and (d) about
4 effectiveness of service on the attorney, and it's going
5 to be very difficult I think for opposing counsel and for
6 the courts to parse through on what type of notice can be
7 given to the attorney and party and what type should only
8 be given to the party. That's putting a tremendous
9 burden -- if you have a court clerk who just mails out
10 notice to everybody on everything and then they have to
11 parse through the appearance and figure out under what
12 issue does this particular notice or hearing fall under, I
13 don't know how you get around that.

14 CHAIRMAN BABCOCK: Justice Bland.

15 HONORABLE JANE BLAND: To address the
16 concern that was raised by Levi and others, perhaps we
17 could amend the first sentence to say, "An attorney making
18 a limited appearance in a case where no other lawyer has
19 made a general appearance."

20 HONORABLE STEPHEN YELENOSKY: Right.

21 HONORABLE JANE BLAND: Does that solve it?
22 And I think that might limit the rule to the case where we
23 have a limited lawyer and no other lawyers. And that's
24 really what the rule was intended to do.

25 MR. KELLY: But opposing party can have a

1 lawyer.

2 HONORABLE JANE BLAND: Right. Right.

3 MR. KELLY: So you have to -- no other on
4 behalf of that particular party.

5 HONORABLE JANE BLAND: That's right. We've
6 got to fix that, and we'll talk about the service and the
7 different options there, and I think your comments are
8 really well-taken, and we'll talk about those when we get
9 down to service.

10 CHAIRMAN BABCOCK: Lisa, then Richard, then
11 Scott, then Skip.

12 MS. HOBBS: Well, so it turns out I do
13 limited scope representation all the time. Every time I'm
14 in a trial court as an appellate court -- I mean as an
15 appellate attorney I am limited in my scope. I'm not --
16 well, sometimes it's blurry, but I try to draft my
17 engagement letter so I limit my scope when I'm in the
18 trial court level. Now, when I go up on appeal, I'm the
19 lead lawyer, and it's my appeal, but all the time I would
20 be bound by this rule, and so as an appellate lawyer I
21 love Justice Bland's suggestion that we limit this rule
22 that we're trying to draft to those instances where
23 another attorney hasn't made an appearance and we're
24 talking about a pro se rule.

25 CHAIRMAN BABCOCK: You like that or you

1 don't like that?

2 MS. HOBBS: I support Justice Bland's
3 additional language that she just proposed.

4 CHAIRMAN BABCOCK: Okay. Richard.

5 MR. ORSINGER: I'm not sure that I got all
6 of Justice Bland's language, and I'm not sure that a
7 general appearance is the term that we should use, but I
8 very strongly support the idea that this rule should be
9 limited to pro ses who have a limited engagement and not
10 with two lawyers that are splitting a general engagement
11 between the two and who can then game the system and cause
12 lots of trouble, so I would much prefer if we could find
13 good language.

14 HONORABLE STEPHEN YELENOSKY: Yeah.

15 MR. LOW: Because quite often the contract
16 calls for the right to hire additional lawyers between
17 them. I mean, they call it local counsel, or what, but
18 they decide what your duties are, but you're -- that's in
19 the contract itself, the original contract.

20 CHAIRMAN BABCOCK: Scott.

21 MR. STOLLEY: Like Lisa, as an appellate
22 lawyer I will often do a limited engagement because I
23 don't want my name on any pleadings in the trial court
24 because I don't want to have to deal with the client
25 thinking I'm representing them on enforcement of the

1 judgment, for example. So I might get retained, for
2 example, right after summary judgment has been granted,
3 and we're not going to file a motion for new trial. We're
4 just going to file a notice of appeal, so I will ghost
5 write the notice, and I will ghost write the request for
6 the record, but I will do it for the trial lawyer's
7 signature because I don't want my name in the trial court.

8 CHAIRMAN BABCOCK: No, I know who you are,
9 you're the guy during trial that's always tugging on my
10 sleeve saying "object," and I go, "On what basis?"

11 MR. STOLLEY: No, so my point is I think
12 there is room -- there are examples where you can
13 legitimately have a limited engagement of a lawyer in the
14 case where it's not the pro se example that everybody is
15 talking about.

16 CHAIRMAN BABCOCK: Yeah. Skip.

17 MR. WATSON: Well, I'm hearing two different
18 things, that the first sentence of 8.2(a) does not make it
19 clear either that it's only in a case in which there is
20 not another lawyer who's made a nonlimited appearance, and
21 it also doesn't differentiate that the limited appearance
22 is in the case only on certain issues, that that's --
23 that's what the limited appearance is. I just think that
24 first sentence needs to clarify both, that it's somebody
25 who is in a case in which no other lawyer has entered an

1 appearance and the appearance is limited to only certain
2 issues. To me that clears it up.

3 CHAIRMAN BABCOCK: Kristen, you had
4 something?

5 MS. LEVINS: Yes. So I have been
6 researching limited scope representation since 2013, and
7 one of the first things I did when I started working at
8 Access to Justice Commission is we finished up a limited
9 scope representation attorney tool kit, and I believe it's
10 in your materials, and I just wanted to comment on the
11 "task" versus "issues" question. In it -- in our tool kit
12 we have a task assignment checklist, and it is stuff that
13 is done generally outside the court, like review and edit
14 settlement proposal, or advice about conducting a hearing
15 and presenting evidence. Then we also have an issues
16 checklist, which goes more to what the legal -- it says,
17 you know, "legal theories, causes of action, elements of
18 time or defense." So at least in our materials that's how
19 we settled the difference between tasks and issues.

20 Also, I know there's a lot of concern about
21 getting into the case and out of the case and in court,
22 and several states have written their rules where you only
23 file this when you're going to court. You don't file it
24 when you're ghost writing. You don't file it if you're
25 just giving advice. You only file and let the court know

1 what you're doing when you're in an appearance in front of
2 a judge or a judicial officer, and then when you list your
3 issues they're going to know that's what's coming up in
4 the hearing. So it's not like you're saying, "Hey, I'm
5 going to be advising this person on these different
6 issues," and we're not going to come to court. So you
7 have no way of knowing that I did that advice. So that's
8 one way that that can be handled.

9 CHAIRMAN BABCOCK: Yeah, Professor Hoffman.

10 PROFESSOR HOFFMAN: So kind of following up
11 on that, one of the thoughts I had was there's nothing
12 about the timing on this, and picking up from 8.1 and from
13 what you just said, Kristen, maybe we want to say
14 something like "on the occasion of the first appearance"
15 or something like that, sort of link it to when it has to
16 go and then, of course, you can withdraw thereafter. But
17 that's already covered.

18 CHAIRMAN BABCOCK: Judge Yelenosky.

19 HONORABLE STEPHEN YELENOSKY: Is anybody
20 here doing limited scope representation with an otherwise
21 pro se litigation? Anybody? Okay. I've talked to those
22 people. They don't have these problems that you're
23 talking about, and so if you're having problems with it,
24 it can be written so it doesn't affect you. If you're
25 concerned about length of time, they're not concerned

1 about that, because if they're concerned the judge isn't
2 going to let them out of the case, they can write that
3 into their limited scope. I'm going to do this so long as
4 it doesn't last more than five years or whatever, but it's
5 incumbent on them. They're happy with this as far as I
6 can understand. These are great problems theoretically
7 that will never apply to you, and they're not asking for
8 these things.

9 CHAIRMAN BABCOCK: But that's what we do.

10 HONORABLE STEPHEN YELENOSKY: I know. I do
11 it all the time, too. I'm just saying this is one
12 instance in which we don't need to do that.

13 CHAIRMAN BABCOCK: Okay. Kristen.

14 MS. LEVINS: So just piggybacking on that,
15 someone called me a couple of months ago. He had retained
16 an attorney in a limited manner, and he was confused about
17 proceedings, and so I talked to him for a while and then
18 he started asking me for legal advice. I was like, "Look,
19 tell your attorney to call me." Well, the next day his
20 attorney called me, and we talked about procedures and how
21 to notice the court that you were going to be
22 participating in only a limited manner and how to
23 withdraw, and then a week later his opposing counsel
24 called me and said, "Hey, I've got this issue where
25 opposing counsel is in a limited scope and I don't know

1 who to notice, and I don't know what issues he's involved
2 in," and it's because we didn't have a rule like this
3 saying let's -- this is how you get in the case, this is
4 how you get out of the case, and this is what happens in
5 the middle.

6 So I'd like to be able to point people to
7 that when they call me saying, "Yeah, I'm in a limited
8 scope representation. I don't know what to do." And so I
9 literally talked to the client, to the attorney, and the
10 opposing counsel within a week of each other.

11 CHAIRMAN BABCOCK: Okay. Yeah, Chris.

12 MR. NICKELSON: Couple of things on subpart
13 (a). The first, and the "issues" probably ought to be
14 followed by -- in subpart (a)(2), I believe, the term
15 "issues" ought to be followed by "and discrete tasks that
16 the lawyer is going to perform for the client," and it is
17 a matter of some importance because the proponents of
18 limited scope representation will tell you that what
19 they're trying to facilitate is a client who cannot afford
20 full service representation, that there are some discrete
21 tasks which a full service lawyer otherwise would provide
22 that that client wants to hire somebody to do those
23 discrete tasks. I think the term "issues" remains
24 because, for example -- and I have to talk about my own
25 perspective, family law. In a family law case, if it's a

1 divorce with children you're going to have the divorce
2 issue, the property division, the issues of
3 conservatorship, possession and access and child support;
4 and so for somebody who was trying to attempt to say,
5 "Well, I'm only going to appear on the divorce property
6 issue, and then to even limit it to the following tasks of
7 what I'm going to do," whether that's a good or bad idea,
8 well, that's up to the client and the lawyer; but I do
9 believe that trying to focus people who are going to
10 attempt to do this on identifying not only to their own
11 client, but to the other side and to the court, "This is
12 what I will enter this case to accomplish," that sort of
13 clarity is what the rule ought to seek to accomplish for
14 the benefit of everyone involved in the case; and that was
15 one of the -- one source of feedback that I got just from
16 the executive committee, the counsel and the section at
17 large have not seen this rule, so I can only comment on
18 what the executive committee has to say.

19 The other issue is one that has already been
20 brought up multiple times here, and this idea that this --
21 the intent behind this proposal is to help modest means
22 low income people. This is not meant -- and great caution
23 should be taken in drafting this rule, because if you were
24 to allow this rule as it's written to stand, my guess is
25 why would anybody else ever be a full service lawyer, or

1 if you took out the provision about nobody could object on
2 the other side to withdrawal, then that would be the
3 greatest benefit ever, and everybody after this should
4 appear only in a limited capacity.

5 So those are the general comments that --
6 materials from the Access to Justice, they are worth
7 looking at in here. If you have time to look at them,
8 because they do list out where somebody attempting to do
9 this to focus their mind around the idea of whether there
10 are issues you might appear on and then there are discrete
11 tasks that you might do, and I think that if we can force
12 people to do that and to somehow limit this rule's
13 application to simply pro se parties who are trying to
14 bring in a lawyer to help with discrete tasks that they
15 cannot otherwise do, then that's the direction to go.

16 CHAIRMAN BABCOCK: Judge Yelenosky.

17 HONORABLE STEPHEN YELENOSKY: Well, I'm just
18 a little concerned about that, because Levi's point makes
19 for me a different point, which is your engagement with
20 your client is your engagement with your client, and as a
21 judge I don't care what that says. All I'm interested in
22 is what does your notice of limited appearance say, and
23 all you should be concerned about in fashioning your
24 notice of limited appearance is what it says to the judge.
25 Yeah, client has to sign off on it, but it could be more

1 general for reasons I don't know, or it could be more
2 specific, but it doesn't have to be completely consistent
3 with your engagement or it can be much, much -- it could
4 be much broader for whatever reason. The judge is going
5 to hold you to what've you put on that. Between you and
6 your client that's part of it, but you also have a letter
7 of engagement.

8 I don't have a problem with suggesting to
9 people somehow that they ought to list tasks or whatever,
10 but it ought to be as flexible as possible. These are
11 lawyers -- I mean, they may need education on it, but I
12 don't -- from the Court's perspective, from our
13 perspective, I don't know why we have to specify what they
14 need to do in order to protect themselves at the risk of
15 limiting what they can do. Sometimes they may want to do
16 discrete tasks. Sometimes they may want to do one
17 particular hearing, for example. They may say, "I'll do
18 the hearing before the associate judge, but if the other
19 side" -- "if you win and the other side wants to take it
20 de novo to the district judge, I'm not going to do that."
21 Fine, you know, if they want to put that in there.

22 So I see this really as a shell that they
23 fill for their -- fill up for their purposes and for the
24 purposes of the court so that the relationship between the
25 court and the lawyer and between the court, lawyer, and

1 opposing party is clear.

2 CHAIRMAN BABCOCK: Why don't we try to focus
3 on 8.2(b), if there are any comments on that.

4 HONORABLE JANE BLAND: 8.2(b) just simply
5 states that the attorney who files the notice of limited
6 appearance is the attorney for those issues or tasks
7 designated in the notice but is not the attorney for
8 matters outside the scope of the notice. It's really
9 just --

10 CHAIRMAN BABCOCK: Yeah, so --

11 HONORABLE JANE BLAND: -- more of the same
12 discussion we've been having.

13 CHAIRMAN BABCOCK: Right. If you get (a),
14 okay, then (b) ought to follow.

15 HONORABLE JANE BLAND: (b) ought to follow
16 with it. (c) is about the duration of the limited --

17 CHAIRMAN BABCOCK: Just a second, Judge.
18 Any comments about (b)? I can't imagine, but Robert.

19 HONORABLE JANE BLAND: I tried to move us
20 along, Chip.

21 CHAIRMAN BABCOCK: I know that was smooth
22 there, but Robert was --

23 MR. LEVY: This might be not necessary, but
24 in referencing that do we want to say the attorney -- the
25 limited appearance for these specific party, because if

1 there are multiple parties involved you might want to --

2 HONORABLE JANE BLAND: Yeah, I think we need
3 to do some work on tethering it to specific parties for
4 the reasons we discussed in (a) so that people know
5 that --

6 CHAIRMAN BABCOCK: Yeah.

7 MR. LEVY: Yeah.

8 CHAIRMAN BABCOCK: Yeah, we'll make (a) and
9 (b) symmetrical.

10 MR. LEVY: Okay.

11 CHAIRMAN BABCOCK: Yeah, Justice Gray.

12 HONORABLE TOM GRAY: Chip, I don't know if
13 it's well here, but on 8.1, I do think it needs to have
14 something tweaked in it, not -- I mean, there's a lot of
15 tweaks that could be made to it, but it seems like it
16 needs to say "except when a limited appearance is made
17 under 8.2" and then go into the rule because otherwise the
18 rule as written seems to be in direct conflict with 8.2.

19 HONORABLE JANE BLAND: That's a good point.

20 CHAIRMAN BABCOCK: Yeah, that is a good
21 point. I thought maybe Justice Bland talked about it at
22 the beginning, but maybe not. Anyway, that's a good
23 point.

24 HONORABLE TOM GRAY: I thought she was
25 trying to skip over any changes to 8.1.

1 CHAIRMAN BABCOCK: No, no, no.

2 HONORABLE TOM GRAY: Because there are some
3 other things that could be --

4 CHAIRMAN BABCOCK: She is sly, we all admit
5 to that.

6 HONORABLE TOM GRAY: I did not say that. I
7 do not admit to that, don't know anything about that.

8 CHAIRMAN BABCOCK: Let's go to 8.2(c).

9 HONORABLE JANE BLAND: 8.2(c) discusses
10 duration, and it provides that a limited appearance
11 continues until the court orders that an attorney may
12 withdraw or until the case is concluded. It also deals
13 with the common occurrence, as I understand it, in limited
14 scope cases where the -- there's an early hearing that the
15 lawyer is representing a client for, and -- and the issue
16 may come up again later. This rule says if the appearance
17 is for a preliminary or a temporary issue and the court
18 defers its ruling then the attorney's obligation to the
19 court ends with the attorney's appearance at the
20 preliminary hearing and the attorney may then move to
21 withdraw under Rule 10.2, and it also talks about interim
22 orders, that if an interim order subject to further
23 consideration -- that doesn't extend the attorney's
24 obligation. The idea is to sort of let the attorney out
25 after the -- after the limited appearance has been made.

1 HONORABLE STEPHEN YELENOSKY: But --

2 CHAIRMAN BABCOCK: Okay. Who had their hand
3 up first? You did. Professor Hoffman.

4 PROFESSOR HOFFMAN: Okay. I'm confused
5 about the second sentence in a few ways. So I'm not sure
6 why we need it. It's also confusing because you've got
7 this -- these two things. Then the attorney's obligation
8 to the court ends and the attorney may move to withdraw.
9 So what happens if they don't withdraw but their
10 obligation is sort of deemed to end? And then, of course,
11 there's the whole question of what is the court's
12 obligation? So I think you could live without the second
13 sentence entirely. I think the first one says, you know,
14 you're in until you withdraw and the court orders you can
15 withdraw and then you've got that last little issue.

16 HONORABLE JANE BLAND: And our committee
17 discussed that. Initially we did not have this sentence
18 in. This is a sentence that's modeled after the Travis
19 County rule, and I think --

20 HONORABLE STEPHEN YELENOSKY: Well, not
21 completely.

22 HONORABLE JANE BLAND: Not completely, okay.

23 HONORABLE STEPHEN YELENOSKY: That was my
24 question because you don't -- because the Travis County
25 rule, if I remember right, it should say that you have

1 to -- you don't get out of it or your obligation doesn't
2 end until there's an order. Suppose you win the hearing
3 and you don't draft the order. According to this you're
4 done.

5 MR. LEVY: Was that reviewed by the Supreme
6 Court?

7 HONORABLE STEPHEN YELENOSKY: I'm sorry?

8 MR. LEVY: Was that rule reviewed?

9 HONORABLE STEPHEN YELENOSKY: Yes, it was.
10 It's right in here with all of the signatures.

11 HONORABLE JANE BLAND: It does make an
12 exception for the orders. This sentence is from the
13 Travis County rule.

14 HONORABLE STEPHEN YELENOSKY: Yeah, but
15 there is a sentence about orders, isn't there, or did you
16 take that out?

17 HONORABLE JANE BLAND: No. No. For
18 preliminary hearings it has this idea that if the order
19 comes later or is revisited --

20 HONORABLE STEPHEN YELENOSKY: Okay.

21 HONORABLE JANE BLAND: -- it doesn't affect
22 the attorney's ability to withdraw.

23 PROFESSOR HOFFMAN: If the cheerleader for
24 Travis County would yield for just a second, my comment is
25 just I don't think you need it, and I think it's

1 confusing. It's unclear when the withdrawal becomes
2 effective, whether or not there's automatic even without a
3 withdrawal. You know, the limited appearance presumably
4 says we are only doing the preliminary hearing or
5 something like that. If it doesn't say that then you may
6 be in for longer. So it just seems like it's a messy
7 sentence that's not adding much.

8 HONORABLE JANE BLAND: I agree it's a messy
9 sentence, and we debated about whether or not to include
10 it, and in the end -- my committee members can help, but
11 we ended up including it because there was this concern
12 that lawyers who made an appearance at a preliminary
13 hearing would never be let out, like that the trial judge
14 would not ever sign an order or would say that the order
15 is subject to consideration on final hearing, defer the
16 ruling to final hearing, those kinds of things; and they
17 wanted clarity, although I'll agree it's a messy sentence.
18 They wanted clarity that they could get out in that
19 situation.

20 HONORABLE STEPHEN YELENOSKY: Well, the
21 problem may be the obligation. "Obligation ends" is
22 different from "the court must allow you to withdraw." It
23 informs the court that that is the limited scope, but
24 what -- what -- and I understand his concern about that.
25 We do have that sentence about if it's deferred, but what

1 we had in there was that "an attorney appears at the
2 hearing, the obligation to the court continues on the
3 matters within the scope until an order is filed that
4 rules on those matters, except as follows."

5 HONORABLE JANE BLAND: No, you're -- this is
6 what your rule says. "If the hearing was on a preliminary
7 or temporary issue and the court defers its ruling until
8 final hearing the attorney's obligation to the court ends
9 with the hearing at which the attorney appeared."

10 HONORABLE STEPHEN YELENOSKY: Right, but the
11 sentence before that defers its ruling. A court says,
12 "I'm carrying this forward to the final hearing." The
13 sentence before that is you get -- suppose you get
14 temporary orders, and the court says, "I'm not deferring
15 the ruling, draft an order." Your rule would say I don't
16 have to.

17 HONORABLE JANE BLAND: I think the whole
18 sentence should come out. I agree with Professor Hoffman.

19 CHAIRMAN BABCOCK: Professor Hoffman.

20 HONORABLE JANE BLAND: But there are others
21 that disagree.

22 PROFESSOR HOFFMAN: So just to add to this
23 and sort of picking up, Jane, what you just said, it seems
24 to me the work is being done by 10.2, which I know we
25 haven't gotten to yet, but the way the rule is set up is

1 if you make a motion and it has these various things like
2 the client consents, nobody else opposes it, then the
3 court must grant the motion to withdraw. So if your
4 limited thing says, "I'm only here for the TRO" or the
5 temporary injunction or preliminary hearing, then you get
6 out as soon as you file your motion to withdraw.

7 HONORABLE JANE BLAND: I agree.

8 PROFESSOR HOFFMAN: So that's my suggestion.
9 Let's let that do the work.

10 HONORABLE STEPHEN YELENOSKY: If I -- yes,
11 but it doesn't help the court, because the court needs
12 somebody to draft the order. And so your limited scope
13 representation can say, "I'm there for the hearing and
14 that's it." If there's no sentence in here about "until
15 the order is signed," then the court has no authority to
16 require you to draft the order.

17 CHAIRMAN BABCOCK: You could put "including
18 drafting the order."

19 HONORABLE STEPHEN YELENOSKY: What's that?

20 CHAIRMAN BABCOCK: I said you could put in
21 "including drafting the order." You've got to appear, and
22 you've got to draft the order if the judge asks you to.
23 Then you're out of it.

24 HONORABLE STEPHEN YELENOSKY: Well, but
25 others might read this as "I don't have to do that."

1 CHAIRMAN BABCOCK: I know. That's a fair
2 point. Chris.

3 MR. NICKELSON: Well, and I would just echo
4 those comments. Yeah, in essence perhaps right now that
5 sentence should probably come out because it needs the
6 lead-in sentence. I was the proponent for keeping that in
7 from Rule 20. I just failed -- I could get the one
8 sentence, not the other one. That's how it came, but that
9 is if -- the source of friction in family law cases is
10 more often than not if someone is going to try to do
11 limited scope representation, they're going to agree to
12 appear for the temporary hearing, and oftentimes the
13 temporary hearing is essentially the trial of the case for
14 a person of modest or limited means because they may not
15 have the money to go on with it and so --

16 HONORABLE STEPHEN YELENOSKY: And those are
17 complicated -- can be complicated orders.

18 MR. NICKELSON: Oh, yeah. As anybody who
19 has seen those orders knows, if it involves children
20 you've got a 40-page order; and so a source of friction is
21 that the trial judge wants the limited scope lawyer who
22 has prevailed at that hearing to enter the order because
23 they're the winner, they're the proponent; and so that
24 should be the baseline default thing, is you appeared at
25 that hearing, you prevailed, you should enter the order.

1 Now, if you've appeared at that hearing and it has
2 multiple issues in it -- that is, conservatorship,
3 possession and access, child support -- if you've appeared
4 on all of those but the court has decided to defer a
5 ruling on some issue or if it's a discovery matter or
6 something else, if the court has decided to defer its
7 ruling to a final trial then the issue should be, well,
8 wait a second, I appeared for this temporary hearing. I
9 didn't appear to be a lawyer for the rest of the case.
10 That's how the Travis County local rule comes down on that
11 issue, and I think it's worth trying to include something
12 of that nature.

13 CHAIRMAN BABCOCK: We're going to give Dee
14 Dee a 10-minute break here right after Jane says
15 something.

16 HONORABLE JANE BLAND: I just -- but the
17 Travis County local rule excepted these two things from
18 this order requirement. The sentence that preceded this
19 sentence is, you know, "An attorney's obligation to the
20 court continues on the matters within the scope of the
21 notice of limited appearance until an order is filed that
22 rules on those matters, except as follows." And then came
23 the sentence about --

24 HONORABLE STEPHEN YELENOSKY: Yes, but it
25 uses the word "defers." The judge says, "I'm not going to

1 rule now," as opposed to the judge says, "I need an
2 order."

3 HONORABLE JANE BLAND: Well, what -- I think
4 the -- I think the better approach is Judge Hoffman -- I
5 mean Professor Hoffman's approach, which is to put it
6 within the general rules governing withdrawal, because I
7 think that there is always going to be a fight about the
8 order, whether it's a protective order or any other kind
9 of order, and we ought to let that be following the
10 general rules.

11 CHAIRMAN BABCOCK: Okay. Let's be back in
12 10 minutes.

13 (Recess from 3:01 p.m. to 3:12 p.m.)

14 CHAIRMAN BABCOCK: All right. We're back on
15 the record. Justice Bland is taking her seat to lead us
16 through the rest of this, and so now we're on -- are we
17 still on (c), or did we finish (c)? Anybody have any more
18 comments on (c)?

19 HONORABLE JANE BLAND: I think that we have
20 an understanding of what we're trying to do with that, and
21 (c) is probably not the place we want to do it, but the
22 concern is that the limited scope practitioner provide a
23 draft order for whatever the matter is that the lawyer is
24 representing the client for, so that the trial court is
25 not left hanging without a draft order. So I think we can

1 take care of that in the withdrawal rules, and Judge
2 Yelenosky and I were working on finding some good language
3 for that, and we'll probably take this sentence out of
4 this part of the rule, because it doesn't belong here.

5 CHAIRMAN BABCOCK: Okay.

6 HONORABLE JANE BLAND: Okay. So now we're
7 on (d).

8 CHAIRMAN BABCOCK: (d).

9 HONORABLE JANE BLAND: If I can find it.

10 CHAIRMAN BABCOCK: Service?

11 HONORABLE JANE BLAND: Okay. So (d) is
12 service, and I think as we talked about a little earlier,
13 there are three ways you can handle service. One is serve
14 the lawyer and the party for everything. One is serve
15 only the lawyer for the lawyer's tasks and only the party
16 for the party's tasks, and one is serve only the party for
17 everything. That's not really practical. Obviously we
18 would want the lawyer to get service. So the committee
19 debated of these three courses which would be the best
20 given that the lawyer is really only representing the
21 client for some discrete tasks, and ultimately what we
22 concluded was that it was easier to serve the lawyer and
23 the party for everything that the lawyer is representing
24 the party on than for the opposing counsel or the court to
25 have to try to figure out whether or not the lawyer is

1 representing the party for this.

2 And so the default rule that we propose is
3 the party gets served with everything in the case and the
4 lawyer gets served with things that pertain to the tasks
5 in the lawyer's notice, but if there ends up being a
6 dispute about that, at least the party has gotten notice
7 for everything. So the way the rule is drafted it says,
8 "Service must be made on the attorney and the party in
9 accordance with Rule 21a for issues designated in a notice
10 of limited appearance. For matters outside the scope, the
11 service must be made on the party." And then there's the
12 last sentence, which is important, "Service directed to an
13 attorney and not the party for matters outside the scope
14 of limited appearance is not effective." So the service
15 that won't be effective is the service that only goes to
16 the attorney when the attorney is not representing the
17 client for that matter, and so the default is going to be
18 serve the party for -- with everything.

19 CHAIRMAN BABCOCK: Okay. Judge Yelenosky.

20 HONORABLE STEPHEN YELENOSKY: Well, I don't
21 disagree with that, but isn't a concern about malpractice
22 going to take care of this anyway, because there's always
23 going to be an argument about exactly where that line is
24 and you haven't served the attorney when you were supposed
25 to and, therefore, it's not effective, or it's not

1 effective because it doesn't comply with the rule. Isn't
2 everybody just going to serve both the attorney and the
3 party on everything, and is that a problem?

4 CHAIRMAN BABCOCK: Peter.

5 MR. KELLY: This is more sort of a drafting
6 issue. Instead of saying "must be made," say "service
7 shall be effective if made on the attorney and the party."
8 Then two lines down, "Service shall be made -- or shall be
9 effective if made," and that makes it more consonant with
10 the last line that service directed to the attorney and
11 not the party is not a bad thing. So focus on
12 effectiveness of service, not on "it must be made" because
13 there is an issue that sometimes you can serve an attorney
14 or somebody you think is the attorney, and it may not be
15 effective service if they haven't paid their bar dues, but
16 if you say it shall be effective, I think that takes care
17 of that. And then the line stating "service directed to
18 an attorney" probably should say "to the attorney" to make
19 it parallel with the top line.

20 CHAIRMAN BABCOCK: Yeah. Good thoughts.
21 Robert.

22 MR. LEVY: It seems like we should put the
23 burden on the attorney that has the limited
24 representation. So if they get service and they know it's
25 something outside of their representation, they need to

1 notify their limited client, but why would we put the
2 burden on the opposing party to parse that and --

3 HONORABLE JANE BLAND: The opposing party
4 will be covered by serving the party always, and the
5 reason that -- the idea I think that you're suggesting is
6 that the limited scope lawyer would then have the
7 obligation to forward whatever it is --

8 MR. LEVY: Right.

9 HONORABLE JANE BLAND: -- to the party. The
10 problem with that is that the limited scope lawyer is no
11 longer in -- no longer in the case.

12 MR. LEVY: Well, once they're out of the
13 case then service doesn't apply to them anyway, so then if
14 there's no other lawyer, then the party is the only person
15 to receive notice, once they have that court order.

16 HONORABLE JANE BLAND: You mean like
17 triggering it to the order of withdrawal?

18 MR. LEVY: Right.

19 HONORABLE JANE BLAND: We could do that.

20 CHAIRMAN BABCOCK: Richard, then Levi.

21 MR. ORSINGER: So I'm very concerned about
22 the situation where a hearing is set and part of the
23 matters in the hearing are the limited scope and part of
24 it is not, and everybody's going to be worried about
25 whether this is within or without or is it just limited to

1 this, and it seems to me like that's too much analysis and
2 there's too much room for error and there's too many
3 objections to the hearing because proper notice wasn't
4 given to everybody. I think the safe thing to do is to
5 notice the lawyer and the client --

6 HONORABLE STEPHEN YELENOSKY: Yeah.

7 MR. ORSINGER: -- on everything, and then no
8 one can ever claim that they didn't have notice. You can
9 maybe have too much notice, but you'll never have too
10 little notice.

11 HONORABLE JANE BLAND: Well, and that's a
12 good idea, especially if we tie it to the order of
13 withdrawal.

14 HONORABLE STEPHEN YELENOSKY: Yeah.

15 HONORABLE JANE BLAND: Because then it
16 wouldn't have to continue.

17 HONORABLE STEPHEN YELENOSKY: Right. And
18 that's what I was saying is going to happen anyway out of
19 fear of malpractice. So why do it in a rule? I mean,
20 who's going to try to parse this just because they don't
21 want to send another letter or do it electronically?

22 MR. NICKELSON: That was our intent. It's
23 counterintuitive, but our intent was -- it just didn't
24 come out in the language, but the intent was to serve both
25 the attorney and the client and not put the burden on the

1 full service side to figure out what were the issues
2 designated between the limited scope side, and so in order
3 not to burden them with trying to figure that out in
4 getting service right just to serve them both.

5 MR. ORSINGER: And to add to that, I think
6 under the electronic filing system now if you file
7 anything --

8 HONORABLE STEPHEN YELENOSKY: Right.

9 MR. ORSINGER: -- it gets served on
10 everybody that's on the case, and so isn't the electronic
11 filing system going to be giving all the lawyers and all
12 the parties notice anyway? I mean, in this day and time I
13 don't even bother to -- I mean, sometimes as a courtesy
14 I'll send an e-mail follow-up, but the electronic system
15 serves everyone automatically, doesn't it?

16 MR. NICKELSON: Well, the only problem and
17 you're not going to like me saying this, but in 10 -- what
18 will be 10.1 on withdrawal, when a full service withdraws
19 it says that "Service shall be made to the client by
20 certified mail, return receipt requested, at the last
21 known address," and so initially when there's a
22 withdrawal, we're supposed to have service on the client
23 by mail.

24 MR. LEVY: That's unique to that act.

25 MR. NICKELSON: Right, and so that -- just

1 pointing out the point that --

2 HONORABLE JANE BLAND: We need to do some
3 tweaking to 10.1, too.

4 MR. NICKELSON: Because the problem
5 oftentimes is -- and I just had it recently in a case
6 where an attorney withdrew on the other side, and all of
7 the sudden now we have all of these deadlines, and I'm
8 having to send out by mail to certain parties in the case
9 expert reports and all sorts of things and then serve the
10 lawyers who still remain in the case representing other
11 parties by e-service. It's real easy. I love e-service.

12 HONORABLE STEPHEN YELENOSKY: But your
13 electronic service isn't going to a pro se litigant.

14 MR. ORSINGER: It is if they're pro se -- I
15 mean --

16 MR. LEVY: If they've entered an appearance,
17 but what if they haven't entered an appearance?

18 MR. ORSINGER: Well, no, pro ses don't enter
19 an appearance. They're either the plaintiff or the
20 defendant, so they're in the lawsuit, so if we have a
21 problem with the electronic service, electronic notices
22 for pro ses, let's fix that.

23 MR. LEVY: But does a pro se have to have an
24 e-mail address?

25 MR. ORSINGER: You know, I think that --

1 what did we decide about that?

2 MS. WOOTEN: We decided no.

3 MR. ORSINGER: I think we decided that we
4 weren't going to force them to have e-mails or did we
5 decide --

6 HONORABLE DAVID EVANS: If he has provided
7 an e-mail address then it can be served through electronic
8 filing.

9 MR. ORSINGER: Right. So it's elective with
10 a pro se.

11 HONORABLE STEPHEN YELENOSKY: Right.

12 HONORABLE DAVID EVANS: That's the way I
13 recall it.

14 HONORABLE STEPHEN YELENOSKY: So you're
15 going to have to -- the electronic isn't going to be
16 reliable, and to avoid malpractice you're going to put it
17 in the mail to the pro se, and you're going to do it
18 electronically to the lawyer, everybody.

19 MR. LEVY: Chip?

20 CHAIRMAN BABCOCK: Yeah, Robert.

21 MR. LEVY: I wanted to come back to an
22 issue. I'm not sure if it had been discussed, but
23 obviously this deals with a situation where you have got a
24 person who is the party, but what about the situation
25 let's say you have a corporation that wants to do a

1 limited, you know, special appearance and hires the lawyer
2 just for that purpose.

3 HONORABLE STEPHEN YELENOSKY: We're going to
4 write the rules so they can't.

5 HONORABLE JANE BLAND: I don't think
6 corporations -- I know -- I know there's some dispute
7 about this, but there is -- there is a body of case law
8 out there that says that corporations can't --

9 MR. LEVY: They can't represent themselves,
10 right.

11 HONORABLE JANE BLAND: Yeah.

12 MR. LEVY: So would this rule be used by a
13 corporation to say, "Oh, I'm not representing myself, but
14 my lawyer is just there for a limited purpose"? Or do you
15 want to limit it to a person.

16 HONORABLE STEPHEN YELENOSKY: Well, whatever
17 the attorney is not there for is not represented by
18 anybody.

19 MS. WOOTEN: Right.

20 HONORABLE STEPHEN YELENOSKY: So no
21 corporation is going to do that.

22 MR. LEVY: But as long as that lawyer's
23 there they've got somebody defending them. Is that an
24 appropriate --

25 HONORABLE STEPHEN YELENOSKY: Well, I don't

1 know. If you can find a corporation that's going to do
2 this, let me know, but, I mean, I would imagine no
3 corporation is going to --

4 MR. LEVY: You might for a corporation that
5 doesn't want to do business in the state.

6 HONORABLE STEPHEN YELENOSKY: Well --

7 MS. PHILLIPS: That's just a special
8 appearance. No big deal.

9 HONORABLE STEPHEN YELENOSKY: It's a special
10 appearance. Yeah, that's a special appearance, but once
11 you're in a lawsuit why would a corporation ever have a
12 lawyer go into court when an issue might come up that that
13 lawyer has said he or she is not handling? I mean, why
14 would that ever happen?

15 MR. LEVY: Because if you -- you might take
16 the strategy for a special appearance, that's it, and if
17 you lose then you'll -- you might even want a default just
18 to appeal to challenge that. Because you don't want to do
19 anything to subject yourself to jurisdiction.

20 CHAIRMAN BABCOCK: Justice Gray, did you
21 have your hand up?

22 HONORABLE TOM GRAY: I was just going to say
23 that my very first court appearance was to represent a
24 corporation for the sole purpose of that hearing, and it
25 was for a default judgment hearing, and they were trying

1 to avoid the default judgment because an owner of the
2 corporation had filed the answer, and they were going to
3 take a default because the answer was ineffective, and so,
4 yeah, you can wind up in that weird situation. Had I
5 known about this I probably would have done a limited
6 appearance and then it would have been -- I don't know
7 what would have happened, but anyway.

8 HONORABLE STEPHEN YELENOSKY: Okay.

9 CHAIRMAN BABCOCK: Okay. Any more comments
10 about subparagraph (d), service?

11 HONORABLE JANE BLAND: And (e) is a mirative
12 provision for court notices and provides that the court,
13 trial court, must direct notice to the attorney and the
14 party. So we'll fix (d), too, more like that.

15 CHAIRMAN BABCOCK: Justice Bland, is
16 subparagraph (e) sort of self-evident or circular or
17 something? I mean, it says if you've got to give a
18 notice, you've got to give a notice, right?

19 HONORABLE JANE BLAND: Well, when the court
20 sends notices it usually sends notices to the attorney of
21 record.

22 CHAIRMAN BABCOCK: Right.

23 HONORABLE JANE BLAND: So this requires the
24 court to send notices to the attorney and the party.

25 CHAIRMAN BABCOCK: I didn't get that from

1 this language. I mean, I understand what you're saying,
2 but would it be better to say you've got to give notice to
3 the party when notice is to be given under (d)?

4 HONORABLE JANE BLAND: Well, there's other
5 kinds of notice. So there's notice of a trial. The main
6 kind is notice of a trial setting. The trial court sends
7 notice of that, and the other kind is notice of a final
8 judgment. Trial court is supposed to send the notice
9 after a final judgment is signed, and the language in
10 those two rules are very different, but they both require
11 a form of notice, and so -- and there's a couple of other
12 places where, you know, the court will be sending out a
13 notice, like a docket control order, for example. And the
14 idea behind (e) was that if the court is sending out a
15 notice and there has been a limited appearance filed, the
16 court should send notice not just to the attorney but also
17 to the party. Ordinarily the party doesn't get that
18 notice.

19 CHAIRMAN BABCOCK: Okay. The phrase "these
20 rules" in subparagraph (e) --

21 HONORABLE JANE BLAND: Is too vague.

22 CHAIRMAN BABCOCK: Excuse me?

23 HONORABLE JANE BLAND: Is it too vague?

24 CHAIRMAN BABCOCK: Well, does that mean the
25 Texas Rules of Civil Procedure?

1 HONORABLE JANE BLAND: Yeah.

2 CHAIRMAN BABCOCK: Or does it mean 8.1 and
3 8.2?

4 HONORABLE JANE BLAND: It means the Texas
5 Rules of Civil Procedure.

6 CHAIRMAN BABCOCK: Okay, that's what I
7 thought.

8 HONORABLE JANE BLAND: So we'll have to
9 clarify that.

10 CHAIRMAN BABCOCK: Okay. Any other comments
11 on (e)?

12 MR. KELLY: Yes.

13 CHAIRMAN BABCOCK: Yeah, Peter.

14 MR. KELLY: Similar to what I made above,
15 emphasis is not necessarily the giving of notice, but what
16 notice is effective, and so I would phrase it that "Notice
17 should be effective if the trial court provides notice to
18 the attorney and to the party directed by these rules."

19 CHAIRMAN BABCOCK: Okay. Good. Any other
20 comments about (e)? All right. Let's talk about the
21 comment. Let's make comments on the comment. Richard.

22 MR. ORSINGER: I like the comment insofar as
23 it covers and references people to the code of
24 professional responsibility. What concerns me is that I
25 don't know -- in fact, I believe that civil liability does

1 not equate with the scope of the Rules of Professional
2 Conduct.

3 HONORABLE STEPHEN YELENOSKY: That's
4 correct.

5 MR. ORSINGER: And so I think it's dangerous
6 for us to provide an official procedure for limited
7 representation and then to tell everybody that it only
8 goes so far as what's ethically allowed, but now our rules
9 are recognizing it, and yet the civil liability system may
10 hold lawyers responsible for failure to point out to their
11 client claims that they are waiving or rights that they're
12 waiving or error they're not preserving, and I'm not sure
13 the civil liability is caught up with the Code of Ethics
14 on this, so I'm concerned that we now have an official
15 rule that says you can do this. You've now been told to
16 be sure that it's okay with the ethical code, and we
17 haven't told everybody, guys, there's a whole world out
18 there of potential malpractice litigation that you need to
19 pay attention to.

20 Now, I talked to Trish about this before the
21 meeting started, and she said that in her experience or at
22 least in the experience of the people in her field that
23 they don't have malpractice claims, and maybe that's
24 because the parties that they represent are indigent and
25 don't have damages or don't have the wherewithal to sue,

1 but I'm really concerned that we're not telling the full
2 story in this warning here when we say just be sure that
3 what you're doing is ethical and not telling them that
4 there may be a danger on the civil liability side.

5 CHAIRMAN BABCOCK: So how would you change
6 it?

7 MR. ORSINGER: I don't know what to say. We
8 didn't -- we're not the first ones that have ever done
9 this. Has anybody else addressed the civil liability
10 question in either comment or statute or anything? Does
11 anybody know?

12 HONORABLE STEPHEN YELENOSKY: Well, why
13 don't we just say the rule does not -- put some civil
14 liability in there. "The rule does not address the civil
15 liability or ethical responsibility of a lawyer."

16 MR. ORSINGER: Something like that. I would
17 figure as popular as this is surely someone has thought
18 about this and written something.

19 HONORABLE JANE BLAND: Well, I think any
20 rule presents an opportunity to be, you know -- I mean,
21 any time you go into court there's a potential for having
22 an impact in the civil liability. I mean, that's like
23 saying, you know, you know, anything you do in the legal
24 profession could potentially be the subject of a
25 malpractice claim, so why --

1 MR. ORSINGER: Okay. I don't know why any
2 of the other rules --

3 HONORABLE JANE BLAND: -- why do we carve
4 this one out?

5 MR. ORSINGER: I don't know how many of our
6 other rules are creating an entirely new legal procedure
7 that we say is only applicable to the extent that it's
8 ethical and not mention that there's a whole world of
9 civil liability out there, so we're branching out in
10 something we've never done before. We're trying to
11 encourage lawyers to go to places they've never gone
12 before, and we're telling them -- we're warning them about
13 the grievance committee, but we're not warning them about
14 damage suits, and it bothers me. And, I mean, I don't
15 know if it bothers anybody else, but it bothers me. So I
16 don't have a suggestion.

17 HONORABLE JANE BLAND: Well, and we're not
18 really warning them about the grievance system. We
19 reference the disciplinary rule only really to say that
20 this kind of engagement is permitted, so to the extent
21 that the comment needs to warn, it does not warn.

22 CHAIRMAN BABCOCK: Yeah, the warning is very
23 subtle. You have to be looking for the warning.

24 MR. ORSINGER: Well, to me the first thing I
25 would do if I was going to do this for the first time is

1 I'd go look and see what Rule 1.02(b) says.

2 CHAIRMAN BABCOCK: Yeah.

3 MR. ORSINGER: That's why this is in here.
4 If they don't do that, then this is -- it's no good if
5 they don't go read it. But at any rate, maybe that's not
6 a big deal and maybe -- you know, what Trish says is
7 around the country historically people -- there's a high
8 client appreciation for a limited representation and
9 there's very little litigation. I mean, Trish, speak for
10 yourself there. I'm sorry, I didn't mean to --

11 MS. McALLISTER: No, no, that's okay, no.
12 Yes. I mean, yes, from what we understand or the feedback
13 we've gotten from other states is that the data that shows
14 that people who -- their client satisfactions are higher
15 when they're doing limited scope representation, possibly
16 because they have a better understanding of what's going
17 on in their case because they're participating more. I
18 don't know. There's some speculation as to why that is,
19 but the incidence of malpractice is lower as well, or at
20 least malpractice, you know, filings or claims. So it
21 could be, you know, that the population is poorer and they
22 don't have, you know, the wherewithal to, you know, follow
23 through on a malpractice claim, but the incidence in
24 malpractice, reported malpractice, is lower. So --

25 CHAIRMAN BABCOCK: Kristen.

1 MS. LEVINS: And so some stats to back up
2 what Trish was saying, I don't have anything on
3 malpractice or civil liability, but I went to a conference
4 on limited scope in October, and the attorney general
5 regulation council of the Colorado Supreme Court was
6 there, and he's the one that handles attorney discipline
7 and complaints, and he said they get 25 -- I'm sorry
8 35,000 requests for investigation a year, and .3 of one
9 percent involve limited scope, and there's been no
10 disciplinary hearings on limited scope as of October 2017.

11 HONORABLE STEPHEN YELENOSKY: But that just
12 means it's terribly unlikely, and that doesn't answer the
13 question of whether --

14 MS. McALLISTER: Right.

15 HONORABLE STEPHEN YELENOSKY: -- it should
16 say something. Why not just take the comment out like any
17 other rule? As you said, Justice Bland, you still have to
18 look at the ethical rules and you have to --

19 HONORABLE JANE BLAND: It's been our common
20 practice to have a comment when we have a new section to
21 the rule, and the committee felt --

22 MS. McALLISTER: I did like the reference to
23 1.02, frankly.

24 HONORABLE JANE BLAND: -- as though a
25 comment that at least directed the practitioner to the

1 disciplinary rule cross-reference and then talks about the
2 fact that this is really not intended to govern the
3 attorney-client relationship, but only the representation
4 in court by the lawyer. That's the reason for the
5 comment. It wasn't to sort of warn or anything. It was
6 more typical of our other comments in the rules that
7 cross-reference the, you know, other places in the rules,
8 in other rules, that the practitioner needs to be aware
9 of.

10 MR. ORSINGER: But this rule comment says
11 the rule addresses the attorney's responsibilities to the
12 court and opposing counsel.

13 HONORABLE STEPHEN YELENOSKY: Not the
14 client.

15 MR. ORSINGER: Not the client, is that --

16 HONORABLE STEPHEN YELENOSKY: Yeah, that's
17 the point.

18 MR. ORSINGER: Is that what you're trying to
19 say by omission, is that this doesn't govern your
20 responsibilities to your own client?

21 HONORABLE JANE BLAND: Because that's
22 governed by the engagement agreement.

23 MR. JEFFERSON: I mean, you could make that
24 more plain in the last sentence where "the rule does not
25 otherwise define the scope or method of representation by

1 a lawyer, nor does it define a lawyer's ethical
2 responsibilities to his client" or something like that.

3 MR. ORSINGER: Nor does it limit his
4 responsibilities or her responsibilities, which is my
5 concern. Because you can file this all day long, but if
6 it doesn't truly limit your duties to your client you're
7 just walking into a lawsuit.

8 MR. JEFFERSON: Well, but, no, but it still
9 allows you to -- I mean, I think the whole purpose of the
10 rule is to go to the trial judge when you're done with
11 your task and say "Let me out." Right? I mean, it
12 encourages limited representation so lawyers don't think
13 they're going to get stuck in a piece of litigation, and
14 so the benefit of the rule is to let you out when you're
15 finished.

16 The only other point I was going to make
17 about the comment is I would want to add a comment that --
18 something about ghost writing, if we're satisfied that
19 that's okay. I still -- I'm concerned with having a rule
20 that would in an unintended way discourage people from
21 doing either ghost writing or helping of clients or
22 anything without actually becoming attorney of record.

23 HONORABLE JANE BLAND: We'll figure out a
24 way of adding a provision to the rule that it's not
25 intended to cover --

1 CHAIRMAN BABCOCK: Judge Peeples.

2 MS. McALLISTER: It's all activities, not
3 just ghost writing.

4 HONORABLE DAVID PEEPLES: I think we want to
5 encourage lawyers to take on limited representations. It
6 would be a good thing, and my question has to do with how
7 sure a lawyer can be that he or she can by contract limit
8 this, and Richard raises the malpractice question. The
9 last sentence in the comment, the last half of it, says
10 that, you know, the rule doesn't deal with it, leaves to
11 the lawyer and client to address it in the agreement. In
12 other words, leaves it to contract and then in 10.2 we're
13 going to get to withdrawal; and as I read 10.2, I'm
14 concerned that if I'm a lawyer, I'm doing fine, I don't
15 need this representation, but I want to help somebody, but
16 I want a limit on it, and I'm willing to go over on the
17 temporary orders hearing, but I don't want to get tied
18 down on the order. I may not. That could drag on. The
19 other side can hassle me about the language of that order,
20 and I have to go back and forth on it, and it seems to me
21 that if I the lawyer and the client are willing to agree
22 I'm going over with you on the temporary orders hearing
23 and my fee will be X and that is it and if I -- if I
24 really deal with it with tight language, it's over after
25 that, and I can walk away. And if I was negligent in that

1 hearing, okay, maybe I get sued, but I want to be out of
2 it after that, and I'm not willing to do this if I can't
3 get that agreement. My question is, can that be done
4 airtight with this statute, and I don't think I can --

5 HONORABLE STEPHEN YELENOSKY: Not if we
6 include the rule. I mean the draft part.

7 MR. ORSINGER: It's inherent -- David, it's
8 inherent in the situation you can't control that by
9 contract, because the -- you are the attorney of record
10 until you get the judge's permission to leave the case.
11 So your contract can give you the right to quit. Your
12 client can fire you three times, but if the judge doesn't
13 tell you you're free you've got to sit at the counsel
14 table next to that person that you quit or who has fired
15 you, and you can't leave. So the truth is this isn't
16 controlled by contract law, and I'm concerned that there's
17 a lot of tort law out there that operates even in the face
18 of contract disclaimers.

19 HONORABLE DAVID PEEPLES: I think that --
20 been a long time since I was a lawyer, I'll grant you
21 that, but I think there are going to be good people out
22 there who would like to help, but they're willing to help
23 for this amount and no more, and that would be a good
24 thing. But if I'm such a lawyer and I might get dragged
25 in, kept in by some judge that won't honor my agreement,

1 I'm not going to touch this with a 10-foot pole, and my
2 question is shouldn't we be concerned about that?
3 Shouldn't we want to encourage the person of goodwill who
4 says, "I'll help you, but only on this, and I want some
5 airtight language that gives me protection."

6 CHAIRMAN BABCOCK: Yeah, Skip.

7 MR. WATSON: Isn't the comment trying to
8 say -- and I'm not involved in this, but I'm just trying
9 to flesh out what the core of it is -- that we're
10 recognizing the right to contractually limit the scope of
11 an engagement with a client under DR or whatever, this
12 rule addresses the attorney's responsibilities to the
13 court and counsel, period. Stop there.

14 HONORABLE STEPHEN YELENOSKY: Only
15 addresses.

16 MR. WATSON: Correct.

17 HONORABLE STEPHEN YELENOSKY: No, I'm adding
18 the word "only."

19 MR. WATSON: That's great, yes.

20 CHAIRMAN BABCOCK: Okay. Speaking of that,
21 why don't we move on to 10.2 so we can --

22 HONORABLE JANE BLAND: Okay.

23 CHAIRMAN BABCOCK: -- see when you can
24 withdraw.

25 MR. ORSINGER: Chip, one last word, can we

1 -- before we go on perhaps we should consider making the
2 contractual limitations binding on the trial court. In
3 other words, should we consider saying that the trial
4 judge is bound to recognize the lawyer's right under the
5 contract to withdraw at the end of the hearing or
6 whatever?

7 CHAIRMAN BABCOCK: No, I'm just going to
8 hire Levi for that.

9 MR. ORSINGER: You need local counsel for
10 that.

11 HONORABLE LEVI BENTON: From your lips to
12 God's ears, as they say.

13 HONORABLE JANE BLAND: So under 10.2 is our
14 effort to provide clarity to the lawyer who wants to get
15 out that he or she may get out, and the trial judge will
16 let them out if once they've completed the tasks, and in
17 10.2(a) you require a motion to withdraw like you do in
18 any case where you're withdrawing before the conclusion of
19 litigation. And then we have language that "The trial
20 court must permit the withdrawal," and five parameters for
21 that. Client consents in writing, statement that the
22 other parties do not oppose the withdrawal, the address of
23 the client, statement of any pending trial settings, and a
24 certification that all tasks required by the notice have
25 been completed; and we're going to add "expressly

1 including" -- don't have the right language right here
2 today, but after discussing with Chris and Judge Yelenosky
3 that somewhere in here is going to say "including a draft
4 order" so that we make sure that whatever the task is,
5 part of that task has to include a draft order. And then
6 if those things are performed the trial court must let the
7 lawyer out. Then the -- that's (a).

8 (b) is substitution, and it's just as -- you
9 know, it's one limited scope lawyer substituting for
10 another limited scope lawyer, and we're going to allow
11 that as long as the client consents. Then (c) is the
12 order, and the order would be either withdrawal because
13 all of the things in (a) have been complied with, or the
14 court has had a hearing and the court has made the finding
15 that the lawyer has complied with all -- completed all of
16 the tasks and permits the withdrawal. And then finally
17 there's a requirement that when the court orders the
18 withdrawal that the withdrawing attorney serve a notice of
19 the order on all the parties. So that's the withdrawal in
20 a nutshell, and now we can go through and talk about
21 tweaking it.

22 CHAIRMAN BABCOCK: Okay. Judge Yelenosky.

23 HONORABLE STEPHEN YELENOSKY: One concern is
24 (c) says, "If the motion is opposed by the client or
25 another party then the court must determine," and so the

1 court can't sua sponte say, "Hey, you haven't finished
2 your tasks," and, I mean, the court still has to be guided
3 by whether you finish your tasks or not, but the parties
4 could agree for whatever reason and they haven't.

5 HONORABLE JANE BLAND: So (a) contemplates
6 everybody believes the lawyer is finished with the
7 lawyer's tasks and the court for some reason doesn't. (a)
8 says the court must allow the withdrawal. In other words,
9 if everybody thinks the lawyer has completed the tasks,
10 the lawyer, the client, and the opposing parties --

11 HONORABLE STEPHEN YELENOSKY: Yeah, okay.

12 HONORABLE JANE BLAND: -- the trial judge
13 should allow --

14 HONORABLE STEPHEN YELENOSKY: If you want
15 that certainty. I'm just imagining a situation where
16 judge -- I understand judges shouldn't be allowed to deny
17 it because you haven't done more, but you could disagree
18 or judge could disagree about whether you've done what you
19 said you wanted to do and the other party not put up a
20 fuss, but I understand the importance of certainty here
21 and the objective, so I get it. That's fine.

22 CHAIRMAN BABCOCK: What else? Any other
23 comments? Yeah, Kennon.

24 MS. WOOTEN: I'm just still a little
25 concerned that requiring consent from the other parties to

1 get out is going to be a deterrent to some people to
2 engage in limited scope representation. I understand the
3 reason for it, but I think part of what we're trying to do
4 is give people a roadmap. I don't think there is any kind
5 of goal or intent to discourage limited scope
6 representation, but I do think that might have the effect
7 that's unintended.

8 A more subtle comment I guess is that
9 although we've gone with "issues" in the prior Rule 8, the
10 term "task" -- "tasks" appears in (a)(5).

11 HONORABLE JANE BLAND: Yeah. We'll make
12 that uniform. That's because we were going back and
13 forth.

14 MS. WOOTEN: Okay.

15 HONORABLE JANE BLAND: It was just an error.

16 HONORABLE STEPHEN YELENOSKY: I didn't hear
17 what --

18 MR. ORSINGER: Number (5).

19 CHAIRMAN BABCOCK: Any more comments? Chief
20 Justice Hecht.

21 CHIEF JUSTICE HECHT: Shouldn't a lawyer be
22 allowed to withdraw from a limited appearance before the
23 agreed work is done, just like in any other case?

24 HONORABLE LEVI BENTON: Yes.

25 CHIEF JUSTICE HECHT: Communication breaks

1 down, they don't pay, whatever.

2 MS. HOBBS: And, Judge, I thought about that
3 same argument, but I think then you just wouldn't file a
4 withdrawal under this rule. You would just file a
5 withdrawal under the other rules. So I raised that in my
6 head, but I think you would just use a different
7 procedure. You would do what we currently do right now.

8 CHAIRMAN BABCOCK: Well, but it could be --
9 this could be confusing.

10 MS. McALLISTER: Right, I was thinking that,
11 too.

12 MR. ORSINGER: If you make a limited
13 appearance, I don't think you get a withdrawal except
14 under a withdrawal from a limited appearance.

15 CHAIRMAN BABCOCK: So that ought to be
16 clarified, I think. I don't think there is any
17 disagreement about that, right? For all of the usual
18 reasons you ought to be able to get out.

19 HONORABLE STEPHEN YELENOSKY: Well, you just
20 put on the grounds that you've completed your tasks.

21 CHAIRMAN BABCOCK: Justice Brown.

22 HONORABLE HARVEY BROWN: I want to echo that
23 I think the subpart (2) about other parties we should
24 remove, but I wanted to raise a question about subpart
25 (c). What is the effect of the court in making this

1 determination if later the attorney is sued and there's a
2 fight over whether the attorney, in fact, fulfilled his or
3 her duties? Will that finding have some kind of
4 collateral estoppel effect or some type of evidentiary
5 effect in a malpractice claim? I don't know that we need
6 the court to make a determination on that. So I don't
7 know the answer, but I just raise the question.

8 CHAIRMAN BABCOCK: Judge Yelenosky.

9 HONORABLE STEPHEN YELENOSKY: Well,
10 obviously the notice of appearance if it's signed by the
11 client is going to be relevant to that malpractice claim,
12 but I still want to keep -- or would counsel against
13 having the court having anything to do with the letter of
14 engagement, so when the court makes a decision here, the
15 court's operating only the notice of limited appearance,
16 and if the letter of engagement contradicts that or
17 whatever, that's an issue to be resolved in the subsequent
18 court, and the court is not ruling on the contractual
19 agreement between -- that you've completed your
20 contractual agreement.

21 All the court's saying is, well, on this
22 limited appearance you've done this. I don't know the
23 answer to your question if that's all there is, but if
24 there's a written letter of engagement with the client,
25 that would be something the judge wouldn't have looked at

1 and, therefore, I don't know how it could be collateral
2 estoppel in a subsequent malpractice

3 HONORABLE JANE BLAND: We can rephrase that
4 so that it doesn't have a qualitative aspect to it and say
5 something about "The court must determine whether the
6 attorney has fulfilled the tasks required in the notice of
7 limited scope representation."

8 HONORABLE DAVID EVANS: Wouldn't the client
9 oppose it if it hadn't been completed? I mean, it would
10 just be a motion to withdraw, and if the client opposed it
11 because it wasn't completed then that would be down there
12 where the court was. By "representation is complete" I
13 think we're overwriting it.

14 HONORABLE JANE BLAND: Really? Overwriting?
15 Us?

16 HONORABLE DAVID EVANS: I mean, it is if you
17 permit limited representation in court and you say that,
18 and the person says, "I finished my representation and I
19 want to be withdrawn," all you've got to do is say that a
20 person has completed their representation and the court
21 can release them if there's not some other obligation like
22 a motion for sanction is pending or any of those other
23 things.

24 I would still like to just put on the record
25 I think that -- I know you don't like to write rules for

1 certain classes, but pro se litigants are different, and I
2 would frame this whole set of rules from the very
3 beginning as applying to pro se litigants who are
4 represented -- have limited representation by counsel so
5 that there's no confusion, there's no magic words that
6 have to be read, no comments. This is what happens when a
7 pro se individual hires an attorney for limited
8 representation, and these are the rules that apply, and
9 then you make it clear what you're doing, and you don't --
10 and we're living with pro se litigants everyday.

11 CHAIRMAN BABCOCK: Yeah.

12 HONORABLE DAVID EVANS: So I would urge you
13 to reconsider that point.

14 CHAIRMAN BABCOCK: Justice Bland, it's your
15 intention to, I think, to go back with the subcommittee
16 and redraft this pursuant to the comments today?

17 HONORABLE JANE BLAND: That is the plan.

18 CHAIRMAN BABCOCK: Excuse me?

19 HONORABLE JANE BLAND: Yes, that is the
20 plan.

21 CHAIRMAN BABCOCK: Okay. And you can come
22 back on our September agenda and spend a little bit of
23 time, a half an hour maybe or an hour?

24 HONORABLE JANE BLAND: I would be delighted
25 to have a time limit imposed.

1 MR. ORSINGER: This is a limited engagement,
2 30 minutes only.

3 CHAIRMAN BABCOCK: We're having a limited
4 engagement, limited representation.

5 HONORABLE JANE BLAND: If you will permit me
6 to withdraw at the conclusion of 30 minutes.

7 CHAIRMAN BABCOCK: Well, only so you can
8 spend more time on the Bland committee.

9 HONORABLE STEPHEN YELENOSKY: Yeah.

10 CHAIRMAN BABCOCK: Justice Gray.

11 HONORABLE TOM GRAY: It seems to me that
12 (a)(4) could be taken out entirely, or it needs to be
13 written consistent with Rule 10. Rule 10 says "all
14 pending settings and deadlines." I don't care really one
15 way or the other whether or not the entirety of (4) comes
16 out because it's not the limited scope attorney's
17 responsibility to tell the client what remains to be done.
18 Their part is finished, but --

19 HONORABLE JANE BLAND: We talked about that
20 and --

21 HONORABLE TOM GRAY: And what was y'all's
22 decision?

23 HONORABLE JANE BLAND: Well, the decision is
24 that we put in the pending trial setting and nothing else
25 with the idea being, yes, there's no obligation, but a

1 trial setting is such a critical juncture of any lawsuit
2 and that if you don't -- if you don't at least give notice
3 of the trial setting then you probably haven't done your
4 work. There were some on the committee that thought we
5 should tell the client all pending deadlines, but others
6 who thought that that was too cumbersome and -- Chris, you
7 want to speak to that?

8 MR. NICKELSON: I think I was on the side
9 of, yeah, just the trial setting only, not all of the
10 deadlines because if you say all deadlines then you're
11 imposing upon the limited scope lawyer to go figure out
12 everything else about the case, and that sort of defeats
13 the whole purpose of the limited scope idea.

14 HONORABLE TOM GRAY: So why not just relieve
15 him of his obligation to say anything rather than lead his
16 client down a blind alley that this is the only thing left
17 to do?

18 MR. NICKELSON: I understand that. Nobody,
19 I don't know why -- everybody just kept saying, well,
20 there's one thing, and it was the trial setting, making
21 sure the client was aware of the trial setting.

22 CHAIRMAN BABCOCK: Yeah, good. All right,
23 everybody. Thank you very much for coming here on a
24 summer day, and we will -- what's the date in September?

25 MS. WALKER: 28th and 29th.

1 CHAIRMAN BABCOCK: All right. September
2 28th and 29th.

3 (Adjourned)

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

* * * * *

REPORTER'S CERTIFICATION
MEETING OF THE
SUPREME COURT ADVISORY COMMITTEE

* * * * *

I, D'LOIS L. JONES, Certified Shorthand
Reporter, State of Texas, hereby certify that I reported
the above meeting of the Supreme Court Advisory Committee
on the 13th day of July, 2018, and the same was thereafter
reduced to computer transcription by me.

I further certify that the costs for my
services in the matter are \$ 1,632.00 .

Charged to: The State Bar of Texas.

Given under my hand and seal of office on
this the 13th day of August, 2018.

/s/D'Lois L. Jones
D'Lois L. Jones, Texas CSR #4546
Certificate Expires 12/31/18
3215 F.M. 1339
Kingsbury, Texas 78638
(512) 751-2618

#DJ-468