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**MEETING OF THE SUPREME COURT ADVISORY COMMITTEE**

SEPTEMBER 29, 2018

(SATURDAY SESSION)

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Taken before *D'Lois L. Jones*, Certified  
Shorthand Reporter in and for the State of Texas, reported  
by machine shorthand method, on the 29th day of September,  
2018, between the hours of 9:00 a.m. and 11:50 a.m., at  
the Texas Association of Broadcasters, 502 East 11th  
Street, Suite 200, Austin, Texas 78701.

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**INDEX OF VOTES**

No votes were taken by the Supreme Court Advisory Committee during this session.

**Documents referenced in this session**

- 18-15 Local Rules Memo (Sept. 24, 2018)
- 18-16 Petition for a Cyberbullying Restraining Order
- 18-17 Instructions for Petition for a Cyberbullying Restraining Order
- 18-18 Cyberbullying statute

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CHAIRMAN BABCOCK: All right. Local rules, Nina, let's go.

MS. CORTELL: Kennon, let's go.

CHAIRMAN BABCOCK: Local rules, Kennon, let's go.

MS. WOOTEN: All right. So we talked about local rules during our last meeting, and the memo that you have before you is an updated version of the memo we brought to you last time to reflect the feedback that we received during the meeting here and also further discussions among subcommittee members. There is this time a draft to be discussed among the full committee here that's gone through subcommittee review a couple of times, so I think it makes the most sense to just give you a real level overview of what we did and why, and we can dive into the text.

Essentially during the last meeting there was a lot of conversation about, for example, what do we do with the Court of Criminal Appeals in that these rules address not only civil procedures but also procedures affecting criminal cases. But we were looking at a Rule of Civil Procedure, specifically 3a, and wondering how do we deal with the reality of criminal procedures in a rule of civil procedure. Judge Newell made the, I think,

1 astute observation that it might be better to address  
2 these procedures in Rule of Judicial Administration 10  
3 because that rule already affects local rules and has some  
4 overlapping content. It's not limited to the civil  
5 context, so we don't have to deal with the same constraint  
6 that we were confronting with Rule of Civil Procedure 3a.

7           So in the draft what you see is a pretty  
8 significant rewrite to reflect the feedback we received,  
9 the need to acknowledge the Court of Criminal Appeals  
10 among other things. During the last meeting another thing  
11 that was discussed quite a bit is standing orders and what  
12 do we do with standing orders. There is a concern about  
13 condoning them to a degree, if you say too much. There  
14 is, however, the acknowledgement that they exist and we  
15 have to deal with them, and so what we've done in the  
16 proposed rule is address standing orders head on. You'll  
17 see that the rule refers to standing orders in the title  
18 and then in content as well; and the structure is, like I  
19 said, very different from what we see in the rules now.

20           Specifically what you see is a lot of the  
21 detail in 3a totally removed from 3a and incorporated into  
22 Rule of Judicial Administration 10. The format for Rule  
23 of Judicial Administration 10 is more in line with the  
24 format for the modern rules. It is separated by  
25 subsection with headings to help the reader; and it's,

1 like I said, designed to wed these two rules and  
2 acknowledge the involvement of the Court of Criminal  
3 Appeals and the need for the Court of Criminal Appeals to  
4 be involved with the local rules process. If you step  
5 down to the proposal that starts on page two of the memo,  
6 you'll see that subpart (a) of Rule of Judicial  
7 Administration 10 effectively incorporates into it the  
8 language from Rule 3a about not having any local rules  
9 that are inconsistent with statewide rules, but then  
10 expands that to talk about inconsistencies that might  
11 exist with constitutions and statutes as well.

12           In addition, the change that you see as a  
13 part of Rule 10 is to go beyond simply saying you can't be  
14 inconsistent with the other authorities to also saying  
15 that you can't duplicate what's in the other authorities.  
16 The main reason that we have the duplication prong is to  
17 acknowledge the reality that a lot of local rules simply  
18 repeat what's in the statewide rules. You get really long  
19 sets of rules that don't need to be there because you're  
20 already covering the content in the statewide rules. The  
21 other concern that's addressed with not having duplication  
22 is that you'll have a change to the statewide rules that  
23 isn't reflected in the local rule, which is tracking a  
24 prior version of the statewide rule. So that's why we  
25 have the no duplication rule in part (a) of Rule of

1 Judicial Administration 10. We did, however, remove the  
2 language precluding modification by local rule, and the  
3 reason we did that was primarily in response to the  
4 feedback we got from Justice Christopher. The feedback  
5 that she sent is in the e-mail that's included with the  
6 materials today. We're hopeful that that change will  
7 address the concern about modification.

8           The main, I think, significant change in  
9 part (a) that I haven't addressed so far is, like I said,  
10 to go beyond just saying no inconsistencies with local  
11 rules to say no inconsistencies with statute or  
12 Constitution as well. Holly Taylor, the rules attorney  
13 for the Court of Criminal Appeals, suggested this change;  
14 and I think part of the reason she did that is that  
15 several local rules that are in existence now have content  
16 that is tracking to a degree what you see in the Code of  
17 Criminal Procedure, but may be different from what's in  
18 that code, and so we want to acknowledge that there is a  
19 restriction on inconsistencies beyond those statewide  
20 rules.

21           If you go down to subpart (b) of Rule of  
22 Judicial Administration 10 you'll see it's just the same  
23 language that's in Rule of Judicial Administration 10  
24 already. The difference is it's separated with a  
25 subheading and it's in its own subsection. In subpart (c)

1 of Rule of Judicial Administration 10 you see some new  
2 requirements for the local rule content. Specifically in  
3 part (1) we have added a provision to reflect that there  
4 was a desire expressed through the last meeting to have  
5 templates of local rules. We haven't endeavored to  
6 actually draft the templates just yet but acknowledge that  
7 they might come about, and if they do come about, any  
8 local rules that are submitted should be consistent with  
9 them.

10           For subpart (2) of (c) there, you see a  
11 desire -- or excuse me, a requirement that you specify  
12 when you've got overlapping contents. So for each rule  
13 identify a provision in the Rules of Civil Procedure or  
14 Code of Criminal Procedure that addresses the same subject  
15 matter of the rule, either through a numbering system that  
16 corresponds with the numbering system in the Texas Rules  
17 of Civil Procedure or Code of Criminal Procedure or  
18 through another equally apparent method. The desire here  
19 is to do something with our statewide rules in Texas  
20 that's similar to what you see in the federal rules where  
21 you can easily kind of go back and forth and know I've got  
22 a local rule that's addressing the same type of subject  
23 matter as the statewide rule.

24           In (c)(3) you'll see a lot of language  
25 that's there is what we already have in Rule of Judicial

1 Administration 10. The difference is that we've also  
2 picked up kind of a catch-all procedure -- I'm sorry,  
3 catch-all requirement for addressing in local rules any  
4 content that's required by section 74.093 of the  
5 Government Code. That's the section that's included in  
6 with the materials. It's something that might get  
7 overlooked if you don't know about it, and you're  
8 proposing local rules to the Court. So this provision  
9 effectively just draws the reader's attention to statutory  
10 content that's already on the books.

11           In part (d) there is a desire here to  
12 effectively reduce the workload of the pre-approval  
13 process in excluding from that pre-approval process  
14 certain rule content that doesn't necessarily need to go  
15 through the process in that it addresses things that can  
16 be handled at a local level. The examples here are  
17 standards of decorum. In local rule proposals you'll see  
18 all of the stuff about standards of decorum, and frankly,  
19 that's something that can be handled down below without  
20 having the blessing of the Texas Supreme Court. The same  
21 thing is true for the procedures for handling uncontested  
22 matters, and then what you see is a catch-all for content  
23 of section 74.093 of the Government Code. Again, this is  
24 in your materials. It is specifically Exhibit D to the  
25 memo, and the purpose of having it is really twofold.



1 One, the content required by section 74.093 kind of falls  
2 into that same bucket of things that the Texas Supreme  
3 Court probably doesn't need to get involved with  
4 reviewing, blessing, et cetera. Two, if you have this  
5 here, what you do is say if you're going to put into your  
6 local rules something that's required by statute, then  
7 we're fine with that. We don't have to go through and say  
8 yay or nay to the inclusion of content that's already  
9 required by statute, specifically section 74.093 of the  
10 Government Code. You see a little statement right after  
11 that that's acknowledging the role of the Court of  
12 Criminal Appeals and providing advice on local rules  
13 affecting the administration of criminal justice and the  
14 statutory reference enabling that content.

15           If you turn the page you get to the  
16 publication requirement, and this is similar to what we  
17 proposed or put before the committee to be more precise  
18 during the last meeting. The goal here is to make these  
19 local rules more readily available to the public, not just  
20 in their final form but also in their proposed form.  
21 There is a statement in here about involving the Office of  
22 Court Administration with the process of publishing these  
23 rules. The idea is that the OCA is really the storing  
24 house for the authorities in Texas, and it makes sense to  
25 get them involved with putting the content out for the

1 public to see. That being said, there is a discussion  
2 item you'll see noted to get this committee's input on  
3 whether the OCA should be the one receiving the local  
4 rules or whether that should be the Texas Supreme Court  
5 that then hands them off to the OCA.

6           Finally, in -- sorry, not finally, but next  
7 to last is section there about standing orders. This is a  
8 section dedicated to standing orders. It's not requiring  
9 that each standing order go through review with the Court.  
10 It is saying if you're going to have a standing order you  
11 shouldn't put in your standing order content that's  
12 mandated to be in the local rules, and then you see a  
13 requirement that a standing order can't be enforced unless  
14 it's been filed in the case and provided to each party in  
15 the case. This is language that was I believe recommended  
16 initially by Chief Justice Gray. The idea here is to not  
17 have people bound by orders they might not know about, and  
18 then what you see in the last sentence is that courts can  
19 submit their standing orders to the Texas Supreme Court  
20 for approval if they want to before the standing order  
21 gets approved but they don't have to.

22           Finally, in (g) there is a review process  
23 that's laid out for local rules and standing orders, and  
24 it essentially says that you can submit the -- by written  
25 request for review, excuse me, you can submit to the Texas

1 Supreme Court a request for review of the local rule or  
2 standing order. A discussion item that's out there for  
3 this committee's input is whether this review process  
4 should be limited only to those rules that have not  
5 already been approved by the Court or should be available  
6 to any local rules that are out on the books and have been  
7 approved by the Court. The reality is that some of the  
8 local rules that have been approved may have some content  
9 in them that's not consistent with statewide rules or  
10 statutes, so if we don't allow for this review process to  
11 affect those approved local rules there might be a gap in  
12 what the Court actually sees, but if you include in here a  
13 requirement or an ability for people to ask the Court to  
14 re-review local rules that have already been approved  
15 you're not really achieving the goal of reducing the  
16 burden for the Texas Supreme Court, so this is just a  
17 discussion item for this committee to talk about.

18           The final thing that I should probably say  
19 about this particular section is that we did incorporate  
20 into it an ability for people to submit request for review  
21 without identifying themselves. I think Richard Orsinger  
22 may have been one of the individuals who mentioned a need  
23 for this and maybe Judge Yelenosky as well. The idea is  
24 that we don't want people to be afraid to ask for the  
25 higher court to review something when, for example, they

1 might be before a trial court judge with the rule that is  
2 being enforced.

3 I think I've hit on everything, but I'm sure  
4 Nina and Judge Peeples will correct me if I missed  
5 anything, so I'll stop there.

6 CHAIRMAN BABCOCK: Okay. Nina, anything  
7 else?

8 MS. CORTELL: Nothing to add.

9 CHAIRMAN BABCOCK: All right. Anybody have  
10 any comments? Judge Yelenosky.

11 HONORABLE STEPHEN YELENOSKY: I don't know  
12 that there's anything that can be changed on this that  
13 could possibly be any better, but it's great work. All I  
14 can do is point out some things that maybe somebody else  
15 can figure out a solution to if it indeed is a problem.  
16 First thing is 3a -- let's see, 3a, I'm not sure what it  
17 is, but "no local rule," at the end, "shall ever be  
18 applied to determine the merits of any matter." Is the  
19 "merits of any matter" clear, or can it be made clearer?  
20 Because I would imagine in a case where something happens,  
21 you lose the case, whatever it was, that you can tie to a  
22 local rule you can make an argument that it affected the  
23 merits of the case, and I'll just point that out.

24 The other thing I would point out, and this  
25 is hypertechnical, but 10(a) says, first sentence says,

1 "The local rules adopted or amended by the administrative  
2 judicial regions and the courts of each county in this  
3 state." Well, technically a district court you could say  
4 is "of a county," but it happens -- it's in a county or  
5 you could have a district court that is multi-county, so  
6 maybe there's a different term than just saying "the  
7 courts of each county" to make clear that we're not just  
8 talking about county courts.

9           Then on the next one -- oh, it's also in  
10 (a), on the top of the next page, but it's "not limited to  
11 any time periods provided by constitutional provision,  
12 statute, or statewide rule," the time limits that affect  
13 that. What about affecting it indirectly? In other  
14 words, the local rules of Travis County don't say you have  
15 to give -- you can get a hearing in three days. They  
16 don't say you have to wait more than three days to get a  
17 hearing in that way, but the way the announcement docket  
18 and setting docket is set up, you couldn't set a case  
19 within three days. There is an exception what I think in  
20 Houston they call an ancillary docket, what we call an  
21 uncontested TRO docket, but I wouldn't know whether or not  
22 that violates this because there is a mechanism for doing  
23 it shorter than the standard, but the standard essentially  
24 requires if you put everything together in the local rules  
25 about 10 days.

1           Next thing is towards the back, almost done,  
2 standing orders. "May submit that standing order to the  
3 Supreme Court for approval." Anything that you want  
4 judges to do I think needs to be a "must." Must be a  
5 "must," because the judges who, for whatever reason,  
6 convenience or otherwise, don't want to bother with all of  
7 this are not going to submit it, and who's then going to  
8 determine if that standing order can change content  
9 mandated under (c)(3), because what they're going to --  
10 what a judge is going to do is certainly file it in the  
11 case because that's clear, but the content of it will be  
12 whatever the judge wants to put in the standing order and  
13 not submit to the Supreme Court, in the worse case  
14 scenario. Because I don't think's what's mandated under  
15 (c)(3) is so sufficiently clear that every judge will be  
16 in violation of this or will know he or she is in  
17 violation of this or will be corrected if he or she is in  
18 violation of this.

19           CHAIRMAN BABCOCK: Okay. Thank you, Judge.  
20 Evan.

21           MR. YOUNG: I think to me the problem that  
22 the proposed rules, which in most respects I think are  
23 excellent, don't address is the problem that people have  
24 of coming in from out of town and not being totally sure  
25 they know what is expected of them, and I think that a

1 relatively simple fix could achieve that kind of certainty  
2 both with respect to one's micro-ability in a particular  
3 case to know what is expected of you as well as in a macro  
4 sense whether or not these rules actually satisfy the  
5 substantive principles we've articulated; and that is to  
6 say instead of in Rule 10(d) the approval process will be  
7 as drafted, instead to say, "No local rule will be  
8 effective until posted by the Supreme Court on the Supreme  
9 Court's local rules page," which will be the easiest thing  
10 in the world now. It would have been quite difficult in  
11 earlier iterations of this rule, and that simply means if  
12 anyone wants a local rule you send it to the Supreme Court  
13 when it's satisfied that the local rule is compliant, it  
14 posts it, and every single lawyer in the state knows if I  
15 want to know what's required of me in Williamson County I  
16 go to the Supreme Court's Williamson County link on the  
17 local rules page, and if it's not there I don't have to do  
18 it.

19                   Now, I think that there are objections to  
20 that, and it's primarily about timeliness, but since all  
21 of the rules still have to go to the Supreme Court it's  
22 just a matter of whether we can get the process moving in  
23 a way that will be sufficiently timely. I know we had  
24 talked about at the last meeting the Bland committee and  
25 Justice Bland had volunteered to run a committee that

1 would, you know, help the Supreme Court, if the Supreme  
2 Court wants it to go through these. For example, the  
3 stuff that's in a Rule 10(d) now, the draft, saying  
4 certain things don't have to even be submitted to the  
5 Supreme Court, standards of decorum, procedures for  
6 handling uncontested and civil matters and et cetera.  
7 Well, if those are so easily identifiable, maybe it would  
8 be a relatively easy thing for the Court not even to have  
9 to scrutinize them, say, okay, this fits under that, boom,  
10 we're putting it up; and it can still be challenged by  
11 people under provision (g); but rather than allowing the  
12 local government to itself decree "This is an exception,  
13 we don't even need to send this to the Supreme Court," I  
14 would think that having an absolute rule that guarantees  
15 certainty for everyone, unless it's on this page, I don't  
16 have to follow it, would be a huge advantage for the state  
17 and for all attorneys and clients.

18 I also think that would avoid the  
19 definitional problem, you know, that I just mentioned of  
20 being able to determine whether something really fits  
21 under that category or not.

22 And then lastly, I think this to the extent  
23 that there is a problem with timeliness, it may be that  
24 it's not perfect, but I think it's better than the status  
25 quo or a confusing situation in which some things are



1 going to be published in some place where, you know, what  
2 do we say, is calculated to bring it to the attention of  
3 attorneys and other people. Let's just have a place. You  
4 don't have to guess what's calculated to bring it to the  
5 attention of attorneys and other individuals. It's the  
6 Supreme Court's web page. Boom, done, no ambiguity, no  
7 doubt, no potential gamesmanship, no surprises at the time  
8 of trial or any other moment; and once I think that system  
9 gets going it will become a smooth-operating, well-oiled  
10 machine.

11 CHAIRMAN BABCOCK: Great. Well, we always  
12 want that. Justice Christopher.

13 HONORABLE TRACY CHRISTOPHER: Well, my first  
14 question is what are we going to do with all of the local  
15 rules that are already in effect that may or may not  
16 comply with this?

17 CHAIRMAN BABCOCK: Yeah, I wondered about  
18 that, too. I wonder if Kennon has an answer to that.

19 MS. WOOTEN: I don't have an answer. This  
20 is an issue we addressed in part last time. I do,  
21 however, think that it calls into play subpart (g) in that  
22 we have an open discussion item for whether you have rules  
23 on the books that have already been approved going up for  
24 another round of review. I think you would probably apply  
25 it on a going forward basis. You know, practically

1 speaking, there's so many local rules on the books I don't  
2 think you can do it any other way. Maybe I'm being  
3 shortsided.

4 HONORABLE TRACY CHRISTOPHER: Well, no, I  
5 just -- I would like to see it in the rule that, you know,  
6 this rule is applicable to local rules on a going forward  
7 basis. And then my next question was -- or my next point  
8 was at some point I know there was a template for local  
9 rules, because I'm looking at the Harris County local  
10 rules, and we have a Rule 1 is objective of rules, Rule 2  
11 is reports to the AJ, Rule 3 is flow of cases; and then  
12 when we skip to Rule 10, conflicting engagements; Rule 11,  
13 vacations. So at some point there was a template out  
14 there, and that's why a lot of people's local rules will  
15 have the same numbers on, you know, these particular  
16 points, so I don't know what the history of that is.  
17 Maybe it was just in the second region, but it should  
18 probably be looked at. I think it's probably a good idea  
19 to have a template like that.

20 CHAIRMAN BABCOCK: Lisa Hobbs, who was the  
21 rules attorney several decades ago.

22 MS. HOBBS: Thank you, Chip. I don't know  
23 if we -- I mean, I don't remember anything at the Supreme  
24 Court that was a template. Your region might have had a  
25 template. Your numbering system might be the way it is

1 because of omitted rules where you eliminated a rule and  
2 then didn't renumber it or something.

3 HONORABLE TRACY CHRISTOPHER: No. Huh-uh.  
4 No. No. I mean, our local -- Harris County's local rules  
5 started in 1987. I got there in '95, and our changes to  
6 the local rules we were always told, no, there was nothing  
7 there before that we eliminated. It was like all  
8 vacations and counsel need to be this rule, and then maybe  
9 that's a regional thing.

10 MS. HOBBS: I think it might be a regional  
11 template. Not that I have an awareness of everything up  
12 at the Supreme Court, but you do get to know your rules  
13 files, the history of the rules very well in the position,  
14 and I'm looking at Kennon and she doesn't remember  
15 anything. Do you remember any template? Justice Hecht is  
16 shaking his head no, too, so it might have just been a  
17 regional.

18 MS. WOOTEN: If we had a template we would  
19 have used it.

20 HONORABLE TRACY CHRISTOPHER: Well, then  
21 maybe dig into Region 2's template --

22 MS. HOBBS: Yeah.

23 HONORABLE TRACY CHRISTOPHER: -- to see if  
24 other regional judges or other regions to see if --

25 MS. HOBBS: Is that Underwood?

1 HONORABLE TRACY CHRISTOPHER: It was  
2 Underwood, when the rules were made.

3 MS. HOBBS: It wasn't him?

4 HONORABLE TRACY CHRISTOPHER: No, it was.  
5 It was Stovall. It was Stovall, who is dead, but --

6 CHAIRMAN BABCOCK: Justice Hecht.

7 CHIEF JUSTICE HECHT: There might have been  
8 an outline because Luke Soules was going to gather up all  
9 the local rules and make a template, and he did gather  
10 them all up I think, or we thought pretty much, and it was  
11 like, you know, 750 pages, but and he might have gone  
12 through and analyzed vacation and docket or something, but  
13 we never did get to the point where we had version A,  
14 version B, version C.

15 CHAIRMAN BABCOCK: Judge Yelenosky.

16 HONORABLE STEPHEN YELENOSKY: Maybe it was  
17 said or implicit, but if there is that kind of transition  
18 nonetheless the existing rule would have to be posted on  
19 the Supreme Court website if we do that for the new rules  
20 so that there's no question.

21 CHAIRMAN BABCOCK: Elaine, Professor  
22 Carlson.

23 PROFESSOR CARLSON: Yeah, I was on that  
24 subcommittee, Justice Hecht, and we were asked to put  
25 together model local rules of a menu and the courts could

1 choose from those different models, trying to promote some  
2 consistency, and there was quite a bit of time spent on  
3 that project, and it was received by the judiciary at the  
4 judicial conference in a very hostile way. And so like  
5 our proposed jury rules, they just went away.

6 CHAIRMAN BABCOCK: There you go. Justice  
7 Gray.

8 HONORABLE TOM GRAY: As a footnote to  
9 Elaine's comment, the -- it was recently attempted again,  
10 and I think it was OCA that was actually trying to gather  
11 them, and it really -- by the time we got there so much of  
12 it had been changed and modified because invariably when  
13 you ask a court for their local rules, they look at their  
14 local rules and see all of the problems in their local  
15 rules, and before they turn them over then they want to  
16 start editing that process. But I was sort of the outlier  
17 on the subcommittee on a number of things, and so with  
18 your indulgence I would like to run through kind of four  
19 arguments that were pervasive in my view of this, and I  
20 tried to start with the Supreme Court's referral and the  
21 definition of the problem, which was it was taking too  
22 much Supreme Court time to review the local rules; and so  
23 the more I dug into the issue, the more I realized that  
24 this was an entirely self-inflicted injury, because there  
25 is no statute that requires Supreme Court approval of

1 local rules. It is solely a function of a rule adopted by  
2 the Supreme Court.

3           So with that kind of canvas to work with, I  
4 realized that we could go pretty much anywhere we wanted  
5 to with the review of local rules process, because they  
6 had the -- clearly had the authority to do whatever they  
7 wanted to. But there is a statute that does require local  
8 rules, and I was not aware of that until we got into this  
9 process, and it's Government Code 74.093, which is  
10 referred to a couple of times here in the draft. And it  
11 requires district courts and county court at laws to have  
12 certain local rules regarding how they do things and much  
13 of that -- and by either expressly or by implication is  
14 folded into Rule 10(a) now, but more stuff is in there. I  
15 would propose as an observation that if we're going to do  
16 this process with local rules -- and I'm still going to  
17 suggest some tweaks to the proposal -- that under the  
18 74.093 -- I'm sorry, 22.004(c), the Supreme Court can  
19 effectively overrule a statute by notification to the -- I  
20 think it's Secretary of State of what we think we're  
21 overruling, and I think that needs to be done with regard  
22 to 74.093 so that we can write a cleaner rule and a  
23 cleaner process of what we're doing here.

24           Also, to understand why we're putting it in  
25 Rule 10 instead of Rule 3 is that with the CCA's inability

1 to write local -- or administrative rules like the Texas  
2 Rules of Civil Procedure because of the Code of Criminal  
3 Procedure, they can't do that, and they've not been  
4 granted that authority, and this is an administrative  
5 rule, and that just seems to be a natural fit. Whatever  
6 we do with it, we're going to -- whatever we do with 3a we  
7 need to do the same thing with I think it's appellate Rule  
8 12, or 21, that says we can have local rules at the court  
9 of appeals level because we need to all be adopting rules  
10 the same way.

11           So kind of my first argument is we need to  
12 consider repealing that statute so that we have a little  
13 bit more flexibility in what we're doing here. The second  
14 argument, if you're going to require prior approval for  
15 the rules, I disagree that it should be the Supreme Court  
16 of Texas doing that review, and I think that a State Bar  
17 of Texas -- I think last time, as Evan pointed out, it was  
18 going to be the Bland commission or the committee that  
19 might be doing it, but I think there is a -- to achieve  
20 the objective that we were set out for when we were  
21 assigned the project, how to limit the Supreme Court's  
22 time in this, let a informed third party body that can do  
23 this review it and do the initial approval process. A lot  
24 of bright people. I think they could do it well, and then  
25 you've got an approval process that in effect takes no

1 time of the Supreme Court.

2           I add as a footnote to that there would be  
3 one situation in which I would advocate for the Supreme  
4 Court's express approval of a local rule, and this was  
5 brought about by Tracy's kind of objection or complaint.  
6 If somebody wants to have a local rule that expressly  
7 conflicts with an existing statewide rule and it's a good  
8 rule, they ought to be able to have that approved, but  
9 they ought to have it approved by the same body that  
10 passed the statewide rule, and so in that limited  
11 circumstance then the Supreme Court would in effect grant  
12 an exception to the statewide requirement and allow local  
13 rule that contravenes an otherwise statewide rule.

14           Argument three, the reviewing body, I'm  
15 really concerned that an attorney that is being some way  
16 impacted by a local rule that is up on a court's web page  
17 can go past the local rule and ask for an interpretation  
18 while that impact is being felt either in an existing case  
19 or in an anticipated case. What I think would be more  
20 efficient and appropriate is if you want to ask for a  
21 review of a local rule that you ask the same committee  
22 that approved them. It has a dual advantage when you do  
23 it that way. One, it's not the body that is ultimately  
24 going to be asked to address the rule if it adversely  
25 impacts me in a case and it comes up through the appellate



1 process, and you can't then use that procedure to impact a  
2 case without the other side really knowing about it. And  
3 then there's this whole thing about, well, does the local  
4 rule stay in place while it's being reviewed or not, and  
5 that causes me some angst because I think it can be --  
6 there's going to be some gamesmanship there because  
7 essentially what they're really asking for is for an  
8 advisory opinion as to how a local rule is going to be  
9 implemented or whether or not it's appropriate or  
10 constitutional or whatever, and this becomes really  
11 important with regard to the existing local rules that are  
12 already out there that aren't going to go back through  
13 this process.

14                   Finally, I agree wholeheartedly with Evan,  
15 although I framed it a little bit differently, and this is  
16 where I am on this. I actually started off on the  
17 standpoint we don't need no stinking local rules,  
18 everything needs to be statewide, we need to decide what  
19 the best way to do things are and mandate it, and then  
20 Nina and -- sent me into the world of local rules that I  
21 could find on the web, and as most of the rules attorneys  
22 that were listening in on the conversation -- I think Lisa  
23 was there. They said, "You wouldn't believe what's in the  
24 local rules," and you're right, I didn't believe what was  
25 in the local rules, but it is huge. It is enormous.

1 There's a lot of local practices that I had no idea, and  
2 that was before I even started looking for local orders or  
3 standing orders, and standing orders is a whole other  
4 thing that can create all kinds of problems.

5           In fact, it didn't make it to the -- what  
6 got into the materials, but I found one, and I sent it to  
7 Nina. It was a standing order that said -- or it was a  
8 standing order that said, "These are not local rules  
9 because we don't want to get them pre-approved." I mean,  
10 it was so obvious that that's what they were -- and so  
11 that's the standing order problem, and what I propose it  
12 would be a mandate from the Supreme Court to the OCA to  
13 create a web page for every court in the state on which  
14 their local rules are posted. That page -- and it  
15 achieves the same purpose Evan was talking about the web  
16 page of the Supreme Court, but it needs to look and feel  
17 every -- and it can't be the regular web page for a  
18 county, because they're not consistent.

19           When I was going through this process myself  
20 to get to the local rules or to the standing orders, you  
21 had to figure out every web page, and that is just a  
22 complexity that should not be there, and I know that if  
23 this task were assigned to David Slayton he would assign  
24 it to Casey and Casey would figure out how to make this  
25 work as a template web page for every court, and it

1 could -- that would allow for differences between courts  
2 that may have -- be in different counties and therefore  
3 have to have different local rules because of the way the  
4 statute currently is.

5                   So I did not talk at the last meeting when  
6 we did this. They bet me that I could not sit on my hands  
7 and not say anything. I won that bet, but now I've said  
8 my piece. I will be happy to comment further if asked,  
9 but having said that and recognizing that I'm in the  
10 minority view on the committee, I will do my best to be  
11 quiet from here on out.

12                   CHAIRMAN BABCOCK: Well, I've got a  
13 question. You say that the Court should overrule 74.093.  
14 All of it? I mean, there's a lot of stuff in there.

15                   HONORABLE TOM GRAY: Well, I did not look to  
16 the extent of the other things, but it's the part of  
17 74.093 that I was focused on was the mandate for the  
18 courts to -- 74.093(b) what the rules must provide for and  
19 then I would have to look down to (c) and (d) if those  
20 could go as well, but basically, yes, (a), (b), and --  
21 well --

22                   CHAIRMAN BABCOCK: If you get rid of (a)  
23 you're getting rid of everything else.

24                   HONORABLE TOM GRAY: It's pretty much done.  
25 I'll put it this way, Chip. I don't remember from my

1 review of that statute anything that need to survive if we  
2 did this either the way the committee was proposing it or  
3 the way that I would propose to do it, because really the  
4 fundamental difference between the committee's proposal  
5 and mine is who does it and then how does the -- how does  
6 it get put up on a web page and who is responsible for  
7 that.

8                   CHAIRMAN BABCOCK: Yeah, it struck me just  
9 looking at this statute quickly that it is not  
10 inconsistent with the rules that Kennon and the  
11 subcommittee have put forward.

12                   HONORABLE TOM GRAY: Well, that was because  
13 I bludgeoned them over the head with it as we were going  
14 through the process, and so there were some last minute  
15 adjustments to make it fit because we recognized, you  
16 know, there is a statute there that requires -- and my  
17 argument to the committee was a trial judge that is  
18 obligated by statute to do this rule, is not going to  
19 feel -- and this is probably where the pushback that  
20 Elaine talked about came from, is I'm statutorily mandated  
21 to have local rules. Where do you come off telling me  
22 that you're going to approve those local rules before  
23 they're effective? I've got to do it, and so that's why I  
24 think there's just a unresolved conflict there between  
25 that local -- between the local rule that we're trying to

1 do -- or the rule regarding local rules and this statute.

2 CHAIRMAN BABCOCK: Yeah.

3 HONORABLE TOM GRAY: With that  
4 inconsistency, I would have gone ahead and overruled the  
5 statute.

6 CHAIRMAN BABCOCK: Great. Thank you. Judge  
7 Yelenosky.

8 HONORABLE STEPHEN YELENOSKY: Couple of  
9 things. You mentioned -- one thing I was concerned about  
10 you mentioned was a system for approval of local rules  
11 that do not -- or clearly conflict with these provisions  
12 and how you get there. I've been through at least two  
13 rule revisions over 12 years and the most recent revision  
14 I was the primary drafter, so I've been through this,  
15 talked to judges about it all; and so from that  
16 perspective, it's an immense undertaking or at least in  
17 our county it was. And judges -- it's something  
18 additional to what judges -- other judges do. So my  
19 thinking is if you have that, some -- what is to prevent a  
20 district court or county court with local rules saying, as  
21 we would say, "Hey, we think our local rules are great and  
22 to the extent anything in here conflicts with what you say  
23 we can't do, we want approval of that"; and so that ends  
24 up going to the Supreme Court; and we are not lessening  
25 any burden on the Supreme Court unless there's some other

1 mechanism in between.

2           And maybe you intended this, but if there is  
3 a other body that's reviewing local rules for compliance,  
4 they would first have to sift through Travis County's  
5 local rules and say, "Okay, these are okay, but these  
6 aren't"; and that would at least narrow down the things  
7 that would go to the Supreme Court; but the response to  
8 that might be, "Look, it's a package, you can't just  
9 isolate" -- for example, what I just said, you can't just  
10 isolate, you know, three days notice because once you  
11 require us to have hearings on short notice, that upsets  
12 the whole setting docket and that destroys the central  
13 docket. So I would just caution that if you have that in  
14 there I don't know what the answer is, but ours would end  
15 up being a request probably at least in part for Supreme  
16 Court approval.

17           The other thing is about transition when we  
18 say, well, what rules are going to apply, the -- there are  
19 lots of local rules out there, as you know, and it's been  
20 a major problem, that were never approved by the Supreme  
21 Court. So when we say that the existing rules will  
22 maintain control, are we including local rules that have  
23 never been approved by the Supreme Court, and if we are,  
24 then there will be local rules posted that clearly  
25 conflict with lots of things, and so will that be a

1 piecemeal attack on those through the mechanism here where  
2 somebody can anonymously attack them, or are we going to  
3 say that a local rule that was never approved, judges, you  
4 should have gotten this approved before. We're not going  
5 to reward your failure to get this approved, are not in  
6 effect, so we'll give you a certain number of days to come  
7 up with local rules that you can submit to us for  
8 approval, allow your local rules to exist for that time,  
9 but you have to come up with something in short -- in a  
10 short period of time.

11           I don't know the answer to that either, but  
12 we do have a dichotomy between local rules that have gone  
13 through the approval process and those that haven't, and  
14 having been through that process and worked with the  
15 Supreme Court rules attorney, it's a good process.  
16 There's a good review. We got some good feedback. It  
17 takes a while, but anything that's going to go to the  
18 Supreme Court is going to take a while. That's the other  
19 point, and then you have this, but as far as -- and the  
20 other thing in standing orders, like you said, there's an  
21 order that said, "This is not a local rule." It certainly  
22 was the case when I got to Travis County that there was a  
23 sense that, well, there was no real explanation as to what  
24 was a standing order was a local rule, so, yeah, if we  
25 didn't think we really needed a local rule and we needed

1 it quick, we could just make it a standing order, and I  
2 resisted that, saying that was just an end run around  
3 approval of local rules, so I don't think that exists  
4 anymore, but there's certainly an incentive to do it that  
5 way, and so there are all of these incentives for busy  
6 district courts to do end runs, and I think we have to  
7 keep that in mind.

8 CHAIRMAN BABCOCK: Judge Peeples.

9 HONORABLE DAVID PEEPLES: Several points. I  
10 think the most important thing here is getting the Supreme  
11 Court not out of the business, but get some relief. I  
12 think the Supreme Court -- I respectfully disagree with  
13 Tom Gray; and we really talked about that in the  
14 committee; and Tom's -- he's by himself on that I think,  
15 at least was on the committee; but the Supreme Court has  
16 reviewed these rules for a long, long time; and it's  
17 inconceivable that we could just let everybody do what  
18 they want to and nobody reviews it; but the Supreme  
19 Court's got to have relief; and Richard Orsinger suggested  
20 at the last meeting a task force set up by the State Bar;  
21 and I think -- I think the committee's thinking was it  
22 would be better to have one chosen by the Court itself;  
23 but to me that is the solution to this. The solution.  
24 You know, we have this desire --

25 CHAIRMAN BABCOCK: Wait, excuse me, Judge,



1 but what is the "that" that is the solution?

2 HONORABLE DAVID PEEPLES: For the Supreme  
3 Court to come up with a committee appointed by it that it  
4 trusts --

5 CHAIRMAN BABCOCK: Okay.

6 HONORABLE DAVID PEEPLES: -- that will  
7 review these things and can make phone calls to people and  
8 say, "what does this mean" and "how does this work" and so  
9 forth. That kind of thing, and it would need to have some  
10 judges on it and maybe some retired judges. By the way,  
11 retired judges, they had their experience in a certain  
12 district, and a lot of them have gone out around the state  
13 and have hands-on experience in many, many courts, rural,  
14 you know, small town and city and all of that and have a  
15 lot of wisdom and, frankly, have time and know how to get  
16 somebody on the telephone and talk to them. We have the  
17 idea that the way to solve this is to write rule, rule,  
18 rule, rule; and we need some of that, but this is -- I  
19 mean, what Richard suggested last time I think modified so  
20 the Court itself would come up with this committee. It  
21 might have people from this group here, I don't know, but  
22 it would need to have lawyers who do civil, family law,  
23 criminal, and other things, too, on both sides and in all  
24 parts of the state, and who are committed to go to the  
25 meetings; and I think, frankly, there are a lot of lawyers

1 who would have time to do it and would be flattered and  
2 honored to serve, if you get the right people. Honored  
3 and flattered to serve and to do something good, but in my  
4 opinion, that is the way to get the Supreme Court out of  
5 the nitty-gritty of it, but still at the top of it, and  
6 that's that suggestion.

7 CHAIRMAN BABCOCK: Could we just interrupt  
8 for one second?

9 HONORABLE DAVID PEEPLES: Yes.

10 CHAIRMAN BABCOCK: Because Holly looked like  
11 there was an electrode attached to her arm.

12 HONORABLE DAVID PEEPLES: Well, I'm on  
13 record as saying the Court of Criminal Appeals needs to be  
14 involved in criminal things. I don't mean to say  
15 otherwise.

16 CHAIRMAN BABCOCK: Is that what you were  
17 going to say, Holly?

18 MS. TAYLOR: Well, that's part of what I was  
19 going to say. But I was going to say, yeah, right now,  
20 this is pretty much 100 percent of what I'm doing, almost  
21 90 percent, reviewing local rules.

22 CHAIRMAN BABCOCK: Okay.

23 HONORABLE DAVID PEEPLES: That's just one  
24 person.

25 MS. TAYLOR: I like the idea of having some

1 -- being able to offload some of that. Jackie may -- I  
2 don't know how she feels about that, and I don't know how  
3 my Court -- I'm not speaking for my Court.

4 CHAIRMAN BABOCK: Yeah.

5 MS. TAYLOR: But it is right now, just  
6 because we've had this backlog, it's quite a bit of what  
7 I'm doing, and I think it's a great idea to have a group  
8 of folks who have the time to focus on it and make phone  
9 calls and all of that, but what I will say is that one  
10 thing that I am finding with these rules is that a lot of  
11 them have problems with regard to the Code of Criminal  
12 Procedure.

13 CHAIRMAN BABCOCK: Yep.

14 MS. TAYLOR: So there's a rule that  
15 ostensibly applies either to both civil and criminal or  
16 maybe just to criminal, and it does not cite or refer to  
17 an article in the Code of Criminal Procedure which covers  
18 the exact same material and in many cases it's completely  
19 inconsistent with that statute. So this is what I'm  
20 finding a lot, and I think that we -- those are out there,  
21 they're probably being used, and that's a problem.

22 CHAIRMAN BABCOCK: Back to you, Judge.  
23 Sorry.

24 HONORABLE DAVID PEEPLES: That's my first  
25 point. My second point, I want to endorse what Evan Young

1 said. We've got the language in here that says you've got  
2 to post these rules in a manner reasonably calculated,  
3 blah, blah, blah. He is right.

4 CHAIRMAN BABCOCK: When you put it that way.

5 HONORABLE DAVID PEEPLES: Well, you know, a  
6 place, and people around the country and around the state  
7 ought to know this is where you go, and it needs to be  
8 somebody who knows how to do a website. That's point two.

9 Point three is as we do all of this, we need  
10 to recognize that some diversity is inevitable and is  
11 okay, and this is a federalism point really. How in the  
12 world can the same local rules govern Harris County and  
13 some rural county where there's one judge who has three  
14 counties and another judge who has one of those counties  
15 and two others, and then he shares or she shares with  
16 somebody that's got some overlap and not total overlap.  
17 They've got -- just, for example, the problems of getting  
18 lawyers to court when they've got conflicting settings is  
19 different in Houston than it is in East Texas. I mean,  
20 it's just different. It is -- we are a diverse state, and  
21 so we've got to accept there will be some diversity, and  
22 we shouldn't be fighting to make everybody conform except  
23 on some things, but we need to accept the diversity, and I  
24 think it's not only -- some of it's good.

25 And then the last point I want to talk about

1 a template. I think it ought to be doable to come up with  
2 some specimen, here's something that looks good. These  
3 points ought to be covered and so forth. You don't have  
4 to do it this way, but you can look at this, and it can be  
5 a first draft for you, and if in area A you want to do it  
6 a little differently, fine, submit it to us. B wants to  
7 do it a little differently, fine, but here's something  
8 that can get you started. And then a related point is  
9 existing rules, and I would -- the Court through this  
10 committee that I hope it sets up ought to be looking at  
11 rules. They ought to just be meeting, you know, number  
12 one, and they review five of them and just look at them.  
13 Just see how -- what they look like and work their way  
14 through it, and this is not going to happen and get  
15 finalized soon. It is too big a job, but I think that  
16 would be a good way to start.

17 CHAIRMAN BABCOCK: We'll get to you in a  
18 second, Roger, but Kennon has an urgent need to speak.

19 MS. WOOTEN: This is urgent. Two things I  
20 want to point out about the draft. First, in part (d)  
21 there is a reference to an appointed entity of the Court  
22 that could assist with the review process. The rule is  
23 structured to allow, however, for the Court to keep this  
24 work or to take it back if they want to in the future, and  
25 I think that's a good thing in case the appointed entity

1 process isn't working as intended as it should be, et  
2 cetera. So the draft as it stands does refer to an  
3 appointed entity. There's flexibility, however, to bring  
4 it back to the Court or change from Court-appointed to  
5 State Bar in the future if the Court decides that.

6 CHAIRMAN BABCOCK: Is that language enough  
7 for you, Judge Peeples?

8 HONORABLE DAVID PEEPLES: I wasn't paying  
9 attention to the language, I'm sorry.

10 MS. WOOTEN: You can just say yes.

11 CHAIRMAN BABCOCK: Refreshingly candid.

12 MS. CORTELL: He knew about that clause.

13 MS. WOOTEN: He voted in favor of that  
14 clause in the subcommittee. And then in part (e), I want  
15 to make it clear that the first sentence is about proposed  
16 local rules. The second sentence is about approved local  
17 rules, so the idea is that if you have a proposed local  
18 rule you want to make it available in a way reasonably  
19 calculated to bring it to the attention of people, and  
20 that's tracking some existing language I can't identify by  
21 number right now.

22 The second sentence is that you would give  
23 the approved local rules over to the court or OCA. The  
24 idea being that if you do that there will be somebody who  
25 is going to put it out there in a way that will make it

1 available to the people. I would hesitate to be very  
2 precise about the specific way you're going to post things  
3 online because things change and technology develops  
4 rapidly. So I think if you give it to the OCA, for  
5 example, to post it somewhere where it should be posted  
6 and give some flexibility over the course of time for OCA  
7 to decide the best way to post it online for people to get  
8 to it, that's better than being so precise that our rule  
9 gets outdated with technological developments.

10 HONORABLE STEPHEN YELENOSKY: But you can  
11 say -- despite the technology you can say a unitary place,  
12 a unique place.

13 MS. WOOTEN: U-huh, that's true.

14 CHAIRMAN BABCOCK: Yeah, Kim.

15 MS. PHILLIPS: I'm just sitting here  
16 listening to this discussion and thinking about the  
17 discussion we had in July, and I have a real question  
18 about whether we've been bold enough and creative enough  
19 in solving the problem for the Court, and so I was  
20 listening with intrigue as Justice Gray started to speak  
21 about, you know, is it a self-inflicted wound. I mean,  
22 the Government Code seems pretty clear what the local  
23 rules should contain, and it feels like we have lots of  
24 idiosyncratic local rules, and you know, how does the  
25 Court and this body stop that process. So, you know, for

1 me it feels like, you know, if we didn't have this system  
2 that we have, starting with a clean slate, what would this  
3 look like, how would we do it, what would be the mechanism  
4 by which we would prescribe the counties to submit the  
5 local rules, as opposed to trying to fix what we have, and  
6 so the solutions that we're proposing are already, you  
7 know, in this paradigm that we've identified is a real  
8 problem. If we started from scratch and from the  
9 beginning, what would we do and how would it look, and I'm  
10 not sure we've had enough time to get to that point.

11 CHAIRMAN BABCOCK: Okay. Thank you. Roger.

12 MR. HUGHES: Well, I want to go back to what  
13 we've been talking about getting these local rules to the  
14 practitioner, and I see in subsection (e) it's sort of a  
15 bifurcated thing that a local rule has to be made  
16 available to practitioners, but we're not saying how, and  
17 then they also are supposed to be delivered to the OCA and  
18 made available online there. You know, that is one way to  
19 approach it, and we may want to leave it that way, but I  
20 think it would be very helpful if we were to require that  
21 the local rules be posted in a specific place in the  
22 county's website, because I have found that trying to find  
23 local rules, if they're posted at all, one county puts  
24 them with the district clerk's web page and who knows what  
25 page it's located on, and some of them put them on a



1 court -- specific court's website -- web page.

2           It might be of value to have OCA at least  
3 give local -- require that OCA give some guidance as to if  
4 you're going to have a website where are you going to put  
5 these rules so people know where to find them when they  
6 want to go looking for them, and then the second thing I  
7 do note that the thing about standing orders, I have seen  
8 standing orders used in all kinds of different ways.  
9 Sometimes it's an individual court would have them, and  
10 sometimes they're done on a county basis in reaction to a  
11 situation. Like when Hidalgo County was inundated with  
12 hail cases the district judges got together and had a  
13 standing order about how to handle -- how to handle them  
14 in the interim before an MDL was set up; and once again,  
15 trying to find that standing order was sort of like if you  
16 didn't know where it was you weren't going to find it; but  
17 if you knew where it was, you could go right to it.

18           CHAIRMAN BABCOCK: Usually the case, but --

19           MR. HUGHES: So I'm suggesting we have some  
20 provision at least on standing orders, number one, that  
21 they be posted online. Maybe OCA could give some guidance  
22 about a logical location and then when you talk about  
23 filing it in a case and provided to each party, well, who  
24 is supposed to do that? I mean, in federal court, of  
25 course, there is not so many of them, they're just posted

1 online. You can go to a web page on each district court  
2 to see all of the standing orders, but this is who is  
3 supposed to provide standing order to the parties? The  
4 clerk? The bailiff? I'm not sure if -- I'm sad to say,  
5 if you leave it -- if you don't specify then who knows who  
6 is being tasked to do it and unless -- you know, you might  
7 want to make the party that filed the case responsible for  
8 getting a standing order applicable to that case. Make  
9 them provide it. Sometimes with federal court -- I know  
10 in a removed case you're required to provide copies of  
11 orders to everybody in the case, that is the party removes  
12 it, so that's just a suggestion.

13 CHAIRMAN BABCOCK: Okay. Buddy.

14 MR. LOW: Chip, I don't have any answers,  
15 but I have three questions.

16 CHAIRMAN BABCOCK: As is your practice.

17 MR. LOW: In order to relieve the load of  
18 the Court I had heard some talk about going through the  
19 administrative judge for that district, whether that would  
20 relieve, you know, and he could do what he wanted to. The  
21 second question I had is whether the committee considered  
22 on existing rules a note that says, "Existing rules must  
23 be reviewed by the issuing party and certified to the  
24 Court that they are consistent with these rules." In  
25 other words, somebody look over existing rules because

1 there's some of them that might be inconsistent with these  
2 new rules or new --

3 CHAIRMAN BABCOCK: Who would that somebody  
4 be?

5 MR. LOW: Whoever. Whoever sought -- the  
6 court that sought to have local rules, whoever submitted  
7 that.

8 CHAIRMAN BABCOCK: Yeah.

9 MR. LOW: Now, the last question I have is  
10 can any court -- we talk about Harris County rules, but  
11 the rule isn't written that way. It says "any court," so  
12 can any court in Harris County have its own local rules or  
13 what says -- this rule talks about any court. It doesn't  
14 say in a county or what. Was that considered? It just  
15 says "any court." Does that mean any judge in Jefferson  
16 County -- we have four civil judges -- any one of them can  
17 have his own. He doesn't want to be -- we don't have to  
18 have -- if I had read further and understood I wouldn't  
19 have asked that last question.

20 HONORABLE DAVID PEEPLES: Well, (b) says --  
21 10(b), "in multicourt counties," Houston, you know,  
22 "having two or more court divisions, each division must  
23 adopt a single set of local rules which govern all courts  
24 in the division."

25 MR. LOW: Again, I'll repeat what I said.

1                   CHAIRMAN BABCOCK:  Okay.  Yeah, Nina.  Then  
2 Justice Christopher.

3                   MS. CORTELL:  We did think about  
4 administrative judges, Buddy, we did --

5                   CHAIRMAN BABCOCK:  Hey, Buddy, she's talking  
6 to you.

7                   MR. LOW:  Oh, wait a minute.  Don't ask a  
8 question.

9                   MS. CORTELL:  We did seek -- our first  
10 thought was to have administrative judges, presiding  
11 judges in regions, handle this task, but there was a  
12 pushback on that.

13                   MR. LOW:  I'm not for it.  I just wondered.

14                   MS. CORTELL:  No, I'm just saying it  
15 absolutely was a suggestion and we sought feedback and  
16 were told that was not a good place to go.

17                   MR. LOW:  Well, all of my questions have  
18 been answered, and the third one embarrassingly by judge.

19                   CHAIRMAN BABCOCK:  Justice Christopher.

20                   HONORABLE TRACY CHRISTOPHER:  I just note  
21 that we don't have very many trial judges here today.  We  
22 have a lot, a lot, a lot of trial judges across the state;  
23 and if you make this rule too burdensome with respect to  
24 trial judges, local rules, standing orders, whatever, the  
25 rules will go underground.  All right.  So if it's a rule

1 in my court that I'm not going to grant your motion unless  
2 you have a copy of an order with it, you should know that  
3 in, you know, the court's standing order or local rule,  
4 whatever you call it; and if you make it too difficult for  
5 a judge to get that sort of information out and  
6 enforceable, then that rule goes underground; and so only  
7 the people who practice in that court will know, oh, Judge  
8 Christopher really wants a copy of an order before she  
9 grants your motion; and you know, you have to -- you have  
10 to understand that's what will happen if you make it too  
11 difficult.

12                   Why did that particular county -- I don't  
13 know, whoever it was, say "This is a standing order, not a  
14 local rule"? Because there was a time period when local  
15 rules that were sent up to the Supreme Court -- and I  
16 don't know what it's like now -- went into limbo for  
17 years. Okay. So if you wanted to actually put that rule  
18 into place, you couldn't call it a local rule. Another  
19 thing we were talking about, okay, there's an emergency.  
20 Something happens. The judges on the ground need to be  
21 able to make emergency procedures, emergency changes in,  
22 you know, how things are done without waiting on the  
23 Supreme Court, without waiting on some group of lawyers  
24 that -- and judges that meets twice a year. Without  
25 waiting. So you have to maintain local control and cannot

1 make the rule too difficult, and I think what you've done  
2 is made it too difficult.

3 CHAIRMAN BABCOCK: And when you say they've  
4 made it too difficult, you're talking about the proposed  
5 rule?

6 HONORABLE TRACY CHRISTOPHER: Yes, the  
7 proposed rule. But I'm just being honest. That's why  
8 that county said, "This is a standing order." I mean, in  
9 Harris County we would make changes to our local rule, and  
10 we would send it up, and we're like, "Okay, we haven't  
11 heard back from them. Let's just implement it anyway,"  
12 and we did. We put it on the website. We started  
13 following it. Lawyers started following it. That was  
14 just it.

15 CHAIRMAN BABCOCK: We're all about honesty.

16 HONORABLE TRACY CHRISTOPHER: I'm trying to  
17 tell you how it really works, and I only have the  
18 experience of a big county. I'm sure judges in a small  
19 county have a very different experience.

20 CHAIRMAN BABCOCK: Well, let's talk to a  
21 judge from a smaller county, Potter.

22 HONORABLE ANA ESTEVEZ: Okay. Before I say  
23 anything I would like to be granted immunity.

24 HONORABLE TRACY CHRISTOPHER: See. See.

25 HONORABLE ANA ESTEVEZ: Can I get it? Okay,

1 because I will tell you --

2 CHAIRMAN BABCOCK: The Chair will grant  
3 immunity, for what that's worth.

4 HONORABLE ANA ESTEVEZ: Our local rules were  
5 implemented I believe in 1978. You are amazing if you  
6 were in charge of getting the local rules passed because I  
7 tried 12 years ago as the administrative judge. I am the  
8 administrative judge again, but before you can even get to  
9 the next level you have to actually get a majority of  
10 votes with the people you're working with to what those  
11 local rules should be.

12 CHAIRMAN BABCOCK: Right.

13 HONORABLE ANA ESTEVEZ: Therefore, I had my  
14 underground rules that nobody knows -- or people know in  
15 here, you know, that practice before me. Some of them I  
16 believe are insane that I actually have to put in a dress  
17 code, but you actually have to look somewhat like an  
18 attorney to come into my courtroom on a hearing. You  
19 know, and then -- yeah, you have no idea.

20 MR. HUGHES: Does that include socks?

21 HONORABLE ANA ESTEVEZ: Huh?

22 MR. HUGHES: Does that include socks?

23 HONORABLE ANA ESTEVEZ: No, I do not --

24 CHAIRMAN BABCOCK: What about Rusty's  
25 outfit?

1 HONORABLE ANA ESTEVEZ: No, you don't have  
2 to wear socks. It is not even -- it is not even a sock  
3 requirement. I mean, it is so minimal it's insane. I  
4 went to a docket call where somebody showed up once, a  
5 lawyer, in shorts. Okay. Exactly. He's no longer  
6 practicing there. But anyway, so there are lawyers --  
7 there are lawyers and there are older lawyers, and so some  
8 of the judges have been there a long time wanted  
9 exceptions for -- and I won't state the names of the  
10 lawyers, but, you know, a special lawyer, like the Rusty  
11 Hardin exception, so if Rusty wanted to show up for a  
12 hearing in jeans and a jacket, then Rusty could, but  
13 nobody else would have the guts. Or if it's female, the  
14 females look like they've been to Wal-Mart, not in my  
15 court, but I'm just saying.

16 MR. PERDUE: Your immunity is going fast.

17 HONORABLE ANA ESTEVEZ: What did he say?

18 CHAIRMAN BABCOCK: I think he's withdrawing  
19 your immunity.

20 MR. PERDUE: I don't have that privilege,  
21 but I'm just telling you.

22 HONORABLE ANA ESTEVEZ: Well, I'm just  
23 saying, so every now and then I do get somebody who, you  
24 know, flies in from Houston as for some little hearing and  
25 may be a little more casual. It's always a female. Never



1 had a male not show up dressed right. I don't know why,  
2 but I guess it's just harder for a female to dress down.  
3 Anyway, I just wanted to say that Justice Christopher is  
4 right on point, that Judge Yelenosky is an amazing person  
5 that I need to take notes from to try to get local rules.  
6 Other people who have been administrative judge in  
7 between. I have two counties. I can always get really  
8 close on one and very far on the other, but, you know, the  
9 courts are changing, so every few years you have a new  
10 opportunity with a new group of people.

11 CHAIRMAN BABCOCK: Yeah.

12 HONORABLE ANA ESTEVEZ: So, anyway, yes,  
13 they're difficult, and it is a -- it's a difficult process  
14 anyway, but, I mean, I think that if you could make it  
15 easier for everyone involved and make it go quickly, I  
16 don't think that will be an issue, but there are  
17 underground rules, and I have been granted immunity, and  
18 I'm going to stand by that immunity.

19 CHAIRMAN BABCOCK: Okay.

20 HONORABLE ANA ESTEVEZ: And you can't take  
21 it away because only he can take it away, and he nodded.  
22 For the record, there was a nod from Justice Hecht.

23 HONORABLE TRACY CHRISTOPHER: I saw it.

24 HONORABLE ANA ESTEVEZ: Thank you.

25 CHAIRMAN BABCOCK: All right. Nina.

1 MS. CORTELL: It seems to me there's a  
2 couple of fundamental questions for the committee to think  
3 about, and one is should we have an approval process. It  
4 seems to me beyond that we should -- because you do want  
5 to make sure that at least you don't have some truly  
6 contradictory outliers that, you know, avoid our otherwise  
7 statewide rules. So, for example, in Dallas -- I think  
8 I've told this story before. We had a district court  
9 judge who imposed a 15-day requirement to answer request  
10 for admissions; and when you didn't know about the rule  
11 and didn't comply, all of your requests were deemed  
12 admitted. I'm sure Chip will remember that era. No?

13 CHIEF JUSTICE HECHT: Yes.

14 MS. CORTELL: Judge Hecht does.

15 HONORABLE ANA ESTEVEZ: I saw him nod, too.

16 CHAIRMAN BABCOCK: Wasn't your rule?

17 CHIEF JUSTICE HECHT: No, it was not.

18 MS. CORTELL: He's no longer on the bench,  
19 but he had that rule for a long time, and there were three  
20 Dallas court of appeals opinions all sending it back down,  
21 but those sorts of things I think do happen, and so we do  
22 need to have some type of approval process, and maybe --  
23 and what this rule endeavors to do is take out of the  
24 approval process certain types of rules such as the one,  
25 Judge, that you were just talking about such as decorum

1 and so forth would not have to go for approval. We  
2 provided for a designated entity to help with the approval  
3 process, but it seems to me if -- I don't know if there  
4 should be a vote or not, whether it's in the statute or  
5 not we should have an approval process for the efficient  
6 administration and consistent administration of justice in  
7 this state.

8                   So that's one issue, the approval process,  
9 and I think -- and by the way, kudos to Kennon who has  
10 worked so hard on this draft rule, along with Holly. What  
11 a great job they've both done. So I don't know if there  
12 should be a vote on it or not, but it seems to me the way  
13 we're handling the approval process, which again, is  
14 vested in the Texas Supreme Court or its designee, so  
15 we've provided some flexibility there, is a concept that  
16 we should embrace.

17                   Second, it's been talked about by a lot of  
18 people here. There needs to be notice. I think Evan's  
19 idea of a single place with the OCA if that's workable,  
20 and maybe the idea brought out by this discussion is all  
21 rules, whether approved or not, need to be in a central  
22 place so at least everyone has notice and you have leveled  
23 the playing field for all practitioners in those courts.  
24 And finally, Justice Christopher brought up the effective  
25 date issue, I think that's an important one, but obviously

1 we have provided here for if it's already approved,  
2 already gone through the process, then you simply have to  
3 have publication of that. Otherwise, these rules would be  
4 prospective in nature, effective so many days after  
5 approved.

6 CHAIRMAN BABCOCK: Judge Yelenosky.

7 HONORABLE STEPHEN YELENOSKY: That is the  
8 incentive -- I lived to the incentive, and I agree with  
9 both of the judges, trial judges, and any others that have  
10 been trial judges would probably say the same thing about  
11 the incentive; and all I think we can do is three things,  
12 goes along kind of with what Nina said, that decrease the  
13 instances in which that happens without too much trouble  
14 on the district judges, and one of the pressures that you  
15 said is the time it takes for the change. So if we have a  
16 different body that -- which moves faster, that at least  
17 lessens the incentive to go underground; or at least if  
18 you go underground, you're not going underground for long,  
19 because you're doing it for a while and you're getting an  
20 answer quicker. Everybody has said transparency.

21 And then the third thing that I think is  
22 crucial that's in here, and if you have these three things  
23 somehow I think we'll have an improvement, is the  
24 anonymous complaints because that means the attorneys --  
25 all the attorneys around the state who practice anywhere

1 are doing some of the work, and I think those things are  
2 crucial to this if we do any of those -- all of those  
3 things in some manner that that will be an improvement. I  
4 also think that, you know, there's some common sense to  
5 this about what needs to be a local rule, and I'm not sure  
6 how that works through, but, for example, all of us have  
7 done -- all judges have done CLE in which we're asked for  
8 particular tips or things that you require in your court.  
9 Some of those things really ought to be local rules and  
10 shouldn't be tips. On the other hand, some of those  
11 things are just tips, and I think the difference is it's  
12 really a question of common sense about notice to people  
13 and how the judge imposes that idiosyncratic requirement.

14           So it's one thing to say -- like that,  
15 there's a 15-day rule which wouldn't be approved under the  
16 system anyway; and it's another thing to say, well, you  
17 know, when you present your summary judgments I prefer  
18 that you put all of the briefs in one notebook rather than  
19 giving me two different notebooks. You know, you give me  
20 one side's notebook, that doesn't keep me from reading the  
21 other side's, so just put them all together and put all of  
22 your exhibits in another notebook. So does that need to  
23 be in a local rule? No, but if somebody comes and they  
24 haven't done that, am I going to refuse to hear the case?  
25 That would be stupid. So, you know, there isn't -- all we

1 can do is lessen the incentive to go underground on the  
2 things that matter. Nobody is going to complain that a  
3 judge requires that if a judge imposes it in a common  
4 sense way.

5 CHAIRMAN BABCOCK: Tom.

6 MR. RINEY: As a practitioner I really want  
7 to emphasize the notice part of it. I think that is real  
8 important, because as we were talking I went on the  
9 Supreme Court website to see if I could find the, quote,  
10 Potter County local rules, and sure enough you lead to the  
11 district clerk's website, and it shows the 1978 rules.

12 HONORABLE ANA ESTEVEZ: They're insane.

13 MR. RINEY: That was not only pre-discovery  
14 control plan era, pre-electronic filing era, it was  
15 pre-fax machine. Okay. And five district judges -- my  
16 experience is that four of them do not believe those rules  
17 are in effect. One of them occasionally will cite those  
18 rules -- well, will cite those rules and pretend they're  
19 in effect. So I get calls from people around the state  
20 saying, "I've got a call in Potter County -- or I've got a  
21 case in Potter County, and I looked up and there are these  
22 -- where are the new ones? Where are the current ones?"  
23 And so I explain, well, they really don't apply except  
24 certain circumstances in one court. Now, you know, that's  
25 pretty misleading. I mean, we need to have some type of

1 uniformity to do it.

2           Now, let me give Judge Estevez a bit of good  
3 news. She's got immunity, I'd like to keep this  
4 confidential. There are a group of trial practitioners in  
5 Amarillo who recognize that there is going to be a  
6 significant change in the bench in Amarillo and are going  
7 to volunteer to try to put together a task force to offer  
8 to help with drafting.

9           HONORABLE ANA ESTEVEZ: I have them drafted,  
10 so if this passes and it says decorum won't be in it,  
11 actually I think that the person that's getting off will  
12 aid me in getting a majority vote to pass all of our rules  
13 that we've been trying to pass for the last 12 years.

14           MR. RINEY: Well, we're going to be there to  
15 help.

16           HONORABLE ANA ESTEVEZ: But this will exempt  
17 all decorum rules anyway, and that was one of our big  
18 issues. So, thank you, and they're ready. I just need a  
19 vote.

20           CHAIRMAN BABCOCK: Justice Christopher,  
21 Judge Wallace, and then Judge Peeples.

22           HONORABLE TRACY CHRISTOPHER: Well, if we're  
23 thinking outside the box with a whole new idea, instead of  
24 saying that things have to be approved if they're  
25 inconsistent with the Rules of Civil Procedure, why don't

1 we establish a harm standard? Okay. So that if a rule is  
2 inconsistent with the Rules of Civil Procedure it's  
3 enforceable unless there's some sort of harm. So, for  
4 example, okay, a judge that requires admissions to be  
5 answered in 15 days instead of 30 days, that's harmful.  
6 Okay, but what if a judge said 30 days is really too  
7 short, I'm going to give you 60 days in all of my cases to  
8 answer request for admissions. Now, you know, that  
9 clearly conflicts with the local rule, but is it harmful?  
10 Or with a Rule of Procedure, but, you know, is it harmful?  
11 You know, probably no, it's not.

12           So if we think outside the box with the idea  
13 of local rules are local rules. Notice is important. I'm  
14 not disagreeing that, you know, people are entitled to  
15 notice, however we do it, but that they're enforceable  
16 unless they're used to affect -- to hurt substantial  
17 rights of the litigants or some words to that effect. I  
18 don't know exactly what the standard would be.

19           CHAIRMAN BABCOCK: Okay. Judge Wallace, and  
20 then Judge Peeples.

21           HONORABLE R. H. WALLACE: Tom's comment made  
22 me think and I've been sitting here thinking, the Tarrant  
23 County local rules I guess are fairly modern. They were  
24 promulgated in 1999. But I was thinking, you know, if we  
25 abolish the Tarrant County local rules tomorrow, the



1 litigation process would not change appreciably in Tarrant  
2 County. I mean, because most of the stuff there is just  
3 common sense type things, or some of it is. Some of it is  
4 disregarded now. It goes back -- there's talking about --  
5 it talks about deadlines to file motions for continuance,  
6 the Wednesday prior to trial. That goes back to when all  
7 of the judges came down to the jury room on Thursday and  
8 heard continuances. That doesn't happen anymore.

9           So I read Martha's memo with interest  
10 because I started practicing -- my practice was in federal  
11 court, and federal courts have a plethora of local rules.  
12 They love to promulgate local rules, and to me less is  
13 better. I'm not saying we don't need local rules,  
14 although we could probably live without them, but I think  
15 less is better, and the standing orders like Judge  
16 Christopher wants an order, whatever, I don't see any --  
17 standing orders would be fine for that type of thing,  
18 and -- but I admire the work you guys have done. To me,  
19 this has been an unbelievable task, but I'm not really  
20 sure how important local rules are in the overall process  
21 we're talking about.

22           CHAIRMAN BABCOCK: Judge Peeples.

23           HONORABLE DAVID PEEPLES: I think we should  
24 give some attention to the default rules that are embedded  
25 in this draft here, and one of them is (d), local rule

1 approval process, "No local rule become effective until  
2 it's submitted to and approved by the Supreme Court." You  
3 could change that to say, "No local rule is effective" --  
4 except for the excepted matters. "No local rule is  
5 effective until submitted to the Supreme Court," maybe for  
6 30 days after or whatever, and it goes into effect unless  
7 the Supreme Court says, "Hold on, we're going to stay this  
8 or look at it." In other words, the default rule would be  
9 you can make the change and you don't have to wait years  
10 or whatever. If the Court wants to say, "We need to take  
11 a look at this, it looks like it's major," they could do  
12 it through their committee; and I was looking in here,  
13 Nina and Kennon, I thought we had something about, you  
14 know, when you're going to make a change you've got to  
15 send a redlined version. Did we not do that?

16 MS. WOOTEN: We did have a suggestion to  
17 incorporate a requirement into the rule; however, we  
18 realized it didn't really fit where we had it and thought  
19 it might be better for a comment. As of now it's a  
20 discussion point, footnote one, in the memo.

21 HONORABLE DAVID PEEPLES: But to -- that's  
22 just done routinely by people.

23 MS. WOOTEN: It is not.

24 HONORABLE DAVID PEEPLES: Well, it is easy  
25 to do a redline version.

1 MS. WOOTEN: Yes, it is easy, but it is not  
2 routinely done.

3 HONORABLE DAVID PEEPLES: And it's not  
4 burdensome.

5 HONORABLE STEPHEN YELENOSKY: The Supreme  
6 Court could have a local rule that you have to do that.

7 HONORABLE DAVID PEEPLES: Not burdensome to  
8 say if you want to change something send us a redlined  
9 version, and you can look at it, and it might be trivial  
10 and you can let it sail through, but to have the default  
11 rule you can't do anything until we approve it if the  
12 approval process is not fixed, that's a bad rule.

13 HONORABLE STEPHEN YELENOSKY: Yeah.

14 HONORABLE DAVID PEEPLES: So we should look  
15 at that.

16 CHAIRMAN BABCOCK: Okay. Kennon, I noticed  
17 that there were a few footnotes calling for discussion on  
18 discrete topics. Have we covered those?

19 MS. WOOTEN: Not entirely. The first one is  
20 exactly what Judge Peeples just mentioned, and that is  
21 whether we should require submissions to effectively call  
22 out new content. Again, it was in one of the versions  
23 proposed. It does sort of start to feel like  
24 micromanaging quite a bit.

25 CHAIRMAN BABOCK: Yeah.

1 MS. WOOTEN: So it might be better to  
2 address in a comment.

3 MS. PHILLIPS: I'm sorry. I'm just saying  
4 to her if it's not redlined it takes up even more court  
5 time, and that's part of the challenge with this whole  
6 process is the Court's priority shouldn't be distracted by  
7 local rules. It should be to deal with the merits of the  
8 cases that are coming before the Court, and so a redline,  
9 it seems like micromanaging but that is to promote  
10 efficiency for the Court, is it not?

11 MS. WOOTEN: Yes, it is.

12 CHAIRMAN BABCOCK: Yeah. Nina.

13 MS. CORTELL: One way to -- the committee  
14 might want to consider combining a couple of comments from  
15 Judge Peeples and Justice Christopher would be you could  
16 make it effective a certain number of days from submission  
17 unless it -- if you want to say -- I don't know how to say  
18 will disrupt.

19 CHAIRMAN BABCOCK: Unless they put up a stop  
20 sign.

21 MS. CORTELL: Yeah.

22 CHAIRMAN BABCOCK: Unless they put up a stop  
23 sign.

24 MS. CORTELL: Exactly. Exactly. So there  
25 could be some -- you could change the default rule and

1 effective date. I think 30 days is probably a little  
2 steep, but maybe 60 days unless it falls in a certain  
3 category that is facially problematic.

4 HONORABLE STEPHEN YELENOSKY: But for the  
5 transition they have to go in effect right away.

6 HONORABLE TRACY CHRISTOPHER: And we need  
7 emergency rules, too.

8 CHAIRMAN BABCOCK: Yeah, Marcy.

9 MS. GREER: So the stop sign, would that be  
10 effective as to just the rule in question or all of the  
11 rules? Because, I mean, all of these -- like the Travis  
12 County rules are pretty voluminous; and if there's a stop  
13 sign issue only with respect to one, you kind of hate to  
14 hold up everything else. Would it be like a line item  
15 veto kind of thing?

16 HONORABLE STEPHEN YELENOSKY: Maybe just up  
17 to the Court or the Court's appointed body.

18 CHAIRMAN BABCOCK: Yeah.

19 MS. GREER: And then the second observation  
20 or question was, was any consideration given to collecting  
21 kind of gold standard type local rules so that when courts  
22 go through this process they can think about, you know,  
23 here's a good rule that's been used by and approved by the  
24 Supreme Court for one county. You don't necessarily have  
25 to ascribe it, but so that they can think about it,

1 because there are so many different variations among the  
2 different counties, and there's some good ideas in there,  
3 but you wouldn't know it without reading all of them, and  
4 it seems like if we're going to create a body to look at  
5 these local rules that could be one resource that they  
6 could create that would then be helpful and then those  
7 would be almost pre-certified so that if you adopted that  
8 for your county you know it's going to be approved.

9 CHAIRMAN BABCOCK: Evan.

10 MR. YOUNG: I think that underlying so many  
11 of the concerns is the old process and the fear that  
12 things are going to last for years, and if we have  
13 counties where the local rules are 1978 and 1999 at least  
14 some places are not suffering from we urgently have to get  
15 these things passed by the Supreme Court. It's taking so  
16 long or has been submitted for a long time, but the group  
17 that Judge Peeples was talking about, I have been  
18 referring to that as the Bland committee, and I would be  
19 perfectly happy if that phrase were actually adopted in  
20 the rule.

21 But if that committee were working, you  
22 know, expeditiously it wouldn't even matter as much if we  
23 say, okay, it will go into effect automatically after a  
24 certain amount of time unless the Bland committee puts the  
25 stop sign up as to certain things, because things like the

1 rules of decorum and all of the things that are enumerated  
2 out here could be very quickly identified as such and  
3 immediately put onto the website, and I would strongly  
4 urge not carving that out and allowing that just to be  
5 unilaterally done because it's so difficult to tell. If  
6 it's difficult for the Bland committee to tell rapidly  
7 that this is, in fact, is a standard of decorum it's  
8 probably more than a standard of decorum; and that means  
9 that unilaterally allowing it to go into effect would be  
10 problematic. It would become a new end run around it;  
11 whereas, if the Bland committee is just taking forever to  
12 actually make this decision then we're back into the world  
13 where apparently judges are cheerfully going to, you know,  
14 violate the rule of law and do whatever they want to  
15 despite what the rules say if we don't --

16 HONORABLE TRACY CHRISTOPHER: Yes, they are.

17 MR. YOUNG: But to me everything is about  
18 the efficiency of this process, and once that happens then  
19 all of the other problems, you know, fall away. I also  
20 think the proposed rules in subsection (e) should be in  
21 the same Supreme Court -- I call it the Supreme Court web  
22 page. I guess it could be any web page. I think we  
23 should say in here the Office of Court Administration's  
24 local rules web page. That strikes me as something that's  
25 not likely to -- there will be such a thing if we create

1 it for a long period. This rule could be amended if  
2 suddenly the world changes and websites are no longer in  
3 existence. We've got much bigger problems probably than  
4 what we call it in subsection (e), but all of the proposed  
5 rules should be there, all rules in effect should be  
6 there. Prior versions could be memorialized there, and it  
7 would be easy to do redlines if we're having it in a  
8 central place. It's the click of a button these days to  
9 do a redline between version one and version two, and  
10 everybody will see what's proposed, what's in effect at  
11 any given moment of time, and this doesn't have to be  
12 nearly as complicated a problem, and we can advance the  
13 rule of law.

14 CHAIRMAN BABCOCK: Roger.

15 MR. HUGHES: Well, I understand what people  
16 are saying about we don't want judges to do sub rosa what  
17 they can't do -- what we're being told they can't do  
18 officially, but I think we -- and I'm really not in favor  
19 of sending it to a committee but if it doesn't act in 30  
20 days then it's automatically approved or a line item veto.  
21 I mean, we're almost -- we're almost starting out assuming  
22 that this committee is going to be dilatory and a  
23 roadblock in the way of progress; and I think we at least  
24 ought to start off with the presumption that the Bland  
25 committee or whatever name it gets will be efficient and



1 sharp and intelligent and will do its job expeditiously  
2 and not frustrate local practice; and if it turns out to  
3 be opposite, well, then we can put a mandatory you have 30  
4 days or it goes into -- or 60 days or whatever; but I just  
5 think starting off with that presumption is not -- is not  
6 a good way to proceed.

7                   CHAIRMAN BABCOCK: Maybe if we called it the  
8 colorful committee. Justice Boyce, and then Justice  
9 Christopher.

10                   HONORABLE BILL BOYCE: So I'm interested in  
11 the sense of the group. Is there a sense that the vast  
12 majority of local rules are perfectly benign but there's  
13 some stuff that needs to be screened out from time to  
14 time? I mean, that's what I take away from the  
15 conversation that there's rogue stuff that gets in from  
16 time to time, 15 days for responding to admissions or  
17 things like that, but the vast majority of this stuff is  
18 completely benign and so forth.

19                   MS. TAYLOR: I repeat, this is what I'm  
20 doing seven out of eight hours a day lately, and I --  
21 there are a lot of benign local rules. There a lot of  
22 local rules that pertain to things like decorum and stuff  
23 like that that are fine and certainly fit within the  
24 statutory definition of local rules, but there's a lot of  
25 local rules that are very creative. Folks have -- they're

1 not uniform at all. They're all over the map. Some of  
2 them are four to five pages long. Fort Bend County, what,  
3 128 pages?

4 MS. DAUMERIE: 130 pages.

5 MS. TAYLOR: 130 pages. And that can  
6 contain all kinds of material, and sometimes I have to go  
7 through them several times before I pick up on something,  
8 oh, wow, that's a problem. It's quite time-consuming.  
9 Like I said, some of them are benign, but I would not  
10 characterize it as a vast majority.

11 HONORABLE BILL BOYCE: Okay.

12 MS. TAYLOR: And at this point I have not  
13 yet picked up a set of local rules and not flagged at  
14 least a few issues for discussion by my Court that I  
15 thought were important enough for that. So but, of  
16 course, these are people who are asking for approval, and  
17 the other thing about the redlining is in a lot of cases  
18 these rules have already been in effect in part, and I'm  
19 not a hundred percent sure what's new. I don't know if  
20 you are.

21 MS. DAUMERIE: No.

22 MS. TAYLOR: No, so I'm kind of just taking  
23 a look at all of them, but then I'm kind of glad that I am  
24 because I'll find things that it's like oh, oh, my  
25 goodness. For example, local rules that talk about

1 procedures for grand juries based on the statute from like  
2 15 years ago before it was amended and provide that  
3 certain things are not secret which are now by the grand  
4 jury secrecy statute mandated to be secret. That's an  
5 example of something.

6 MS. DAUMERIE: And I just received a set of  
7 local rules that was redlined, but it still had like four  
8 pages of rules that completely conflicted with the  
9 e-filing rules, but they weren't trying to take those out.

10 HONORABLE BILL BOYCE: So that question is a  
11 way to ask this question about -- it goes to Judge  
12 Peeples' point about the default. What do we want the  
13 default to be? Because part of the default of requiring  
14 pre-approval is timely -- concerns regarding timeliness,  
15 so a related concern is just accessibility. If we set the  
16 clock based on when all of the local rules become easily  
17 available through whatever means that happens, then what  
18 default would we want to have after that? Do we want to  
19 say that they are presumptively in effect until something  
20 is identified and stricken, or do we want to have a  
21 continued pre-approval process before they go into effect?  
22 And maybe the answer for that is different in the civil  
23 and criminal context. I don't know.

24 CHAIRMAN BABCOCK: Good question, though.  
25 Justice Christopher, then Professor Carlson.

1 HONORABLE TRACY CHRISTOPHER: Local rules  
2 provide innovation. If I look, for example, at the Harris  
3 County local rule in the family division, they require  
4 automatic disclosure of certain information in divorces.  
5 All right. Now, that clearly conflicts with the Rules of  
6 Civil Procedure, doesn't it? Because otherwise you have  
7 no duty to do anything, but is that a harmful rule? No.  
8 It's not. If this is the kind of information that someone  
9 would be entitled to after a request for disclosure, the  
10 fact that the Harris County family courts are requiring it  
11 without a request for disclosure is not a harmful rule.

12 So, again, you know, this inconsistent,  
13 y'all are in the weeds on inconsistent, and maybe you just  
14 need some advice from Justice Hecht on that. Only look  
15 for things that really hurt someone, and let lower courts  
16 and local courts innovate.

17 CHAIRMAN BABCOCK: Okay. Judge Peeples.

18 HONORABLE DAVID PEEPLES: Just to follow up  
19 on what she said, one way to look at standing orders and  
20 some of these things that happen is if a judge in a family  
21 court, for example, takes the position as a matter of  
22 discretion in every divorce case I'm going to require  
23 certain disclosures, just period, end of discussion, I'm  
24 going to do it. Why don't we want that put out there so  
25 everybody knows it, not just the people who practice

1 there? So the judge ought to be able to tack on the door  
2 or put on the website and so forth "In divorce cases I've  
3 got this practice." And I agree that if it were harmful  
4 that might be a different matter, but there are all kinds  
5 of things that judges after they've got some experience,  
6 like scheduling orders maybe or the discovery policies,  
7 then they say, "My practice as a matter of discretion is  
8 going to be to do A, B, and C in this situation."

9 Discovery disputes and disclosures and so forth. I'm  
10 going to do that. I have the discretion to do it, and if  
11 that's the judge's position I think it's a good thing for  
12 that to be written down somewhere publicized so everybody  
13 knows it, the guy from out of town and the local person,  
14 too; and then so in effect that's a lot of times what  
15 standing orders do; and I will say -- I said this in  
16 committee. We cannot allow standing orders to be a way to  
17 wire around and avoid the requirements of local rules. We  
18 can't go that far, but I don't look at standing orders as  
19 necessarily devious and bad.

20 CHAIRMAN BABCOCK: Professor Carlson.

21 PROFESSOR CARLSON: To respond to Justice  
22 Boyce, I would be interested to see what the rules  
23 attorneys, both present and former, think. When our  
24 subcommittee years and years and years ago reviewed all  
25 the local rules and, as Justice Hecht said, like a stack,

1 it was shocking to me what was in some of the local rules.  
2 Not so much in the major counties, but some of the smaller  
3 counties, and so I think we really have to think about  
4 whether we want to grandfather in everything. Do you want  
5 to -- if you don't, do you do it like electronic filing,  
6 kind of roll out here's the schedule of when these  
7 counties have to have their local rules into us for  
8 further review so that it's not 254 counties at once or,  
9 you know, you have some semblance of order. I think the  
10 Harris County local rules are actually very good and  
11 organized very well and it's very easy to find the  
12 standing orders and the local rules for the district  
13 courts anyway.

14 CHAIRMAN BABCOCK: Okay. We're going to  
15 take our -- I'm sorry, were you done?

16 PROFESSOR CARLSON: Yes, I am. Thank you.

17 CHAIRMAN BABCOCK: We're going to take our  
18 morning recess, and we're not done talking about local  
19 rules, but we are going to move this discussion to the  
20 next meeting so we can talk about cyberbullying, which is  
21 a good way to end up a Saturday morning, I think. So  
22 we'll be in recess for 15 minutes.

23 (Recess from 10:38 a.m. to 10:55 a.m.)

24 CHAIRMAN BABCOCK: All right. Judge  
25 Yelenosky is going to take us through cyberbullying in the

1 time remaining. We're going to quit 10 minutes early so  
2 people can get the 1:10 flight to Houston, but this will  
3 spill over to the next meeting, so we don't have to finish  
4 it, and we won't finish it today. But, Judge, have at it.

5 HONORABLE STEPHEN YELENOSKY: Okay. The  
6 committee, subcommittee, was me, Frank, Lamont, and Pete  
7 Schenkkan. Pete and Lamont couldn't be here today.  
8 Hopefully they will be here when we spill over. I guess  
9 I'd like to start with the concrete, if you can pull out  
10 the thing that says "Petition for Cyberbullying." It  
11 looks like a petition.

12 HONORABLE DAVID PEEPLES: Just the  
13 instructions?

14 HONORABLE STEPHEN YELENOSKY: Nope.

15 MR. GILSTRAP: A form.

16 HONORABLE STEPHEN YELENOSKY: It's got a  
17 style, a blank style at the top.

18 CHAIRMAN BABCOCK: Got it.

19 HONORABLE STEPHEN YELENOSKY: Okay. All  
20 right. I wanted to start with this kind of like when you  
21 go into court and you want to explain to the judge where  
22 you're going and you present a draft order before the  
23 argument. This is what I'm going to ask for at the end.

24 MR. RODRIGUEZ: Are you following the local  
25 rules?

1 HONORABLE STEPHEN YELENOSKY: The ones I  
2 made up.

3 HONORABLE ANA ESTEVEZ: 1978 rules.

4 HONORABLE STEPHEN YELENOSKY: So there are  
5 lots of issues and since Chip said it's going to spill  
6 over, we certainly will take time for those, but the -- at  
7 the end of everything because there's a statute that asks  
8 the Supreme Court to prepare this however the Supreme  
9 Court wanted to do it, my understanding is the Supreme  
10 Court wants a product, and it's not a whether question.  
11 Is that fair, Justice Hecht?

12 CHIEF JUSTICE HECHT: Yeah.

13 HONORABLE STEPHEN YELENOSKY: It's a how.  
14 Okay. So we may not end up with this exactly, but we've  
15 got to end up with something, and so just to explain where  
16 we ended up and then we'll back up from that, this is a  
17 petition for a cyberbullying restraining order, and  
18 accompanying that are the instructions, and both are meant  
19 to be understandable and usable by a pro se litigant, most  
20 likely the parent of a child who is alleging  
21 cyberbullying, and so that's why it starts with "adult  
22 applying for the order." There are -- there is a matrix  
23 of possibilities. I don't think I need to go over all of  
24 them, but there's a matrix of possibilities for the suit  
25 itself based on the age of the people at the time of suit,



1 whether it's the parent who sues -- well, what the age of  
2 the student is at the time of the suit, what the age of  
3 the alleged bully is at the time of the suit, what the age  
4 of the alleged bully was at the time of the incident, what  
5 the age of the bully was -- or what the age of the victim  
6 was at the time of the incident. Regardless of the time  
7 of the incident, they have to be students at that time or  
8 some other way you might argue they're connected to  
9 education.

10           So understandability is key to this. Most  
11 parents are not -- well, many parents are not likely able  
12 to hire an attorney to do this, so it's kind of a  
13 checklist petition; and the parts are really just fill in  
14 who the adult is, fill in the adult you want to restrain;  
15 and obviously in that instance if the cyberbully is under  
16 18 you're looking to restrain the parent. If the  
17 cyberbully is 18 or older you're looking to restrain the  
18 cyberbully, which of course raises the problematic  
19 questions like how do you deal with an order against the  
20 parent, and the parent instructs the child, and the child  
21 nonetheless does what he or she shouldn't do.

22           The grounds for restraining order basically  
23 refer to a declaration under penalty of perjury, which is  
24 just described as what it's supposed to cover, and then  
25 it's kind of a blank page where they can say basically why

1 they think they should have the order, and it's under  
2 penalty of perjury so they don't have to get it notarized  
3 and then some language of requesting the restraining order  
4 form language and the request that the record be sealed  
5 consistent with the law, which right now would mean  
6 everything could be sealed except the order. So if you  
7 have any questions just about sort of the structure of it,  
8 might start with that and then we can back up.

9 CHAIRMAN BABCOCK: Okay. Any questions  
10 about structure?

11 HONORABLE R. H. WALLACE: What's the  
12 authority for sealing it?

13 HONORABLE STEPHEN YELENOSKY: Just -- I  
14 don't remember. Is it statutory in there, or is it just  
15 76a?

16 MR. GILSTRAP: No. No. It's -- of course  
17 we've got the general sealing rule.

18 HONORABLE R. H. WALLACE: Would you have to  
19 follow the 76a to seal it?

20 MR. GILSTRAP: You know, and I guess do we  
21 have to -- you know, does this fall in the domestic  
22 relations exception? Probably not. Obviously, the  
23 problem we've got here --

24 HONORABLE STEPHEN YELENOSKY: Does it arise  
25 under the Family Code?

1 MR. GILSTRAP: Yeah, under the Family Code.

2 HONORABLE STEPHEN YELENOSKY: If it arises  
3 under the Family Code then 76a doesn't apply, but 76a has  
4 one aspect which applies to everything, which is no order  
5 shall be sealed unless there's a statutory provision that  
6 says you can seal it, like adoptions.

7 MR. GILSTRAP: It's a problem. The problem  
8 is, you know, these people are -- they're trying to stop  
9 images on the internet, statements on the internet, that  
10 are disturbing to this child; and what we don't want to do  
11 is make them public record so anybody can go on the  
12 internet and find these statements. So that's the problem  
13 we're dealing with, and I'm not sure how we deal with the  
14 sealing problem.

15 HONORABLE STEPHEN YELENOSKY: Well, I think  
16 we'll be able to seal the order. It's a problem of how  
17 specific the order can be and be effective and enforceable  
18 because it's the order that can't be sealed.

19 HONORABLE DAVID PEEPLES: Could you explain  
20 the limits on enjoining the juvenile himself? The  
21 16-year-old, let's say, or 15. Can't be done?

22 HONORABLE STEPHEN YELENOSKY: Frank, you  
23 want to take that?

24 MR. GILSTRAP: Well, I -- you know, the  
25 problem is that the juvenile can't be a party and you have

1 to sue the parents as next friend of -- or the person in a  
2 parental relationship. Is that correct?

3 HONORABLE STEPHEN YELENOSKY: That's what we  
4 decided.

5 MR. GILSTRAP: That's what we decided, and  
6 the statute I think it -- the statute does not contemplate  
7 suit against the juvenile. It could, but it doesn't.

8 HONORABLE DAVID PEEPLES: It didn't do it.

9 MR. GILSTRAP: And so, you know, I guess we  
10 have to tell the parents to stop the -- to tell the kid to  
11 stop. Now, what happens when the kid doesn't stop, I  
12 don't know. It's very interesting. This whole procedure  
13 is -- kind of contemplates a one off deal. Basically you  
14 go get the order and you show it to the student, and in 99  
15 percent of the cases they stop. The problem is in some  
16 cases they're not going to.

17 CHAIRMAN BABCOCK: Is there any empirical  
18 data that suggests that in 99 percent of the cases they'll  
19 stop?

20 MR. GILSTRAP: Well, I think -- no. No.

21 HONORABLE STEPHEN YELENOSKY: We don't know.  
22 We didn't -- it wouldn't affect what we did.

23 CHAIRMAN BABCOCK: No, it doesn't affect  
24 what we do. It's just I'm curious. Judge Wallace.

25 HONORABLE R. H. WALLACE: Does the statute

1 indicate what courts these can be filed in? Can it be  
2 filed in county court, any district court?

3 HONORABLE STEPHEN YELENOSKY: I don't  
4 remember actually.

5 MR. GILSTRAP: It does. I think it just  
6 contemplates a court of general jurisdiction.

7 CHAIRMAN BABCOCK: Kimberly, is that your  
8 hand up, or is that Marcy?

9 MS. GREER: Mine.

10 CHAIRMAN BABCOCK: Sorry.

11 MS. GREER: So two questions. If they -- if  
12 the parent --

13 CHAIRMAN BABCOCK: Could you speak up just a  
14 little bit? Sorry.

15 MS. GREER: If the parent is not successful  
16 in restraining, would the parent be subject to contempt?

17 HONORABLE STEPHEN YELENOSKY: Well, that's  
18 what I was alluding to, and that's beyond our work I  
19 guess, but we are setting up a temporary restraining  
20 order. Like any other restraining order presumably it  
21 theoretically is subject to contempt, but there could  
22 be -- it could be some things that are beyond the control  
23 of the parent, but, for example, you could have an order  
24 that says, "Take this thing down from the internet," which  
25 the parent himself or herself could do with some effort,

1 or "take the device away from the child," which doesn't  
2 preclude the child from going somewhere else, but you  
3 know, it depends on what the order says whether it can be  
4 effectively enforced by contempt.

5 MS. GREER: And one other question is I  
6 think that you can't put the child's name in the petition,  
7 right? It has to be by initials?

8 HONORABLE STEPHEN YELENOSKY: I don't  
9 believe so.

10 MS. GREER: Is that --

11 HONORABLE STEPHEN YELENOSKY: I mean, I know  
12 the court of appeals has a rule about that, right, but at  
13 the trial court level I don't think that's true, and I  
14 don't see anything in here that makes that different.

15 CHAIRMAN BABCOCK: Yeah, I'm sorry. Judge  
16 Estevez.

17 HONORABLE ANA ESTEVEZ: It just strikes me  
18 that this -- the type of enforcement that we're seeking  
19 might be very similar to a truancy type of case, so I  
20 would just suggest that some of these issues could be  
21 addressed if we looked at what the truancy laws are,  
22 because that is the adult being held liable for the acts  
23 of the child. It's the JP type of case.

24 HONORABLE STEPHEN YELENOSKY: It's still  
25 criminal? Truancy?

1 HONORABLE ANA ESTEVEZ: I don't think it is.  
2 I think it's quasi, some sort of quasi, but I'm not really  
3 sure.

4 HONORABLE STEPHEN YELENOSKY: This is  
5 clearly civil.

6 HONORABLE ANA ESTEVEZ: This is civil, but I  
7 don't know. I think that it's -- I think it's civil and  
8 it's just enforced by contempt, so but I don't know that.  
9 I just thought that when I read this --

10 HONORABLE STEPHEN YELENOSKY: Yeah.

11 HONORABLE ANA ESTEVEZ: -- it just rings in  
12 the truancy type of rules where we're talking about --  
13 we're telling the kid this is what you've got to do, but  
14 we're holding the parent accountable for it, and so I'm  
15 going to guess that most of those issues would have been  
16 resolved in those statutes, and I think a JP court would  
17 be a lot cheaper because who wants to file -- unless  
18 you're indigent and you can prove indigency who wants to  
19 spend 360 to \$420 when you can pay \$60 for this.

20 HONORABLE STEPHEN YELENOSKY: But a JP court  
21 can't issue an injunction, and the statute says a court of  
22 general jurisdiction, so we're stuck with that. I do  
23 think the truancy -- I mean, it's a good example. We also  
24 looked at protective orders, of course, but we weren't  
25 charged with doing a form order I guess, so what the order

1 would actually say might be something that needs to be  
2 worked out looking at those other examples. So this is  
3 just -- this is what a parent -- it's like a kit, what a  
4 parent would need, not what a judge would need. Other  
5 questions, and then maybe we should go on to the  
6 instructions.

7 CHAIRMAN BABCOCK: Well, Lisa has got a  
8 question. Go ahead, Lisa.

9 HONORABLE STEPHEN YELENOSKY: Yeah.

10 MS. HOBBS: Well, I just -- I worked on this  
11 bill during the session. It started out as creating a  
12 private cause of action for a parent to be able to sue --

13 HONORABLE STEPHEN YELENOSKY: For damages.

14 MS. HOBBS: -- for damages and then was  
15 tweaked throughout the session to -- to just provide  
16 injunctive relief as we're talking about now. I think as,  
17 you know, some of the questions that are being raised I'm  
18 like wasn't that in the statute; and I think it might have  
19 been in some reiteration; and now I'm looking at the  
20 statute again, and so some of them are in here; but, you  
21 know, the idea is do we know statistically that a parent  
22 is going to, you know -- 99 percent of the time that it's  
23 going to be taken down? No. But now you are subject to a  
24 court order. It's not just a teacher telling you to take  
25 it down; and to answer Marcy's question about contempt, I



1 think the idea was now you have an order with the  
2 enforceability of court orders to deal with these parents  
3 if they don't take reasonable steps to --

4 HONORABLE STEPHEN YELENOSKY: Right, but  
5 there's the practical problem --

6 MS. HOBBS: Right, yeah.

7 HONORABLE STEPHEN YELENOSKY: -- I mean, and  
8 the legal problem with any contempt order whether the  
9 prior order was clear enough and, you know, was specific  
10 and all of those problems, and there's a child maybe doing  
11 something the parent says not to do, so those problems are  
12 not resolvable with that court order.

13 MS. HOBBS: Right.

14 MR. GILSTRAP: Stephen, let me comment on  
15 the 99 percent.

16 CHAIRMAN BABCOCK: Yeah, Frank.

17 MR. GILSTRAP: You know, maybe that's too  
18 sanguine to say that 99 percent are going to back off once  
19 they get the order, but the statute seems to contemplate  
20 that. It talks about a restraining order. It kind of  
21 mentions an injunction, but it doesn't -- once we get past  
22 the restraining order we kind of had to go on our own and  
23 figure out instructions for what may happen next. Like,  
24 you know, the suit's not automatically dismissed. What do  
25 you do about that, and we've had instructions about that,

1 but the statute is totally silent. It contemplates  
2 instead of sending kids to the principal's office you go  
3 to the district court, the district court brings the kid  
4 in and tells him to stop, here's the order, even if in --  
5 the district court issues an order --

6 CHAIRMAN BABCOCK: Yeah.

7 MR. GILSTRAP: -- and then maybe if the kid  
8 comes in for an injunction they tell him to stop, but it  
9 doesn't go past that.

10 HONORABLE STEPHEN YELENOSKY: But the order  
11 goes -- controls the parent.

12 MR. GILSTRAP: Yes.

13 CHAIRMAN BABCOCK: Can I ask a question?  
14 And maybe I haven't studied this statute closely enough,  
15 but in 129A.003(a) it says, "The Supreme Court shall, as  
16 the Court finds appropriate, promulgate forms for use as  
17 an application for initial injunctive relief by  
18 individuals representing themselves in suits involving  
19 cyberbullying and instructions for the proper use of each  
20 form or set of forms." Does the Court have any broader  
21 mandate than that? Or, yeah, mandate, because the Court  
22 is mandated to do that.

23 MR. GILSTRAP: That's right.

24 CHAIRMAN BABOCK: Right?

25 HONORABLE STEPHEN YELENOSKY: Well, I mean

1 (b) --

2 MR. GILSTRAP: It just talks about  
3 injunctive relief.

4 HONORABLE STEPHEN YELENOSKY: Part (b).

5 CHAIRMAN BABCOCK: Yeah, and what's going to  
6 be in the form.

7 HONORABLE STEPHEN YELENOSKY: Right. I  
8 don't know of anything else, but since it tells you what  
9 has to be in the forms, "They shall be readily available,"  
10 et cetera, must be translated in Spanish, I don't think it  
11 leaves the Supreme Court -- well, I can't speak for the  
12 Supreme Court, but the way I read it I don't think it  
13 allows the Supreme Court to say, "No, we don't want to do  
14 anything." Is that fair?

15 CHAIRMAN BABCOCK: That's fair to me. It  
16 seems fair to me, although that phrase "as the Court find  
17 appropriate," what does that mean?

18 HONORABLE STEPHEN YELENOSKY: I think -- I  
19 read that to mean not whether but how, as the Court -- I  
20 don't know what it means, but I don't think it means --  
21 and this is just my interpretation. I don't think it  
22 means if the Court finds appropriate.

23 CHAIRMAN BABCOCK: Yeah, it struck me as  
24 unusual language.

25 HONORABLE STEPHEN YELENOSKY: It is.

1 CHAIRMAN BABCOCK: You know, we've been  
2 delegated lots of --

3 HONORABLE STEPHEN YELENOSKY: Right.

4 CHAIRMAN BABCOCK: -- rule writing by the  
5 Legislature over the last 15 years, but I've never seen  
6 that phrase I don't think. I don't remember. Lisa, do  
7 you know anything about it?

8 MS. HOBBS: I think it might be a misplaced  
9 modifier. They didn't mean it right after "shall." I  
10 think they might mean it right after "forms."

11 HONORABLE STEPHEN YELENOSKY: Yeah.

12 MS. HOBBS: So forms that they find  
13 appropriate, not to diminish the mandatory nature of the  
14 "shall," is my guess. I'm not going to take credit for  
15 those.

16 HONORABLE STEPHEN YELENOSKY: Well, that's a  
17 statutory interpretation I would give as an advisory  
18 opinion.

19 CHAIRMAN BABCOCK: Yeah, Chief.

20 CHIEF JUSTICE HECHT: The request of a  
21 tyrant is hardly discernible from a command, so we're  
22 probably going to do something, and so probably how rather  
23 than whether I think will be the --

24 MR. GILSTRAP: Chip, I don't think inaction  
25 is really an option here. This came from -- this was

1 prompted by a very tragic incident; and, you know, you  
2 know, I don't think it would be proper for the Court not  
3 to go ahead and do what the Legislature said.

4 CHAIRMAN BABCOCK: No, and I wasn't  
5 suggesting that at all.

6 MR. GILSTRAP: Well, I understand, but  
7 that's the background.

8 CHAIRMAN BABCOCK: Yeah, but it just struck  
9 me as odd language and --

10 HONORABLE STEPHEN YELENOSKY: It did me,  
11 too. It did me, too.

12 CHAIRMAN BABCOCK: Huh?

13 HONORABLE STEPHEN YELENOSKY: It struck me  
14 as odd, too.

15 CHAIRMAN BABCOCK: And the scope of the  
16 command to the Court seems to me that it is to develop the  
17 kind of form that you've developed, which is -- which is  
18 to, you know, fill out this form, file with the court, and  
19 then the court will deal with it. I'm not sure it's  
20 broader than that.

21 MR. GILSTRAP: It's an odd statute, and it's  
22 an odd procedure. It's totally unprecedented as far as I  
23 can tell.

24 CHAIRMAN BABCOCK: Yeah.

25 HONORABLE STEPHEN YELENOSKY: And when

1 you're ready we can go to the other part that's required,  
2 which is instructions for it that are understandable, but  
3 there's still questions.

4 CHAIRMAN BABCOCK: Lisa.

5 MS. HOBBS: So are you worried about having  
6 to draft an order or some kind of -- I understand what  
7 you're saying, that this is limited to the form, the  
8 initial form and the instructions. What are you  
9 worried --

10 CHAIRMAN BABCOCK: I don't know that I'm  
11 worried. I think I'm wondering how far we have to go. We  
12 can always go farther, of course, if the Court wants, but  
13 it seems to me that at a minimum we have to do this form,  
14 and the instructions have to comply with the statute.

15 MS. HOBBS: And then on those protective  
16 order forms that we looked at yesterday, do they have an  
17 order, too, so that the judge -- or is the protective  
18 order kit just the application and instructions? Do y'all  
19 remember? Okay. I'll look it up.

20 MS. NEWTON: It has the form order, yes.

21 CHAIRMAN BABCOCK: Roger.

22 MR. HUGHES: Well, going back to the  
23 question of enforcement, I guess my more of a question  
24 here is if you truly have a diligent parent who is trying  
25 to do -- trying to get the child to comply or the teenager

1 in this case, most cases, and the teenager is just wily  
2 and unruly and disobedient, is that grounds for declaring  
3 them what we used to call a delinquent for another family  
4 court proceeding? Because I think most judges can discern  
5 when the parent's merely going "Oh, yeah, I'm really  
6 trying" but not --

7 CHAIRMAN BABCOCK: Right.

8 MR. HUGHES: -- and dealing with that, but  
9 if we really do have a disobedient and creatively wily  
10 child, is there other procedures available to deal with  
11 such a person?

12 HONORABLE STEPHEN YELENOSKY: That wasn't  
13 within our charge, so we didn't address that.

14 MR. HUGHES: Well, no, I know, but I'm just  
15 thinking if there's some alternative somewhere in the  
16 system in the Family Code to maybe cajole, threaten, or  
17 persuade the child that there is more -- there is more we  
18 can do besides making life hard on your parents.

19 CHAIRMAN BABCOCK: Yeah. And like --

20 HONORABLE STEPHEN YELENOSKY: There may be,  
21 but regardless, there's going to be this alternative.

22 CHAIRMAN BABCOCK: Yeah, and that gets a  
23 little bit to the question I was posing about how broad is  
24 the command to the Court. I mean, you know, how much does  
25 the Court have to do about this, because there are

1 obviously a lot of problems raised by the statute, but I  
2 don't know that you can cure those problems with a form or  
3 even --

4 HONORABLE STEPHEN YELENOSKY: And this is --

5 CHAIRMAN BABOCK: -- address them with a  
6 form --

7 HONORABLE STEPHEN YELENOSKY: I'm sorry.

8 CHAIRMAN BABOCK: -- but we can try.  
9 Eduardo.

10 MR. RODRIGUEZ: At what point does  
11 cyberbullying become a crime? In other words, take what  
12 Roger is talking about. I mean, you go through this  
13 process and nothing happens, and the bully continues to do  
14 stuff. I mean, at what point do -- are we going to -- is  
15 that part of what we're talking about? That's one  
16 question I have.

17 The other question is, is there going to be  
18 provisions for the filing of this? Are they going to  
19 require the payment of filing fees like a normal matter  
20 or --

21 HONORABLE STEPHEN YELENOSKY: That's  
22 addressed in here.

23 CHAIRMAN BABCOCK: I think that's addressed.

24 HONORABLE STEPHEN YELENOSKY: There's no  
25 filing fee. As far as these other things, I mean, I did



1 say there are a lot of issues here and unsigned,  
2 constitutional issues, due process, First Amendment,  
3 whether or not you can hold somebody in contempt. All of  
4 those things relate to this. Some of them relate to how  
5 we drafted this and the instructions. The things you're  
6 talking about, are there alternatives, is there a  
7 criminal, that -- whether they exist or not, this is our  
8 task, and they will be alongside one another, whatever the  
9 Supreme Court decides to promulgate.

10 CHAIRMAN BABCOCK: Yeah, Roger, I cut you  
11 off. I'm sorry.

12 MR. HUGHES: No, I'm just saying I don't  
13 think we need to address or do anything to implement  
14 whatever other remedies there are. I'm just wondering if  
15 that's an alternative so that we really don't need to  
16 worry about it.

17 HONORABLE STEPHEN YELENOSKY: Well, I mean,  
18 the Legislature specifically asked for something on  
19 cyberbullying, and I don't believe there is anything else  
20 in the statute that specifically references cyberbullying.  
21 Now, maybe it could be encompassed within those things, or  
22 an argument is they would be encompassed, civil or  
23 criminal, but regardless, I think we're not using our time  
24 wisely if the question is, well, we don't -- do we really  
25 need this. I think if you look at the statute, and maybe

1 we should turn to that in part at this time.

2 CHAIRMAN BABCOCK: Yeah, we -- the Court's  
3 been charged with doing forms for initial injunctive  
4 relief with instructions on how to use the forms. So, I  
5 mean, that's -- right, Judge?

6 HONORABLE STEPHEN YELENOSKY: Yes, and  
7 it's -- the other -- the other document you can turn to  
8 that says "Section 11 of statute relating to cyberbully --  
9 cyberbullying and other statutory provisions," this is  
10 not -- what I've done here is I have inserted --  
11 referenced the Texas Education Code and its contents  
12 because it's referred to right at the top in the  
13 definition, and I didn't want you to have to switch back  
14 and forth. So I just cut and pasted it in, but you'll see  
15 that -- if you look through at the statute, we've been  
16 looking at 129A.003, promulgation of forms on page three,  
17 but if you'll just skim through that, I think it's pretty  
18 clear that this is a different stand-alone new cause of  
19 action with injunctive relief only as a relief, not  
20 damages, no filing fee, intended for people to be able to  
21 use -- understand and use without a lawyer; and whatever  
22 else exists, this is different.

23 CHAIRMAN BABCOCK: Yep. Okay. Yeah,  
24 Professor Carlson.

25 PROFESSOR CARLSON: So in looking at the

1 statute in this, is this replacing Texas Rule of Civil  
2 Procedure 680 for TRO?

3 HONORABLE STEPHEN YELENOSKY: No.

4 PROFESSOR CARLSON: No, this is --

5 HONORABLE STEPHEN YELENOSKY: We don't see  
6 it as replacing it. We see it as not in conflict with.

7 PROFESSOR CARLSON: Okay.

8 HONORABLE STEPHEN YELENOSKY: Do you see  
9 something in there that --

10 PROFESSOR CARLSON: No, no. I was just  
11 curious.

12 HONORABLE DAVID PEEPLES: Stephen, at what  
13 point does the judge get some guidance as to what relief  
14 to grant?

15 HONORABLE STEPHEN YELENOSKY: Not from us.

16 HONORABLE DAVID PEEPLES: I mean, does the  
17 statute --

18 HONORABLE STEPHEN YELENOSKY: The statute  
19 says "injunctive relief." I don't think -- maybe it says  
20 something -- it says, "A court may issue enjoining from  
21 engaging in cyberbullying or compelling a defendant who is  
22 a parent," blah, blah, blah, "to take reasonable actions  
23 to cause the individual to cease engaging in  
24 cyberbullying"; and so that's, I guess, the direction to  
25 the judge; but our work was not -- as I said earlier, we

1 were not tasked with trying to help the judge.

2 HONORABLE DAVID PEEPLES: Okay. Okay.

3 MR. GILSTRAP: Let me say this. The statute  
4 is very vague. First of all, it doesn't require any  
5 continuing conduct or showing of -- it expressly excludes  
6 a requirement of irreparable harm. One incident of  
7 cyberbullying is enough to trigger the statute, and the  
8 judge can then issue a temporary restraining order and  
9 later a temporary injunction, although that's not really  
10 contemplated.

11 HONORABLE STEPHEN YELENOSKY: To that extent  
12 it's different from 680.

13 MR. GILSTRAP: Yeah, right.

14 HONORABLE STEPHEN YELENOSKY: Because it  
15 doesn't require irreparable harm.

16 MR. GILSTRAP: Right. But it doesn't say --  
17 it says the court can restrain cyberbullying. It doesn't  
18 say, for example, "Okay, you put this bad image on the  
19 internet once, don't put it again." It's not clear what  
20 the judge can restrain or how the judge is limited in his  
21 restraint. It's very vague.

22 HONORABLE STEPHEN YELENOSKY: And that may  
23 be once whatever is implemented, if anything, will work  
24 out in the cases. Maybe there will be at least some -- I  
25 don't know what Frank said, 98 percent. Maybe there will

1 be the two percent or whatever percent where it doesn't  
2 stop immediately that go up and are reviewed, but I'm just  
3 assuming that the intent was in part we need something  
4 that parents can use quickly, that might work quickly, and  
5 the Legislature -- Legislature hadn't really thought  
6 further down the road or purposely decided not to go  
7 further down the road.

8                   HONORABLE DAVID PEEPLES: I can understand  
9 that our mandate is to do A and B, but if C and D are  
10 let's help the judge come up with some language that's  
11 specific enough to give people fair notice and make a  
12 contempt holding valid, that might be a good thing.

13                   HONORABLE STEPHEN YELENOSKY: Yeah. I mean,  
14 if we were asked to do that I guess we could. We haven't  
15 been asked to do that at this point.

16                   CHAIRMAN BABCOCK: Have there been any cases  
17 under this statute?

18                   HONORABLE STEPHEN YELENOSKY: I'm not aware  
19 of anything.

20                   CHAIRMAN BABCOCK: I haven't heard of any.  
21 It's been in effect for a year.

22                   HONORABLE STEPHEN YELENOSKY: I mean, the  
23 statute's out, but obviously this stuff isn't out.

24                   MR. GILSTRAP: Yeah, the form's not out, but  
25 someone could come in --

1 CHAIRMAN BABCOCK: Sure.

2 MR. GILSTRAP: -- and file his own suit. I  
3 haven't heard of anything like that.

4 HONORABLE STEPHEN YELENOSKY: Right. Right.  
5 But people aren't aware that it's effective is probably  
6 primarily what's going on.

7 CHAIRMAN BABCOCK: Sorry. Yeah, Lisa.

8 MS. HOBBS: You know, during the legislative  
9 process one of the bigger issues in this was about how to  
10 get schools more engaged with cyberbullying that they know  
11 about because schools took the position that if it doesn't  
12 happen on my property I can't control these kids, and when  
13 it's happening on the internet or by text messages it  
14 wasn't happening, so the bulk of the bill -- this was just  
15 such a small piece of the bill. The bulk of the bill was  
16 to change the Education Code to get administrators more  
17 engaged when they know this is happening to their  
18 students.

19 HONORABLE STEPHEN YELENOSKY: That's right.  
20 And that's why the definition is important from the  
21 Education Code. There's pages and pages of stuff that  
22 don't apply to us. That's why the top of this says  
23 "Section 11 of statute." That's the only part that we  
24 found applied to our charge.

25 CHAIRMAN BABCOCK: Right.

1 MR. GILSTRAP: Yeah. And the -- both the  
2 perpetrator and the victim have to be students.

3 HONORABLE STEPHEN YELENOSKY: Right.

4 MR. GILSTRAP: And the conduct can -- has to  
5 relate to education. Now, it's fairly broad, but if it's  
6 not education related or related to educational  
7 opportunity or related to educational ability to be  
8 educated, it can't be the subject of this proceeding.

9 MS. HOBBS: And I guess my point in saying  
10 that was to answer Chip's question about are we seeing any  
11 of these cases. If the legislative process was intended  
12 to get the schools to intervene earlier through the  
13 education process, there would be less need for parents to  
14 have to use the judicial system to get the same results,  
15 because ideally it's being taken care of by school  
16 administrators now, and this is just a backstop if it's  
17 not being taken care of at school.

18 CHAIRMAN BABCOCK: Yeah.

19 MR. GILSTRAP: Although let me say this. I  
20 think that's -- that might be naive. I mean, you know,  
21 what if the students are in different schools, for  
22 example, which may be the case. I've actually -- you  
23 know, we all know about face-to-face bullying. I've  
24 actually talked to teachers recently and asked them what  
25 do they do if they see an incident of bullying because the

1 literature says you've got to act promptly, that's how you  
2 deal with bullying, and they say, "Oh, we write a report."  
3 Good luck.

4 CHAIRMAN BABCOCK: Yeah. Yeah, Judge.

5 HONORABLE STEPHEN YELENOSKY: The part that  
6 schools can't do that -- that I understand schools can't  
7 do is if you look at the second page, the document that  
8 says "Section 11 of statute," and you look at (a-1)(3),  
9 this section -- and (a-1) is "This section applies to (3)  
10 cyberbullying that occurs off school property," "occurs  
11 off school property or outside of the school sponsored or  
12 school-related activity if the cyberbullying interferes  
13 with the student's educational opportunity or  
14 substantially disrupts the orderly operation of a  
15 classroom." That's part of the definition of  
16 cyberbullying, but can the school effectively control  
17 that. Maybe it's a backstop, but the court clearly can  
18 effectively issue an order, whether it can enforce it,  
19 when there's a student-on-student bullying that affects  
20 the child's education, whether it happens, you know, at  
21 any other time, any other place, and otherwise meets the  
22 definition of cyberbullying; whereas whether a school can  
23 address that or not is questioned or effectively is the  
24 question. Should we go to the instructions quickly or --

25 CHAIRMAN BABCOCK: Sure, yeah. Yeah. Go



1 ahead.

2                   HONORABLE STEPHEN YELENOSKY: Well, if you  
3 look at the instructions -- and before I go to that, on  
4 the petition because there's this matrix, how old is the  
5 student at the time, how old was the student at the time  
6 of the suit, I'll just show you. It looks something like  
7 this, and because we have to translate this matrix into a  
8 petition we did try to translate it into one petition.  
9 Frank has made the suggestion that we have separate  
10 petitions based on the age of the student and the bully at  
11 the time of the incident and at the time of suit. One way  
12 or the other we have to deal with at least this matrix,  
13 because the statute mandates that we deal with this  
14 matrix.

15                   And so you'll see reflected in the  
16 instructions as well reference to, well, if you're this  
17 age at this time and you sue this person or your parent  
18 sues this person, if the bully was 17 at the time but is  
19 now 18, you sue the bully, not the parent, all of that  
20 kind of stuff. So don't get too sidetracked by that right  
21 now, unless we're going to go line by line, but that's in  
22 there. So the idea here was you could pick up this and  
23 the form and as a pro se parent figure out how to get  
24 yourself to a judge. And so it gives the definition of  
25 cyberbullying in more accessible language than the

1 statute. It takes the definition of student or gives the  
2 definition of student and minor, the internet, and all of  
3 that comes from the statute. Right, Frank, all of that  
4 language?

5 MR. GILSTRAP: Yes.

6 HONORABLE STEPHEN YELENOSKY: What is a  
7 restraining order is just out of my head. There's not a  
8 definition of that in the statute, but since it's not the  
9 statutory language maybe that's not good language,  
10 likewise with what a petition is. To some extent that is  
11 dictated by the statute, but otherwise it's just kind of  
12 explain to a parent or an old student and then who can  
13 complete and sign the petition. It starts out talking  
14 about you can hire a lawyer, you should if you can, and  
15 then the next paragraph there is what I was alluding to,  
16 which is who sues whom depending on ages, and then the  
17 next paragraph is -- also deals with age, the age of the  
18 cyberbullying matter. Does the age matter? No. As long  
19 as they were a student, and by student that would be no  
20 higher than I guess secondary education at the time of the  
21 bullying. So if you have a child for whatever reason that  
22 is 21 in high school and is alleged to have bullied  
23 another child under 18 at the time, then the statute  
24 applies.

25 The next part refers to the declaration,

1 which is really the meat of it. It's like your affidavit  
2 for a TRO, which says it has to be signed under penalty of  
3 perjury, and then there's a -- there's a kind of a warning  
4 we decided should be in here because we thought when  
5 parents do this they need to be aware obviously because of  
6 privacy concerns that these are public records, and you  
7 can ask the judge to make them unavailable, but the judge  
8 can't make some things confidential, and the courtroom is  
9 open. So perhaps the judge will make things confidential  
10 immediately, but they need to know that it's an automatic.  
11 Where to file the petition, the clerk of the county or  
12 state district court. No charge -- oh, we are charged to  
13 pay the standard fee; is that right?

14 MR. GILSTRAP: Well, I didn't know. I  
15 didn't know there was a no charge provision.

16 HONORABLE STEPHEN YELENOSKY: Well, you  
17 know, I may be wrong about that. We'll just do whatever  
18 the statute says of course.

19 MS. HOBBS: I think there is a charge, but  
20 it also is a cost shifting.

21 HONORABLE STEPHEN YELENOSKY: Oh, yes. Yes.  
22 That's what it is, and the petition is consistent with  
23 that. It's cost shifting. You have to -- but of course  
24 you can file an affidavit of inability like anything else.  
25 I don't know if we -- did we say that? If you believe the

1 filing fee should be waived, yeah, we address that.

2           Then what happens basically -- basically,  
3 this paragraph is courts are different by local rule or  
4 sub rosa, and so we can't tell you exactly how it's going  
5 to work, but you should ask questions, and we say ask the  
6 clerk. It could be that there's somebody else, but they  
7 have to file it with the clerk, so if it's not the clerk  
8 to answer the questions hopefully the clerk can send them  
9 to the right place to answer questions that are  
10 appropriate for officials of the court to answer. And  
11 then it goes on to explain that, yes, you can do this  
12 without other party there; but that's an exception and  
13 it's special and that you may have to testify under oath;  
14 and then if the judge grants the order when is it  
15 effective; and there we talk about the hope essentially  
16 that, you know, this will be worked out without having to  
17 go further than a TRO. Part of that reason that is in  
18 there is not just that we aspire to that; but because of  
19 all of the warnings about this will be public, you may  
20 have to testify under oath, a parent may be concerned  
21 that, well, I go in and file this TRO, and then I'm in a  
22 lawsuit for a long period of time without realizing that  
23 it may very well be resolved without continuing.

24           But it does say in here somewhere -- I may  
25 have passed it up, doesn't it, Frank, that when you file

1 the suit you could be -- you yourself could be sued, and  
2 we had to tell them that. So there are a lot of warnings  
3 of the reality, but also we thought they should know that  
4 you might be able to resolve it, and then as Frank said,  
5 we don't have any real guidance after that other than the  
6 Rules of Civil Procedure, case law, what if the judge  
7 denies my petition. This isn't a final order, and you'll  
8 have to decide whether to continue this case and then it  
9 just says bluntly, "These instructions cannot and do not  
10 provide any guidance on whether or how to do that."

11 CHAIRMAN BABCOCK: This is only for pro se  
12 litigants, right?

13 HONORABLE STEPHEN YELENOSKY: Well, a lawyer  
14 could use it I guess, but it's designed for pro ses.

15 MR. GILSTRAP: The statute requires it, and  
16 it says we've got to provide it for pro se litigants.

17 CHAIRMAN BABCOCK: It says the form is an  
18 application for initial injunctive relief by individuals  
19 representing themselves.

20 HONORABLE STEPHEN YELENOSKY: Right, but --

21 CHAIRMAN BABCOCK: Any lawyer could --

22 MR. GILSTRAP: Sure.

23 CHAIRMAN BABCOCK: -- could copy it if they  
24 wanted.

25 MR. GILSTRAP: Any lawyer could draft his

1 own petition under the cyberbullying statute. There's no  
2 problem there.

3 CHAIRMAN BABCOCK: Yeah.

4 MR. GILSTRAP: The real problem -- I mean,  
5 look, there's obviously a lot of reasons that a parent  
6 needs to know before they go forward, and we've tried to  
7 put some in here, like you might wind up with a lawyer on  
8 the other side, you might wind up getting sued, the suit  
9 could go on, but assuming that the parents decide to go  
10 forward there's still some real problems. Once they get  
11 the TRO issued, how do they get it served. Well,  
12 that's -- that's not an easy thing, and then once -- but  
13 when you get the TRO, how do you approach the judge?  
14 Well, as we all know, that's different in almost every  
15 county, and every county has its own procedure for getting  
16 a -- sometimes you have to notify the other side if  
17 there's a lawyer, who knows what it is, but these are real  
18 procedural mazes, but --

19 HONORABLE STEPHEN YELENOSKY: But it's no  
20 different from a pro se who wants a protective order and  
21 there's no county attorney or district attorney  
22 representing them. It's no different from the zillions of  
23 pro se family law cases we have with respect to knowing  
24 what to do, and so we didn't start going down the road of  
25 the kind of direction that will differ court by court, and

1 the best we could do is sort of ask the clerk and hope the  
2 clerk knows or send you to somebody else. I think that's  
3 generally how it happens with pro ses.

4 CHAIRMAN BABCOCK: Yeah. I think that  
5 was -- I think that was smart. I think that was wise  
6 because the mandate is to have a form to get him into  
7 court and then they're on their own.

8 MR. GILSTRAP: Yeah, but it's -- you know,  
9 some people are just going to have no idea what's going to  
10 happen to them when they file this thing.

11 CHAIRMAN BABCOCK: No, no, I thought the  
12 warnings were appropriate, I thought.

13 MR. GILSTRAP: Oh, yeah. Yeah. I think  
14 there may be more.

15 CHAIRMAN BABCOCK: Yeah. Yeah. Yeah,  
16 Marcy.

17 MS. GREER: I have a question on completing  
18 and signing, because they're doing this under penalty of  
19 perjury, and some people may not understand what perjury  
20 is, so I would put an affirmative statement in there to  
21 say you need to tell the truth; but when you think about  
22 what the truth is and you're a parent who is writing this  
23 on behalf of a minor, the truth may involve some things  
24 you've been told that you may or may not be able to verify  
25 or corroborate, and so we may want to explain to them you

1 can say "upon information and belief" or, you know, "this  
2 was what was told me to me" because otherwise I could see  
3 a parent not knowing and could fall into a trap, and you  
4 know --

5 HONORABLE STEPHEN YELENOSKY: Well, not  
6 knowing what perjury means, maybe, I understand that. The  
7 other part, the law isn't different for pro se, but you  
8 have to interpret things I think the Supreme Court said  
9 understanding that the person is pro se, so at least I  
10 would think this is a real issue for the judge rather than  
11 for telling the person, because, you know, it's difficult.  
12 So if a parent says this child did such-and-such, put this  
13 up on the internet, and it turns out that that's because  
14 their neighbor told them, they've never seen it on the  
15 internet, I don't think they're going to be prosecuted for  
16 perjury because that will come out as you go along, but if  
17 we haven't defined perjury then maybe we need to.

18 MS. GREER: Well, I mean, I would state it  
19 affirmatively that this means you are swearing that this  
20 is the truth to the best of your knowledge and then maybe  
21 give some guidance about if you don't know something for  
22 certainty, you know, you may want to qualify it or  
23 something like that to --

24 HONORABLE STEPHEN YELENOSKY: Well, to be an  
25 affidavit for a TRO I think it has to be true and correct



1 on personal knowledge; is that right? Technically, and so  
2 what I'm saying is we can't tell them to sign something  
3 that's based on information and belief. They will  
4 probably include things that are not of personal  
5 knowledge, and we just have to live with that and hope  
6 with common sense that nobody is going to be prosecuted  
7 for perjury because they didn't understand the difference.

8 MS. GREER: Well, or you could say something  
9 like "it is my understanding," if you don't know the  
10 absolute truth you could say "is my understanding that"  
11 and what that's based on, some guidance. I mean, I'm  
12 wondering if we have anything like it anywhere else in,  
13 you know, pro se tool kits.

14 HONORABLE STEPHEN YELENOSKY: Well, maybe,  
15 but if you had -- what would be sufficient here for a TRO  
16 might not be sufficient -- or an affidavit, might not be  
17 sufficient under other circumstances in the civil suit  
18 with lawyers on both sides, and it's very possible that  
19 the judge wouldn't go only off the affidavit, but off of  
20 questioning of the parent. It's going to be one of those  
21 situations. I don't know -- we're trying to avoid to get  
22 too much instruction when not only do things differ from  
23 court to court, but we can't give them a lesson in the  
24 law, but I take the point we can go back and look at it.

25 MS. GREER: Because one of the things I

1 worry about is parent A sues parent B, and then parent B  
2 turns around and tries to get them held for perjury and  
3 all kinds of other things.

4 HONORABLE STEPHEN YELENOSKY: Well, we did  
5 mention they could be sued.

6 MS. GREER: Right, but I mean --

7 HONORABLE STEPHEN YELENOSKY: Yeah, that  
8 could happen, but you know, in 12 years on the bench when  
9 I thought somebody lied but I didn't -- couldn't prove it,  
10 and maybe the other side thought they lied, I've never  
11 seen anybody prosecuted for perjury, and maybe they should  
12 more often be. I think this is one of the more unlikely  
13 instances.

14 CHAIRMAN BABOCK: Kennon.

15 MS. WOOTEN: I think it might be helpful in  
16 the instructions to do two things. One, second paragraph,  
17 last two sentences, essentially state there are other laws  
18 out there that could cover maybe types of bullying that  
19 aren't covered here. I would probably put that in a  
20 separate paragraph to make it a little bit more --

21 HONORABLE STEPHEN YELENOSKY: I'm sorry,  
22 where are you again?

23 MS. WOOTEN: It's the second full paragraph,  
24 sentence starting "for anyone not covered," just make it a  
25 little bit more prominent, and I realize that it's not an

1 exercise in educating people on the law, but I would  
2 include citations to the statute so that they can go to it  
3 and perhaps be more informed.

4 HONORABLE STEPHEN YELENOSKY: Well, if  
5 they're informed after reading the statute, they're  
6 smarter than I am.

7 CHAIRMAN BABCOCK: Lisa.

8 MS. HOBBS: To Marcy's point about what we  
9 might say about the declaration, one of the things we  
10 might say is that they might attach any -- like if there's  
11 been a communication online, they might want to attach  
12 copies of --

13 HONORABLE STEPHEN YELENOSKY: Then it  
14 becomes public.

15 MR. GILSTRAP: Then it becomes public  
16 record, see.

17 HONORABLE STEPHEN YELENOSKY: Yeah.

18 MR. GILSTRAP: The picture that they're  
19 threatening to put on or they've put on the internet  
20 that's disturbing your child --

21 CHAIRMAN BABCOCK: That you're wanting them  
22 to take down.

23 MR. GILSTRAP: -- is now going to be there  
24 forever.

25 MS. HOBBS: Well, then maybe you say

1 something about there may be a hearing, at this time you  
2 might want to bring it. It just seem likes you might want  
3 to tell them the judge might want to see what it is.

4 HONORABLE STEPHEN YELENOSKY: Yeah, I mean,  
5 we can, but I think parents will end up anyway in a lot of  
6 situations without doing that, so we need to be prepared  
7 for that not to happen even if we ask them to, which means  
8 there's going to be a lot on the judge. You know, when  
9 you have people come in on a TRO even when they're  
10 represented by counsel it should be based solely on the  
11 affidavit, and I always try to do that, but lots of judges  
12 will ask questions and put somebody under oath on a TRO  
13 before they make a decision. You know, it really does put  
14 a burden on the judge to understand the purpose of this  
15 and act within the bounds of the law understanding the  
16 purpose.

17 MR. GILSTRAP: You know, Steve, I think --  
18 I've thought and I think it might be helpful to have some  
19 statement in here saying you might want to bring  
20 screenshots with you, but don't attach them to the  
21 petition.

22 MS. HOBBS: It was just something I thought  
23 of.

24 CHAIRMAN BABCOCK: Well, you know, that just  
25 seems to me to be getting beyond what the Court has been

1 asked to do and what it should do. I mean, you're really  
2 getting into the realm of legal advice there.

3 HONORABLE STEPHEN YELENOSKY: Yeah, that's  
4 true.

5 MR. GILSTRAP: Well --

6 CHAIRMAN BABCOCK: There's no question that  
7 a pro se litigant is going to potentially mess up, but --

8 HONORABLE STEPHEN YELENOSKY: Well, and like  
9 file what they're supposed to bring in, because that is a  
10 problem. But, you know, they come into court, and it's a  
11 TRO but it's not like -- I mean it's already up. That's  
12 the problem. It's not like somebody is about to pull the  
13 plug in the hospital; and the judge may very well say,  
14 "Well, how do I know this is on the internet" or  
15 something. "Show me it" or whatever.

16 CHAIRMAN BABCOCK: Yeah. Yeah. I mean, I  
17 think the instructions are helpful, but I think they are  
18 the -- at the boundary of what the Legislature has asked  
19 the Court to do.

20 MR. GILSTRAP: Certainly we should tell them  
21 not to attach it to the petition. I mean, that would  
22 be such a -- that would undo the entire purpose of the  
23 whole thing, you know, which is to keep it off the  
24 internet.

25 HONORABLE STEPHEN YELENOSKY: Well, the

1 judge can still seal it after the fact.

2 CHAIRMAN BABCOCK: Yeah, and are you going  
3 to -- is the Court going to instruct somebody in an  
4 instruction about how to fill out a form not to attach  
5 something? I don't think that's appropriate.

6 HONORABLE STEPHEN YELENOSKY: Right. I  
7 agree.

8 MS. GREER: But you can tell them what the  
9 consequence would be if you attach it.

10 CHAIRMAN BABCOCK: Lisa, and then Judge  
11 Estevez.

12 MS. HOBBS: Sorry, yeah, I just had one more  
13 nitpicky, and y'all did such a good job on this, by the  
14 way. I was just trying to go through and think about  
15 things. One of the things is on the petition itself it  
16 has like the cause number at the top, and nowhere in our  
17 instructions do we say something simple like "Don't worry  
18 about the cause number at the top, you'll be given one  
19 when you go to the courthouse" or something.

20 HONORABLE STEPHEN YELENOSKY: Oh, okay.

21 MS. HOBBS: That's just -- I mean, that's  
22 just really if they've never done a lawsuit before they  
23 might be confused by what they're supposed to put there.

24 HONORABLE STEPHEN YELENOSKY: I looked back  
25 at your point on documents or attaching things. We just

1 warn them generally "Before you file a petition and  
2 declaration be aware that all documents filed with the  
3 clerk are public records."

4           CHAIRMAN BABCOCK: Yeah, I think that goes  
5 as far as you should right there. That's just one man's  
6 opinion. Judge Estevez, and then Justice Christopher.

7           HONORABLE ANA ESTEVEZ: Just a suggestion  
8 policywise, I just -- I mean, I know this is a huge  
9 problem in high schools and middle schools. I would just  
10 suggest that during -- or in the instructions that you put  
11 the obvious statement since this is going to pro se  
12 litigants to somehow address the issue that it could be  
13 that a parent does not realize that the child is doing  
14 this, so you may want to call the parent before you file  
15 this, because I just -- the type of schools that we have,  
16 once the first person files this then with their group of  
17 friends they're all going to tell them about this, and  
18 then you're going to have a huge amount of litigation,  
19 which will stop the cyberbullying, but policywise don't we  
20 want them to take care of it just knowing that this can  
21 happen and not necessarily file the lawsuit, just because  
22 parents are petty, too.

23           HONORABLE STEPHEN YELENOSKY: Well,  
24 hopefully they'll do that beforehand, but I'm a little  
25 concerned, as Chip is, about giving legal advice because

1 there are circumstances under which an attorney would tell  
2 them don't call the parent. Right?

3 HONORABLE ANA ESTEVEZ: I don't -- I don't  
4 know. The lawyer would probably call the parent.

5 HONORABLE STEPHEN YELENOSKY: Probably, but  
6 it's legal advice to say, "You should call the parent  
7 before you file this." I think.

8 HONORABLE ANA ESTEVEZ: Or "you can call a  
9 parent." Maybe you could put something. I don't know. I  
10 just thought that this is an exciting thing for a lot of  
11 parents with teenagers, because I've seen, having raised a  
12 teenager, how petty parents get, teenage girls.

13 HONORABLE STEPHEN YELENOSKY: What she's  
14 suggesting --

15 CHAIRMAN BABCOCK: Yeah, Justice  
16 Christopher, and then Justice Bland, and then we're going  
17 to leave.

18 HONORABLE TRACY CHRISTOPHER: I think that  
19 this needs to look a lot more like the application for  
20 protective order, which has a lot more information in it  
21 than what's here; and it includes a form of an affidavit;  
22 and in the affidavit, for example, it specifically says,  
23 "Describe the most recent time the respondent hurt you or  
24 threatened to hurt you." That's in the protective order.  
25 So to me the affidavit here should include the information



1 that, you know, "Describe the most recent time that the  
2 child threatened," you know -- "harassed your child by the  
3 use of the phone or the internet." And you also have to  
4 say that the harassment is related to school or affects  
5 the bullied student's education. I mean, you need to tell  
6 them what facts to put in it just like you need to tell  
7 them what facts to put in a protective order, in my  
8 opinion, to be effective.

9 CHAIRMAN BABCOCK: Justice Bland.

10 HONORABLE JANE BLAND: And in connection  
11 with that, it would be good to look at the instructions in  
12 connection with the protective order kit, and in  
13 particular there is a paragraph about being safe with  
14 technology that would be applicable here about changing  
15 e-mail addresses and passwords and defriending people, and  
16 I mean, a lot of cyberbullying can be stopped by getting  
17 off the internet, and so I think it would be a good idea  
18 to compare the provisions in the instructions in the  
19 existing protective order kit to see if they could be  
20 helpful in guiding these people that are seeking the  
21 cyberbullying protective order.

22 HONORABLE STEPHEN YELENOSKY: We did look at  
23 the protective orders, but you're right, we don't give  
24 that kind of information.

25 CHAIRMAN BABCOCK: All right. Well, that's

1 the last word for today, and we'll continue this  
2 discussion in 2019 of all things.

3 HONORABLE ANA ESTEVEZ: We're not doing this  
4 again?

5 CHAIRMAN BABCOCK: Our meeting on December  
6 7th will be dedicated to deep thoughts where we discuss  
7 ways to improve the civil justice system in Texas, and  
8 we'll have a number of guest speakers and hopefully  
9 members of the Legislature and, of course, members of the  
10 Court and this committee. So I look forward to seeing  
11 everybody again then, and we're in recess. Thank you.

12 (Adjourned)

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**REPORTER'S CERTIFICATION**  
MEETING OF THE  
SUPREME COURT ADVISORY COMMITTEE

\* \* \* \* \*

I, D'LOIS L. JONES, Certified Shorthand Reporter, State of Texas, hereby certify that I reported the above meeting of the Supreme Court Advisory Committee on the 29th day of September, 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 \$ 795.00.

Charged to: The State Bar of Texas.

Given under my hand and seal of office on this the 29th day of October, 2018.

/s/D'Lois L. Jones  
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